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# The Helms-Burton Act: Force or Folly of the World's Leader?

**Christian Franken**

The strong is mightiest alone.

J.C. Friedrich von Schiller,  
*Wilhelm Tell*, Act I, sc. I (1804)

Against the assault of laughter nothing can stand.

Mark Twain,  
*The Mysterious Stranger*, (1922).

In response to Cuba's downing of two civilian aircraft registered in the United States, President Clinton signed the Helms-Burton Act<sup>1</sup> (hereinafter *Libertad*) into law on March 12, 1996. Title III of *Libertad* creates a cause of action against foreign citizens and companies who currently own, manage, or use properties that were confiscated by the Cuban government from people who are now U.S. nationals.<sup>2</sup> These foreign citizens and firms face liability in U.S. courts if they knowingly and intentionally traffic in property expropriated by the Cuban government without the consent of the U.S. national who previously owned the property.<sup>3</sup> *Libertad* defines the term "trafficking" very broadly to include the sale, transfer, brokerage, or possession of any property to which a U.S. citizen had a claim.<sup>4</sup> Furthermore, *Libertad* codifies all previous trade restrictions against Cuba that were in existence as of March 1, 1996, thus making it impossible for Presidents alone to modify or repeal existing U.S.

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1. Cuban Liberty and Democratic Solidarity (*Libertad*) Act, 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997). This law is also known as the Helms-Burton Act.

2. See 22 U.S.C.A. §§ 6081-6085.

3. 22 U.S.C.A. § 6082. See also Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 420 (1996); Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325, 328 (1996).

4. 22 U.S.C.A. § 6023(13). See also 22 U.S.C.A. § 6091(b)(2) (defining "trafficking" for purposes of exclusion of certain aliens).

policies towards Cuba.<sup>5</sup> Libertad thus dramatically widens the scope of the U.S. embargo on trade with Cuba.

The extraterritorial reach of Libertad is problematic. U.S. trading partners claim that the Act violates their sovereignty by exposing their citizens to the extraterritorial application of American law.<sup>6</sup> Critics also assert that Libertad breaches trade agreements, particularly the General Agreement on Tariffs and Trade (GATT)<sup>7</sup> and the North American Free Trade Agreement (NAFTA),<sup>8</sup> by restricting access to the U.S. domestic market. The European Union has already requested a World Trade Organization (WTO) hearing on the question of whether Libertad violates GATT.<sup>9</sup> Many commentators believe that the Act endangers the stability of U.S. foreign relations and raises questions about the consistency of its foreign policy.<sup>10</sup>

Libertad also has domestic implications. The Act has the potential to open U.S. courts to a flood of litigation by creating a new class of plaintiffs, including those originally entitled to relief under the Foreign Claims Settlement Act<sup>11</sup> and those native

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5. 22 U.S.C.A. §§ 6032(h) (codifying trade restrictions in effect on March 1, 1996), 6064(e) (describing procedure the President must follow to modify policy).

6. Extraterritorial application of national law is only permitted in a few well-defined situations. Justice Holmes, writing for the majority in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), found it inconceivable that an act of Congress would apply outside the territory of the U.S. See generally BARRY A. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 727-45 (1991) (discussing evolution of this doctrine). Since 1909, when *American Banana* was decided, the United States has moved away from a strict application of this rule and is much more willing to prosecute outside of its territory. *Id.* Other nations have found this extraterritorial application of U.S. law to violate their sovereignty, and even many U.S. commentators, including the drafters of the Restatement of Foreign Relations Law, believe that extraterritorial application of domestic law should be limited by an international law rule of reasonableness. *Id.*

7. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1944, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* (1994) [hereinafter GATT].

8. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., reprinted in 32 I.L.M. 289 and 32 I.L.M. 605 (1993) [hereinafter NAFTA].

9. See WTO Secretariat, *United States—The Cuban Liberty And Democratic Solidarity Act: Request for the Establishment of a Panel by the European Communities*, WT/DS38/2 (Oct. 8, 1996). See also Guy de Jonquiere & Lionel Barber, *EU puts US "Bully" in the WTO Dock*, FIN. TIMES, Oct. 3, 1996.

10. See, e.g., Wayne S. Smith, *Is Hurting Cuba Worth Alienating Friends?* L.A. TIMES, March 2, 1997, at M2; Martin Woollacott, *Commentary: The See-through Reality of Sanctions*, GUARDIAN (Manchester), Aug. 31, 1996, at 23; Review & Outlook, *This Land Is Their Land*, WALL ST. J. EUR., Aug. 25, 1997, at 8.

11. Foreign Claims Settlement Act, 22 U.S.C. § 1643 (1994).

Cubans who have become Americans since their flight to the United States.<sup>12</sup>

This Note asserts that the Helms-Burton Act violates GATT and NAFTA. Second, this Note argues that the Act violates general principles of international law and illustrates weaknesses and inconsistencies in U.S. foreign policy.

Part I briefly traces the recent history of U.S.-Cuban relations. Part II discusses Libertad under principles of international law. Part III casts doubts on Libertad as a part of U.S. foreign policy and attacks the Act's validity under GATT and NAFTA and conventions of international law. Part IV considers foreign policy issues pertaining to Libertad.

## I. THE UNITED STATES, CUBA AND THE WORLD

### A. HISTORY OF UNITED STATES-CUBAN RELATIONS

For the past century, the histories of Cuba and the United States have been intertwined. From the American-Spanish War until the Castro-led revolution, few countries in the world were so closely tied to the United States as Cuba.<sup>13</sup> Cuba resembled a federal state, yet lacked the advantages of statehood.<sup>14</sup> Historians and contemporary observers alike went so far as to call Cuba a colony of the U.S.<sup>15</sup>

After the American-Spanish War, Cuba gained formal independence. However, as Spanish colonial rule ended, Cuba became a U.S. protectorate.<sup>16</sup> To ensure continued Cuban loyalty, the United States literally dictated a portion of the new Cuban

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12. See, e.g., Lucio, *supra* note 3, at 328.

13. Besides Cuba, Puerto Rico, Panama, the Philippines and Guam have been in an almost colonial relationship with the United States. See, e.g., Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 226 (1996).

