

COMMENT

THE HELMS-BURTON ACT: THE EFFECT OF INTERNATIONAL LAW ON DOMESTIC IMPLEMENTATION

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INTRODUCTION

Congress might be passing statutes that are against the law. The Helms-Burton Act¹ ("the Act") and other recent sanction legislation² aimed at isolating rogue and terrorist-supporting nations³ might

1. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 1996 U.S.C.A.N. (110 Stat.) 785 (to be codified at 22 U.S.C. §§ 6021-6091, 16431 and 28 U.S.C. § 1611) [hereinafter Helms-Burton Act].

2. Another recent example of this kind of legislation is the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 1996 U.S.C.A.N. (110 Stat.) 1541 (to be codified at 50 U.S.C. § 1701).

3. When describing nations, the term "rogue" entails more than evil. The Soviet Union was the "evil empire," but it was not a rogue state. See Ronald Reagan, Remarks at the Annual Convention of the National Association of Evangelicals (Mar. 8, 1983), in PUB. PAPERS 356, 363 ("When they [in the Soviet Union] preach the supremacy of the state, declare its omnipotence over individual man, and predict its eventual domination of all peoples on the Earth, they are the focus of evil in the modern world."). Rather, the distinguishing quality of a rogue nation appears to be its isolation from a coalition of like-minded allies. A rogue nation is the renegade that spurns international norms. See *Princz v. F.R.G.*, 813 F. Supp. 22, 26 (D.D.C. 1992) (declaring Nazi Germany a rogue nation that "neither recognized nor respected . . . international law"); see also Stephen S. Rosenfeld, *The Menace of Rogue States*, WASH. POST, June 7, 1996, at A23 (describing typical rogue as "single unruly state"). Former U.S. Ambassador to the United Nations Madeleine Albright's classification of the post-communist world order reinforces this distinction: "good citizens" are countries with democratic values and free-markets; "emerging democracies" include the former communist countries that are building democratic institutions; "failed states" are administered by the world community; and "rogues" act contrary to the international system of order. See Thomas L. Friedman, *Cold War Without End*, N.Y. TIMES, Aug. 22, 1993, § 6 (Magazine), at 28. Some commentators suggest that the term "rogue" is vacuous nomenclature engineered by the Department of Defense for its own self-preservation. See MICHAEL KLARE, ROGUE STATES AND NUCLEAR OUTLAWS: AMERICA'S SEARCH FOR A NEW FOREIGN POLICY 3-34 (1995) (explaining Pentagon's proposals for justifying defense spending in post-communist world); Friedman, *supra*, at 28 (describing U.S. government officials accustomed to communist threat as searching for new guiding principles).

violate the United States' legal obligations established under customary international law and international agreements. By enacting legislation that impinges on these international obligations, Congress may expose the United States to liability in international tribunals⁴ and may allow U.S. courts to undermine congressional statutory intentions. The latter danger arises because U.S. courts have used both customary international norms⁵ and international agreements⁶ to define the reach of domestic statutes. For example, courts may limit the effect of these "illegal"⁷ laws by construing them in a way

Countries included in the rogue category, and the characteristics earning them that designation, include: Pol Pot's Cambodia and Idi Amin's Uganda, for their "virtual genocide," see Editorial, *Rogue Regime*, WASH. POST, Apr. 3, 1979, at A18; Castro's Cuba, for its attack on a Bahamian patrol boat, see Editorial, *Piracy*, WASH. POST, May 13, 1980, at A16; Muammar Qaddafi's Libya, for instigating unrest, supporting international terrorism, and killing political foes, see Editorial, *The Nastiest Regime Going*, WASH. POST, Aug. 1, 1980, at A12; China, for its interrogation of foreign journalists, see Editorial, *Incident in Beijing*, WASH. POST, May 19, 1992, at A18; and Iraq, for its conduct as an aggressor state, see Editorial, *Half a Policy on Iraq*, N.Y. TIMES, Nov. 28, 1994, at A16.

4. Such liability is the result of settled international legal norms denying the supremacy of domestic law over international obligations. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(b) (1986) [hereinafter RESTATEMENT (THIRD)]. International tribunals that may hear claims against the United States relating to the Helms-Burton Act include the World Trade Organization ("WTO") and a panel of the North American Free Trade Agreement ("NAFTA"). Canada and Mexico have initiated the dispute resolution process under NAFTA. See *NAFTA Designates Confer on Complaint Against Helms-Burton Under Chapter 20*, 13 Int'l Trade Rep. (BNA) 1093, 1093 (July 3, 1996) (reporting teleconference between designates of trade ministers from each country as part of dispute resolution process in Chapter 20 of NAFTA). Furthermore, the European Union ("EU") has asked the WTO to name panelists to hear the EU's complaint against the Helms-Burton Act. See *EU Proposes Naming Panel to Handle WTO Complaint Against Helms-Burton*, 14 Int'l Trade Rep. (BNA) 230, 230 (Feb. 5, 1997). The United States recently indicated that it would not participate in the WTO panel if it is appointed. See Paul Blustein & Anne Swardson, *U.S. Vows to Boycott WTO Panel*, WASH. POST, Feb. 21, 1997, at A1.

5. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (interpreting labor relations statute so as not to violate customary sea law); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (determining applicability of statute based on customary sea law); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (referring to international doctrine of diplomatic protection to limit application of Nonintercourse Act). See generally *Filariga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (using norms of international law to define content of Alien Tort Statute).

6. See *Weinberger v. Rossi*, 456 U.S. 25, 32-33 (1982) (construing employment discrimination statute so as not to abrogate provisions of Military Base Agreement between United States and Philippines).

7. "Illegal" only in the sense of international law. There is no constitutional limitation on congressional authority to pass laws that breach international law. See *Reid v. Covert*, 354 U.S. 1, 5, 13 (1957) (stating that although international law reigns supreme over federal law, Congress is not bound to acquiesce to treaties or other instruments of international law; rather, Congress is limited only by adherence to U.S. Constitution). Nevertheless, as discussed throughout this Comment, constructions of domestic statutes that would violate international law are subordinated by U.S. courts to other constructions that reconcile the statutes with international norms. See *infra* notes 38-44 and accompanying text (describing principle of reconciliation articulated in *Charming Betsy*); see also RESTATEMENT (THIRD), *supra* note 4, § 155(a) (discussing relationship between domestic law and international law when they conflict).

that avoids inconsistencies between domestic and international law.⁸ This Comment discusses how international law⁹ and related principles of statutory construction may affect the implementation of the Helms-Burton Act.

Congress recently enacted, and President Clinton signed, the Helms-Burton Act, officially known as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.¹⁰ The Act allows any "person"¹¹ to be sued for "trafficking" in confiscated property¹² belonging to U.S. nationals.¹³ Businesses deriving any benefit from confiscated property in Cuba thus are exposed to large damage claims.¹⁴ Furthermore, the Act instructs the State Department to deny visas to aliens who "traffic" or who are associated with "traffick-

8. See *infra* notes 74-81 and accompanying text (discussing conflict between international and domestic law and tendency of courts to resolve contradiction through statutory construction that favors international law).

9. See *infra* note 26 (explaining guidelines for international law principles used in this Comment).

10. Pub. L. No. 104-114, 1996 U.S.C.C.A.N. (110 Stat.) 785 (to be codified at 22 U.S.C. §§ 6021-6091, 16431 and 28 U.S.C. § 1611). The House Bill, H.R. 927, passed the House of Representatives on September 21, 1995, by a vote of 294-130. See 141 CONG. REC. H9399 (daily ed. Sept. 21, 1995). The Senate passed H.R. 927 on October 19, 1995, by a vote of 74-24. See *id.* at S15,323 (daily ed. Oct. 19, 1995). A conference committee was appointed by the House and Senate. See *id.* at H11,807 (daily ed. Nov. 7, 1995); *id.* at S18,639 (daily ed. Dec. 14, 1995). The Senate agreed to the conference report on March 5, 1996, by a vote of 74-22. See 142 CONG. REC. S1511 (daily ed. Mar. 5, 1996). The House agreed to the conference report by a vote of 336-86. See *id.* at H1749 (daily ed. Mar. 6, 1996). The bill was presented and signed by the President on March 12, 1996. See *id.* at H2121 (daily ed. Mar. 12, 1996); *id.* at D192. For discussion of the congressional votes, see John E. Yang, *Cuba Sanctions Bill Clears Hill, Goes to Clinton*, WASH. POST, Mar. 7, 1996, at A30; John E. Yang, *Senate Passes Bill to Discourage Investment in Cuba*, WASH. POST, Mar. 6, 1996, at A4.

As indicated, the official name of the Act is the Cuba Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("libertad" is Spanish for "liberty"), but this Comment will refer to the Act by its popular name, the Helms-Burton Act.

11. The Act defines "person" broadly to include "any person or entity, including any agency or instrumentality of a foreign state." Helms-Burton Act § 4(11), 1996 U.S.C.C.A.N. (110 Stat.) at 790 (to be codified at 22 U.S.C. § 6023(1)).

12. The Act makes liable a person who "traffics" in confiscated property; that is, one who knowingly and intentionally—

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,

(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

Id. § 4(13), 1996 U.S.C.C.A.N. (110 Stat.) at 790-91 (to be codified at 22 U.S.C. § 6023(13)).

13. The provisions creating a right of action are found in Title III of the Act. See *id.* §§ 301-306, 1996 U.S.C.C.A.N. (110 Stat.) at 814-22 (to be codified at 22 U.S.C. §§ 6081-6085). The intricacies of this provision are discussed *infra* Part I.B.

14. See Helms-Burton Act § 302(a)(3), 1996 U.S.C.C.A.N. (110 Stat.) at 815-16 (to be codified at 22 U.S.C. § 6082(a)(3)).

ers.”¹⁵ The United States’ closest trading partners,¹⁶ especially those countries with significant financial interests in Cuba,¹⁷ fear that

15. Title IV of the Act covers the exclusion of aliens who have confiscated property or trafficked in confiscated property. “Traffic,” as used in Title IV, has a different meaning than that found in Title III. Title IV defines “traffic” as follows:

[A] person “traffics” in confiscated property if that person knowingly and intentionally—

(i) (I) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property,

(II) purchases, receives, obtains control of, or otherwise acquires confiscated property, or

(III) improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after the date of the enactment of this Act to manage, lease, possess, use, or hold an interest in confiscated property

(ii) enters into a commercial arrangement using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,

without the authorization of any United States national who holds a claim to the property.

Id. § 401(b)(2), 1996 U.S.C.C.A.N. (110 Stat.) at 823-24 (to be codified at 22 U.S.C. § 6091(b)(2)).

The conference report notes that this definition is narrower than the definition in Title III. The committee attempted to target acts of trafficking that began on or after the date of enactment in Title IV. *See* H.R. CONF. REP. NO. 104-468, at 66 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 581. Title IV “trafficking” also excludes the sale or abandonment of confiscated property in order to avoid deterring divestment. *See id.*

This provision has been executed by the State Department. *See* Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30,655 (1996). Furthermore, pursuant to these guidelines, the State Department has notified executives from two foreign companies that they will be barred from entering the United States. *See Mexican Firm Grupo Domos Found in Violation of Helms-Burton*, 13 Int’l Trade Rep. (BNA) 1346, 1346 (Aug. 21, 1996) (describing State Department’s letters to ten executives of Mexican telecommunications firm); *State Dept. Tells Canadian Firm of Visa Denials Under Helms-Burton*, 13 Int’l Trade Rep. (BNA) 1160, 1160 (July 17, 1996) (reporting State Department’s announcement that it notified principal shareholders and executives of Canadian firm, probably Sheritt International Corp., that visas to enter United States would be denied).

16. The top ten U.S. trading partners in 1996, determined by the value in billions of U.S. dollars of imports and exports combined, are: Canada (289.05), Japan (182.83), Mexico (130.02), China (63.50), Germany (62.47), United Kingdom (59.85), South Korea (49.27), Taiwan (48.36), Singapore (37.06), and France (33.08). *See* U.S. Census Bureau, *Top Ten Countries with Which the U.S. Trades* (visited Mar. 1, 1997) <<http://www.census.gov/foreign-trade/www/balance.html>>.

17. Spain, Canada, and Mexico lead the investment drive into Cuba in the 1990s. *See* Pascal Fletcher & Stephen Fidler, *Move May Not Deter Many Foreign Investors*, FIN. TIMES, Mar. 7, 1996, at 4 (discussing countries with substantial financial interests in Cuba). Companies in Spain, France, and the United Kingdom have large operations in Cuba and, thus, may be harmed by the Act. *See id.*; *see also* Howard Schneider, *Canada and Cuba: Booming Partners*, WASH. POST, Oct. 20, 1996, at A1 (calling Canada Cuba’s largest trading partner). The European Parliament voted on January 18, 1996, to support closer economic ties between Cuba and the European Union (“EU”). *See Parliament Approves Closer Ties with Cuba*, 13 Int’l Trade Rep. (BNA) 4, 4 (Jan. 24, 1996).

the Act may be applied broadly against foreign companies and have criticized the Act as violative of U.S. international legal obligations.¹⁸

This Comment examines the domestic implementation of the Act in light of its potential breaches of international customary norms or treaty obligations.¹⁹ This issue is important because if the Act is enforced against foreign companies benefitting from confiscated property in Cuba, U.S. nationals with claims to that property may bring suit in domestic courts against those foreign entities.²⁰ In these cases, the defendant likely will assert that the Helms-Burton Act should be strictly construed not to apply to foreign entities so that it does not violate U.S. international obligations. Federal courts then will have to examine the questions addressed in this Comment relating to: the impact of U.S. international legal obligations on domestic statutes;²¹ rules of construction for extraterritorial application of U.S. laws;²² the extent to which Congress considered possible international legal challenges to the Act;²³ and the possibility of

18. See *European Commission Calls Cuba Bill "Clear" Violation of International Law*, 13 Int'l Trade Rep. (BNA) 368, 368 (Mar. 6, 1996) (reporting harsh criticism of Act from U.S. allies); see also Victoria Brittain, *Britain Defies US Sanctions on Cuba*, GUARDIAN, Mar. 16, 1996, at 11 (describing resolution passed by European Parliament denouncing Helms-Burton); Bruce Clark, *Rifkind Hits at Cuba Trade Curb*, FIN. TIMES, May 30, 1996, at 4 (summarizing British foreign secretary's statement that "US was threatening western unity and hurting its own interests by penalizing European companies that trade with Cuba"); Guy de Jonquieres, *Brittan in Fierce Attack on US Trade Policies*, FIN. TIMES, May 22, 1996, at 4 (interpreting statements by Europe's trade commissioner as suggesting that Act "set back global liberalization and jeopardized the multilateral trade system"); Jonathan Freedland, *Cuba Trade Ban Angers UK*, GUARDIAN, Mar. 13, 1996, at 2 (relating anger raised by Act in Britain, Canada, France, and European Commission); *Italy Condemns US Law on Cuba*, FIN. TIMES, June 20, 1996, at 8 (reporting "Europe's strongest warning against the Helms-Burton law" from Italian foreign minister Lamberto Dini); Zecchini Laurent, *Le Congres americain renforce l'embargo contre Cuba; La Commission de Bruxelles et le Canada protestent contre ces mesures de retorsion commerciale*, LE MONDE, Mar. 8, 1996, at back page (describing vigorous protest from European Commission and Canadian government); Berman Simon et al., *Cuba Embargoes Spark Protests*, FIN. TIMES, Mar. 2, 1996, at 3 (describing Canadian and Mexican objections to Act). The Act also has been criticized by Russia and Latin America. See Pascal Fletcher, *Russia Vows to Defy US on Links with Havana*, FIN. TIMES, May 24, 1996, at 8; Larry Rohter, *Latin American Nations Rebut U.S. for the Embargo on Cuba*, N.Y. TIMES, June 6, 1996, at A6.

19. Whether the Act violates international law is not the focus of this Comment; that task ultimately is delegated to the judicial bodies authorized to hear claims brought in the appropriate fora. One such forum under the North American Free Trade Agreement is discussed in Articles 2003-2019 of that agreement. See North American Free Trade Agreement arts. 2003-2019, 32 I.L.M. 612, 694-98 [hereinafter NAFTA] (establishing guidelines for resolution of disputes under NAFTA and encouraging consultation of the parties in an effort to resolve disputes or to agree on forum for dispute resolution). United States courts also are empowered to determine and interpret international law. See generally RESTATEMENT (THIRD), *supra* note 4, § 113(1).

20. Title III of the Act creates this cause of action. See Helms-Burton Act §§ 301-306, 1996 U.S.C.A.N. (110 Stat.) at 814-22 (to be codified at 22 U.S.C. §§ 6081-6085).

21. See *infra* Parts I.A. & II.C.

22. See *infra* Part II.C.

23. See *infra* note 235.

narrow interpretation of the statute to reconcile it with international law.²⁴ Because causes of action may be brought under the Act as early as July 1997,²⁵ these questions will be pertinent to practical aspects of real cases.

The significance of the issues raised by the Act transcends any particular case that may be brought under it. Because the Helms-Burton Act impinges on international agreements, it is an example of how foreign policy sanction legislation challenges U.S. courts to juggle the demands made by Congress' legislative intent and those made by Congress' prior obligations under international agreements. Absent clear language indicating Congress' intention to abrogate earlier agreements, courts must construe such legislation carefully to determine the effects of the statute vis-à-vis the meaning of the agreements. In that capacity, courts are at risk of either misreading U.S. obligations or of misinterpreting congressional intent.

Part I of this Comment provides background relating to international law and the Helms-Burton Act. It briefly identifies the sources of international legal norms and discusses their impact on U.S. law. Part I also explains each section of the Helms-Burton Act, including the complex provisions in Title III that create liability for "trafficking" in confiscated property.

Sections A and B of Part II discuss how Title III of the Helms-Burton Act may violate U.S. international obligations. These sections present the strongest arguments that the Act is contrary to international law, highlighting the principles of statutory construction requiring U.S. courts to reconcile the Act with international norms.²⁶

24. See *infra* Part II.C.

25. President Clinton has exercised his authority under the Act twice to suspend for six months the right to bring an action under Title III of the Act. See Helms-Burton Act, Pub. L. No. 104-114, § 306(c), 1996 U.S.C.C.A.N. (110 Stat.) 785, 821-22 (1996) (to be codified at 22 U.S.C. § 6085(c)); see also *infra* note 134 (citing other sources related to President's decision). The President has indicated that he will continue to utilize this provision every six months for the indefinite future. See Steven Lee Myers, *One Key Element in Anti-Cuba Law Postponed Again*, N.Y. TIMES, Jan. 4, 1997, at A6 (reporting indefinite suspension).

