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The Cuban Liberty and Democratic Solidarity Act: Violations of International Law and the Response of Key American Trade Partners

Muriel van den Berg

THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT: VIOLATIONS OF INTERNATIONAL LAW AND THE RESPONSE OF KEY AMERICAN TRADE PARTNERS

I. INTRODUCTION

The Helms-Burton Act, or the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act[1] as it is officially known, is one of the most controversial pieces of legislation signed by President Clinton during his first term. Despite the controversy, many Americans have never heard of the Libertad Act. The reason for this is that the Act's most disputed aspect is its attempt to apply U.S. law extraterritorially. Congress passed the Libertad Act with the intended goal of tightening the U.S. embargo against Cuba and speeding the ouster of Fidel Castro, but the result has been just the opposite. The Act's infringement on the sovereignty of U.S. allies and other nations around the world has sparked angry and pointed responses which aim to neutralize the effect of the Libertad Act and call into question the justification for the continued American embargo of Cuba. This comment seeks to (1) evaluate the events leading up to passage of the Cuban Liberty and Democratic Solidarity Act, (2) explain the Act's substantive provisions, (3) examine its violations of international law, and (4) analyze the legal steps taken by major U.S. trading partners in response to the Act. These steps include the passage of UN resolutions, the adoption of legal countermeasures, and the filing of a complaint before the World Trade Organization.

II. EVENTS LEADING UP TO THE ACT

A. *The Embargo*

Shortly after coming to power,[2] Fidel Castro nationalized all large commercial interests in Cuba in August 1960.[3] Within two years, Castro's

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1. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996). The Helms-Burton Act, Libertad Act, and Cuban Liberty and Democratic Solidarity Act are used interchangeably to refer to the legislation that is the topic of this comment.

2. *See* Richard D. Porotsky, *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, 908 (1995). Castro took power in 1959 by launching a revolt against the repressive Batista regime. *Id.*

3. *Id.* at 909. In 1954, the Department of Justice created an agency called the Foreign Claims Settlement Commission (FCSC) pursuant to the International Claims Settlement Act of 1949. Arthur Golden, *Accounts Receivable*, SAN DIEGO UNION-TRIB., Sept. 26, 1996, at I-1. The FCSC's function is to certify the claims of U.S. citizens whose overseas property has been seized by foreign governments without adequate compensation. *Id.* Once certified, the claims are presented to the State Department which negotiates with foreign governments for their payment. *Id.*

relations with the United States had deteriorated to the point that President Kennedy formally instituted a trade embargo against Cuba on February 3, 1962.[4] The embargo's purpose was to economically and politically strangle the Castro regime out of power. At its outset, the embargo prohibited all financial and trade transactions with Cuba by persons subject to U.S. jurisdiction.[5] Castro, defiant against U.S. attempts to isolate his government, rapidly forged links with the socialist bloc to fill the economic void left by the embargo instituted by the United States and supported by many American allies.[6] Meanwhile, the only recourse for those American citizens and corporations whose Cuban property had been nationalized was to certify the amount of their loss with the Foreign Claims Settlement Commission and hope for an eventual settlement of these claims with the Cuban government.

For the next thirty years, successive U.S. administrations maintained the embargo on the ground that Cuba represented a communist threat to U.S. security.[7] With the collapse of the former Soviet Union in 1991, this justification for the embargo ceased to exist in the eyes of many around the world, yet the United States has doggedly perservered in enforcing it.

B. *The Cuban Democracy Act of 1992 and Growing Foreign Criticism*

The collapse of the Soviet Union brought an end to its $5 to $6 billion in annual subsidies to Cuba, and the island plunged into a lasting recession.[8] Between 1989 and 1994, the Cuban economy contracted by 35 percent because of the cutoff of Soviet aid.[9] The U.S. Congress passed the Cuban Democracy Act of 1992 specifically seeking to exploit the potential for a transition to democracy that this economic hardship provided.[10] The Cuban Democracy Act tightened the existing embargo using mechanisms to accomplish this goal which angered the international community.[11] Foremost, the Cuban Democracy Act abolished the U.S. system

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By 1968, about 6000 U.S. corporations and citizens who lost property in Cuba when Castro nationalized their assets had claims certified by the FSCS. *Id.* These claims were worth about $1.8 billion in the 1960s and, with interest, are now worth about $5.6 billion. Steve Fairnaru, *U.S. Firms Haven't Closed Book on Cuba*, BOSTON GLOBE, Sept. 29, 1996, at A1.

4. Porotsky, *supra* note 2, at 906.

5. *Id.*

6. *Id.* at 910.

7. *Id.* at 912.

8. Porotsky, *supra* note 2, at 913.

9. *Cuba Expects GDP to Grow*, STAR TRIBUNE, Mar. 12, 1997, at 3D.

10. *See* Gabriel M. Wilner, *International Reaction to the Cuban Democracy Act*, 8 FLA. J. INT'L L. 401, 402 (1993).

11. *Id.*

of granting licenses to do business with Cuba to the foreign subsidiaries of American companies.[12] This license system had enabled these subsidiaries to trade with Cuba while such trade remained forbidden to their American parents.[13] The European Community and others opposed the elimination of the licensing process because it forced the subsidiaries operating within their sovereign territories to comply with the U.S. foreign policy objectives in Cuba by subjecting them to penalties under American law for trading with the island.[14] From the perspective of American trade partners, this amounted to the extraterritorial application of U.S. law in violation of principles of international law.[15] Further, not only did the Cuban Democracy Act attempt to reach the foreign subsidiaries of U.S. companies, it also took the more egregious step of setting up a secondary boycott by denying some foreign companies, with no American parent company or other ties to the United States, the right to trade with the United States if they did business with Cuba.[16] Though this secondary boycott applied only to the shipping industry,[17] its operation to bar any ship from entering an American port if that ship had visited a Cuban port within the previous six months was ill-received by the international community.[18]

After the enactment of the Cuban Democracy Act of 1992, Cuba initiated a series of United Nations resolutions relating to the embargo in an attempt to capitalize on this international annoyance with the Cuban Democracy Act and prior embargo legislation.[19] Without naming the United States specifically, the resolutions condemned the promulgation of laws by member states which infringe on the sovereignty of other

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12. *Id.*

13. *Id.*

14. *Id.*

15. *See* Porotsky, *supra* note 2, at 914.

16. *See* Wilner, *supra* note 10, at 402.

17. *Id.*

18. *See* Porotsky, *supra* note 2, at 914. Although the statutory language of the Cuban Democracy Act did not provide for other secondary boycotts, the practical effect of the Act and prior U.S. embargo laws was to create such boycotts. *See* Wilner, *supra* note 10, at 402. For example, non-U.S. companies were prevented from selling their goods in the United States if the goods contained a certain percentage of Cuban inputs. *Id.* at 403. Foreign-owned banks which operate exclusively outside the United States were forbidden by the U.S. government from maintaining Cuban accounts in U.S. dollars or conducting commercial transactions in U.S. dollars with Cuba. *Id.* Lastly, the United States exerted informal pressure on non-U.S. companies to avoid trade with Cuba. Foreign companies often yielded because of the possibility of future legal ramifications, a turn of events made credible by the ever-growing body of U.S. embargo legislation at the time. *Id.*

19. *See U.N. Again Calls on U.S. to End Embargo of Cuba*, BALTIMORE SUN, Nov. 13, 1996, at 16A.

states.[20] The resolutions called for nations of the world which had enacted extraterritorial legislation in order to maintain the embargo against Cuba to repeal such laws.[21] It was within this swirl of growing criticism of unilateral American legislation concerning Cuba and its extraterritorial effects that the Helms-Burton bill was born.[22]

III. THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT

A. *Genesis*

Drafting of the Helms-Burton legislation began in the summer of 1995.[23] It started as an attempt to allow U.S. nationals of all descents to recover damages for their expropriated foreign property.[24] When the far-reaching implications of such broadly worded legislation were considered, the bill was quickly narrowed to deal only with confiscated property in Cuba.[25] The legislation's development over the next year was shaped by key external forces such as the 1996 U.S. presidential election race and the downing of two private American planes by the Cuban Air Force on February 24, 1996.[26] Later versions of the Act retained only the slightest resemblance to its original premise.[27] Just as President Bush had opposed the Cuban Democracy Act of 1992 and later signed it under candidate Clinton's pressure,[28] the Clinton White House initially disapproved of the Helms-Burton bill until election year politics and the downing of the planes forced the administration to capitulate.[29] When

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20. *See* Wilner, *supra* note 10, at 406.

21. *See* Porotsky, *supra* note 2, at 940-41, n.207 (citing the full text of the first of these U.N. resolutions, G.A. Res. 47/19, U.N. GAOR, 47th Sess., Agenda Item 39, 70th plen. mtg., U.N. Doc. A/RES/47/19 (1992)).

22. *See generally* Wilner, *supra* note 10, at 405.

23. *See* Ann Davis, *Helms to Cuba: See You in Court*, NAT'L L.J., July 10, 1995, at A1 (explaining how Helms staffers drastically rewrote the legislation after receiving feedback from international lawyers).

24. *Id.*

25. *Id.*

26. David E. Sanger, *U.S. Rejects Role for World Court in Trade Dispute*, N.Y. TIMES, Feb. 21, 1997, at A9. For a chronicle of the events and personalities behind the shoot down of the Brothers to the Rescue planes, see Jefferson Morley, *Shoot Down*, WASH. POST, May 25, 1997, at W8.

27. *See* Davis, *supra* note 23, at A1.

28. *See* David Rieff, *From Exiles to Immigrants*, FOREIGN AFF., July/August 1995, at 86.

29. *See* 142 CONG. REC. S1510 (1996) (quoting a letter from President Clinton to Congress indicating the White House's change of heart on the Helms-Burton legislation: "The atrocity over the Florida straits—the murder of matyrs of February 24—has galvanized opposition to Castro. And it has overcome obstacles to passing their Libertad bill

Clinton finally signed the Cuban Liberty and Democratic Solidarity Act into law in July 1996, he immediately exercised his authority under the Act to suspend its most draconian provisions for six months in order to appease international reproach of the Act's extraterritorial reach.[30] President Clinton resuspended these provisions for six months in early January 1997[31] and again in July 1997.[32] Despite the Administration's effort to placate foreign critics by suspending the bill's main impact, the international storm over the Libertad Act rages on.