14. *Id.* at 227. Even though formally independent, Cuba's public law was revised under American supervision and according to American legal principles. *Id.* See also JACQUES-FRANÇOIS BONALDI, L'EMPIRE US CONTRE CUBA: DU MÉPRIS AU RESPECT 8 (1982). According to many authors, including Bonaldi, the United States has not yet come to terms with Cuba's independence, which accounts for its ongoing preoccupation with its smaller neighbor. *Id.*

15. BONALDI, *supra* note 14, at 9. Bonaldi quotes American diplomats as referring to "our Cuban colony." *Id.* Another author writes that "if Cuba was not a colony, it was certainly a subordinate client state." JUAN M. DEL AGUILA, CUBA: DILEMMAS OF A REVOLUTION 55 (1994).

16. DEL AGUILA, *supra* note 15, at 16.

Constitution of 1902 by forcing the drafters to include the Platt Amendment.<sup>17</sup>

While the Platt Amendment was revoked in 1934, and a new constitution was drafted in 1940,<sup>18</sup> Cuba remained dependent on the United States because of their virtually exclusive trading relationship.<sup>19</sup> A succession of authoritarian regimes marked the years before Cuba's 1959 revolution. This succession was interrupted only by a short period of democratically elected, albeit ineffective, governments. The Batista regime, which held power from 1952 to 1959, was actively supported by the United States.<sup>20</sup> When the 1959 revolution deposed Batista and imposed a communist regime, relations between Cuba and the United States deteriorated. Following the revolution, Cuba passed legislation facilitating the expropriation and nationalization of property privately held by both foreign and Cuban nationals.<sup>21</sup> By October 1960, Cuba had initiated the confiscation

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17. Platt Amendment, ch. 803, 31 Stat. 895-98 (1901). The Cuban Constitution that went into effect in 1902 included the Platt Amendment, which (1) assured that the United States would continue to have access to Cuban ports, (2) limited Cuba's sovereignty, and (3) permitted the United States to "intervene for the preservation of Cuban independence and for the maintenance of a government adequate for the protection of life, property, and individual liberty." DEL AGUILA, *supra* note 15, at 18 (quoting FEDERICO G. GIL, *LATIN AMERICAN-UNITED STATES RELATIONS* 91 (1971)). The Platt Amendment also barred Cuba from entering into any treaty that would impair its independence and from assuming any public debt absent adequate means of repayment. Platt Amendment, 31 Stat. at 897 (I and II). It also required the Cuban government to sell or lease to the United States land necessary for establishing naval stations in Cuba. *Id.* See also Oscar M. Garibaldi & John D. Kirby, *Property Rights in the Post-Castro Cuban Constitution*, 3 U. MIAMI Y.B. INT'L L. 225 (1995)

18. See Garibaldi & Kirby, *supra* note 17, at 229.

19. SUSAN SCHROEDER, *CUBA: A HANDBOOK OF HISTORICAL STATISTICS* 414 (1982). During the 1950s sugar accounted for more than 80% of Cuba's exports. *Id.* The United States bought much of this sugar at 80% above market value, which meant that the United States was effectively subsidizing most of Cuba's economy. Richard D. Porotsky, Note, *Economic Coercion and the General Assembly: a Post-Cold War Assessment of the Legality and Utility of the Thirty-five-Year-Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901, 908 (1995). One cannot help drawing parallels between the relationship of the United States with Cuba before the 1959 revolution and the relationship of the Soviet Union with Cuba thereafter.

20. See DEL AGUILA, *supra* note 15, at 16.

21. Jonathan R. Ratchik, Note, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 344 (1996). The expropriations were based on "confiscatory decrees" such as the Agrarian Reform Law (May 17, 1959) (redistributing ownership of land); a law requiring the re-registration of mineral claims (Law 617, Oct. 27, 1959), imposing a 25% export tax on minerals which the United States deemed confiscatory; and a petroleum law imposing a 60% royalty on oil production (Law 635, Nov. 20, 1959). *Id.* at 345.

of the last foreign-owned businesses.<sup>22</sup> Most Cuban companies suffered a similar fate.<sup>23</sup> The United States responded with sanctions that exist to this day.<sup>24</sup>

The most important of these sanctions has been a general embargo, originally implemented by President Kennedy as part of the Foreign Assistance Act of 1961 (FAA).<sup>25</sup> In 1962, he expanded the sanctions with an executive order adding Cuban Import Regulations (CIR) to the FAA.<sup>26</sup> However, because of doubts about the U.S.'s authority to prosecute U.S. citizens acting outside the United States, Kennedy soon amended the CIR, changing them from being part of the FAA to being part of the Trading with the Enemy Act.<sup>27</sup> Under the broad definitions of the Trading with the Enemy Act,<sup>28</sup> the President enjoyed great flexibility in adapting policy towards Cuba. One instance of this discretion is that in spite of the general embargo, Kennedy and subsequent Presidents created a general license which allowed subsidiaries of American corporations to trade with Cuba as long as no U.S. assets or citizens were involved.<sup>29</sup>

This situation changed in the mid-seventies when tensions increased over Cuba's involvement on the African continent.<sup>30</sup> The general license was then abolished and foreign subsidiaries of American-owned firms that wanted to trade with Cuba were

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22. *Id.* at 347.

23. Many of the Cuban victims of the expropriation decided to flee rather than to suffer continued harassment from the Castro regime. Due to their business ties and the proximity, most of the refugees resettled in the United States.

24. One of the first of these sanctions occurred in 1959. When American oil refineries located on the island refused to process Soviet oil imports, Cuba seized the refineries, prompting President Eisenhower to reduce Cuba's sugar quota from 739,752 tons to 39,752 tons. *Id.* at 346 n.26. See also Sugar Act of 1948, 61 Stat. 922 (1947) (expired Dec. 31, 1974).

25. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at scattered sections of 22 U.S.C., 7 U.S.C., and 42 U.S.C.). See also Embargo on All Trade with Cuba, Proclamation No. 3447, 3 C.F.R. 157 (1962).

26. 31 C.F.R. § 515.201 (1962). See also Lowenfeld, *supra* note 3, at 420.

