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## Helms-Burton and Canadian-American Relations at the Crossroads: The Need for an Effective, Bilateral Cuban Policy

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# Helms-Burton and Canadian-American Relations at the Crossroads: The Need for An Effective, Bilateral Cuban Policy

*Christine L. Quickenden*<sup>\*</sup>

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## INTRODUCTION

"It is only with Cuba that America continues the Cold War."<sup>1</sup>

When President Clinton signed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton)<sup>2</sup> into law on March 12, 1996 he unleashed a firestorm of international opposition.<sup>3</sup> Canada led the vociferous con-

1. THOMAS G. PATERSON, *CONTESTING CASTRO: THE UNITED STATES AND THE TRIUMPH OF THE CUBAN REVOLUTION* 263 (1994) (quoting an unnamed Cuban official). Paterson concludes with the question whether Cuba and the United States could attempt to resolve their differences as others, such as the Israelis and Palestinians, along with the United States and Vietnam, have done. *Id.*

2. Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. § 6021) [hereinafter Helms-Burton]. The legislation is named for the Act's sponsors, Senator Jesse Helms (R-NC) and Representative Dan Burton (R-IN). President Clinton's signature of Helms-Burton signified a complete policy reversal after a year of stringent Administration lobbying against the law, fueling speculation that the President's drive for Florida's electoral votes in the November 1996 election motivated his policy about-face. Hugh Davies, *Clinton Goes for Votes with Cuba Blockade U-Turn*, DAILY TELEGRAPH, Mar. 13, 1996, at 11. The February 24, 1996 shootdown of two civilian aircraft by Cuban MiGs provided the President's official impetus. See Helms-Burton, *supra*, § 116 (relating congressional findings on Havana's downing of the airplanes in a special section of the law entitled, "Condemnation of Cuban Attack on American Aircraft"). Canada immediately joined the United States in deploring the shootdown, disagreeing only with the way in which the Americans responded. CANADIAN DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, CANADA CONDEMNS CUBA'S DOWNING OF U.S. AIRCRAFT (1996).

3. See Peter Moeron, *The U.S. Shouldn't Be Stunned That its Allies Don't Back Cuba Policy*, FIN. POST, June 22, 1996, at 21 (describing Washington as alone in its belief that Helms-Burton constitutes sound foreign policy); see also Tom Carter & Warren P. Strobel, *Clinton, Hill Unite on Cuba; Deal Reached on Stringent Sanctions Bill*, WASH. TIMES, Feb. 29, 1996, at A1 (elaborating on the negative foreign response to Helms-Burton). In rebuttal, Representative Ileana Ros-Lehtinen (R-FL) noted: "The ambassadors from Canada and Britain are going nuts. Our allies have to choose whether to play footsy with Fidel or have access to the U.S. market." *Id.* at A14. Due to spatial constraints, this Comment focuses solely on Canadian reaction to Helms-Burton, but signals to the reader that Mexico, the Organization of American States (OAS), Britain, Spain, and the European Union either passed or currently are considering blocking legislation. Helms-Burton also is the subject of a European Union (EU) complaint at the World Trade Organization (WTO). See *Clinton Extends His Suspension of Title III of Cuba Law: Canada Weighs NAFTA Action*, 14 Int'l Trade Rep. (BNA) 42 (Jan. 8, 1997) (noting that the WTO agreed to the EU's request for a dispute settlement panel on November 20, 1996); Paul Blustein and Anne Swardson, *U.S. Vows to Boycott WTO Panel: Move Escalates Fight With European Union Over Cuba Sanctions*, WASH. POST, Feb. 21, 1997, at A1, A12 (noting the American position that the issue is one of foreign policy, rather than trade, and is, thus, improperly before the WTO). At present, however, the EU challenge is suspended, pending European and American concrete efforts at increased, mutual understanding. See *EU Suspends Effort to*

demnation that sounded almost immediately from prominent American trade, political, and strategic allies around the world.<sup>4</sup> The multinational consensus is that the legislation violates international law and is bad foreign policy and is successful only in its alienation of important American friends.<sup>5</sup>

Canada and the United States have a solid, if imperfect, bilateral relationship, evidenced by cooperation in several arenas.<sup>6</sup> Recent developments such as the 1988 Canada-United States Free Trade Agreement (CFTA)<sup>7</sup> and the 1994 North American Free Trade Agreement (NAFTA)<sup>8</sup> deepen and codify already strong economic ties.<sup>9</sup> Trade and foreign policies diverge, however, when Cuba becomes

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*Challenge in WTO Helms-Burton Legislation*, 14 Int'l Trade Rep. (BNA) 742 (Apr. 23, 1997).

4. See Lorraine Woellert, *Allies Complain of "Chilling Effect,"* WASH. TIMES, Aug. 6, 1996, at A1 (noting the continuing condemnation from the international community of America's unilateralist approach and unfavorably comparing the range of discretionary powers afforded the office of the president under Helms-Burton with that provided in other legislation).

5. See U.S. Trend Toward Unilateral Action "Disturbing," *Canadian Official Says*, 13 Int'l Trade Rep. (BNA) 613 (Apr. 10, 1996) (quoting Canadian official who decries the United States's "selective [American] adherence to the rule of law").

6. See generally MARC LEMAN & VINCENT RIGBY, LIBRARY OF PARLIAMENT RESEARCH BRANCH, CANADIAN-AMERICAN RELATIONS, Current Issue Rev. No. 79-34E (1992) (recognizing the primarily positive nature of the relationship between Canada and the United States). The publication provides an overview addressing trade and investment, energy, environment, maritime boundaries, and fishery concerns. *Id.* It also includes a survey of then-recent action taken by the Canadian Parliament vis-à-vis its southern neighbor. *Id.* The publication further notes that the extent of contacts between Canada and the United States implies that there necessarily will be disagreements but that both parties generally are amenable to their rapid resolution, given the importance of bilateral ties. *Id.*

7. Canada-United States Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281 (1988) [hereinafter CFTA]. See generally Ann Carlsen, Note, *The Canada United States Free Trade Agreement: A Bilateral Approach to the Reduction of Trade Barriers*, 12 SUFFOLK TRANSNAT'L L.J. 299 (1989) (providing an overview of the agreement). Carlsen addresses the evolution of Canadian-American trade relations in a sometimes turbulent century and focuses on the agreement's removal of trade barriers to services and its establishment of a detailed mechanism for the settlement of disputes. *Id.*; see also Jean Raby, *The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective*, 84 AM. J. INT'L L. 394, 394 (1990) (noting that the agreement was the culmination of a hard-fought process dating back to 1854 and the brief life of the Elgin-Marcy Reciprocity Treaty, which provided for the free exchange of natural products between Canada and the United States).

8. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 and 32 I.L.M. 605 (1993) [hereinafter NAFTA]; see RALPH H. FOLSOM & W. DAVIS FOLSOM, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS (1996) (providing a detailed description of Canadian, American, and Mexican history, legal traditions, and business relationships prior to NAFTA and explaining the agreement, its implementation, and its ramifications for the developing and potentially expanding North American market).

9. John Whalley & Colleen Hamilton, *The Intellectual Underpinnings of North*

the subject.<sup>10</sup> Canada<sup>11</sup> engages in extensive commerce with Havana<sup>12</sup> and employs a policy of affirmative engagement to demonstrate, *inter alia*, the independence of Canadian foreign policy.<sup>13</sup> The United States pursues an opposite agenda, fighting Havana's lack of democracy with economic sanctions designed to deny resources to the socialist regime, which is desperate for capital.<sup>14</sup>

Ottawa perceives Helms-Burton as an effort to infringe upon Canadian sover-

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*American Economic Integration*, 4 MINN. J. GLOBAL TRADE 43 (1995) (elaborating on the origins of the free trade agreements and their underlying objectives, while assessing their effect and contrasting the North American experience with gradations of economic integration with that of the Europeans).

10. See James Morrison, *Helms-Burton Critic*, WASH. TIMES, June 5, 1996, at A15 (relating remarks of the Canadian Ambassador to the United States, Raymond Chretien, criticizing the Helms Burton law). The Ambassador noted:

Canada and the United States share the goal of a peaceful, democratic transition in Cuba, the last undemocratic bastion in this hemisphere . . . . [W]hile the United States advocates a policy of isolation, Canada advocates a policy of engagement. While the United States advocates an embargo to pressure the Cuban government to open its society to political change, Canada advocates commercial engagement, which we believe will make economic and political change inevitable . . . . We recognize that it is the United States' sovereign prerogative to conduct its foreign policy as it sees fit. We ask for no less from the United States.