26. The courts may use various sources to establish international law principles, such as those restricting extraterritorial application of a nation's laws. See *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (reviewing sources that courts should consult to ascertain norms of customary international law); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-85 (2d Cir. 1980) (consulting general usages, practices, customs of nations, judicial opinions, works of jurists, United Nations charter, United Nations declarations, and international treaties and accords as sources of customary international law). For the purposes of this Comment, customary international norms will be guided by the principles established in the *Restatement (Third)*. United States courts often have cited to the *Restatement (Third)* as persuasive authority on international legal principles. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (citing RESTATEMENT (THIRD), *supra* note 4, § 415(g) for proposition that legal act committed in foreign state still can be subject to U.S. antitrust laws, even when foreign state encourages act in question); *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (discussing RESTATEMENT (THIRD), *supra* note 4, § 451, which

Section C of Part II provides a hypothetical case under the Act and proposes three alternative judicial holdings in light of the issues previously discussed.

Part III of this Comment recommends ways in which Congress can avoid the risk that courts will narrowly construe statutes in ways that may conflict with congressional intentions. The primary recommendation is that lawmakers recognize the extent of both their legal authority to shape international law through international agreements and their legal obligation to respect the international legal principles implemented as U.S. law. Specifically, Part III advocates the use of statutory language included in other U.S. legislation that overtly recognizes international legal principles as controlling the construction of such legislation. Similarly, it suggests that Congress should express clearly the meaning of its legislation vis-à-vis international law. These suggestions are intended to help avoid the legal quagmire courts face when construing statutes that potentially violate international law despite congressional assertions to the contrary.

I. BACKGROUND

A. *Impact of International Law on Domestic Statutes*

1. *Customary international law and its impact on U.S. domestic law*

Customary international law has been established by the practices of states in their relations with one another.²⁷ It may be understood

explains state sovereign immunity and concludes that such immunity is inapplicable when activity in question can be carried out by private actor); *Kadic*, 70 F.3d at 240 (observing that RESTATEMENT (THIRD), *supra* note 4, pt. 11, notes violations of international law that are of universal concern, "such as piracy, war crimes, and genocide"); *Neely v. Club Med Management Servs., Inc.*, 63 F.3d 166, 183 (3d Cir. 1995) (stating that court would rely specifically on *Restatement (Third)* for guidance regarding international law principles); *Matter of Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995) (relying on *Restatement (Third)* for evidence of exception to "noninquiry rule"), *cert. denied*, 116 S. Ct. 2558 (1996); *Yapp v. Reno*, 26 F.3d 1562, 1567 (11th Cir. 1994) (citing *Restatement (Third)* principles concerning treaty interpretation). Nevertheless, courts are not bound by the *Restatement (Third)*'s conclusions about international legal principles. In light of possible variations in international norms relied on by U.S. courts, it should be remembered that the point of this Comment is not to establish definitively that the Helms-Burton Act violates international law; rather, it is to present arguments that the Act may violate international law and then to examine how domestic courts may address these violations. For this reason, Sections A and B of Part II may appear conclusory in nature, but they are conclusory with a purpose.

27. See generally RESTATEMENT (THIRD), *supra* note 4, § 102(2) (discussing consistent state practice constituting international law); IAN BROWNLIE, INTERNATIONAL LAW 4 (4th ed. 1990) (setting forth customs as primary source of international law); STATUTE OF THE INTERNATIONAL COURT OF JUSTICES art. 38 (declaring custom as legitimate legal source of international law), *reprinted in* RESTATEMENT (THIRD), *supra* note 4, § 102 rep. n. 1. As used in this Comment, the term "state" is used synonymously with "nation."

as a form of common law of international conduct.²⁸ As one source of international law,²⁹ customary norms form a substantive part of U.S. law.³⁰ For example, U.S. courts have applied customary international law to prevent the seizure of fishing boats during war-time,³¹ to define rights granted under the Alien Tort Act,³² and to construe domestic statutes.³³

Despite its traditional role, the status of the authority of international customary law in U.S. domestic fora may be challenged. First, much of customary international law does not regulate conduct in the United States; rather, the activity regulated is that of the United States in its relation with other countries.³⁴ Second, international customary law must yield to other sources of U.S. law, such as the Constitution³⁵ and federal legislation.³⁶ Finally, courts may be hesitant to

28. See RESTATEMENT (THIRD), *supra* note 4, § 111 cmt. d (likening customary practice of states to common law in that both are thought to establish legal norms).

29. See *id.* § 102(1)(a) (identifying custom as a source of international law). According to the American Law Institute, other sources of international law are international agreements and "general principles common to the major legal systems of the world." *Id.* § 102(1)(b)-(c). In addition to these sources, article 38(1) of the Statute of the International Court of Justice states that the court "shall apply . . . judicial decisions and teachings of the most highly qualified publicists . . . as subsidiary means for the determination of rules of law." STATUTE OF THE INTERNATIONAL COURT OF JUSTICES art. 38(1), reprinted in RESTATEMENT (THIRD), *supra* note 4, § 102 rep. n. 1. The U.S. Supreme Court first discussed the appropriate sources of international law in *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820). The Court recognized the works of jurists, general usage and practice, and judicial decisions as authoritative sources. *Id.* at 160-61. For further discussion of the ascertainment of international law by the U.S. judiciary, see *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980).

30. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (discussing evolution of customary norms of international law and declaring that "[i]nternational law is part of our law").

31. See *id.* at 714 (declaring unlawful seizure of fishing vessel during military action in Cuba).

32. See *Filartiga*, 630 F.2d at 884 (finding torture a cognizable claim under Alien Tort Statute).

33. See, e.g., *Weinberger v. Rossi*, 456 U.S. 25, 32-33 (1982) (construing "treaty" as used in employment discrimination statute as not limited to Article II treaties under U.S. Constitution so that international agreement with Philippines will not be breached); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 18-21 (1963) (interpreting National Labor Relations Act as not applying to maritime operations of foreign flagships in part so as to reconcile statute with "well-established rule of international law"); *Lauritzen v. Larsen*, 345 U.S. 571, 576-83 (1953) (limiting applicability of "any seaman" language in domestic statute in light of international law); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (establishing that resort to statutory construction in conflict with international law is improper "if any other possible construction remains"). See generally Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (presenting comprehensive study of impact of international law on domestic statutory construction).

34. See RESTATEMENT (THIRD), *supra* note 4, § 111 cmt. c (noting that customary international law often is viewed by domestic courts as lacking quality of binding law because it regulates interests and activities outside United States).

35. See *id.* § 111 cmt. a (declaring supremacy of Constitution over international law for purposes of U.S. law). Congress has entered numerous reservations to treaties stipulating their subordination to the U.S. Constitution. For example, this kind of reservation was submitted upon ratification of the Genocide Convention. It reads: "[N]othing in the Convention requires

rely on customary law as a rule of decision because of the nonformal character of customary law, the difficulty in ascertaining when and if it has come into effect, and doubts about the justification of applying coercive international rules that lack domestic political authority.³⁷

The use of international customary law by U.S. courts as a form of statutory construction was initiated by Chief Justice John Marshall's pronouncement in *Murray v. The Schooner Charming Betsy*.³⁸ According to the Chief Justice, domestic legislation never should "be construed to violate the law of nations if any other possible construction remains."³⁹ The *Charming Betsy* principle has become a canon of statutory construction.⁴⁰ When courts determine that international customary law is part of the law of the United States,⁴¹ it is presumed that absent clear evidence to the contrary, subsequent domestic statutes comply with that law.⁴² Therefore, when an apparent conflict between international customary law and a domestic statute exists, courts attempt to reconcile the two.⁴³ This mode of

or authorizes legislation or other action by the United States prohibited by the Constitution of the United States as interpreted by the United States." COVEY J. OLIVER ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 761 (4th ed. 1995).

36. See *Paquete Habana*, 175 U.S. at 686 (resorting to customary international law only after finding no legislative act that would guide decision); *Shroeder v. Bissel*, 5 F.2d 838, 842 (D. Conn. 1925) (holding that customary international law must bend to Congress' will); *United States ex rel. Pfefer v. Bell*, 248 F. 992, 995 (E.D.N.Y. 1918) (declaring that "the rules of international law . . . are subject to the express acts of Congress"); see also RESTATEMENT (THIRD), *supra* note 4, § 115 (1)(a). See generally Jack M. Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 146-51 (1984) (arguing that customary international law never overrides statutes even if it contradicts pre-existing statute).

37. See RESTATEMENT (THIRD), *supra* note 4, § 111 rep. n. 1; Steinhardt, *supra* note 33, at 1108 (discussing political debate surrounding impact of international law on domestic law).

38. 6 U.S. (2 Cranch) 64 (1804).

39. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

40. See RESTATEMENT (THIRD), *supra* note 4, § 114 (codifying *Charming Betsy* principle); Steinhardt, *supra* note 33, at 1135-82 (providing comprehensive analysis of *Charming Betsy* principle as canon of statutory construction).

41. See *supra* notes 29-33 and accompanying text (providing argument for and examples of international customary law as law of United States).

42. See RESTATEMENT (THIRD), *supra* note 4, § 115 cmt. a ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law."). This principle is related intimately to a fundamental rule of statutory construction that all parts of a statute should be read together. See 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51.01 (Norman J. Singer ed., 5th ed. 1992). A statute implicitly includes all related material, or *pari materia*. See *id.* (defining *pari materia* and discussing its use for statutory construction). In this context, the *Charming Betsy* principle is an argument for extending *pari materia* to include customary international law.

43. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (interpreting labor relations statute so as not to violate customary sea law); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (determining applicability of statute as based on customary sea law); *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (referring to international doctrine of diplomatic protection to limit application of Nonintercourse Act). See generally *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-85 (2d Cir. 1980) (using norms of international law to define content of Alien Tort Statute).

construction does not signify that Congress lacks the power to violate international obligations in enacting legislation.⁴⁴ Rather, it suggests that if a court can find a statutory interpretation that is in accordance with international customary norms, it will favor that interpretation over one contrary to those norms.

2. *International agreements and their impact on U.S. domestic law*

a. *Types of international agreements in U.S. law*

The U.S. government uses two categories of agreements to obligate itself internationally: treaties and executive agreements.⁴⁵ In the eyes of international law, these two categories are indistinguishable.⁴⁶ Under U.S. law, however, there are differences between treaties and other kinds of international agreements. The U.S. Constitution imposes various formal requirements on treaties⁴⁷ that ensure Senate participation in the formation of international obligations. Furthermore, the Constitution explicitly recognizes treaties as the "supreme Law of the Land."⁴⁸

Executive agreements lack this explicit constitutional formality and authority. Executive agreements are compacts that obligate the United States to foreign states but that, unlike treaties, are not presented to the Senate as directed in Article II of the Constitution.⁴⁹ These agreements may be congressional-executive agree-

44. See RESTATEMENT (THIRD), *supra* note 4, § 115(1)(a) (stating that act of Congress may supersede earlier rule or provision of international law provided that intent of Congress to do so is manifest); see also *infra* notes 237-43 and accompanying text (discussing later-in-time doctrine that recognizes congressional authority to nullify preexisting international obligations).

45. See CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 41-68 (Comm. Print 1993) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS] (dividing international agreements in U.S. law into treaties and executive agreements).

46. See *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982) ("Under principles of international law, the word [treaty] ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force."); TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 45, at 41 (stating that distinction between two modes of making international agreements has no international significance); RESTATEMENT (THIRD), *supra* note 4, § 303 cmt. a (comparing United States with foreign terminology regarding treaties).

47. The Constitution requires that the President obtain "the Advice and Consent of the Senate, to make Treaties, . . . [and that] two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2; see also *Weinberger*, 456 U.S. at 29-30 (defining "treaty" and describing constitutional requirements for treaties).

48. See U.S. CONST. art. VI, cl. 2.

49. See RESTATEMENT (THIRD), *supra* note 4, § 303 cmt. a; Department of State Circular 175, 11 FOREIGN AFF. MANUAL § 721.2b, reprinted in TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 45, at 303; THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 276 (2d ed. 1993). Both the *Restatement (Third)* and the State Department suggest that these non-treaty international agreements be called "international

ments,⁵⁰ treaty-executive agreements,⁵¹ or presidential-executive agreements.⁵² Whereas treaty-making was debated vigorously in the Constitutional Congress⁵³ and is authorized explicitly in the Constitution,⁵⁴ the origins,⁵⁵ authority,⁵⁶ and legal status⁵⁷ of executive

agreements other than treaties." Nevertheless, other sources refer to these agreements collectively as executive agreements. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 201 (2d ed. 1995) ("International agreements other than treaties are generally referred to as 'executive agreements.'"); FRANK & GLENNON, *supra*, at 276 (defining executive agreement as nontreaty international agreement); JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 117 (3d ed. 1995) (classifying international agreements as either treaties or executive agreements); *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, *supra* note 45, at 51-52 (defining executive agreements as international agreements that have not been concluded using the form of treaties). At the risk of breaching official terminology, this Comment defines executive agreements as international agreements other than treaties.

50. Congressional-executive agreements are international agreements authorized jointly by the President and both Houses of Congress. See *RESTATEMENT (THIRD)*, *supra* note 4, § 303 cmt. e (describing various ways in which both Houses of Congress may authorize or require President to conclude international agreement); *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, *supra* note 45, at 52-59 (tracing history, discussing subject matter, and reviewing legal status of congressional-executive agreements). See generally Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (tracing development of congressional-executive agreements from 1920s to present and arguing for constitutional validity of this instrument).

51. Treaty-executive agreements are made by the executive pursuant to a ratified treaty. Because Congress either explicitly or implicitly authorized executive action during the ratification process, treaty-executive agreements do not require further congressional consent. See *RESTATEMENT (THIRD)*, *supra* note 4, § 303 cmt. f (equating treaty-executive agreements with treaties); JACKSON ET AL., *supra* note 49, at 118 (defining treaty-executive agreements); Department of State Circular 175, 11 FOREIGN AFF. MANUAL § 721.2b(1) (basing executive's authority to conclude an international agreement pursuant to treaty on prior consent by Senate), reprinted in *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, *supra* note 45, at 303; see also *Wilson v. Girard*, 354 U.S. 524, 528-29 (1957) (holding that Senate approval of Security Treaty with Japan authorized subsequent treaty-executive agreement governing jurisdiction over criminal offenses).

These agreements implementing ratified treaties often concern the administrative details necessary to implement the broad language of treaties. See *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, *supra* note 45, at 59-60. The authority to conclude such agreements may be found in the President's duty in the Take Care Clause. See U.S. CONST. art. II, § 3 (stating that President "shall take Care that the Laws be faithfully executed"); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 176 (1972). It has been argued that this authority is distinct from the authority referred to by the Supreme Court in *Wilson v. Girard*. See *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, *supra* note 45, at 60. Laws passed under the authority of the Take Care Clause, however, rely on more than independent powers granted to the executive under Article II. In fact, like treaty-executive agreements, those laws depend on congressionally granted authority.

52. Presidential-executive agreements, also known as sole-executive agreements, are concluded pursuant to the President's powers under Article II of the Constitution. See *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, *supra* note 45, at 60-68 (defining and explaining "modern scope and contentious nature" of presidential-executive agreements); *RESTATEMENT (THIRD)*, *supra* note 4, § 303 cmts. g-j (discussing President's authority to make presidential-executive agreements, limits on that authority, congressional role in restricting agreements, and status of agreements as law of land).

53. See FRANK & GLENNON, *supra* note 49, at 272-76 (summarizing debates at Federal Convention of 1787 concerning Treaty Clause).

54. See U.S. CONST. art. II, § 2, cl. 2 (describing presidential power to make treaties).

55. Compare FRANK & GLENNON, *supra* note 49, at 276-281 (tracing origins of executive agreement from British practice to early practice under Constitution), with *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, *supra* note 45, at 51 (noting only one reference to another type

agreements are less clear. Nonetheless, the number of executive agreements continues to increase, especially as compared to the number of treaties.⁵⁸ Some warn that this trend evidences a growing concentration of power in the executive branch;⁵⁹ others flatly declare certain aspects of executive agreements unconstitutional;⁶⁰ still others applaud the practicality and ingenuity of these instruments.⁶¹ For purposes of this Comment, these debates are less important than the fact that courts have granted executive agreements authority equal to treaties under federal law.⁶²

of international agreement in Constitution as compared to four references to treaty).

56. See RESTATEMENT (THIRD), *supra* note 4, § 303(2)-(4) (basing authority of executive agreements on constitutional powers of Congress and President); CARTER & TRIMBLE, *supra* note 49, at 201 (basing authority for executive agreements on treaty power in Article II, as well as on constitutional authority granted to Congress and vested in executive); Department of State Circular 175, 11 FOREIGN AFF. MANUAL § 721.2b (citing three sources of authority for executive agreements: treaties, legislation, and constitutional authority of president), *reprinted in* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 45, at 303.

For the classic argument for interchangeability of treaties and congressional-executive agreements, see Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Security*, 54 YALE L.J. 181 (1945). For a challenge to, tempered by sympathy with, the conclusions reached by McDougal and Lans and the generation of constitutional writers on this subject that they represent, see Ackerman & Golove, *supra* note 50, at 806-37.

57. The courts' treatment of executive agreements depends a great deal on the type of agreement. See *infra* Part I.A.2.a (discussing types of executive agreements and their legal effects).

58. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 45, at xxxv (charting comparative number of treaties and executive agreements concluded by United States between 1789 and 1989); RESTATEMENT (THIRD), *supra* note 4, § 303 rep. n. 8 (noting that gap between number of treaties and executive agreements continues to increase).

59. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 45, at xxxiv (suggesting problems confronting Senate as result of growing number of executive agreements).

60. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249-1278 (1995) (arguing for exclusivity of Treaty Clause and criticizing proponents of congressional-executive agreements for their broad reading of Article I power without regard to limiting provisions in Article II). At least two of Professor Tribe's colleagues at Harvard Law School reportedly support his position. See Ackerman & Golove, *supra* note 50, at 917-18 n.502 (listing Professors Richard Parker and Anne-Marie Slaughter as subscribing to Professor Tribe's view).

61. See Ackerman & Golove, *supra* note 50, at 907-16 (describing political events leading to procedure by which Congress obtained authority to approve international agreements by simple majority of both Houses, praising adaptation as reflection of national consensus, and arguing that Article I provides sufficient authority to Congress to legislate in this manner).

62. See, e.g., *Weinberger v. Rossi*, 456 U.S. 25, 31 (1982) (holding that meaning of "treaty" in § 106 of Pub. L. No. 92-129 is not limited to Art. II treaties); *Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981) (recognizing authority of executive agreement to settle foreign claims with Iran even though settlements were achieved historically through treaties); *United States v. Pink*, 315 U.S. 203, 230 (1942) (holding that executive agreements like Litvinov Assignment, a presidential-executive agreement between United States and Russia, are, like treaties, the law of the land); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937) (holding that Litvinov Assignment was international agreement not requiring participation of Congress because power to conclude such agreements is within implied powers of executive); *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (construing "treaty" in § 5 of Circuit Court of Appeals Act of 1891 to include executive agreements); *Louis Wolf & Co. v. United States*, 107 F.2d 819, 826 (C.C.P.A. 1939) (interpreting term "Commercial Convention" used to describe executive

b. Domestic legal status of international agreements

International agreements are another source of international law.⁶³ Therefore, they enjoy the same degree of domestic legal authority as customary norms.⁶⁴ They also bear similar restrictions.⁶⁵ Although international agreements are the law of the land,⁶⁶ they are, like customary norms, limited by the Constitution⁶⁷ and by subsequent federal legislation.⁶⁸ Despite the similar status of customary law and international agreements, it may be argued that the latter enjoy greater judicial acceptance in the U.S. domestic legal system.⁶⁹ First, the U.S. Constitution makes treaties the "supreme Law of the Land,"⁷⁰ a status that courts have conferred on executive agreements as well.⁷¹ The constitutional basis of treaties and executive agreements provides a mechanism by which the political branches may initiate, shape, and ultimately embrace or repudiate international agreements as U.S. law.⁷² Second, unlike customary international

agreement as equal to "Commercial Convention" used to describe an Article II treaty). Although equal treatment of treaties and executive agreements may be challenged in some cases, the subtlety of the difference is beyond the scope of this Comment. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 45, at 65-68 (discussing reluctance of courts to enforce presidential-executive agreements when prior congressional action has been taken). Acknowledging the general equivalence between treaties and executive agreements, this Comment uses the terms for the two kinds of international agreements interchangeably. Furthermore, when the term international agreement is used, it refers to both treaties and executive agreements unless stated otherwise.

63. See RESTATEMENT (THIRD), *supra* note 4, § 102(1)(b). For citation to discussion of other sources of international law, see *supra* note 29.

64. For discussion of the status of customary norms in U.S. domestic law, see *supra* Part I.A.1.

65. See *supra* notes 36-37 and accompanying text (recognizing limits to impact of customary international law on U.S. domestic law in light of contrary constitutional or legislative provisions).

66. See U.S. CONST. art. VI, cl. 2 (including treaties as law of United States).

67. See *Reid v. Covert*, 354 U.S. 1, 17 (1957) (noting supremacy of Constitution over treaties); see also RESTATEMENT (THIRD), *supra* note 4, § 302(2) ("No provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States.").

68. See RESTATEMENT (THIRD), *supra* note 4, § 115(1)(a) ("An act of Congress supersedes . . . a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled."). Even though an international agreement may be superseded as law of the United States, that agreement still binds the United States in international law. See *id.* § 115(1)(b).

69. See Steinhardt, *supra* note 33, at 1108 (suggesting importance of written text and constitutional origins of international agreements).

70. U.S. CONST. art. VI, cl. 2.

71. See *supra* note 62 (citing cases equating executive agreements with treaties and conferring on both status of supreme law of the land).

72. The treaty-making process includes the following steps: initiation; appointment of negotiators; issuance of powers and instructions to negotiators; negotiation; conclusion; Secretary of State's formal submission of treaty to the President; President's transmittal to the Senate;

norms, international agreements are documented in writing. This allows courts to discern more easily the rights and duties these agreements create, and to interpret⁷³ and enforce them more readily.

In domestic law, international agreements are similar to federal statutes.⁷⁴ This status confers on international agreements not only the same authority under federal law that statutes possess, but also the interpretive function that statutes serve. The courts refer to the text of an agreement to determine the extent of U.S. obligations within the agreement itself and to construe subsequent domestic legislation that impinges on the international obligations imposed by the

Senate's receipt and referral to Foreign Relations Committee; committee action; conditional approval (including reservations, understandings, declarations, and provisos); committee's report to the full Senate; consideration of resolution of ratification as recommended by the committee; amendments to the resolution; conditional approval of the resolution (including reservations, understandings, and other conditions); vote on the resolution for ratification; signing of an instrument of ratification by the President; depositing or exchanging of instruments of ratification by the Secretary of State; President's proclamation that the treaty is in force; implementation; interpretation; settlement of international disputes; modification; suspension; extension; termination; and congressional oversight. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 45, at xviii-xxvi (explaining each step of treaty-making process and providing charts illustrating steps).

Although executive agreements lack the formalities of legislative participation that are part of the treaty-making process, they are subject to congressional authority. See *supra* text accompanying notes 49-62 (discussing ways in which Congress participates in formation of executive agreements); see also Ackerman & Golove, *supra* note 50, at 916-29 (arguing for appropriateness of participation by both Houses of Congress in formation of certain international agreements and presenting constitutional argument for nonexclusivity of Treaty Clause).

73. United States courts have utilized the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27 [hereinafter Vienna Convention] to interpret U.S. international agreements. The Vienna Convention provides standards for construing international agreements. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191, 194 (1993); *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 638 (5th Cir. 1994); *Barr v. U.S. Dep't of Justice*, 819 F.2d 25, 28 (2d Cir. 1987); *R. Griggs Group, Ltd. v. Filanto Spa*, 920 F. Supp. 1100, 1105 (D. Nev. 1996); *Hilario v. United States*, 854 F. Supp. 165, 169 (E.D.N.Y. 1994); *Cementos Anahuac del Golfo, S.A. v. United States*, 12 Ct. Int'l Trade 401, 409 (1988); *Westar Marine Servs. v. Heerema Marine Contractors, S.A.*, 621 F. Supp. 1135, 1139 n.14 (N.D. Cal. 1985). The Vienna Convention also has been used in domestic courts for other purposes. See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (citing Vienna Convention for definition of *jus cogens*); *Footwear Distribs. & Retailers of Am. v. United States*, 18 Ct. Int'l Trade 391, 409 (1994) (citing Vienna Convention for its explication of principle of *pacta sunt servanda*); *Nissan Fire & Marine Ins. Co. v. Singapore Airlines, No. C 91-3858*, 1992 U.S. Dist. LEXIS 4589, at *6 (N.D. Cal. Mar. 30, 1992) (using Vienna Convention to determine whether nation was party to agreement); *Collins v. Weinberger*, 707 F.2d 1518, 1521 (D.D.C. 1983) (citing Vienna Convention for definition of treaty).

74. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision."); see also RESTATEMENT (THIRD), *supra* note 4, § 111 cmt. d (claiming that international agreements constitute federal law); *id.* § 115 rep. n. 1 (equating international agreements with statutes).

agreement.⁷⁵ In other words, the *Charming Betsy* principle, which initially was enunciated in the context of customary international law,⁷⁶ also applies to international agreements.⁷⁷

The reconciliation of statutes and international agreements by U.S. courts may lead to interpretations of acts that are narrower than intended by Congress.⁷⁸ Nevertheless, statutes are no more vulnerable to varying interpretation because of reconciliation with international agreements than they are in light of other canons of statutory construction.⁷⁹ Because the *Charming Betsy* principle mandates reconciliation only when the statutory language permits,⁸⁰ Congress retains the ultimate power of interpretation: Congress has the authority to enact statutes that explicitly and consciously repudiate international norms embodied in international agreements.⁸¹

75. See *Sale*, 509 U.S. at 177-87 (interpreting Immigration and Nationality Act of 1952 in light of Article 33 of United Nations Convention Relating to the Status of Refugees); *Weinberger v. Rossi*, 456 U.S. 25, 28-32 (1982) (limiting overseas application of employment discrimination statute because of executive agreements between United States and Philippines); *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (referring to U.S. obligations under General Agreement on Tariffs and Trade ("GATT") to evaluate propriety of International Trade Commission's interpretation of domestic statute); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 81 F.3d 293, 303 (5th Cir. 1994) (using NAFTA as guide in defining "same" as it appears in Poultry Products Inspection Act); *Footwear Distribs.*, 18 Ct. Int'l Trade at 407-14 (recognizing but rejecting plaintiff's argument that GATT panel decision entitles party to domestic judicial relief); *United States v. Palestinian Liberation Org.*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (limiting interpretation of Anti-terrorism Act of 1987 because of Agreement Between the United States and the United Nations Regarding the Headquarters of the United Nations).

76. See *supra* Part I.A.1 (describing *Charming Betsy* principle).

77. See *Weinberger*, 456 U.S. at 32 (using *Charming Betsy* to reconcile international agreement with statute); *South African Airways v. Dole*, 817 F.2d 119, 125 (D.C. Cir. 1987) (invoking *Charming Betsy* to examine order pursuant to section of Comprehensive Anti-Apartheid Act); *Caterpillar Inc. v. United States*, 941 F. Supp. 1241 (Ct. Int'l Trade 1996) (citing *Charming Betsy* to invalidate Customs Agency's construction of § 402(b) of Tariff Act of 1930); *Palestinian Liberation Org.*, 695 F. Supp. at 1464-71 (invoking *Charming Betsy* to reconcile international obligation under United Nations Headquarter Agreement and Anti-terrorism Act of 1987); *Reston v. Federal Communications Comm'n*, 492 F. Supp. 697, 707 (using *Charming Betsy* to support FCC's interpretation of 47 U.S.C. § 605 in light of International Telecommunication Convention of Malaga-Torremolino); see also RESTATEMENT (THIRD), *supra* note 4, § 114 (stating that statutes should be interpreted so as not to conflict with international agreements whenever possible). But see *Mississippi Poultry Ass'n*, 81 F.3d at 303-05 (refusing to apply *Charming Betsy* as requiring Congress to express its intention to violate GATT); *Suramericana de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) ("[I]f the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy.").

78. For an extreme example of the use of the *Charming Betsy* principle to undermine congressional intent because of absence of specific provisions in a statute renouncing treaty obligations, see *Palestinian Liberation Org.*, 695 F. Supp. at 1456.

79. See *supra* note 42 (discussing relationship between *Charming Betsy* principle and standard rules of statutory construction).

80. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .") (emphasis added).

81. See *Weinberger*, 456 U.S. at 32 (requiring affirmative expression of intent to abrogate international obligations); *South African Airways*, 817 F.2d at 126 (noting that Congress may

B. *The Helms-Burton Act*

Before analyzing how customary international law and international agreements may affect implementation of the Helms-Burton Act, it is necessary to understand exactly what the Act does. One purpose of the Act is to destabilize the current Cuban government by strengthening sanctions against it.⁸² It is the latest in a long series of punitive measures aimed at Cuba since Fidel Castro took power in 1959.⁸³ The Act restates and reinforces these previous sanctions⁸⁴ and expresses dissatisfaction over the lack of vigor with which the Administration is enforcing the existing U.S. embargo.⁸⁵ Specifically, Title I urges the President: to enforce the U.S. embargo against Cuba;⁸⁶ to convince other nations of the need for the embargo;⁸⁷ to prohibit U.S. financing of confiscated property in Cuba;⁸⁸ to oppose

denounce treaties freely); *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972) (acknowledging that Congress may nullify treaty); *American Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 771 (N.D. Cal. 1989) (pointing out that Congress need not abide by international law); *Farr Man & Co. v. United States*, 4 Ct. Int'l Trade 55, 63-64 (1982) (noting that Congress may supersede all or part of treaty by legislation); RESTATEMENT (THIRD), *supra* note 4, § 115(1)(a) (stating that Congress' ultimate authority to enact statutes supersedes existing treaty obligations); *Steinhardt*, *supra* note 33, at 1184-85 ("If the majority wishes by legislation to violate international law, nothing in the Charming Betsy principle thwarts that will except to require that it be expressed clearly.").

82. See Helms-Burton Act, Pub. L. No. 104-114, § 3(2), 1996 U.S.C.C.A.N. (110 Stat.) 785, 788 (1996) (to be codified at 22 U.S.C. § 6022(2)).

83. An embargo on trade with Cuba was imposed by President Kennedy in 1962, see Proclamation No. 3447, 27 Fed. Reg. 1085 (1962), using the authority of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a)(1) (1994). Additional regulations were issued shortly thereafter, see 27 Fed. Reg. 2765 (1962), relying on the authority of the Trading with the Enemy Act, 50 U.S.C. App. § 5 (1994). After the Cuban missile crisis in October-November of 1962, the executive branch issued more complete sanctions that have been renewed annually by the President. See Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101 to -809 (1996) (providing current version of embargo regulations). Although these regulations have been subject to multiple revisions, until the Helms-Burton Act, the most significant development occurred in 1992 when Congress passed the Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010, which codified the embargo and restricted presidential discretion in its administration. See generally Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 420-22 (1996) (providing comprehensive chronology of United States' anti-Castro regulatory regime).

84. See Helms-Burton Act §§ 101-105, 1996 U.S.C.C.A.N. (110 Stat.) at 791-95 (to be codified at 22 U.S.C. §§ 6032-6035) (calling for strict enforcement of previously enacted sanctions on Cuba); see also H.R. CONF. REP. NO. 104-468, at 44-47 (1996) (expressing congressional reaffirmation of previously enacted sanctions), *reprinted in* 1996 U.S.C.C.A.N. 558, 559-62.

85. See H.R. CONF. REP. NO. 104-468, at 46 (1996) ("The committee of conference expresses its profound conviction that executive branch agencies must be more vigorous in their enforcement of certain provisions of the U.S. embargo on Cuba . . ."), *reprinted in* 1996 U.S.C.C.A.N. 558, 561.

86. See Helms-Burton Act § 102, 1996 U.S.C.C.A.N. (110 Stat.) at 792-94 (to be codified at 22 U.S.C. § 6032).

87. See *id.* § 101(2), 1996 U.S.C.C.A.N. (110 Stat.) at 792 (to be codified at 22 U.S.C. § 6031(2)).

88. See *id.* § 103, 1996 U.S.C.C.A.N. (110 Stat.) at 794 (to be codified at 22 U.S.C. § 6033).

Cuban membership in international financial institutions;⁸⁹ to oppose Cuban participation in the Organization of American States;⁹⁰ and to observe current import restrictions on Cuban products.⁹¹ In short, these provisions, among others,⁹² tighten the noose that already has been tied around Cuba.⁹³

If Title I resorts to the policies of the past to push Cuba toward democracy, Title II of the Act⁹⁴ looks to the future by outlining U.S. policy toward a post-Castro Cuba. The prospective nature of Title II serves as a message to the Cuban people, promising them better times ahead.⁹⁵ It also establishes substantive standards for determining what constitutes a transition government⁹⁶ and a democratically elected government in Cuba.⁹⁷ Like Title I, Title II has not proved controversial.⁹⁸

89. See *id.* § 104, 1996 U.S.C.C.A.N. (110 Stat.) at 794-95 (to be codified at 22 U.S.C. § 6034).

90. See *id.* § 105, 1996 U.S.C.C.A.N. (110 Stat.) at 795 (to be codified at 22 U.S.C. § 6035).

91. See *id.* § 110, 1996 U.S.C.C.A.N. (110 Stat.) at 800 (to be codified at 22 U.S.C. § 6040).

92. See, e.g., *id.* § 106, 1996 U.S.C.C.A.N. (110 Stat.) at 795-98 (to be codified at 22 U.S.C. § 6036) (assessing role of former Soviet states in Cuba); *id.* § 107, 1996 U.S.C.C.A.N. (110 Stat.) at 798 (to be codified at 22 U.S.C. § 6037) (converting Television Marti Service to UHF); *id.* § 108, 1996 U.S.C.C.A.N. (110 Stat.) at 798-99 (to be codified at 22 U.S.C. § 6038) (calling for report on extent of aid supplied and business conducted with Cuba by foreign countries); *id.* § 109, 1996 U.S.C.C.A.N. (110 Stat.) at 799-800 (to be codified at 22 U.S.C. § 6039) (authorizing appropriations for certain democracy-building activities in Cuba); *id.* § 111, 1996 U.S.C.C.A.N. (110 Stat.) at 800-02 (to be codified at 22 U.S.C. § 6041) (withholding funds from countries supporting construction of Juragua Nuclear Plant in Cuba); *cf. id.* § 114, 1996 U.S.C.C.A.N. (110 Stat.) at 803 (to be codified at 22 U.S.C. § 6044) (authorizing President to establish exchange of news bureaus with Cuba under specific circumstances).

93. This analogy was used by both sides of the debate over the Helms-Burton Act. See 142 CONG. REC. H1731 (daily ed. Mar. 6, 1996) (statement of Rep. Diaz-Balart) (supporting tightening of "economic noose" around Castro); *id.* at S1479 (daily ed. Mar. 5, 1996) (statement of Sen. Kassenbaum) (questioning usefulness of tightening "the noose around Cuba"); 141 CONG. REC. E1851 (daily ed. Sept. 28, 1995) (statement by Hon. Lynn C. Woolsey of Cal.) (arguing that tightening "an economic noose around the island of Cuba" will bring only misery to innocent Cuban citizens).

94. Helms-Burton Act §§ 201-207, 1996 U.S.C.C.A.N. (110 Stat.) at 805-14 (to be codified at 22 U.S.C. §§ 6061-6067).

95. See H.R. CONF. REP. NO. 104-468, at 52 (1996) ("Title II sends a clear message to the Cuban People that the United States is prepared fully to assist in a peaceful, democratic transition . . ."), reprinted in 1996 U.S.C.C.A.N. 558, 567.