27. Cuban Import Regulations: Miscellaneous Amendments, 27 Fed. Reg. 2765 (1962); Trading With the Enemy Act of 1917, codified at 50 U.S.C. app. §§ 1-44 (1994). Initially, the Trading with the Enemy Act had not been implicated because President Kennedy thought that it would be unnecessarily provocative to do so only a few months after the Bay of Pigs Invasion. Lowenfeld, *supra* note 3, at 421 n.18.

28. 50 U.S.C. app. §§ 3(a)-(d), 4(a), (b). For example, President Eisenhower's lifting of the Cuban sugar quota was done under the Trading With the Enemy Act.

29. 31 C.F.R. §515.541(1963). See also Lowenfeld, *supra* note 3, at 421.

30. DEL AGUILA, *supra* note 15, at 126.

required to apply for licenses individually.<sup>31</sup> Amendments to the Cuban Assets Control Regulations in 1977<sup>32</sup> and 1988<sup>33</sup> further refined and restricted relations between U.S. nationals and Cuba.<sup>34</sup>

Until the late 1980s, the alliance of Cuba with the Warsaw Pact countries provided a clear and, at least from a Western perspective, legitimate rationale for U.S. policy.<sup>35</sup> The collapse of the Soviet Union and the end of the Cold War did not bring a correspondingly significant change in relations between the United States and Cuba. Indeed, U.S. efforts to isolate Cuba intensified.<sup>36</sup>

During the early nineties, the Bush Administration shifted its Cuban policy away from the Cold War aim of containing a potential Soviet bridgehead at America's door. The new policy focused on the promotion of democracy, human rights and a market economy in Cuba.<sup>37</sup> Congress codified this new policy in the Cuban Democracy Act of 1992.<sup>38</sup> While promoting the post-Cold War policies, this statute also narrowed the discretion that the President previously enjoyed,<sup>39</sup> making the licensing of for-

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31. See 31 C.F.R. §515.559 (1975).

32. 42 Fed. Reg. 16,620 (1977). See also Lowenfeld, *supra* note 4, at 421 n. 19. The 1977 amendment somewhat relaxed the restrictions for certain U.S. visitors to Cuba by permitting individuals to pay for certain goods and services while in Cuba. DEL AGUILA, *supra* note 15, at 126. This was in response to a partial formalization of contacts between the two nations during the Carter administration.

33. 53 Fed. Reg. 47,526 (1988). See also Lowenfeld, *supra* note 3, at 421 n.20. The 1988 amendment prohibited the use of credit cards in connection with travel to Cuba. *Id.* at 421. This was one of the Reagan administration's last actions to increase pressure on the Castro regime.

34. Radio Martí, which broadcast anti-Castro propaganda from the United States to Cuba, was also established during the Reagan era. DEL AGUILA, *supra* note 15, at 136.

35. UNITED STATES ECONOMIC MEASURES AGAINST CUBA: PROCEEDINGS IN THE UNITED NATIONS AND INTERNATIONAL LAW ISSUES 163 (Michael Krinsky & David Golove eds., 1993) (hereinafter Krinsky & Golove). In 1988 "Congress instructed the administration to prepare appropriate recommendations for improving the enforcement of restrictions on importation of articles from Cuba," which resulted in a tightening of the embargo. The Bush administration kept the Reagan era's hard-line stance against Cuba alive to end Soviet, and then Russian, support of Cuba. *Id.* at 167.

36. *Id.* at 167.

37. Michael Krinsky, *U.S. Embargo of Cuba: An Overview*. N.Y.L.J., Feb. 20, 1996, at S2. See also Krinsky & Golove, *supra* note 35, at 136.

38. Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (1994). See also Lowenfeld, *supra* note 3, at 422.

39. The Cuban Democracy Act suspended the president's discretion to issue licenses. 22 U.S.C. § 6005. "Notwithstanding any other provision of law, no license may be issued for any transaction described in section 515.559 of title

eign subsidiaries of U.S. firms impossible.<sup>40</sup> In 1995, Congress further tightened the embargo on Cuba by passing the Helms-Burton Act.<sup>41</sup> Initially, President Clinton indicated that he would veto Libertad, based on fears that Titles III and IV of the Act might be inconsistent with international law, as well as with U.S. obligations under NAFTA and GATT.<sup>42</sup> However, after a series of Cuban air-to-air missiles downed two airplanes flown by the Florida-based Cuban-American organization Brothers to the Rescue<sup>43</sup> on February 24, 1996, he signed Libertad into law.<sup>44</sup>

Since Libertad passed, the President has twice exercised his discretion to suspend the effectiveness of Title III of Libertad.<sup>45</sup> Meanwhile, claimants have been lining up outside of law offices to seek redress under the Act,<sup>46</sup> while U.S. trading partners whose nationals and companies may be threatened by Libertad are preparing to retaliate.<sup>47</sup>

31, Code of Federal Regulations, as in effect on July 1, 1989." 22 U.S.C. § 6005(a)(1).

40. *Id.*

41. 22 U.S.C.A. §§ 6021-6091.

42. Leslie M. Norwood, *International Banking—U.S. Banks Operating Abroad*, 15 ANN. REV. BANKING L. 169, 173 (1996).

43. Brothers to the Rescue engages in search and rescue missions of refugees adrift in the waters around Cuba. It also actively seeks the overthrow of the Castro Regime.

44. Bill Tracking Report H.R. 920. The Cuban Liberty and Democratic Solidarity (Libertad) Act, H.R. 9399, passed in the House on September 21, 1995, and an amended version, S. 15325, passed in the Senate on October 10, 1995.

45. The President is authorized to suspend Title III if it is "necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." 22 U.S.C.A. § 6085(b). First, "President Clinton suspended the practical implications of the Helms-Burton Act until January [1997] to give Undersecretary of Commerce for International Affairs and special envoy to the European Union, Stuart Eizenstat, the opportunity to convince U.S. allies to join a new, concerted effort to bring democracy to Cuba." David Fox, *EU Widens Retaliation to U.S. Trade Measures*, Reuter European Community Report, Sept. 15, 1996, available in LEXIS, News Library, REVEC File. On January 2, 1997, President Clinton suspended for another six month period the portions of Libertad that would affect foreign nationals and companies. He stated that he would continue to exercise his privilege to defer the Act as long as U.S. allies continue to work toward a democratic Cuba. *President Clinton Statement on Helms Burton*, U.S. Newswire, Jan. 3, 1997, available in LEXIS, News Library, USNWR File.