*Id.*

11. See CUBAN AMERICAN NATIONAL FOUNDATION, CUBA'S HALL OF SHAME (released to members of the press on March 15, 1996 by Marc Thiessen, Press Spokesman for the United States Senate Committee on Foreign Relations) (undated copy on file with author). According to this list, Canada is only one of many nations trading with Cuba. *Id.* The list includes Australia, Austria, Brazil, Canada, Chile, Colombia, Ecuador, China, the Dominican Republic, France, Germany, Greece, Holland, Honduras, Hong Kong, Israel, Italy, Jamaica, Japan, Mexico, Panama, South Africa, Spain, Sweden, the United Kingdom, and Venezuela. *Id.*

12. See CANADIAN DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, BACKGROUNDER ON U.S. HELMS-BURTON LEGISLATION (1996) (relating that trade between Canada and Cuba grew by 54% from 1994-95, Canadian exports to Cuba during this period grew from Can. \$115 million to Can. \$254.5 million, and Canadian imports from Cuba grew from Can. \$194 million to Can. \$320.9 million); Howard Schneider, *Canada and Cuba: Booming Partners—Despite U.S. Obstacles, Trade, Diplomacy Flourish*, WASH. POST, Oct. 20, 1996, at A1, A24 (describing the win-win perspective that both Canada and Cuba take on their relationship). Without competition from American investors, Canadians are able to reap huge financial profits. *Id.* Similarly, Cuba is able to benefit from a relationship with prosperous Canada and receive much-needed grants and loan guarantees, such as those required for the financing of the new air terminal in Havana. *Id.*

13. See Christopher Marquis, *Canada Sees Cuba's Friendship As Aiding Latin American Trade*, J. OF COM., Feb. 10, 1990, at 13A (noting that after the United States, Canada is the second-largest contributor to the Organization of American States).

14. See generally UNITED STATES ECONOMIC MEASURES AGAINST CUBA: PROCEEDINGS IN THE UNITED NATIONS AND INTERNATIONAL LAW ISSUES (Michael Krinsky & David Golove eds., 1993) [hereinafter Krinsky & Golove] (providing an excellent description of the genesis and development of American economic policy toward Cuba, including a chronology of legal measures through 1992).

eighty and force the adoption of American foreign and economic policies.<sup>15</sup> After Canadian diplomats unsuccessfully lobbied Washington against Helms-Burton,<sup>16</sup> the Canadian parliament voted to amend the Foreign Extraterritorial Measures Act (FEMA).<sup>17</sup> The FEMA amendment effectively nullifies Helms-Burton in Canada by creating a cause of action to recover expenses lost as a result of an adverse judgment in the United States and imposing heavy financial penalties upon any Canadian entity complying with the American law.<sup>18</sup>

The adoption of completely contradictory regulations by the United States and Canada necessarily raises the specter of an inevitable collision.<sup>19</sup> Helms-Burton harms the Canadian-American relationship in spirit.<sup>20</sup> Today, however, both countries are at a crossroads, and their responses to this stalemate will determine the extent to which they will allow the dispute to affect both their bilateral relationship and NAFTA. One path of increasing conflict regarding Cuba sets the stage for a diplomatic, commercial, and litigious war,<sup>21</sup> while the other leads to

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15. Canadian Dep't of Foreign Affairs and Int'l Trade, Notes for an Address by the Honourable Art Eggleton, Minister for International Trade, on the Occasion of the Second Reading of the Bill to Amend the Foreign Extraterritorial Measures Act (1996) [hereinafter Eggleton Address]. The Canadian official stated:

[A]t the most fundamental level [Helms-Burton] is objectionable because it attempts to enforce uniformity of approach and to deny the freedom to other nations to make up their own minds and implement their own policies . . . . Many years ago, President Kennedy said of the [Canadian-American] relationship . . . that "geography has made us neighbours, but history has made us friends." That is true . . . but it has not made us the 51st state . . . . Our foreign policy and our trade policy are made in Ottawa—not Washington.

*Id.* at 1.

16. See Carol Goar, *Canada Tries to Kill U.S. Anti-Cuban Legislation: Ambassador Launches Phone Blitz of Senators in Lobby Effort*, TORONTO STAR, Oct. 12, 1995, at A22 (recognizing Canada's slim chance of victory in the face of opposition from then Senate Majority Leader Bob Dole and the organized and powerful Cuban-American community in Florida).

17. An Act to Amend the Foreign Extraterritorial Measures Act, Bill C-54, 35th Parl. (1996). This bill was introduced to the House of Commons on Sept. 16, 1996, passed by the House on Oct. 9, 1996, passed by the Canadian Senate on Nov. 28, 1996, and became law on January 1, 1997. An Act to Amend the Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1996) (Can.) [hereinafter FEMA Amendment].

18. See discussion *infra* part IIB (describing the FEMA).

19. See Howard Schneider, *Canadians Fire Back at U.S. Law: Helms Burton Retort Passes Unanimously*, WASH. POST, Oct. 10, 1996, at A41 (noting that the bill initially was expected to pass the Canadian Senate without delay and enter into force rapidly thereafter). Canada explicitly took legislative action to make the option of suing under Title III less attractive to potential American litigants. *Id.* at A43.

20. See Charles Trueheart, *U.S. Alarms Canada With Cuba Shift; Ottawa Protests Proposed Bill*, WASH. POST, Apr. 1, 1995, at A17 (relating that Harvard Latin America expert, Jorge Dominguez, called Helms-Burton "the Canada-Bashing Act of 1995"). Bill Graham, the head of the Standing Committee on Foreign Affairs of the Canadian House of Commons, expressed worry about the American attitude of punishing other countries who do not play by Washington's rules. *Id.* at A22.

21. See discussion *infra* part I.B.3 (discussing Title III of Helms-Burton, which pro-

the cooperative fashioning of a joint and proactive approach toward Havana.<sup>22</sup> One cannot deny the urgent need for increased economic and political liberties and human rights for the Cuban people.<sup>23</sup> The operative question is how can Canada and the United States best work together to achieve their mutual goal of fostering a democratic Cuba?

The purpose of this Comment is to delve into Canadian objections and responses to Helms-Burton and discuss their impact on the overarching Canadian-American rapport. Part I surveys the bilateral relationship between Canada and the United States and explores their very different approaches to Cuba. Part II analyzes Ottawa's objections to Helms-Burton, samples the American response regarding the legitimacy of the legislation, and chronicles Canada's legal action against the American law on both its domestic legal front and in international dispute resolution fora. Part III suggests that Helms-Burton is not the most constructive legislative answer to America's need for a forward looking Cuban policy, but rather that it threatens a further cooling of relations with Canada, a destabilization of the international climate for investment and trade, and potentially fruitless litigation. This Comment concludes by advocating the formation of an effective Canadian-American policy of constructive cooperation designed to promote democracy in Cuba.

## I. CANADIAN-AMERICAN RELATIONS BEFORE HELMS-BURTON: NO BETTER FRIENDS, YET DIFFERENT OUTLOOKS TOWARD HAVANA

### A. THE UNITED STATES AND CANADA: A SOLID COMMERCIAL RELATIONSHIP GROWING STRONGER AND CODIFIED IN NAFTA

Business ties between the United States and its northern neighbor are extensive

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vides a cause of action in American courts against those "trafficking" in expropriated American assets). *See also* discussion *infra* part II.B (regarding FEMA's creation of a cause of action in Canadian courts for those against whom an adverse Helms-Burton judgment is rendered in the United States). Canada devised its law to "clawback" the value of any award and court costs. *See infra* notes 140-41 and accompanying text.

22. *See U.S. Hopes Canada Will Help Win Democracy for Cuba, Envoy Says*, 13 Int'l Trade Rep. (BNA) 1364 (Sept. 4, 1996) (quoting an American official as being "cautiously optimistic" that Canada and the United States can fashion a mutually acceptable plan to overcome Cuban totalitarianism). Such a policy should concern itself with how best to promote democracy on the island today, not twenty-five years down the road.

