

THE HELMS-BURTON ACT: IS THE U.S. SHOOTING ITSELF IN THE FOOT?*

Changes are not brought about by building walls,
but by building bridges.¹

I. INTRODUCTION

The United States' tool of choice to further its foreign policy goals appears to be economic sanctions. Since 1993, the United States has increasingly applied economic sanctions to further its foreign trade policy. Specifically, more than one-half of the sanctions imposed in the past eighty years have been imposed in only the past four years.² The frequent use of economic sanctions has angered and discouraged our allies while significantly weakening the United States' national interests. With so many countries under sanctions, the efficacy of using economic sanctions to promote the United States' foreign policy has been called into question. Suffering from "sanctions fatigue," the international community no longer supports many of the sanctions.³ Many of the United States' allies avoid or even evade the sanctions, thus

* I would like to thank Professor Darrell Bratton for his guidance and encouragement, Dagmar Maniaci for her invaluable research assistance, and Dr. Rodney Peffer for his initial recommendations and insights into Cuba.

1. Phil Billington, *Better to Build Bridges Than Walls*, COLUMBUS DISPATCH, Nov. 13, 1993, at O7A.

2. Stuart E. Eizenstat, *Economic Sanctions*, Testimony Before the House International Relations Committee, June 3, 1998, available in LEXIS, Legis Library, NGTST File. Sanctions have been applied a total of 115 since World War I and 61 times since 1993. *Id.*

3. Paul Magnusson, *Business vs. The Righteous: Why Trade Sanctions Are Softening*, BUS. WK., Apr. 10, 1998, at 53.

undermining the value of the sanctions as a foreign policy tool. The sanctions against Cuba⁴ illustrate the ineffectiveness and cost, both politically and economically, of unilateral sanctions.

Eight American presidents⁵ and a succession of Congresses have tried unsuccessfully for nearly four decades to legislate Fidel Castro out of existence. After Castro came into power, his government took over virtually all of the commercial enterprises in Cuba.⁶ Almost every person or entity that owned an enterprise that existed prior to January 1, 1959, had its property expropriated by Castro's regime.⁷ Included in the nationalization were enterprises owned by nationals of the United States,⁸ Cuba,⁹ and third countries.¹⁰

Castro's nationalization of all United States property could be considered an impetus which began a series of sanctions aimed at ridding Cuba of Castro, and promoting democracy on the island.¹¹ In 1962, President Kennedy signed one of the first retaliatory sanctions¹²—

4. See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021-91, 1643, 28 U.S.C. § 1611 (1996) [hereinafter Helms-Burton Act].

5. Presidents Kennedy, Johnson, Nixon, Ford, Carter, Reagan, Bush, and Clinton.

6. See Arthur Golden, *Accounts Receivable*, SAN DIEGO UNION-TRIB., Sept. 22, 1996, at 11.

7. See *id.*

8. See 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, 919 (1995). The nationalization of all United States property began in October of 1960. This action was partially in reaction to the United States' elimination of its Cuban sugar quota. *Id.* at 908-09. The United States government has valued property nationalized by Castro at US \$6 billion. Therese Raphael, *The U.S. and Europe Clash Over Cuba*, WALL ST. J. ASIA, Apr., 1, 1997, at 10. Big losers include International Telephone and Telegraph (US \$130 million), Moa Bay Mining (US \$88.3 million), American Sugar (US \$81 million), Standard Oil (US \$71.6 million) and Texaco (US \$51 million). See generally *Cuba: Canadian & Other Foreign Companies Show Interest in Cuban Investments Despite Helms-Burton Law*, NOTISUR-LATIN AM. POL. AFF., Dec. 6, 1996, available in 1996 WL 8089483; Golden, *supra* note 6, at 11; Jim Carrier, *International Business: Wish You Were Here; Marxist Cuba Beckons, and U.S. Capitalists Champ at the Bit*, N.Y. TIMES, Apr. 22, 1998, at D1. Exxon, Goodyear, and Sears Roebuck also have claims. John Pearson, *Cuba Trade: This Hornet's Nest is Really Buzzing*, BUS. WK., Nov. 25, 1996, at 58. See *infra* notes 69-71.

9. See Steven E. Hendrix, *Tensions In Cuban Property Law*, 20 HASTINGS INT'L & COMP. L. REV. 1, 38 (1996). Expropriated property owned by Cuban nationals is valued at US \$25 billion. *Id.*

10. See Raphael, *supra* note 8, at 10. Canada's total property confiscated was valued at US \$9.4 million. *Id.* Cuba recently agreed to pay Confederation Life Insurance Co., a Canadian company, over US \$8 million for assets seized and accounts frozen after the 1959 revolution. *Compensation to Canadian Insurance Co.*, CARIBBEAN UPDATE, June 1, 1998.

11. See Foreign Relations and Intercourse: Settlement of International Claims, 22 U.S.C. § 1643a (1997).

12. Embargo on Trade with Cuba, Proclamation No. 3447, 27 Fed Reg. 1085 (1962).

an embargo against all trade with Cuba.¹³ Its stated purpose was to promote security in the western hemisphere by isolating Castro's government, thus reducing the communist threat.¹⁴

Tension between the United States and Cuba eased somewhat during the mid-1970s. In 1974, informal discussions were commenced on various areas of mutual concern, such as protection of third country embassies.¹⁵ The following year the United States allowed foreign subsidiaries of U.S. companies to trade approved goods with Cuba when licensed by the Office of Foreign Assets Control.¹⁶ In 1984, however, any tentative improvements in relations deteriorated when President Reagan countered increased Cuban influence in the western hemisphere by tightening the embargo.¹⁷ This particular tightening of the noose discouraged American corporations from trading with Cuba and pressured U.S. nationals not to send hard currency to Cuba.¹⁸ Ultimately, Cuba's military assistance in Angola and Nicaragua in the early 1990s completely reversed the United States' position on trade with Cuba, and the policy of isolating Castro by prohibiting trade with Cuba was once again put into effect.¹⁹ The Cuban Democracy Act (CDA),²⁰ enacted during the Bush administration, prohibited all trade between Cuba and overseas firms owned or operated by U.S. residents or nationals.²¹

The latest and the most uncompromising attempt aimed at isolating Cuba and ending Castro's reign was enacted in 1996. The Cuban

13. See *id.* Embargo had been defined as an international relations management tool. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 420 (1996).

14. See Embargo on Trade with Cuba, Proclamation No. 3447, 27 Fed Reg. 1085 (1962).

15. See GILLIAN GUNN, CUBA IN TRANSITION: OPTIONS FOR U.S. POLICY 1, 14-17 (1993).

16. See *id.*

17. See 22 U.S.C. §1643a (1997). President Reagan tightened the embargo primarily because Cuba provided military assistance in Angola and Nicaragua. Craig R. Giesze, ABA INT'L NEWS, Spring 1997, at 23.

18. See 22 U.S.C. § 1643 (1997). See also GUNN, *supra* note 15, at 75-79.

19. See Cuban Democracy Act, Pub. L. No. 102-484, §§ 1701-12, 106 Stat. 2575 (1992).

20. *Id.* This act was enacted shortly after the fall of the Soviet Union. The United States believed would make Castro vulnerable and thus unable to avoid the effects of the U.S. embargo. The Act perhaps narrowed the President's power by no longer requiring the embargo to be renewed yearly. Lowenfeld, *supra* note 13, at 422.

21. The Cuban Democracy Act, Pub. L. No. 102-484, §§ 1701-12, 106 Stat. 2575 (1992).

Liberty and Democratic Solidarity (LIBERTAD) Act, also known as the Helms-Burton Act,²² was hastily signed in the wake of Cuba's shooting down two U.S. civilian airplanes in February 1996.²³ The stated purpose of the Act is to destabilize the current Cuban government by strengthening sanctions against it.²⁴

The purpose of this Comment is to illustrate the ramifications of the Helms-Burton Act. The Comment proposes that even though President Clinton has suspended for the fifth time Title III,²⁵ arguably the most stringent section of the Helms-Burton Act, the Act has still had a significant impact within the international community, particularly Canada, the European Union (EU), Mexico, Cuba, and the United States. The Comment attempts to show that using a legal mechanism—the Helms-Burton Act—to promote United States foreign policy has caused greater potential tension between allies and trade partners than benefit for the United States. The tension stems from the Act violating norms of international coexistence and hindering cooperation plans, particularly free trade agreements. Additionally, the Act has potentially set a harmful international legal precedent. If the United States cites national security as the legal basis for the Act, the international trading system may be weakened because a precedent would be set which would allow any country to cite national security to justify protectionism which is contrary to the goal of international free trade.

Since 1959, Castro has "grown hoarse and gray-haired,"²⁶ but comfortable in power. Castro's success in taking care of his people was primarily due to economic assistance from the Soviet Union.²⁷ In 1960, Castro signed a pact with the Soviet Union whereby Cuba received a

22. 22 U.S.C. §§ 6021-91, 1643, 28 U.S.C. § 1611.

23. See *Castro Praises Grounding of Anti-Communist Exile*, SAN DIEGO UNION-TRIB., May 19, 1996, at A28. A Florida federal district court awarded approximately \$187 million to the families of the persons killed. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). The Cuban government did not put on a defense. *Id.*

24. 22 U.S.C. § 6022(2) (1996). Commentators have suggested that the purpose of Helms-Burton is "to deter nationals of third countries from doing business with and investing in Cuba." Lowenfeld, *supra* note 13, at 462. Another purpose suggested is "to discourage persons and companies from engaging in commercial transactions involving confiscated property and in so doing to deny the Cuban regime the capital generated by such ventures and deter the exploitation of property confiscated from U.S. nationals." *Id.* at 427.

25. Office of the Press Secretary, *Statement by the President on July 16, 1998* (visited Aug. 1, 1998) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1998/7/17/5.text.1>> [hereinafter Presidential Press Release].

26. Thomas G. Donlan, *The World's Freedom Requires Open Borders for Business*, BARRONS, June 2, 1997, at 62.

27. See Ignacio Meneses, *Our Strategy Doesn't Lead to Capitalism*, 5 BARAGUA 10 (1995).

shipment of oil in exchange for Cuban sugar.²⁸ The pact also increased Soviet aid and involvement in Cuba, such as scientific assistance.²⁹ During this period, Castro advanced his country economically, technologically, and educationally³⁰ while under the tough strict isolationist policy of the United States.³¹

The Cuba-Soviet relationship continued until the fall of the Soviet Bloc in 1989.³² For almost two centuries, the Cuban economy has been dominated by sugar production.³³ The Soviet Union imported eighty percent of all Cuban sugar during the 1980s.³⁴ This economic reliance on a single crop was a major cause of Cuba's economic crisis when the Soviet Bloc fell.³⁵ The lack of goods and capital from the Soviet Union since 1990 has contributed to the severe hardships suffered by the Cuban people.³⁶ In response to the Cuban people's suffering, Castro continually and somewhat successfully has blamed the United States' sanctions for his country's economic and social problems.³⁷

Cuba's economic crisis forced Castro to implement drastic reforms to attract foreign investors and reduce Cuba's dependence on sugar exports.³⁸ After heated debate, the Cuban parliament in 1995 passed measures that would enable Cuba to compete with its neighbors with regard to foreign investment.³⁹ The new measures allow foreigners to

28. See David S. De Falco, Comment, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: Is The United States Reaching Too Far?*, 3 J. INT'L LEGAL STUD. 125, 128 (1997).

29. See *id.* Cuba received low interest loans, technical advancement, and supplies of crude and refined petroleum from the Soviet Union. Bureau of Public Affairs, Background Notes: Cuba, DEP'T ST. BULL., vol. V, No. 14, at 5 (1994).

30. Cuba has a ninety-nine percent literacy rate. See DEP'T ST. BULL., *supra* note 29, at 1.

31. See Meneses, *supra* note 27, at 10. One of the primary reasons the United States adopted this tough isolationist policy was due to the perceived threat of Cuba as the "bridgehead of Sino-Soviet imperialism within the inner defenses of the Western Hemisphere." Porotsky, *supra* note 10, at 911.

32. Tim Golden, *Many Have Left Cuba But Problems Remain*, SAN DIEGO UNION-TRIB., Sept. 6, 1994, at A1.

33. See DEP'T ST. BULL., *supra* note 29, at 5.

34. See *id.*

35. Cuba's economy is estimated to have declined by forty percent from 1989 to 1993. *Id.*

36. See Douglas Farah, *Cubans Blame Slowdown on Helms-Burton Act*, WASH. POST, Jan. 25, 1997, at A16. The Cuban economy shrank more than thirty percent between 1991 and 1994. See *id.*

37. See Meneses, *supra* note 27, at 10.

38. See *infra* note 116 (discussing specific reform legislation enacted by Cuba).

39. Cuban Law on Foreign Investment, Law 77, Sept. 5, 1995 (visited Aug. 22,

buy houses, offices and hotels and allow parties to enter into economic association contracts (EAs).⁴⁰ EAs are contracts between various parties for the purpose of carrying out some form of economic activity without creating a legal entity separate from the contracting parties.⁴¹ Additionally, the investment measures lifted the ban on full foreign ownership of businesses, allowing foreign investors to buy businesses⁴² or form joint ventures in Cuba.⁴³ For example, Alficsa, a Cuban-Spanish joint venture was formed in August 1997 to produce quality liquor—the first joint venture with foreign capital in the sugar cane by-products industry.⁴⁴ These reforms are problematic to the United States, however, because property that was confiscated from United States nationals in the early 1960's, and for which the United States has not been compensated is now being used for joint ventures or is being sold outright to foreign investors.⁴⁵

Castro's reforms have led to the latest United States' legislation aimed at tightening the economic noose around Cuba—the Helms-Burton Act. The Act consists of four primary sections.⁴⁶ Title I restates and reinforces the previous sanctions against Cuba, the Cuban Democracy Act of 1992.⁴⁷ Title II defines an acceptable democratically elected government and requires that “demonstrable progress in returning to United States citizens . . . property taken by the Cuban government . . . on or after January 1, 1959” be shown before the embargo will be

1998) <<http://www.cubaweb.cu/invertir/flaim.html>>.

40. *Id.* at ch. VI, art. 16.

41. See Lawrence E. Koslow, *U.S. Business Stands By As Foreign Rivals Profit From Cuban Investment*, NAT'L L.J., Apr. 6, 1998, at B12. EAs are similar to consortia used throughout Latin America and are primarily used for infrastructure projects and hotel construction. See *id.* The Cuban Law on Foreign Investment further defines EAs as an “agreement among one or more national investors and one or more foreign investors, for the joint realization of actions appropriate to an international economic association.” See Law 77, *supra* note 39, ch. III, art. 2(g).

42. Koslow, *supra* note 41. The difficulty in obtaining approval for a wholly owned foreign company and the higher tax rate of 35% as compared to 30% for joint ventures makes full ownership unlikely, unless the entity is willing to make significant investments in Cuba. See *id.*

43. See *id.*, at B12. Foreigners still face a high risk of expropriation. The law states that foreign assets cannot be expropriated, “except for reasons of the public good or in the interest of society, as declared by the Government.” *Id.* at ch. III, art. 3. Although the law does provide that if assets are expropriated, indemnification will be made in hard currency and at a value mutually agreed upon or set by an internationally recognized organization. See *id.*

44. See Dalia Acosta, *Cuba-Economy: Big Changes For Ailing Sugar Sector*, INTER PRESS SERV., Aug. 26, 1997, at 1, available in 1997 WL 13256247. Note: author has been unable to determine whether Alficsa is using property expropriated from U.S. nationals.

45. See *id.*

46. Helms-Burton Act, 22 U.S.C. §§ 6031–6040 (1996).

47. See 22 U.S.C. §§ 6001–6010 (1998).

suspended.⁴⁸ Further, Title II provides inducements for Cuba to elect a democratic government, including limited economic assistance, military adjustment assistance, and economic development assistance.⁴⁹ Additionally, Title II authorizes the President to suspend most of the provisions of the embargo upon determination that a transitional government in power in Cuba will lead to a democratically elected government.⁵⁰

Title IV of the Act excludes certain aliens from the United States. Under this title, the Secretary of State can not grant visas to and the Attorney General cannot admit any aliens who "traffic" in confiscated property, or act as officers or controlling shareholders of an entity that confiscates or "traffics" in such property.⁵¹ The Act denies U.S. visas to spouses, minor children, and agents of these aliens.⁵² Eleven executives of Sherritt International, a Canadian corporation, and members of their immediate family were barred from entering the United States⁵³ because the company operates a Cuban nickel mine expropriated from Freeport-MacMoRan, Inc.⁵⁴ Executives of Grupo Domos, a Mexican telecommunications group, have also been barred from the United States⁵⁵ because of their use of Cuban properties formerly owned by ITT

48. *Id.* § 6066(6). Title II apparently applies to all property taken without compensation that was owned by persons who are now U.S. citizens. *See id.* §§ 6066-6067. This would then include a large majority of Cuban immigrants over the past thirty-six years. *See Lowenfeld, supra* note 13, at 423-24.

