

## HELMS-BURTON MYTHS & REALITY

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Early in 1995, Senator Helms, Chairman of the Senate Foreign Relations Committee, introduced in the Senate, along with a bipartisan coalition of more than twenty co-sponsors, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995. Dan Burton, Chairman of the Western Hemisphere Subcommittee of the House's International Relations Committee, along with an even broader bipartisan coalition, introduced a similar provision in the House. Though as introduced, the measures were, with one important difference, mostly reintroductions in one omnibus package of bills which had been introduced in the prior Congress, the presence of a Republican majority in both Houses of Congress has assured a more serious consideration of the proposals.

While the reaction at times has been so loud on both sides as to drown out rational consideration, the adherents of the bill have not turned a deaf ear to well reasoned objection, have made many improvements to the bill and, in my view, have responded to almost all of the well reasoned objection.

As I write, in August 1995, the bill is poised for consideration on the House floor after the August recess, at which time I believe it will pass with a substantial majority. Its consideration in the Senate will follow soon thereafter. Having responded to most of the legitimate criticisms, the bill is faced with continued opposition by those who have traditionally been against the embargo and is supported by those who traditionally have believed that an effective embargo is the only cornerstone upon which any principled agreement can be reached with Cuba.

The debate over the past months has been waged, as was the battle over the Cuba Democracy Act, not just on policy grounds, but against charges that the bill violates international law and will have dire consequences for the U.S. if enacted. What follows is recitation of most of the "myths" spun by its opposition and a discussion of the reality of the bill as of its passage out of the House International Relations Committee (Draft date July 12) and as introduced by Senator Helms on July 31 as an amendment to S.908, the Foreign Relations Revitalization Act.

Before moving to the body of the paper, let me add a thought about international law. First, international law is *not* yet equal to our domestic criminal or civil law in that if you deviate from an accepted norm you are not dragged to international jail or, except in rare circumstances, before an international court to pay damages. International law is a developing body of law composed of specific agreements between and among states, international organizations and custom accepted over the years. Its vitality depends on the will of nations and as such there is, as a practical matter, give and take in its application. And there are holes in its coverage, which over time are filled first by one state, then others follow.

As a world leader and an international commercial transaction powerhouse, the U.S. has both a responsibility to initiate advances in international law on the one hand and to be careful not to "break the crockery" on the other. In this regard, it is clear that under the domestic law of almost all of our principle trading partners, if a man steals from another and a third party knowingly and intentionally takes advan-

tage of that theft to receive or beneficially use the fruits of the theft, that person would be as guilty of that theft as the original perpetrator. The user would also be, under the law of most of our trading partners, subject to civil remedies in their own courts for his “conversion” or “trespass” upon the property of the other.

Title III of Helms-Burton adopts this principle, a principle already available under the common law for our own citizens, as a part of our federal statutory law, and in the case of the wholesale theft of our citizens’ property by Cuba, says to international traffickers in this stolen property:

“Don’t do it. It is morally wrong and if you do, nevertheless, then don’t try to do business in the United States. We don’t want you here and if you come, then expect to rectify the wrong you committed before we will allow you the benefits of our market.”

In taking this position, the sponsors of Helms-Burton have filled an important missing piece in international commercial law. The Cuban Government opposes this bill because Title III is the single element of the bill it fears most. Stripped of its false rhetoric about Americans coming back to reclaim their houses, it realizes that it is the element that will succeed in denying it access to the tainted dollars of those proping up its regime at the expense of its own people and our citizens’ property rights. This measure needs to be adopted, and I for one would welcome similar legislation around the globe. If this were to occur, international business and people everywhere would have little cause to fear unlawful confiscation of their property.

The importance of the adoption of this right into our statutory law will, I believe, ultimately transcend the downfall of the Cuban Government that it will help bring about. In saying this however, I remind you of my second admonition regarding “care for the crockery.” As the legal analysis that follows will indicate, it has long been held by our courts and the courts of our principle trading partners that a country is free to determine property issues within the country that concern only its own citizens.

Though the right of action in Helms-Burton has been greatly restricted and will not have a particularly significant impact on the administration of our courts, by allowing individuals who were not citizens of the U.S. at the time their loss occurred to take advantage of this privilege, it deviates from the norm. Those who favor this extension suggest that the action created is not a remedy for the “theft” that occurred when they weren’t citizens years ago, but rather for the “trafficking” that is occurring now when they are citizens and entitled to equal access to our courts. I am sympathetic to this plea, but have not been able to sufficiently separate the Cuban right to determine the ultimate property rights issue as to its own citizens from the “trafficking” issue presented to our courts. At the very least it “cracks” the crockery. Given the restrictions in the statutory proposal as it now exists, I question as a matter of policy whether it is worth the potential disadvantage to all of us, including Cuban Americans, in our world-wide trading arrangements, should this notion of a remedy for post-confiscation nationals gain wider acceptance.

#### **MYTH: LIBERTAD DETRIMENTALLY AFFECTS THE INTERESTS OF REGISTERED CLAIMANTS**

##### **Reality**

- Nothing in Helms-Dole requires or authorizes the President to espouse the claims of naturalized citizens in any settlement with Cuba. Rather, the Helms-Dole amendment specifically states that the U.S. *only* has espousal responsibility for the existing certified claimants and that only they shall have an interest in any such settlement.
- Post-confiscation nationals (naturalized citizens) are entitled only to a limited right of civil action to sue in U.S. courts those who can be found in the United States who traffic in their commercial property after having been given adequate notice to stop and where the amount in controversy is \$50,000 or more.
- The opening of a nation’s courts to private judicial remedies against a person over whom it exercises domestic jurisdiction does not constitute “state espousal” of a claim.

- It is a well-established principle that nations may prescribe rules of law regarding activities which have a substantial effect on that nation, even if those activities are outside a nation's borders.

### Discussion

The terms of *Libertad* are specific: no provision of the Act will be construed to create new espousal rights for post-confiscation nationals. In addition, traditional jurisdictional requirements, combined with a variety of additional protective measures, required under Title III, will severely limit the number of such actions. Consequently, the interests of certified claimants in a lump sum agreement will be enhanced by inhibiting third party traffickers from dealing in confiscated property of U.S. claimants, and by creating a setoff for sums received in actions against traffickers. The provisions in the bill addressing the Exclusivity of Foreign Claims Settlement Procedure clearly state that no one but certified claimants shall have an interest in any settlement.<sup>1</sup> According to section 303(c)(1):

“nothing in this Act shall be construed to require or otherwise authorize the claims of Cuban nationals who became United States citizens after their property was confiscated to be included in the claims certified to the Secretary of State by the Foreign Claims Settlement Commission for purposes of future negotiation and espousal.”

Further, the provisions for reopening the Commission's determination of ownership of Cuban claims emphasize that such a determination may only be used for evidentiary purposes in an action against third party traffickers by post-confiscation nationals.<sup>2</sup>

The bill and its proposed amendments also limit post-confiscation nationals' right of civil action. Post-confiscation nationals may sue traffickers in U.S. courts only after traffickers have been presented with adequate notice and where the amount in controversy is at least \$50,000.<sup>3</sup>

Further, the bill contains an election of remedies provision. Under this provision, a U.S. national who brings a claim under Title III is precluded from bringing another claim under the common law, Federal law, or state law.<sup>4</sup> Similarly, the bill prevents the double compensation of certified claimants by setting off any trafficking action recovery against any future interest in a lump sum agreement.<sup>5</sup>

In addition, the Helms-Dole proposed amendments incorporate and amend the service provisions of the Foreign Sovereign Immunities Act<sup>6</sup> by explicitly stating that no default judgments will be entered against Cuba, its agencies, or instrumentalities, unless a Cuban government, which we recognize, is given the opportunity to cure, or be heard, and the plaintiff has proven his case to the satisfaction of the court.<sup>7</sup>

Most important, Title III's provision for a private right of action does nothing to dilute the claims of certified claimants. Title III does nothing to eliminate or even limit traditional minimum contacts requirement for personal jurisdiction.<sup>8</sup> Relatively few actions will be brought under Title III, as both parties must be sufficiently present in the U.S. to sustain the jurisdiction of the courts. Private judicial remedies, where the plaintiff retains the traditional personal jurisdictional burdens, do not constitute state

1. H.R. 927, 104th Cong., 1st Sess. § 304 (1995) (amending Title V of the International Claims Settlement Act of 1949 (22 U.S.C. § 1643 et seq.)).