96. See Helms-Burton Act § 205, 1996 U.S.C.C.A.N. (110 Stat.) at 811-12 (to be codified at 22 U.S.C. § 6065) (providing criteria for transition government in Cuba).

97. See *id.* § 206, 1996 U.S.C.C.A.N. (110 Stat.) at 812-13 (to be codified at 22 U.S.C. § 6066) (establishing criteria for what constitutes a democratically elected government in Cuba).

98. Even one of the most vocal critics of the Helms-Burton Act, Representative Lee Hamilton of Indiana, would have accepted the provisions in Titles I and II. During hearings, Rep. Hamilton offered an amendment to the bill that would have preserved the first two titles of the proposed legislation while eliminating the more objectionable elements of Titles III and IV. See *Markup by the House Comm. on Int'l Relations on H.R. 927*, 104th Cong. 19, 40 (1995) [hereinafter *House Markup*].

The significant and controversial provisions in the Act are found in Titles III and IV.⁹⁹ Title III¹⁰⁰ makes any person who "traffics"¹⁰¹ in property¹⁰² confiscated by the Cuban government on or after January 1, 1959, civilly liable for monetary damages to any U.S. national who owns the claim to that property.¹⁰³ The legal theory behind this provision is the tort theory of conversion:¹⁰⁴ the cause of action redresses injury to U.S. nationals¹⁰⁵ whose property was confiscated¹⁰⁶ by making investors who use that property liable.

99. See *id.* at 43-45 (presenting responses of House members to Rep. Hamilton's amendment to strike Titles III and IV from Act). Congressman Burton argued that Titles III and IV would not open the floodgates of litigation for claims to property by non-U.S. nationals in U.S. courts. See *id.* at 43. He further argued that determining the chain of title to confiscated property would not be difficult. See *id.* at 44. Finally, he argued that Title IV could and would be implemented consistently with NAFTA. See *id.* Congresswoman Ros-Lehtinen noted that international concern about the bill already has deterred foreign investment in Cuba. See *id.* at 44-45.

100. See Helms-Burton Act §§ 301-306, 1996 U.S.C.C.A.N. (110 Stat.) at 814-22 (to be codified at 22 U.S.C. §§ 6081-6085).

101. See *supra* note 12 (providing definition of "traffics" in Act).

102. "Property" for purposes of the Act is defined broadly to mean "any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." Helms-Burton Act § 4(12)(A), 1996 U.S.C.C.A.N. (110 Stat.) at 790 (to be codified at 22 U.S.C. § 6023(12)(A)). The Act further states, as related to Title III:

"[P]roperty" does not include real property used for residential purposes unless, as of the date of the enactment of this Act—

(i) the claim to the property is held by a United States national and the claim has been certified under title V of the International Claims Settlement Act of 1949; or

(ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba.

Id. § 4(12)(B), 1996 U.S.C.C.A.N. (110 Stat.) at 790 (to be codified at 22 U.S.C. § 6023(12)(B)).

103. See *id.* § 302(a)(1), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(1)).

104. See *House Markup, supra* note 98, at 21 ("The basic theory of this legislation . . . is a tort theory, not a contract theory. The effort is to redress injury, not settle disputed issues about who owns the property."); see also Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434, 437 n.17 (1996) (citing F.A. MANN, *FURTHER STUDIES IN INTERNATIONAL LAW* 126 (1990), for discussion of conversion in relation to illegal confiscations of property).

105. "United States national" is defined as:

(A) any United States citizen; or

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

Helms-Burton Act § 4(15), 1996 U.S.C.C.A.N. (110 Stat.) at 791 (to be codified at 22 U.S.C. § 6023(15)).

106. "Confiscated" is defined for purposes of the Act as:

(A) the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property, on or after January 1, 1959—

(i) without the property having been returned or adequate and effective compensation provided; or

(ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and

Such liability begins three months after the effective date of the Act.¹⁰⁷

The provisions in Title III create two kinds of plaintiffs, both of which must meet certain baseline requirements. To bring an action under this section, all claimants: (1) must have acquired ownership of their claim to the property before March 12, 1996, if the property was confiscated before that date;¹⁰⁸ (2) must not have acquired post-confiscation ownership by assignment if the property was confiscated on or after March 12, 1996;¹⁰⁹ (3) may not bring claims against "persons" two years after those persons have ceased their "trafficking" activity;¹¹⁰ (4) must meet a minimum claim value of more than

(B) the repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay, on or after January 1, 1959

(i) a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government;

(ii) a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or

(iii) a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim.

Id. § 4(4), 1996 U.S.C.C.A.N. (110 Stat.) at 789 (to be codified at 22 U.S.C. § 6023(4)); *see also supra* note 102 (providing statute's definition of "property").

107. *See* Helms-Burton Act § 302(a)(1)(A), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(1)(A)). Because the Act holds liable any "person" who benefits in any way from confiscated property in Cuba, Congress realized that once the Act was signed, any "person" attempting to comply with it by selling off this property would be in violation of the Act. Congress therefore allowed these individuals a three-month grace period. *See* H.R. CONF. REP. NO. 104-468, at 57-58 (1996) (reasoning that grace period will allow persons to wind down activities so that they may avoid liability), *reprinted in* 1996 U.S.C.C.A.N. 558, 572-73.

108. *See* Helms-Burton Act § 302(a)(4)(B), 1996 U.S.C.C.A.N. (110 Stat.) at 816 (to be codified at 22 U.S.C. § 6082(a)(4)(B)). This provision is one of many that attempt to prevent a market for claims to confiscated property. This paragraph seeks to eliminate the incentive that may exist for foreign nationals, who are not entitled to the cause of action created in Title III, to transfer claims to confiscated property to U.S. nationals. *See* H.R. CONF. REP. NO. 104-468, at 59 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 574. The provision also attempts to discourage foreign entities with claims to confiscated property from relocating to the United States in order to take advantage of the Act. *See id.*; *see also House Markup, supra* note 98, at 18-19 (discussing effects of Act on clouding title to certified claims); *id.* at 46-48 (discussing hypothetical of corporation becoming U.S. national after date of enactment of legislation).

Despite the clear intent expressed in the Conference Report and the explanation of the provision presented by Counsel to the House International Relations Committee, Mr. Rademaker, the language is unclear. A plain reading of the provision does not necessarily preclude a company that has owned a claim to confiscated property since 1959, and becomes a U.S. national in 1997, from filing suit against a "trafficker." Similarly, a Cuban national that has owned a claim since 1959 and flees Cuba today will have a cause of action under the Act.

109. *See* Helms-Burton Act § 302(a)(4)(C), 1996 U.S.C.C.A.N. (110 Stat.) at 816 (to be codified at 22 U.S.C. § 6082(a)(4)(C)).

110. *See id.* § 305, 1996 U.S.C.C.A.N. (110 Stat.) at 821 (to be codified at 22 U.S.C. § 6084).

\$50,000;¹¹¹ and (5) may base their claims on liability accruing from November 1, 1996.¹¹²

The first class of plaintiffs are those with claims certified by the Foreign Claims Settlement Commission ("the Commission").¹¹³ To succeed in their cause of action, these plaintiffs only need present the certified claim¹¹⁴ and demonstrate that the defendant "traffics"¹¹⁵ in the claimed property. Once these showings are made, plaintiffs may collect court costs and reasonable attorney fees,¹¹⁶ plus three times the amount certified by the Commission or treble the fair market value of the property,¹¹⁷ whichever is greater.¹¹⁸ The plaintiffs in this class who recover these funds may receive additional payments from a subsequent claims settlement agreement reached between the United States and Cuba only if the amount already received is less than the amount of their certified claim.¹¹⁹

The second class of plaintiffs consists of those who do not have certified claims with the Commission. These claimants: (1) cannot file claims under this provision if they were eligible to file a claim with the Commission but failed to do so;¹²⁰ (2) cannot re-establish claims

111. See *id.* § 302(b), 1996 U.S.C.C.A.N. (110 Stat.) at 817 (to be codified at 22 U.S.C. § 6082(b)). The minimum claim value is computed as stipulated in subclause (i) of § 302(a)(1)(A), minus any interest.

112. Section 302(a) of the Act establishes liability three months after the effective date of Title III, which, according to § 306(a), is August 1, 1996. See *id.* §§ 302(a), 306(b), 1996 U.S.C.C.A.N. (110 Stat.) at 815-17, 821 (to be codified at 22 U.S.C. §§ 6082(a), 6085(b)).

113. See International Claims Settlement Act of 1949, 22 U.S.C. § 1643 (1994) (establishing that purpose of subchapter is to determine amount and validity of claims to confiscated property by U.S. nationals against Cuban and Chinese governments).

114. The court must accept the Commission's certification as conclusive proof of ownership. See Helms-Burton Act § 303(a)(1), 1996 U.S.C.C.A.N. (110 Stat.) at 819-20 (to be codified at 22 U.S.C. § 6083(a)(1)).

115. See *supra* note 12 (defining "trafficking" for purposes of Act).

116. See Helms-Burton Act § 302(a)(1)(A)(ii), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(1)(A)(ii)).

117. See *id.* § 302(a)(3)(A), (C), 1996 U.S.C.C.A.N. (110 Stat.) at 815, 816 (to be codified at 22 U.S.C. § 6082(a)(3)(A), (C)).

118. See *id.* § 302(a)(1)(A)(i), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(1)(A)(i)). There is a presumption in favor of the amount that is certified by the Commission even if the other amounts are greater. This presumption may be rebutted by showing through clear and convincing evidence that the fair market value is "appropriate." See *id.* § 302(a)(2), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(2)). Congress provided no explanation in the Act or the legislative history of what constitutes "appropriate."

119. See *id.* § 302(f)(2)(A), 1996 U.S.C.C.A.N. (110 Stat.) at 818-19 (to be codified at 22 U.S.C. § 6082(f)(2)(A)). If a plaintiff receives an amount equal to or greater than the certified claim, that plaintiff will not receive any payments from a subsequent claims settlement between the United States and Cuba.

120. See *id.* § 302(a)(5)(A), 1996 U.S.C.C.A.N. (110 Stat.) at 816 (to be codified at 22 U.S.C. § 6082(a)(5)(A)). The Act establishes a priority for those claims certified with the Foreign Claims Settlement Commission. See *id.* § 302(a)(5)(C), 1996 U.S.C.C.A.N. (110 Stat.) at 817 (to be codified at 22 U.S.C. § 6082(a)(5)(C)) (disallowing for two years claims not certified under Title V of the International Claims Settlement Act).

denied by the Commission, as the Commission's findings will be accepted as conclusive by the courts that hear cases under this provision;¹²¹ (3) must wait until March 12, 1998, to file an action under this title;¹²² (4) have the burden of proving that their interest in property is not the subject of a certified claim by another person;¹²³ (5) may certify their claims by a court-appointed special master for fact-finding purposes only;¹²⁴ (6) must show by clear and convincing evidence that it is appropriate that they receive the fair market value for their property;¹²⁵ and (7) may collect triple the value of their property only when the action is brought thirty days after giving notice to "traffickers," if such notice is given after the Act's three-month grace period has expired.¹²⁶

Title III includes other important provisions.¹²⁷ For example, all Title III claimants are forbidden from filing other civil actions under the same subject matter.¹²⁸ Similarly, claimants may not file an action under Title III if they seek compensation for a claim in another civil action that would be cognizable under this title.¹²⁹ All claimants, however, are allowed to bring and settle their cases without presenting any sort of license from a government agency.¹³⁰ The Act makes immune property in Cuba that is used as a facility or

121. See *id.* § 302(a)(5)(B), 1996 U.S.C.C.A.N. (110 Stat.) at 816 (to be codified at 22 U.S.C. § 6082(a)(5)(B)).

122. See *id.* § 302(a)(5)(C), 1996 U.S.C.C.A.N. (110 Stat.) at 817 (to be codified at 22 U.S.C. § 6082(a)(5)(C)).

123. See *id.* § 302(a)(5)(D), 1996 U.S.C.C.A.N. (110 Stat.) at 817 (to be codified at 22 U.S.C. § 6082(a)(5)(D)).

124. See *id.* § 303(a)(2), 1996 U.S.C.C.A.N. (110 Stat.) at 820 (to be codified at 22 U.S.C. § 6083(a)(2)).

125. See *id.* § 302(a)(2), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(2)).

126. See *id.* § 302(a)(3)(B), (D), 1996 U.S.C.C.A.N. (110 Stat.) at 816 (to be codified at 22 U.S.C. § 6082(a)(3)(B), (D)). Notice must be in writing and sent by certified mail or delivered personally. See *id.* § 302(a)(3)(D), 1996 U.S.C.C.A.N. (110 Stat.) at 816 (to be codified at 22 U.S.C. § 6082(a)(3)(D)). The effective date of Title III is August 1, 1996; thus, notice may be given after September 1, 1996.

127. For a summary of additional provisions of Title III, see Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955 (1996).

128. See Helms-Burton Act § 302(f)(1)(A), 1996 U.S.C.C.A.N. (110 Stat.) at 818 (to be codified at 22 U.S.C. § 6082(f)(1)(A)).

129. See *id.* § 302(f)(1)(B), 1996 U.S.C.C.A.N. (110 Stat.) at 818 (to be codified at 22 U.S.C. § 6082(f)(1)(B)).

130. See *id.* § 302(a)(7), 1996 U.S.C.C.A.N. (110 Stat.) at 817 (to be codified at 22 U.S.C. § 6082(a)(7)). The co-founder of the United States-Cuba Foundation criticized this provision as a way of allowing claimants to share in the profits of those doing business with Cuba. See Louis F. Desloge, *The Great Cuban Embargo Scam: A Little-Known Loophole Will Allow the Richest Exiles to Cash In*, WASH. POST, Mar. 3, 1996, at C1. This point also was made by Rep. Jack Reed of Rhode Island. See 142 CONG. REC. E309 (daily ed. Mar. 7, 1996) (statement of Rep. Reed).

installation for official purposes by an accredited diplomatic mission.¹³¹ More significantly, the Act declares inapplicable the act-of-state doctrine,¹³² which otherwise would have been a strong defense to the cause of action Title III creates.¹³³ Finally, the Act grants the President various powers of suspension¹³⁴ and provides means for terminating the rights it grants.¹³⁵

131. See Helms-Burton Act § 302(e), 1996 U.S.C.C.A.N. (110 Stat.) at 818 (to be codified at 22 U.S.C. § 6082(e)).

132. See *id.* § 302(a)(6), 1996 U.S.C.C.A.N. (110 Stat.) at 817 (to be codified at 22 U.S.C. § 6082(a)(6)). This court-made doctrine was defined first in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), and although it currently is subject to some uncertainty, the act-of-state doctrine has been explained as follows:

In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a government character done by a foreign state within its own territory and applicable there.

RESTATEMENT (THIRD), *supra* note 4, § 443(1). The *Restatement (Third)* recognizes that the doctrine is subject to modifications by legislation. See *id.* at § 443(2).

133. One commentator believes that this provision is the most significant part of the Act, because absent the act-of-state doctrine, lawsuits against those benefiting from confiscated property would be cognizable. See Brice M. Clagett, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Continued: A Reply to Professor Lowenfeld*, 90 AM. J. INT'L L. 641, 644 (1996). An often cited case applying the act-of-state doctrine, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), involved confiscation of property in Cuba.

134. See Helms-Burton Act, Pub. L. No. 104-114, § 306(b)-(d), 1996 U.S.C.C.A.N. (110 Stat.) 785, 821-22 (1996) (to be codified at 22 U.S.C. § 6085(b)-(d)). President Clinton refused to use his powers under § 306(b) to postpone the effective date of Title III for up to six months. He did, however, use his power under subsection (c) to suspend for six months the right to bring an action under Title III. See Deputy National Security Advisor Sandy Berger and Under Secretary of State for Political Affairs Peter Tarnoff, Office of the Press Secretary, The White House, *Press Briefing* (July 16, 1996) <<http://library.whitehouse.gov/Retrieve.cgi?dbtype=text&id=6921&query=>> (on file with *The American University Law Review*) [hereinafter Berger-Tarnoff Briefing]; see also Rossella Brevetti & Peter Menyasz, *Clinton Delays Lawsuits Under Title III of Helms-Burton*, 13 Int'l Trade Rep. (BNA) 1158, 1158 (July 17, 1996) (reporting President Clinton's decision not to suspend effective date but to suspend right to bring lawsuits under Title III). This suspension must be renewed every six months. See Helms-Burton Act § 306(c)(2), 1996 U.S.C.C.A.N. (110 Stat.) at 822 (to be codified at 22 U.S.C. § 6085(c)(2)). President Clinton has indicated that he will exercise his authority under § 306(c)(2) to grant six-month suspensions for the indefinite future. See Myers, *supra* note 25, at A6 (reporting indefinite suspension). To suspend the right of action, the executive had to determine and report to Congress that the suspension is necessary "to the national interests of the United States and will expedite a transition to democracy in Cuba." Helms-Burton Act § 306(c)(2), 1996 U.S.C.C.A.N. (110 Stat.) at 822 (to be codified at 22 U.S.C. § 6085(c)(2)). This determination was made despite the judgment of the conference committee of Congress that "under current circumstances the President could not in good faith determine that suspension of the right of action is either 'necessary to the national interests of the United States' or 'will expedite a transition to democracy in Cuba.'" H.R. CONF. REP. NO. 104-468, at 65 (1996) (quoting Helms-Burton Act § 306(c)(1)(B), 1996 U.S.C.C.A.N. (110 Stat.) at 822 (to be codified at 22 U.S.C. § 6085(c)(1)(B))), *reprinted in* 1996 U.S.C.C.A.N. 558, 580.

135. See Helms-Burton Act § 302(h), 1996 U.S.C.C.A.N. (110 Stat.) at 819 (to be codified at 22 U.S.C. § 6082(h)) (providing that rights established under § 302 can be suspended if President determines that democratically elected government is in power in Cuba).