23. *See* H.R. REP. NO. 104-202, at 23 (1995), *reprinted in part in* 1996 U.S.C.C.A.N. 527, 528 (citing reports by Amnesty International and the Inter-American Commission on Human Rights about the continuing political and social repression of the Cuban people). It is imperative to note that this Comment's criticism of the technical flaws in Helms-Burton's construction and its foreign policy ramifications in no way implies support for Castro or fails to recognize the human rights violations that his regime perpetrates.

and involve approximately U.S. \$272 billion a year.<sup>24</sup> Two-way trade in goods, services, and income increased by one-third between 1989 and 1993, when the Canada-United States Free Trade Agreement (CFTA)<sup>25</sup> entered into force.<sup>26</sup> Drafters of the North American Free Trade Agreement (NAFTA) based many of its provisions on those already in existence in the CFTA, which NAFTA superseded on January 1, 1994.<sup>27</sup> North America as a whole is experiencing an expansive movement toward the establishment of a continental economy, exemplified by the increasing integration and interdependence between Canada, the United States, and Mexico.<sup>28</sup>

In foreign affairs, a mixture of American dominance and Canadian assertions of independence characterize the Canadian-American relationship.<sup>29</sup> The political, military, and cultural strength of the United States tilts the scales in its favor.<sup>30</sup> This balance of power equation fosters debate as to whether Ottawa's ne-

24. See Judith Hippler Bello et al., *Annual Review of Significant Developments: 1995 - International Trade*, 30 INT'L LAWYER 391, 411 (1996) (noting that Canada was the destination for 22% of American exports and the source for 20% of its imports).

25. CFTA, *supra* note 7. Congressional goals listed in the 1974 Trade Act, 19 U.S.C. § 2486 (1994) include free trade with Canada. See FOLSOM & FOLSOM, *supra* note 8, at 65 (noting that Congress found a trade agreement with Canada to be critical to continued economic stability between the two countries); *id.* at 79-83 (setting forth a thorough description of the contents, objectives, scope, and basic commitments of the CFTA).

26. EMBASSY OF CANADA, CANADA-UNITED STATES: THE WORLD'S LARGEST TRADING RELATIONSHIP (1996).

27. UNITED STATES TRADE REPRESENTATIVE, 1996 NATIONAL TRADE ESTIMATE: CANADA (1996) (visited Oct. 9, 1996) <<http://www.ustr.gov/reports/nte/1996/canada.html>>.

28. See NAFTA, *supra* note 8, preamble (listing resolutions to which Canada, Mexico, and the United States pledge themselves in the context of the free trade agreement). This list includes contributing to the harmonious development and expansion of world trade, acting as catalysts to broaden international cooperation, and maintaining a predictable commercial framework for business planning and investment. *Id.*; see also Alan K. Henrikson, *The U.S. "North American" Trade Concept: Continentalist, Hemispherist, or Globalist?*, in TOWARD A NORTH AMERICAN COMMUNITY? 155, 155-56 (Donald Barry et al. eds., 1995) (noting that the movement toward economic integration includes a debate about the proper "widening" or "deepening" of the agreement and whether it should be continental, hemispheric, or global in nature).

29. See Denis Stairs, *Change in the Management of Canada-United States Relations in the Post-War Era*, in TOWARD A NORTH AMERICAN COMMUNITY? 54-56 (Donald Barry et al. eds., 1995) (noting that Canada's awareness of its powerful southern neighbor causes it to seek international influence in multilateral venues). Stairs also identifies the cultivation of relationships with diverse countries as a second prong of Canadian foreign policy. *Id.* at 56. Stairs then illustrates this point with an excerpt from a 1968-70 government foreign policy review wherein Ottawa noted "the constant danger that sovereignty, independence and cultural identity may be impaired [by American influences and that] active pursuit of trade diversification . . . will be needed to provide countervailing factors." *Id.* at 57.

30. See Lloyd Axworthy, *Foreign Policy at a Crossroad*, Address to the Standing Comm. on Foreign Affairs and Int'l Trade (visited Apr. 16, 1996) <<http://www.dfaif>



gotiation of closer ties with Washington via NAFTA is a capitulation of sorts<sup>31</sup> or, rather, an attempt to gain equal footing and preserve Canadian sovereignty.<sup>32</sup>

## B. DIVERGENT CUBAN POLICIES

### 1. Canada: Opportunity Knocks

The collapse of the Soviet empire left Cuba without the international benefactor that provided four-fifths of Cuba's imports and sustained Havana in the face of the American trade embargo.<sup>33</sup> Cuba responded to the reality of its post-Cold War economic situation by flirting with aspects of a market economy.<sup>34</sup> The Foreign Investment Act of 1995<sup>35</sup> provided a legal basis for the opening of the business community.<sup>36</sup> Cuba's Foreign Investment Act is only a beginning, but it allows the country increased opportunities for capital infusions, transfers of technology and management know-how, and gradual assimilation into the global economy.<sup>37</sup> Many foreign investors find themselves drawn to Havana, and current trade estimates cite approximately 240 joint ventures throughout thirty-four

.maeci.gc.ca.english/news/statem~1/96\_state/96/012e.html> (describing the Canadian-American relationship as the world's most successful, but not immune from an inequality in terms of population and economic power).

31. See Lawrence Martin, *Continental Union*, 538 ANNALS AM. ACAD. POL. & SOC. SCI. 143, 143 (1995) (arguing that Canada's embrace of economic integration with the United States will result in joint political management and meaningless borders).

32. See Stairs, *supra* note 29, at 69 (discussing the viewpoint that perhaps the negotiation of a bilateral trade agreement with the United States was a preferable guarantor of independence as compared to a gradual drift toward assimilation).

33. See Krinsky & Golove, *supra* note 14, at 129 (finding that Cuba's trade dependent economy and people are struggling to survive the current economic crisis, the worst since the Revolution in 1959).

34. See Anna Szterenfeld, *Foreign Investment Increases: Economic Reform Under Way*, N.Y.L.J., Feb. 20, 1996, at S3 (noting that the Cuban economy finally is starting to show signs of recovery, following five years of 35% contraction in gross domestic product and near eradication of trade).

35. See Ley No. 77: Ley de la Inversion Extranjera (Foreign Investment Act), *reprinted in* 35 I.L.M. 331 (1995) [hereinafter CFIA] (providing for the infusion of foreign investments in all aspects of the Cuban economy except in defense, national security, education, and public health). The CFIA created three mechanisms by which foreign investment may be channeled into Cuba: joint ventures, corporations, and economic associations. CFIA, art. 1. See generally Ron First, Comment, *Cuba's Changing Foreign Investment Climate: Castro's Attempt to Lure Foreign Investors*, 9 TRANSNAT'L LAW. 295 (1996) (discussing the CFIA's purposes, related procedures, and other issues such as taxation and potential limitations on foreign investment).

36. CFIA, *supra* note 35, art. 1.

37. See Szterenfeld, *supra* note 34, *passim* (noting that although Cuba still faces critical difficulties that may deter potential investors, such as a shortage of hard currency and a lack of access to foreign credit, it appears to be on its way to a mixed economy that provides for both aspects of a free market and a heavy state sector).

sectors of the Cuban economy.<sup>38</sup>

The opening of Cuba's economy provides Canada with a fertile opportunity to increase trade and investment, a long standing goal of its relationship with Cuba.<sup>39</sup> Canada pursues a policy of regional engagement in the Caribbean and Latin America, both as a means to enhance its influence,<sup>40</sup> and to underline the independence of its foreign policy from Washington.<sup>41</sup> Since the 1945 opening of Canada's embassy in Havana, relations between Canada and Cuba have managed to surmount, but not ignore, strong differences in political, economic, and strategic philosophies.<sup>42</sup> Canadian officials routinely stipulate that the way to open all aspects of Cuban society is through contact with trading partners, not isolation.<sup>43</sup> Canada's trade and investment relationship with Cuba is extensive, involving over forty Canadian firms and close to U.S. \$450 million in two-way trade during 1995.<sup>44</sup> Canada became Cuba's foremost commercial partner in 1995.<sup>45</sup> The year before, Canada launched an assistance package for Havana, offering advice on the modernization of key sectors in the economy, such as tax reform and banking

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38. See Marc Cooper, *A Conflict of Interests*, *WORLD BUSINESS*, May-June 1996, at 20 (noting, *inter alia*, that billboards that once proclaimed anti-capitalist slogans now tout commercial products).