2. *Id.* at § 303(a)(2).

3. Section 2303(b) Helms-Dole amendment to S.908 provides the amount in controversy requirement to ensure that judicial resources are directed only towards matters of significant economic interest. S. 908, 104th Cong., 1st Sess. § 2303(b) (1995).

4. H.R. 927, 104th Cong., 1st Sess. § 302(e) (1995); S. 908, 104th Cong., 1st Sess. § 2302(e)(1) (1995).

5. S. 908 at § 2302(e)(1).

6. 28 U.S.C. § 1608.

7. *Supra* note 3, at § 2302(c).

8. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

espousal of claims and do not interfere with any future lump sum agreement.

**MYTH: LIBERTAD'S PROPERTY SETTLEMENT REQUIREMENTS WILL DELAY PRIVATIZATION AND HINDER THE ABILITY OF THE U.S. TO ASSIST A POST-CASTRO CUBA**

**Reality**

- The property settlement requirements are consistent with international law and U.S. foreign policy, and will facilitate, not hinder, Cuba's economic progress.

**Discussion**

*Libertad* requires a post-Cuban Government to settle the outstanding claims of U.S. nationals to qualify as a transition government eligible for U.S. assistance.<sup>9</sup> The U.S. has the sovereign prerogative to create such conditions for the normalization of relations, and has taken such action with its embargo on all Cuban trade pending equitable compensation to citizens who have had property illegally confiscated by the government of Cuba after January 1, 1959.<sup>10</sup> Although the Act requires settlement of Cuban Ameri-

can claims as a prerequisite to normalization and the provision of aid that will flow thereafter, it does not assert rules which govern a sovereign state with regard to the settlement of property claims by its own citizens. As a result, the structure of a system and the nature of the remedies provided to its own nationals remain the decision of the Cuban people. Thus, protest against the bill based upon an expressed concern about foreign tribunals ruling on local property disputes are unsubstantiated.<sup>11</sup>

*Libertad's* requirement for restitution is fully consistent with international standards, where we are talking about prerequisites for aid. Further, as to certified claimants, it is a well established matter of international law that states who confiscate the property of foreign nationals are obligated to pay compensation.<sup>12</sup>

Cuba's political and economic progress will depend on the efficient resolution of property claims, as the transformation to a market economy requires effective solutions to property questions.<sup>13</sup> A transition government will have the opportunity to provide either restitution or compensation, in order to meet

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9. *Id.* at § 206(5)(G) requires that a transition government make [] public commitments to and make[] demonstrable progress in—. . . (G) taking appropriate steps to return to United States citizens (and entities which are 50 percent or more beneficially owned by United States citizens) property taken by the Cuban government from such citizens and entities on or after January 1, 1959, or to provide equitable compensation to such citizens and entities for such property . . .

10. Prohibitions Against Furnishing Assistance, 22 U.S.C.A. § 2370 (1979).

11. Nestor E. Bague, "Bill Grants U.S. Undue Powers Over Cuban Affairs," *The Miami Herald*, 15A (June 7, 1995).

12. Ian Brownlie, *Principles of Public International Law* 532-35 (1990).

13. As a strictly personal note, the solutions to Cuba's problems do not rest solely in their hands. Our government's behavior towards both Cubans and its own citizens has historically not been entirely blameless. While it is unconstitutional to take the property of a citizen, our government has heretofore succeeded in taking property value indirectly through regulations, which if done directly would have resulted in successful litigation and compensation. Quite possibly, the most directly relevant instance of such a taking by the United States government is suggested by the following comment of the United States Department of Agriculture (U.S.D.A.) in the GAO Report on the Sugar Program: "The report's discussion of effects of the program on sugar users does not mention its impact on U.S. Refiners. Ten U.S. refineries, representing 35 percent of U.S. cane sugar refining capacity, have closed since the implementation of the current sugar program in 1982. While not all of this decline in industrial activity can be attributed to the sugar program [no other cause cited], the program's limitation on imports of raw cane sugar is a major contributing factor." Report to the Hon. Charles E. Shumer, House of Representatives, *Sugar Program Changing Domestic and International Conditions Require Program Changes* (April 1993).

It is significant that in its report, the USDA omits the fact that the very regulation that it attributes as a major contributing factor to the destruction of a substantial number of privately owned industrial facilities in the United States was later found to be a violation of the United States trade obligations by a GATT dispute resolution determination that was accepted by the United States.

The fundamental reality is that the problems of the Cubans and the U.S. domestic sugar refineries have been caused, in part, by our government's regulation of the access to the United States market for foreign raw cane sugar. The United States government needs to do a better job of complying with its own obligations to its citizens while it seeks adherence by Cuba to similar obligations both to its own citizens and ours.

Opposition to the sweetener provisions of NAFTA by those who benefit from the sugar quotas suggests that restoration of U.S. market access for Cuban sugar will face strong opposition. The sugar program responds to certain domestic economic interests rather than to actions of the Government of Cuba. Reforms by or changes in the Government of Cuba will not moderate this opposition.

the property settlement requirements. A lack of available assets may force a transition government to provide restitution.<sup>14</sup> Settlement in the form of restitution should provide economic benefits to the Cuban people.<sup>15</sup> Consequently, a system of restitution can facilitate the privatization process, as evidenced by the experiences of Eastern European nations.<sup>16</sup>

*Libertad* provides that humanitarian assistance be offered to a transition government, and that the United States support Cuban membership in the international financial institutions (“IFIs”) once a democratically elected Cuban government is in power.<sup>17</sup> The assertion that the Act is too restrictive in terms of impeding Cuban access to IFIs is erroneous. It is unlikely that a transition government would be eligible for aid from the IFIs given that the standards established for eligibility by IFIs are very similar to the conditions set out in the Act itself,<sup>18</sup> and the delay between application and admission would most likely be longer than the existence of the transition government itself.<sup>19</sup>

## MYTH: THE CUBAN GOVERNMENT’S CONFISCATIONS ARE NOT VIOLATIONS OF INTERNATIONAL LAW

### Reality

- The Cuban Government’s confiscations violated customary international law as prompt, adequate, and effective compensation has never been provided to U.S. property owners.

### Discussion

*Libertad* recognizes international law’s prohibition of confiscation and holds the Cuban Government liable under this basic principle.<sup>20</sup> Under traditional principles of sovereignty, the Cuban Government’s expropriations would have been legal if justified by a public purpose and by the payment of prompt, adequate, and effective compensation to the private owner. Under customary international law, an expropriating state acts in clear violation of customary international law if it fails to provide prompt, adequate, and effective compensation to the private owner. An expropriation is also illegal if it “includes interference with the assets of international organizations and taking contrary to promises amounting to estoppels.”<sup>21</sup> Further, illegal expropriations include:

14. See Barbara Ehrich Locke, Holland & Knight, “Resolution of U.S. Claims Against Cuba: Comparative Models,” presented at The Evolving Cuban Marketplace: What Every U.S. Company Needs to Know (May 5, 1994) (discussing Cuba’s effective default on its 1986 settlement agreement with Spain); see also *Final Report of the Cuban Claims Program*, Foreign Claims Settlement Commission of the United States, 414 (1972) (estimating value of U.S. claims).

15. While I am not proposing such a limited use of restitution, a restitution process which returns the top ten U.S. claims, even assuming no new investment by the returning property owners, will increase the ability of the Cuban economy to absorb the net possible non-inflationary imports by over a billion dollars in the first five years. José F. Alonso, “An Economic Exercise in Restitution” (July 8, 1994), *construed in* Robert E. Freer, “Restitution’s Role in the Recovery of the Cuban Economy” (July 1994).

16. For a survey on restitution schemes and their productive results, see Nicolás Gutiérrez, “Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to Democratic Cuba,” Cuban-American Bar Association Cuban Law Project, Property Rights Symposium (November 5, 1993).

17. H.R. 927 § 202(e)(1); s. 381 § 202(E)(1).

18. Ernesto F. Betancourt, “Governance and Post-Castro’s Cuba,” in *Cuba in Transition-Volume 4* (Washington: Association for the Study of the Cuban Economy, 1994).