Title IV of the Act relates to the exclusion of certain aliens from the United States.¹³⁶ The title requires that the Secretary of State deny visas to all aliens who confiscate property, "traffic" in such confiscated property, or act as officers or controlling shareholders of an entity that confiscates or traffics in such property.¹³⁷ This prohibition extends to the spouses, minor children, and agents of these aliens.¹³⁸ This title, however, employs different definitions of "confiscated" and "trafficking" than those used in the other sections of the Act.¹³⁹ Also, unlike Title III, Title IV may not be suspended.¹⁴⁰

II. ANALYSIS: POSSIBLE INTERNATIONAL LAW VIOLATIONS AND THEIR IMPLICATIONS ON DOMESTIC IMPLEMENTATION

A. *Violations of International Customary Law*

1. *Title III as a secondary boycott*

According to some commentators, Title III of the Act effectuates a secondary boycott against nations trading with Cuba.¹⁴¹ To under-

136. For a detailed summary of the provisions in Title IV, see Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 30,655 (1996).

137. See Helms-Burton Act § 401, 1996 U.S.C.C.A.N. (110 Stat.) at 822-24 (to be codified at 22 U.S.C. § 6091).

138. See *id.* § 401(a)(4), 1996 U.S.C.C.A.N. (110 Stat.) at 822 (to be codified at 22 U.S.C. § 6091(a)(4)). For a story of the effect of Title IV on the family members of a Mexican businessman, see Molly Moore, *Tighter Cuban Embargo Snares Mexican, Despite U.S. Ties*, WASH. POST, Sept. 9, 1996, at A14.

139. Compare Helms-Burton Act § 4(13), 1996 U.S.C.C.A.N. (110 Stat.) at 790-91 (to be codified at 22 U.S.C. § 6023(13)) (defining "traffics" for purposes of Title III), with *id.* § 401(b)(2), 1996 U.S.C.C.A.N. (110 Stat.) at 823-24 (to be codified at 22 U.S.C. § 6091(b)(2)) (defining "traffics" for purposes of Title IV). The conference report states that "the definition of trafficking for purposes of section 401 is slightly narrower than the definition applicable to title III set forth in section 4(13)." H.R. CONF. REP. NO. 104-468, at 66 (1996), reprinted in 1996 U.S.C.C.A.N. 558, 581. The difference reflects congressional intent to apply Title IV only to new acts of trafficking that begin on or after March 12, 1996, the date of enactment, and to avoid application of Title IV to acts of divestiture from Cuba. See *id.*, reprinted in 1996 U.S.C.C.A.N. 558, 581.

140. Compare Helms-Burton Act § 306(b)-(d), 1996 U.S.C.C.A.N. (110 Stat.) at 821-22 (to be codified at 22 U.S.C. § 6085(b)-(d)) (granting suspension authority to President), with *id.* § 401(d), 1996 U.S.C.C.A.N. (110 Stat.) at 824 (to be codified at 22 U.S.C. § 6091(d)) (specifying effective date of Title IV provisions as date of enactment of Act, that is, March 12, 1996).

141. See Lowenfeld, *supra* note 83, at 429 ("[T]he Helms-Burton Act is . . . in intent—and probably in effect—a classical secondary boycott . . ."); *Helms-Burton Law Guidelines Are Inadequate, Lawyer Charges*, 13 Int'l Trade Rep. (BNA) 1050, 1050 (June 26, 1996) (reporting remarks of Michael Leir, minister for Canadian Embassy, referring to Act as de facto secondary boycott); Joseph Kirwin, *EU Rejects Transport Networks as Tool to Fight Unemployment*, 13 Int'l Trade Rep. (BNA) 1064, 1064 (June 26, 1996) (quoting statement of European Council characterizing Act as secondary boycott). Although defendants in Title III actions may include foreign

stand this type of boycott, it is instructive to examine the primary boycott. A primary boycott¹⁴² is limited to transactions between the boycotting nation *A* and the boycotted nation *B*. Using the terms of sanction laws, the sender *A* prevents its nationals from trading with the target *B* and its nationals.¹⁴³ Because *A* bases jurisdiction on its control over its own territory and its own nationals, a primary boycott rarely raises questions of international law.¹⁴⁴ A secondary boycott however, is a different matter.¹⁴⁵ It reaches beyond nations *A* and *B* to restrict transactions between person *X*, a national of state *C*, and nation *B*. *A*'s leverage with *X* usually stems from the fact that *X* has some kind of business interest in *A*. Because *X* does business with *A* and *A* does not allow business with *B*, under the structure of a secondary boycott, *X* must make a choice between doing business with *A* or doing business with *B*. *X* is forced to choose even though *X*'s activities are perfectly legal from the point of view of its own country *C*.¹⁴⁶

A broad reading of the Helms-Burton Act creates this choice for foreign companies that have interests in both Cuba and the United States. As stated by Congress and others, one purpose of the Act is to discourage business with Castro's Cuba.¹⁴⁷ In addition to state-

companies trading with Cuba, the Act is primarily anti-Cuba legislation. For example, twenty-six of the twenty-eight findings in the Act directly address the crimes of Cuba, and the other two findings concern U.S. policy toward Cuba and United Nations treatment of rogue nations. See Helms-Burton Act § 2, 1996 U.S.C.C.A.N. (110 Stat.) at 786-88 (to be codified at 22 U.S.C. § 6021). The majority of the findings in Title III emphasize the wrongful nature of Cuba's action in confiscating the property. See *id.* § 301, 1996 U.S.C.C.A.N. (110 Stat.) at 814-15 (to be codified at 22 U.S.C. § 6081); see also Lowenfeld, *supra* note 83, at 430; Malcolm Rifkind, *Punishing the Wrong Party*, WASH. POST, May 27, 1996, at A23 (criticizing United States for targeting companies that do business with terrorist states).

142. For an explication of the eponymous origin of the word "boycott," its historical meaning, and its judicial applications in antitrust and labor law, see Justice Scalia's opinion in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 800-11 (1993) (Scalia, J.).

143. See generally GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 27-28 (1985) (defining "sender," "target," and types of sanctions).

144. See Lowenfeld, *supra* note 83, at 429 ("[A] primary boycott does not usually raise issues of international law, because the boycotting state is exercising its jurisdiction in its own territory or over its own nationals.").

145. This discussion of secondary boycotts is in the context of international trade. Although conceptually similar, secondary boycotts in the context of labor law is beyond the scope of this Comment. See Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 397-404 (1984) (discussing history of political and judicial treatment of secondary boycotts used by unions).

146. See Lowenfeld, *supra* note 83, at 429-30 (noting that secondary boycott occurs when one state tells nationals of another state that they may not trade with a third state even though trade with that third state is permitted by laws of state in which nationals reside).

147. See H.R. REP. NO. 104-202, at 39 (1996) (explaining that purpose of Act is to deny Castro's regime the capital it obtains from confiscations), reprinted in 1996 U.S.C.C.A.N. 527, 544; see also Berger-Tarnoff Briefing, *supra* note 134 (statement of Sandy Berger) ("The fundamental purpose of Title III . . . is to promote the transition of democracy in Cuba."); *Cuba and the United States: Scarecrow*, THE ECONOMIST, Apr. 13, 1996, at 38 (quoting Nicolas Gutierrez, a

ments by the drafters of the legislation, various provisions in the Act manifest this purpose.¹⁴⁸ The United States (nation *A*) seeks to discourage foreign companies (*X*) based in other nations (*C*) from trading with Cuba (nation *B*). Although the Act does not forbid trade with Cuba,¹⁴⁹ it exposes such traders to large damages¹⁵⁰ through litigation. Thus, those who trade with Cuba face a Hobson's choice.¹⁵¹ Because the choice given to these nations is, in fact, no choice at all, the Act seeks to prevent conduct that takes place lawfully outside the United States.¹⁵² Title III thus resembles a secondary boycott against nations trading with Cuba.¹⁵³

Although U.S. participation in secondary boycotts has been outlawed domestically,¹⁵⁴ secondary boycotts are not per se violations of international law.¹⁵⁵ Nevertheless, the extraterritorial framework upon which secondary boycotts rely may breach international legal principles.¹⁵⁶ These principles restrict the prescriptive jurisdiction of domestic statutes, or the extent to which national

lawyer who represents Nat'l Ass'n of Sugar Mill Owners of Cuba and was involved in crafting the Act, as saying "[t]he main objective is to drive foreigners out of Cuba").

148. These provisions include a three-month grace period before liability is triggered, *see* Helms-Burton Act, Pub. L. No. 104-114, § 302(a)(1), 1996 U.S.C.C.A.N. (110 Stat.) 785, 815 (1996) (to be codified at 22 U.S.C. § 6082(a)(1)), and treble damages, *id.* § 302(a)(3), 1996 U.S.C.C.A.N. (110 Stat.) at 815-16 (to be codified at 22 U.S.C. § 6082(a)(3)).

149. *See* Clagett, *supra* note 133, at 641 ("[T]itle III deals only with 'trade' of a specific type: occupying, dealing in or otherwise benefiting or profiting from property that was confiscated from U.S. nationals without compensation . . .").

150. *See supra* text accompanying notes 116-19, 126 (describing sums of money involved in litigation).

151. *See* Lowenfeld, *supra* note 83, at 429 (describing *X*'s choice as one "between an ice cream sundae and a root canal treatment").

152. *See id.* at 430 (describing U.S. actions as coercive and unreasonable because trade it proscribes occurs outside U.S. borders, is otherwise legal, and is legal in other state); *see also* H. Scott Fairley, Does Helms-Burton Act Violate International Law: An Argument in the Affirmative, Remarks at the American Conference Institute Program 20 (June 24, 1996) (on file with *The American University Law Review*).

153. *See supra* notes 147-52 and accompanying text (discussing Helms-Burton Act as a secondary boycott).

154. *See* Export Administration Act of 1977, 50 U.S.C. app. § 2402(5)(A)-(B) (1994).

155. The *Restatement (Third)*, the primary source of norms of international law for this Comment, *see supra* note 26, mentions secondary boycotts only once, *see* RESTATEMENT (THIRD), *supra* note 4, § 441 rep. n. 4, in relation to persons subject to U.S. jurisdiction, *see* Clagett, *supra* note 104, at 436 n.13 (suggesting that secondary boycott does not violate international law).

156. Not all exercises of extraterritorial jurisdiction are per se violations of international law. *See* Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, in 1994-I RECUEIL DES COURS 9, 43-44 (L'Académie de Droit International 1995) (stating that great deal of conduct involved in litigation takes place in more than one state and criticizing pejorative use of extraterritorial). Following Professor Lowenfeld's advice, this analysis attempts to restrict its discussion to "jurisdictional" questions rather than to "extraterritorial" questions to avoid pejorative connotations of the latter designation. *See id.* at 44 (suggesting that it is best to think of issue in terms of "jurisdiction to prescribe" rather than to taint discussion by characterizing jurisdiction as "extraterritorial"). Nevertheless, the use of "extraterritorial" is, at times, hard to avoid, but it should be noted that the limited use of this term implies no *a priori* negative judgment of the action being discussed.

legislation may extend to conduct outside a nation's borders.¹⁵⁷ The following sections examine these principles in greater depth.

2. *Title III and jurisdictional issues*

If the target of the Helms-Burton Act is conduct of non-U.S. nationals that occurs outside U.S. territory, Congress cannot rely on the two principal justifications for its jurisdiction to prescribe, namely territoriality and nationality.¹⁵⁸ Section 402 of the *Restatement (Third) of Foreign Relations Law*, however, offers bases for exercising authority over conduct that do not rely on these justifications. These bases of authority allow prescription of behavior that has a substantial effect inside the United States or that endangers its security.¹⁵⁹

United States courts have extended extraterritorial application of domestic statutes to conduct that has a "substantial effect" inside the United States.¹⁶⁰ This principle has become a part of international

157. Prescriptive jurisdiction refers to a state's authority "to make its law applicable to the activities, relations, or . . . persons." *RESTATEMENT (THIRD)*, *supra* note 4, § 401(a). International law recognizes limitations to a state's authority to prescribe laws, *see id.*, and sets forth various bases upon which this authority must be based. *See id.* § 402. Part II.A.3 of this Comment analyzes whether the required conditions are met in the context of the Helms-Burton Act. *See infra* text accompanying notes 158-208. The other forms of jurisdiction under international law are jurisdiction to adjudicate, *see RESTATEMENT (THIRD)*, *supra* note 4, § 421, and jurisdiction to enforce, *see id.* § 431. *See generally* OLIVER ET AL., *supra* note 35, at 132-270 (discussing forms of jurisdiction in international law). For discussions of the application of the principle of prescriptive jurisdiction in U.S. courts, *see Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 813-14 (1995) (Scalia, J., dissenting in part); *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 544 (1987); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Neely v. Club Med Management Services*, 63 F.3d 166, 176 (1995); and *Phillipines v. Westinghouse Electric Corp.*, 43 F.3d 65, 75-76 (1994).

It was on lack of U.S. jurisdiction to prescribe that the State Department initially opposed enactment of the Helms-Burton Act. *See House Markup*, *supra* note 98, at 19-20, 55 (testimony of Allen Weiner, Attorney-Advisor, State Dep't, Office of Legal Advisor).

158. *See RESTATEMENT (THIRD)*, *supra* note 4, at 237 introductory note ("Territoriality and nationality remain the principal bases of jurisdiction to prescribe."). Territoriality, that is, the nation's authority to regulate conduct that takes place within its territory, is the unquestioned form of jurisdiction. *See id.* § 402 cmts. b-c. ("The territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe, and it has generally been free from controversy."). Because the Helms-Burton Act, if applied broadly, will regulate conduct that occurs outside its territory, the territorial principle does not apply. The nationality principle historically referred to a nation's authority to control the conduct of its citizens, no matter where that conduct took place. *See id.* § 402(2). It is an "exceptional . . . basis for the exercise of jurisdiction." *Id.* § 402 cmt. b. Because the Helms-Burton Act, if applied broadly, will regulate the conduct of non-U.S. nationals, the nationality principle does not apply.

159. *See RESTATEMENT (THIRD)*, *supra* note 4, § 402(1)(c), (2) (describing "substantial effect" and "security of state" principles).

160. *See Hartford Fire*, 509 U.S. at 796 (citing as "well-established," application of Sherman Act to foreign conduct because of substantial effects doctrine); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (emphasizing that "American antitrust laws do not regulate the competitive conditions of other nations' economies"); *American Tobacco Co. v. United States*, 328 U.S. 781, 786 (1946); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 442 (1945) (stating "that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state

law.¹⁶¹ In examining the Helms-Burton Act, therefore, the question becomes whether the act of "trafficking" as defined by the Act has a "substantial effect" inside the United States. As the following argument contends, broad jurisdictional authority of the Act may not be based on the substantial effects doctrine.¹⁶²

The Act explicitly claims to provide rules of law relating to conduct that, although occurring outside the United States, has a substantial effect within its territory.¹⁶³ This conclusory statement, however, must be reconciled with the underlying "effect" addressed in the Act, that is, the wrongful confiscation of property by Castro's Cuba.¹⁶⁴ The Act contains no specific findings that "trafficking" promotes the confiscation of property of U.S. nationals; rather, the findings merely show that Cuba benefits economically from this "trafficking."¹⁶⁵ The

reprehends"). See generally OLIVER ET AL., *supra* note 35, at 137-165 (discussing effects principle, also known as objective territoriality, in context of international law norms); RESTATEMENT (THIRD), *supra* note 4, § 402(1)(c). Although the "substantial effect" principle is controversial, the European Community increasingly has invoked it to regulate restrictive business practices. See *id.* § 402 rep. n. 2.

161. See RESTATEMENT (THIRD), *supra* note 4, § 402.

162. The caveat provided in *supra* note 26 is worth repeating: the conclusory nature of some of these arguments is intended to introduce the statutory construction questions, *infra* Part II.C. Nevertheless, a conclusory argument is not necessarily without merit. The merits of the argument against jurisdiction based on the substantial effects doctrine are bolstered by the Opinion of the Inter-American Juridical Committee on Resolution AG/DOC.3375/96, Freedom of Trade and Investment in the Hemisphere, CJI/RES.II-14/96, §§ 8-9 (Aug. 23, 1996) (holding that "[a] prescribing State does not have the right to exercise jurisdiction over acts of trafficking abroad by aliens under circumstances where neither the alien nor the conduct in question has any connection with its territory").

163. See Helms-Burton Act, Pub. L. No. 104-114, § 301(9), 1996 U.S.C.C.A.N. (110 Stat.) 785, 815 (1996) (to be codified at 22 U.S.C. § 6081(9)). The language used by Congress is almost identical to the language of the *Restatement (Third)*. Compare *id.* ("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."), with RESTATEMENT (THIRD), *supra* note 4, § 402(1)(c) ("[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect with its territory . . ."). The language in the Act, however, does not supply the qualifier of reasonableness that is present in the RESTATEMENT (THIRD), *supra* note 4, § 403. See Lowenfeld, *supra* note 83, at 431 (pointing out that Congress' attempt to "impose US policy on third countries or their nationals is unreasonable by any standard" and that Americans would be "outraged" if other countries imposed their policies on United States); see also *infra* Part II.A.3.a (discussing reasonableness principle).

164. The effects defined by Title III include: (1) the confiscation of property by Castro's Cuba, see Helms-Burton Act § 301(3), 1996 U.S.C.C.A.N. (110 Stat.) at 814 (to be codified at 22 U.S.C. § 6081(3)); (2) the offering of such property to foreign investors, see *id.* § 301(5), 1996 U.S.C.C.A.N. (110 Stat.) at 814 (to be codified at 22 U.S.C. § 6081(5)); (3) the undermining of U.S. foreign policy toward Cuba, see *id.* § 301(6), 1996 U.S.C.C.A.N. (110 Stat.) at 814 (to be codified at 22 U.S.C. § 6081(6)); (4) the protection of the property rights of U.S. citizens, see *id.* § 301(10), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6081(10)); and (5) the victimization of U.S. nationals, who should be given a remedy, see *id.* § 301(11), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6081(11)).