49. *See* 22 U.S.C. §§ 6062-63.

50. *See* 22 U.S.C. § 6064(a). Section 6065 defines "transition government" in great detail with eight requirements and four factors. *See id.* § 6065.

51. *Id.* § 6091(a). This section employs different definitions of "confiscated" and "trafficking" than used in other sections of the Act. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289, 1312 (1997). "The difference reflects congressional intent to apply Title IV only to new acts of trafficking that begin on or after March 12, 1996 . . . and to avoid application of Title IV to acts of divestiture from Cuba." *Id.* at 1312 n.139.

52. *See* 22 U.S.C. § 6091(a)(4). Note that Title IV cannot be suspended. *Id.* § 6091(d).

53. *See* Andrew Duffy, *U.S. Angers Trade Minister over Helms-Burton Action*, VANCOUVER SUN, Mar. 15, 1997, at A5. Canadian Trade Minister, Art Eggleton, stated that the United States had "reached an all-time low" by barring the Sherritt executives and their families from the United States. *Id.*

54. *See* Golden, *supra* note 7, at 15. The claim for the nickel mine originally was US \$33 million, but with interest is now worth US \$71 million. *Id.*

55. Mexico: Act to Protect Trade and Investment From Foreign Norms That Contravene International Law, 36 I.L.M. 133, 135 (1997) (the Mexican government sent a diplomatic note of protest stating that barring Grupo Domos executives from the United States "erodes the political dialogue between the two governments and provides a

Corp.⁵⁶ However, the State Department waived application of Title IV for STET, an Italian telecommunications corporation, conditioned upon compensation to ITT for property confiscated by Castro.⁵⁷

The primary controversy over the Helms-Burton Act stems from Title III.⁵⁸ In an unprecedented move by Congress and the President, Title III makes liable any "person"⁵⁹ who "traffics"⁶⁰ in confiscated property for up to treble money damages plus interest from the date of confiscation.⁶¹

framework not conducive to the conversations that the Clinton administration wishes to conduct in Mexico") [hereinafter Mexican Act]. *Id.* at 136. Grupo Domos' long-term investment in Cuba is valued at approximately US \$1.5 billion. Martin Warwick, *Back into the Cold; US Embargo on Cuba*, COMM. INT'L, Apr. 1996, at 14; see also Anthony DePalma, *New U.S. Curbs Sound Alarm for Cuba Investors*, N.Y. TIMES, Apr. 6, 1996, at 3.

56. See Golden *supra* note 6, at 15. The ITT claim originally worth US \$130 million has soared to US \$280 million. See *id.*

57. See *U.S. Ends Helms-Burton Probe of Italy's STET, Raising Helms' Ire*, DOW JONES ONLINE NEWS, July 23, 1997, available in Westlaw, International News (INTNEWS); Peter Glossop, *Canada's Foreign Extraterritorial Measures Act and U.S. Restrictions on Trade with Cuba*, 32 INT'L L. 93 (1998). Under the agreement, ITT agreed not to exercise its right under Title III to sue STET for dealing in expropriated property for a ten year period. ITT additionally received an undisclosed settlement payment. See *Stet Secures Cuban Waiver*, EUR. TELECOMM., Aug. 8, 1997. ITT's claim was certified by the FCSC in June 1970, for US \$130 million, plus interest. Golden, *supra* note 6, at 11. One of the primary reasons the United States gave STET a waiver is because in April 1997, the EU agreed to suspend its WTO claim in exchange for certain exemptions from the Act. See European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, 36 I.L.M. 529 (1997) [hereinafter EU-US Understanding].

58. One commentator believes that Title III, (specifically the "partial repeal" of the Act of State doctrine) is an "unhealthy development" because "[r]ather than letting the courts set the ground rules for the scope of their jurisdiction Congress wants to use the courts as instruments in furthering its own foreign policy objectives." Lowenfeld, *supra* note 14, at 428.

59. 22 U.S.C. § 6023(11) (1996). "Person" is defined as "any person or entity, including any agency or instrumentality of a foreign state." *Id.*

60. *Id.* § 6091(b)(2). Trafficking is defined as selling, transferring, distributing, dispensing, brokering, managing, purchasing, leasing, receiving, possessing, using, obtaining control of, holding an interest in, or otherwise disposing of or acquiring confiscated property. See *id.* Also, engaging in commercial activity, using or benefiting from confiscated property or causing, directing, participating in or profiting from trafficking by or through another person is considered to be trafficking within the scope of the Act's definition. See *id.* Trafficking excludes: the delivery of international telecommunication signals to Cuba, trading or holding publicly traded securities, transactions incident and necessary to lawful travel to Cuba, or transactions and uses of property by Cuban citizens who are not Cuban government officials or officials of the ruling party of Cuba. See *id.*

61. See *id.* § 6082(a)(3). Claimants are allowed to recover treble damages and attorney's fees. Damages are established in three ways: (1) the value of the confiscated property as certified by the Foreign Claims Settlement Commission, if the property was the subject of such certification, plus interest from the date of confiscation; (2) the value determined by a special master appointed by the presiding court, plus interest from the date of confiscation; or (3) the fair market value of the property at the time of confiscation or at present, whichever is greater, plus interest from the date of

Under Helms-Burton, entities that "traffic" in confiscated property can be sued in federal court by United States nationals who previously owned the property.⁶² Initially, the cause of action was available only to persons who filed claims with the Foreign Claims Settlement Commission.⁶³ Others became eligible to bring claims under the Act after March 12, 1998.⁶⁴ Thus, any person or entity that deals with an enterprise that existed prior to January 1, 1959, 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 The Act, however, does give persons trafficking in confiscated property a three month grace period from the effective date of Title III to sell investments or cancel contracts before they become liable.⁶⁶

The property values involved are substantial.⁶⁷ At the time of seizure, the Foreign Claims Settlement Commission valued the claims at US \$1.8

confiscation. *Id.* § 6082(a)(1)(A).

62. The type of suit contemplated in Title III "would run up against" the Act of State doctrine. Lowenfeld, *supra* note 13, at 427. However, 22 U.S.C. § 6082(a)(6) states that the Act of State Doctrine shall not be applicable to actions brought under the Act. One commentator believes that the Act of State waiver shows that Congress does not trust the executive or judicial branches. Lowenfeld *supra* note 13, at 428. The waiver of the Act of State constitutes a constitutional issue, *id.* at 428, which this Comment does not intend to address.

63. See 22 U.S.C. § 6082(a)(5). Almost six thousand persons have claims certified by the Foreign Claims Settlement Commission. Samuel A. Giberger, *International Law*, 44 L.A. B.J. 268, 269 (1996).

64. See 22 U.S.C. § 6082(a)(5) (1998). The distinction between persons with certified claims and those without certification is an important one. First, non-certified claimants cannot sue until two years after the date of enactment. See *id.* Second, in order for non-certified claimants to recover treble damages they must give notice to the trafficker of their intention to sue and the trafficking must continue during the thirty days following notice. See *id.* § 6082(a)(3). Third, certified claimants enjoy a presumption that the value of their claim was properly established by the Foreign Claims Settlement Commission. See *id.* § 6082(a)(2). This presumption is rebuttable upon clear and convincing evidence that the certified amount was inappropriate. See *id.* Also, persons who were eligible to file a claim with the Commission but did not and those whose claims were rejected by the Commission are barred from making any claim under the Act. See *id.* § 6082(a)(5).

65. See *id.* § 6082.

66. See *id.* § 6082(a)(1)(A). This grace period applies to both the certified claims and the uncertified claims that can be brought beginning in 1998. See *id.*

67. The size of the claims varies from hundreds of millions to a few million. Boise Cascade Co. has the biggest claim against the Cuban government. Initially approved by the Commission for US \$267 million, Boise Cascade Co.'s claim is now worth approximately US \$845 million. See Golden, *supra* note 6, at 11. Chrysler Corp.'s claim is valued at approximately US \$2 million. See *id.*

billion⁶⁸ or what today amounts to approximately US \$6 billion.⁶⁹ However, if Title III of Helms-Burton is allowed to go into effect, many major American companies could be the big losers. Helms-Burton would allow thousands of Cuban-Americans who were not United States citizens when their property was seized to file individual suits in United States courts beginning in 1998.⁷⁰ The potential result would be to dilute certified claims with a "flock of new ones."⁷¹ Consider the fact that the current total of outstanding claims (US \$6 billion) is probably so large that it exceeds "Cuba's ability to pay a significant portion of the principal, let alone interest."⁷²

Although Helms-Burton has slowed foreign investment in Cuba, the Act has not stopped investment.⁷³ Since the passage of the Act, over forty new foreign ventures have been set up in Cuba.⁷⁴ Destabilization

68. See Raphael, *supra* note 8, at 10.

69. See *id.* The Commission calculates a six percent simple rate of interest on the claims. See Golden, *supra* note 6, at 11. Claims with other third countries were substantially smaller than U.S. claims and have been mostly settled. Canada had only US \$9.4 million in confiscated property which has been settled satisfactorily with Cuba. See Raphael, *supra* note 8, at 10. Spain settled its claims with Cuba valued at US \$350 million for approximately US \$40 million. See Golden, *supra* note 6, at 11.

70. See 22 U.S.C. § 6023(15) (1996). A "United States national" is defined as:

(A) any United States citizen; or (B) any other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has its principal place of business in the United States.

Id.

71. Pearson, *supra* note 8, at 58. The Foreign Claims Settlement Commission limited its definition of national of the United States to either a natural person who is a citizen of the United States or a corporation or other legal entity organized under the laws of the United States—aliens were not included as claimants. See 22 U.S.C. § 1643(a)(1). The certification procedure further states that neither United States nationals who were eligible to file but did not timely file nor any person who was ineligible to file a claim or the government of Cuba shall have a claim to or interest in the compensation paid to a United States national on their claim. See *id.* § 1643(m). David W. Wallace, chairman of the Joint Corporate Committee on Cuban Claims which represents 5,911 claimants asserts that Helms-Burton "is really a bill for wealthy Cubans. It's throwing people who weren't citizens at the time in the same pot as us." Pearson, *supra* note 8, at 58.

72. Golden, *supra* note 6, at 11.

73. See generally *Cuba: Canadian & Other Foreign Companies Show Interest in Cuban Investments Despite Helms-Burton Law*, NOTISUR-LATIN AM. POL. AFF., Dec. 6, 1996, available in 1996 WL 8089483. Eumelio Caballero Rodriguez, Cuban representative to the WTO, said that since Helms-Burton was enacted the number of foreign investors interested in investing in Cuba has risen, and many foreign companies already in Cuba are negotiating to expand and diversify. See *id.* Plans have been drawn for free trade zones where companies would pay no custom taxes and receive big reductions from taxes on profits. These projects, however, currently exist only on paper. See *id.*

74. See Pearson, *supra* note 8, at 58. Vice President Carlos Lage, Cuba's top economic official "believe[s] the damage from the law will be temporary." *Id.*

of Castro's government, a goal of the Helms-Burton Act,⁷⁵ is undermined by foreign companies owning or using Cuban property. The foreign investment contributes to an improvement of the Cuban economy. For example, Grupo Doms, a Mexican conglomerate, and Caribe S.A. have signed an agreement to invest US \$20 million in a free zone site.⁷⁶ Sherritt International Corp., a Canadian multinational firm, is investing US \$500 million in oil, tourism and mining operations under an agreement signed with the Cuban government in 1996.⁷⁷ Boralex Inc., a Canadian based firm, has signed a joint venture with the Ministry of Basic Industry valued at US \$60 million to build three hydroelectric power stations on the Toa River.⁷⁸ Another indicator of increased foreign interest in Cuba is the rise in attendance at the annual Havana International Trade Fair in November of 1996.⁷⁹ Additionally, several Prime Ministers from neighboring Caribbean islands visited Cuba during 1997 to discuss trade opportunities.⁸⁰

Although under pressure to enforce the Helms-Burton Act, President Clinton once again suspended Title III in July 1998.⁸¹ This is the fifth time the President has used his suspension powers.⁸² In January 1997, President Clinton claimed that as long as steps were being taken in the international community "to promote a transition to democracy in

75. 22 U.S.C. § 6022 (1996).

76. See *Cuba: Canadian & Other Foreign Companies Show Interest in Cuban Investments Despite Helms-Burton Law*, *supra* note 73.

77. See *id.*

78. See *US \$60 Million Hydroelectric Venture*, CARIBBEAN UPDATE, Apr. 1, 1998, available in 1998 WL 8149173.

79. See *Cuba: Canadian & Other Foreign Companies Show Interest in Cuban Investments Despite Helms-Burton Law*, *supra* note 73. Fourteen hundred foreign firms from 60 countries attended. The Fair has grown from 108 firms participating in 1983 to 1,650 including Cuban companies in 1996. Spain, Italy, Canada, Panama, Mexico, Venezuela, Brazil and Guatemala had the largest number of exhibitors. *Id.*

80. Grenada's Prime Minister visited in April 1997; Jamaica's Prime Minister visited in May 1997; the Prime Ministers of Barbados and St. Vincent and the Grenadines are planning visits. See Don Dohning, *Jamaica Widening Relations with Cuba Prime Minister Snubs U.S. Policy, Leads Big Delegation in 4-Day Havana Visit*, PITT. POST-GAZETTE, June 1, 1997, at A6.

81. See Presidential Press Release, *supra* note 25.

82. The President has the power to suspend Title III for a period of six months if he determines and reports to Congress that the suspension "is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." 22 U.S.C. § 6085(b)(1) (1996). The President may extend the suspension for periods of up to six months. See *id.* § 6085(b)(2). Additionally, if the Title does go into effect, the President may still suspend the right to bring a cause of action for periods up to six months. See *id.* § 6085(c).

Cuba," he would continue to suspend Title III.⁸³ According to the President, the suspension of Title III is necessary to the national interest and will expedite a transition to democracy in Cuba.⁸⁴ In his most recent announcement of the suspension, President Clinton cited Pope John Paul II's visit, the US-EU agreement reached in May, the visits to Cuba by various Latin American Presidents and the work of international nongovernmental organizations (NGOs), as his rationale for the continued suspension of Title III.⁸⁵ In reality, pressure exerted on the United States' by its trade partners was most likely the deciding factor in President Clinton's decision to continue to suspend Title III.⁸⁶

Clinton's suspension of Title III has angered many United States politicians. The power to suspend was not part of the original House or Senate bill, but was a compromise to the executive branch.⁸⁷ The House of Representative Report stated that "suspension would remove a significant deterrent to investment in Cuba 'thereby helping prolong Castro's grip on power.'"⁸⁸ The executive branch argues, however, that the power to suspend gives the President flexibility to react to new developments in Cuba.⁸⁹

Congress is not in agreement as to whether to give the President more or less power to implement unilateral sanctions. One bill has been proposed to "provide a framework for consideration by the legislative and executive branches of unilateral economic sanctions."⁹⁰ Specifically, this bill would require more deliberation before imposing unilateral trade sanctions and would provide authority for the President to waive the sanction.⁹¹ However, many amendments to Helms-Burton have been proposed that would lessen Clinton's ability to postpone implementation of the Act.⁹²

83. United States: Statement by the President on Suspending Title III of the Helms-Burton Act, 36 I.L.M. 216, 216-17 (1997); see also *Promoting a Peaceful Transition to Democracy in Cuba*, 7 DEP'T ST. DISPATCH 336, 364 (July 15, 1996).

84. See *Efforts to Implement the Cuban LIBERTAD Act*, 7 DEP'T ST. DISPATCH 410 (Aug. 5, 1996).

85. See Presidential Press Release, *supra* note 25.

86. See Evelyn F. Cohn and Alan D. Berlin, *European Community Reacts to Helms-Burton*, 24 N.Y.L.J., S2 (Aug. 4, 1997).

87. See Lowenfeld, *supra* note 13, at 426.

88. *Id.* at 426-27.