19. Carlos N. Quijano, “The Role of International Organizations in Cuba’s Early Transition,” *statement at the Cuban Transition Workshop* (January 27, 1994).

20. *Supra* note 1, at § 301. Statement of Policy.

21. Ian Brownlie, *Principles of Public International Law* 538 (1990).

“seizures which are a part of crimes against humanity or genocide, involve breaches of international agreements, are measures of unlawful retaliation or reprisal against another state, are discriminatory, being aimed at persons of particular racial groups or nationals of particular states, or concern property owned by a foreign state and dedicated to official state purposes.”<sup>22</sup>

These latter conditions for illegality are sometimes characterized as factors distinguishing nationalizations from expropriations of particular items of private property.<sup>23</sup>

Unlike the murky distinctions between nationalizations and individual expropriations, the general rule of compensation is well established and is directly applicable to the Cuban Government’s confiscations. Under U.S. law, the compensation rule gained formal recognition as the “Hull formula,” when U.S. Secretary of State, Cordell Hull, outlined the requirements of prompt, adequate, and effective compensation to the Mexican Government during a 1939 dispute over Mexico’s nationalization of foreign-owned

oil fields.<sup>24</sup> The compensation rule is underpinned by a cornerstone of international law, the international minimum standard,<sup>25</sup> and sometimes substantiated by principles of acquired rights,<sup>26</sup> unjust enrichment, and human rights.<sup>27</sup>

That the Cuban government’s expropriation of the property of U.S. nationals is a violation of international law under the compensation rule is virtually undisputed. More than three decades have passed since the Cuban Government regime began its socialist program of widespread confiscations, yet neither compensation nor the assurance of compensation to private owners is imminent.

Moreover, some observers charge that Cuban confiscations have been discriminatory,<sup>28</sup> thus inherently violative of basic norms of international law. These commentators claim that the confiscation of the property of U.S. nationals was motivated by retaliatory intent against the U.S. government for its poli-

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22. *Id.* at 538.

23. Some scholars distinguish between these two cases for purposes of compensation analysis. Under this analysis, where the expropriation of particular items of property is concerned, only a duty to pay compensation for direct losses is involved. Where a nationalization, or the expropriation of a major industry or resource is concerned, liability for consequential loss—otherwise known as *lucrum cessans*—is implicated. In addition, some scholars argue that only the former case creates valid title; however, scholarship is mixed on this point. *Id.* at 538-39.

24. Patrick M. Norton, “A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation,” 85 *American Journal of International Law* 474, 475 (1991), citing G. Hackworth, *Digest of International Law* 655-65 (1942) (reproducing the diplomatic correspondence).

25. The doctrine of an international minimum standard dictates the supremacy of a moral standard of the treatment of aliens over national standards. Although the global community has not reached consensus on the debate, the international minimum standard has gained increasing support throughout the twentieth century, including the support of a majority of states at the Hague Codification Conference and United Nations affirmation through the General Assembly’s 1962 Declaration on Permanent Sovereignty over National Resources. *Supra* note 21, at 524-25, 539-41.

The U.S.-Mexico General Claims Commission ratified the standard in the 1926 *Neer Claim* case: “. . . the propriety of governmental acts should be put to the test of international standards. . . the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency. *Supra* note 21, at 525. More recently, the international minimum standard and compensation rule was ratified by President Nixon in a policy statement. “Statement of Policy by the President of the United States Concerning the International Minimum Standard,” 8 *Weekly Compilation of Presidential Documents* 1334 (1972).

26. The principle of “acquired” or “vested” rights appears in some judicial and academic discussions of property rights, particularly in the context of state successions.

27. Some human rights treaties refer to the individual right to not be arbitrarily deprived of property. *See, e.g.*, Universal Declaration of Human Rights, Art. 17, G.A. Res. 217 A (III), Dec. 10, 1948; American Convention on Human Rights, Art. 21, OEA/Ser.L/V/II.23 (1978).

28. Some of these observers note that the Cuban Government’s confiscations violated Cuba’s 1940 Constitution.

cies toward Cuba<sup>29</sup> and by distrust of individuals who left post-revolution Cuba.<sup>30</sup>

Although the discrimination allegations are more controversial and may be more difficult to firmly substantiate, the Cuban Government's retaliation and suppression of counter-revolutionary elements provide some basis for illegality. More important, Cuba's consistent violation of the compensation rule provides ample support for a U.S. nationals' claim of an international law violation. Thus, Title III is well supported by international law and U.S. practice.

### MYTH: TITLE III IS UNFAIR TO TRAFFICKERS

#### Reality

- The right of action applies, potentially, only to those who “knowingly and intentionally” use, benefit from, or gain an interest in, property wrongfully confiscated from American nationals as of six months after the provision's date of enactment. Potential liability does not attach for past activities, as the right of action does not apply retroactively.
- The provision allows a six month grace period, plus notice, so that those who have put themselves at risk can avoid liability if they so choose.
- The underlying concept of the right of action provision is similar to that for actions against those who deal in (i.e., “fence”) stolen property.
- The Helms-Dole provision sends a clear message that the United States, as a matter of domestic law, finds “trafficking” in wrongfully confiscated property unacceptable behavior and that anyone who engages in or wrongfully profits from this activity faces the prospect of either compensating the legal owner of the property or staying clear of the jurisdiction of U.S. courts.

#### Discussion

Third party traffickers have no claim against the Cuban government for protection of their interests in expropriated property, nor do they have any viable defense against suits by U.S. nationals. Their precarious position is due to the fact that they cannot claim to be *bona fide* purchasers. By knowingly and intentionally engaging in joint ventures involving confiscated property, third party traffickers have tainted their own legal status with Cuba's international law violations. *Libertad* is consistent with international law, which recognizes that defective title cannot properly be transferred; more specifically, international law recognizes that a property interest gained through confiscation cannot properly be trans-

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29. One commentator argues that: “Castro's confiscations of U.S.-owned property violated international law ‘because, *inter alia*, its purpose was to retaliate against United States nationals for acts of their government, and was directed against United States nationals exclusively.” *Hearing on the Cuban Liberty and Solidarity Act of 1995*, June 14, 1995 (statement of Brice M. Clagett for the Subcommittee on Western Hemisphere Affairs of the Senate Foreign Relations Committee), *citing*, 1 *Restatement (Third) of Foreign Relations Law of the United States* 210; *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1956), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *see also* Department of State, *Foreign Relations of the United States* 777-876 (1987) (documenting discriminatory impact of Cuba's reduced participation in the U.S. sugar market); Statement by Bruce Fein, constitutional and international law expert regarding the application of developing notions of human rights law to the traditional property construct.

30. *Id.* at note 15, *citing*, International Commission of Jurists, *Cuba and the Rule of Law* 100 (1962).

ferred.<sup>31</sup> At least one leading international scholar calls for “an international legal duty of non-recognition of the Cuban Government’s titles.”<sup>32</sup> Additionally, foreign tribunals have held that title acquired by confiscation is invalid and cannot be transferred.<sup>33</sup>

Even in the absence of judicial and scholarly recognition of the invalidity of title gained by confiscation, international law provides such liability. Under the principle of *jus cogens*,<sup>34</sup> third parties should be liable for trafficking in confiscated property. Under this fundamental principle of international law, general principles of law recognized by virtually all nations

rise to the level of peremptory norms enforceable as international law. Thus, in theory, international law recognizes the concepts of conversion, possession of stolen property, and trespass.