B. *Substantive Provisions of the Libertad Act*

In its final form, the Cuban Liberty and Democratic Solidarity Act of 1996 consists of four titles, the most controversial of which is Title III.

1. Title I

Title I reaffirms American commitment to enforcing the embargo against Cuba and expresses congressional resolve to strengthen the existing embargo.[33] Beyond providing a tone-setting introduction, several

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before us today."). The downing of the planes ensured that Title III, which had been ejected from the Senate version of the bill in October 1995, was reincorporated into the Act in the House of Representatives.

Clinton's signing of the Libertad Act was also seen as an attempt to capture the Cuban-American vote in the important states of Florida and New Jersey. *See U.S.-EU Trade War Unlikely to Erupt*, STRAITS TIMES (Singapore), Aug. 17, 1996, at 28.

In any event, the shooting down of the Brothers to the Rescue planes resuscitated new life into the Helms-Burton bill which, despite its relative unimportance to domestic or foreign affairs, had previously consumed a disproportionate amount of Congress's time in the eyes of some members: "Let us remember what is about to occur shortly in this Chamber. As of midnight tonight, the Federal Government ceases all but essential services. . . . Even if it were not in the throes of a critical fiscal crisis, I would still argue the priorities of the leadership in taking up this particular bill at this juncture. . . . Fidel Castro has been around for more than three decades. . . . [T]his legislation is nothing more than special interest legislation par excellence." 141 CONG. REC. S16974 (1995).

30. Sanger, *supra* note 26.

31. Joel Glass, *U.S.A.: Clinton Extends Helms-Burton Act*, REUTERS TEXTLINE LLOYDS LIST, Jan. 6, 1997, *available in* LEXIS, World Library, TXTNWS File.

32. *The White House: Statement By the President*, M2 PRESSWIRE, July 18, 1997, *available in* LEXIS, Market Library, IACNWS File.

33. Libertad Act, § 101, 110 Stat. at 792. Title I also provides for the continuation of television broadcasting to Cuba via Television Marti. *Id.* § 107, 110 Stat. at 798. Television Marti, which is supposed to provide Cubans with news from an American perspective, has been widely criticized as a waste of taxpayer money since its signal is effectively jammed by the Castro government. Yet, Congress overlooks this reality in the findings prefacing the Libertad Act, asserting that, "Radio Marti and Television Marti

sections of Title I are noteworthy in that they subordinate important foreign policy decisions, which arguably should be decided independently, to events related to Cuba. Section 104 states that the United States will continue to oppose the admission of Cuba to international financial institutions such as the International Monetary Fund.[34] Section 106 requires the President to withhold assistance to the independent states of the former Soviet Union in direct proportion to the aid they give to Cuban intelligence facilities,[35] while section 111 creates a similar prohibition on aid to countries supporting the completion of a Cuban nuclear facility.[36] In the words of Senator Dodd, Title I, although not the widely contested part of the Act, nevertheless shows America's obsession with Cuba because "it places some contingencies on other foreign policy matters that ought to be of greater weight than what we are presently doing or not doing in Cuba."[37]

2. Title II

Title II of the Act outlines what future U.S. policy will be regarding, first, a post-Castro transitional government and, subsequently, a democratically elected government in Cuba.[38] Title II mandates that the President develop a plan for assisting the government which succeeds the Castro regime.[39] A host of benefits available to the two designated phases of post-Castro government in Cuba are listed.[40] For the transition government, they include humanitarian help, lifting of travel restrictions, and whatever measures the President certifies to Congress as "essential to the successful completion of the transition to democracy."[41] For a democratically elected government, Title II pledges assistance with economic de-

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have both been effective vehicles for providing the people of Cuba with news and information and have helped to bolster the morale of the people of Cuba living under tyranny." *Id.* § 2, 110 Stat. at 786. The President is authorized to establish an exchange of news bureaus with Cuba upon condition of unrestricted press coverage and reciprocity. *Id.* § 114, 110 Stat. at 803.

34. *Id.* § 104, 110 Stat. at 794-795. During congressional debates on the bill, Senator Christopher Dodd (D-CT) pointed out that the IMF and other world financial institutions played a critical role in Russia's transition to democracy. In his eyes, continuing to deny Cuba this assistance undermines the lessons learned about its importance in dismantling command economies. 141 CONG. REC. S16974, 16975-16976 (1995).

35. *Id.* § 106, 110 Stat. at 797.

36. *Id.* § 111, 110 Stat. at 802.

37. 141 CONG. REC. S16975 (1995).

38. Libertad Act, §§ 201-204, 110 Stat. at 805-811.

39. *Id.* § 202, 110 Stat. at 806.

40. *Id.* at 806-807.

41. *Id.* at 807.

velopment through various U.S. institutions such as the Export-Import Bank, the Overseas Private Investment Corporation, and the Trade and Development Agency; preparing Cuban military forces for adjustment to a democratic government; and advocacy by the President on behalf of Cuba on the world stage.[42] Accession to the North American Free Trade Agreement and extension of most-favored-nation trade treatment are listed as a second tier of possibilities that the President must work on with Congress following his determination that a democratically elected government exists in Cuba.[43] Detailed prerequisites are set forth that must be met by a transitional government or democratically elected government before such assistance can be offered and the embargo can be lifted.[44]

3. Title III

The heart of the Libertad Act is Title III, which creates a private civil right of action for U.S. nationals against "traffickers" in property which was confiscated by the Cuban government on or after January 1, 1959.[45] The term "traffics" is so broadly defined as to cover nearly every conceivable knowing tie to confiscated property in Cuba other than "the delivery of telecommunication signals to Cuba, . . . the trading or holding of securities publicly traded or held, . . . uses of property incident to lawful travel to Cuba, . . . or transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban government."[46]

The private civil remedy permits recovery in the form of money damages for the greater of either the amount of a claim certified by the Foreign Claims Settlement Commission during the 1960s or an amount

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42. *Id.*

43. *Id.*

44. *Id.* §§ 204-206, 110 Stat. at 810-813. Qualifying as a "transition government" such that assistance from the U.S. can be authorized, entails that the post-Castro government fulfill eight conditions. §§ 205-206, 110 Stat. at 811-813. There was debate in the Senate about the appropriate level of specificity for these requirements. Some advocated scrapping the requirements altogether because of a fear that they might tie the hands of future administrations from assisting a transition to democracy in Cuba. 141 CONG. REC. S15316 (1995). Examples of contested provisions include requirements that the post-Castro government "legalize all political activity" and make "public commitments" to organizing free elections, establishing an independent judiciary, and respecting internationally recognized human rights. *See* Libertad Act, §§ 204-206, 110 Stat. at 810-813. This language is open to many differing interpretations. 141 CONG. REC. S15316 (1995).

45. Libertad Act, § 302, 110 Stat. at 815.

46. *Id.* § 401, 110 Stat. at 823-824.

determined by the court through a special master.[47] Recovery for interest and court fees is permitted, and damages are automatically trebled for actions brought on certified claims or on uncertified claims where the claimant has given the intended defendant thirty days notice of the fact that he owns a stake in or is trafficking in property in violation of the Libertad Act.[48]

Several details significant to recovery by claimants and the operation of the Act are buried deeper within Title III. First, U.S. nationals who were eligible to certify a claim of confiscated Cuban property under the International Claims Settlement Act of 1949 and did not do so are barred from bringing an action under the Libertad Act for such a claim.[49] Second, U.S. nationals whose claims were not eligible for certification during the 1960s, because they were Cuban refugees and not yet U.S. citizens at that time, must wait two years from the date of enactment of the Act before bringing an action.[50] Essentially, this gives certified claimants a two-year headstart in the litigation process. Third, the Act imposes a substantial amount in controversy requirement[51] which may limit the number of lawsuits that it generates. In order to bring an action under the Libertad Act, the expropriated property claim must exceed $50,000, "exclusive of interest, costs, and attorneys' fees."[52] The news media has made note of the fact that this high threshold amount precludes all but the wealthiest property holders from bringing claims.[53] The middle-class Cuban of 1959, now a U.S. citizen otherwise eligible to bring a Title III claim, was unlikely to have owned property worth $50,000 at the time of nationalization.[54]

The suspension provision provides the President with the authority to postpone the effectiveness of Title III for successive six month inter-

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47. *Id.* §§ 302-303, 110 Stat. at 815-820.

48. *Id.* § 302, 110 Stat. at 816.

49. *Id.*

50. *Id.*

51. *Id.* at 817.

52. *Id.*

53. *See* 142 CONG. REC. E309 (incorporating the following article into the record: Louis F. Desloge, *The Greatest Embargo Scam—A Little Known Loophole Will Allow the Richest to Cash In*, WASH. POST, Mar. 3, 1996).

54. If the amount in controversy does not bar the claims of former middle-class Cubans who have since become U.S. citizens, then the exclusion of "real property used for residential purposes" from the definition of "property" as used in Title III likely will. *See* Libertad Act § 4, 110 Stat. at 790. That this limitation is meant to protect the Cuban people from hardship is discernible from the fact that real property occupied by "an official of the Cuba government or the ruling political party in Cuba" is not excluded from possible claims. *Id.* In any event, certified claims are not subject to the residential exclusion. *Id.*

vals.[55] In order to exercise this authority, the President must report in writing to Congress that "the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."[56]

This power to suspend Title III has assumed great importance in Clinton's diplomatic efforts with U.S. trading partners angry over the extraterritorial effects of the Act.[57] Shortly after suspending Title III for the first time in July 1996, President Clinton dispatched then Undersecretary of Commerce Stuart Eizenstat to smooth over relations with offended allies and trading partners.[58] Meanwhile, the President warned Europe that he would not resuspend Title III if the EU failed to lobby more actively for human rights improvements in Cuba.[59] The EU tactfully responded to this presidential posturing by providing Clinton with the tools he needed to justify to Congress suspensions of Title III in January 1997,[60] but remained unchanged in its opposition to Helms-Burton.[61] As part of its efforts to appear tougher on Cuba, the EU Council adopted a "Common Position" stating that its intent to "be Cuba's partner in the progressive and irreversible opening of the Cuban economy" depended on "improvements in human rights and political freedoms."[62] In addition, European business leaders offered an olive branch by saying that their investment efforts in Cuba would be directed at benefitting the people rather than the government.[63] President Clinton made clear that such "momentum" against Castro had to be maintained in order for him to extend future suspensions.[64] As a result, this diplomatic dance with trade partners continued, and the President was able to justify another suspension of Title III in July 1997.[65] As a justification of the latest suspension, the Presi-

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55. *Id.* § 306, 110 Stat. at 819-820.