165. See *id.* § 301(6), 1996 U.S.C.C.A.N. (110 Stat.) 814 (to be codified at 22 U.S.C. § 6081(6)) (relating that through "trafficking" activities Cuba obtains "financial benefit, including hard currency, oil, and productive investment and expertise").

findings in the Act, therefore, offer no viable nexus between "trafficking" and confiscation.¹⁶⁶ This failure to make a causal connection between the conduct prescribed and the purpose behind that prescription is related to the secondary boycott structure of the Act.¹⁶⁷ The Act attempts to punish Cuba by creating a cause of action against third parties dealing with Cuba. The injury for which Congress attempts to compensate, however, is not an injury caused by the "trafficking" countries. In short, Congress is forcing third parties to pay for Cuba's wrongs.¹⁶⁸

Under the protective principle, international law permits a state to control conduct that endangers its security.¹⁶⁹ One potential effect in the United States of the confiscation of property from Cuban nationals is an increase in the flow of refugees to the United States from Cuba.¹⁷⁰ Even assuming that an influx of refugees constitutes a threat to U.S. security, the Act fails to make findings suggesting that "trafficking" in property leads to more Cubans seeking refuge.¹⁷¹ The Helms-Burton Act makes findings related only to Cuba's threat to the United States,¹⁷² not to threats posed by the conduct targeted

166. On the other hand, it may be argued that the tort theory of a Title III cause of action creates a sufficient nexus. See *supra* note 104 (discussing theory of conversion that underlies Title III). In other words, foreign companies that benefit from confiscated property in Cuba are depriving rightful owners of that benefit. When the deprivation is inflicted upon a U.S. national, there is a substantial effect in the United States. For the strongest arguments supporting jurisdiction based on the substantial effect principle, see Clagett, *supra* note 104, and Clagett, *supra* note 133.

167. See *supra* Part II.A.1 (discussing secondary boycotts).

168. See Lowenfeld, *supra* note 83, at 431 (pointing to Cuba as source of behavior that Congress seeks to address).

169. See RESTATEMENT (THIRD), *supra* note 4, § 402(3) (permitting state to prescribe law when act is "directed against the security of the state or against a limited class of other state interests"); *id.* § 402 cmt. f (allowing states to punish offenses that threaten both their security and the integrity of their governmental functions).

170. See Helms-Burton Act, Pub. L. No. 104-114, § 2(19), 1996 U.S.C.C.A.N. (110 Stat.) 785, 787 (1996) (to be codified at 22 U.S.C. § 6021(19)) (citing legislative findings).

171. In fact, an argument can be made that the Act will have a powerful impact on Cuba, leading to the demise of Fidel Castro. Upon his departure and the installation of a transition government leading to a democracy, the flight of refugees will cease. An equally plausible argument is that, given Castro's ability to endure several embargoes in the past, this Act will not trigger his fall. Many have warned that Castro will use the Act to rally the Cuban people. See H.R. REP. NO. 104-202, at 57 (1996) (arguing from Helms-Burton dissenters' point of view that Castro will use Act to bolster nationalistic arguments), *reprinted in* 1996 U.S.C.C.A.N. 527, 556. The point here is that the connection between Cuban refugees in Florida and a Canadian company's use of Cuban land is remote at best and would not satisfy the effects principle.

172. See, e.g., Helms-Burton Act § 2(13), 1996 U.S.C.C.A.N. (110 Stat.) at 787 (to be codified at 22 U.S.C. § 6021(13)) (denouncing Cuban government's role in harboring fugitives and trading drugs); *id.* § 2(14), 1996 U.S.C.C.A.N. (110 Stat.) at 787 (to be codified at 22 U.S.C. § 6021(14)) (finding that Cuba engages in terrorism); *id.* § 2(19), 1996 U.S.C.C.A.N. (110 Stat.) at 787 (to be codified at 22 U.S.C. § 6021(19)) (finding that Castro uses illegal means to influence actions of Western Hemisphere sovereigns); *id.* § 2(28), 1996 U.S.C.C.A.N. (110 Stat.) at 788 (to be codified at 22 U.S.C. § 6021(28)) (finding that Cuban government continues to pose national security threat to United States).

by the Act. Additionally, although Title III punishes foreign companies dealing with Cuba, the Act does not brand their conduct a national security threat. Rather, the Helms-Burton Act recognizes only that the use by foreign companies of confiscated property undermines U.S. foreign policy.¹⁷³ For purposes of the protective principle, frustrated foreign policy goals do not constitute national security risks.¹⁷⁴

3. *Limitations on jurisdiction*

a. *Reasonableness*

Even if a party successfully argues that the "effects principle" or the "protective principle" reaches the conduct that Title III regulates,¹⁷⁵ the party must show that jurisdiction exercised pursuant to either principle is reasonable.¹⁷⁶ Construed broadly, the Helms-Burton Act may not meet any of the following factors relevant to determining reasonableness:

(1) *Territorial link*.¹⁷⁷ The Act relates to conduct that may take place completely outside U.S. territory. Based on the Act's definition of "trafficking," a company only need benefit from some transaction involving confiscated property in Cuba to fall within the ambit of the Act.¹⁷⁸ That benefit need not accrue to nor affect the U.S. entity being sued.¹⁷⁹ Indeed, any conduct that occurs in the United States

173. See *id.* § 301(6), 1996 U.S.C.C.A.N. (110 Stat.) at 814 (to be codified at 22 U.S.C. § 6081(6)).

174. The sort of national security threats envisioned by the protective principle are more specific and direct than general foreign policy goals. According to the *Restatement (Third)*, the protective principle refers to

a limited class of offenses committed outside [a state's] territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems, *e.g.*, espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.

RESTATEMENT (THIRD), *supra* note 4, § 402 cmt. f.

175. See Clagett, *supra* note 104, at 435-36 (arguing that Cuba's proximity to United States, its continued suppression of democracy, and its reluctance to relinquish property owned by U.S. nationals substantially affect United States).

176. See RESTATEMENT (THIRD), *supra* note 4, § 403(1) ("Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

177. See *id.* § 403(2)(a).

178. See *supra* note 12 (discussing definition of "trafficking" for purposes of Act).

179. The definition of "trafficking" appears to be broad enough to allow suit against a U.S. subsidiary of a foreign parent company when the parent draws some benefit from confiscated property in Cuba. See Helms-Burton Act, Pub. L. No. 104-114, § 4(13), 1996 U.S.C.C.A.N. (110 Stat.) 785, 790-91 (1996) (to be codified at 22 U.S.C. § 6023(13)) (defining "traffics" for

already is covered by other U.S. laws.¹⁸⁰ Because the conduct most likely will occur outside the United States, a territorial link as the basis for jurisdiction does not weigh in favor of the United States.

(2) *Other connections*.¹⁸¹ Most defendants in cases brought under the Helms-Burton Act will not be U.S. nationals.¹⁸² In fact, there may be no connection between "the person principally responsible for the activity to be regulated"¹⁸³ and the United States. The plaintiffs in such cases must be U.S. nationals,¹⁸⁴ so there will be some connection between the regulating state and "those whom the regulation is designed to protect."¹⁸⁵ Nevertheless, the connection may be nominal.¹⁸⁶

(3) *Character of the regulation and its importance to the regulating state*.¹⁸⁷ Many countries legally engage in activity regulated by the Act, namely benefitting from confiscated properties. In fact, the United States allows (indeed, promotes) this same activity when the confiscated property is in a country other than Cuba.¹⁸⁸

(4) *Frustration of justified expectations*.¹⁸⁹ Just as a Canadian company operating in the United States expects to be required to comply with U.S. law relating to its U.S. operations,¹⁹⁰ that company expects its operations in Cuba to be regulated only by Cuban and Canadian laws.¹⁹¹ There is no expectation of U.S. jurisdiction over a foreign company's operations that do not involve the United States. Under the Helms-Burton Act, however, foreign companies may face liability

purposes of Title III of Act).

180. See Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (1994).

181. See RESTATEMENT (THIRD), *supra* note 4, § 403(2)(b) (listing "nationality, residence, or economic activity" as reasonableness factors).

182. The Cuban Democracy Act of 1992 forbids any dealings with Cuba by U.S. nationals. See Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (1994).

183. RESTATEMENT (THIRD), *supra* note 4, § 403(2)(b).

184. See Helms-Burton Act § 302(a)(1)(A), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(1)(A)).

185. RESTATEMENT (THIRD), *supra* note 4, § 403(2)(b).

186. See Ann Davis, *Helms-Burton's First Test Comes Soon*, NAT'L L.J., Apr. 1, 1996, at A6 (reporting that lawyers are forming U.S. corporations for potential foreign plaintiffs from Spain and Honduras so that non-U.S. nationals have ability to sue under Act).

187. See RESTATEMENT (THIRD), *supra* note 4, § 403(2)(c) (explaining that "character of the activity to be regulated" is a factor to be considered in analyzing reasonableness of jurisdiction).

188. Some recent examples include U.S. commercial activity in Vietnam and Eastern Europe. See Lowenfeld, *supra* note 83, at 231-32 (hypothesizing French version of Helms-Burton Act and its impact on U.S. investments in Vietnam).

189. See RESTATEMENT (THIRD), *supra* note 4, § 403(2)(d) (setting forth effect on expectations as relevant factor in determining propriety of exercising jurisdiction).

190. See *id.* § 402(a)-(b) (noting general rule that state may exercise jurisdiction over conduct, persons, or things that either occur or exist within that state).

191. See *id.*

for normal business conduct that is recognized as legal activity in their home countries.¹⁹²

(5) *Regulation's importance to international political, legal, or economic system.*¹⁹³ The uniqueness of the measures in the Act,¹⁹⁴ the unilateral aspects of its benefits,¹⁹⁵ and the negative reactions of foreign governments¹⁹⁶ suggest that the significance of the Act to the international, legal, political, and economic order is minimal.

(6) *Historical consistency.*¹⁹⁷ Foreign governments have criticized and Congress has admitted the uniqueness of the liability created by the Act.¹⁹⁸

(7) *Extent of another state's regulatory interests¹⁹⁹ and the likelihood of conflict with another state's regulation.*²⁰⁰ The conduct that creates liability under the Helms-Burton Act is conduct over which another state may have reasonable territorial or national jurisdiction.²⁰¹ If the Act is interpreted broadly to apply to foreign companies' business with Cuba, there is a high likelihood that a pre-existing regulatory regime governs the transactions that the Act addresses. Given the reaction in the 1980s to U.S. attempts to regulate companies associated with a Russian pipeline project, it is reasonable to expect that some of these foreign regulations will conflict with the requirements of the Act.²⁰² In fact, because of previous disputes over the

192. See Lowenfeld, *supra* note 83, at 431-32 (using U.S. investments in Vietnam as example for measuring unreasonableness if France enacted law similar to Helms-Burton Act relating to property in France).

193. See RESTATEMENT (THIRD), *supra* note 4, § 403(2)(e) (indicating that international importance of regulation should be used as a weighing factor in jurisdictional analysis).

194. See Helms-Burton Act, Pub. L. No. 104-114, § 301(8), 1996 U.S.C.C.A.N. (110 Stat.) 785, 814 (1996) (to be codified at 22 U.S.C. § 6081(8)) (stating that international law does not provide effective remedies like those created in Act); H.R. CONF. REP. NO. 104-468, at 58 (1996) (noting uniqueness of right of action), *reprinted in* 1996 U.S.C.C.A.N. 558, 573.

195. The private causes of action created by this Act will benefit those plaintiffs who successfully litigate claims against "traffickers." See Helms-Burton Act § 301(11), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6081(11)).

196. See *supra* note 18 (discussing negative reactions of foreign governments to enactment of Helms-Burton Act).

197. See RESTATEMENT (THIRD), *supra* note 4, § 403(2)(f) (noting that consistency with historical traditions is a factor to consider in analyzing jurisdiction).

198. See H.R. CONF. REP. NO. 104-468, at 58 (1996) ("[T]his right of action is a unique but proportionate remedy for U.S. nationals."), *reprinted in* 1996 U.S.C.C.A.N. 558, 573.

199. See RESTATEMENT (THIRD), *supra* note 4, § 403(2)(g) (providing that interest of another state in activity to be regulated should be considered in analysis of jurisdiction).

200. See *id.* § 403(2)(h) (observing that conflict with regulation of another state should be weighed when analyzing proper exercise of jurisdiction).

201. A reasonable exercise of jurisdiction may be maintained by more than one state. See *id.* § 403 cmt. d. The point here is to show that other states have solid grounds for employing jurisdiction over the conduct regulated by Helms-Burton.

202. The unilateral sanctions imposed by then-President Ronald Reagan on companies that helped the former Soviet Union build a natural gas pipeline received widespread criticism from the United States' European allies. The sanctions were intended to punish Soviet repression in

jurisdictional reach of U.S. laws, Canada currently has regulations that prohibit Canadian companies from complying with U.S. extraterritorial laws.²⁰³ When the Act is read in light of these previously enacted Canadian regulations,²⁰⁴ a company based in Canada will be placed in a catch-22: Canadian law prohibits what U.S. law now requires.²⁰⁵

b. Assessment of interest of other states

The existence of a Canadian statute that directly conflicts with the Helms-Burton Act also is significant because international law mandates an assessment of each state's interest when both regulate

Poland, but ended up creating division between the United States and Western Europe that led to the eventual revocation of the regulations. The incident is known *l'Affaire Gazoduc*. See generally HUFBAUER ET AL., *supra* note 143, at 205-20 (presenting its case study of pipeline sanctions); ANDREAS F. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 267-306 (2d ed. 1983) (recounting story of Reagan's pipeline regulations); Duane D. Morse & Joan S. Powers, *U.S. Export Controls & Foreign Entities: The Unanswered Questions of Pipeline Diplomacy*, 23 VA. J. INT'L L. 537, 538-44 (1983) (detailing history of pipeline regulation and European reaction); Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1 (1985) (explaining United States' use of pipeline regulations in context of implementing export controls).

203. See Foreign Extraterritorial Measures (United States) Order, SOR/92-584, 1992 C. Gaz. Part II, at 4048. This order was issued by the Canadian Attorney General in consultation with the Secretary of State of External Affairs of Canada under the authority of the Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985). The legislation authorizes the attorney general to prohibit or restrict the production of records to a foreign tribunal, *see id.* § 3(1), and to issue orders that: (1) "require any person in Canada to give notice to" the attorney general of such measures affecting international trade or commerce

of a kind or in a manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty;

or (2) "prohibit any person in Canada from complying with such measures." *Id.* §§ 3(1), 5. The first order relating to the United States was issued in 1990 in anticipation of the passage of the Cuban Democracy Act. See Foreign Extraterritorial Measures (United States) Order, SOR/90-751, 1990 C. Gaz. Part II, at 4918. When the Cuban Democracy Act of 1992 was passed, another order was issued by the Canadian attorney general. See Foreign Extraterritorial Measures (United States) Order, SOR/92-584, 1992 C. Gaz. Part II, at 4048; *see also Canadian Issues Order Blocking Cuban Democracy Act Expansion*, 9 Int'l Trade Rep. (BNA) 1759 (1992) (reporting blocking order issued in reaction to anti-Cuba sanction law). This order recently was amended to leave no doubt that it may be applied in the context of the Helms-Burton Act. See Foreign Extraterritorial Measures (United States) Order, SOR/96-84, 1996 C. Gaz. Part II, at 611. See generally Fairley, *supra* note 152, at 31-33 (discussing Canadian blocking legislation); Keith Highet et al., *International Decisions*, 88 AM. J. INT'L L. 532 (1994) (reporting decision of Canadian Supreme Court in *Hunt v. Lac d'Amiante* that discussed constitutionality of provincial version of blocking statute); Selma M. Lussenburg, *The Collision of Canadian and U.S. Sovereignty in the Area of Export Controls*, 20 CAN.-U.S. L.J. 145, 147-153 (1994) (discussing history and applications of Foreign Extraterritorial Measures Act).

204. The Foreign Extraterritorial Measures (United States) Order was issued October 9, 1992, and amended January 12, 1996, as compared to enactment of the Helms-Burton Act on March 12, 1996. Compare Foreign Extraterritorial Measures (United States) Order, SOR/92-584, 1992 C. Gaz. Part II, at 4048, with *supra* note 10 (chronicling enactment of Helms-Burton Act).

205. See *supra* note 203 (presenting Canadian order that forbids Canadian companies' compliance with U.S. extraterritorial laws).

the same conduct.²⁰⁶ Therefore, even if the Act's extraterritorial application is determined to be reasonable, the law must be examined in light of the interests of other relevant nations in order to determine jurisdiction. This assessment is based on the reasonableness factors discussed above.²⁰⁷ A consideration of interests must recognize that the activity at issue in the Act may: (1) take place in Canada; (2) involve Canadian nationals; and (3) entail conduct traditionally regulated by Canada. Further, because the Canadian regulation is more consistent with the established norms of jurisdiction,²⁰⁸ it appears that Canada will be able to claim a greater interest in exercising jurisdiction.

B. Violations of International Agreements

The North American Free Trade Agreement ("NAFTA")²⁰⁹ is a congressional-executive agreement.²¹⁰ As a source of international law implemented in the United States by domestic legislation,²¹¹ NAFTA obligates the United States in its relations with other nations.

206. See RESTATEMENT (THIRD), *supra* note 4, § 403 cmt. e (proposing interest analysis when two or more states having conflicting regulations exercise jurisdiction). For purposes of this principle, there must be more than a mere difference in priorities and policies; there must be an actual conflict. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993) (citing *Restatement (Third)* to stress that there is no conflict when company is able to comply with laws of both regulating states).

207. See *supra* Part I.A.3.a (describing limitations on jurisdiction imposed by reasonableness); RESTATEMENT (THIRD), *supra* note 4, § 403(3) (maintaining that exercise of jurisdiction by multiple states having conflicting regulations is guided by reasonableness analysis).

208. In the example given, Canada can claim jurisdiction based on territoriality and nationality, the "principal bases of jurisdiction to prescribe." RESTATEMENT (THIRD), *supra* note 4, at 237 introductory note; see also *supra* note 158 (defining territoriality and nationality principles).