U.S. law recognizes that, unless the initial title is valid, no rights can arise in favor of anyone; any agreements that arise from the initial “contract” are tainted by the prior defect.<sup>35</sup> Although every holder is presumed to be a holder in due course,<sup>36</sup> if it is established that there is a defect in title through illegality, etc., the burden shifts to the holder to demonstrate that he is a *bona fide* endorsee for value. Under the

31. One scholar notes: “Where the foreign State has taken property in circumstances which, for one or the other reason, are contrary to international law, the forum should treat the taking as null and void. In its courts the original owner should continue to enjoy title. . . . The chattel confiscated in a manner considered to be internationally illegal should be treated as having been stolen. The original owner, therefore, has retained his title except where a subsequent purchaser in accordance with the general law of the *lex situs* has acquired it. Where title to stolen property can be acquired at all, the purchaser will usually have to act without actual or constructive notice. If the person in possession of “hot products” knows their origin he may also become liable in damages to the true owner, not only for such a tort as conversion, but also for conspiracy committed by co-operating with others to deprive the true owner of his rights.” F.A. Mann, *Further Studies in International Law* 177, 186 (1990). For further discussion of this issue in international law, Brice Clagett cites: Sir Robert Jennings and Sir Arthur Watts, *Oppenheimer’s International Law* 371-75 (1992); “Nationalization and International Law: Testimony of Elihu Lauterpacht, Q.C.,” 17 *International Lawyer* 97 (1983); F.A. Mann, *Studies in International Law* 373-90, 420-65 (1973); Martin Domke, “Foreign Nationalizations,” 55 *American Journal of International Law* 585, 610-15 (1961); Ignaz Seidl-Hohenveldern, “Title to Confiscated Foreign Property and Public International Law,” 56 *American Journal of International Law* 507, 508-09 (1962). See *Hearing on the Cuban Liberty and Solidarity Act of 1995* (June 14, 1995 (statement of Brice M. Clagett for the Subcommittee on Western Hemisphere Affairs of the Senate Foreign Relations Committee)).

32. Clagett, *supra* note 31, at 20, citing F.A. Mann, *Studies in International Law* 385-86 (1973): “If, then, the sacrosanctity of the foreign act of State is treated as a rule of the municipal law of the United States, Britain, and Holland, it cannot be so extended as to lead to the legalization of the international wrong. Such a consequence would be opposed to the very “comity of nations” which was invoked to justify the maxim. On the contrary, as has already been suggested, if a State commits an international wrong and the court of another State, the forum, refuses recognition to that wrong, the latter does what international law expects it to do and what it must do in order not to become an accessory to the delinquency.” Mann, *supra*, at 385-86.

33. *Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)*, W.L.R. 246, 20 I.L.R. 316 (Aden Sup. Ct.) (awarding title to expropriated owner, denying validity of title through confiscation, and finding [the property] in dispute to still be the property of the plaintiffs), cited in, Clagett, *supra* note 31, at note 26. Clagett also cites the following decisions of French courts that awarded title to the expropriated owner: *Bouniation v. Societe Optorg* (1924); *Banque et Societe des Petroles v. Compagnie Mexicaine* (1939); *Braden Copper Co. v. Le Groupement d’Importation des Metaux* (1972). See also F.A. Mann, *Further Studies*, *supra* note 31, at 183-83 (providing additional international case law).

34. Article 38 of the Statute of the International Court of Justice outlines four traditional sources of international law: a) international conventions; b) customary international law; c) general principles of law “recognized by civilized nations” (*jus cogens*); and d) judicial decisions and the writings of “the most highly qualified publicists.” It is a widely accepted position by publicists that these four categories operate in some form of descending order of weight. Consequently, law promoted by *jus cogens* may generally have more influence than judicial decisions or the writings of publicists.

35. *Williston on Contracts* (3rd ed. 1959) § 364A.

36. Two commentators offer the following definition: “A transferee of a “negotiable instrument” who takes his interest by “negotiation” under circumstances that qualify him as a “holder in due course” is *not* subject to conflicting claims of ownership or to most defenses which the obligor could raise against the transferor. The only defenses that may be raised against a holder in due course are the so-called “real” defenses: infancy, fraud “in factum,” duress or illegality that would “render the obligation of the party a nullity.” Michael Slattery and Ron Martinetti, “The Rights of “Owners” of Lost, Stolen or Destroyed Instruments Under UCC Section 3-804: Can They Be Holders In Due Course?,” 98 *Commercial Law Journal* 328, 328 (1993).

U.C.C., the holder must show that he was without notice of any potential defect in title to meet this requirement.<sup>37</sup> In other words, the holder must meet a good faith requirement.<sup>38</sup>

This principle is not unique to U.S. law. For example, under British law, “every holder is *prima facie* presumed to be a holder in due course, but if in an action it is established that ‘. . . the acceptance, issue, or subsequent negotiation of the bill is affected with . . . illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.’”<sup>39</sup> In fact, the defective title, holder in due course, and good faith principles are not unique to any legal system.<sup>40</sup> Indeed, the basic principle that defective title cannot be transferred to a third party who is aware of a potential defect may exist in Cuban law itself.<sup>41</sup>

Third party traffickers cannot claim to be good faith purchasers of interests in expropriated property. Cuba’s program of expropriation has been well-publicized and the tenuous relations between the U.S. and Cuba are well-known to the international community. In addition the U.S. Department of State has since 1992 warned all diplomatic and consular posts abroad, on at least three occasions, that “Cuba may be selling or leasing to foreign investors property expropriated from U.S. nationals in order to earn dollars and investment commitments.”<sup>42</sup> These missions

then informed their host governments that U.S. expropriation claims against Cuba were unsettled.<sup>43</sup> Thus, foreign governments and, effectively, foreign investors, have received adequate notice that questions of defective title surrounded joint ventures involving expropriated property. The holder in due course defense, consequently, is unavailable to these third party traffickers.

### **MYTH: TITLE III VIOLATES CUBA’S SOVEREIGNTY AND THE ACT OF STATE DOCTRINE**

#### **Reality**

The United States, like any state, has the authority to prescribe domestic law to govern conduct or effects occurring within its own territory or conduct outside the United States that has substantial impact on the United States.<sup>44</sup>

- Title III is consistent with current U.S. law which limits the act of state doctrine.
- The “act of state” doctrine is a judicially-created restriction that U.S. courts have imposed on themselves. The doctrine is subject to modification by statute, such as Congress’s approval of the “Hickenlooper” amendments, which reversed the application of the “act of state” doctrine in cases of claims to ownership in cases of confiscations.

37. See Slattery and Martinetti, *supra* note 36, at 332.

38. “Good faith” is defined in Revised Article 3 of the U.C.C. as “honesty in fact and the observance of reasonable commercial standards of fair dealing.” This standard incorporates both subjective and objective elements. Slattery and Martinetti, *supra* note 36, at 332.

39. L.P. Hitchens, “Holders for Value and Their Status,” *Journal of Business Law* 571, 574 (1993), (*quoting* the Bills and Exchange Act of 1882 § 30(2)).

40. Hitchens notes that there is “universal understanding” with respect to the good faith requirement of holder in due course status. *Supra* note 39, at 575 (*quoting* Parke B. in *Bailey v. Bidwell* (13 M. & W. 73) (*quoted in* *Smith v. Braine* (1851) 16 Q.B. 244 at 251)).

41. See Brice Clagett, “Public International Legal Standards Applicable to Property Expropriation in Cuba” (delivered at ABA Annual Meeting, New Orleans, August 9, 1994, as part of Showcase Program, Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties); Alberto Díaz-Masvidal, “Scope, Nature and Implications of Contract Assignments on Cuban Natural Resources (*Mineral and Petroleum*),” presented at the Fourth Annual Meeting of the Association for the Study of the Cuban Economy, August 11-13, 1994.

42. Message from Secretary of State Warren Christopher to all diplomatic and consular posts: “Buyer Beware: Cuba May Be Selling American Property” (September 1993) (on record with Dept. of State); *infra*, note 76.

43. *Id.*

44. See Joseph Modeste Sweeney et al., *The International Legal System* 84-108 (1988).

- Helms-Dole operates within a recognized limited general exception to the doctrine, as Congress has every right to do and has done before. In fact by further restricting the circumstances under which a default judgment can be obtained against Cuba, the bill is more conservative than existing law under other statutes.

### Discussion

According to established principles of foreign relations 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>45</sup> The conduct of third parties who traffic in the confiscated property of U.S. nationals has substantial harmful effect within the U.S. The U.S. may therefore enact domestic laws creating a domestic remedy in domestic courts.

Not only does the U.S. have jurisdiction to prescribe domestic law to curtail and punish traffickers in confiscated property, it has the jurisdiction to enforce such law and provide a remedy in U.S. courts. The Foreign Sovereign Immunities Act of 1976<sup>46</sup> provides federal jurisdiction over the commercial activities of foreign states, their agencies, and instrumentalities, where there is a rational nexus to the United States.<sup>47</sup> Moreover, the FSIA provides that the commercial property of states “may be levied upon for

the satisfaction of judgments rendered against them *in connection with* their commercial activities”<sup>48</sup> (emphasis added).