56. *Id.*

57. *See* Martin Walker, *Clinton Rewards Tough EU Line on Cuba*, GUARDIAN, Jan. 4, 1997, at 12, *available in* LEXIS, World Library, GUARDN File.

58. *Id.*

59. *See* Glass, *supra* note 31.

60. *EU/United States/Cuba*, REUTERS TEXTLINE LLOYDS LIST, Jan. 6, 1997, *available in* LEXIS, World Library, TXTNWS File.

61. Zecchini Laurent, *Bill Clinton repousse de six mois la mise en oeuvre complete de l'embargo contre Cuba; Une disposition de la loi Helms-Burton a nouveau suspendue [Clinton Again Suspends Helms-Burton for Six Months]*, LE MONDE, Jan. 6, 1996, Sec. International, *available in* LEXIS, World Library, TXTLNE File.

62. Common Position of 2 December 1996, 1996 O.J. (L 322) 1.

63. *See* Glass, *supra* note 31.

64. Nancy Dunne, *Clinton Suspends Helms-Burton Again*, FIN. TIMES (London), Jan. 4, 1997, at 3.

65. *U.S. Sanctions Law a Flop, Cuba Says, as Foreign Investment Surges Twenty-Five Percent*, AGENCE FRANCE PRESSE, June 11, 1997, *available in* LEXIS, World Li-

dent's accompanying report to Congress cited gains in the efforts of trading partners to "promote democratic transition in Cuba."[66]

4. Title IV

Unlike Title III, the provisions of Title IV became effective immediately upon President Clinton's signing of the Libertad Act. Title IV creates an additional penalty on foreigners who traffic in the confiscated property of U.S. nationals by denying these foreigners visas to enter the United States.[67] The visa ban includes corporate officers, principals, shareholders with controlling interests in entities which have been involved in the confiscation or trafficking of relevant property, and even their spouses and minor children.[68] The United States has already denied visas to executives of foreign companies based in Canada, Mexico, and Italy and to their families.[69]

C. *Title III Loopholes and Other Problems*

1. The Strategy of Settlements

The core of the Libertad Act, Title III, has several large loopholes, the existence of which the media and some in Congress attribute to the power of special interest groups.[70] The advantages that these loopholes bestow on certain subsets of the American population casts doubt upon the sincerity of the Act's Title I mission and, at the same time, fuels anger abroad.[71] While the purported goal of the Act is to discourage foreign

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66. *See id.*

67. Libertad Act, § 401, 110 Stat. at 822.

68. *Id.*

69. Stephen Bates & John Palmer, *EU Unites in Defiance of U.S. Curbs*, GUARDIAN, Oct. 29, 1996, at 14, *available in* LEXIS, World Library, GUARDN File. In March 1997, the Clinton administration denied visas to four members of the board of directors of the Canadian firm, Sherritt International Corp., because the company operates a nickel mine in Cuba that was expropriated from a U.S. corporation. *See* Norman Kempster, *Walmart May Face Sanctions over Cuban PJs*, LOS ANGELES TIMES, Mar. 15, 1997, at D1. Seven other Sherritt employees were denied visas in 1996. *Id.*

70. *See* 142 CONG. REC. E308 (1996) (statement of Sen. John F. "Jack" Reed (D-RI) (citing Desloge, *supra* note 53). The special interests identified in the article include sugar, tobacco, and rum companies who will be able to sue competitors who are now doing business in Cuba once the suspension on Title III is lifted. *Id.* The Helms-Burton Act was drafted with the help of attorneys Nick Gutierrez, representing the National Sugar Mill Owners of Cuba and the Cuban Association for the Tobacco Industry, and Ignacio Sanchez, representing the Bacardi Rum Co. *Id.*

71. *See* Davis, *supra* note 23 (quoting Gary Jarmin of the U.S. Cuba foundation, a

business investment in Cuba and thereby strengthen the Cuban embargo, this goal has not materialized.[72]

Critics of the Act who predicted that the creation of a private civil action would have little deterrent effect on foreign investment have been proven right, though not quite in the way they imagined.[73] The specter of Title III lawsuits was initially seen as a tool which would enable U.S. claimants, mostly corporations, who owned assets prior to their nationalization by Castro to harass foreign competitors now using their former property by threatening impending lawsuits.[74] Faced with the choice of abandoning profitable Cuban ventures or cutting deals with U.S. claimants, it was predicted that foreign corporations would settle these lawsuits by giving U.S. claimants a share of their Cuban profits or by compensating claimants for the assets outright.[75] By its express language, the Act allows for such results: "[A]n action . . . may be brought and may be settled, and a judgment rendered in such action may be enforced, without obtaining any license or other permission from any agency of the United States."[76] There was speculation that wealthy claimants might even shop around for prospective investors in Cuba and offer full releases of their property claims in exchange for a share of profits or a lump-sum settlement.[77]

2. Sidestepping Titles III and IV

While the predictions of unseemly results due to the Act have come true, the strategy of profiteering by American claimants which has emerged is at a level more complex than anticipated. Ironically, the tactic which has evolved may not be all that bad for foreigners investing in Cuba. This is because the strategy promotes the elimination of the one Helms-Burton thorn which still sticks in the side of foreign investors, namely the Title IV visa denial provision which the State Department

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Washington lobbying group, who said of the Helms-Burton Act, "I refer to it as the Bacardi Rum Protection Act."). There may be truth in these words as the President and CEO of Bacardi-Martini USA Inc. organized a $500-a-plate luncheon for Senator Jesse Helms (R-NC) in Miami in April 1995. *Id.*

72. *U.S. Sanctions Law a Flop, Cuba Says, as Foreign Investment Surges 25%*, AGENCE FRANCE PRESSE, June 11, 1997, *available in* LEXIS, World Library, TXTNWS File.

73. *See* 142 CONG. REC. E309 (1996) (citing Desloge, *supra* note 53).

74. *Id.*

75. *Id.*

76. Libertad Act § 302, 110 Stat. at 817.

77. *See* 142 CONG. REC. E 308 (statement of Sen. Reed) (citing Desloge, *supra* note 53).

continues to enforce.[78] The strategy works in this way: (1) American claimants demand compensation from the foreign investors for using their expropriated Cuban assets; (2) The foreign investors agree to settle, not out of the fear of an eventual Title III lawsuit, but rather in order to evade harassment under the provisions of Title IV; (3) Once a settlement is reached, the State Department disengages its policy of visa denials against the senior executives of these foreign companies, enabling them and their families to resume travel or study in the United States.[79]

A well-documented example of this scenario surfaced in July 1997. After the Italian telecommunications company, Stet, agreed to compensate ITT for the use of its communications network on Cuba, the State Department announced that it would no longer take adverse action against Stet or its executives.[80] Thus, the net effect of the Helms-Burton legislation in this case was a big pay off to an American claimant and a guarantee to a foreign investor of no further repercussions of any kind for its business dealings with Cuba.[81] This settlement embodies the Act's senseless and corrupt results as well as its failure to stengthen the embargo of Cuba.

3. Constitutional Equal Protection Issues

The Helms-Burton legislation raises constitutional equal protection issues as well.[82] While the vast majority of Americans are forbidden to

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78. *See* Stephen Bates, *Americans Pacified by Payoff for Cuban Deal*, GUARDIAN, July 25, 1997, at 14, *available in* LEXIS, World Library, GUARDN File.

79. *Id.*

80. *Id.*

81. *Id.*

82. Objections have been raised on other constitutional grounds as well. Notably, Senator Paul Simon (D-IL) proposed an amendment to the Libertad Act that would have lifted the travel restrictions on Americans traveling to Cuba. *See* 141 CONG. REC. S15320 (1995). The Senator argued that the First Amendment right to free speech is violated by any limitation on the right to travel that is not justified by overriding requirements of national security, which he did not see implicated in permitting Americans to travel to Cuba. *Id.* at 15322. "[W]e do not just get the Government line on anything. . . . That means we ought to have the freedom to travel where there is no risk." 141 CONG. REC. S15284-85 (1995). Senator Dodd supported the Simon amendment by drawing a parallel with the lifting of travel restrictions to the former Soviet Union. In the case of the Soviet Union, Congress decided that contact with Americans would encourage democracy in the Soviet Union. 141 CONG. REC. S15322 (1995). In practical terms, the travel restrictions to Cuba are unenforceable since Americans can travel to Cuba via an intermediary country. 141 CONG. REC. S15284, 15285 (1995).