46. See Ann Davis, *Helms-Burton's First Test Comes Soon*, 18 NAT'L L.J., Apr. 1, 1996, at A6. See also Mario M. Cuomo, *Helms-Burton Bill: A Sound Solution? U.S. Should End Embargo Against Cuba Immediately*, 215 N.Y.L.J., Feb. 20, 1996, at 56.

47. See Fox, *supra* note 45. See also European Information Service, *EU Resists US Sanctions, Laws on Cuba, Iran and Libya*, European Rep. No. 2154



## B. RELEVANT INTERNATIONAL LAW, TRADE AGREEMENTS AND POLICY CONSIDERATIONS

### 1. *International Law*

In recent decades, the United States has become more willing to apply U.S. law extraterritorially,<sup>48</sup> justifying its actions under the "effects doctrine." The effects doctrine, one of several different approaches to establish extraterritorial jurisdiction, is defined in the Restatement (Third) of Foreign Relations Law. "Subject to § 403, [which requires reasonableness in the extraterritorial application of law,] a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory."<sup>49</sup>

This trend of extraterritorial application is strongly resisted by those nations who see U.S. action as a violation of their sovereignty. The reasonableness requirement imposed by § 403 of the Restatement of Foreign Relations Law provides a tool to limit the scope of extraterritorial application of national law.<sup>50</sup> Before a nation state can exercise extraterritorial jurisdiction, it must show an unmistakable link between itself and the activities in the target state.<sup>51</sup> Furthermore, even if there is a link, the regulating state should refrain from exercising its jurisdiction if the other state's interests are clearly greater.<sup>52</sup>

A second relevant issue under international law is the continuous nationality requirement.<sup>53</sup> To successfully claim property expropriated by third nations, a claimant must show that the claim was "continuously owned from the date the claim arose, and at least to the date of presentation, by nationals of

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(1996); Commission of the European Communities, *Commission Proposes European Anti-Boycott Law*, Press Releases 1P 96-732, July 30, 1996.

48. CARTER & TRIMBLE, *supra* note 6, at 738. Antitrust legislation and securities regulation are clear examples of U.S. laws that have been applied extraterritorially.

49. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(c) (1987).

50. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987). See also CARTER & TRIMBLE, *supra* note 6, at 738.

51. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(a) (1987).

52. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (1987).

53. "Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse." *Panevezys-Saldutiskis Railway*, 1939 P.C.I.J., (ser. A/B), No. 74, 4, at 16 (Feb. 28, 1939).

the state asserting the claim.”<sup>54</sup> “Innumerable international, domestic and mixed claims arbitral tribunals have followed and applied [this rule].”<sup>55</sup>

## 2. Trade Agreements

Both GATT and NAFTA provide that, except under a set of well defined exceptions, member states are enjoined from imposing regulations that interfere with the free flow of goods and services among GATT members.<sup>56</sup> Generally, members of either agreement are prohibited from engaging in non-tariff restrictions on the import or export of goods.<sup>57</sup> A member state may even challenge measures that do not expressly conflict with GATT or NAFTA provisions if such measures nullify or impair a benefit that the party expects under the agreement.<sup>58</sup> More specifically,

if a benefit accruing to [a contracting party] . . . is nullified or impaired . . . as the result of the application by another contracting party of any measure, whether or not it conflicts with the provisions of this agree-

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54. Kenneth L. Bachman, et al., *Anti-Cuba Sanctions May Violate NAFTA*, GATT, 18 NAT'L L.J., Mar. 11, 1996, at C3 (quoting Nationality of Claimant, 8 Whiteman Dig., § 19, at 1241). The continuity requirement is well tested under U.S. law. See, e.g., Schott v. Islamic Rep. of Iran, Case No. 268, 24 Iran-U.S. C.T.R. 203 (1990); Lianosoff v. Gov't of the Islamic Rep. of Iran, Case No. 183, 5 Iran-U.S. C.T.R. 90 (1984). See also Keith Highet, et al., *Iran-U.S. Claims Tribunal—Dominant and Effective Nationality Test—Beneficial Ownership of Claims*, 87 AM. J. INT'L L. 447, 448 (1993).

Under the long-established rule of international law of continuous nationality, no claimant is entitled to diplomatic protection of the state whose assistance is invoked unless such claimant was a national of that state at the time when the claim arose and continuously thereafter until the claim is presented. In effect, a claim must be a national claim not only at the time of its presentation, but also at the time when the injury or loss was sustained.

Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 76 AM. J. INT'L L. 836, 836 (1982).

55. Leich, *supra* note 54, at 837.

56. The parties to GATT noted that they were “entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.” GATT, *supra* note 7, at preamble. Canada, Mexico and the United States declared that they would “BUILD on their respective rights and obligations under [GATT]” and “CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation.” NAFTA, *supra* note 8, at preamble.

57. “[N]o prohibitions or restrictions . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted . . .” GATT, *supra* note 7, art. XI, ¶ 1. NAFTA contains essentially the same language. NAFTA, *supra* note 8, art. 309.