209. NAFTA, *supra* note 19.

210. See Ackerman & Golove, *supra* note 50, at 802-03 & n.6 (discussing NAFTA as congressional-executive agreement because it was subject to ex post review by Congress); Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 996 (1996) ("Fast track [which was used in NAFTA passage] is a type of executive agreement known as a congressional-executive agreement."); Harold H. Koh, *Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992) (discussing history of NAFTA negotiation process); Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 247-48 (1995) (discussing NAFTA in U.S. law). For further discussion of congressional-executive agreements, see *supra* Part I.A.2.a. NAFTA was negotiated on a "fast track" basis by the executive branch pursuant to the Trade Act of 1974, 19 U.S.C. §§ 2101, 2111-2112, 2191-2193 (1994), and the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2902. This framework requires that the President involve Congress in the negotiating process. See 19 U.S.C. §§ 2092(c)-(d), 2211(a)(1), 2903(a)(1)(A); see also Ackerman & Golove, *supra* note 50, at 904-07 (describing negotiations of international trade agreements under Trade Act regime). NAFTA then was approved by Congress in the North American Free Trade Implementation Act, Pub. L. No. 103-182, § 101, 107 Stat. 2057, 2061-62 (1993) (codified at 19 U.S.C. § 3311 (1994)) [hereinafter NAFTA Implementation Act].

211. See NAFTA Implementation Act, 107 Stat. 2057 (codified in scattered sections of 18, 19, 22, 26, 28, 46 U.S.C.).

When domestic legislation impinges on the obligations set forth in NAFTA, contracting parties²¹² may challenge the legislation under NAFTA's dispute resolution processes.²¹³ Some parties already have initiated these mechanisms to challenge Titles III and IV of the Helms-Burton Act.²¹⁴ Whether the Act violates NAFTA ultimately will be determined by the appropriate panels created by that agreement.²¹⁵ However, U.S. courts also must consider how the Helms-Burton Act affects U.S. obligations under NAFTA.²¹⁶

One argument that the Act violates U.S. obligations under NAFTA concerns Article 1105 of NAFTA.²¹⁷ Entitled the "Minimum Standard Treatment," this article requires that each NAFTA party treat

212. United States, Mexico, and Canada are the contracting parties to NAFTA. See 19 U.S.C. § 3311(a)(1).

213. NAFTA Article 2004 states, in pertinent part, that "the dispute settlement provisions of this Chapter shall apply . . . wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement" The dispute settlement provisions to which this article refers include Articles 2005-2022. See NAFTA *supra* note 19, arts. 2005-2022.

214. On June 28, 1996, Mexico, Canada, and the United States held consultations as provided for under Chapter 20 of NAFTA. See *NAFTA Designates Confer on Complaint Against Helms-Burton Under Chapter 20*, 13 Int'l Trade Rep. (BNA) 1093, 1093 (July 3, 1996) (reporting teleconference between designates of trade ministers from each country). This mechanism is the first step in the formation of a NAFTA panel. See NAFTA, *supra* note 19, art. 2006. Although Canada and Mexico were able to request the formation of a NAFTA dispute resolution panel after 30 days of the consultations, see *id.* art. 2008, neither country had exercised that authority as of the publication of this Comment. Canada recently decided to postpone requesting the formation of such a panel until the EU, which is negotiating with the United States in order to avoid the appointment of a dispute panel by the WTO, has completed those negotiations. See *Canada Delays NAFTA Helms-Burton Case Pending EU Negotiations with United States*, 14 Int'l Trade Rep. (BNA) 307, 307 (Feb. 19, 1997) (quoting Canadian International Trade Minister Art Eggleton about Canadian decision).

215. If consultation between the parties fails, any party may request a meeting of the Free Trade Commission. See NAFTA, *supra* note 19, art. 2001 (establishing Free Trade Commission); *id.* art. 2007 (empowering parties to request meeting of commission). A party then may request that an arbitral body be empaneled. See *id.* art. 2008. Following the rules of procedure set forth in NAFTA, the panelists will issue an initial report and then a final report. See *id.* art. 2012 (providing rules of procedure for arbitral panel); *id.* art. 2016 (describing arbitral panel's initial report); *id.* art. 2017 (describing arbitral panel's final report). The disputing parties then must implement the final report. See *id.* art. 2018; see also *id.* art. 2019 (allowing suspension of benefits upon non-implementation of final report).

216. See *supra* Part I.A.2.b (discussing impact of international agreements on domestic legislation). In dicta, one court refused to recognize NAFTA's impact on domestic law. See *Mississippi Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 303 (5th Cir. 1994) ("NAFTA . . . is not meant to affect United States law other than as 'specifically provided.'" (quoting NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2062 (1993))). Courts also may have to consider the Helms-Burton Act in relation to GATT. For a discussion of the Act in the context of GATT, see Jonathan R. Ratchik, Comment, *Cuban Liberty and Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 351-57 (1996).

217. See Kenneth L. Bachman et al., *Anti-Cuba Sanctions May Violate NAFTA, GATT, NAT'L L.J.*, Mar. 11, 1996, at C3 (stating that additional arguments concerning Title III's violation of trade obligations are "not as strong" as argument under NAFTA Article 1105). The main concern over Title III is its apparent violation of NAFTA Article 1005 and not necessarily any violations of other trade obligations. See *id.*; Fairley, *supra* note 152, at 39 (calling NAFTA, *supra* note 19, art. 1105, a "particularly promising" challenge to Helms-Burton Act).

"investments of investors of another Party . . . in accordance with international law."²¹⁸ NAFTA's definition of investments is broad enough to encompass the property held by businesses that are nationals of NAFTA countries.²¹⁹ Therefore, if the Helms-Burton Act violates international customary law, it also violates Article 1105 of NAFTA.²²⁰

Title IV of the Helms-Burton Act also may interfere with NAFTA's guarantee to facilitate temporary entry of business persons who are citizens of one NAFTA country into another NAFTA country.²²¹ Each NAFTA Party guarantees temporary entry for business persons engaging in business activity as long as that person complies with "existing immigration measures."²²² "Existing," as between Canada and Mexico or the United States and Mexico, is defined as in effect when the agreement entered into force,²²³ and as between Canada and the United States, means as of January 1, 1989.²²⁴ Because Title IV of the Helms-Burton Act restricts the travel of business persons even if they are engaging in business activity,²²⁵ and because this restriction was not an existing immigration measure,²²⁶ one could argue that Title IV violates NAFTA's guarantee of temporary entry for business persons.

C. *Implication of International Law Violations on Domestic Implementation*

The preceding discussion presented the strongest arguments that the Helms-Burton Act violates international law. Because international law may be used to shape the construction of domestic legisla-

218. NAFTA, *supra* note 19, art. 1105.

219. The definition extends to any "investment owned or controlled directly or indirectly by an investor of such Party." NAFTA, *supra* note 19, art. 1139; *see also* Bachman et al., *supra* note 217, at C3; Fairley, *supra* note 152, at 38-39.

220. *See supra* Part II.A (discussing possible violations of international customary law).

221. *See* NAFTA, *supra* note 19, art. 1603(1); *see also* Bachman, *supra* note 217, at C3 (suggesting Helms-Burton Act's possible violation of this NAFTA provision).

222. NAFTA Implementation Act, *supra* note 210, annex 1603 § A(1).

223. *See id.* annex 1608(a). The agreement went into force on January 1, 1994. *See* 19 U.S.C. § 3311(b) (1994).

224. *See id.* annex 1608(b).

225. *See* Helms-Burton Act, Pub. L. No. 104-114, § 401(a), 1996 U.S.C.C.A.N. (110 Stat.) 785, 822 (1996) (to be codified at 22 U.S.C. § 6091(a)).

226. The measures in Title IV of the Helms-Burton Act became effective immediately upon enactment of the Act on March 12, 1996, after the dates defining "existing" in NAFTA. *See* Helms-Burton Act § 401(d), 1996 U.S.C.C.A.N. (110 Stat.) at 824 (to be codified at § 6091(d)).

tion,²²⁷ U.S. courts may be required to interpret the Act in light of these potential violations.

To analyze the construction problems domestic courts may face and to test the outer limits of the Act's reach, this Comment hypothesizes one potential kind of defendant. This defendant is a domestic company (America Inc.) that allegedly is liable to a U.S. national because the domestic company's foreign parent, a Canadian corporation (Canada Corp.), has "trafficked" in property confiscated in Cuba. Assuming all other requirements of the Act are met and that America Inc. has not benefitted from the alleged trafficking, a court may have to address questions concerning the significance of international law violations in the Act if America Inc. asks the court to dismiss the claim by ruling that the plaintiff has failed to state a cause of action.²²⁸ America Inc. would argue that the Act should be construed so as not to cover conduct by Canada Corp., because a presumption arises against extraterritorial application of U.S. law, and international law does not support Congress' prescriptive jurisdiction.²²⁹ Courts faced with this challenge may choose to respond in one of the following ways:

(1) *The Helms-Burton Act does not violate international law.* Courts may rule that the Helms-Burton Act does not violate international law by making America Inc. liable to U.S. nationals for trafficking by the foreign parent, Canada Corp. Because of growing trade between foreign companies and Cuba, this holding, representing aggressive implementation of the Helms-Burton Act, would impact numerous foreign companies with U.S. subsidiaries even if those companies were able to prove that their U.S. concerns received no benefit from the parent's trafficking.

In order to justify this broad implementation of the Act, a court could rely on various rationales. First, it could respond to all of the arguments claiming that the Act violates international law,²³⁰ including the Act's direct conflict with the law of another country.²³¹ This

227. See RESTATEMENT (THIRD), *supra* note 4, § 111 (stating that international law and international agreements are law of the United States); *id.* §§ 113-114 (describing impact of international law on domestic courts); see also Parts I.A.1 and I.A.2.b (discussing impact of international law on construction of U.S. statutes).

228. See FED. R. CIV. PRO. 12(b)(6); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting in part) (distinguishing between dismissal for lack of subject matter jurisdiction and dismissal for lack of authority).

229. See *Hartford Fire*, 506 U.S. at 814-21 (Scalia, J., dissenting in part).

230. See *supra* Part II (presenting arguments that Helms-Burton Act violates international law).

231. See *supra* note 203 (describing Canadian law prohibiting compliance with Helms-Burton Act); see also *Hartford Fire*, 509 U.S. at 798-99 (ruling that no true conflict exists between U.S. and

reasoning may stress that the Helms-Burton Act covers activities that have a substantial effect in the United States and that the exercise of prescriptive jurisdiction is reasonable.²³² A court also may find that the Act is within Congress' jurisdictional authority because it regulates activity that endangers U.S. national security.²³³ Second, a court may decide that a ruling on the international law aspect of the Act is not within its competence given the ambiguity of the relevant international law principles.²³⁴ This reasoning could rely on Congress' discussion of the Act's international law ramifications during its consideration of the Act and defer to Congress' assertions that the Act is consistent with international law.²³⁵

This holding would not contradict the *Charming Betsy* principle. As a mode of statutory construction, this principle disfavors interpretations of statutes that contravene international law.²³⁶ In finding no incompatibility between the Helms-Burton Act and international law, the court simply could determine that *Charming Betsy* does not apply.

(2) *Despite possible violations of international law, later-in-time domestic statutes trump international law obligations.* Courts may favor this holding because it allows them to avoid examining questions of international law. The later-in-time principle states that current

British law when person can comply with laws from both states); Fairley, *supra* note 152, at 30-33 (distinguishing facts in *Hartford Fire* from those likely to be found in cases brought under Helms-Burton Act).

232. See *Cuban Liberty and Democratic Solidarity Act: Hearings on S.381 Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong. 136 (1995) (prepared statement of Ignacio E. Sanchez) (arguing that Act is reasonable exercise of jurisdiction based on factors in *Restatement (Third)* because Act helps United States protect its nationals' property rights); Clagett, *supra* note 104, at 436-38 (contending that Act is reasonable exercise of jurisdiction). The substantial effects argument appears to be the basis on which Congress assumed its jurisdiction. See Helms-Burton Act, Pub. L. No. 104-114, § 301(9), 1996 U.S.C.A.N. (110 Stat.) 785, 815 (1996) (to be codified at 22 U.S.C. § 6081(9)) ("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.")

233. See Clagett, *supra* note 104, at 435-36 (stressing danger to U.S. national security because of proximity of Cuba to United States).

234. See *supra* note 37 and accompanying text (discussing application of international law to Act).

235. See *House Markup*, *supra* note 98, at 56 (statement of Rep. Menendez) ("There is no one who can come to that microphone and say that there is international law that in fact stops us from pursuing such a cause of action [in Title III] on behalf of U.S. citizens and U.S. companies."); 142 CONG. REC. H1737 (daily ed. Mar. 6, 1996) (statement of Rep. Burton) ("International law and comity were not conceived to protect the corporate scavengers who are profiting at the expense of the Cuban people, pilfering the purloined assets of American citizens, and propping up a bandit regime."); *id.* at S1481 (daily ed. Mar. 5, 1996) (statement of Sen. Coverdell) ("This bill violates no treaty or international convention. It does not violate customary international law.").

236. See *supra* notes 38-44 and 74-81 and accompanying text (defining and discussing *Charming Betsy* principle).

legislation supersedes any previous international legal obligation.²³⁷ Because Congress has the authority to override international law,²³⁸ courts reason that there is no need to ask whether Congress has, in fact, done so. Instead, courts stress the judiciary's role in enforcing the laws as passed and understood by Congress. The Federal Circuit recently took this approach in responding to the argument that provisions of national legislation should be interpreted consistently with U.S. obligations under the General Agreement on Tariffs and Trade ("GATT").²³⁹ The court ruled:

[W]e are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy.²⁴⁰

Otherwise stated, courts must give full effect to Congress' intent.

It may be argued that Congress clearly intended to apply the Helms-Burton Act broadly.²⁴¹ Because U.S. companies already are

237. The later-in-time doctrine explicitly recognizes Congress' authority to violate international norms. See *supra* notes 35, 36 and 44 (discussing authority of Congress to contravene international norms). The *Restatement (Third)* states that:

An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.

RESTATEMENT (THIRD), *supra* note 4, § 115(1)(a).

As stated in the passage quoted above, the later-in-time doctrine requires that the statute and international law irreconcilably conflict. Therefore, an argument against holding that a subsequent domestic statute automatically overrides international obligations is that such a per se rule fails to determine whether the two indeed are irreconcilable. For a general discussion of this doctrine, see Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 226-31 (1993).

238. See, e.g., *United States v. Dion*, 476 U.S. 734, 745 (1986) (holding that treaty with Indian tribe was abrogated by Eagle Protection Act); *Chae Ping v. United States*, 130 U.S. 581, 599-602 (1899) (The Chinese Exclusion Cases) (holding that statute passed after treaty prevails); *Edye v. Robertson*, 112 U.S. 580, 600 (1884) (The Head Money Cases) (ruling that later Act of Congress prevails over conflicting international obligation); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) (ruling that domestic statute passed after GATT is controlling even when this statute conflicts with GATT); *South African Airways v. Dole*, 817 F.2d 119, 125-26 (D.C. Cir. 1987) (stating that Congress has power to enact legislation that conflicts with prior treaty obligation); *United States v. Georgescu*, 723 F. Supp. 912, 921 (E.D.N.Y. 1989) (referring directly to later-in-time doctrine to reject interpretation of international convention).

239. See *Aleaciones Laminadas*, 966 F.2d at 667-68.

240. *Id.*

241. There is ample evidence that Title III of the Helms-Burton Act has been understood to grant nothing less than the right to sue foreign companies. Legislators have not doubted the reach of Title III. For example, the conference report accompanying the Act states:

The purpose of [the Act's] civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the Cuban regime of Fidel Castro the capital generated by such ventures and to deter the exploitation of property confiscated from U.S. nationals.

prohibited by the Cuban Democracy Act from engaging in commercial activities with Cuba,²⁴² interpreting the Act to outlaw what already is illegal would render Titles III and IV of the Act useless. The provisions in these titles are intended to "discourage third-country nationals from seeking to profit from illegally confiscated property."²⁴³ Narrow construction would undermine these intentions.

(3) *The Act must be construed narrowly so as not to violate U.S. obligations under international law.* A narrow construction of the Act would limit its application to U.S. companies. The court could base this limitation on the presumption against extraterritoriality that presumes that legislation is meant to apply only within the United States.²⁴⁴ To overcome this presumption, the proponent of extraterritorial application must make an affirmative showing that Congress manifested clear intent to give the legislation extraterritorial effect.²⁴⁵ A

H.R. CONF. REP. NO. 104-468, at 58 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 573; *see also* 142 CONG. REC. H1726 (daily ed. Mar. 6, 1996) (statement of Rep. Diaz-Balart) (criticizing bill for granting to select few the right to sue foreign companies); *id.* at S1484 (daily ed. Mar. 5, 1996) (statement of Sen. Coverdell) (describing bill as permitting "lawsuits in American courts against Canadian, Mexican, European and other foreign companies").

Furthermore, certain sections of the Act may be unintelligible if Title III does not refer to the regulation of foreign companies. *See, e.g.,* Helms-Burton Act, Pub. L. No. 104-114, § 108, 1996 U.S.C.C.A.N. (110 Stat.) 785, 798-99 (1996) (to be codified at 22 U.S.C. § 6083) (requiring reports on commerce with Cuba from other foreign countries); *id.* § 301(5), 1996 U.S.C.C.A.N. (110 Stat.) at 814 (to be codified at 22 U.S.C. § 6081(5)) (making finding related to opportunities for foreign investors in Cuba); *id.* § 301(10), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6081(10)) (stating U.S. obligation to protect its citizens from wrongful confiscations by foreign nations and their citizens); *id.* § 303(a)(3), 1996 U.S.C.C.A.N. (110 Stat.) at 820 (to be codified at 22 U.S.C. § 6083(a)(3)) (concerning effect of determinations of foreign entities). The broad application of Title III also is at the root of the international controversy over the Act. *See supra* notes 202-05 (discussing international reaction to Act). Despite the belief that the Act applies to foreign companies, the term "foreign companies" is not specifically mentioned in the Act itself or in any of the committee reports. *See infra* notes 244-61 and accompanying text (arguing that Act does not apply to foreign companies).

242. *See* 22 U.S.C. § 6001 (1994) (providing sanctions for engaging in prohibited transactions).