Senator Helms opposed the amendment to lift travel restrictions for several reasons. He countered the argument that contact would foster democracy by describing Castro's policy of "tourist apartheid"—isolating "tourists and tourist facilities from the larger Cu-

profit from economic transactions with Cuba, the select group of claimants discussed above can indirectly siphon off profits from business in Cuba under the Act.[83]

Moreover, the constitutionality of allowing redress to Cuban-Americans for the nationalization of their property is questionable in the face of a denial of the same private right of action to other ethnic Americans whose assets have been nationalized by the governments of their native countries.[84] This particular inequality was among the principal reasons why Title III was initially removed from the Libertad Act in order to secure its first passage by the Senate.[85] However, the House of Representatives ultimately prevailed in their demand to reincorporate Title III into the Act.[86]

Despite the foregoing problems, by far the largest problem with Title III is its extraterritorial reach. Nations around the world insist that the Libertad Act violates international law, and they have taken diplomatic

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ban population." 141 CONG. REC. S15284, 15285 (1995). Helms further indicated that much travel to Cuba is motivated by the desire of tourists to engage in sex tourism, exploitation in which he feels Americans should not be involved. *Id.* Finally, Helms argued that denying Castro the hard currency of American tourist dollars represents a national security interest which justifies the restrictions on travel. *But see* Rieff, *supra* note 28, at 85 (explaining the perversity of denying the Castro regime U.S. tourist dollars while the Cuban Democracy Act of 1992 provided for an agreement between American telephone carriers and the Castro regime that gives the Cuban government a dollar royalty for every call placed to Cuba, resulting in large hard currency transfers).

The Simon amendment was easily defeated, but it does strike at the two fundamentally opposed views on achieving the ouster of Castro: freezing Cuba out economically and politically in order to bring Castro to his knees versus increasing contacts with the Cuban people as a way to encourage democratic change. Over the years, the U.S. has remained the sole staunch advocate of the freeze-out approach. *See* Gustavo Capdevila, *Former Allies Split by the Blockade on Cuba,* INTER PRESS SERVICE, Oct. 16, 1996, *available in* LEXIS, World Library, INPRES File; *see* Wilner, *supra* note 10, at 401.

83. *See* 142 CONG. REC. E308, 309 (1996) (Sen. Reed citing Desloge, *supra* note 53).

84. *See, e.g.*, Davis, *supra* note 23 (discussing early versions of the Helms-Burton Act which would have allowed, *inter alia*, Chinese Americans to sue U.S. companies that sell garments sewn on what was once their land).

85. *See* 141 CONG. REC. S15322, 15324 (1995). In debate, Senate Majority Leader Bob Dole (R-KS) said of the constitutional equal protection issue, "Opponents of this bill say Title III would create a right for Cuban-Americans not enjoyed by Polish-Americans. They are right. And there is one critical distinction--today, Poland is free while Cuba suffers under the boot of Castro's repression. 141 CONG. REC. S15277 (1995).

Senator Dodd countered, "[T]itle III [has] virtually nothing to do with Cuba and an awful lot to do with our claims process in this country. While Poland may be free today, Vietnam and the People's Republic of China are not. That would create unique distinctions for those of Cuban nationality." *Id.*

86. 142 CONG. REC. S1510 (1996).

and legal steps to cope with its effect on them. [87]It is the Act's extraterritoriality and the international backlash over it that warrant a more in-depth discussion.

IV. VIOLATIONS OF INTERNATIONAL LAW

A. *The Making and Role of International Law*

The worldwide consensus is that the Helms-Burton Act violates international law. International law is formed in two principal ways: 1) by the maturation of widely accepted practices of nations into legal obligations (customary law), and 2) by purposeful agreement among nations (law by convention).[88] While there is no formal enforcement of international law, countries nonetheless abide by it because they recognize the common benefit of maintaining norms and standards in the international arena.[89]

The United States accepts international law and considers it part of the law of the United States.[90] Like domestic law, the United States subjects international law to the requirements of the Constitution and subordinates it to subsequently adopted law of the United States.[91] Simultaneously, the United States recognizes and incorporates into its body of law the evolutions in international law.[92] Changes in international law can occur both as a result of the ratification of new treaties and conventions, and by the ripening of practices into new customary international law.[93] If the change in international law occurs through this process of maturation from practice to legal principle, it is important to note that neither the United States nor any nation is bound by a law from which it dissociated itself during the process of acceptance and maturation.[94]

The United States also adheres to the principle that in the event of an incompatibility between international law and domestic law, "[a]n act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose

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87. *See, e.g.,Canada Announces Measures to Combat Helms-Burton Act*, LATIN AM. L. BUS. REP., July 31, 1996, *available in* LEXIS, Market Library, IACNWS File; *US-EU Trade War Unlikely to Erupt*, STRAIGHTS TIMES (Singapore), Aug. 17, 1996, at 28, *available in* LEXIS, World Library, STRAIT File.

88. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. pt. I, ch. 1, Introductory Note (1986).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* § 111.

of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provison cannot fairly be reconciled."[95] While Congress thus trumps previous international law in terms of defining the law of the United States, the United States agrees that it is nonetheless responsible for the consequences of thereby violating international law.[96]

B. *No Basis for Jurisdiction*

With this background, the stage is set to examine what aspects of international law the United States has violated by passing the Helms-Burton Act.

Under international law, a distinction is made between "jurisdiction to prescribe," "jurisdiction to adjudicate," and "jurisdiction to enforce."[97] Since the ability to file suit under Title III remains suspended, any discussion of the extraterritoriality of the Helms-Burton Act can as yet be limited to its violations of the principles of jurisdiction to prescribe. This category of jurisdiction refers to the limitations imposed by international law on a state's power to make its law applicable in circumstances affecting the interests of other states.[98]

1. The Jurisdictional Principles of Nationality and Territoriality

Historically, territoriality and nationality have served as the two accepted bases of jurisdiction to prescribe,[99] and the United States has given broad interpretation to these concepts of jurisdiction to the dismay of the international community.[100]

In the case of Title III, the world is correct in alleging that Congress has transgressed beyond the most far-reaching developments in the concepts of territoriality and nationality. In the past, the jurisdictional concept of nationality has been stretched to reach foreign subsidiaries and branches of American corporations to reflect "the recognition that multinational enterprises do not fit neatly into the traditional bases of jurisdiction."[101] However, the Helms-Burton Act purports to subject wholly foreign-owned corporations and foreign nationals with no U.S. ties of any kind to claims of compensation.[102] Thus, nationality could not serve

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95. *Id.* § 115.
96. *Id.*
97. *Id.* § 401.
98. *Id.* pt. IV, ch. 1, Introductory Note.
99. *Id.*
100. *Id.*
101. *Id.* § 414 cmt. a.
102. *See* Libertad Act §§ 301-302, 110 Stat. at 814-819. Contrast the jurisdictional

as a justification for the Act's overbroad jurisdiction.

2. The Effects Doctrine

Instead, Congress relied on the concept of territoriality to justify Title III.[103] More specifically, Congress tried to shoehorn the reach of Title III into an offshoot of territoriality called the "effects doctrine."[104]

According to the Restatement of the Foreign Relations Law of the United States, the effects doctrine grants a state jurisdiction to prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory."[105] Congress recites this same passage in the Libertad Act as a justification for its extraterritorial application: "[I]nternational law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory."[106]

American trade partners and other nations agree that the effects doctrine exists but rightly maintain that it is inapplicable here. The inapplicability of the effects doctrine stems from the fact that jurisdiction under the Libertad Act is based not on the substantial effect of foreign entities on the United States, with which they may have absolutely no ties, but rather rests solely on their relations with Cuba.

3. The Requirement of Reasonableness

Even assuming a weak argument could be made that business dealings with Cuba may still have a "substantial effect" on the United States, the exercise of jurisdiction fails to pass the second crucial component of reasonableness.[107] A list of specific factors to determine whether exercise of jurisdiction is reasonable is given in Section 403 of the Restatement of Foreign Relations Law of the United States.[108] The easiest

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assertion of the Helms-Burton Amendment with President Reagan's executive order imposing sanctions against South Africa in 1985 to force change in its system of apartheid. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE U.S. § 414 Reporters' Note 3 (1986). The mandatory rules announced by President Reagan applied only to United States nationals, a far cry from the Libertad Act's attempt to go so far as to compel the subsidiaries of United States companies to abide by the sanctions. *Id.*

103. *See* Libertad Act § 301, 110 Stat. at 815 (1996).

104. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 402 cmt. d.

105. *Id.* § 402.

106. Libertad Act § 301, 110 Stat. at 815.

107. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403.

108. *Id.*

way to reject Helms-Burton as reasonable is to answer the following question in the negative: Would the United States regard it as reasonable if other states were to exercise such jurisdiction as is asserted by the provisions of the Helms-Burton Act if the circumstances were reversed?[109]

American courts have construed the demand of reasonableness when determining permissible exercises of jurisdiction under international law as a requirement equivalent to comity.[110] The traditional notion of comity is that its application should be limited to cases where it would be reasonable for either of two states to exercise jurisdiction in a situation where both wish to do so.[111] Under such circumstances, comity implores these sovereigns in conflict to resolve an existing controversy "with restraint, cooperation, and good will."[112]

The extraterritoriality of the Helms-Burton Act is so patently unreasonable that the international principle of comity should not even enter into the analysis. Yet, the U.S. Congress turns to the principle of comity to justify the Act's reach. Like the effects doctrine, the principle of comity is explicitly referred to in the congressional findings which preface Title III: "The wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, undermines the *comity* of nations, the free flow of commerce, and economic development."[113] Congress's plan seems to have been to cloak the Libertad Act in reasonableness by relying on the effects doctrine and then calling upon foreign nations to accept this tortured basis for jurisdiction as a nod to comity.

C. *Defying the United Nations*

1. Five Consecutive Resolutions

Since 1992, the international community has used the United Nations as one forum in which to address its objections to the extraterritorial effects of the U.S. policy toward Cuba.[114] After President Clinton signed into law the Libertad Act of 1996, the United Nations General Assembly voted to adopt a resolution for the fifth consecutive year con-

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109. *See id.* § 403 Reporters' Note 5.

110. *Id.* § 403 cmt. a.

111. *Id.* § 403.

112. Peter Durack, *Australia: Conflict and Comity, in* ACT OF STATE AND EXTRATERRITORIAL REACH 41, 43 (John R. Lacey ed., 1983).