89. See *id.* at 426.

90. Enhancement of Trade, Security, and Human Rights through Sanctions Reform Act, S. 1413, H.R. 2708, 105th Cong. (1997).

91. *Id.* A bipartisan task force, chaired by Sen. Mitch McConnell (R-Ky), was formed to study sanctions reform. See *Sanctions: Senate Votes to Allow President to Lift Sanctions Against India, Pakistan*, 15 Int'l Trade Rep. (BNA) No. 29, at 1265 (July 22, 1998). The task force plans to issue a report by Sept. 1. See *id.*

92. Tougher legislation proposed include: (1) cutting off U.S. aid to nations that trade with Cuba; (2) requiring the executive branch to report to Congress every three

The United States' latest sanction legislation against Cuba threatens to jeopardize the United States' reputation in the international trade community.⁹³ United States' trading partners, particularly Canada and the European Union, argue that Helms-Burton is an outrageous example of United States extraterritorial reach,⁹⁴ and have retaliated with blocking and "clawback" legislation.⁹⁵ Such retaliatory laws both forbid nationals to comply with Helms-Burton, and provide redress in national courts for any damages incurred as a result of the Act.⁹⁶

months on the enforcement of Title IV; (3) providing at least US \$ 2 million per year to pro-democratic groups in Cuba; and (4) increasing the frequency of radio and television broadcasts of United States sponsored anti-Castro programming. See Tracey Eaton, *Cubans Blast Proposed U.S. Policies*, DALLAS MORNING NEWS, May 31, 1997, at 21A. Senator Connie Mack also is drafting legislation that would force companies that buy seized properties to reimburse the U.S. Treasury for tax write-offs claimed by companies and individuals whose holdings were confiscated by Castro. See *Mack Proposal for Castro Removal Another Strategy Doomed to Failure*, SUN-SENTINEL, May 31, 1997, at 14A.

93. Countries angered by the Helms-Burton Act with significant financial interest in Cuba include Spain, Canada, Mexico, France and the United Kingdom. See generally *infra* notes 111-73. The Japanese Ministry of International Trade and Industry criticized the Act as a unilateral measure in its annual report on unfair trade practices. See Toshio Aritake, *MITI Report Criticizes Unilateral Actions by United States* 14 Int'l Trade Rep. (BNA) No. 14, at 597 (Apr. 2, 1997). Chilean President, Eduardo Frei, criticized the Act as "counter-productive" and "a law of intervention in the free rights of a nation." Jim Wolf, *Chile Attacks Anti-Cuba Law*, REUTERS, Feb. 27, 1997. The twelve member Rio Group, a Latin American regional group, condemned the Act as a threat to "relations of friendship and cooperation." *Latin America Pushing for Security Council Seat*, FRESNO BEE, Aug. 24, 1997, at B4. The Rio Group includes Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. See Juan Carlos Rocha, *Rio Group: Presidents to Condemn 'Unilateral' U.S. Measures*, INTER PRESS SERV., Aug. 22, 1997.

94. The Canadian Trade Minister, Art Eggleton, said that Helms-Burton was "an unacceptable intrusion into the trade and foreign policy of other countries." He further called the Act "an American bullying tactic." Pearson, *supra* note 8, at 58. British Foreign Secretary, Malcolm Rifkind, when discussing the European Union's position on the Act said that "[t]here is no doubt we are united in opposition to this [U.S. Act]." *World News: International*, FIN. POST, July 16, 1996, at 2.

95. See Foreign Extraterritorial Measures Act, Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act, 36 I.L.M. 111 (1997) (specifically amended in 1996 to provide some protection to Canadians from lawsuits filed pursuant to Title III) [hereinafter FEMA]; European Union: Council Regulation (EC) No. 2271/96, 36 I.L.M. 125 (1997) (blocking recognition and enforcement of Helms-Burton, the Cuban Democracy Act of 1992, and the Iran & Libya Sanctions Act of 1996) [hereinafter EC Regulation No. 2271/96]; Mexican Act, 36 I.L.M. 133 (1997) (blocking recognition and enforcement of Helms-Burton Act).

96. See generally FEMA, 36 I.L.M. at 111; EC Regulation 2271/96, 36 I.L.M. at 125; Mexican Act, 36 I.L.M. at 133.

Part I of this Comment proposes that even without implementation, Title III has had an impact throughout the international community, Cuba, and the United States. Initially, Part I discusses specific ramifications of the Helms-Burton Act. It identifies the retaliatory measures enacted by the United States' closest allies and largest trading partners—Canada, the European Union, and Mexico. This section will focus on the conflict between sovereign governments created by Helms-Burton and the blocking and clawback statutes of Canada, the European Union, and Mexico. Blocking and clawback statutes will be defined with a brief discussion of how these statutes have been used in the past.

Next, Part I discusses the impact Helms-Burton has had on the international community. Primarily the focus will be on the impact within Canada, the European Union, and Mexico. This section will also analyze whether Helms-Burton has contributed to the promotion of democracy in Cuba even with Title III being suspended. Additionally, the effect the Act has had on the Cuban people's standard of living will be discussed. Finally, this section will detail the ramifications of the Act within the United States, such as increased tensions with trade partners.

Part II of this Comment will discuss dispute resolution options, including the World Trade Organization, North American Free Trade Agreement, and resolution through diplomatic intervention. One of the primary concerns throughout the international community is that the Helms-Burton Act encourages a confrontational rather than a cooperative approach to resolving issues. The section will analyze each dispute resolution option and discuss the advantages and disadvantages of each, both for the United States and the countries disputing Helms-Burton.

Part III suggests alternatives to Helms-Burton that may accomplish the Act's purpose without alienating United States' neighbors and important trading partners. These alternatives will include repealing the Act and allowing United States investment in Cuba or repealing the Act while developing a set of administration standards for dealing with property rights worldwide.⁹⁷

II. RAMIFICATIONS

Although Title III has not been enforced, Helms-Burton has caused long and short-term ramifications within the international community, Cuba and the United States. Some of these ramifications were explicit

97. Note that this Comment will not discuss the jurisdictional issues of Helms-Burton as this area has been thoroughly analyzed by many scholars. See e.g. Lowenfeld, *supra* note 13; Hendrix, *supra* note 9; De Falco, *supra* note 28.

or implied goals of the Helms-Burton Act such as intensified discussions concerning human rights within Cuba, and reduced foreign investments. Although not necessarily goals of the Helms-Burton Act, other secondary negative ramifications have occurred. Examples of these secondary negative ramifications include: (1) implementation of retaliatory blocking statutes, (2) increased tensions between the United States and its trading partners, (3) food and medicine shortages on the island, (4) the strengthening of Castro's position within Cuba through increased awareness of potential benefits of investing in Cuba, and (5) loss of revenue by United States' nationals.

A. Retaliatory Measures: Blocking and "Clawback" Statutes

Blocking and "clawback" statutes greatly restrict the ability of two nations to reach a cooperative, mutually profitable compromise because such statutes grant recognition to a legal form of coercion rather than attempting to eliminate harmful legislation.⁹⁸ A blocking statute is a retaliatory measure whose underlying goals are to protect the State's nationals from objectionable foreign legislation, and to compel the foreign State to cede its claims to regulate aspects of the affected State's economy.⁹⁹ A clawback statute allows for a right of recovery in the affected State's courts of any sum of money paid in satisfaction of a judgment under the objectionable foreign legislation.¹⁰⁰

In 1980, the United Kingdom enacted the Protection of Trading Interests Act, thus setting a precedent.¹⁰¹ As the first law of its kind, the British blocking statute was enacted in response to "a perceived increase in the aggressively extraterritorial enforcement of American antitrust and trade law."¹⁰² In response to the enactment of the United Kingdom's statute, the United States expressed concern that the blocking statute "[would] encourage a confrontational rather than a cooperative" approach to settling issues in which both countries have a valid

98. See United States: Judicial Proceedings in Antitrust Action of Laker Airways Limited, 23 I.L.M. 517, 562 (1984).

99. See United Kingdom: Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act, 21 I.L.M. 834, 849-50 (1982) [hereinafter UK Protection of Trading Interests Act].

100. See *id.* at 838.

101. *Id.* at 840.

102. Joseph E. Neuhaus, Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1099 (1981).

interest.¹⁰³ Although the United Kingdom acknowledged the existence of better alternatives to resolve international trade issues, Her Majesty's Government viewed the blocking statute as the best and only way, at that time, to protect the legitimate interests of the United Kingdom.¹⁰⁴ The United Kingdom, therefore, reluctantly enacted a limited countervailing remedy to provide persons in the United Kingdom legal protection from the United States' extraterritorial anti-trust and trade laws.¹⁰⁵ The law provided protection from "requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom."¹⁰⁶ Thus, the United States' extraterritorial laws appear to have been the impetus for the enactment of the first blocking and "clawback" statute.

The United States has once again forced its closest allies and trading partners to enact blocking and "clawback" statutes in order to protect their nationals from the United States' extraterritorial¹⁰⁷ Helms-Burton Act.¹⁰⁸ The Act represents a recent trend whereby United States legislation has significant and direct extraterritorial reach. The main purpose of the blocking and clawback statutes is to neutralize, or at least seriously hinder, the effect Helms-Burton has on Canadian, European Union and Mexican nationals by declaring Helms-Burton void within each of these countries.¹⁰⁹

B. Canadian Foreign Extraterritorial Measures Act

The Canadian government's policy towards Cuba is diametrically opposed to the United States' foreign policy. Canada has a policy of engaging Cuba whereas the United States' policy is focused on isolating

103. United States Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill, 21 I.L.M. 840 (1982).

104. See United Kingdom Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill, 21 I.L.M. 847 (1982).

105. *Id.* at 850. The United Kingdom statute has been used as protection from United States' law on several occasions. See *House of Lords v. Laker Airways*, 23 I.L.M. 727 (1984) (unprecedented collision between United States and English courts caused by conflicting jurisdictional bases and diametrically opposed antitrust policies).

106. UK Protection of Trading Interests Act, *supra* note 99, at 834.

107. W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U.L. REV. 1289, 1335 (1997) (stating that the Act has no apparent purpose without extraterritorial application); David S. DeFalco, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: Is the United States Reaching Too Far?*, 3 J. INT'L LEGAL STUD. 125, 150 (1997) (finding that the United States is unable to justify the extraterritoriality of Helms-Burton).

108. See acts cited in *supra* note 95.

109. See acts cited in *supra* note 95.

Cuba.¹¹⁰ Canada does not intrinsically object to the assertion of extraterritorial jurisdiction.¹¹¹ However, Canada does oppose "extraterritorial measures that contradict or undermine the laws or clearly enunciated policies of another state exercising concurrent jurisdiction on a territorial basis over the same conduct."¹¹² Although Canada is concerned with Cuban foreign policy differences between itself and the United States, the Canadian government's main concern is the long term implications of the United States resorting to extraterritorial legal mechanisms to "try and force other nations to act in accordance with U.S. objectives."¹¹³ Furthermore, the Canadian government believes that Helms-Burton violates United States obligations under international trade agreements including the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO).¹¹⁴ If the United States is allowed to enforce Helms-Burton, then other countries could also enact legislation in the guise of national security to set protectionist trade policies.

Since Castro's economic reforms,¹¹⁵ Canada has become Cuba's leading foreign investor and trade partner.¹¹⁶ Despite the United States

110. See *Remarks by President Clinton and Canadian Prime Minister Chretien*, U.S. NEWSWIRE, Apr. 8, 1997.

111. See FEMA, 36 I.L.M. 111, 111 (1997).

112. *Id.*

113. *Id.* at 113.

114. See *Efforts to Combat U.S. Protectionism Key Priority for Canada*, Int'l Trade Rep. (BNA), No. 14, at 605 (Apr. 2, 1997).

115. In September 1995, Cuba passed a law on investment which for the first time since Castro has been in office allows the participation of foreign capital in all branches of the economy except education, health and national defense. See Law 77, *supra* note 39, ch. IV. The foreign investment law allows foreigners to wholly own businesses and property and guarantees that foreign properties cannot be expropriated without compensation. Additionally, the law allows for the establishment of free trade zones in Cuba. See *id.* ch. III, VI. See also Pedro Smith, *The Cuban Factor*, CARIBBEAN BUSINESS, Mar. 13, 1997, available in LEXIS Newsbank, Newsfile database. In 1993, Cuba passed Law 41 which allows small private businesses to operate in 100 selected occupations, and gave approximately 170,000 Cubans licenses to work on their own. See *Int'l Trade Developments*, U.S. INT'L TRADE COMM'N., July 19, 1995. In 1994, Cuba legalized the holding of dollars, eliminated grants, and opened the agricultural sector to supply and demand forces. *Id.*; see also, Shelley Emling, *Plenty of U.S. Goods Wind up in Cuba*, SAN DIEGO UNION-TRIB., Dec. 15, 1996, at A39.

116. See *Canada's Chretien Has Marathon Talks with Cuba*, CARIBBEAN UPDATE, June 1, 1998 available in LEXIS, News library, Curnws file. Approximately forty Canadian firms operate in Cuba, including Northern Orion Exploration Ltd., Wilton Properties, FirstKey Project Technologies, Inc., Intelcan, and Sherritt International. See *id.* Intelcan, for example, constructed a new terminal at Havana's international airport. See *id.* Sherritt International raised US \$506 million to finance prospective ventures in

embargo, Canadian business has taken advantage of Cuba's confiscated property by "aggressively purchasing such properties at bargain prices from the cash-strapped Cuban government."¹¹⁷ Canadian investment reached US \$490 million in 1997, primarily in oil and mineral projects.¹¹⁸ Thus, Canada has a great interest in either seeing Helms-Burton repealed or having the Act found illegal under international law because of its extraterritorial reach.¹¹⁹

The Canadian blocking statute, Foreign Extraterritorial Measures Act ("FEMA"), which took effect in 1985,¹²⁰ became necessary after conflicts in the late 1970's and early 1980's over extraterritorial assertion of jurisdiction that Canada found unacceptable.¹²¹ FEMA was amended on October 9, 1996, to counter Title III of Helms-Burton.¹²² The primary purpose of FEMA's amendments was "to provide tools to Canadians to protect themselves from Helms-Burton litigation in respect to property interests that they might have in Canada."¹²³ Additionally, the amendments provide the Canadian government with greater flexibility to react when foreign legislation may significantly affect Canadian trade or impinge Canadian sovereignty.¹²⁴

FEMA has three blocking provisions and a "clawback provision."¹²⁵ (1) Section 5 prohibits Canadians (individuals and businesses and their officers) from complying with extraterritorial measures which adversely affect "significant Canadian trading interests or infringe [on] Canadian sovereignty;"¹²⁶ (2) Section 3 permits the Attorney General to order that records in Canada not be produced to a foreign tribunal, or under certain circumstances to order that the records be seized for safe-keeping;¹²⁷ (3)

Cuba, including sugar growing, telecommunications, real estate, finance, and transportation. See Pearson, *supra* note 8, at 58.

117. Giberga, *supra* note 63, at 269.

118. See *Canada's Chretien Has Marathon Talks with Cuba*, *supra* note 116.

119. Sherritt, a Canadian firm, continues to invest in Cuba, but has taken "evasive action" against Title III. In 1995 the corporation separated its Cuban nickel mining assets into Sherritt International Corp. and renamed its fertilizer company Viridian Inc. See Pearson, *supra* note 8, at 58.

120. FEMA, 36 I.L.M. 111, 112 (1997). FEMA was primarily based on the United Kingdom's Protection of Trading Interests Act. *Id.*

121. See *id.* Conflicts over the extraterritorial assertion of jurisdiction included the United States' enactment of the Siberian pipeline embargo, the uranium cartel litigation and the Bank of Nova Scotia subpoenas. See *id.*

122. *Id.* at 111. The amendments to FEMA came into force on January 1, 1997. *Id.*

123. *Id.* at 113.

124. See *id.*

125. See *id.* at 112-14.

126. *Id.* at 112. The broad language of Section 5 enables the government to deal with any measures affecting international trade or commerce that adversely affect significant Canadian interests or infringe upon Canadian sovereignty. *Id.*

127. See *id.* As of July 1998, no Section 3 order had been issued in relation to Helms-Burton proceedings. See Glossop, *supra* note 57, at 98.