39. See Richard V. Gorham, *Canada and Cuba: Four and a Half Decades of Cordial Relations*, in *CUBA'S TIES TO A CHANGING WORLD* 215 (Donna Rich Kaplowitz ed., 1993) (describing trade as the main element in the Canadian-Cuban relationship).

40. CONRAD SHECK ET AL., *CANADIAN DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, CANADA IN THE AMERICAS: NEW OPPORTUNITIES AND CHALLENGES* (1994) (arguing that Canada has a strategic interest in trade and investment in the Americas, a region often overlooked in the past in favor of the United States and Europe). The authors note that this interest, and the influence that accompanies an increased regional presence, should grow with any accession to NAFTA. *Id.*

41. See Eggleton Address, *supra* note 15; Howard Schneider, *Canada and Cuba: Booming Partners—Despite United States Obstacles, Trade, Diplomacy Flourish*, *WASH. POST*, Oct. 20, 1996, at A1, A24 (noting that Canada's independent Cuba policy dates back to the 1962 Cuban Missile Crisis, when then Prime Minister John Diefenbaker opposed President Kennedy's request that Canadian troops be put on alert in anticipation of military action).

42. See Gorham, *supra* note 39, at 215-16, 220-21 (explaining that the Canadian-Cuban relationship has never been without strains, but noting Canada's active work to end Cuba's isolation in the world community).

43. See John Kirk, *A Historical Overview of the Cuba-Canada-U.S. Triangle*, in Symposium, *Helms-Burton and International Business: Legal and Commercial Implications*, Found. for the Americas and Center for Int'l Pol'y at 9 (May 16-17, 1996) (copy on file with author) [hereinafter *Americas and Int'l Pol'y*] (stating that Canada and Cuba have enjoyed a consistent and strong trade relationship since 1899). Kirk asserts that Canada pursues the goal of increasing trade with several countries in Latin America at a parallel pace. *Id.* at 9-10. He further notes that 73% of Canadians stated in a poll that it was more important that they follow Canadian, rather than American, law. *Id.* at 10.

44. *Cuba: Canadian Investments in Cuba*, *CARIBBEAN UPDATE*, May 1, 1996, available in LEXIS, News Library, CURNWS File.

45. *Id.*

law.<sup>46</sup>

Despite the fact that most Canadians are bullish about this profitable Caribbean market,<sup>47</sup> Cuban investment draws its share of domestic criticism.<sup>48</sup> In the United States as well, certain American business interests oppose Washington's official policy and believe that Cuba's geographical proximity and emerging ability to operate in the global market with hard currency make it an excellent candidate for commercial relations.<sup>49</sup>

## 2. The United States: Castro as an International Pariah

The United States long has employed a system of economic sanctions against Castro.<sup>50</sup> Washington's anger at Cuba stems from Havana's non-payment of

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46. See Christine Stewart, *Address, in Americas and Int'l Pol'y*, *supra* note 43, at 3 (noting the insistence of Canada's Secretary of State for Latin America and Africa that in negotiations with Cuba her country pursues issues such as human rights, on which the two disagree). The Secretary further noted that Cuba may respond to laws such as Helms-Burton by turning inward and engaging in militant nationalism, reversing any progress made on the fronts of democratic and economic liberalism. *Id.* at 4.

47. See Schneider, *supra* note 41, at A1, A24 (illustrating that the Canadian economy, in general, and firms such as Sherritt International, Genoil, and Delta Hotels have benefited from recent growth in Canada's external trade with Cuba).

48. See Michael Harris, *United States Needs Our Friendship*, TORONTO SUN, Aug. 8, 1996, at 17 (arguing that Canadian dislike of Helms-Burton has little to do with sovereignty and all to do with the desire to make money); see also Arnold Beichman, *Castro's Curious Canadian Comforters*, WASH. TIMES, March 22, 1996, at A19 (expressing disgust for Canada's practice of embracing Castro while his regime violates human rights and terming those who "traffick" in property to which an American claim attaches, "fences"); Terrence Corcoran, *Down With Canada's Fidelistas*, GLOBE AND MAIL, Mar. 13, 1996, at B9 (suggesting that Ottawa end its romance with Cuba); Bob MacDonald, *Ottawa Still Loves Tyrant*, TORONTO SUN, Feb. 28, 1996, at 20 (arguing that Canadian trade with Cuba only props up Castro's regime and allows him to oppress the Cuban people); Peter Worthington, *Our Shameful Double Standard*, TORONTO SUN, May 23, 1996, at 11 (suggesting that Canadians should direct their indignation at those who perpetrated the confiscation, rather than at the victims who are seeking redress).

49. See Michael D. Kaplowitz & Donna Rich Kaplowitz, *Cuba and the United States: Opportunities Lost and Future Potential*, in CUBA'S TIES TO A CHANGING WORLD 223, 240-41 (Donna Rich Kaplowitz ed., 1993) (arguing that the United States has a financial interest in actively pursuing a commercial relationship with Cuba). The authors suggest that due to missed business deals, the embargo's "opportunity cost" to American investors is much higher than an annual U.S. \$1.3 billion. *Id.* at 241. It is the most anxious capitalists, mainly American parent companies of foreign subsidiaries such as Continental Grain, that advocate an onslaught of American investment in Cuba as soon as possible to avoid a further competitive disadvantage vis-à-vis foreign competitors, as Cuba gradually increases its market reforms. *Id.* at 234.

50. See Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325, 327 (1995-96) (noting that prior to this piece of legislation, the American economic embargo

"prompt, adequate, and effective" compensation<sup>51</sup> to the American individuals and corporations whose property the Cuban government expropriated.<sup>52</sup> The United States Foreign Claims Settlement Commission (FCSC) has certified almost 6,000 individual property claims against the Cuban government.<sup>53</sup> Although it is Cuba's responsibility to make reparations, the complex system of American laws created to punish Cuba for its wrongful non-payment does very little to assist certified claimants in obtaining due compensation. Thirty-eight years after the Cuban Revolution, political animosity endures between the United States and Cuba, and the claims remain unpaid.<sup>54</sup>

#### Extraterritorial questions surrounding pre-Helms-Burton American legislation

against Cuba was the product of executive orders issued by U.S. presidents from John Kennedy to Bill Clinton); Krinsky & Golove, *supra* note 14, at 92-97 (explicating the statutory and legislative authorities that enable the Cuban embargo); see also Maria L. Pagan, *United States Legal Requirements Affecting Trade With Cuba*, 2 TULSA J. COMP. & INT'L L. 289, 289-90 (1995) (describing American laws affecting trade with Cuba as a two-tiered structure, with the first tier being regulations authorizing and implementing the embargo against Cuba and the second tier consisting of more general restrictions on foreign assistance aimed at Communist countries or states that meet certain designated criteria, such as those deemed to support terrorism).

51. See RICHARD B. LILlich & BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 208 (1975) (directing the reader to the American Law Institute's Restatement of the Foreign Relations Law of the United States for an elaboration of the meaning of "prompt, adequate, and effective"). As Lillich and Weston wrote the piece in 1975, their referral to the Restatement would be to the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-90 (1965). The very act of defining the requirements for compensation indirectly recognizes the right of a sovereign nation to exercise dominion over properties located in its physical territory and expropriate them as well, as long as the nation provides remuneration. *Id.*; see also Richard B. Lillich & Burns H. Weston, *Introduction*, in *INTERNATIONAL CLAIMS: CONTEMPORARY EUROPEAN PRACTICE* 10 (Richard B. Lillich & Burns H. Weston eds., 1982) (articulating the international conventional wisdom of the World War II era, during which time several nations negotiated settlement agreements providing for prompt, adequate, and effective compensation).

52. See Jonathan R. Ratchik, Comment, *Cuban Liberty and Democratic Solidarity Act of 1995*, 11 AM. U.J. INT'L L. & POL'Y 343, 344-47 (1996) (elaborating on the history of Cuba's confiscation of American property and the gradual deterioration of relations).

53. See Archibald R.M. Ritter, *The Compensation Issue in Cuban-United States Normalization: Who Compensates Who, Why and How?*, in *CUBA IN THE INTERNATIONAL SYSTEM: NORMALIZATION AND INTEGRATION* 259, 261-63 (Archibald R. M. Ritter & John M. Kirk eds., 1995) (noting that as of 1994, the 5911 claims accepted by the Foreign Settlement Claims Commission possessed a collective value of U.S. \$5.7 billion).