113. Libertad Act § 301, 110 Stat. at 814 (emphasis added).

114. *See U.N. Again Calls on U.S. to End Embargo on Cuba, supra* note 19, at 16A.

demning U.S.-style extraterritorial embargo laws, wherever they might exist around the world.[115] All fifteen EU member countries, including Britain, Germany, and the Netherlands who had abstained in 1995, voted in favor of the 1996 resolution which passed with the biggest approval margin yet.[116]

The first of these Cuban-sponsored resolutions was passed by the General Assembly in 1992 as an expression of international disapproval over the Cuban Democracy Act.[117] In its first year, the resolution registered 59 supporting member states, 3 opposing member states, and 71 abstentions.[118] With each subsequent year, the resolution garnered more support from the General Assembly. In 1993, the tally was 88 to 4, with 57 abstentions.[119] In 1994, the resolution condemning the U.S. economic embargo of Cuba was approved by a vote of 101 to 2, with 48 abstentions.[120] France, Canada, Spain, and Mexico were among the notable U.S. allies who defied the United States by backing the resolution that year.[121] The resolution was adopted in 1995 by an overall margin of 117 to 3.[122]

2. United Nations Charter Violations

The 1996 resolution, like its predecessors, was based in large part on the violations of several specific articles of the United Nations Charter by the collective body of American embargo laws.[123] Articles 39 and 41, considered in tandem, present the strongest argument that the Libertad Act and previous U.S. embargo laws against Cuba are violations of international law.[124] These two articles are interpreted to allow for the

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115. *Id.* The vote was 137-3 with twenty-five abstentions. The three countries which voted against the resolution were the United States, Israel, and Uzbekistan. *Id.*

116. *Id.*

117. Facts on File, Vol. 52, No. 2717, Dec. 21, 1992, at 962.

118. *Id.*

119. *Id.* Vol. 53, No. 2769, Dec. 23, 1993, at 958.

120. *Id.* Vol. 54, No. 2817, Nov. 24, 1994, at 886.

121. *Id.*

122. *Id.* Vol. 55, No. 2874, Dec. 31, 1995, at 975.

123. *See* PETER R. BAEHR & LEON GORDENKER, THE UNITED NATIONS IN THE 1990s 3 (1994). The United Nations Charter consists of rules establishing an organization of member states whose governments agree to be legally bound by the provisions of the Charter. *Id.* The United Nations received the task of developing international law much like a national parliament, but member states have not sought to exercise this envisioned authority to legislate such compulsory rules for member states. *Id.* at 3-4.

124. *See* Wilner, *supra* note 10, at 409. The full text of Article 39 of the UN Charter is:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or

imposition of economic sanctions when "there is a threat to the peace."[125] While maintaining international security arguably provided grounds for the embargo against Cuba before the collapse of the Soviet Union, Cuba has since ceased to pose a threat to the peace so as to justify economic sanctions under Articles 39 and 41.[126]

3. Weight of the Resolutions

The United Nations Charter represents an international agreement to which the United States is a signatory and to which it is bound under international law.[127] The Charter confers on the United Nations General Assembly the power to impose binding obligations on its members[128] when resolutions refer to the provisions of the Charter.[129] Such law-making resolutions differ from declaratory resolutions which do not incorporate specific articles of the charter and thus do not rise to the level of international law.[130]

Until now, the General Assembly has refrained from referencing specific charter violations in its resolutions on the topic of the Cuban embargo. Accordingly, the resolutions should be considered declaratory in character rather than characterized as law-making. However, even if specific charter provisions remain absent from future embargo resolutions, the resulting declaratory resolutions are important because they may mature into customary law over time.[131] Factors such as "how large a majority [the resolution] commanded and how numerous and important are the dissenting states, whether it is widely supported . . . , [and] whether it is confirmed by other practice" determine the impact of such

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decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

U.N. CHARTER art. 39. The text of Article 41 reads:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Id. art. 41.

125. Wilner, *supra* note 10, at 409.

126. *Id.*

127. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. h (1986).

128. *Id.* § 102 cmt. g.

129. *Id.*

130. *Id.* § 103 cmt. c.

131. *Id.* § 102, Reporters' Note 2.

resolutions on shaping customary law.[132] The declaratory pronouncements of the United Nations also provide some evidence of what the states voting for the resolutions regard international law to be.[133] Because the resolutions adopted in response to America's Cuban embargo laws drew tremendous support, these resolutions will have a particularly high evidentiary value if used in a case against the United States.[134]

In any event, by passing the Helms-Burton Act and prior embargo legislation, the United States triggered a fundamental reevaluation of the legality of the overall embargo. United Nations member states went to considerable lengths to urge a repeal of the offending American laws, including siding with Fidel Castro.[135] The result of this upheaval has been a broad rejection of the propriety of the embargo against Cuba and a subsequent backfire of Congress' alleged attempt to strengthen the embargo by enacting the Libertad Act.[136] Meanwhile, the United States continues to promote the Act as valid U.S. law even though its jurisdictional reach is not within the accepted limits of international law.[137] This refusal on behalf of the United States to revoke the Libertad Act prompted American trading partners to take action to ensure that the United States would not get away with impunity for its violations of international law.[138]

V. THE INTERNATIONAL RESPONSE

To accomplish this goal, American trading partners employed two crafty methods which also served to insulate the sovereignty of trading partners from any infringements by Title III. The two measures taken were as follows: 1) the ratification by the EU, Canada, and Mexico of blocking legislation to counter the Act's extraterritorial effects, and 2) the filing by the EU of a complaint before the World Trade Organization dispute resolution panel.[139]

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132. *Id.*

133. *Id.* § 103 cmt. c.

134. *See id.* § 103 Reporters' Note 2.

135. *See UN Again Calls on U.S. to End Embargo*, *supra* note 19, at 16A (reporting that the General Assembly adopted a Cuban-drafted resolution).

136. *See, e.g.*, Bates & Palmer, *supra* note 69, at 14.

137. *See id.* § 403 cmt. g. (explaining that if a United States statute is inconsistent with international law, the statute is nevertheless valid, but its application may give rise to international responsibility for the United States).

138. *Canada Joins EU Challenge on U.S. Laws on Cuba*, REUTER EUR. COMMUNITY REP., Oct. 2, 1996, *available in* LEXIS, World Library, REUEC File.

139. Walker, *supra* note 57, at 12.

A. *Blocking Legislation*

1. European Union Legislation

Four years ago with the passage of the Cuban Democracy Act, the members of the European Union were unable to muster the unanimity necessary to react legislatively to block the Act's offending provisions.[140] The fact that the EU successfully ratified such blocking legislation on October 28, 1996, in response to the Libertad Act,[141] shows the depth of the members' anger over the Act's reach.

a. Hurdle to Enactment

Accomplishing the enactment of the blocking legislation was not without its problems for the European Commission.[142] The largest obstacle in connection with this feat concerned finding a provision of the Maastricht Treaty which would grant the European Commission the power to draw up collective countermeasures.[143] After scouring the Treaty, the Commission preliminarily identified Article 235 as the provision giving it such power.[144] This article is a "catch-all clause" which exists to grant the European Council the necessary power to achieve objectives of the Community if the Council has not been vested with such power by any other provision of the Maastricht Treaty.[145] As a prerequisite to exercising this residual Article 235 power, the Council must first consult with the European Parliament and then act with unanimity to approve taking the proposed measure.[146] Thus, in order to ratify the

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140. Wilner, *supra* note 10, at 405.

141. David Fox, *EU Counters the Helms-Burton Act*, REUTERS EUR. BUS. REP., Oct. 28, 1996, *available in* LEXIS, World Library, REUEUB File.

142. Caroline Southey & Hilary Barnes, *Danes Block EU Riposte to Cuba Law*, FIN. TIMES (London), Oct. 23, 1996, at 8.

143. *EU/U.S.: Commission Tries to Wring Danish Support for Cuba Measure*, EUR. REP., Oct. 26, 1996, *available in* LEXIS, World Library, EURRPT File.

144. *Id.*

145. Tom Buerkle, *Danes Upset EU's Unity on Cuba Trade; Threat to Veto Anti-U.S. Effort is Seen as a Retreat From Maastricht*, INT'L HERALD TRIB., Oct. 23, 1996, at news sec.

146. Treaty Establishing the European Community [EC Treaty] art. 235 (as amended 1992), *reprinted in* 1 C.M.L.R. 573, 716. The full text of Article 235 reads:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Id.

Helms-Burton blocking legislation, the Council needed the unanimous support of the fifteen EU-member states.[147]

Unity among EU members is rare on any issue requiring a collective political front,[148] and the ratification of the blocking legislation proved no different. Its passage was jeopardized when the Danes announced that, despite their opposition to the Libertad Act, they would not vote for the blocking legislation.[149] Facing a domestic lawsuit alleging that the government had violated the Danish Constitution by giving up too much sovereignty to the EU under Article 235,[150] Denmark implored the Commission to find a basis other than this broad residual clause on which to exercise the power necessary to enact the blocking legislation.[151] The European Commission's legal experts again scoured EU laws and found an obscure 1968 treaty declaration which clarified that the use of the residual clause in Article 235 was to be restricted to exceptional circumstances.[152] With this treaty incorporated into the text of the blocking proposal, Denmark made the ratification of the countermeasures unanimous.[153]

b. Substance of the Countermeasures

Model legislation used to draft the proposed blocking measures was originally developed to counter U.S. antitrust legislation[154] and included

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147. *See id.* With no provision to override a member state's veto, the Commission's only recourse in such an event would have been to bring the proposed legislation up for another vote. *See* Lorraine Woellert, *Denmark Foils EU Attack on U.S. Law*, WASH. TIMES, Oct. 23, 1996, at B6.

148. European Union member governments have delegated responsibility for trade negotiations to the European Commission, but have not handed over sovereignty in political matters. *See* Southey & Barnes, *supra* note 142, at 8.

149. *Denmark Confirms It Will Veto EU Retaliation on U.S. over Cuba*, AGENCE FRANCE PRESSE, Oct. 23, 1996, *available in* LEXIS, World Library, AFP File.