Title III of Helms-Burton thus derives enforcement authority from the FSIA as third party trafficking in confiscated property falls within its scope. Regardless of the controversy over the illegality of Cuban confiscations of U.S. nationals’ property, third party traffickers cannot portray their own conduct as quintessential state activity.

Some critics might continue to assert that Title III nevertheless contravenes the spirit of the act of state doctrine. The act of state doctrine is, however only a judicially created instrument and is no longer a dispositive jurisdictional defense. The Hickenlooper Amendment and the FSIA have themselves limited the doctrine’s influence in U.S. courts.<sup>49</sup>

Further, the act of state doctrine itself has been inaccurately equated with the Supreme Court’s ruling in *Banco Nacional de Cuba v. Sabbatino*.<sup>50</sup> The act of state doctrine may be correctly understood as two strands of judicial deference, rather than one.<sup>51</sup> Before *Sabbatino*, there existed a tension between a conflicts-of-law approach<sup>52</sup> and a judicial restraint ap-

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45. American Law Institute, *Restatement (Third) of Foreign Relations Law* § 402(c) (1987). See, e.g., *Handelswerkerij G.J. Bier and Stichting Reinwater (The Reinwater Foundation) v. Mines de Potasse d’Alsace S.A.*, Court of Justice of the European Communities, 1976, [1977] 1 *Common Market Law Reports* 284 (concluding that Dutch court of appeal had jurisdiction over suit for pollution originating in France and causing damage in the Netherlands).

46. 28 U.S.C. § 1602 et seq.

47. The FSIA codifies the restrictive theory of sovereign immunity, whereby immunity is granted for claims arising out of quintessential government activities (*de jure imperii*) and immunity is denied for claims arising out of private activities (*de jure gestionis*). See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976) (ratifying the FSIA and the restrictive theory of sovereign immunity).

48. 28 U.S.C. § 1602.

49. See *F. Palicio y Compañía, S.A. v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966) (ratifying the second Hickenlooper Amendment); *Dunhill*, *supra* note 41 (ratifying the FSIA).

50. 376 U.S. 398 (1964) (holding that the Court would not review the merits of the plaintiffs action against Cuba, despite the fact that a violation of customary international law was alleged).

51. See generally Anne-Marie Burley, “Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine,” 92 *Columbia Law Review* 1907 (1992) (utilizing the act of state doctrine as a model to apply and extend a Kantian theory of liberal internationalism).

52. The conflicts approach can be viewed as an affirmative doctrine, directing the court to apply foreign law in a transnational approach.

proach<sup>53</sup> as a means of applying the act of state doctrine.<sup>54</sup> The holding in *Sabbatino* marked the height of the judicial restraint approach. However, since this ruling, the history of the doctrine is marked mainly by efforts to undermine it. Outrage from academic and professional communities that the *Sabbatino* approach would position the U.S. in effective violation of international law provided at least part of the motivation behind the Hickenlooper Amendment and the FSIA.<sup>55</sup> In fact, the post-*Sabbatino* case history of courts applying the act of state doctrine suggests a trend back toward the conflicts approach.<sup>56</sup>

Moreover, a retrospective look at the *Sabbatino* ruling suggests that the Court’s “constitutional underpinnings” analysis of the act of state doctrine “was not simply a detour around the public policy and international law exceptions, but rather a more fundamental statement that the act of state doctrine could not function as a conflicts rule on the particular facts of the case.”<sup>57</sup> Specifically, the Court was cognizant of the fact that the normal “private law model” of individual dispute resolution was displaced by the anticipation of a negotiated lump sum settlement.<sup>58</sup> The Court also could not justify applying Cuban law under the conflicts approach on the basis of comity; there was no reasonable expectation of reciprocity or predictability.<sup>59</sup>

The act of state doctrine is consequently no longer a significant barrier to Title III or any other aspect of Helms-Burton. Although the doctrine may still exist in some form to protect quintessential sovereign acts, Helms-Burton does not violate current international or U.S. law addressing sovereign immunity.

Rather, Helms-Burton buttresses traditional principles of comity. If U.S. courts were to invoke the act of state doctrine to shield Cuba’s illegal confiscations from legal redress, the U.S. would effectively position itself in the global community as an accessory to Cuba’s international wrongs. Helms-Burton thus protects the United States from the potential of judicial misappropriation of the act of state doctrine.

**MYTH: THE CREATION OF A CIVIL REMEDY IN U.S. COURTS AGAINST THIRD PARTY TRAFFICKERS SUBJECT TO THEIR JURISDICTION VIOLATES INTERNATIONAL LAW**

**Reality**

- There is no rule of international law that limits a state’s ability to regulate only conduct which occurs within its territory, or to establish private remedies/rights of action for those within its domestic jurisdiction.
- International law recognizes that a state has jurisdiction to prescribe rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory when the exercise of such jurisdiction is reasonable in all circumstances.
- Helms-Dole provides for a private remedy against those who are subject to U.S. law and a U.S. court’s jurisdiction. The remedy is available to U.S. nationals, who continue to hold legal title to the property. The property may be situated outside the U.S., but the legal owner of the property is a U.S. national.

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53. The judicial restraint approach, the approach of the *Sabbatino* Court, can be viewed as a negative doctrine, forbidding review of the validity of a foreign act.

54. *Supra* note 51, at 1928-33.

55. *Supra* note 51, at 1936-39.

56. *Supra* note 51, at 1961-85. Professor Burley conducted a study of over seventy lower court decisions to arrive at this conclusion. She also notes that a closer look at *W.S. Kirkpatrick & Co. v. Republic of Cuba*, 425 U.S. 682 (1976) (construing the Hickenlooper Amendment narrowly), demonstrates a tilt back toward the conflicts approach. *Supra*.

57. *Supra* note 51, at 1950.

58. *Supra* note 51, at 1950.

59. *Supra* note 51, at 1949.

- The right of action is analogous to the common law actions of trespass and conversion which, arguably, are available to U.S. claimants already. U.S. courts currently are open to handle cases of foreign nationals for actions against other foreign nationals that occurred outside the United States (e.g., Alien Tort Statute and Torture Victim Protection Act).
- Existing U.S. law offers a solid precedent for this right of action: The “Second Hickenlooper Amendment” states that “No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right of property is asserted...based upon (or traced through) a confiscation or other taking...”
- The Foreign Sovereign Immunities Act (FSIA) provides that an agency or instrumentality of a foreign state is not immune from claims based “upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”
- New causes of action have been created in this way, ranging historically all the way from trespass and tort, through antitrust, securities and trademarks derelictions, down to strict liability for environmental offenses and discrimination.

### Discussion

Helms-Burton would create a civil remedy for United States citizens to obtain compensation from third parties who choose to profit from use of property confiscated by the Cuban Government in violation

of international law. The proposed remedy is an essential component of the existing lawful United States boycott of Cuba. The remedy is a logical and timely development of international law. Cuba has no lawful title to give to third parties. A third party profiting from use of the unlawfully confiscated property is committing an act that would be criminal under any other circumstances. Our allies have no justifiable interest in protecting such conduct.

Title III of Helms-Burton would provide United States citizens, whose property was unlawfully confiscated by the Cuban Government, with the ability to protect their interests pending normalization of relations between Cuba and the United States. The legislation would allow them to recover damages from predatory third parties who have wrongfully “knowingly and intentionally” derived benefit from use of the property without legal title. The Cuban Government has entered into commercial agreements with others for the purpose of exploiting these properties, confiscated without compensation, to enrich himself and to finance his government.

Present international law does not contain effective means to address unlawful confiscations of property. The United States embargo of Cuba and freezing of its assets, now more than thirty years old, has failed to force the Cuban Government to come to terms, possibly because the stakes are simply not high enough.<sup>60</sup>

International resolutions of such disputes are entirely consensual and may take an exceedingly long time to bring about. Recovery through espousal between governments almost always leads to a severe compromise in the compensation paid as a condition for normalization of relations.<sup>61</sup> Given these realities,

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60. The only success in this areas was the United States’ freezing of assets of Iran which lead to the Algiers Accords of 1981, and the Iran-United States Claims tribunal. In this instance both parties were motivated to resolve the dispute. The United States had frozen \$13 billion dollars in Iran assets and it desperately wanted to recover the U.S. embassy hostages.