54. Interview with Orestes Hernandez, Cuban Interests Section, in Washington, D.C. (Oct. 14, 1996) [hereinafter Hernandez Interview] (acknowledging Cuba's responsibility to pay and its willingness to do so provided that a realistic payment schedule or compensation arrangement is drafted) (transcript on file with author). Housed in the Embassy of Switzerland, the Cuban Interests Section is the official government representative of the Republic of Cuba in the United States, in the absence of an embassy and formal diplomatic relations.

aimed at Cuba also have generated international controversy.<sup>55</sup> The 1992 Cuban Democracy Act (CDA)<sup>56</sup> served as a prelude to the current international debate.<sup>57</sup> American allies protested<sup>58</sup> the CDA's extension of the United States economic embargo to overseas subsidiaries of American companies.<sup>59</sup> In response to the CDA, Canada's Attorney General issued the 1992 Foreign Extraterritorial Measures Order in reference to the United States.<sup>60</sup> It prohibited Canadian subsidiaries of American corporations from complying with the CDA and effectively nullified the CDA's impact in Canada.<sup>61</sup> Although Canadian-American disagreement regarding the alleged extraterritorial nature of the United States's Cuba policy is nothing new,<sup>62</sup> Helms-Burton attempts to involve third parties further in the

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55. Allen DeLoach Stewart, Comment, *New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992*, 53 LA. L. REV. 1389 (1993) (describing questions raised in 1992 about the Act and American authority to control the trade practices of subsidiaries of United States companies domiciled on foreign soil).

56. The Cuban Democracy Act (CDA), Pub. L. No. 102-484, Title XVII, §§ 1701-1712, 106 Stat. 2575 (1992) (codified at 22 U.S.C. § 6001).

57. Manfred Wolf, *Hitting the Wrong Guys: External Consequences of the Cuban Democracy Act*, 8 FLA. J. INT'L L. 415, 418 (1993) (advocating a "balancing of interests" approach when inquiring as to the validity of a nation's assertion of extraterritorial jurisdiction). Such an approach must take into account issues such as the degree to which the international community approves of the objectives and means of the state wishing to exert jurisdiction and any effects on the interests of third parties. *Id.* at 418-19.

58. See Gabriel M. Wilner, *International Reaction to the Cuban Democracy Act*, 8 FLA. J. INT'L L. 401, 404 (1993) (articulating that American policies toward Cuba affect much more than the bilateral American-Cuban relationship). See generally Second Annual International Business Law Symposium, *Trading With Cuba: The Cuban Democracy Act and Export Rules*, 8 FLA. J. INT'L L. 335 (1993) (containing responses to the CDA of several members of the international academic community).

59. The Cuban Democracy Act (CDA), *supra* note 56, § 1706(a).

60. Foreign Extraterritorial Measures (United States) Order, 1992, C. Gaz. (1992) (Can) [hereinafter Foreign Extraterritorial Measures Order]. According to the structure of Canadian law, Acts of Parliament may authorize the creation of subordinate legal documents, known variously as "regulations" or "orders." CANADIAN DEP'T JUSTICE, A GUIDE TO THE MAKING OF FEDERAL ACTS AND REGULATIONS 15-16 (1996). Orders or regulations are not made by Parliament but, rather, by an individual to whom such authority is specifically delegated. *Id.* at 15.

61. See Foreign Extraterritorial Measures Order, *supra* note 60. The relevant text provides:

No corporation shall comply with an extraterritorial measure of the United States in respect of trade or commerce between Canada and Cuba or with any directives, instructions, intimations of policy or other communications relating thereto that are received from a person who is in a position to direct or influence the policies of the corporation in Canada.

*Id.*

62. See Jamie Dettmer, *Cuba Act Stirs Tempest*, WASH. TIMES, June 17, 1996, at 6 (stating that European diplomats may not rule out a trade and diplomatic war over Helms-Burton reminiscent of the 1980s trans-Atlantic conflict concerning President Reagan's effort to prohibit Europeans from selling American-made parts to the Soviet Union for use in the construction of the trans-Siberian gas pipeline); Sheldon E. Gordon, *Pipeline Fallout:*

American-Cuban confrontation and thus promotes instability.<sup>63</sup>

### 3. The Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton)

The United States is like the parent that goes to the kindergarten and spansks other peoples' kids.

—Todd Malan, Executive Director, Organization for International Investment<sup>64</sup>

On February 9, 1995, Senator Jesse Helms introduced the Cuban Liberty and Democratic Solidarity Act.<sup>65</sup> Five days later, Representative Dan Burton presented the House version.<sup>66</sup> Helms-Burton's sponsors enacted this further anti-Castro legislation due to, *inter alia*, serious concerns about the lack of human rights protections in Cuba.<sup>67</sup> Other reasons included the perception that Havana's recent market reforms were superficial and designed only to attract a quick influx of foreign capital.<sup>68</sup> Furthermore, the desire of United States legislators to codify disincentives to foreign companies whose commerce with Cuba sustained Castro's

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*Outrage in Canada, Too*, CHRISTIAN SCI. MONITOR, Sept. 10, 1982, at 22 (stating that winning the occasional test of wills does nothing to resolve the problem of such extraterritorial conflicts between the United States and Canada); Michael T. Kaufman, *Laws Across the Border Strain United States-Canadian Ties*, N.Y. TIMES, Sept. 3, 1982, at 3 (stating that nowhere in the world does the issue of extraterritoriality enter into a bilateral diplomatic relationship as it does between the United States and Canada); Frank J. Priol, *United Nations Votes to Urge United States to Dismantle Embargo on Cuba: A Rebuke to Washington*, N.Y. TIMES, Nov. 25, 1992, at A1 (referring to the controversy surrounding the CDA); Martin Sieff, *United States Bill on Cuban Trade Angers Canada, EC*, WASH. TIMES, Oct. 9, 1992, at A7 (stating that the CDA threatened U.S. \$500 million a year in business by European companies investing in Cuba).

63. See discussion *infra* part IB.3 (describing Title III).

64. See Woellert, *supra* note 4, at A1 (noting that the Organization for International Investment is a trade association whose goal is to represent American subsidiaries of foreign businesses); see also Charles Trueheart, *French Veterans Reflect on Old Ally's New World: Armistice Day Evokes Fond Past, Blunt View of United States "Unilateralism,"* WASH. POST, Nov. 12, 1996, at A9-10 (citing continental frustration with the unilateral character of American foreign policy since the fall of the Berlin Wall and cautioning that it would be "clumsy" for the United States to fail to comprehend this European sentiment).

65. See S. 381, 104th Cong. § 2(5) (1995) (finding in the Senate version of the bill that Castro has defined democratic pluralism as "garbage").

66. See 141 CONG. REC. H1751 (daily ed. Feb. 14, 1995); see also Ratchik, *supra* note 52, at n.5 and accompanying text (noting that the House version of the bill passed with a vote of 294-130).

67. See H.R. REP. NO. 104-202, at 22-23 (1995), *reprinted in part in* 1996 U.S.C.C.A.N. 527, 527-28 (relating the findings of independent human rights investigatory organizations as to the lack of freedom of expression on the island).

68. *Id.* at 23-24 (expressing the belief of the majority of the House Committee that the current opening of the Cuban economy is based only on the country's dire need for hard currency and that true free market development is not possible without viable property rights, something not yet in existence in Cuba).

regime and whose officers trafficked in confiscated American property led to the passage of the law.<sup>69</sup> In addition, section 116 of Title I of the Helms-Burton Act specifically delineates congressional findings regarding the February 24, 1996 downing of airplanes operated by the Miami based Brothers to the Rescue organization,<sup>70</sup> the tragic event most believe caused the Clinton Administration to reverse its opposition to the law and join a bipartisan effort for its passage.<sup>71</sup>

Helms-Burton aims to strengthen economic sanctions against Cuba, encourage free and fair democratic elections with international supervision, provide a policy framework for United States support for a post-Castro democratic transition government, and protect certified American property claims.<sup>72</sup> Helms-Burton only manages successfully to achieve the first goal and describe a future framework in which to accomplish the second and third. Given Canada's recent legislative measures to combat Title III, Helms-Burton does little to obtain meaningful relief for American property claimants who bring suits against Canadians, given the likelihood that any favorable judgment by an American court will be nullified by a claim in a Canadian court.<sup>73</sup>

Title I strengthens the American economic embargo against Cuba by, *inter alia*, prohibiting indirect financing of Cuba;<sup>74</sup> requiring full implementation of

69. *Id.* at 24 (taking direct aim at countries "willing to put aside what [they] know about the Castro regime in exchange for mythical market share"). Senator Jesse Helms is known to compare world leaders who deal with Fidel Castro to Neville Chamberlain sitting down with Adolf Hitler, then returning to London to declare that there would be "peace in our time." UNITED STATES SENATE, COMMITTEE ON FOREIGN RELATIONS, IN MIAMI, HELMS BLASTS EUROPEAN UNION, CANADA, MEXICO FOR THREATS OVER CUBA LAW (1996) (copy on file with author).