150. Woellert, *supra* note 147. Not only was the Danish government feeling the pressure of a lawsuit by eleven plaintiffs, it was fulfilling its promise to be "Euro-skeptical," a promise which was crucial to the Danes' approval of the Maastricht Treaty in their second referendum on the issue in 1993. *Id.*

151. Southey & Barnes, *supra* note 142, at 8.

152. Fox, *supra* note 141.

153. *Id.* Denmark was severely criticized by other EU member states which feared that the inability to stand up to Washington on this issue would destroy the EU's credibility. *See* Buerkle, *supra* note 140. Some states argued that Article 235 cannot, by its very operation of requiring unanimity, lead to infringement on a member state's sovereignty. *Id.* The whole affair left many within the EU thinking of ways to avoid future requirements for unanimity, perhaps by functioning in regional sub-groups on certain issues. *Id.*

154. *Denmark Confirms It Will Veto EU Retaliation on U.S. over Cuba*, *supra* note 149. *See generally* Durack, *supra* note 109 (discussing the British model for blocking

primarily the British Protection of Trading Interests Act of 1980.[155] At its inception, the British Protection of Trading Interests Act contained four distinct responses to the extraterritorial reach of U.S. antitrust laws.[156] It was later modified to address the offending provisions of any overseas law which regulates international trade by way of extraterritorial measures or damages British trading interests.[157] In its original form, the British act 1) forbade British nationals from responding to demands for information made by foreign courts or other foreign authorities, 2) stated that British courts would not enforce overseas judgments for multiple damages for antitrust violations, 3) offered guidance to those affected by foreign laws infringing on British sovereignty, and 4) in certain circumstances, allowed persons carrying on business in the United Kingdom and against whom an overseas court had awarded multiple damages to recover those damages in British courts.[158]

These same mechanisms form the essence of the EU blocking regulation which entered into force on November 29, 1996.[159] The countermeasures are aimed at protecting EU business enterprises and individuals against the extraterritorial effects of the Libertad Act. Article One of the regulation consists of a statement of purpose and provides for an annex to the regulation in which are enumerated the laws that the regulation is meant to counteract.[160] Besides the Libertad Act of 1996, the two other laws currently listed in the annex are the Cuban Democracy Act of 1992 and the Iran and Libya Sanctions Act of 1996.[161] The Council reserves the power to add or delete targeted laws from the annex,[162] making it a tool to combat the extraterritorial application of any future U.S. or other foreign legislation.

The regulation's substantive protections and requirements apply to all persons encompassed within a sweeping definition given in Article Eleven.[163] Those persons include all natural persons who are residents of EU member countries, any legal person incorporated within the Commu-

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legislation).

155. *See* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981).

156. *Id.*

157. *Id.*

158. William Knighton, *Britain: Blocking and Claw-Back, in* ACT OF STATE AND EXTRATERRITORIAL REACH 52, 54 (John R. Lacey ed. 1983).

159. Council Regulation (EC) No. 2271/96, 1996 O.J. (L 309) 1, 4.

160. *Id.* art. 1, at 2.

161. *Id.* Annex, at 5-6.

162. *Id.* Annex, at 5. The Iran and Libya Sanctions Act of 1996 is colloquially known as the D'Amato Bill.

163. Council regulation (EC) No. 2271/96, 1996 O.J. (L 309) 1; art. 1, at 2.

nity, and any other natural person within the Community under the jurisdiction or control of a member country and acting in a professional capacity.[164]

In the event that the financial interests of such persons are affected by a law specified in the annex, such as the Libertad Act, they are required to inform the European Commission within thirty days.[165] A guarantee is made that the information they provide to the Commission will be covered by the obligation of professional secrecy and disclosed only in connection with legal proceedings, with care taken not to divulge business secrets.[166]

Article Four contains the non-recognition provision which forms the heart of the countermeasures.[167] It provides that foreign court judgments which are based on laws listed in the Annex, such as the Libertad Act, will not be enforced or recognized in the EU.[168]

Moreover, all persons protected by the regulation are forbidden by Article Five from cooperating with the requests of foreign courts relating to the laws in the Annex and from complying with any aspect of the targeted laws in any context.[169] For example, a European-based subsidiary or executive of a U.S. parent company may not obey orders from the parent to stop "trafficking" in Cuban assets. Apparently, preemptive settlement agreements concerning the Helms-Burton disputes between American claimants and European investors are permissible under the EU's regulations. This conclusion is based on the lack of uproar that transpired when the Italian communications firm, Stet, reached such an agreement with an American claimant in mid-1997 to escape provisions of the Act.[170] If this is true, the possibility of negotiating amicable settlements softens the impact of the EU non-compliance legislation.

Furthermore, the policy of mandatory non-compliance with offensive foreign laws is already softened by an official mechanism that allows for exceptions to be made in cases where non-compliance would seriously damage the interests of natural and legal persons covered by the regulation.[171] Sanctions for those who breach any of the regulation's provisions, such as the non-compliance provision, are left to the determination of in-

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164. *Id.* art. 11, at 3-4.

165. *Id.* art. 2, at 2.

166. *Id.* art. 3, at 2.

167. Council Regulation 2271/96, art. 4, 1996 O.J. (L 309) 1, 2.

168. *Id.*

169. *Id.* art. 5, at 2.

170. *See* Bates, *supra* note 78.

171. 1996 O.J. (L 309) art. 5, at 2.

dividual member states.[172]

The regulation also contains a "clawback" measure whereby those sued based on a law in the Annex or those whose interests are adversely affected by the mere application of such a law are entitled to recover any damages they sustain, including legal costs.[173] The regulation says that this "clawback" recovery for EU residents and corporations "could take the form of seizure and sale of assets held by those persons, entities, persons acting on their behalf or intermediaries within the Community, including shares held in a legal person incorporated within the Community."[174] Such all-encompassing methods for recovery seem to indicate that the Council wants to ensure that its countermeasures will have some deterrent effect and eventual impact if the suspension of Title III of the Libertad Act is ever lifted and the interests of EU residents and corporations are damaged by U.S. judgments. The EU regulation does not address the Title IV visa ban that is already in operation under the Helms-Burton Act.[175]

The preface to the regulation refers specifically to three articles of the EC Treaty upon which the European Council relied on for the authority to issue the countermeasures in the regulation.[176] The underlying basis for the Council's authority, Article 235, is the catch-all provision which confers on the Council the power to take any action, for which no authorization is given elsewhere in the EC Treaty and which proves necessary to attain a Community objective.[177] Secondly, Article 73c of the EC Treaty is mentioned.[178] Article 73c provides that whenever the Council seeks to ratify measures "which constitute a step back in Community law as regards the liberalization of the movement of capital to or from third countries," unanimity is required rather than just the approval of a majority or a qualified majority.[179] Thus, the unanimity requirement for

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172. *Id.* art. 9, at 3.

173. *Id.* art. 6, at 2.

174. *Id.* at 3.

175. Under Title IV, several well-known "EU executives have been refused entry to the United States because they are associated with companies which have investments in Cuba." *Euro-Mps to Push for Swift Action on Cuba Law*, REUTER EUROPEAN COMMUNITY REPORT, Sept. 25, 1996, *available in* LEXIS, Intlaw Library, REUEC File.

176. 1996 O.J. (L 309) at 1.

177. *Id.*; *see generally* EC Treaty, *supra* note 146, art. 235.

178. 1996 O.J. (L 309) at 1.

179. EC Treaty, *supra* note 146, art. 73c. Unless otherwise specified in the EC Treaty, the European Council may act by a majority of its members. *Id.* art. 148. Where the Council is required to act by a qualified majority, the votes of each of the member states are weighted. *Id.* Specifications govern how many total votes are needed to achieve a qualified majority and dictate from how many member states these votes must come.

the passage of the countermeasures stemmed from two separate articles of the EC Treaty.[180]

Finally, the preface refers to Article 113 of the EC Treaty.[181] It provides the Council with the power to ratify regulations implementing the "common commercial policy" of the EU in accordance with proposals from the European Commission.[182] Countermeasures to the Libertad Act presumably fall into the category of common commercial policy, such that Article 113 could serve as an additional or alternative basis of authorization for their implementation.

2. Canadian and Mexican Blocking Legislation

In September 1996, Canada introduced a bill to amend its Foreign Extraterritorial Measures Act (FEMA), legislation enacted in 1985 to deal with infringements on Canadian sovereignty by foreign laws, in order to counter the impact of the Libertad Act on Canadian business.[183] The proposed amendments to FEMA entered into effect on January 1, 1997.[184] On this date, the Canadian Foreign Affairs Minister, Mr. Lloyd Axworthy, summed up his government's approach to Cuba: "These amendments send an important signal that Canada continues its vigorous opposition to Helms-Burton. . . . Canada still believes that the best way to encourage democratic development in Cuba is through engagement and dialogue."[185] Canada likes to point out that this argument is similar to the one which the United States uses to renew its most-favored-nation trading status with communist China.[186]

The FEMA amendments give the Canadian Attorney General the authority to block any attempt by a foreign claimant to enforce a Libertad Act judgment in Canada and to forbid compliance by Canadian nationals and corporations with extraterritorial measures that endanger Canadian sovereignty.[187] For example, if a U.S. head office advises a Canadian subsidiary to decline investment in Cuba, the Canadian subsidiary must re-

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Id.

180. *Id.* arts. 73c and 235.

181. 1996 O.J. (L 309) at 1.

182. EC Treaty, *supra* note 146, art. 113.

183. *See Canada Announces Measures to Combat Helms-Burton Act, supra* note 87.

184. *EU/Europe/Cuba*, REUTER TEXTLINE AGENCE EUROPE, Jan. 7, 1996, *available in* LEXIS, World Library, TXTNWS File.

185. *EU/United States/Cuba*, REUTER TEXTLINE AGENCE EUROPE, Jan. 7, 1997, *available in* LEXIS, World Library, TXTNWS File.

186. Merrill Goozner, *U.S. Law Fails to Scare Canada Firms Out of Cuba; Helms-Burton Act Ignored as Trade Between Two Picks Up*, CHICAGO TRIB., June 16, 1997, at 4.