58. GATT, *supra* note 7, art. XXIII, ¶ 1(b).

ment, the contracting party may, with view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party . . . which it considers to be concerned.<sup>59</sup>

GATT panels have interpreted this language to apply to legislation that does not directly target a specific nation. For example, the Panel Report in *Australia: Subsidy on Ammonium Sulfate* held that an Australian domestic fertilizer subsidy, enacted during World War II, nullified and impaired Chile's GATT benefits, because Chile produced a similar fertilizer.<sup>60</sup>

Valid excuses for non-compliance with the requirements of the agreements can be found in a number of exemptions.<sup>61</sup> If the GATT-legality of Libertad were challenged, the U.S. would most likely rely on the defense of the security exemption.<sup>62</sup> In the event of a national emergency or an outside threat, a member state is exempted from taking actions that run counter to its national security interests. In particular, a member state can rely on the following language:

Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection to its essential security interests taken on in time of war or other emergency in international relations.<sup>63</sup>

The United States used this section to justify the embargo it imposed on Nicaragua in 1985.<sup>64</sup> Nicaragua argued that the security exemptions should only be applied in cases of self-defense, such as when states are subjected to direct aggression. The Panel examining the issue was unable to examine whether the United States' use of Article XXI was justified, because its terms of reference precluded it from even considering any invocation of Article XXI.<sup>65</sup>

The GATT member states decided that with respect to Article XXI, they "should be cautious not to take any step which might have the effect of undermining the General Agreement,"<sup>66</sup>

59. *Id.*

60. Australian Subsidy on Ammonium Sulphate, Apr. 3, 1950, GATT B.I.S.D. (Vol. 2) at 188 (1952); WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX 610 (1994) [hereinafter ANALYTICAL INDEX].

61. See the Escape Clauses (GATT, *supra* note 7, art. XIX), the General Exceptions Clause (GATT, *supra* note 7, art. XX) and the Security Exemption (GATT, *supra* note 7, Art. XXI).

62. See GATT, *supra* note 7, art. XXI, ¶b(iii).

63. GATT, *supra* note 7, art. XXI. See also NAFTA, *supra* note 8, art. 2102.

64. World Trade Organization, Panel Report on United States—Trade Measures Affecting Nicaragua, L/6053 (not adopted) (Oct. 13, 1986).

65. *Id.* See also ANALYTICAL INDEX, *supra* note 60, at 555.

66. ANALYTICAL INDEX, *supra* note 60, at 554.

which implies that good faith is a requisite for Article XXI's invocation.<sup>67</sup> This does not, however, preclude a member state affected by an invocation of Article XXI from reserving its non-violation nullification and impairment rights under Article XXIII.<sup>68</sup>

### 3. Policy Considerations

When a nation imposes controversial policies that have an impact beyond its borders, the effect on foreign relations and foreign trade can be chilling. The U.S. embargo on Cuba has never enjoyed much support from the international community.<sup>69</sup> Even nations otherwise friendly to the United States have complained to the United States about the embargo, and the United Nations has passed resolutions condemning the embargo.<sup>70</sup> Libertad also effectively creates a secondary boycott<sup>71</sup> which encompasses nations not directly involved in the Cuba-United States conflict.

Libertad creates a potentially large volume of litigation, a problem that is associated with any new law that introduces a new cause of action.<sup>72</sup> If Congress does not introduce legislation to control the potential flood of lawsuits, large numbers of actions brought under the new law could bog down the federal courts.

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67. "[T]he spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses." *Id.*

68. Argentina reserved its Article XXIII rights when it was subjected to trade restrictions for non-economic reasons under the guise of Article XXI. *Id.* at 560.

69. See Smith, *supra* note 10, at M2. See also Kees J. Kuilewijk, *Export Law Restrictions Hit Traders*, FIN. TIMES, Oct. 10, 1996, at 19; Howard Schneider, *Canada Knows a Good Deal When It Sees One, and It Sees One in Cuba*, MINNEAPOLIS STAR TRIB. Oct. 23, 1996, at A15; Krinsky, *supra* note 37, at S2.

70. In response to the Cuban Democracy Act of 1992, Cuba submitted a draft resolution to the United Nations General Assembly (UNGA) condemning the economic embargo against the nation. The UNGA adopted a revised version of the draft resolution, 59 votes to three, with 71 abstentions. See Draft Resolution A/47/L.20/Rev.1, reprinted in Krinsky & Golove, *supra* note 35.

71. Libertad creates a secondary boycott by applying sanctions not only to Cuba, the victim of the primary boycott, but also against Cuba's trading partners. When the League of Arab States imposed a boycott on third-party companies that did business in Israel, the United States strongly condemned the boycott and passed legislation prohibiting American corporations from complying with the embargo. The United States went so far as to prosecute a large American firm that complied with the Arab Boycott Administration's request for information. Lowenfeld, *supra* note 3, at 430.

72. See Davis, *supra* note 46, at A6; Cuomo, *supra* note 46, at 56.

## II. LIBERTAD UNDER INTERNATIONAL LAW

Opinions among international practice attorneys are divided over whether Libertad is legal under international law. Proponents of the legislation point out that Cuba violated international law by nationalizing foreign property without just compensation and thus Libertad is a justifiable response and remedy.<sup>73</sup> Libertad's supporters also emphasize that the expropriation of Cuban nationals was at odds with basic human rights such as the right to property,<sup>74</sup> and violated international law.<sup>75</sup> Nevertheless, it is questionable whether Libertad will stand up to challenges from the international community.

### A. EFFECTS DOCTRINE

Libertad's drafters defend its extraterritorial reach under the effects doctrine.<sup>76</sup> However, they fail to acknowledge that the reasonableness requirement limits the effects doctrine.<sup>77</sup> Under the reasonableness requirement, the United States must not only show that substantial effects resulted from the nearly 40-year old expropriations, but must employ reasonable means to redress those effects that have accrued to the disadvantage of U.S. nationals.<sup>78</sup>

The United States would be hard pressed to convincingly demonstrate that any territorial effects stemming from Cuba's expropriations were substantial enough to form a basis for extraterritorial jurisdiction. Even if there are substantial effects, they were not caused by the corporations and individuals that

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73. Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434, 438 (1996).

74. The right to property has been recognized in Article 17 of the Universal Declaration of Human Rights. U.N.G.A. Res. 217 III, U.N. Doc. A/810, at 71 (1948). At least one author argues that Libertad is justified as a countermeasure to Cuba's violation of this right. Clagett, *supra* note 73, at 438.

75. See Clagett, *supra* note 73, at 438.

76. 22 U.S.C.A. § 6081 contains an almost literal restatement of the effects doctrine: "International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory." 22 U.S.C.A. § 6081 (referring to the Restatement (Third) of Foreign Relations Law).

77. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987). See also Lowenfeld, *supra* note 3, at 430-31. While the drafters made the effects doctrine an integral part of Libertad, references to its "reasonable" application as interpreted by current international law standards are conspicuously absent.