70. Helms-Burton, *supra* note 2, § 116. Havana's downing of the Brothers to the Rescue airplanes was tragic. Cuban Minister of Foreign Affairs, Roberto Robaino's reaction to then United Nations Ambassador Madeline Albright's criticism was full of machismo. On the official website of the Cuban government, Robaino responded with the following:

Ambassador Albright, using highly infrequent language in diplomatic circles, had no qualms in affirming with respect to my country . . . that "this was not a matter of 'cajones,' but of cowardice [sic]." I wish only to respond that we have always had an abundance of the former, and never suffered from [a] lack of the latter.

Roberto Robaina, *Cuban Response to Madeline Albright* (visited Oct. 19, 1996) <<http://www.cubaweb.cu/noticias/madeline.html>>.

71. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESS RELEASE (Aug. 16, 1996) (copy on file with author); see Robert D. Novak, *Courting the Cuban Vote*, WASH. POST, Sept. 30, 1996, at A23 (offering a pundit's take on the role domestic American politics played in President Clinton's policy reversal); see also Wayne Smith, *Background and Implications for the Future, in Americas and Int'l Pol'y*, *supra* note 43 at 12 (noting then candidate Bill Clinton's support for the Cuban Democracy Act during the previous presidential campaign in a bid for Florida's electoral votes). Smith also notes President Bush's political reversal from opposition to support as the election drew near. *Id.*

72. S. 381, 104th Cong. § 2 (1995) (noting the objectives for the legislation as described when first introduced to the Senate).

73. See *infra* part II.B (discussing Canada's "clawback" legislation).

74. Helms-Burton, *supra* note 2, § 103.

sanctions against Havana and nations that assist her as codified in existing American law;<sup>75</sup> opposing Cuban membership in international financial institutions or the Organization of American States;<sup>76</sup> reducing assistance to countries of the former Soviet Union by the amount of aid or credits they provide to Cuba for the use of intelligence facilities targeting the United States;<sup>77</sup> and requiring annual reports to Congress on all third-country assistance, joint ventures, and trade with Cuba.<sup>78</sup> As Title I successfully entrenches the sanctions policy against Havana by codifying all Cuban embargo and executive orders issued since President Kennedy's term in office,<sup>79</sup> only congressional action can alter America's policy toward Cuba.<sup>80</sup> This is a derogation of the flexibility with which the executive office of the president traditionally has fashioned Cuban policy and it potentially constitutes congressional usurpation of the executive's power over foreign affairs.<sup>81</sup>

Title II describes the mechanisms for American assistance to a democratic government following Castro.<sup>82</sup> It also delineates steps for the normalization of relations and the lifting of the economic embargo<sup>83</sup> and details characteristics that a transitional government must possess to be eligible for American assistance.<sup>84</sup> This title is useful in outlining steps toward normalization but is only capable of emerging as a viable plan for action at some hypothetical time in the future, should Cuba's political and economic structures evolve to the degree specified in Title II.<sup>85</sup> Title II does nothing to support free and fair elections or a democratic government today. Furthermore, a nation does not stand on firm ground when it only selectively views concerns of human rights and democracy as the basis for its refusal to engage in normalized relations.<sup>86</sup> The latter two of the four titles re-

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75. *Id.* § 102.

76. *Id.* §§ 104-05.

77. *Id.* § 106.

78. *Id.* § 108.

79. Helms-Burton, *supra* note 2, § 102.

80. *Id.* §§ 102(H), 204.

81. WAYNE S. SMITH, CENTER FOR INTERNATIONAL POLICY, THE UNITED STATES-CUBA IMBROGLIO: ANATOMY OF A CRISIS (visited Oct. 19, 1996) <<http://www.us.net/cip/imbroglio.html>>. The Clinton Administration's earlier opposition to versions of Helms-Burton as they passed the House (H.927) and Senate (S.381) focused on concerns about, *inter alia*, Helms-Burton's potential usurpation of presidential prerogatives in the realm of foreign affairs. Tom Carter and Warren P. Strobel, *Clinton, Hill Unite on Cuba: Deal Reached on Stringent Sanctions Bill*, WASH. TIMES, Feb. 29, 1996, at A1.

82. Helms-Burton, *supra* note 2, § 202.

83. *Id.* §§ 203-04.

84. *Id.* § 205.

85. *See id.* § 202(a)(1) (providing for American assistance to Cuba "at such time as the President determines that a transition government or a democratically elected government . . . is in power").

86. *See* Kirk, *supra* note 43, at 9-11 (terming Helms-Burton a modern version of the 1820 Monroe Doctrine and pointing out the inconsistency of a contemporary American trade policy that simultaneously promulgates Helms-Burton and grants most favored nation



ceive the most international attention and condemnation, for they most directly affect foreign individuals and corporate citizens.

Titles III and IV attempt to protect American property claims by pressuring third parties to abstain from trade with Cuba when such commerce involves property to which an American claim attaches.<sup>87</sup> Title III confers subject matter jurisdiction on United States district courts, and creates a cause of action for owners of certified property claims against Cuba to bring suit against those foreign persons or companies that "knowingly and intentionally traffick in confiscated property of United States nationals in Cuba."<sup>88</sup> The American president has the authority to delay the right to file suits under Title III if the president determines such action to be in the national interest.<sup>89</sup> President Clinton took such a measure on July 17, 1996, stipulating that the delay would give the Administration an opportunity to garner international support for the law.<sup>90</sup> Subsequently, on January 3, 1997, the

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status to a nation such as China, whose human rights practices are the subject of regular international concern). *Realpolitik* dictates, however, that the comparison only goes so far, and it is impossible not to recognize the practical differences between China with her billions of people and global, nuclear power and Cuba, a much smaller and relatively isolated state. *Id.* In contrast to the American approach, Canada's commercial policy provides for the maintenance of trade with other nations in all circumstances short of war. *Id.* (quoting former Canadian Prime Minister Pierre Trudeau).

87. See Lucio, *supra* note 50, at 328-337 (discussing the scope and limitations of Title III's attempt to protect the property rights of American nationals).

88. See H.R. REP. NO. 104-202, at 23 (1995), *reprinted in part in* 1996 U.S.C.C.A.N. 527, 528. As used in Title III, "trafficking" is defined broadly as when an entity 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.