187. *See Canada Announces Measures to Combat Helms-Burton Act, supra* note 87.

port the directive to the Canadian government, and it must defy its parent or its executives face a $10,000 fine or risk a five year prison term.[188] The amendments also include a "clawback" feature which gives Canadian companies and individuals a recourse in Canadian courts if an award were made against them in the U.S.[189] The amendments call for a schedule to be maintained listing objectionable foreign legislation that violates international law according to the Attorney General.[190] Lastly, the existing FEMA fines that can be levied against Canadians who comply with objectionable foreign laws were increased to deter Canadians from doing so.[191]

The new Canadian countermeasures have already found the spotlight in a legal battle involving Wal-Mart.[192] After a customer in a Canadian Wal-Mart told a store manager that selling Cuban-made pajamas might be a violation of the Helms-Burton Act, the manager pulled the pajamas from the shelf.[193] The incident escalated in the climate of hostility towards extraterritorial American laws, and Wal-Mart Canada, a wholly owned subsidiary of the U.S. corporation based in Arkansas, opted to remove Cuban-made pajamas from stores across Canada in March 1997 out of concern that it might be violating any one of a number of American embargo laws by selling the pajamas.[194] The Company then reversed its decision and put the Cuban pajamas back into circulation to avoid violating the Canadian FEMA amendments which were designed to prevent compliance with the U.S.'s extraterritorial anti-Cuba laws.[195] By reversing its decision, Wal-Mart Canada defied an order by its American parent to keep the pajamas out of circulation in order to reflect its "commitment to meet the expectations of the Canadian marketplace."[196]

Interestingly, the sale of the pajamas was already illegal under U.S. laws predating the Helms-Burton Act.[197] However, when the Helms-Burton Act further extended the extraterritorial application of U.S. law, Canada was no longer willing to ignore the infringement of its sover-

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188. Susan Riggs, *Will Obscure Canadian Law Bring U.S. Policy to Heel?*, BALTIMORE SUN, Jan. 5, 1997, at 5F.

189. *See Canada Announces Measures to Combat Helms-Burton Act*, *supra* note 87.

190. *Id.*

191. *Id.*

192. *See* Howard Schneider, *Canada, U.S. Wager Diplomatic Capital in a High Stakes Pajama Game*, WASH. POST, Mar. 14, 1997, at A29.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

eignty and consequently adopted countermeasures.[198] "The Cuba-Canada link has become a badge of honor among Canadians."[199]

Under Mexican blocking legislation passed the week of October 4, 1996, non-compliance fines similar to those set up by the Canadian legislation range up to $300,000.[200] This potential financial penalty has placed several Mexican executives in a situation which parallels the type of no win scenario faced by Wal-Mart Canada: if they pull out of Cuba to receive the visas that their families require to travel to the United States, then they subject themselves to heavy fines by their own government.[201]

Mexico is also experiencing "hypersensitivity" to American meddling in its internal affairs.[202] Anti-American sentiment is so pervasive that "Burton Helms," a caricatured American who is culturally insensitive and arrogant, is being used in ads by Mexico's telephone monopoly to ward off foreign competitors such as AT&T and MCI.[203] This example is one more manifestation of the resentment sparked by the Helms-Burton Act.

B. *The WTO Complaint*

Neither the EU countries nor Canada and Mexico have been able to overcome the shortfall that their "clawback" measures will only be effective if the U.S. claimant at issue has assets subject to the jurisdiction of their courts. For this reason, the filing of a complaint before the World Trade Organization was a crucial second tier attack on the Libertad Act; an adverse WTO decision against the United States is perhaps the only way to make it feel the full effects of its violations of international law.

1. Why an Adverse Verdict Will Matter

The World Trade Organization was created during the Uruguay Round as a replacement for the GATT system of enforcing trade rules.[204]

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198. *Id.*

199. E.A. Torriero, *U.S. Finds Itself Stuck in the Middle; Relationship Between Cuba, Canada is Galling to Many*, SUN-SENTINEL (Fort Lauderdale), Mar. 2, 1997, at 1A.

200. Mary Beth Sheridan, *Cuba Wrangle Puts Mexicans in the Middle*, L.A. TIMES, Oct. 4, 1996, at D1.

201. *See id.* (recounting the dilemma of a Mexican phone company executive for Grupos Domos who has been warned by the U.S. government to drop the company's Cuban investment or lose his children's visas to attend American schools).

202. Howard LaFranchi, *Mexicans Air Gripes of U.S. with Style*, CHRISTIAN SCIENCE MONITOR, Mar. 10, 1997, at 7.

203. *Id.*

204. Andrew Alexander, *Clinton Must Not Drag Us into His Cuba Crisis*, DAILY MAIL, Oct. 24, 1996, at 69.

One of the mechanisms that the WTO framework established to accomplish this goal was the dispute settlement panel. At first sight, the WTO dispute panel seems to suffer from the same lack of enforcement power as other proclaimers of international law, for its decisions are not binding in the domestic courts of its member states.[205] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act, which was prepared for Congress, spells out this limitation:

> Reports issued by panels or the Appellate Body under the DSU have no binding effect under the laws of the United States. They are no different in this respect than those issued by GATT panels since 1947. If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for Congress to decide whether any such change will be made.[206]

The Clinton Administration has even gone so far as to say that it does not "believe anything the WTO says or does can force the [United States] to change its laws."[207] Despite the fact that dispute settlement panel decisions are not binding in domestic U.S. courts, there are several reasons why the filing of a WTO complaint still holds promise as a way of forcing the repeal of Title III.

To begin, the dispute resolution panel procedure provides for alternative methods of policing in the event that a government refuses to remove a measure that a panel has found to be inconsistent with a Uruguay Round agreement.[208] The alternative methods include "the provision of trade compensation and other negotiated settlements [to the injured nations], or the suspension of benefits equivalent to the 'nullification or impairment' of benefits caused by the offending measure."[209] When combined with the moral pressure applied by all member nations to obey a WTO decision, a government's fear of losing the advantages of such

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205. *See, e.g.*, H.R. Doc. No. 316, 103d Cong., 2d Sess. 1008 (explaining that the WTO cannot diminish U.S. sovereignty because "the new WTO dispute settlement system does not give panels any power to order the United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences."). For the text of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations of the WTO Agreement, see *id.* at 1326-36.

206. *Id.* at 1036.

207. Sanger, *supra* note 26.

208. H.R. Doc. No. 316, 103d Cong., 2d Sess. 1032.

209. *Id.*

tariff concessions and other GATT benefits provides a powerful tool with which to compel compliance with the panel's verdict.[210] The moral pressure to comply is intense, for the GATT and WTO agreements were hammered out in painstaking negotiations which give them a legacy of validity and solid international consensus on the underlying rules.[211]

Faced with a growing WTO case before the dispute settlement panel, the United States risks much by lifting the suspension of Title III. In addition, American claimants, who might previously have salivated at the thought of filing Title III claims, must now factor into their decision to pursue claims the negative repercussions which may follow in the form of "alternative resolutions" by the WTO panel who finds against the United States.

Finally, acting to empower the dispute resolution panel is the assumption that the contracting parties to the WTO agreements will oppose the weakening of respect for these obligations, for this will undermine the foundation on which the agreements rest.[212] "If respect for rules and commitments is eroded, if member countries hesitate to intervene when there is a breach of the legal rule simply to keep open the possibility of circumventing the rule themselves, the means of constraint must lose a great part of their force and effectiveness."[213]

2. Abusing the National Security Exception

The U.S. has threatened to plead a "national security" exception based on Article 21 of the GATT as a possible way to avoid having the Helms-Burton and other embargo legislation examined from the point of view of WTO trade rules.[214] This means that the WTO dispute settlement panel will have to decide whether the wording of Article 21 allows the panel to examine the substantive legitimacy of such a national security defense or whether the panel is simply bound to accept the defense at face value.[215] The United States argues that the panel must do the latter since a national security defense is a political issue rather than a matter

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210. *See* OLIVIER LONG, LAW AND ITS LIMITATIONS 67 (1987).

211. *See id.* (making this argument for GATT only); *see also Averting Trade Wars*, WASH. POST, Oct. 21, 1996, at A18 (acknowledging the arduous negotiation process underlying the creation of the WTO dispute settlement panel).

212. *See* LONG, *supra* note 210, at 67.

213. *Id.* "Meaningful constraint requires consensus among the member countries on the objectives of the treaty and the means of attaining them, as well as on the extent of their application." *Id.*

214. Robert Evans, *U.S., EU to Meet at WTO on Cuba Dispute-Diplomats*, REUTERS MONEY REP., Feb. 3, 1997, *available in* LEXIS, World Library, REUFIN File.

215. *Id.*

for trade panelists to decide.[216] On the other hand, those who advocate that the panel does have the authority to review the factual underpinnings of the asserted national security defense contend that, while legislation enforcing a trade embargo might be shielded from panel scrutiny by such a defense, legislation providing for claim damages for past foreign investment surely is not implicated by the national security exception.[217]

In the eyes of many nations as well as WTO Director-General Renato Ruggiero, abusing this fifty-year-old GATT loophole[218] by invoking it as a defense to the EU's case places the United States in the position of having begun the deterioration of the WTO trade rules.[219] The United States' action has opened the door for all future defendants to assert the national security exception to "defend domestic sacred cows."[220] For example, Japan could formally raise this exception to keep its rice market closed to imports based on a justification of safeguarding "food security," or South Korea could make a parallel argument to continue sheltering its car industry from foreign imports.[221] In this scenario, the United States hurts itself above all others since early results from the WTO dispute resolution panel show that it is working well and that U.S. companies are benefitting more than most.[222] The United States finds itself the complainant far more often than the defendant in matters of foreign trade practices before the WTO.[223]

3. Procedural Fights and a Fragile Truce

In October 1996, the EU launched the formal procedure to call for the opening of a WTO dispute settlement panel[224] and was soon joined by Canada.[225] On November 20, 1996, the dispute settlement body of the WTO officially agreed to set up an adjudication panel in response to the

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216. *See id.*

217. *See Cuban Feud*, FIN. TIMES (London), Feb. 4, 1997, at 21.