Section 8 provides that the Attorney General may issue orders forbidding enforcement of foreign judgments made pursuant to legislation listed in the schedule;¹²⁸ (4) Section 9, the clawback provision, has been extended to allow for a right of recovery including expenses and consequential damages in Canadian courts "in whole or in part" of any sums of money paid in satisfaction of a judgment.¹²⁹ Additionally, the Canadian Parliament increased the penalties under FEMA to counterbalance penalties in jurisdictions attempting to enforce extraterritorial measures that Canada wants to block.¹³⁰ A fine of up to US \$1 million is imposed upon Canadians who breach FEMA, and comply with Helms-Burton.¹³¹

The Canadian government, in amending FEMA, hopes that if Title III is enforced, the existence of this blocking statute will "discourage the initiation of lawsuits both by ensuring that judgments cannot be enforced against assets in Canada and providing for a clawback of damages and costs."¹³² The amendments to FEMA now place Canadian subsidiaries of American companies in a tough position. Prior to the amendments, corporate officials were able to cite "other" reasons for not doing business with Cuba.¹³³ Now, however, the Canadian subsidiary must report when the American parent company advises it not to trade with or invest in Cuba.¹³⁴ Thus, the tougher fines and the specific focus on Helms-Burton in the amendments to FEMA "emboldens companies to defy U.S. foreign policy and punishes them if they do not."¹³⁵

128. See FEMA, 36 I.L.M. at 113.

129. *Id.* at 114. The clawback provision is likely to deter U.S. plaintiffs with significant assets in Canada, such as a subsidiary. However, U.S. plaintiffs with few or no assets or business interests in Canada will likely not be deterred by the clawback provision. Additionally, the clawback provision does not insulate the U.S. or other foreign assets of Canadian defendants from seizure. See Glossop, *supra* note 57, at 98.

130. See FEMA, 36 I.L.M. at 113.

131. See *id.* The factors that a Canadian court considers in determining the sentence for a breach of sections III or V include: (1) the degree of premeditation in the commission of the offense; (2) the size, scale and nature of the offender's operations; and (3) whether any economic benefits have, directly or indirectly, accrued to the offender as a result of having committed the offense. See *id.* at 113-14.

132. See *id.* at 113.

133. Susan Riggs, *Shooting Down the Helms-Burton Act*, MIAMI HERALD, Mar. 11, 1997, at A23.

134. See *id.* See also *infra* notes 274-77.

135. Riggs, *supra* note 133, at A23.

C. European Union Regulation No. 2271/96

Helms-Burton was explicitly the impetus behind the creation of Council Regulation No. 2271/96.¹³⁶ Canada only had to amend its blocking statute to counter the Helms-Burton Act,¹³⁷ but the EU had to enact a new regulation.¹³⁸ The preamble of the Regulation clearly states that its purpose is "to remove, neutralize, block or otherwise counter the effects of the U.S. LIBERTAD Act of 1996."¹³⁹ The Act goes on to state that the legislation listed in the Annex¹⁴⁰ of the Regulation is contrary to the objectives of the Union, one of which is contributing to the continued development of world trade and to the progressive abolition of restrictions on international trade.¹⁴¹ Article I limits the application of the Regulation to persons "engaging in international trade and/or movement of capital and related commercial activities between the Community and third countries."¹⁴²

The Council regulation contains two blocking provisions, and a clawback provision for countersuit: (1) Article 4, a non-recognition provision, provides that foreign judgments made pursuant to legislation listed in the Annex will not be recognized or enforceable in any manner within the Community;¹⁴³ (2) Article 5, a noncompliance provision, directs persons¹⁴⁴ (including businesses and subsidiaries) not to comply with the extraterritorial measures listed in the Annex;¹⁴⁵ (3) Article 6, the

136. According to a spokesman for Trade Commissioner Sir Leon Brittan, the Council Regulation is "a powerful response to Helms-Burton." David Fox, *EU Probes Firms Breaking Anti-Helms-Burton Laws*, REUTERS, Feb. 26, 1997 available in LEXIS, News library, Curnws file.

137. See FEMA, 36 I.L.M. at 111.

138. See EC Regulation No. 2271/96, 36 I.L.M. 125 (1997).

139. *Id.*

140. See *id.* at 130-31. Legislation listed in the Annex are the Helms-Burton Act, The Cuban Democracy Act 1992 and the Iran and Libya Sanctions Act of 1996. See *id.*

141. See *id.* at 127.

142. *Id.* at 128. Dr. Jurgen Huber presents a detailed description of the Council Regulation and the legal problems which occurred during the Council deliberations. Dr. Jurgen Huber, Essay, *The Helms-Burton Blocking Statute of the European Union*, 20 FORDHAM INT'L L.J. 699 (1997).

143. See EC Regulation No. 2271/96, 36 I.L.M. at 128.

144. Article 11 lists to whom this Regulation shall apply: (1) any natural person being a resident in the Community and a national of a Member State; (2) any legal person incorporated within the Community; (3) any natural or legal person referred to in Article 1(2) of Regulation (EEC) No. 4055/86 (Regulation No. 4055/86 applies to maritime transport); (4) any other natural person being a resident in the Community, unless that person is in the country of which he is a national; and (5) any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity. See *id.* at 129-30.

145. See EC Regulation No. 2271/96, 36 I.L.M. 125, 128 (1997). See *supra* note 140 for the laws listed in the Annex. The article, however, does allow persons to request

clawback provision, allows any person to recover any damages, including legal costs, caused by the application of Helms-Burton or other law listed in the Annex.¹⁴⁶

Cooperation from EU companies with the Council Regulation did not occur.¹⁴⁷ Companies did not report to the Commission as required under Article 2¹⁴⁸ when Helms-Burton had an impact on their financial or economic decisions with Cuba.¹⁴⁹ The Commission did not receive a single response to requests that companies identify themselves to the Commission when they are contacted by the United States State Department.¹⁵⁰ The European Commission investigated dozens of companies possibly in breach of the Council Regulation.¹⁵¹ The concern was that European companies obeying Helms-Burton might set a dangerous precedent by encouraging the United States to use further legal mechanisms to promote foreign policy in other areas of the world.

These breaching companies undermined the EU's efforts to counter the Helms-Burton Act.¹⁵² Thus, the EU's blocking statute has not been the powerful statement against the Helms-Burton Act that the Commission had attempted.¹⁵³ To date, the Council Regulation has become superfluous. The EU and the United States reached an understanding in May in which President Clinton agreed to a permanent

a waiver of the Regulation if the Council determines that non-compliance with Helms-Burton or any other law listed in the Annex would "seriously damage their interests or those of the Community." EC Regulation No. 2271/96, 36 I.L.M. at 128.

146. See *id.* at 128-29. Note that the Brussels Convention of September 27, 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters applies to actions brought and judgments given under Article 6.

147. See Fox, *supra* note 136.

148. See EC Regulation No. 2271/96, 36 I.L.M. at 128. Article 2 requires that persons (includes corporations) affected either directly or indirectly by the laws listed in the Annex to inform the Commission within thirty days from the date the person obtained the information. See *id.*

149. See Fox, *supra* note 136.

150. See *id.* A spokesman for the European Trade Commissioner believes that some companies might not be aware of the Council Regulation and that they could apply for a waiver. See *id.*

151. See *id.*

152. See *id.* Under Article 2 of the Council Regulation, the Commission can request information concerning the financial interests of a person that might have been impacted by one of the laws listed in the Annex. Any person contacted by the Commission must provide the requested information within 30 days. See EC Regulation No. 2271/96, 36 I.L.M. at 128.

153. One trade expert believes that by not reporting to the Commission, the companies are "playing right into the hands of the Americans" and thus undermining the EU's action in trying to overturn Helms-Burton. Fox, *supra* note 136.

waiver of Title III for EU companies.¹⁵⁴

*D. Mexico's Act to Protect Trade and Investment From
Foreign Norms that Contravene International Law*

The Helms-Burton Act was the impetus yet again behind the creation of another retaliatory blocking statute, Mexico's Act to Protect Trade and Investment from Foreign Norms that Contravene International Law.¹⁵⁵ The blocking statute was enacted on October 23, 1996, in direct response to the Helms-Burton Act, and establishes a legal precedent in Mexican history for protection of trade and investment.¹⁵⁶ Mexico, like the majority of the international trade community, believes that the Helms-Burton Act is extraterritorial in nature and therefore "violates international law and free commercial exchanges."¹⁵⁷ Thus, the Mexican government was forced to enact a statute "establishing clear and precise norms to protect [its] internal commerce and the commerce [Mexico] conduct[s] with other countries. . . ."¹⁵⁸ The federal Congress also stated that another purpose of the statute was to "preserve the fundamental principles and institutions of Mexico's public order."¹⁵⁹

The Mexican Act has three blocking provisions and a clawback provision.¹⁶⁰ (1) Article 1 expressly prohibits Mexican nationals, Mexican corporations, and foreign nationals and foreign corporations, from engaging in acts affecting trade and investment which result from an extraterritorial foreign law;¹⁶¹ (2) Article 2 prohibits persons from providing records or any information to foreign authorities as required under an extraterritorial foreign law;¹⁶² (3) Article 4 provides for the

154. See discussion in text and *infra* notes 314-319.

155. Mexican Act, 36 I.L.M. 133, 133 (1997). This statute is also known as "Ley Antidoto." *Id.*

156. See *id.*

157. *Id.* at 134. During discussion of the bill by the Chamber of Senators, one Senator stated that "[our] country. . . rejects in an energetic manner the pretension of any country to apply, outside its territory, legal provisions that affect third countries." *Id.* at 151.

158. *Id.* at 149.

159. *Id.*

160. See *id.* at 140-43. Articles 4 follows the FEMA and the Council Regulation while Article 5 incorporates Canada's clawback provision. See *id.*

161. See *id.* at 145. The Mexican statute contains two provisions that are not included in either Canada's FEMA or the European Union's Regulation: (1) Article 7 empowers the SRE and the SECOFI to give advice to persons affected by the Helms-Burton Act; and (2) Article 8 states that the SRE and the SECOFI will issue "general criteria for interpreting" the statute. *Id.* at 143. It is believed that the "criteria" will not be drafted until judicial proceedings are initiated within the United States against a Mexican, Canadian, or EU person. *Id.*

162. See *id.* at 145. In the legislative history to the statute, the Mexican Federal Congress enumerated three primary ways a foreign law could have undesirable

blocking of recognition and enforcement of foreign judgments, judicial resolutions, and arbitral awards made pursuant to legislation with extraterritorial effects; (4) Article 5, the clawback statute, allows for the full recovery of amounts obtained under the contested foreign legislation, including damages, expenses, and judicial costs.¹⁶³ Additionally, Article 3 requires that the persons affected by an extraterritorial law report to the Mexican government, specifically the Secretariat of Foreign Affairs (SRE) and the Secretariat of Commerce and Industrial Development (SECOFI), any harmful effects upon international trade and investment transactions as well as any official request from a foreign court acting pursuant to an extraterritorial foreign law.¹⁶⁴

Penalties for violating the statute are found in Article 9.¹⁶⁵ For violating Article I, the fine is up to one hundred thousand days of the general minimum salary in force in the Federal District.¹⁶⁶ A violation of Article 2 can incur a fine of up to fifty thousand days of the general minimum salary in force in the Federal District.¹⁶⁷ A violation of Article 3 will result in an admonition; however, a second violation is punishable by a fine of up to one thousand days of the general minimum salary in force in the Federal District.¹⁶⁸ "A fine of up to twice the maximum amount of the corresponding sanction shall be imposed" for further repeat violations.¹⁶⁹

These monetary sanctions are not an effective deterrent because of the low value of the Mexican peso and the small minimum salary in force in the Federal District. For example, as the chart below illustrates, the fine for a violation of Article 1 is US \$ 338,461.53 as compared to the potential liability under the Helms-Burton Act of treble money damages

extraterritorial effects. These are that (1) the extraterritorial application of foreign laws affect Mexico's trade with another country by imposing an economic blockade; (2) it could allow Mexican nationals to make claim payments as a result of dealing in expropriated property in Cuba; and (3) it could deny entry into the country which enacted the law as a means of accomplishing (1) or (2). *See id.* at 149-50.

163. *See id.* at 142.

164. *See id.* at 145.

165. *See id.* at 143. Penalties are imposed on both Mexican and foreign persons who violate the statute. *See id.*

166. *See id.* at 146.

167. *See id.*

168. *See id.* at 146-47.

169. *Id.* at 147. When determining the proper sanction, the Secretariat of Foreign Affairs will consider the "circumstances that are relevant to the violator and the degree to which trade or investment were affected." *Id.*

plus interest. Thus, most multinational corporations based on cost effectiveness alone will certainly choose to violate the Mexican Act rather than face exposure to litigation in the United States.

CHART 1: POTENTIAL PENALTIES
(AS OF JULY 30, 1998)¹⁷⁰

CURRENCY	Rate (U.S. \$)	Penalty Art. 1 Violation	Penalty Art. 2 Violation	Penalty Art. 3 Violation
Mexican Peso	.11212	US \$ 320,663.20	US \$ 160,331.60	US \$ 3,206.63

* All penalties are based on the minimum salary of 28.60 Mexican pesos in the Federal District which is Mexico City.

It is interesting to note that all three blocking statutes utilize the same legal strategy that they repudiate— “the unilateral imposition of unilateral extraterritorial effects.”¹⁷² A collision between two such conflicting statutes does not frequently occur for two reasons. First, few nations had blocking provisions, and second, diplomats usually stepped in to resolve the conflict before resolution by the judiciary was necessary. Now, however, due to the Helms-Burton Act, the EU and Mexico have enacted blocking provisions while Canada has strengthened its Act. Thus, even with diplomatic intervention, a collision between two diametrically opposed statutes could occur more frequently, particularly if Title III goes into effect.

There have been few cases concerning the use of a blocking or clawback statute. One legendary example occurred between the antitrust policies of the United States and the United Kingdom.¹⁷³ In 1982, Laker Airways, Ltd. (Laker) brought an antitrust action in U.S. District Court

170. *Key Currency Cross Rates*, WALL ST. J., July 31, 1998, at C14.

171. The translator of the Mexican Act noted that the minimum salary in the Federal District, which is Mexico City, was 28.60 Mexican pesos. *See* Mexican Act, 36 I.L.M. 133, 146 (1997).

172. *Id.* at 140.

173. *Laker Airways, Ltd. v. Pan American Airways*, 559 F. Supp. 1124 (D.D.C. 1983). The English action was brought under the Protection of Trading Interests Act of 1980. United States: Judicial Proceedings in Antitrust Action of Laker Airways Limited, 23 I.L.M. 517, 524 (1984).

against two American airlines and four foreign airlines.¹⁷⁴ In 1983, the four foreign airlines filed suit in "the Court of Queen's Bench in London seeking a declaration of non-liability to Laker and an order enjoining Laker permanently from continuing its action in the United States."¹⁷⁵ The purpose of the British action was to terminate the American action.¹⁷⁶ After several judicial proceedings, the United Kingdom court ultimately determined that an "unconscionable evasion of domestic laws" was not proven by the four airlines; thus, the Laker actions in the United States' courts were allowed.¹⁷⁷

The above example shows how a blocking statute could potentially protect a country's nationals from suit within another country. In the *Laker* case, one of the primary reasons the British court found against the four airlines was because the airlines did not make a "very strong case" which is necessary when the decision "concerns international relations between the United Kingdom and a foreign sovereign state."¹⁷⁸ However, if the airlines had met their burden, the United Kingdom could have brought an injunction against Laker to stop the suit. If Laker continued with the action in the United States' court, the airlines could later file to recover the sums paid in a United Kingdom court. As there is little precedent available, it is uncertain what ultimate impact these blocking and clawback statutes will have in the future. There is a strong possibility, however, depending on the facts of the case, that the statutes will to a certain extent protect third country nationals from the extraterritorial reach of the Helms-Burton Act.

E. Human Rights Issues

One positive impact of Helms-Burton has been to intensify discussions within the international community about improving human rights conditions within Cuba. According to Amnesty International, human rights abuses in Cuba include arbitrary detainment and frequent harassment of political dissidents and members of unofficial organizations, mistreatment of prisoners, and excessive use of deadly

174. See *Laker Airways*, 23 I.L.M. at 517. The action was brought against British Airways, British Caledonian Airways, Lufthansa, and Swissair. See *id.*

175. *Id.*

176. See *id.* at 536.

177. *Id.* at 537.