78. See Lowenfeld, *supra* note 3, at 431.

are now liable under Libertad, but were instead caused by the Cuban government.<sup>79</sup>

Furthermore, Libertad could be quite easily interpreted as unreasonable:

Whether . . . jurisdiction over a person or activity is unreasonable is determined by evaluating . . . (a) the extent to which the activity takes place within the territory, or has substantial, direct and foreseeable effect upon or in the territory; . . . (c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulations to the international political, legal, or economic system.<sup>80</sup>

The arguments that Libertad serves domestic political short-term goals rather than any important legitimate purpose; that the interests and expectations of U.S. trading partners are damaged incommensurately to any benefits; or that Libertad may indeed harm the international political and legal system as a whole, all suggest Libertad's unreasonableness.

It is highly unlikely that the United States would passively accept similar legislation targeting *its* nationals.<sup>81</sup> A fictional scenario was raised recently in a debate at the American Society of International Law.<sup>82</sup> If France adopted a law exposing American companies that invest in Vietnam to litigation in French courts, based on the expropriation of French property that occurred when the French left Vietnam in the 1950s, how would the United States react? The United States would likely reject the French law with the same vehemence that Libertad has incited in the rest of the world. A Canadian legislative proposal sought to test this assumption, and thereby expose the absurd basis for Libertad, by claiming reparations for properties expropriated from Tory loyalists during the American Revolution.<sup>83</sup> It can be assumed that neither a U.S. President, nor Congress, nor the American business community would accept a law that

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79. On the other hand, the fact that the expropriations caused many Cubans to flee to the United States could be considered a potentially substantial effect.

80. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (1987).

81. See *supra* note 70. The United States was not willing to accept the Arab countries' boycott of Israel.

82. See Lowenfeld, *supra* note 3, at 432.

83. *Canadians Parody Helms-Burton Act: Satiric yet Serious Bill Mocks the U.S. Anti-Cuba Effort*, MINNEAPOLIS STAR TRIB., Oct. 23, 1996, at A15.

so harms the United States as being either reasonable or consistent with international law.<sup>84</sup>

## B. CONTINUITY

By allowing Cubans who became naturalized U.S. citizens to bring actions concerning their claims, Libertad may violate the principle that requires continuity of nationality in international claims settlement.<sup>85</sup> Under the continuity principle, expropriated property must have been owned continuously by a national of the state asserting the claim, at least until the claim is presented.<sup>86</sup> While Cuban nationals may have held continuous claims against Cuba, they cannot transfer these claims to the jurisdiction of the United States simply by becoming U.S. citizens. At the time when the Cuban nationals' property was expropriated, they were not U.S. citizens. Therefore, they should not be able to recover by simply bringing their claim through the intermediary mechanism of the United States' judicial system. This type of attempt to circumvent the continuity principle has been challenged in the past.<sup>87</sup>

However, before the passage of Libertad, Congress steadfastly refused to violate the continuity principle out of fear that a variance from this principle would spur many naturalized Americans to bring claims against foreign nations. Because Congress so blatantly ignored this fear, one must ask whether the Act was passed in haste. Yet, Congress must have anticipated how Libertad would reverberate around the world. Careless drafting and hasty passage cannot be used to explain the foreign policy implications of the Act. Perhaps Congress did not carefully consider the continuous nationality requirement doctrine. By overturning the longstanding precedent that only nationals who have continuously held a claim to property expropriated by a foreign nation may have a cause of action, Congress opened the door to similar legislation, which could al-

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84. See Lowenfeld, *supra* note 3, at 432.

85. International law deals differently with expropriation of foreigners and of nationals. The expropriation of foreigners calls for prompt and just compensation. See, e.g. CARTER & TRIMBLE, *supra* note 6, at 860. Traditionally, the expropriation of nationals has been seen as a purely domestic issue outside the scope of international law. In the context of Libertad, it has been argued that expropriation of nationals should be treated as a human rights violation, which would bring it within the scope of international law. See, e.g. Clagett, *supra* note 73, at 438.

86. See *supra* notes 46-48 and accompanying text.

87. Examples of these challenges can be found in note 54, *supra*.

low a flood of actions brought by naturalized U.S. citizens against countries around the world where property nationalization has occurred.

### III. LIBERTAD UNDER INTERNATIONAL TRADE AGREEMENTS

In addition to being vulnerable to challenges under international law, Libertad also violates key provisions of NAFTA and GATT. Indeed, the European Union, Canada, and Mexico have registered complaints against the United States. The European Union requested a hearing with the WTO barely six months after the passage of the Act.<sup>88</sup> The United States blocked the E.U.'s request, but the matter will automatically receive a hearing at the next meeting.<sup>89</sup> In March 1997, the WTO's director-general, Renato Ruggiero, assembled a panel to review the European Union claims only weeks before Libertad's first anniversary.<sup>90</sup> The establishment of the panel was averted only when President Clinton, for the second time, exercised his discretion to delay implementation of Libertad's Titles III and IV.<sup>91</sup>

Libertad is susceptible to challenge by WTO member countries and the United States' NAFTA partners because it imposes burdensome, non-tariff barriers on trade. Article XI of GATT maintains that "[n]o prohibitions or restrictions . . . shall be instituted or maintained,"<sup>92</sup> thus providing support for challenging the sanctions against foreign nationals proscribed under Titles III and IV of Libertad.

#### A. NULLIFICATION AND IMPAIRMENT PROVISIONS

The nullification and impairment provisions<sup>93</sup> of GATT and NAFTA allow a member state to challenge a measure that does not expressly violate the terms of the trade agreements. Under

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88. See *supra* note 9.

89. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes (Apr. 15, 1994), art. 6(1) (33 I.L.M. 112, 118) reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994). "If the complaining party so requests, a panel shall be established at the latest at the DSB [Dispute Settlement Body] meeting following that at which the request first appears." *Id.*

90. See Smith, *supra* note 10.

91. See *supra* note 77 and accompanying text.

92. GATT, *supra* note 7, art. XI(1) (emphasis added).

93. GATT, *supra* note 7, art. XXIII and NAFTA, *supra* note 8, Annex 2004(1).



the nullification and impairment provision of GATT, a member state, whose benefits accruing from provisions of the Agreement are nullified or impaired through an impediment to trade created through the actions by another member state, can have recourse against that state even if the actions do not facially violate the Agreement.<sup>94</sup> One way in which Libertad impairs benefits expected under the trade agreements is that it exposes foreign companies to private litigation. As a result, consistency in enforcement and adjudication will be difficult to predict. Foreign companies that fear being sued under the Act may cease to do business with either Cuba or the United States, and thus forego the profit associated with such trade. As a result, Libertad introduces an element of difficulty and uncertainty into trade relations with the United States.<sup>95</sup>

If a GATT panel finds nullification and impairment of a benefit accruing under GATT due to Libertad, it can recommend that the United States disable the damaging legislation. If the United States chooses not to comply with the recommendation, the complaining states may seek authorization from the WTO to suspend the application of obligations to the United States. For example, in the dispute over the United States boycott of Nicaragua, the Panel recommended that the United States voluntarily suspend the embargo.<sup>96</sup> Had the United States not followed these recommendations, the Panel would have allowed Nicaragua to take countermeasures against the United States.<sup>97</sup> While acknowledging its inability to consider the case under Article XXIII,<sup>98</sup> the Panel recognized that it was unlikely that the United States would follow the recommendations and that Nicaragua was in no position to impose effective countermeasures. Nullification and impairment under Libertad is different because even if the United States would decide not to disable the offending Act, the countermeasures taken by the damaged parties—virtually all of its main trading partners—would be sufficient to reciprocate for lost trade opportunities.

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94. See *supra* note 58.

95. Kenneth L. Bachman et al., *Anti-Cuba Sanctions May Violate NAFTA, GATT*, 18 NAT'L L.J. Mar. 11, 1996, at C3.

96. See *U.S. Embargo on Nicaragua Did Not Violate Obligations Under GATT, Dispute Panel Rules*, 3 Int'l Trade Rep. (BNA) No. 45, at 1368-69 (Nov. 12, 1986).

97. *Id.*

98. See *supra* note 64 and accompanying text.

## B. NATIONAL SECURITY EXCEPTION

In response to GATT and NAFTA challenges, the United States will likely claim a security exception.<sup>99</sup> In the past, the national security exception has been used as a *passé partout* provision to justify measures unpopular with other member states. Although the security exception has yet to be challenged successfully,<sup>100</sup> the validity of its use has often been suspect. Moreover, the credibility of the national security exception is further eroded when it is employed by powerful nations against a small but uncomfortable neighbor.<sup>101</sup>

While Cuba was aligned with the Soviet Bloc, the United States was more apt to defend the use of the security exception because of Cold War concerns and objectives. However, since the end of the Cold War, Cuba stands truly isolated and is hardly a danger to the United States, the predominant power in the world. It may be argued that in the current climate of terrorist threats and actions against the U.S., and in light of the downing of an American aircraft, an argument for the national security exception may make sense. However, Cuba hardly belongs to the nations that export terrorism and the U.S. sanctions against Cuba fail to specifically aim to reduce terrorist threats emanating from the small island nation. Furthermore, unlike in the past, the United States will have to defend its invocation of Article XXI against a majority of GATT member states. Nevertheless, an Article XXI exemption is the most likely way for the United States to avoid an adverse panel report.

## C. THE EXISTENCE OF WTO

The most serious issue involving Libertad and the WTO Agreement is not Libertad's possible transgression of GATT provisions. Instead, it is the strained relationship between the United States and other GATT members which results from

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99. See *supra* notes 62-63 and accompanying text.

100. Alan S. Lederman, Remarks at the ABA Section of International Law and Practice Fall Meeting (Oct. 24, 1996). While it may be true that the security exception has never been successfully challenged, it has been retracted more than once, often when the reasons for claiming the exception were so strained that they would have exposed the claimant state to the ridicule of all other state parties. See ANALYTICAL INDEX, *supra* note 53, at 557.

101. It is interesting to note that the United States is quite selective about which dictators it elects to combat and which it openly supports. The overt support of Batista, see *supra* notes 19-21 and accompanying text, is only one example of the support, or at least the tacit acceptance, of regimes that show little respect for democracy or human rights. See also *infra* note 109.

Libertad. Indeed, the dispute over Libertad may threaten the very existence of the WTO Agreement. Some commentators believe that Congress and the Clinton Administration underestimated the vigor with which America's WTO partners would pursue the issue.<sup>102</sup> By submitting the dispute to a GATT panel, the parties will not only seek adjudication of their claims, but also test the very fabric of the Agreement. If the panel finds that Libertad violates GATT, it will call on the United States to either repeal Libertad or to modify it to bring it into compliance. The President has no power over Libertad's content, and it could be argued that the current Congress would rather cancel the United State's membership in the World Trade Organization than repeal or significantly amend the Act.<sup>103</sup> The very threat of this scenario has caused some of the adversaries in the Libertad dispute to relent—as President Clinton has used his only power under Libertad, (the power to suspend the portions of the Act every six months),<sup>104</sup> the Europeans have concurrently ceased their efforts to bring the issue before a GATT-WTO panel.

#### IV. POLICY ISSUES

##### A. FOREIGN RELATIONS

The United States' imposition of Libertad on Cuba's trading partners creates a classical secondary boycott. This is particularly disturbing, because until now the United States has strongly condemned secondary boycotts.<sup>105</sup> This is an obvious inconsistency in U.S. foreign policy.

It comes as no surprise that the United States' trading partners do not take kindly to the exposure of their nationals and companies to litigation. Within six months of Libertad's enactment, the European Union, Canada, Mexico and other trading partners of the United States protested the Act. Indeed, these nations announced countermeasures that will be implemented once the Act takes effect.<sup>106</sup> Meanwhile, the European Union,

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102. See Smith, *supra* note 10.

103. *Id.* The recent failure of Congress to give President Clinton fast-track authority indicates Congress' stubbornness and fracturedness in trade matters. See, e.g., Jill Abramson, *Labor Victory on Trade Bill Reveals Power*, N.Y. TIMES, Nov. 12, 1997, at A1.