218. *See EU Puts U.S. 'Bully' in the WTO Dock: Guy de Jonquie're and Lionel Barber on Europe's Frustration*, FIN. TIMES (London), Oct. 3, 1996, at 5.

219. *See* Robert Evans, *U.S., Angry With EU, Expected to Ignore WTO on Cuba*, REUTERS FIN. SERVICE, Money Rep. Sec., Feb. 4, 1997, *available in* LEXIS, World Library, TXTLNE File.

220. *Averting Trade Wars*, *supra* note 211.

221. Sanger, *supra* note 26.

222. *See Averting Trade Wars*, *supra* note 211.

223. *See* Sanger, *supra* note 26.

224. *EP Committee Hears Brittan on U.S. Trade Action*, REUTER EUR. COMMUNITY REP., July 26, 1996, *available in* LEXIS, Intlaw Library, REUEC File.

225. *Canada Joins EU Challenge on U.S. Law on Cuba*, REUTER EUR. COMMUNITY REP., Oct. 2, 1996, *available in* LEXIS, Intlaw Library, REUEC File.

EU's complaint.[226] The United States showed its anger over the EU's complaint by devising a procedural deadlock on the issue of the composition of the three-member panel.[227] This resulted in months of delay in the panel's substantive task.[228] In February 1997, the EU moved to end the stalemate by requesting that the WTO Director-General personally nominate the panel members.[229] This action would have required the Director-General to name the panel's constituents within ten days;[230] however, the EU asked for a last minute delay to foster a possible compromise.[231] As no deal was struck, the panel was subsequently appointed.[232] Failing a friendly resolution by the EU and the United States, the panel was to have rendered a verdict by August 20, 1997,[233] if not for a subsequent truce.[234]

In April 1997, months of negotiation between the United States and the EU produced a fragile truce under the terms of which the EU suspended its WTO complaint until October 15, 1997 in exchange for the Clinton Administration's promise to ask Congress to amend the Helms-Burton legislation to meet EU objections.[235]

In the interim, the EU has been collecting information to use in its case before the WTO dispute panel since October 1996.[236] The breadth of

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226. *See Clinton Likely to Continue Softly-Softly Approach to Anti-Cuba Law*, EUR. REP., Jan. 4, 1997, *available in* LEXIS, World Library, EURRPT File.

227. *See* Evans, *supra* note 219.

228. *See EU to Press Ruggiero on Panel for U.S. Anti-Cuba Laws*, EUR. REP., Feb. 5, 1997, *available in* LEXIS, World Library, EURRPT File.

229. *See Cuban Feud*, *supra* note 217, at 21.

230. *See EU Calls on Mr. Ruggiero to Appoint Members of the Panel That Will Give Its Position on the Helms-Burton (Cuba) Law*, REUTERS TEXTLINE, Feb. 4, 1997, *available in* LEXIS, World Library, TXTLNE File.

231. *See* David Sanger, *Europe Postpones Challenge to U.S. on Havana Trade*, N.Y. TIMES, Feb. 13, 1997, at A1.

232. *See* Sanger, *supra* note 26.

233. REUTERS TEXTLINE, *supra* note 230.

234. *Keeping the Lid on Helms-Burton*, FIN. TIMES (London), July 31, 1997, at 4.

235. *Id.* The terms of the temporary truce reached between the EU and the United States are complicated by the EU's fight against another extraterritorially applied American law, the Iran-Libya Sanctions Act. *Id.* If the United States does not soon waive provisions which levy penalties on foreign companies investing in the energy sectors of Iran and Libya, the EU may pressure the United States into doing so by threatening to reinstate the Helms-Burton complaint with the WTO. *Id.*

236. Appeal for information concerning the effects on Community enterprises of the Cuban Liberty and Democratic Solidarity Act of 1996 of the United States of America and of other measures taken by the United States affecting trade with Cuba, 1996 O.J. (C 307) 4 [hereinafter "Appeal"]. Specifically, the Commission seeks facts about adverse effects of "prohibitions on export to Cuba, prohibitions on imports into the USA of merchandise made or derived in whole or in part of any article which is the growth, produce,

the European Commission's call for information suggests that it might incorporate the extraterritorial effects of previous embargo legislation into its WTO complaint as well.[237] Canada's participation in the WTO complaint as an interested third party means the dispute settlement panel will also take into account the Canadian government's submissions in its final report.[238]

4. The EU's Strongest Arguments

Regardless of how expansive the EU case becomes, several arguments have already been identified as its core elements. The EU is likely to contend that by interfering with trade between the EU and Cuba, the U.S. is violating Article 11 of the GATT.[239] A second count will likely allege that even if the U.S. has not broken any specific WTO rule, its actions have "nullified and impaired the benefits that the EU might reasonably have expected from U.S. trade commitments."[240] The "nullified and impaired" clause stems from the language of Article 23 of the GATT. If the EU employs such an argument, it will carry the burden of providing a detailed justification of the nullified or impaired benefits accruing to it under the GATT.[241] To the extent that this includes proving a chill in the willingness of EU companies to expand investment in Cuba due to Title III, it will be a difficult burden to shoulder.[242]

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or manufacture of Cuba, denial of access to the quota for the import of sugar into the USA, and restrictions on entry into ports of the USA and access to port facilities for ships which have visited Cuba or have been carrying Cuban goods." *Id.*

In addition to this appeal for information, the European Commission is also compiling for publication a list of the names of U.S. citizens and companies who will be filing Title III actions. Notice concerning the publication of a list of citizens and companies filing actions under Title III of the Cuban Liberty and Democratic Solidarity Act of 1996, Appeal, 1996 O.J. (C 276) 5. This watchlist will be one of a number of non-legal responses to counter the damage to EU citizens and companies under the Helms-Burton Act.

237. Appeal, 1996 O.J. (C 307) 4.

238. *See Clinton Likely to Continue Softly-Softly Approach to Anti-Cuba Law*, *supra* note 226.

239. *See U.S.-EU Trade War Unlikely to Erupt*, *supra* note 87, at 28.

240. *Id.*

241. *See* LONG, *supra* note 210, at 76 (explaining that if the complainant brings an Article 23 claim alleging that measures which do not actually conflict with the provisions of the GATT have nullified or impaired benefits accruing to the complainant under the GATT, then the complainant carries the burden of providing a detailed justification for bringing the action). Normally, the complainant enjoys a presumption that its benefits have been nullified and impaired if it alleges that the opposing party has breached the GATT rules. *Id.*

242. *See id.* at 75.

The American reaction to the filing of the WTO complaint has remained unchanged since its initial response, which came from the U.S. ambassador to the WTO.[243] The ambassador expressed surprise that the EU was airing its "tactical and foreign policy differences over Cuba" before a multi-lateral trade forum.[244] The United States maintains that the Libertad Act provisions have nothing to do with trade because they are not protectionist barriers to shield American industry from foreign competition.[245] This argument is mere rhetoric. Viewed in light of the history of the GATT panel system, the EU action of bringing a complaint before the WTO dispute resolution panel is perfectly appropriate. Although the EU's case will have political overtones relating to the reasons for the embargo, the practical effects of Title III and the provisions of past embargo statutes, such as the Cuban Democracy Act, fall squarely within the realm of a trade dispute. GATT panels, the largely comparable forerunner to the WTO dispute settlement panels, proved adept at handling this volatile mix:

> The panel system has resolved many differences between GATT member countries over the years that have threatened friction and even disorder in trade relations. . . . The issues are invariably sensitive with political overtones. They are always difficult, otherwise they would not come before a panel. As often as not, politically important sectoral interests are involved.[246]

VI. CONCLUSION

Throughout the congressional debate, Senator Dodd repeatedly raised two questions for considering whether the Helms-Burton bill deserved Congress's support: 1) Is what it proposes to accomplish in the best interests of the United States?; and 2) Is it likely to achieve the desired results in Cuba?[247] This comment demonstrates how the Libertad Act is a failure in both respects. U.S. interests are best served by maintaining a healthy relationship with trading partners and supporting the promising international trade dispute resolution mechanisms set up by the WTO, from which the United States has already benefitted in several cases. Unilateral sanctions against Cuba of the type envisioned by Title

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243. Gustavo Capdevila, *Former Allies Split by the Blockade on Cuba*, INTER PRESS SERVICE, Oct. 16, 1996, *available in* LEXIS, World Library, INPRES File.

244. *Id.*

245. *See* Sanger, *supra* note 26.

246. LONG, *supra* note 210, at 84.

247. *See* 141 CONG. REC. S15324 (1995).

III of the Libertad Act, founded on extraterritorial application of U.S. law through private civil remedies against foreigners, benefit only a small contingent of wealthy American claimants with negligible effect on tightening the embargo and at enormous international political cost.

The initial justification for the Act—the deterring of foreign investment in Cuba by way of private Title III actions—has been marred by the ratification of blocking legislation by key U.S. trading partners whose nationals do substantial business with Cuba and by the exploitation of loopholes in the Act. Fortunately, the Clinton Administration has steered a course of resuspending the most offending part of the Libertad Act, Title III[248]—a trend that will likely continue presuming a minimum of cooperation from Congress. This course of action leaves intact the lesser effects of the Cuban Democracy Act of 1992 and prior embargo legislation as well as the annoying but less damaging Title IV visa ban until the United States rids itself of its obsession with isolating Cuba. The current U.S. policy toward Cuba is forcing American allies to choose between compromising their sovereignty and condemning Castro to the full extent possible for his poor human rights record. This gives Castro "larger than life" status, as exemplified by his recent joint declaration with the Canadian government announcing the strenthening of ties.[249] Meanwhile, the furor over Helms-Burton is highlighting overreaching U.S. laws totally unrelated to Cuba and fueling international perception of the United States as not only a cultural imperialist but a growing legal imperialist.

Muriel van den Berg

248. *See* Bates, *supra* note 78.

249. *See Canadian Foreign Minister Concludes Visit; Joint Declaration Issued*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 24, 1997, *available in* LEXIS, World Library, BBCSWB File.