H.R. 927, 104th Cong. § 4(13) (1996) (ver. 2). The American plaintiff is entitled to seek damages calculated at either: 1) the amount of the claim as certified by the Foreign Claims Settlement Commission pursuant to Title V of the International Claims Settlement Act of 1949, 22 U.S.C. § 1643 (1949), plus interest; or 2) the fair market value of the property at either its current rate or its worth at the time of confiscation plus interest, whichever is greater. H.R. 927, 104th Cong. § 302(a) (1996) (ver. 2). Section 302(a)(1)(B)(2) further creates a rebuttable presumption in favor of the certified claims and Section 302(a)(8)(B) mandates an amount in controversy over U.S. \$50,000, exclusive of interests or costs. *Id.*

89. Helms-Burton, *supra* note 2, § 306(B)(1). The relevant language provides: "The President may suspend the effective date . . . for a period of not more than six months . . . [when] the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." *Id.*

90. See Sandy Berger et al., Remarks at a White House Briefing (July 16, 1996), available in LEXIS, U.S. Newswire Library, CURNWS File [hereinafter Berger Briefing] (describing the United States as wanting to use Title III as a lever to promote allied accession to Washington's vision of how best to promote democracy in Cuba). Berger articu-

President announced that the suspension would endure indefinitely, and he extended it a third time for another six months on July 16, 1997.<sup>91</sup>

Title III further creates a private right of action for Americans who were not citizens of the United States at the time of confiscation but achieved citizenship at a later date.<sup>92</sup> Should the American government actually take on these claims, this would contravene established American practice regarding the internationally accepted doctrine of espousal, by which a government represents the claims of its citizens to foreign states.<sup>93</sup> Title III enables the creation of more claims, in addition to the massive amounts that Cuba owes, and actually may frustrate the resolution of this debt due to Cuba's inability to pay the already exorbitant sum.<sup>94</sup> The claims of Americans who were United States citizens at the time of the expropriation also will face potential dilution by the claims of Cuban-Americans, newly allowed under Title III.<sup>95</sup>

Title III destabilizes the climate for international investment by subjecting the

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lated the Clinton Administration's position that it plans to work cooperatively with American allies during each six-month period of suspension but will allow the specter of liability to accrue. *Id.* Berger also reiterated the United States government's desire to avoid a cycle of retaliation and counter-retaliation. *Id.*

91. Thomas W. Lippman, *Clinton Suspends Provision of Law That Targets Cuba*, WASH. POST, Jan. 4, 1997, at A1, A18; *Clinton Again Puts Off Any Action Against Cuba: Helms-Burton Act Title III Waived for a Third Time*, J. OF COM., July 17, 1997, at 2A. Suspension of Title III initially was a deft political move from Clinton's perspective: he supported the law when it was politically expedient in an effort to garner votes in Florida's primaries; then he effectively emasculated Title III in the eyes of many by promising never to give full effect to the law's most controversial section. See Robert S. Greenberger, *U.S. Holds Up Cuba Suits, Pleasing Few*, WALL ST. J., Jan 6, 1997, at A9 (noting that the Clinton administration supported Title III only after Cuban fighter planes shot down two civilian planes which resulted in four Cuban-American deaths and caused anger in the politically important state of Florida).

92. See Helms-Burton, *supra* note 2, § 302(a)(5)(C) (providing that such a person may not bring a cause of action for two years from the date of enactment of the statute).

93. See Robert C. Kelso, *Espousal: Its Use in International Law*, 1 ARIZ. J. INT'L & COMP. L. 233, 235 (1982) (noting that from the American perspective, espousal means that a claimant effectively assigns their claim to the United States government, represented by the State Department's Office of the Legal Adviser, who advocates on the claimant's behalf). Kelso notes that espousal requires the following:

- 1) United States nationality of the claimant; 2) the claimant's continuous ownership of the claim; 3) a wrongful act by the accused nation which caused damage to or loss of property; 4) reasonable proof of the value of loss or damage to the property; 5) exhaustion of all local remedies available in the accused nation; and 6) negation of anticipated defenses to be raised by the accused nation.

*Id.* at 237.

94. See Ratchik, *supra* note 52, at 359 (noting that a surge in the number of lawsuits against Cuba could forestall the resolution of Cuban-American property claims).

95. See Matias F. Traviesco-Diaz, *Alternative Remedies in a Negotiated Settlement of the United States Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659, 660 (1996) (noting that there would be an inevitable competition for Cuba's finite resources).

business practices of a third party, consistent with the laws of its own jurisdiction, to United States approval and the investments of Americans abroad to similar measures enacted by other states.<sup>96</sup> Title III may serve to discourage investment in the United States if a potential investor would not know whether its assets could be attached pursuant to Helms-Burton.<sup>97</sup> Finally, Title III could destabilize investment in other parts of the world, such as Central and Eastern Europe, if Congress enacts a similar measure with reference to other formerly Communist regimes.<sup>98</sup> Potential investors would question whether the property described by a government had ever been the subject of a non-compensated expropriation and whether it would, therefore, be amenable to a lawsuit in the United States.<sup>99</sup>

Title IV denies issuance of a visa or exclusion at the port of entry into the United States to any entity found to be "trafficking" under Title III.<sup>100</sup> Title IV's broad construction<sup>101</sup> thus envisions placing as much pressure as possible on "traffickers" to choose between their Cuban and American business interests.<sup>102</sup> Title IV aims to supplement Title III's asserted protection of American property interests with another incentive for third parties to cease "trafficking."<sup>103</sup> Imagine, however, a major Canadian company choosing to capitalize on enormous profits garnered from doing business in Cuba and foregoing physical entry into the United States and the situation exists wherein Title IV harms American inter-

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96. Letter from Raymond Chretien, Canadian Ambassador to the United States, to Benjamin A. Gilman, Chairman, House International Relations Committee (Feb. 27, 1996), *quoted in Hearings on H.R. 927 Before the House Comm. on Rules*, 104th Cong. (1996) (statement of Congressman Tom Campbell (R-CA)) [hereinafter Campbell].

97. Letter from British Ambassador to the United States, to Benjamin A. Gilman, Chairman, House International Relations Committee (Feb. 27, 1996), *quoted in Campbell, supra* note 96.

98. *Id.*

99. *Id.*

100. See H.R. 927, 104th Cong. § 401 (1996) (ver. 2) (providing for the exclusion from American soil of aliens who have confiscated property or who traffic in property to which the claim of a United States national is attached). The law further provides for the exclusion of individuals who are corporate officers, principals, or shareholders with a controlling interest in any such confiscating or trafficking entity and who are the spouse, minor child, or agent of such an excludable individual. *Id.* The Senate bill did not include a version of Title IV, and the authority to deny visas, discretionary in the House version, was made mandatory in conference. *Hearings on H.R. 927 Before the Comm. on Int'l Relations*, 104th Cong. (1996) (statement of Peter Tarnoff, Under Secretary for Political Affairs), *available in* LEXIS, Federal News Library, CURNWS File.

101. H.R. 927, 104th Cong. § 401 (1996) (ver. 2).

102. See Stan Crock et al., *One Man Against A Tide of Foreign Investment*, BUS. WEEK, May 29, 1995, at 26 (describing the Senate Foreign Relation Committee's press spokesman Mark Thiessen as clearly articulating the position that foreign companies must choose between doing business with Cuba or with the United States).

103. See H.R. REP. NO. 104-202, at 25 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 530 (noting that Title IV excludes persons trafficking in confiscated property of United States nationals from entering the United States).

ests without effectively strengthening Title III.<sup>104</sup> In such an instance, Title IV gains nothing for American policy goals while it promotes missed opportunities for American commercial interests and financial loss for the tourism industry. Finally, although it may complicate the title to property in Cuba,<sup>105</sup> "trafficking" as defined in Helms-Burton does not appear to violate any established norms of international law. Not only does Helms-Burton threaten the aforementioned undesirable results, it also runs the risk of creating retaliatory lawsuits and monopolizing American time and resources to defend the law in multilateral dispute resolution theaters.<sup>106</sup> It thus distracts American policy makers from fashioning an effective and multilateral plan to promote democracy, human rights, and social and economic freedom in Cuba today.

## II. CANADA: CONTENTION AND ACTION

### A. CANADIAN OBJECTION AND THE AMERICAN RESPONSE

Canada claims that Titles III and IV of Helms-Burton violate international law and are an affront to national sovereignty in their interjection of sovereign third parties directly into the American-Cuban fray. First, Canada has expressed concerns over Title III's extension of claimant rights to Americans who were Cuban nationals at the time of confiscation.<sup>107</sup> Ottawa correctly claims that this is a serious contravention of the international law of claims and established American practice regarding the settlement of foreign claims.<sup>108</sup> Proponents of the Ameri-

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104. See Mark Heinzl, *Canadian Will Take His Chances in Cuba: Sherritt Chief Isn't One to Back Down in Face of U.S. Ban*, WALL ST. J., July 29, 1996, at A9 (noting the Sherritt Chairman's decision that his investments in Cuba are worth foregoing Florida vacations with his family and board meetings at Sherritt's Kentucky steel mill).

105. See Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent With International Law*, 90 AM. J. INT'L L. 434, 434-36 n.7 (1996) (noting then Secretary of State Warren Christopher's admonition to United States diplomats abroad to warn investors in Cuba of the potential complication of issues of title that could result from their purchase of property to which an American claim attaches).

106. See discussion *infra* parts IIB-C (elaborating Canadian attacks on Helms-Burton by creating retaliatory lawsuits in its court system and challenging the law as a violation of NAFTA).