243. H.R. REP. NO. 104-202, at 25 (1996), *reprinted in* 1996 U.S.C.C.A.N. 527, 530.

244. *See* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting in part) (describing presumption against extraterritoriality as traditional canon of statutory construction); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249 (1991) (commonly known as *Aramco*) (using presumption against extraterritoriality to construe narrowly Title VII of Civil Rights Act of 1964 as not applying to employment practices of U.S. firms employing U.S. citizens abroad); *Maxwell Communication Corp. v. Societe Generale*, 93 F.3d 1036, 1047 (1996) (noting that overcoming presumption against extraterritoriality "requires a clear expression from Congress for a statute to reach non-domestic conduct"). This presumption originated in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). For comprehensive treatment of the presumption against extraterritoriality, *see* Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. REV. 598 (1990).

245. *See Aramco*, 499 U.S. at 248. The presumption against extraterritorial application of domestic legislation has been overcome in relation to antitrust statutes. *See Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting in part) (describing as "well established" precedent concerning

U.S. national bringing a case under Title III of the Helms-Burton Act may argue that this clear intent is present not only in the legislative history of the Act²⁴⁶ but also in the language of the Act itself. The conduct that would precipitate a valid claim under this title, what is called "trafficking," is defined broadly to capture a wide range of commercial activity in relation to confiscated property.²⁴⁷ Furthermore, liability for this conduct is imposed on "any person."²⁴⁸ If "any person" is liable, certainly, according to this argument, a foreign person is liable.

Despite the sound logic of this plain meaning interpretation of the statute, it is precisely this kind of broad boilerplate language that the Supreme Court has deemed insufficient to overcome the presumption against extraterritoriality.²⁴⁹ Although courts may have difficulty limiting the conduct that is covered by the Act in light of the statute's language,²⁵⁰ they may limit who may be held liable for such conduct. Title III of the Act makes any person that engages in the specified conduct liable to a U.S. national for that conduct.²⁵¹ In turn, "person" for the purposes of the Act already has been defined as "any person or entity, including any agency or instrumentality of a foreign state."²⁵² This same kind of language was limited in

extraterritorial application of Sherman Act); *see also supra* notes 160-63 (discussing extraterritorial application of antitrust legislation in relation to substantial effects doctrine).

Courts have applied the presumption against extraterritoriality selectively, depending on the context of the legislation. *See* Turley, *supra* note 237, at 222-23 (discussing selective application in context of antitrust, securities, employment, and environmental law). An interesting question for the court would be whether the presumption also is overcome in the context of international sanction law legislation that often would have little effect if not applied extraterritorially. *See supra* notes 241-43 and accompanying text (discussing how Helms-Burton Act would be rendered useless by limiting its coverage to U.S. companies).

246. *See supra* notes 241-43 and accompanying text (presenting evidence from legislative history of Congress' clear intent to apply Act extraterritorially).

247. *See* Helms-Burton Act, Pub. L. No. 104-114, § 4(13), 1996 U.S.C.C.A.N. (110 Stat.) 785, 790-91 (1996) (to be codified at 22 U.S.C. § 6023(13)); *see also supra* note 12 (reproducing statute's definition of "trafficking" for purposes of Title III).

248. *See* Helms-Burton Act § 302(a)(1), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(1)); *see also supra* note 11 (reproducing statute's definition of "person").

249. *See Aramco*, 499 U.S. at 249 (rejecting party's reliance on Title VII's broad boilerplate language extending its application to commerce "between a State and any place outside thereof" because language is overbroad); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925) (refusing to extend extraterritorial effect to law even though language implicated commerce between "any of the States or territories and any foreign nation or nations"). *But see Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952) (granting broad extraterritorial jurisdiction to Lanham Act that covered "all commerce which may lawfully be regulated by Congress"); Turley, *supra* note 237, at 222-23 (discussing extraterritorial application of laws in various contexts).

250. "Trafficking" is defined meticulously. *See supra* note 12 (reproducing Act's definition of "trafficking").

251. Helms-Burton Act § 302(a)(1), 1996 U.S.C.C.A.N. (110 Stat.) at 815 (to be codified at 22 U.S.C. § 6082(a)(1)).

252. *Id.* § 4(11), 1996 U.S.C.C.A.N. (110 Stat.) at 790 (to be codified at 22 U.S.C. § 6023(11)). The Act defines "agency or instrumentality of a foreign state" the same way as the

Lauritzen v. Larsen.²⁵³ In construing the "any seaman" language in the Jones Act to mean "any U.S. seaman," Justice Jackson stated for the majority:

Unless some relationship . . . to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal working.²⁵⁴

Similarly, it may be argued that "any person" in the Helms-Burton Act means any U.S. person.²⁵⁵

Other textual elements in the Act support this narrow construction. For example, the activity of foreign companies is not addressed specifically in either the Act or the legislative history. The term "foreign national" is defined in the Act²⁵⁶ and would include foreign companies.²⁵⁷ Nevertheless, this term is not incorporated in the definition of "any person,"²⁵⁸ nor does it appear in Title III of the

Foreign Sovereign Immunities Act. See *id.* § 4(1), 1996 U.S.C.C.A.N. (110 Stat.) at 789 (to be codified at 22 U.S.C. § 6023(1)) (cross-referencing to definition in Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b) (1994)).

253. 345 U.S. 571 (1953).

254. *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953). It is important to note that *Lauritzen* is not a presumption-against-extraterritoriality case; rather, the authority for its narrow construction was based on the conceptually and historically related *Charming Betsy* principle. The close relationship between the two concepts has caused the Supreme Court to use cases utilizing one principle to support the use of the other. For example, *Charming Betsy* cases were cited as support for the majority's opinion in *Aramco*. See *Aramco*, 499 U.S. at 248 (citing *Benz v. Compania Naviera Hidalgo*, 336 U.S. 281 (1949) and *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963)); *id.* at 264 (Marshall, J., dissenting) (pointing out majority's reliance on *Charming Betsy* principle for ruling on presumption against extraterritoriality); see also *infra* note 262 (discussing relationship between *Charming Betsy* principle and presumption against extraterritoriality).

255. In part, the presumption against extraterritoriality is based on potential conflicts between U.S. law and laws of foreign nations. See *Aramco*, 499 U.S. at 248 (stating that presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord"). The direct conflict between extraterritorial application of the Helms-Burton Act and the laws of other nations, especially those of Canada, would support the application of this presumption. See *supra* notes 203-05 (discussing Canadian law that prevents Canadian companies from complying with U.S. extraterritorial laws).

256. Section 4(8) of the Act states:

The term "foreign national" means—

(A) an alien; or

(B) any corporation, trust, partnership, or other juridical entity not organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States.

Helms-Burton Act § 4(8), 1996 U.S.C.C.A.N. (110 Stat.) at 790 (to be codified at 22 U.S.C. § 6023(8)).

257. See *id.* § 4(8)(B), 1996 U.S.C.C.A.N. (110 Stat.) at 790 (to be codified at 22 U.S.C. § 6023(8)(B)).

258. *Id.* § 4(11), 1996 U.S.C.C.A.N. (110 Stat.) at 790 (to be codified at 22 U.S.C. § 6023(11)).

Act.²⁵⁹ Rather, the conduct of foreign nationals is referenced only in the context of written reports concerning commerce with and assistance to Cuba.²⁶⁰ It may be argued that this specific definition of "foreign nationals" excludes them from the general definition of "any person." Also, the recognition of a special category called "foreign nationals" illustrates how Congress could have been more specific in Title III if it had intended to do so.²⁶¹ By failing to include "foreign nationals" among those liable for trafficking, Congress did not express its intent to hold foreign companies liable for their extraterritorial conduct.

By finding that the presumption against extraterritoriality has not been overcome, the court also would honor the *Charming Betsy* principle.²⁶² Because many of the inconsistencies between the Act

259. See *id.* §§ 301-306, 1996 U.S.C.C.A.N. (110 Stat.) at 814-22 (to be codified at 22 U.S.C. §§ 6081-6085).

260. See *id.* § 108, 1996 U.S.C.C.A.N. (110 Stat.) at 798-99 (to be codified at 22 U.S.C. § 6038). "Foreign nationals" appears only twice in the entire Act, once in § 108(b)(3) and once in § 108(b)(6).

261. Recognition that Congress knows how to employ the language of extraterritoriality when it intends extraterritorial application of domestic legislation is part of the reasoning behind the Court's use of the presumption against extraterritoriality. See *EOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute."). In *Aramco* the Court cites numerous statutes illustrating clear statutory language indicating extraterritorial application of laws. See *id.* Among others, it cites the Export Administration Act of 1979, 50 U.S.C. app. § 2451(2) (1988), which defines a U.S. person as "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern," and the Logan Act, 18 U.S.C. § 953 (1988), which statutorily applies to "[a]ny citizen . . . wherever he may be." See *Aramco*, 499 U.S. at 258.

262. The presumption against extraterritoriality and the *Charming Betsy* principle are closely related. See Turley, *supra* note 237, at 190 (recognizing common origins of the two forms of statutory construction); Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 345 n.30 (1990) (stating that distinction between two principles "only obscures prescriptive origins of the presumption"); James Mathieu, Note, *The Supreme Court's Not So Clear Statement in: Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 21 BROOK. J. INT'L L. 939, 939 (1996) (tracing history of presumption against extraterritoriality to *Charming Betsy* principle). Nevertheless, courts have attempted to distinguish them. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting in part) (discussing both principles as distinct forms of statutory construction); *EOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 264 (1991) (Marshall, J., dissenting) (declaring *Charming Betsy* principle "wholly independent rule of construction" from presumption against extraterritoriality); *Boureslan v. ARAMCO*, 857 F.2d 1014, 1023 (5th Cir. 1988) (King, J., dissenting) (arguing that presumption against extraterritoriality requires less stringent showing of legislative intent than does *Charming Betsy* principle), *aff'd on reh'g en banc*, 892 F.2d 1271 (5th Cir. 1990), *aff'd sub nom.* *EOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). For a comprehensive treatment of the presumption against territoriality and the *Charming Betsy* principle (referred to as the presumption in favor of international law), see Turley, *supra* note 237, at 210-224. In part Professor Turley states that the presumption against extraterritoriality "was created by the direct application of an international source in the form of the customary international law on prescriptive jurisdiction." *Id.* at 231. In other words, the presumption against extraterritoriality may be considered a sub-class of the *Charming Betsy* principle concerned with international

and international law relate to jurisdictional questions,²⁶³ and because the presumption against extraterritoriality resolves these questions in favor of limited, national jurisdiction, there no longer would be an inconsistency between international law and a domestic statute requiring reconciliation under the *Charming Betsy* principle.²⁶⁴ In other words, many of the arguments that the Act violates international law would be moot if Title III of the Act is limited to conduct by U.S. nationals.

III. RECOMMENDATIONS: METHODS OF RECONCILING CONFLICTS BETWEEN DOMESTIC STATUTES AND INTERNATIONAL OBLIGATIONS

Enforcers of the Helms-Burton Act may avoid domestic judicial scrutiny of the Act's potential violation of international law.²⁶⁵ Nevertheless, reconciling aggressive sanction legislation with international law will continue to present courts with the difficult choice of either undermining congressional intent or abandoning the *Charming Betsy* principle. To avoid this unnecessarily risky form of lawmaking, Congress must harness its vast powers either to define U.S. international obligations²⁶⁶ such that they do not conflict with other legislative objectives, or to formulate domestic legislation that accords with pre-existing obligations. The following recommendations offer a sampling of congressional action that should be taken.

A. Presidential Suspension Authority

Title III of the Helms-Burton Act provides the executive with authority to suspend some aspects of the Act after certain determinations have been made.²⁶⁷ This authority is helpful because it gives the executive discretionary power to balance the provisions of the law with other foreign relations concerns. Congress may, as in this case, attempt to define narrowly the determinations required under the Act. Any language other than factual requirements, however, will lend itself to varying interpretations depending on legal and policy

norms of jurisdiction.

263. See *supra* notes 158-208 and accompanying text (discussing Act's potential violations of international law based on jurisdictional issues).

264. For general treatment of the *Charming Betsy* principle, see *supra* notes 38-44 and 74-81 and accompanying text.

265. See *supra* Part II.C (presenting arguments that Act does not violate international law).

266. See *supra* Part I.A.2 (discussing congressional power to define U.S. international obligations).

267. See Helms-Burton Act, Pub. L. No. 104-114, §§ 306(b)-(d), 1996 U.S.C.C.A.N. (110 Stat.) 785, 821-22 (1996) (to be codified at 22 U.S.C. § 6085(b)-(d)); see also *supra* note 134 and accompanying text (describing workings of presidential suspension authority).

needs. This flexibility will permit the executive to raise potential violations of international law as justifications for avoiding implementation of certain statutory provisions.

B. Suspension Authority Based on International Law Determinations

Suspension may be linked to determinations or rulings of bodies other than the executive. This approach has been used with some export control laws²⁶⁸ and is the best way to ensure U.S. compliance with international law. One export control law includes a provision that mandates suspension of any part of the statute that is found to violate U.S. obligations under international trade agreements.²⁶⁹ A determination by the body authorized under the applicable international agreement that a violation has occurred triggers this suspension provision.²⁷⁰ This approach pays full respect to the international agreement by linking domestic legislation to determinations by the authorized international body that such legislation does not infringe international law. The disadvantage is that national bodies relinquish control of and accountability for domestic legislation when the validity of such legislation is decided by international bodies.²⁷¹

C. Comprehensive Sanction Legislation

Because U.S. sanction laws often are the source of international condemnation and legal challenges, Congress may avoid the legal

268. See, e.g., 16 U.S.C. § 620c(g) (1994) (defining suspension authority when U.S. law violates trade agreement).

269. See *id.* The statute states:

The President is authorized . . . to suspend the provisions of this action if a panel of experts has reported to the Contracting Parties to the General Agreement on Tariffs and Trade, or a ruling issued under the formal dispute settlement proceeding provided under any other trade agreement finds, that the provisions of this section are in violation of, or inconsistent with, United States obligations under that trade agreement.

Id.

270. See *id.*

271. The extent of this disadvantage is mitigated by Congress' power to effect the content of international agreements and the obligations they entail. See *supra* Part I.A.2 (discussing congressional ability to determine content of international agreement). In addition, determinations by international bodies concerning issues in international agreements or international law, in general, already can have an effect on domestic legislation. See *supra* Part I.A.1 (discussing *Charming Betsy* principle). But see *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667 (1992) (concluding that GATT was not controlling authority when it conflicted with domestic statute). Nevertheless, given the broad standards in many international agreements and the malleable nature of language, there always will be some unpredictability concerning the precise scope of certain obligations and the meaning of certain commitments. By linking domestic legislation to determinations by the proper international bodies, Congress authorizes these bodies to "veto" certain provisions in legislation that are construed to violate international obligations in the same way that the Constitution authorizes the courts, through judicial review, to "veto" statutory provisions that violate federal constitutional obligations.

problems associated with laws such as the Helms-Burton Act by enacting a comprehensive international sanction law. Such an act should create a continuum of increasing export controls and other sanction techniques.²⁷² The law would require presidential determinations or congressional findings to trigger imposition of higher or lower levels of sanctions. This approach would avoid the case-by-case initiatives that often involve raw, election year politics and short-term, ideological goals. More importantly, an international sanction act could define the specific national interests underlying sanctions that might be challenged under international law. The debate over such national interests would allow Congress to define exactly when it is ready to breach international law in pursuit of national goals and what level of deference courts should extend to international legal principles in this inquiry.

D. Clear Intent to Violate International Law

Congress also can use its legislative authority to express its clear intent to enforce a statute even though the statute may violate international law. In applying domestic law, courts consistently have recognized Congress' power to violate international norms.²⁷³ By expressly stating an intent to violate international law, Congress will prevent domestic courts from construing legislation narrowly. Statutes that expressly flout international law, however, may set a dangerous international precedent. In general, countries do not wish to be perceived as outside the international legal system. Furthermore, the United States would not want to undermine a system from which it benefits.

E. Congressional Authority to Affect Obligations Under International Law

Congress has the ability to define the obligations the United States assumes under international agreements.²⁷⁴ Therefore, it may wish simply to assert this power to formulate international agreements with which the United States can comply. Congress, for example, could have demanded safeguards in NAFTA and GATT that allow international sanctions even though they may violate international law. Those demands could have been addressed either in the statute

272. See Anne Q. Connaughton, *Exporting to Special Destinations: Terrorist-Supporting Embargoed Countries*, in *COPING WITH U.S. EXPORT CONTROLS*: 1995, at 447, 544-48 (Evan R. Berlach & Cecil Hunt eds., 1995) (illustrating categories of exported items that may be restricted).

273. See Goldklang, *supra* note 36, at 144 (stating that courts long have held that domestic legislation prevails over international law).

274. See *supra* Part I.A.2 (describing congressional power).

authorizing the negotiation of these agreements, through pressure on the administration during the negotiations, or by refusal to adopt the final agreement. The advantage of this approach is that it preserves the integrity of the United States' commitment to international agreements. The disadvantage is that it may result in stalled talks and derailed negotiations of complex and significant international agreements.

CONCLUSION

The globalization of commerce has resulted in a closer relationship between international and domestic legal systems. Standard domestic commercial statutes of yesteryear have become far-reaching international trade legislation of today. As a result, domestic statutes increasingly will have international law ramifications. This situation is evident particularly in the context of foreign policy sanctions legislation, which, by definition, has international implications. In the United States, lawmakers must understand the consequences of enacting legislation that impinges on international legal obligations. Courts may use the *Charming Betsy* principle and related rules of statutory construction to construe narrowly such statutes so as to reconcile them with international law.

The Helms-Burton Act provides a good example of a foreign policy sanction law that may have its purpose undermined by the judiciary's interpretive rules. The questions surrounding its domestic application presage potential problems of judicial interpretation in the world of overlapping legal guidelines. The Act appears to have no purpose without extraterritorial application, but it is textually ambiguous. Thus, courts interpreting the Helms-Burton Act will be caught between the rules of statutory construction that favor narrow interpretation and the apparent, but unclear, congressional intent that suggests broad application of the Act.

Although violation of international law comes at a cost, Congress has the domestic authority to decide to pay that price in exchange for what it determines to be important national priorities. Absent clear congressional intent, however, courts may undermine those priorities. The courts may not have an interpretive role in applying the Helms-Burton Act, because certain provisions never may become effective. However, courts increasingly will face the problems the Act raises. Congress has the legal authority to avoid these problems. Congress also has the legal responsibility to adhere to the international obligations it created.