61. Richard Lilich & Burns Weston, *International Claims: Their Settlement by Lump Sum Agreements* (1979). Payments averaged 4.59 percent to 60.6 percent of adjudicated value and were paid without interest though the average payment was made twenty years after the original confiscation. The 1979 settlement between the United States and China, more than thirty years after the confiscation, was for 40 percent of the value of the property at the time of the taking, without interest. The 1992 settlements between the United States and Germany for acts of East Germany were for 100 percent of value at the time of the taking without interest or appreciation for the 40 years period during which the assets were used by others.

and Cuba's impoverished condition, the only current opportunities for owners of confiscated Cuban property to obtain fair compensation are to preserve their assets for eventual restitution and/or to recover from third parties who have entered into business relationships with the Cuban Government whereby they have derived ill-gotten profits.

The properties used in these unlawful transactions are, in essence stolen, and the remedies proposed, consistent with conventional legal concepts of trespass and conversion. Under international law, confiscation without compensation did not effect a transfer of title recognizable under international law.<sup>62</sup> As the illegality of the Cuban Government's actions are universally known, those who entered into business relations with him to exploit the property of others are not acting innocently, a concept known in commercial law as being a "holder in due course" and thus are, in effect, receivers of stolen property.<sup>63</sup>

Because Cuba cannot convey title to third parties, they have no legitimate defense against actions for conversion or trespass. Title III merely creates a cause of action which supplements such common law claims and provides a Federal forum where subject matter and personal jurisdiction can be found. Other nations have no legitimate interest in protecting their citizens who have committed an obvious wrong against a United States citizen. Indeed, it is in the interests of all nations to protect against this very type of illegal behavior. Helms-Burton will strengthen the rule of law and property rights in the international community.<sup>64</sup>

**MYTH: THE PROVISIONS OF HELMS-BURTON WHICH SAFEGUARD AGAINST THE IMPORTATION INTO THE UNITED STATES OF CERTAIN CUBAN PRODUCTS, ESPECIALLY SUGAR, VIOLATE OUR OBLIGATIONS UNDER THE GATT AND NAFTA TREATIES**

**Reality**

- The provision tightens enforcement of existing prohibitions against the importation of Cuban sugar or products containing Cuban sugar by requiring a certificate of origin that provides the Secretary of the Treasury with an additional means of ensuring compliance with existing U.S. laws and regulations.
- U.S. accession to NAFTA does not modify or alter U.S. sanctions against Cuba. The NAFTA Statement of Administrative Action clearly noted that "Article 309(3) permits the United States to ensure that Cuban products or goods made from Cuban materials are not imported into the United States from Mexico or Canada and that United States products are not exported to Cuba through those countries."
- This provision does not violate GATT or NAFTA obligations. They are mere implementations of the longstanding United States policy of prohibiting Cuba from benefiting from trade effecting the United States as long as it continues to benefit from the unlawful confiscation of the property of U.S. citizens.
- A certificate of origin requirement does not constitute a secondary embargo, is consistent with

62. Ignaz Seidl-Hohenveldern, "Title to Confiscated Foreign Property and International Law," 56 *American Journal of International Law* 507, 508-9 (1962); Martin Domke, "Foreign Nationalizations," 55 *American Journal of International Law* 585, 610-15; F.A. Mann, *Further Studies in International Law*, 177 (1990).

63. Mann, *supra*, note 56 at 186.

64. Some have argued that Helms-Burton will be met with mirror legislation in other countries, which will allow their citizens to bring an action against a State, County or regulatory body for a regulatory taking. As a general rule, the United States does not engage in the extra-judicial confiscation of the property of its citizens or foreign nationals. *But see supra* note 13. Lands are taken, if at all, pursuant to condemnation laws, which provide for valuation and compensation. There is presently a debate in this country regarding regulatory takings. However, the trend in this area is toward compensation, *Dolan v. City of Tigard*, 114 Sup.Ct. 2309 (1994), and indeed, legislation is pending in the Congress to address this concern with regard to all Federal regulatory takings. There is already some precedent—the Hickenlooper Amendments, for example—recognizing regulatory takings as a confiscation without compensation.

the rights of nations to determine rules of origin, and does not raise quota allocation or denial of access problems under GATT Articles XIII and XI.

### Discussion

The House and Senate versions of the proposed legislation both contain provisions directed towards ensuring that no sugar or other product, which has been produced in, transported through, or is derived from products of Cuba shall be imported into the United States or dealt with by U.S. citizens abroad.<sup>65</sup> The drafters of the legislation have been mindful of U.S. obligations to other nations. The policy upon which the proposed legislation is based is not new, but rather a continuation of a thirty-five year effort to compel Cuba to return to U.S. citizens the property which it illegally took from them in the early 1960's and to eliminate Cuba's threat to peace and democracy in the Western Hemisphere. The policy is consistent with international law, specifically referred to by the North American Free Trade Agreement treaty (NAFTA) and violates neither it nor U.S. obligations under the General Agreement on Trade and Tariffs (GATT).<sup>66</sup>

International law recognizes the principle that incident to its sovereignty, a nation has the right to choose those economic principles that will govern its trade relations with another nation.<sup>67</sup> Indeed, secondary boycotts of other nations intended to effect foreign policy are not *per se* illegal.<sup>68</sup> The United Na-

tions has in the past sanctioned boycotts against Rhodesia, South Africa, Iraq, and the former Yugoslavia.

The drafters of the legislation have been mindful of our treaty obligations. The United States accession to the NAFTA specifically addresses this issue. Article 309(3) permits the United States to ensure that Cuban products or goods made from Cuban materials are not imported into the United States from either Mexico or Canada and that United States products are not imported into Cuba. Indeed, it allows for secondary boycotts.<sup>69</sup>

GATT Article XI does contain a provision which generally prohibits embargoes and secondary boycotts. However, Article XXI creates an exception to this prohibition, and indeed, all of its obligations by prohibiting construction of the treaty to preclude

“any contracting party from taking an action which it considers necessary for the protection of its essential security interests...[when] taken in time of war or other emergency of international relations, as long as their implementation is not applied”

in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.<sup>70</sup> The proposed legislation clearly is consistent with the GATT restrictions on boycotts.

The findings upon which the proposed legislation is based clearly set forth an emergency in international

65. H.R. 927, Section 109 and S. 908, Section 2110.

66. Memorandum to the U.S. Senate Foreign Relations Committee from the American Law Division of Congressional Research Service, July 31, 1995.

67. *Nicaragua v. U.S. Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14 (“A State is not bound to continue trade relations longer than it sees fit to do so in the absence of a treaty commitment or other specific legal obligation.”)

68. Fenton, “Transnational Boycotts,” 17 *Vanderbilt Journal of Transnational Law* 205, 230 (1984) (“[T]he circumstances under which a boycott is implemented, the motivations underlying its use and the degree of severity it assumes generally determine its legal status.”)

69. Article 309: Import and Export Restrictions: “3. In the event that a Party adopts or maintains a prohibition or restriction on the importation from or exportation to a non-Party of a good, nothing in this Agreement shall be construed to prevent the Party from: (a) limiting or prohibiting the importation from the territory of another Party of such good of that non-Party; or (b) requiring as a condition of export of such good of the Party to the territory of another Party, that the good not be re-exported to the non-Party, directly or indirectly, without being consumed in the territory of the other Party.” Mexico's and Canada's obligations related to expropriation under article 1110 of NAFTA must also be noted.

70. GATT Article XX, XXI, para. (g)

relations. The Cuban government is an international outlaw whose conduct continues to cause palpable injury to its neighboring States.<sup>71</sup>

The proposed legislation's provisions which address the movement of U.S. and Cuban products are not a new concept. They represent a long and consistent U.S. policy to protect the property of its citizens from confiscation without compensation in violation of international law and to refuse to trade with nations which it views as a direct threat to international peace. This policy is more than thirty years old, predating U.S. accession to either NAFTA or GATT. Certainly, the other parties to these treaties were aware of U.S. policy regarding the embargo of Cuban products when the treaties were contemplated.