104. See *supra* note 45.

105. *Id.*

106. See *supra* note 47. Canada is set on amending the Foreign Extraterritorial Measures Act (FEMA), R.S.C. ch. F-29 (1990) (Can.). As it exists today, FEMA allows the Candian Government to block the extraterritorial application of foreign legislation or trading directives that adversely affect Canadian trading

supported by Japan, ignored the Clinton Administration's assurances that Libertad would not be applied against major U.S. trading partners and demanded a GATT panel investigation.<sup>107</sup> The European Union backed away from its panel request only when Clinton suspended the implementation of the Act for another six months. At the very least, Libertad will undermine the U.S.'s credibility in trade negotiations.

The implications of Libertad, however, go far beyond trade. While the nations most interested in the outcome of WTO panel decisions are the U.S.'s major trading partners, most nations around the world are concerned about American strong-arm policies.<sup>108</sup> Aggressive unilateral U.S. action is especially worrisome considering that it does not seem to be applied uniformly. Cuba, a weak nation, is singled out for punishment, while strong, wealthy nations receive more lenient treatment. At the very least, Libertad raises questions about the consistency of the policies of the world's most powerful nation's New World Order. In order to strengthen its foundation as the world's leader, the United States ought to go beyond economic and military power and engage in moral leadership, especially when it claims moral principles as one of the motivations for its foreign policy. For example, the United States has highlighted the poor record on human rights in both Cuba and China when implementing its policies toward these nations. But while Cuba remains under a continued embargo, China's Most Favored Nation status has been renewed every year.<sup>109</sup> The moral principles on which the

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interests or infringe on Canadian sovereignty. The proposed amendments will block the enforcement of any judgments and awards obtained pursuant to Libertad and establish a "clawback" provision that allows a Canadian individual or corporation to sue in Canada for recovery of excessive foreign judgments. Selma M. Lussenburg, Canadian Response to Cuba Embargo, Remarks at the ABA Section of International Law and Practice Fall Meeting (October 25, 1996).

107. See *supra* note 9.

108. The most recent addition to the international chorus of rejection is the Vatican. "Archbishop Jean-Louis Tauran, the Vatican's foreign minister, denounced Helms-Burton publicly during an official visit to Havana late last month after a three-hour meeting with Castro." The Vatican has staunchly opposed sanctions in any context because they "harm people." Tad Szulc, *Castro and the Pope*, WASH. POST, Nov. 10, 1996, at C7.

109. Even critics of Castro's Cuba, those who are otherwise sympathetic to the plight of the Cuban people living under an oppressive regime and who are open to economic sanctions as adequate measures towards the establishment of a democracy, recognize the fundamental injustice of the Helms-Burton Act. They cannot help but notice the absence of similar sanctions against China, which is equally disrespectful of human rights and disinclined to change. Mario Vargas Llosa, *Helms-Burton Law Offers Hope to Cubans*, DAILY YOMIURI, Oct. 1, 1996, at 10. See also Daniel C. Turack, *The Clinton Administration's Response*

United States purports to rely should, at the very least, dictate that like political systems are treated alike.

## B. LITIGATION

It is likely that the large number of claims under Libertad will draw a large number of lawsuits.<sup>110</sup> Even though Cubans who have become naturalized citizens will not be able to bring claims before 1998, attorneys have already begun to solicit potential clients.<sup>111</sup> This potential flow of litigation not only endangers the recovery of the original U.S. claimants, by diluting their claims,<sup>112</sup> but also has the potential of paralyzing the federal courts in the southeastern United States, due to the sheer volume of suits filed.

## V. CONCLUSION

Even if the President of the United States were to indefinitely continue to suspend its effectiveness, the Cuban Liberty and Democratic Solidarity Act is inherently flawed. The aim of the Helms-Burton Act, to accelerate the end of the Castro Regime, may be a legitimate goal. But the legislation is thoroughly problematic in more than one respect and should never have been signed into law, not even in response to the tragic event that preceded its enactment.

The Act is flawed because it disregards long standing principles of international law. Even if Cuba's property expropriation

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*to China's Human Rights Record: At the Halfway Point*, 3 TULSA J. COMP. & INT'L L. 1, 6-7 (1995). It seems that the attribution of MFN or the imposition of embargoes is more a function of the target nation's wealth than a function of esoteric values like democracy, human rights, or free trade.

110. Estimates of the number of suits that Cuban immigrants and their descendants may file run as high as 430,000. Davis, *supra* note 46.

111. *Id.* Ironically, some of the attorneys who now create corporations as potential plaintiffs were advisers to the drafters of the Act.

By March 12, the day [Libertad] was signed, Nicolas J. Gutierrez Jr., . . . had created 75 Florida corporations as potential plaintiffs so that even non-U.S. nationals could sue under the act . . . .

Authors of the law have said it would not trigger a flood of suits.

But the actions of Mr. Gutierrez, an adviser to Congress in the bill's drafting, [suggests otherwise].

*Id.*

112. The original field of 6,000 U.S.-based claimants may have been expanded to almost 800,000 naturalized Cubans. See Cuomo, *supra* note 46, at S2. At the same time, the value of claims rose from \$5 billion to more than \$7 billion. Matias Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659, 663 & n.24 (Summer 1996).

violated international law, two wrongs don't make a right. Although Cuba is in America's "backyard," Libertad, the manifestation of America's policy toward Cuba, imposes trade penalties on U.S. trading partners around the world. Libertad impedes free trade, one of the principles it purports to defend. Ironically, Libertad penalizes U.S. citizens by preventing them from effectively competing in the world market.

Libertad is not likely to be changed, because its survival does not depend on continued Presidential goodwill, nor does Congress appear to be inclined to repeal or amend it in spite of the many vocal objections to it by U.S. trading partners. Currently, American citizens and firms are grumbling about how Libertad puts them at a competitive disadvantage. Unless they are content to live with this, they will have to object more strongly to Libertad's unfair and irrational effects. U.S. citizens and companies will likely become more vociferous once Libertad's full impact on trade between the United States and the rest of the world is realized.