178. United Kingdom: House of Lords Judgment in *British Airways Board v. Laker Airways Ltd.*, 23 I.L.M. 727, 739 (1984).

force by law enforcement officials.¹⁷⁹ Since 1993, the United Nations has approved resolutions condemning Cuba's systematic violation of human rights and its failure to cooperate with special envoys sent to investigate Cuba's human rights situation.¹⁸⁰ In 1997, the United Nations approved a resolution reiterating the Member States' concerns about continuing human rights violations in Cuba.¹⁸¹

Due to various negotiations with the United States attempting to resolve the clash over Helms-Burton, several regional groups and individual countries, including the EU and Canada have begun intensive discussions with the Cuban government aimed at improving Cuba's human rights situation. The EU issued a Common Position Paper whose stated objective is to "encourage a process of transition to pluralist democracy and respect for human rights and fundamental freedoms," and improve the standard of living in Cuba.¹⁸² The Common Position paper acknowledges Castro's economic reforms, but states the EU's wish for a "irreversible opening of the Cuban economy."¹⁸³ Additionally, in December 1997, the United States joined the EU and Canada in voting in favor of a United Nations Resolution calling on the Cuban government to end human rights abuses.¹⁸⁴

Canada also has put pressure on the Castro government to improve human rights.¹⁸⁵ During a visit to Havana in January 1997, Canadian Foreign Minister Lloyd Axworthy and Cuban Minister of Foreign Affairs Roberto Robaina issued a joint declaration concerning human rights issues.¹⁸⁶ The declaration discusses increasing and broadening

179. *Amnesty International Report 1996*, AMNESTY INT'L USA, 131.

180. *See Situation of Human Rights in Cuba*, U.N. GAOR, 48th Sess., 85th plen. mtg., at ¶¶ 4, 5, U.N. Doc. A/RES/48/142, (1993); *Situation of Human Rights in Cuba*, U.N. GAOR, 52d Sess., 70th plen. mtg. at ¶¶ 4, 5, U.N. Doc. A/52/644/Add.3 (1997); *see also* U.N. ESCOR, 52d Sess., Supp. No. 3 at ch. II, sec. A, U.N. Doc. E/1997/23 (1997).

181. *See Situation of Human Rights in Cuba*, U.N. GAOR, 52d Sess., 143d plen. mtg., U.N. Doc. A/52/644/Add.3 (1997).

182. European Union: Council of Ministers Common Position on Cuba, 36 I.L.M. 213, 214 (1996).

183. *Id.* at 214. The Common Position paper lists six things the European Union will do in order to facilitate peaceful change in Cuba. (1) Intensify the discussions with the Cuban government concerning human rights issues; (2) Seek out opportunities to remind the Cuban government of its fundamental responsibilities regarding human rights; (3) Encourage reform of internal legislation concerning political and civil rights; (4) Evaluate developments in Cuban internal and foreign policies; (5) Provide ad hoc humanitarian aid with some limitations; and (6) Remain willing to carry out focused economic cooperation actions in support of the economic opening of Cuba. *Id.*

184. *Situation of Human Rights in Cuba*, U.N. GAOR, 52d Sess., 70th plen. mtg., at ¶¶ 4, 5, U.N. Doc. A/52/644/Add.3 (1997).

185. *See Canada-Cuba: Joint Declaration on Cooperation on Political, Economic, and Social Issues*, 36 I.L.M. 210, 212 (1997).

186. *See id.* at 210. Other potential undertakings mentioned in this declaration

cooperation on human rights between Canada and Cuba.¹⁸⁷ Specific actions mentioned in the joint declaration of human rights cooperation include preparing seminars on "diverse matters of mutual interest," academic exchanges, and sharing experiences on the work of specialized organizations of the United Nations.¹⁸⁸ The actions of the EU and Canada support the position that Title III does not need to be enforced in order to get the international community to scrutinize Castro's human rights record and put pressure on Castro to implement reforms.

It can be argued that perhaps one of the unintended negative consequences of Helms-Burton has been to worsen human rights in Cuba. The State Department reported that human rights conditions worsened in 1996.¹⁸⁹ Signs of increased repression by the Cuban government included: (1) increased reports of deaths due to the excessive use of force by police; (2) further restrictions on the distribution of foreign publications; (3) increased use of exile and human rights advocates; (4) antagonism to any foreign diplomatic criticism of human rights practices; (5) restrictions on foreign contacts with human rights activists; (6) denial of visas to U.S. journalists; and (7) expulsions of visiting foreign journalists.¹⁹⁰ The Cuban government particularly cracked down on members of Concilio Cubano, a pro-democracy umbrella group composed of over 130 human rights, political, opposition, and independent professional organizations.¹⁹¹ The deterioration of human rights in 1996 and the increased suppression of dissent may have been a response by the Cuban government to the United States' tightened sanctions.

include: (1) exchanges of judges and judicial training, (2) exchanges between the House of Commons and the National Assembly, (3) supporting activities of Canadian and Cuban non-governmental organizations, (4) continued macroeconomic cooperation, (5) collaboration on narcotics interdiction, (6) food aid, and (7) exploring possibilities for joint research and development in the areas of health and environment. *See id.* at 211-12.

187. *See id.*

188. *Id.* at 211-12.

189. *Cuba*, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996, DEP'T ST. REP., at 413 (1997).

190. *See id.*

191. *See id.*

F. Food and Medicine Shortages

Food¹⁹² and medicine¹⁹³ shortages on the island since Helms-Burton was enacted have risen. Although the Cuban health system was praised by the World Health Organization (WHO) as one of the best in the world because of the primary health services it offers, without essential medicines and medical instruments, Cuba is unable to fulfill the health care requirements of its people.¹⁹⁴ The United States committee for the WHO reported that United States' sanctions against Cuba were contributing to "serious nutritional defects, particularly among pregnant women . . . food shortages were linked to a devastating outbreak of neuropathy numbering in the tens of thousands."¹⁹⁵ The health of women and children has suffered most notably because Cubans cannot obtain necessary food¹⁹⁶ and medicines.¹⁹⁷

Until March 1998,¹⁹⁸ the United States had made the licensing process for medicine so cumbersome that few, if any, medicines reached Cuba.¹⁹⁹ One of the few ways Cuba can get essential food and medicines is through donations made by non-governmental organizations.²⁰⁰ Americans donate more humanitarian aid to Cuba than any other country.²⁰¹ However, due to the inhibiting United States legislation, until

192. See *Necessity of Ending the Economic, Commercial and Financial Embargo*, U.N. GAOR, 51st Sess., 57th plen. mtg. at ¶ 7, U.N. Doc. A/51/355 (1996); see also U.N. GAOR, 48th Sess., 48th plen. mtg. ¶ 6, U.N. Doc. A/RES/48/16 (1993).

193. Lee H. Hamilton, *For and Against Punishing US Allies on Cuba*, CHRISTIAN SCI. MONITOR, June 3, 1997, at 19.

194. See *Praise for Cuban Health Care System*, 5 BARAGUA 25 (Fall/Winter 1995/96). General Director of the World Health Organization, Hiroshi Nakajima, praised Cuba's health care system at the 5th International Seminar on Primary Health Care in November 1995. See *id.* Cuba's infant mortality rate is among the lowest in the world at 10.2 for each 1,000 live births. See *Escambray Mountains Achieve Zero Infant Mortality*, 3 BARAGUA 19 (June/Aug. 1993).

195. Geoff Simons, *Letter: Heavy Price of Angering the US*, INDEPENDENT (London), Aug. 14, 1997, at 13. See also *Necessity of Ending the Economic, Commercial and Financial Embargo*, U.N. GAOR, 52d Sess., 45th plen. mtg., U.N. Doc. A/52/L.11 (1997); Bill Cathey, *Neuropathy Epidemic Hits Cuba*, 3 BARAGUA 1 (June/Aug. 1993).

196. See Deborah Ramirez, *Two Faces of Cuban Economics*, SUN-SENTINEL, Jan. 11, 1997, at 1A. Food rations diminished in 1996. For example, the ration of eggs per person dropped from seven to six per month. See *id.*

197. See Hamilton, *supra* note 193, at 19.

198. Secretary of State Madeleine K. Albright, *Opening Remarks on Cuba at Press Briefing*, DEP'T ST. PRESS BRIEFING, March 20, 1998 (visited July 31, 1998) <<http://www.ciponline.org/sd32098.html>>.

199. Cathey, *supra* note 195, at 2. The Torricelli Law prohibits trade with Cuba in foods and medicines. See *id.*

200. See generally *Ukraine: Solidarity Comes Home to Cuba*, 3 BARAGUA 18 (1993); *Nicaragua: Solidarity with Cuba*, 3 BARAGUA 18 (1993); *Solidarity on Wheels*, 3 BARAGUA 18 (June/Aug. 1993).

201. See DEP'T ST. BULL., *supra* note 29, at 8. Between October 1992 and 1994,

recently American humanitarian missions had to fly donations through third countries.²⁰² United States' Congressmen, sickened by the tough sanctions that are harming the Cuban people, have introduced bills in both the House and Senate to remove food, medicines, medical supplies, and medical instruments from the embargo.²⁰³ According to William Lane, a Caterpillar lobbyist, "[i]f the goal of the sanctions is to keep the Cuban people poor, there is certainly the case that they have been successful . . . [b]ut if the goal is to get . . . Castro out, they have been a colossal failure."²⁰⁴

Pope John Paul II's visit to Cuba in January of 1998 resulted in the Clinton administration finally taking steps to allow United States' citizens to provide humanitarian aid to the Cuban people.²⁰⁵ In March, the Clinton administration proposed four actions "to reach out to the people of Cuba to make their lives more tolerable."²⁰⁶ First, the executive branch will work with certain Congressional leaders who have shown concern about the plight of the Cuban people to find ways to transfer food to Cuba.²⁰⁷ Second, licensing procedures for the sale of medical supplies to Cuba will be streamlined.²⁰⁸ Third, the administration will resume licensing direct humanitarian charter flights.²⁰⁹ Fourth, the President will restore arrangements allowing Cuban-Americans to send money to their relatives in Cuba.²¹⁰ These proposed actions should help reduce the suffering and isolation of the Cuban people without helping Castro's government.

the U.S. government licensed more than \$50 million of humanitarian goods for export to Cuba. *Id.* Additionally, the U.S. government authorized a grant to Freedom House for activities in support of human rights activities on the island. Jeffrey Davidow, *Efforts to Implement the Cuban LIBERTAD Act*, DEP'T ST. DISPATCH 411 (Aug. 5, 1996).

202. See Hamilton, *supra* note 193, at 19.

203. Cuban Women and Children Humanitarian Relief Act, S. 1391, 105th Cong., § 1, (Nov. 6, 1997); Cuban Humanitarian Trade Act of 1997, H. 1951, 105th Congress, § 1, (June 18, 1997). Note that in a survey of 1,004 Americans during March 1997, 48% opposed Helms-Burton with 45% favoring. *In Brief*, Int'l Trade Rep., Apr. 16, 1997, at 698.

204. Donna Smith, *Coalition Fights Trade Sanctions By Activist Cities, States, Counties*, SEATTLE TIMES, Aug. 24, 1997, at F8.

205. Secretary of State Madeleine K. Albright, *Opening Remarks on Cuba at Press Briefing*, DEP'T ST. PRESS BRIEFING, March 20, 1998 (visited July 31, 1998) <<http://www.ciponline.org/sd32098.html>>.

206. *Id.*

207. *See id.*

208. *See id.*

209. *See id.*

210. *Id.*

G. Foreign Investments

The threat of Title III has reduced, but not stopped investments in Cuba. According to Carlos Fernandez de Cosio, a Cuban Foreign Ministry official, "[a]s a result of . . . [Helms-Burton], many people are afraid to invest [in Cuba]."²¹¹ Although no important companies have left, new investments have slowed while some operations have completely ended.²¹² For example, Cemex, a Mexican corporation, completely halted its operations in Cuba as a result of the Act.²¹³ Cemex's concerns partially stem from the fact that the corporation has eight distribution sites in the United States which could be used by the United States judicial system to enforce any Title III claim against the Mexican company.²¹⁴

In contrast, many investors from Canada, Mexico, Malaysia and Indonesia have not been discouraged by the Helms-Burton Act and continue to pour money into Cuba's economy which undermines the goals of the Act.²¹⁵ Since 1996, forty new foreign ventures have been set up in Cuba.²¹⁶ Sherritt International Corp., a Canadian multinational firm, signed an agreement to invest Can \$506 million in various ventures including sugar-growing and telecommunications.²¹⁷ FirstKey Project Technologies Inc., a Canadian corporation, announced plans to invest Can \$500 million to modernize and expand a thermoelectric plant near Havana.²¹⁸ Also in 1996, Grupo Domos, a Mexican conglomerate, and Caribe S.A. signed an agreement to invest US \$20 million in a free trade zone.²¹⁹ Sol Melia, a Spanish group, announced plans "to expand its hotel chain in Cuba to eleven by the end of this year from the eight currently."²²⁰ Trade between Cuba and Malaysia reached RM 1.53

211. Farah, *supra* note 36, at A16.

212. *See id.*

213. *See Mexico Angry Over Cuba Sanctions Law*, SAN DIEGO UNION-TRIB., May 31, 1996, at A2; *Mexican Cement Company to Pull Out of Cuba Over Helms-Burton Act*, DEUTSCHE PRESSE-AGENTUR, May 30, 1996.

214. *See Mexico Angry Over Cuba Sanctions Law*, *supra* note 213.

215. *See Cuba Voices Interest in Forming Joint Ventures*, NEW STRAITS TIMES, June 24, 1997, at 23. *See also* 22 U.S.C. § 6022(2) (1998).

216. *See Pearson*, *supra* note 8, at 58. Vice President Carlos Lage, Cuba's top economic official "believe[s] the damage from the law will be temporary." *Id.*

217. *See id.*

218. *See Canada's Chretien Has Marathon Talks with Cuba*, *supra* note 116. Sherritt International Corp. has invested a broad range of Cuban industries, including oil, horticulture, hotels, electricity generation, and telecommunications. *See id.*

219. *See Cuba: Canadian & Other Foreign Companies Show Interest in Cuban Investments Despite Helms-Burton Law*, NOTISUR-LATIN AM. POL. AFFAIRS, Dec. 6, 1996.

220. *Spain's Melia Expanding Hotel Chain*, CARIBBEAN UPDATE, May 1, 1998 available in LEXIS, News library, Curnws file.

million.²²¹ Furthermore, Malaysian companies are discussing expanding investments in Cuba by establishing joint ventures in the palm oil industry, biotechnology, steel industry, and light industry.²²²

Cuba has attempted to reduce the potential economic impact of the Act by enacting new legislation designed to provide the companies already investing in Cuba with some recourse. The Law of Reaffirmation of Cuban Dignity and Sovereignty "formalizes the Cuban government's right to help foreign companies hide investments."²²³ The purpose of the law is to hide investments from United States' officials through "fiduciary companies, financial institutions, or investment funds."²²⁴

Between 1989 to 1994, total Cuban imports decreased by 73% and total exports decreased by 72%. With the few figures available, it appears that the downward economic slide turned in 1995. As illustrated in Charts 2 and 3, many countries such as Canada, Mexico, the United Kingdom and Spain increased their total imports with Cuba between 1995 and 1996 while the United Kingdom, Spain and Italy increased total exports. The increase in trade with Cuba can be attributed to the Cuban government's economic reforms that allowed foreign ownership. Most claims (other than those of United States' citizens) regarding confiscated property have been settled; therefore, when the state-run economy opened to foreign investment, many companies were eager to invest. Although the Helms-Burton Act may have slowed foreign investment in Cuba, the Act certainly has not stopped investments. Hard currency continues to steadily trickle in, contributing to a small but steady increase in Cuba's economic growth.

221. See *Cuba Voices Interest in Forming Joint Ventures*, *supra* note 215, at 23. The RM 1.53 million was converted to U.S. \$450,000 by using the exchange rate of the Ringgit found in the Wall Street Journal on Oct. 28, 1997 of .2937 (in US \$). See *Currency Trading*, WALL ST. J., Oct. 28, 1997, at C17.