Premised upon the Trading With the Enemy Act, 50 U.S.C. App. 5(b), as amended, and the Foreign Assistance Act of 1961, 22 U.S.C. 2370 in 1985, the U.S. initiated 31 C.F.R. Sec. 515 et seq., Cuban Assets Control Regulations. These regulations, prohibit all aspects of trade involving Cuba.<sup>72</sup> However, they also contain identical prohibitions against trade with other countries viewed to be international outlaws.<sup>73</sup> This policy has been restated as recently as 1985. Section 902(c) of the *Food Security Act of 1985, Public Law 99-198*, requires that the President not allocate any of the sugar import quota to a country that is a net importer of sugar unless that country can verify to the President that any imports of sugar pro-

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71. H.R. 927 Section 2 (13-28): Sec 2. Findings. "The Congress makes the following findings:... 13 The Cuban government engages in the illegal international narcotics trade and harbors fugitives from justice in the United States. 14. The Castro government threatens international peace and security by engaging in acts of armed subversion and terrorism such as the training and supplying of groups dedicated to international violence. 15. The Castro government has utilized from its inception and continues to utilize torture in various forms (including by psychiatry), as well as execution, exile, confiscation, political imprisonment, and other forms of terror and repression, as means of retaining power. 16. Fidel Castro has defined democratic pluralism as "pluralistic garbage" and continues to make clear that he has no intention of tolerating the democratization of Cuban society. 17. The Castro government holds innocent Cubans hostage in Cuba by no fault of the hostages themselves solely because relatives have escaped the country. 18. Although a signatory state to the 1928 Inter-American Convention on Asylum and the International Covenant on Civil and Political Rights (which protects the right to leave one's own country), Cuba nevertheless surrounds embassies in its capital by armed forces to thwart the right of its citizens to seek asylum and systematically denies that right to the Cuban people, punishing them by imprisonment for seeking to leave the country and killing them for attempting to do so (as demonstrated in the case of the confirmed murder of over 40 men, women, and children who were seeking to leave Cuba on July 13, 1994). 19. The Castro government continues to utilize blackmail, such as the immigration crisis with which it threatened the United States in the summer of 1994, and other unacceptable and illegal forms of conduct to influence the actions of sovereign states in the Western Hemisphere in violation of the Charter of the Organization of American States and other international agreements and international law. 20. The United Nations Commission on Human Rights has repeatedly reported on the unacceptable human rights situation in Cuba and has taken the extraordinary step of appointing a Special Rapporteur. 21. The Cuban government has consistently refused access to the Special Rapporteur and formally expressed its decision not to "implement so much as one comma" of the United Nations Resolution appointing the Rapporteur. 22. The United Nations General Assembly passed Resolution 1992/70 on December 4, 1994, Resolution 1993/48/142 on December 20, 1993, and Resolution 1994/49/544 on October 19, 1994, referencing the Special Rapporteur's reports to the United Nations and condemning "violations of human rights and fundamental freedoms" in Cuba. 23. Article 39 of Chapter VII of the United Nations Charter provides that the United Nations 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 decide what measures shall be taken ..., to maintain or restore international peace and security." 24. The United Nations has determined that the massive and systematic violations of human rights may constitute a "threat to peace" under Article 39 and has imposed sanctions due to such violations of human rights in the cases of Rhodesia, South Africa, Iraq, and the former Yugoslavia. 25. In the case of Haiti, a neighbor of Cuba not as close to the United as Cuba, the United States led an effort to obtain and did obtain a United Nations Security Council embargo and blockade against that country due to the existence of a military dictatorship in power less than 3 years. 26. United Nations Security Council Resolution 940 of July 31, 1994, subsequently authorized the use of "all necessary means" to restore the "democratically elected government of Haiti," and the democratically elected government of Haiti was restored to power on October 15, 1994. 27. The Cuban people deserve to be assisted in a decisive manner to end the tyranny that has oppressed them for 36 years and the continued failure to do so constitutes ethically improper conduct by the international community. 28. For the past 36 years, the Cuban government has posed and continues to pose a national security threat to the United States."

72. 31 C.F.R. Sec. 515.204.

73. North Korea, 31 C.F.R. Sec. 500.201(d)(1); Cambodia, 31 C.F.R. Sec. 500.201(d)(2); North Vietnam, 31 C.F.R. Sec. 500.201(d)(3); South Vietnam, 31 C.F.R. Sec. 500.201(d)(4) (now being repealed.)

duced in Cuba are not reexported to the United States. It was restated again in 1991.<sup>74</sup>

House and Senate versions vary in terms of the specific provisions, but do no more than add to the existing enforcement apparatus. Section 109 of H.R. 927 merely provides the Secretary of the Treasury with an additional means of ensuring compliance with pre-existing U.S. laws,<sup>75</sup> by allowing him to require certificates of origin and providing penalties if they are fraudulent. Section 110 of S. 381 prohibits the increase of the absolute quantity of sugar imported to the U.S. above that allocated in 1995 for any country that imports sugar from Cuba. Mindful of our GATT obligations, the Senate draft emphasizes that “Nothing in this provision shall abrogate or otherwise impair U.S. obligations under GATT to allow the minimum of 1,139,195 metric tons of sugar per year to enter the United States.”

**MYTH: HR 927 SECTION 401 CONTAINS LANGUAGE WHICH WILL PREVENT CANADIAN AND MEXICAN BUSINESS PERSONS AND THEIR FAMILIES FROM ENTERING OUR COUNTRY IN VIOLATION OF OUR TREATY OBLIGATIONS UNDER NAFTA, AND THUS BRAND US AS AN UNRELIABLE TRADING PARTNER**

**Reality**

- Section 401 merely excludes from this country only those senior corporate executives, controlling shareholders, or other persons who knowingly and intentionally traffic in property of United States citizens which was illegally confiscated by Cuba.
- It is narrowly tailored, authorizes exceptions where in the national interest and is permissible under language in NAFTA which creates an exception to its provisions for actions necessary to our security interests and the enforcement of the Cuban embargo.

**Discussion**

The sponsors of Helms-Burton seek to supplement American foreign policy as expressed in the Cuban embargo. The twin purposes of the embargo are to force Cuba to restore lands and property unlawfully confiscated from United States citizens and to compel Cuba's return to the family of nations in the Western Hemisphere as a democracy which no longer exports aggression or oppresses its population.

To support this effort, section 401 of H.R. 927 complements Title III's focus on the problem of third party traffickers in illegally confiscated property. Where Title III provides U.S. citizens with access to Federal District Courts to remedy trafficking, section 401 and its Senate equivalent require that the Secretary of State shall exclude from entry into the United States, any alien who has confiscated property, the claim of which is owned by a U.S. national, or who knowingly and intentionally traffics in confiscated property after the enactment of the legislation. Excluded aliens include corporate officers, principals, controlling shareholders and family and agents. The Secretary is authorized to make exceptions, on a case-by-case basis, when in the interest of the United States. The section is to be enforced consistent with U.S. treaty obligations. In the Senate, comparable language appears in an amendment to the Foreign Relations Revitalization Act of 1995.

Some claim that this restriction may bar Canadian and Mexican business persons from access to the United States and that this would constitute a violation of the United States' obligations under the NAFTA treaty. In fact, language in NAFTA allows for the proposed restrictions.

NAFTA does require that its participants provide entry visas to business persons for purposes of developing economic opportunities. Chapter 16 of NAFTA provides that a business person who resides in a contracting party must be afforded a temporary visa to

74. The Cuban Democracy Act, Pub.L.No. 102-484, Title XVII, 106 Stat. 2575 (1992).

75. Section 515.204 of title 31 C.F.R. prohibits the importation of, or dealings in, goods that are of Cuban origin. Section 902(c) of the Food Security Act of 1985 requires verification from those countries which are net importers of sugar that no sugar destined for the U.S. is of Cuban origin.

enter into the territory of another contracting party. However, this provision recognizes that other concerns may restrict or prevent entry and thus requires entry only if the person seeking a visa “otherwise qualifies for entry under applicable measures relating to public health and safety [or] national security . . . .”<sup>76</sup> It also allows entry to be conditioned upon the business person otherwise complying with existing immigration measures applicable to temporary entry.<sup>77</sup>

As we have seen elsewhere, the “national security” exception to our treaty obligations is, under international law, a valid treaty authority for our initiation of boycotts and secondary boycotts. Certainly, it is also authority to prevent the entry into the United States of persons who have violated our laws.