222. See *Cuba Voices Interest in Forming Joint Ventures*, *supra* note 216, at 23.

223. Farah, *supra* note 36, at A16. The law also allows Cubans, to sue the United States if they have been "victims of physical harm or property damage caused by actions supported by the United States, including murder, injury and economic damage suffered under torturers and assassins of the Batista dictatorship or criminals in the pay of North American imperialism." *Id.* (internal quotes omitted). Additionally, the law recognizes the rights of U.S. citizens and corporations to indemnification for nationalized property, but forbids compensation of any American seeking redress through Helms-Burton. See *id.* The law also makes it a crime for "any form of collaboration" in implementing Helms-Burton, such as giving out any information that would help the law be implemented, or speaking in favor of the law. *Id.*

224. *Id.*

CHART 2: TOTAL IMPORTS FROM CUBA²²⁵
(MILLION U.S. \$)

	1990	1991	1992	1993	1994	1995	1996	Q.1 1997
U.S.	00.00	00.00	00.00	00.00	00.00	00.00	00.00	00.00
CANADA	37.30	NA	71.60	44.40	NA	78.00	97.9	46.4
MEXICO	NA	NA	NA	NA	NA	3.01	6.33	NA
EU	122.00	124.00	112.00	NA	131.00	158.00	NA	NA
U.K.	17.40	10.40	7.60	3.90	NA	4.40	10.00	5.6
SPAIN	26.68	30.52	28.04	21.26	NA	32.10	43.68	NA
ITALY	18.00	NA	16.60	11.60	NA	18.00	13.50	NA

CHART 3: TOTAL EXPORTS TO CUBA²²⁶
(MILLION U.S. \$)

	1990	1991	1992	1993	1994	1995	1996	Q.1 1997
U.S.*	0.40	NA	0.40	0.80	NA	2.00	1.80	0.50
CANADA	49.30	NA	32.80	36.00	NA	66.80	65.80	64.90
MEXICO	NA	NA	NA	NA	NA	118.34	117.67	NA
EU	256.00	262.00	193.00	NA	226.00	312.00	NA	NA
U.K.	24.00	16.80	16.70	7.1	NA	10.00	12.70	9.80
SPAIN	101.17	94.44	66.75	63.18	NA	139.15	155.36	NA
ITALY	37.20	NA	33.40	21.80	NA	27.20	36.90	NA

* U.S. exports to Cuba consist primarily of telecommunications equipment such as faxes, copiers, and computers to non-governmental organizations.²²⁷

225. *Monthly Statistics of Foreign Trade*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, June 1991, Oct. 1993, June 1994, June 1997.

226. *Id.*

227. See Davidow, *supra* note 201, at 411.

H. *Castro's Strengthened Position*

Another ramification of the Helms-Burton Act is that Castro's position both within Cuba and in the international community has been strengthened. Using Helms-Burton as justification, Castro has intimidated, harassed, and detained journalists and dissidents—solidifying his own position while suppressing the opposition.²²⁸ The Cuban government claims that the United States' hostile legislation forces Cuban authorities to “take strong measures against those inside the country whom they perceived to be supporting United States policy.”²²⁹

For over twenty years the defects in the Cuban economy were offset by heavy subsidies from the former Soviet Union. When the Soviet Union collapsed in 1989, Cuba lost up to US \$5 billion in annual Soviet subsidies.²³⁰ In October 1990, Castro announced that Cuba had entered a “special period in time of peace” and that the economy would function as if in time of war until the crisis had passed.²³¹ During this “special period,” food, fuel, and electricity were strictly rationed, and priority was given to domestic food production, development of tourism, and biotechnology production.²³² Economic production, however, decreased by more than 40%, forcing Castro to enact several economic reforms.²³³

Between 1993 and 1995, the Cuban government began tremendous economic reforms to diversify its economy and reduce Cuba's dependence on sugar exports.²³⁴ These reforms included allowing participation of foreign capital in almost all branches of the economy, “free use of the dollar, limited self-employment, . . . and the legalization of markets not run by the state.”²³⁵ However, the enactment of the Helms-Burton Act has eased the pressure on Castro to further open the state-run economy,²³⁶ thus stymieing any future modest reforms.²³⁷ Since

228. See Hamilton, *supra* note 193, at 19. Cuban dissidents refer derisively to the Act as the Helms-Burton-Castro Act. *Id.*

229. *Amnesty International Report 1996*, AMNESTY INT'L USA, at 131 (1996).

230. See Anna Maire Lux, *Forbidden Island: U.S. Embargo Depresses Economy But Not Cuban Spirit*, JAMESVILLE, WI GAZETTE, Mar. 16, 1997.

231. DEP'T ST. BULL., *supra* note 29, at 6.

232. See *id.* at 5.

233. See *id.* at 5-6. This figure is from 1989 to 1993. See *id.* at 5.

234. See generally Law 77, *supra* note 39 (promoting and encouraging foreign investment in Cuba).

235. Farah, *supra* note 36, at A16; see Acosta, *supra* note 44, at 1; see also Law 77, *supra* note 39.

236. Hamilton, *supra* note 193, at 19.

Helms-Burton's enactment, the Cuban government has not enacted any new economic or social reform legislation.²³⁸ According to some foreign policy observers, "Cuba is not moving toward democracy and free markets—it is moving in the opposite direction"²³⁹ primarily because of Helms-Burton.

Chart 4 shows Cuba's Gross Domestic Product (GDP) from 1990 to 1998. The chart illustrates how the loss of subsidies from the former Soviet Union caused an economic crisis within Cuba which forced Castro to open the state-run economy to foreign investment.²⁴⁰ For hundreds of years the Cuban economy has relied on a single crop—sugar, 80% of which was imported by the Soviet Union prior to its collapse in 1989.²⁴¹ Between 1990 and 1993, the Cuban economy declined by approximately 40%.²⁴² The less than one percent increase in the GDP in 1994, after six straight years of stagnation, is attributable to drastic reforms such as opening the island to foreign investment, tax hikes and subsidy cuts.²⁴³ According to the Cuban Minister of Economy and Planning, Jose Luis Rodriguez, the increase in GDP in 1996 was based on an 8.5% improvement in work productivity and a 54% rise in foreign investments.²⁴⁴ In 1997, estimates of a 3% to 4% decline in Cuba's economy were attributable to the loss in foreign investment caused by the Helms-Burton Act,²⁴⁵ loss of approximately 200,000 tons of sugar crops because of Hurricane Lili,²⁴⁶ and the lack of renovation or development of new sugar milling plants.²⁴⁷ The small increase in GDP of 1% predicted in 1998 is attributed to a poor sugar harvest,²⁴⁸ severe financing problems, and lower world prices for nickel and sugar exports.²⁴⁹

237. *See id.*

238. *See id.*

239. *Id.*

240. *See generally* DEPT. ST. BULL., *supra* note 29, at 5.

241. *See id.* at 5.

242. *Id.* Note that Russia ultimately ended all trade subsidies in 1993. *See id.*

243. *See* Acosta, *supra* note 44, at 1.

244. *See Cuba 1996-97 Sugar Output Seen Down From Gov't Target*, DOW JONES COMMODITIES SERV., June 1, 1997.

245. *See generally* Acosta, *supra* note 44, at 1; *Cuba 1996-97 Sugar Output Seen Down From Gov't Target*, DOW JONES COMMODITIES SERV., June 1, 1997.

246. *See* Dalia Acosta, *Cuba-Economy: Sugar Production Down, Economic Recovery Slows*, INTER PRESS SERV., June 1, 1997, available at 1997 WL 7075687.

247. *See id.*

248. Sugar production fell 4.4% from 1996. *See Cuba: Government Foresees Another Year of Slow Economic Growth*, ECOCENTRAL: CENT. AM. ECON. & SUSTAINABLE DEV., Mar. 5, 1998 available in LEXIS, News library, Curnws file.

249. *See Cuba Sees Construction Sector Booming in 1998*, REUTERS, July 29, 1998 (visited July 31, 1998) <<http://www.cubanet.org/cnews/y98/jul98/30e3.html>> [hereinafter *Cuba Construction*].

CHART 4: GROSS DOMESTIC PRODUCT (GDP)²⁵⁰

YEAR	GDP (millions of pesos)	% CHANGE
1990	19008.3	-2.9
1991	16975.8	-10.69
1992	15009.9	-11.6
1993	12776.7	-14.9
1994	12868.3	0.72
1995	NA	NA
1996 ²⁵¹	NA	7.8
1997 ²⁵²	NA	2.5
1998 (EST.) ²⁵³	NA	1.0

Cuba's slow but steady recovery has been primarily due to greater access to hard currencies. The most important source of hard currency is from remittances by Cubans in the United States. In 1996, Cuban exiles sent approximately US \$800 million to family and friends in Cuba. This was a huge increase from the US \$100 million of remittances in 1990.²⁵⁴ According to Ernest Preeg, an analyst for the Center for Strategic and International Studies, the "pervasive change for the worse in economic circumstances within Cuba triggered the surge in dollar remittances by Cuban Americans back into Cuba."²⁵⁵

Castro's position within the international arena has also been strengthened. The United Nations has explicitly reaffirmed the need to

250. See *Statistical Yearbook For Latin America and the Caribbean 1995 Ed.*, ECON. COMM. FOR LATIN AM. & THE CARIBBEAN, 276-77 UNITED NATIONS (1996) (source for the 1990 to 1995 figures). Note that Cuba has not published its macroeconomic figures since 1994; thus all data for the years 1995 to 1997 come from various periodicals.

251. See Enrique Rangel, *The Taxman Cometh, Cubans Split on Levies on Entrepreneurs*, DALLAS MORNING NEWS, May 29, 1997, at 1D.

252. See *Cuba Construction*, *supra* note 249.

253. *Id.*

254. *Cuba: Government Foresees Another Year of Slow Economic Growth*, ECOCENTRAL: CENT. AM. ECON. & SUSTAINABLE DEV., Mar. 5, 1998 available in LEXIS, News library, Curnws file.

255. *Id.*

"eliminate the unilateral application of economic and trade measures by one State against another for political purposes."²⁵⁶ At the end of 1997, the United Nations voted one hundred forty three to three to end the economic, commercial, and financial sanctions against Cuba.²⁵⁷ An analysis of the voting records of the various annual resolutions concerning Cuba reveals a definite softening by the international community towards Cuba. Between 1993 and 1996, the voting pattern reveals a 17% decrease in the countries supporting a censoring of Cuba, a 25% increase in the countries not supporting the resolutions, a 38% increase in the countries abstaining; and a 52% decrease in the countries not participating in the vote.²⁵⁸

The decrease in the number of countries supporting the resolutions against Cuba and the increase in the countries not supporting the resolutions show the international community's concern that extraterritorial laws hinder freedom of trade and demonstrate the desire to prevent such laws in the future. The increase in abstentions is most likely due to the fact that some countries have not determined the ramifications of taking a position. For example, on the one hand, a vote to support the resolution implies an agreement with the use of extraterritorial legal mechanisms for political purposes. On the other hand, a vote against the resolution may signal support for Castro. The decrease in non-participating nations can be attributed to the Helms-Burton Act because the Act is forcing countries to take a position for or against the use of extraterritorial legal mechanisms for political purposes.

Other actions within the international community also reflect a strengthening of Castro's position. For example, Mexico has requested that Cuba be allowed to rejoin the Organization of American States (OAS) and become a member of the hemispheric community because "dialogue and communications are better alternatives than ... embargoes and sanction."²⁵⁹ Additionally, the chairman of the Caribbean

256. See *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, U.N. GAOR, 48th Sess., 79th plen. mtg., at 1, U.N. Doc. A/RES/48/16 (1993).

257. See *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, U.N. GAOR, 52d Sess., 45th mtg., U.N. Doc. A/52/L.11 (1997). There were 17 abstentions and 15 States absent. See *id.*

258. Compare *Situation of Human Rights in Cuba*, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/142 (1993) with *Situation of Human Rights in Cuba*, U.N. GAOR Plenary, 51st Sess., 82d plen. mtg., U.N. Doc. A/RES/51/113 (1996) (percentages noted in text calculated by author).

259. *US Tells Latin American States That It Shares Responsibility for Drugs*, AGENCE FRANCE-PRESSE, June 3, 1997, available at 1997 WL 2126664. Cuba was suspended from the OAS in 1962, but sanctions on trade were lifted in 1975, leaving the

Community (CARICOM)²⁶⁰ has discussed the Helms-Burton Act with President Clinton and stated that the Caribbean leaders believe that "every effort should be made to reintegrate Cuba as a full member into the hemispheric family."²⁶¹ All fourteen members of CARICOM, plus Haiti²⁶² either have full diplomatic relations with Cuba or are in the process of establishing them.²⁶³ Discussions have been held this year by Caribbean leaders to allow Cuba to become a member of CARICOM.

Another sign of acceptance of Cuba by the international community is Cuba's invitation to attend an Asia-Caribbean-Pacific Group (ACP) meeting in May 1998.²⁶⁴ ACP is an organization of former European colonies with special trade links to the EU.²⁶⁵ Members of ACP receive certain trade preferences with the EU.²⁶⁶ Cuba would have to meet EU political and economic standards for entry which could prevent the country's full membership in ACP.²⁶⁷

I. Increased Tensions Between the U.S. and Its Trading Partners

A primary impact of Title III within the United States has been increased tension between the United States and its trading partners. No other country observes the United States embargo against Cuba, and its attempt to strengthen sanctions has angered trading partners. Since it was enacted, Canada, the EU and Mexico have vehemently protested the Helms-Burton Act as an attempt by the United States "to dictate policy."²⁶⁸ The EU has called the Act "a sword of Damocles"²⁶⁹ and

option to resume diplomatic and trade relations with Cuba to the individual OAS members. See *Trade Between the U.S. and Current/Former Nonmarket Economies*, NAT. TRADE DATA BANK, ch. 3 (1994).

260. CARICOM is a regional trading bloc. See *Cuba Courts More of Its Neighbors*, ASSOCIATED PRESS, July 29, 1998, available at 1998 WL 6700833.

261. Dohning, *supra* note 80, at A6.

262. Haiti's membership to CARICOM was pending as of June 1997. See *id.*

263. See *id.* Furthermore, Jamaica opened a consulate in Havana in 1996, and since mid-June 1997, Air Jamaica flies to Havana three times a week. See *id.*

264. See *Cuba: News in Brief*, ECOCENTRAL: CENT. AM. ECON. & SUSTAINABLE DEV., June 4, 1998 available in LEXIS, News library, Curnws file.

265. See *id.*

266. See *id.*

267. See *id.*

268. *EU Not Planning To Contest U.S. Restraints on Cuba*, DOW JONES NEWS SERVICE, June 4, 1997. See Duffy, *supra* note 53, at A5. Some Canadian legislators have even written a bill that would authorize penalties against U.S. companies that use assets seized in the American Revolution. See James Walsh, *America the Brazen Amid*

agreed to compile a "watch list" of United States companies that took legal action against European firms with Cuban ties.²⁷⁰ According to the Canadian Trade Minister, Art Eggleton, the United States has "reache[d] an all-time low."²⁷¹ He further stated that "if the U.S. wants to deal with Cuba, it should deal with Cuba directly" and not by punishing companies in other countries with its law.²⁷²

The United States' trading partners find the Helms-Burton Act unacceptably intrusive in their country's affairs. One clash occurred in March 1998, between Canada and the United States over Cuban pajamas carried by Wal-Mart Canada, a subsidiary of an American company.²⁷³ Initially, the company removed the pajamas from their shelves, but after determining that they were a Canadian corporation, Wal-Mart Canada returned the pajamas to the shelves.²⁷⁴ Eggleton praised the company stating that "[t]hey decided they're a Canadian corporation when they operate in this country and they're going to operate by Canadian law."²⁷⁵ The United States Treasury Department, however, threatened to take action against Wal-Mart, but to date no prosecution has occurred.²⁷⁶ The Wal-Mart situation clearly demonstrates the increased tensions that have been created by the enactment of Helms-Burton, and the difficulties subsidiaries of United States companies can face when encountering the conflicting requirements of United States law and Canadian law.

Another example of increased tensions occurred between the United States and the EU over the EU's filing of a claim with the WTO. In the two and one-half years of the WTO, the United States and the EU have been the biggest users and beneficiaries of its dispute resolution system.²⁷⁷ However, both nations are not using the WTO to settle the Helms-Burton dispute. The EU filed a complaint against the United States, but it suspended the complaint in April 1997. The United States claimed that the Helms-Burton dispute is not a trade issue but a foreign

Mounting Umbrage at American 'Arrogance' Abroad, TIME INT'L, Aug. 4, 1997, at 22.

269. Walsh, *supra* note 268, at 22.

270. *EU Unites Against Helms-Burton Act*, FIN. POST, July 16, 1996, at 2.

271. Duffy, *supra* note 53, at A5.

272. *Id.*

273. *See id.*

274. *Id.*

275. *Id.*

276. *See* Glossop, *supra* note 57.

277. *See* WTO Trade Policy Review Body, *United States, Report by the Secretariat - Summary Observations*, (Oct. 1996) (visited July 30, 1998) <<http://www.wto.org/wto/reviews/tprb46.html>>. *See also*, Frances Williams, *WTO Gets A Vote of Confidence*, FINANCIAL TIMES, Sept. 24, 1997, at 6. In the one hundred claims filed with the WTO, the United States has brought thirty-five cases and defended twenty while the EU has brought twenty-one cases and defended fourteen. *See id.*

policy issue and threatened to ignore any decision of the WTO.²⁷⁸ As the tension between the EU and the United States increased, negotiators on both sides worked furiously to reach some form of resolution. Finally, the EU agreed to allow its claim to lapse in exchange for the United States agreeing to continue to suspend Title III. In May 1998, both sides reached an agreement whereby President Clinton would grant permanent waivers to Title III. President Clinton also agreed to seek waiver authority for Title IV from Congress. The WTO situation is discussed in detail in Part III of this Comment.²⁷⁹

J. Loss of Revenue by U.S. Nationals

One way United States' business has been impacted by Helms-Burton is loss in revenue. Such revenue loss includes the inability to invest in Cuba (because investment in Cuba by United States citizens was banned even before Helms-Burton), and the cost of unrecoverable claims filed with the Foreign Settlements Claims Commission. Prior to the enactment of Helms-Burton, the United States had been negotiating with Cuba to settle American claims.²⁸⁰ The Foreign Claims Settlement Act established the Foreign Claims Settlement Commission to certify claims of confiscated property in Cuba and negotiate with the Cuban government to reach a settlement.²⁸¹ In order to receive certification, United States nationals and entities who had property seized in Cuba must have filed a claim with the Foreign Claims Settlement Commission.²⁸² These claims amounted to approximately US \$6 billion in 1996.²⁸³ Settlement negotiations stopped, and in 1996, Cuba passed legislation which recognized the rights of United States' citizens and companies to indemnification for property losses which occurred in 1960, but forbade compensation of any American seeking redress

278. See Juan O. Tamayo, *Europe Forges Ahead with Legal Challenge to Helms-Burton Law*, MIAMI HERALD, Feb. 5, 1997, at A28; Paul Blustein and Anne Swardson, *U.S. Vows to Boycott WTO Panel*, WASH. POST, Feb. 21, 1997 at A1.

279. See *infra* notes 305-21.

280. See Golden, *supra* note 6, at 11.

281. Foreign Claims Settlement Commission, 22 U.S.C. §1643(a) (1995). Of the 8,816 claims filed by U.S. citizens and companies, the Commission only certified 5,911 as valid. See Golden, *supra* note 6, at 11.

282. See *id.* The Foreign Claims Settlement Commission completed its claims certification in 1972. See Samuel A. Giderga, *Recent Developments, International Law*, 44 LA. B. J. 268, 269 (1996).

283. See Golden, *supra* note 6, at 11.

through Helms-Burton.²⁸⁴

Trade sanctions cost United States' companies billions. According to a study conducted by the Institute for International Economics, trade sanctions cost United States' companies US \$15 billion to US \$19 billion in 1995.²⁸⁵ The study additionally indicated that the resulting job losses in the export sector in 1995 may have been as high as 200,000 to 250,000.²⁸⁶ Many American businesses believe that unilateral sanctions undermine American competitiveness.²⁸⁷

In an attempt to counter trade sanctions, six hundred twenty-three United States' companies and trade groups began working with USA Engage.²⁸⁸ One objective of this coalition is to formulate a long-term strategy aimed at stopping or reducing the United States' use of economic sanctions to promote its foreign policy.²⁸⁹ The group is devising a set of procedures that Congress would have to follow before initiating sanctions against a country.²⁹⁰ One of the procedures requires that the cost to United States' companies be considered.²⁹¹ The group argues that trade sanctions rarely work, cost the United States sales and jobs, and often alienate allies and trade partners.²⁹²

III. DISPUTE RESOLUTION OPTIONS

As members of the international trade world continue to become more reliant upon one another, the importance of predictable and fair solutions to trade disputes becomes critical. Greater reliance should be placed on consistent application of trade agreements and less importance should be placed on the relative power of the parties.²⁹³ Predictability and fairness

284. See Farah, *supra* note 36, at A16.

285. See Gary G. Yerkey, *U.S. Sanctions Against Other Countries Cost Exporters Up to \$19 Billion, Study Says*, 14 INT'L TRADE REP. (BNA) No. 17, at 736 (Apr. 23, 1997).

286. See *id.*

287. See *id.*

288. See David Ivanovich, *Trade Sanctions*, HOUSTON CHRON, Aug. 3, 1997, at 1. The companies working with USA Engage range from the huge multinational Exxon Corp. to the small locally owned Bayou City Ford Truck Sales. See *id.*

289. See USA Engage Position Papers (visited Aug. 4, 1998) <<http://www.usaengage.org/resources/studiespapers.html>>.

290. See *id.*

291. See *id.*

292. See George Melloan, *Sanctions Are an Expensive Way to Win Votes*, ASIAN WALL ST. J., June 3, 1997, at 10.

293. There are two general views on dispute resolution, a "power-oriented" or "pragmatist" approach and a "rule-oriented" or "legalist" approach. See Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2288 (1997). The pragmatists believe that the primary purpose of the dispute resolution system is to encourage negotiations and political compromises even if they are contrary to the rules

are the goals in dispute resolution. This Comment proposes three potential vehicles for resolution of the Helms-Burton dispute: the World Trade Organization Dispute Settlement Body, the North American Free Trade Agreement, and resolution through diplomatic intervention.

A. *World Trade Organization (WTO)*

The WTO officially came into existence on January 1, 1995, and within six months one hundred countries accepted membership.²⁹⁴ The WTO is the first international organization charged with the responsibility of overseeing the world trading system.²⁹⁵ One flaw with the WTO's dispute resolution system is that only nations, not private parties, are allowed to challenge illegal trade practices.²⁹⁶ Thus, individuals or companies doing business with Cuba who are adversely affected by Helms-Burton cannot file a dispute with the Dispute Settlement Body (DSB) of the WTO.²⁹⁷

Under the WTO Charter, parties have the right to appeal panel decisions to the Appellate Body which is a permanent court made up of seven judges appointed by the DSB.²⁹⁸ Panel and Appellate Body decisions are virtually automatic.²⁹⁹ A decision can be stopped only if all the member nations, including the winning nation, agree by consensus not to adopt it.³⁰⁰ To ensure compliance with a decision, the WTO Charter provides for ongoing surveillance of the party's trade practices,

and agreements governing the trade practices in dispute. *See id.* The bottom line of the pragmatic approach is that the relative power of the parties determines resolution of the dispute. *See id.* at 2289. On the other hand, the legalists believe that the purpose of the dispute resolution system should be to "preserve the integrity of the applicable rules." *Id.* The legalists place no significance to the relative power of the parties. *See id.*

294. *See* JOHN H. JACKSON, *THE URUGUAY ROUND AND THE LAUNCH OF THE WTO: SIGNIFICANCE AND CHALLENGES*, IN *THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 1* (Terence P. Stewart ed., 1996). Currently, there are one hundred thirty-two member nations of the WTO. *See About the WTO* (visited Aug. 1, 1998) <<http://www.wto.org/wto/about/organsn6.html>>.

295. *See* Jackson, *supra* note 292, at 1.

296. *See* GATT: Multilateral Trade Negotiations, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125, 1226 (1994) [hereinafter GATT].

297. *See id.*

298. *See* Marrakesh: Agreement Establishing the World Trade Organization (Apr. 15, 1994), 33 I.L.M. 1144, 1236 (1994).

299. *See id.*

300. *See id.* at 1237.

and the imposition of sanctions against nations that refuse outright to comply with adopted decisions.³⁰¹

One important provision in the Charter requires that member nations cannot respond to a dispute by a unilateral retaliatory action, but must settle the dispute through the WTO.³⁰² The pertinent section prohibits all members from "mak[ing] a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding."³⁰³ For example, instead of enacting higher tariffs against another nation because of a trade dispute, the member nation must file a dispute with the DSB and adhere to the decision.

The European Union initially began proceedings to use the WTO to settle the dispute over the Helms-Burton Act.³⁰⁴ The EU's claim stated that the "trade restrictions on goods of Cuban origin related to expropriated properties were inconsistent with WTO trading rules."³⁰⁵ Much of the international community was dismayed when the European Union filed a claim with the WTO against the Helms-Burton Act in 1996 because the WTO only began hearing cases in 1995. Few scenarios could have left the WTO unscathed from the ramifications of any ruling it made regarding Helms-Burton.³⁰⁶ When both sides met with the appointed WTO director to discuss the three-member panel that would be appointed, the United States rejected all seven names put forward.³⁰⁷ The United States argued that the Helms-Burton Act is not a trade dispute but a foreign policy issue that could not be judged by the WTO.³⁰⁸ Some would view it as fortunate that in 1997 the EU suspended

301. See *id.* at 1238.

302. See GATT, *supra* note 296, art. 23(2)(a).

303. *Id.*

304. See Christopher Marquis, *Defending Trade Law Before WTO Has Risks*, ATLANTA J. & CONST., Nov. 10, 1996, at A12.

305. John R. Schmertz Jr., *EU Ends its WTO Challenge to U.S. Cuban Sanctions Act*, 4 INT'L L. UPDATE 67 (1998).

306. See *id.*

307. See Tamayo, *supra* note 278, at A28. Europe requested that the WTO director unilaterally appoint a panel as allowed under World Trade Organization rules. See *id.* The panel was appointed on February 20, 1997, but a senior U.S. official commented that the U.S. would not show up to the three member panel. According to the Clinton administration, "Helms-Burton is a political and national security issue, not a trade issue, and thus does not belong in the WTO." Thomas W. Lippman, *Shoot-Down Became Diplomatic and Political Turning Point*, WASH. POST, Feb. 25, 1997, at A3.

308. See Tamayo, *supra* note 278, at A28. According to U.S. Undersecretary of Commerce, Stuart E. Eizenstat, the WTO is not an appropriate forum for resolving differences over what is essentially a disagreement over foreign policy. See Thomas W. Lippman, *Clinton Suspends Provision of Law that Targets Cuba*, WASH. POST, Jan. 4,

its claim in the WTO,³⁰⁹ thus giving the WTO more time to become entrenched as a dispute resolution body within the international trade community. In the 1997 agreement reached by the EU and the United States, the United States agreed to suspend enforcement of Title III,³¹⁰ while the EU agreed to suspend its WTO complaint.³¹¹ After over a year of intense negotiations, the EU dropped its WTO challenge to the Helms-Burton Act.³¹²

Less than one month later, the United States and the EU reached an agreement that still must be approved by Congress.³¹³ The parties agreed on a policy that will take legal form if the Organization for Economic Cooperation and Development (OECD) negotiations on the Multilateral Agreement on Investment (MAI) reach fruition.³¹⁴ Key points of the agreement as relevant to investment in Cuba include: (1) no government finance or other help will be available to investors in illegally expropriated property as defined by international law, an unanswered claim, or occurrence in a country with an "established record" of illegal expropriation; (2) a registry of claims will be established to warn investors and agencies providing assistance that a property was expropriated; and (3) no government support or advocacy, through embassies or commercial, foreign or trade ministries, for investments in expropriated property.³¹⁵

In the understanding reached between the EU and the United States, the EU acknowledged that one of the primary tools that the Cuban government used in its mass expropriation of property from the United States after the revolution "appears to be contrary to international law."³¹⁶ The EU additionally stated that it is "reasonable to assume" that

1997, at A1. Canadian Foreign Affairs Minister, Lloyd Axworthy, said that the United States' refusal to co-operate with the WTO "runs counter to years of work to create a world trading regime with a set of rules." Allan Thompson, *Canada, U.S. Agree to Disagree over Cuba*, TORONTO STAR, Mar. 5, 1997, at A12.

309. The EU suspended its claim in April 1997. *U.S., E.U. to Meet June 12 on Helms-Burton*, EMERGING MARKET REP., June 2, 1997 available in Westlaw, Allnewsplus library.

310. See EU-US Understanding, *supra* note 57, 36 I.L.M. at 529.

311. See *id.* at 530.

312. See Schmertz, *supra* note 305, at 67.

313. See *id.*

314. See Eizenstat testimony, *supra* note 2. The MAI negotiations are scheduled to continue in October 1998. See *OECD Meeting At Ministerial Level*, OECD NEWS RELEASE, Apr. 28, 1998.

315. Eizenstat testimony, *supra* note 2.

316. *Id.* Canada is currently analyzing the EU-U.S. agreement to determine whether

the policies set out in this agreement will apply to certain expropriations of U.S. citizens' property.³¹⁷ According to the Clinton administration the combination of the principles set out in the agreement and the EU's acknowledgments will effectively discourage investment in Cuba by accentuating the high risk of such an investment.³¹⁸

The WTO was never a viable solution because the United States' rejecting the decision or resigning from the WTO would have seriously undermined the WTO's credibility as a dispute resolution option.³¹⁹ Such a result would have had a serious adverse impact on the international trading system. In its short life, the WTO has resolved one-third as many disputes as the General Agreement on Tariffs and Trade (GATT), its predecessor, had settled in almost fifty years.³²⁰ As shown by the number of cases it has settled since its inception, the WTO is an important, extremely necessary and efficient dispute settlement system. It appears that both the EU and the United States realized the serious and long-term ramifications that a fight over Helms-Burton in the WTO could have created, and chose not to potentially harm the system that has been working so well for both. Resolution of the EU-US dispute over Helms-Burton was obtained instead through intense negotiations on both sides.

B. North American Free Trade Agreement (NAFTA)

NAFTA entered into force in 1994 to promote free trade principles among the United States, Canada, and Mexico.³²¹ NAFTA contains several dispute settlement mechanisms,³²² some of which have been pursued by Canada and Mexico in an attempt to resolve the Helms-Burton dispute.³²³ Both nations claim that Helms-Burton violates

they will participate. See *Canada Carefully Weighing Deal On Helms-Burton Before Acting*, 15 INT'L TRADE REP. (BNA) No. 23, at 1021 (June 10, 1998).

317. Eizenstat testimony, *supra* note 2.

318. See *id.* Four ways the investment risk in Cuba will be accentuated are: (1) the policies highlight Cuba's record of illegal expropriations; (2) the serious risk potential investors face that any investment in Cuba could turn out to involve expropriated property; (3) the policies state the United States' and the EU's strong disapproval of investment in expropriated property; and (4) the policies proclaim that now investors who deal in expropriated property cannot get help from their governments. *Id.*

319. See Williams, *supra* note 277, at 6.

320. See *id.* The WTO has received over one hundred requests for resolution. See *id.*

321. See North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993), 32 I.L.M. 605 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

322. See *infra* note 326.

323. See *U.S. Agrees to Talk with Canada, Mexico, on Helms-Burton Cuba Sanctions Measure*, 13 INT'L TRADE REP. (BNA) No. 14, at 476 (1996). See Cherie

NAFTA by interfering with the "very trade liberalization measures that NAFTA was designed to promote."³²⁴

NAFTA has five dispute resolution mechanisms, two of which could potentially be used to resolve the Helms-Burton dispute.³²⁵ First, under Chapter 20 the parties are encouraged to attempt to use arbitration and mediation to resolve disputes.³²⁶ Arbitration appears not to be a viable option for the dispute over Helms-Burton because the United States probably would not agree to arbitration or mediation as shown by its response to the EU's WTO claim.³²⁷ Also, the policy issues behind Helms-Burton require a more sophisticated forum for resolution because either party can choose to ignore the settlement if they do not like the result, leaving the losing party without an available enforcement mechanism.