**MYTH: TITLE III WILL COMPLICATE A FUTURE SETTLEMENT WITH CUBA OF CERTIFIED CLAIMS**

**Reality**

- To the contrary, it is the Cuban Government’s policy of selling and/or transferring confiscated properties to foreign investors that *is complicating* any attempt to return the properties to their original owners even after Castro is no longer in power.
- This consequence of Cuban Government conduct is recognized by the State Department in its periodic “Buyer Beware” cable to foreign governments: “Cuba may be offering equity in Cuban factories and other assets, including properties expropriated from U.S. nationals, in order to obtain hard currency, ... *Transfer of these properties to third parties would complicate any attempt to return them to their original owners* [emphasis added].”

- Having an added deterrent, like a private right of action, will not complicate resolution. Rather, it helps, as it will cause a would-be investor to give second thoughts about investing in Cuba in confiscated American properties or activities derived from confiscated properties.
- Just by its introduction, the Helms-Dole bill has caused foreign investors to re-assess investing in Cuba:
  - “Foreign investments in Cuba are slowing because of concerns over a bill in the U.S. Congress that would tighten the U.S. trade embargo...” [*Miami Herald*, June 23, 1995].
  - “One thing seems clear already. The chilling specter of lawyers enforcing the embargo has led more than one foreign investor to conclude that investing in Cuba nueva may not be worth the risk of having their U.S. assets attacked by companies that did business [i.e., that have claims to confiscated properties] on the island”. [*National Law Journal*, July 10, 1995]
  - The right of action will help reduce the pool of certified claimants eligible for espousal by providing an offset for recoveries against third party traffickers. This will make a future settlement more likely and easier to achieve by lightening the burden on any post-Castro government, and increasing the *pro rata* share of the certified claimants whose cases remain unsettled.

**Discussion**

Title III provides United States citizens possessing claims for illegal confiscation of their property by Cuba in the 1960’s to obtain a remedy in Federal Court from third parties who enter into business

76. NAFTA art. 1603(1).

77. *Id.* at Annex 1603(A)(1). For the United States, “existing immigration measures” are defined as the immigration laws contained in Section 100(a) (15)(B) of the Immigration and Nationality Act (“INA”), 1952, as amended. *Id.* at Annex 1603 (A)(3). Pursuant to the INA, an alien may be excluded from the United States if the Secretary of State believes, based on reasonable grounds, that his/her entry or proposed activity in the United States would have potentially serious adverse foreign policy consequences for the United States. INA Section 212(a)(3)(C), 8 U.S.C. Section 1182(a)(3)(C).

ventures with Cuba and take possession of or traffick in what is essentially stolen property. Obviously, these parties enter into such ventures in order to profit at the expense of our citizens. Clearly, it is appropriate, where we can, for us to protect our citizens against the consequences of such behavior. And, as is the case with all similar legislation, it is also the intent of the drafters of the legislation that Title III serve as a deterrent to this conduct. Indeed, there is some indication that the proposed legislation is already slowing investment by third parties in such projects.

Critics of Title III argue that the litigation which may result from Title III will forestall Cuba's ability to provide restitution in a timely manner. Further, claiming that Cuba's bill for its unlawful confiscations may reach 100 billion dollars at present day values with interest, they argue that the Title III litigation may deplete Cuba's minimal resources for payment through a negotiated espousal of the claims certified by the Cuban Claims Commission in the 1960's.

Nothing could be further from the truth. A lump sum settlement by espousal is unworkable now, with-

out Title III. Cuba does not have any cash assets to make a meaningful payment. International law presently favors either full compensation or restitution. An examination of the international law standards governing compensation in cases of unlawful expropriation<sup>78</sup> leads to the conclusion that a future government would have serious difficulty meeting those standards monetarily<sup>79</sup>. Cuba's present inability to fulfill its obligations under existing agreements, such as that with Spain, is additional evidence that an adequate settlement of certified claims will have to involve restitution in a form other than money.<sup>80</sup>

Title III should have the effect of preserving the confiscated properties from exploitation, complex title arguments, and dissipation. For those properties for which espousal nonetheless will be considered, Title III will make a successful negotiation more likely, as it will help reduce the number of certified claimants. Its election of remedies provision requires that claimants who prevail in litigation against third party traffickers and satisfy their claim financially against solvent defendants shall be eliminated from the espousal class.<sup>81</sup>

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78. Lawful expropriation must be for a public purpose, non-discriminatory, in accordance with due process of law, and on payment of compensation equal to the fair market value of the property. NAFTA, Article 1110, Expropriation and Compensation. Cuba's confiscations of the property of registered claimants were discriminatory. Law No. 851 confiscated all property owned by U.S. citizens. See Resolution No. 1, *Gaceta Oficial* (August 6, 1960), p.1.

79. There is a growing consensus that the remedy for unlawful confiscations is full compensation or restitution. See *Texas Overseas Petroleum Co. & California Asiatic Oil Co. v Libyan Arab Republic*, 17 ILM 1 (1978); *Amoco Int'l Fin. Corp.*, 15 Iran-U.S. C.T.R. 189 (1987 II). See also Norton, "A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation," 85 *American Journal of International Law* 474 at 489 (July 1991). Some of the recent settlements made by the U.S. with other countries have obtained full compensation, though the agreed upon rate varies. Registered claimants obtained 100% compensation and 89% interest in the settlement with Vietnam. See transcript of additional questions submitted for the record to Under Secretary Peter Tarnoff by Senator Helms, Senate Foreign Relations Committee, Western Hemisphere Subcommittee, May 21, 1995, question 16, p. 2. This presents a striking contrast with the settlement between the U.S. and China, which resulted in a recovery of approximately 40 cents on the dollar, and led to the case of *Shanghai Power*. See "Agreement between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims," May 11, 1979, 18 *International Legal Materials* 551 (1979).

80. The Cuban settlement with Spain provides ample evidence of this. Although they reached an agreement in 1986 which would allow recovery of about 12 cents on the dollar to be paid over a fifteen year period, they have effectively defaulted. Barbara Ehrich Locke, Esq.: "Resolution of U.S. Claims Against Cuba, Comparative Models," p. 4. Paper presented at "The Evolving Cuban Marketplace: What Every U.S. Company Needs to Know," May 5, 1994, Washington D.C., sponsored by Holland and Knight. U.S. claims amount to \$1.8 billion in 1960 dollars, \$1.6 of which are corporate claims. See *Final Report of the Cuban Claims Program*, Foreign Claims Settlement Commission of the United States, 414 (1972). It is estimated that value of blocked Cuban assets in this country is no more than \$149 million. Stanley J. Glod, "Potential Approaches to the Resolution of U.S. Claims," p. 3 in CTW 95.

81. H.R. 927, 104th Cong., 1st Sess. § 302(e) (1995); S. 908, 104th Cong., 1st Sess. § 2302(1) (1995).

In any event, Title III's impact on settlement of the property issue with Cuba, by encouraging restitution, does not create a new issue. Restitution would have played a large part in the settlement of certified claims under existing United States law. The Foreign Assistance Act mandates that no government of Cuba will be eligible for U.S. aid until "such a government has taken appropriate steps according to international law standards to return to United States citizens ... or to provide equitable compensation to such citizens and entities for property taken ... by the Government of Cuba."<sup>82</sup>

Restitution is certainly then the only viable option for satisfaction of the certified claims. Cuban Government's transfer or waste of the illegally confiscated properties will make any restitution program more difficult. The State Department has recognized this in its "Buyer Beware" cables: "Transfer of these properties would complicate any attempts to return them to their original owners."<sup>83</sup>

Discouraging third parties from trafficking in these properties protects the interests of certified claimants and increases the likelihood of a settlement by preserving the possibility of restitution.

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82. 22 U.S.C.A. 2370 (2)

83. Warren Christopher, "Buyer Beware: Cuba May be Selling American Property," Cable to all United States Diplomatic and Consular Posts, September 9, 1993; State Department Action Cable re Unilever joint venture with the Cuban Government-owned firm, Suchel, for the marketing and manufacture of Unilever products in Cuba; State Department cable re Unilever investment involving expropriated U.S. property in Cuba, Ref. (A) 94 STATE 175951; Lawrence C. Eagleburger, "Buyer Beware: Cuba May be Selling American Property," Ref. A (91 Rome 18558) January 1991. The cables' reference to "original" owners is actually inappropriate. In fact, the ultimate reality is that these "original" owners remain the *only owners* recognized by international law.