A second dispute resolution option is provided in Chapter 19 which discusses resolution of disputes arising out of unfair trade competition claims—primarily antidumping and countervailing duty determination claims.³²⁸ A panel reviews the challenge and issues a report. However, the panel reports are problematic in two ways. First, the panel report replaces domestic judicial review, although its only legal effect concerns the particular administrative determination issued. Second, the panel reports do not have precedential value in the domestic legal systems of

O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850 (1996).

324. Anthony M. Solis, Comment, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L. INT'L & COMP. L.J. 709, 733 (1997). See Brian J. Welke, Comment, *GATT and NAFTA v. The Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361 (1997); Robert E. Lutz, *Current Developments in the North American Free Trade Agreement: A Guide for Future Economic Integration Efforts*, 18 WHITTIER L. REV. 313 (1997).

325. The five major dispute options are: (1) Chapter 20 which can be used to resolve general disputes arising under the terms of NAFTA (*see supra* note 321, at 693-99); (2) Chapter 19 can be used to settle antidumping and countervailing duty determinations (*id.*, at 682-93); (3) Chapter 11 to settle for investment disputes (*id.* at 642-47); (4) and (5) the North American Agreement of Labor Cooperation or the North American Agreement on Economic Cooperation to resolve labor and environmental disputes. North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., arts. 27-41, 39 I.L.M. 1499, 1509-13 (1993); North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., arts. 22-36, 32 I.L.M. 1480, 1490-94 (1993).

326. See NAFTA, *supra* note 321, at 693-99.

327. See Tamayo, *supra* note 278, at A28.

328. See NAFTA, *supra* note 321, at 682-93.

the disputing countries. If a party disputes the operation of panel process, Chapter 19 does allow the establishment of an extraordinary challenge committee,³²⁹ which is similar to an appeals process. In essence, the dispute resolution option will not work because the resolution option is aimed at *antidumping* and *subsidy*, while Helms-Burton is an *economic* sanction measure. Further, the United States has indicated that "NAFTA is not designed to deal with political questions."³³⁰

Any resolution, however, reached under NAFTA that declares Helms-Burton an illegal trade action will not prevent the United States from continuing to enforce the law because NAFTA has a national security interest exception.³³¹ It is virtually guaranteed that the United States will claim that Helms-Burton is necessary to protect the United States' security interests.³³² The Helms-Burton Act explicitly states that Castro is a threat to "international peace and security"³³³ and that he "pose[s] a national security threat to the United States."³³⁴ United States Undersecretary of Commerce, Stuart Eizenstat, stated that any complaint to NAFTA would be "a serious mistake which may increase the tension and complicate the relations between Mexico, the United States and Canada."³³⁵

C. Diplomatic Intervention

Diplomacy is defined as the "art and practice of conducting negotiations between foreign governments for the attainment of mutually satisfactory political relations."³³⁶ Diplomatic intervention is one of the primary and most successful tools available in peacefully resolving international disputes. Compromise and power usually are the two main elements involved in diplomacy and each is closely intertwined. Power relates to the notion of each party's influence, clout, or might. Generally, in disputes resolved through diplomatic

329. See *id.* at 682-93; see also, Taylor, *supra* note 323, at 890.

330. Jorge A. Vargas, *Introductory Note to Mexican Act*, 36 I.L.M. 133, 135.

331. *United States Agrees to Talk with Canada, Mexico on Helms-Burton Cuba Sanctions Measure*, 13 INT'L TRADE REP. (BNA) No. 14, at 476 (1996) (describing actions by Cuba affecting U.S. national security interests).

332. See *id.* Article 2102 contains the national security exception and provides that any party can pass legislation that would otherwise be inconsistent with the NAFTA for an emergency dealing with international relations. See *id.*; see also *NAFTA Round-Up: Helms-Burton May be Defended on National Security Grounds*, 6 N. AM. FREE TRADE & INVESTMENT REP., Aug. 15, 1996.

333. 22 U.S.C.A. § 6021(14) (1996).

334. *Id.* § 6021(28).

335. See Vargas, *supra* note 330, at 135.

336. BLACK'S LAW DICTIONARY 315 (6th ed. 1990).

intervention the nation with the most relative power will have to make fewer compromises to obtain the result it wants.

In addition to using organized systems, such as the WTO and NAFTA, Canada, the EU and Mexico have also attempted to resolve the Helms-Burton dispute through diplomatic actions. These diplomatic actions have been conducted at regional,³³⁷ bilateral,³³⁸ and multilateral³³⁹ levels. Of the three dispute resolution options discussed, only diplomacy appears to have had some success, particularly between the EU and the United States.

After almost a year and a half of angering its allies, the United States made some concessions to limit the application of the Helms-Burton Act. In April 1997, the United States and the European Union reached an understanding concerning the Helms-Burton Act and the Iran and

337. Regional diplomatic actions include: (1) the Group of Rio consisting of twelve Latin American countries signed a joint declaration criticizing the Helms-Burton Act and "encouraging free trade in the Americas" by 2005, *Brazil, Argentina, Pres: Give Latin America Permanent U.N. Seat*, DOW JONES INT'L NEWS SERV., Aug. 24, 1997. (2) Jamaican Prime Minister P.J. Patterson, the chairman of the Caribbean Community (CARICOM), a fourteen member regional group, expressed to President Clinton the group's concerns about Helms-Burton. See Don Bohning, *Despite U.S. Efforts, Jamaica Expands Ties with Cuba*, MIAMI HERALD, May 29, 1997.

338. Bilateral diplomatic actions include: (1) the 13th Annual Meeting of the United States-Mexico Binational Commission in May 1996, see Mexican Act, *supra* note 55, at 134-5. Jose Angel Gurria Trevino, noted that Mexico is "the third commercial partner" of the United States, "with an annual flow of 120 billion dollars." Vargas, *supra* note 330, at 135. Trevino reminded the United States that both countries have to "apply the rules of commerce and international law." *Id.* (2) August 1996 meeting between Mexico's Secretary of Commerce and Industrial Affairs, Herminio Blanco and the United States Undersecretary of Commerce, Stuart Eizenstat. *Id.* Five concerns stated in a "special document" delivered to Eizenstat: (a) the U.S. government should repeal the Helms-Burton Act; (b) the only viable conduct to guarantee a civilized co-existence among States is respect for and effective compliance with an international legal order; (c) international law prohibits the imposition of coercive measures against any State unless these measures are adopted by the competent organs of the United Nations; (d) the clear departure of the Helms-Burton Act from these positions explains the open repudiation this unilateral legislation has received by the global community; and (e) the government of Mexico will continue to use all available legal means to challenge the validity of the extraterritorial effects contrary to international law of said enactment to protect and safeguard the legitimate interests of Mexicans who may be affected by it. *Id.*

339. In October 1996, the U.N. General Assembly voted on United States policy towards Cuba which included the Helms-Burton Act and the Cuban Democracy Act of 1992. See Simons, *supra* note 195, at 13. The vote was one hundred thirty-seven against and three for the economic sanctions against Cuba. The Cuban government filed a protest with the U.N. in an effort. See *U.N. Condemns Blockade—Again!*, 5 BARAGUA 22 (Fall/Winter 1995/96).

Libya Sanctions Act.³⁴⁰ Under this agreement both sides “confirm their commitment to continue their efforts to promote democracy in Cuba.”³⁴¹ The United States agreed to continue to suspend Title III as long as the “EU and other allies continue their stepped up efforts to promote democracy in Cuba.”³⁴² Additionally, President Clinton agreed to request from Congress the authority to grant waivers of enforcement of Title IV to countries that have developed disciplines and principles for the strengthening of investment protection.³⁴³

Diplomatic measures were successful once again in May 1998. The United States and the EU reached an understanding under which President Clinton agreed to give EU companies permanent waivers of Title III.³⁴⁴ Additionally, the President agreed to ask Congress for waiver authority for Title IV.³⁴⁵ “The agreement provides for disciplines aimed at discouraging investing in any illegally expropriated property in the future, and for setting up a claims registry to handle unresolved property disputes.”³⁴⁶

On a regional level, the thirty-five member Organization for American States (OAS)³⁴⁷ adopted a resolution directing the Inter-American Juridical Committee, the juridical body of the OAS, “to examine and decide upon the validity under international law of the Helms-Burton Act . . . as a matter of priority.”³⁴⁸ According to the opinion of the Juridical Committee, “the exercise of jurisdiction . . . over acts of ‘trafficking’ . . . [in confiscated property] does not conform with [the

340. See EU-US Understanding, *supra* note 57.

341. *Id.*

342. *Id.*

343. See *id.* Rep. Dan Burton and Rep. Ileana Ros-Lehtinen issued a joint statement that said any “efforts by the EU or the Clinton administration to alter the law in any way ‘would be met with stiff resistance by the Congress.’” George Gedda, *EU, U.S. Reach Deal on Cuba Trade*, ASSOC. PRESS NEWS SERV., Apr. 12, 1997. The statement also reported that any efforts by the WTO to sanction the U.S. would be met with the possible action of requesting Congress to remove the United States from the WTO. See *id.*

344. See Schmertz, *supra* note 305, at 67.

345. See *id.*

346. U.S., *EU Reach Accord To End Dispute Over Helms-Burton; Helms Objects*, 15 Int’l Trade Rep. (BNA) No. 20, at 855 (May 20, 1998).

347. See *Fact Sheet: Organization of American States*, 7 DEP’T ST. DISPATCH 33 (May 1995). The OAS dates back to 1890 and is the world’s oldest regional organization. See *id.* All sovereign states of the Western Hemisphere are OAS members, although Cuba has been excluded from participation since 1962. See *id.*

348. *Organization of American States: Inter-American Juridical Committee Examining the U.S. Helms-Burton Act*, 35 I.L.M. 1322, 1328 (1996). The Resolution deviated from “normal diplomatic delicacy of style” by “directing” rather than “requesting” the Committee to formulate its opinion. *Id.* at 1322. This deviation could reflect the member nations’ anger at the United States for attempting to force its foreign policy on other sovereign nations and strong opposition to the Helms-Burton Act. See *id.* The United States was the only dissent of this resolution. See *id.*

norms established] by international law.”³⁴⁹ Although the opinion supports the basis for fair treatment and protection of the property rights of nationals, it condemns the use of Helms-Burton to coerce other nations to follow the United States’ foreign policy.³⁵⁰ Although the resolution was intended to “safeguard the international public order of the hemispheric system,”³⁵¹ the opinion has “no binding effect on Member States.”³⁵²

Diplomatic options should be pursued vigorously before unilateral sanctions are even discussed. The diplomatic options can range from the symbolic, like withdrawing an Ambassador or reducing Embassy staff to denying visas to certain officials or persons whose actions threaten the United States’ interests. Sanctions should be a last resort and used only after all other options have failed or been inadequate or inappropriate.

IV. ALTERNATIVES

One alternative to the Helms-Burton Act is to repeal the Act and employ a policy of engagement at every level: political, diplomatic, economic, charitable, religious, educational, and cultural. The United States can follow Canada, the EU, and Mexico’s example by allowing capital investments, partnerships, and joint ventures in Cuba.³⁵³ This alternative is particularly attractive because arguably it has been proven to obtain results. The United States had a policy of engagement with Eastern Europe which contributed to the fall of those Communist regimes.³⁵⁴ Some commentators argue that the Eastern European regimes fell not because they were isolated, but because they were penetrated by people, new ideas, and commerce.³⁵⁵

This is the same approach the United States is taking with China to promote a democratic form of government within that country. In a speech before the Subcommittee on Trade of the House Ways and Means Committee, U.S. Trade Representative Charlene Barshefsky

349. *Id.* at 1334.

350. *See id.* at 1330-32.

351. *Id.* at 1329.

352. *Id.*

353. *See generally supra* notes, 44, 74-8, and 213-20. Canada asserts that its policy of engagement with Cuba will have more success in bringing about economic and political reforms than the U.S. sanctions. *See* Barry Schweid, *US Blasts Canadian’s Cuba Visit*, ASSOC. PRESS NEWS SERV., Jan. 21, 1997.

354. *See* Hamilton, *supra* note 193, at 19.

355. *Id.*

stated that China's full integration into the international community will never be achieved "by building walls that divide us."³⁵⁶ Barshefsky further discussed how the most repressive periods in modern Chinese history occurred in times of isolation, not in times of open exchange.³⁵⁷

The policy of engagement with China has achieved several goals. On the one hand, trade between the United States and China continues to grow steadily which benefits both countries. In the United States, exports to China created 160,000 jobs for Americans.³⁵⁸ Additionally, in 1995, American businesses contracted to invest approximately US \$ 4 billion in Shanghai alone.³⁵⁹ In China from 1993 to 1996, the annual growth rate has been approximately 10%, primarily due to exports to the United States.³⁶⁰ On the other hand, while the United States accepts one-third of China's exports, China accounts for less than 2% of United States' exports and maintains a highly restricted import policy.³⁶¹ Additionally, China has not strictly enforced the Intellectual Property Rights Enforcement Agreement of 1995, resulting in piracy of copyrighted American products.³⁶² The exact monetary effect on the United States' economy of the Chinese piracy is unknown, but the figures must be substantial since the computer software industry is one of the United States' fastest growing industries.³⁶³

Although in the short-term United States' business may lose money from a policy of engagement, in the long-term nationals from both the United States and China will benefit.³⁶⁴ A deepening cooperation between both countries contributes to building peace and prosperity and an ability to jointly confront threats that "respect no borders," such as nuclear proliferation, terrorism, drug trafficking, disease, and environmental destruction.³⁶⁵ The most effective way to confront these threats is globally, which can occur only in a cooperative, communicative environment.

It is a contradiction for the United States' administration to say increased trade with China will loosen the political environment, but

356. Charlene Barshefsky, *U.S.-China Relationship*, DEP'T. ST. DISPATCH 324 (June 17, 1996).

357. *See id.*

358. *See id.*

359. *See id.*

360. *See id.*

361. *See id.* at 325.

362. *See id.* at 324.

363. *See id.* at 324-25. In 1995, the computer industry created 60,000 jobs. *See id.* at 325.

364. *See* Secretary Albright, *U.S. Leadership for a Global Community and China's Emerging Role*, DEP'T ST. DISPATCH 25 (May 1997).

365. Secretary Christopher, *The United States and China: Building a New Era of Cooperation for a New Century*, DEP'T ST. DISPATCH 581 (Nov. 25, 1996).

argue that with Cuba only sanctions will open the system. Foreign investment can potentially create a process of a more open political system. Isolation and coercion have never proven to be an effective method of promoting a transition to democracy. Step by step the United States should lift the embargo—restart direct flights, lift travel and currency restrictions and begin exchanges, dialogue and humanitarian relief.³⁶⁶

A second alternative is to develop a set of administration standards for dealing with property rights worldwide. This is the approach taken by the United States and the European Union in their understanding.³⁶⁷ Both countries are working feverishly to generate a set of principles that can be included in the MAI to resolve conflicting jurisdictional issues affecting investors.³⁶⁸ The terms of the plan, however, should be expanded to include a set of guidelines on how to resolve property issues arising not just through expropriation, but worldwide standards applicable also to intangible property.

CONCLUSION

The only visible result of over thirty-five years of continuous economic sanctions against Cuba is a decreased standard of living of the Cuban people. Generally, forcing the enactment of retaliatory measures has a restricting effect on trade. Thus, the United States must try a new foreign policy approach with Cuba because the use of a legal mechanism, such as Helms-Burton, appears to cost much more than it advances United States' foreign policy. As the world continues to become more tightly interconnected and reliant upon one another through trade, the less nations can use their own legislation to promote foreign policy without greatly impacting other nations' sovereignty.

The ramifications from Helms-Burton will continue long past the repeal of the Act. In the short-term, the United States may have gained some benefit, such as increased scrutiny on Castro's human rights record, but over the long-term the United States has shot itself in the foot by losing the respect of the international trade community. The bottom line is that every U.S. politician should ask three questions before voting on any legislation concerning promoting democracy in Cuba: "Is it

366. See Hamilton, *supra* note 193, at 19.

367. See generally Eizenstat testimony, *supra* note 2.

368. See *id.*

working for me? Is my family better off? Do I feel more secure?"³⁶⁹
After almost forty years of sanctions, it appears that the only way
Castro's government will be toppled is by Fidel Castro's death.

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369. Stacey Evers, *The Jane's Interview*, JANE'S DEFENSE WEEKLY, Aug 6, 1997, at 32.