107. See Robert L. Muse, *The Ins and Outs of the Helms-Burton Act: Implications for Canadian and United States Business*, HELMS-BURTON AND INTERNATIONAL BUSINESS: LEGAL AND COMMERCIAL IMPLICATIONS 21, 22 (1996) (referencing *F. Palacio y Compania, S.A. v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966)). The court held that, "confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law." *F. Palacio y Compania, S.A. v. Brush*, 256 F. Supp. at 487.

108. See Muse, *supra* note 107, at 21 (citing a 1971 diplomatic communication from Ottawa to Havana regarding the resolution of property claims in which Canada stated that, for purposes of resolving outstanding claims against Havana, it only recognizes as valid those claims of persons (or corporate entities) who were Canadian citizens at the time of

can extension of claimant rights base their argument on an individual's entitlement to own property and to be free from its arbitrary deprivation (noted in Article 17 of the Universal Declaration of Human Rights).<sup>109</sup> This argument is unconvincing, however, for in its zeal to compensate the victims of Castro's expropriation, it ignores the protocol of espousal.<sup>110</sup> A state may have a moral obligation to compensate its citizens for the confiscation of their property, but Title III may not mandate United States enforcement of such a new international right on behalf of the world community. Second, Canadians protest the extraterritorial nature of Titles III and IV as they have protested earlier attempts to export the American embargo.<sup>111</sup> Washington defends the international legality of Title III<sup>112</sup> according to the doctrine of "Substantial Effects,"<sup>113</sup> which allows the exercise of jurisdiction if there is a sufficient nexus between the "trafficking" in confiscated property and the unresolved property claims of American nationals.<sup>114</sup> This argument also is unconvincing when confronted with the doctrine's requirement that the exercise of jurisdiction be reasonable when compared to the interests of other states.<sup>115</sup> The American government possesses a valid interest in

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the expropriation). See also Ratchik, *supra* note 52, at nn.108-09 and accompanying text (discussing the nationality of claims rule as discussed by the Foreign Settlement Claims Commission).

109. Clagett, *supra* note 105, at 438.

110. See Kelso, *supra* note 93, at 237-39 (explaining the nationality requirement for espousal).

111. See Selma M. Lussenburg, *The Collision of Canadian and United States Sovereignty in the Area of Export Controls*, 20 CAN.-U.S. L.J. 145 *passim* (1994) (chronicling Canada's general frustration with the extraterritorial application of American law regarding Cuba); see also *Canadian Business Official Says Lumber Pact Sets Dangerous Precedent*, 13 Int'l Trade Rep. (BNA) 683 (Apr. 24, 1996) (illustrating one businessman's objection to the extraterritorial aspects of Helms-Burton). But see *Canada Should Enlist United States Help in Negotiating Trans-Atlantic Agreement with European Union*, Panel Says, 13 Int'l Trade Rep. (BNA) 1214 (July 24, 1996) (noting that Canada, too, is subject to a complaint by Spain that it is attempting extraterritorially to extend the effect of Canadian fisheries law into the North Atlantic beyond its jurisdictional limit).

112. See Clagett, *supra* note 105, *passim* (defending the American legislation). A full inquiry into the question of whether Helms-Burton is consistent with international law is beyond the scope of this Comment. The State Department had previously opposed the promulgation of laws with extraterritorial implications in order to avoid a disruption of trade relations and a proliferation of retaliatory legislation. See Kaplowitz & Kaplowitz, *supra* note 49, at 234 (noting the State Department's opposition to Senator Connie Mack's attempt to impose on American subsidiaries a pre-Cuban Democracy Act prohibition on trade with Cuba).

113. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) [hereinafter RESTATEMENT] (providing that a state has jurisdiction over "conduct outside its territory that has or is intended to have substantial effect within its territory").

114. See Clagett, *supra* note 105, at 436 (noting that Congress frequently legislates based on the substantial effects idea, notably in the field of antitrust law).

115. RESTATEMENT, *supra* note 113, § 403(1). The Restatement limits the exercise of jurisdiction with the mandate that "a state may not exercise jurisdiction to prescribe law

promoting the resolution of its citizens' claims, yet Title III is not the appropriate vehicle with which to pursue this goal given its attempted exercise of jurisdiction over third parties who are obeying the laws of their states.<sup>116</sup> Furthermore, Canada submits that it is extraordinary for the United States government to assert an interest in real property superior to that of the state sovereign.<sup>117</sup>

Both Canadian and American arguments ultimately are moot if United States district courts fail to obtain jurisdiction over any defendants sued pursuant to Title III.<sup>118</sup> Helms-Burton does nothing to change American requirements for the procurement of *in personam* jurisdiction over a foreign defendant. The threshold level of minimum contacts with the forum state, as outlined in the landmark case of *International Shoe Co. v. Washington*<sup>119</sup> and its progeny, remains a critical first step to the pursuit of any Title III action.<sup>120</sup>

Ottawa's response to Helms-Burton hinges not only on a desire to affirm Canadian sovereignty,<sup>121</sup> but also on the necessity to protect extensive Canadian business interests in Cuba.<sup>122</sup> For Canadians, Title III of Helms-Burton is a serious and potentially destabilizing threat, given the extent of Canadian investment in Cuba and the money that Canada would lose were this market no longer avail-

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with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Id.* Sections 403(2)(a)-(h) describe the factors which a state actor must consider in ascertaining reasonableness. *Id.* §§ 403(2)(a)-(h).

116. See *id.* § 403(2)(h) (stipulating that one must consider "the likelihood of conflict with regulation by another state" in contemplating the validity of the exercise of jurisdiction). Third parties trading with Cuba do so according to the laws of their jurisdiction.

117. See Blair Hankey, *Discussion, in Americas and Int'l Pol'y*, *supra* note 43, at 36-37 (stating that the Doctrine of Substantial Effects would be a stronger argument if there was a right under international law for the restitution of improperly expropriated property and noting that there is no such right codified either in Chapter 11 of NAFTA or the draft text currently in circulation among members of the Organization for Economic Cooperation and Development as part of their discussions on a multilateral agreement on investment).

118. See *Implementation of the Cuban Sanctions: Hearings Before the Subcomm. on Western Hemisphere Affairs of the Senate Comm. on Foreign Relations*, 104th Cong. (1996) (statement of Monroe Leigh, Esquire, Steptoe & Johnson), available in LEXIS, LEGIS Library, CNGTST File (advancing the argument that Title III operates within proper jurisdictional boundaries because it only authorizes lawsuits against those "traffickers" with the requisite jurisdictional connection to the United States according to the Due Process Clause and American case law on personal jurisdiction).

119. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that a defendant must have minimum contacts with the forum such that the suit does not offend traditional notions of fair play and substantial justice). *International Shoe* further elaborates on the requirement of minimum contacts according to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* This threshold must be met in order for any foreign entity to appear in United States courts for a violation of Title III. Helms-Burton, *supra* note 2, § 302(a)(8)(c) (1996).

120. Helms-Burton, *supra* note 2, § 302(a)(8)(c).

121. See discussion *supra* part I.B.1 (recalling Canada's desire to chart an independent foreign policy course in the shadow of its dominant neighbor).

122. *Id.*

able.<sup>123</sup> Sherritt International, a Canadian company with a mining investment in Cuba valued at U.S. \$275 million,<sup>124</sup> is one of the first foreign business entities cited by the American government under Title IV.<sup>125</sup>

The United States Department of State continues to investigate Canadian companies doing business in Cuba and to formulate procedures for taking action against those deemed to be in violation of Helms-Burton.<sup>126</sup> Some businesses may have no operations or assets in the United States or Cuba that Helms-Burton could affect, and therefore, may find that the threat of lawsuits is overstated in so far as their interests are concerned.<sup>127</sup> Canadian companies that potentially could be cited under Titles III and IV must choose whether to continue doing business as usual or to withdraw their Cuban investments quietly and seek to establish commercial ties elsewhere.<sup>128</sup>

#### B. CANADIAN AMENDMENT OF THE FOREIGN EXTRATERRITORIAL MEASURES ACT

In 1984, Canada passed the Foreign Extraterritorial Measures Act (FEMA).<sup>129</sup> The law authorizes the government to block unreasonable laws or rulings of a for-

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123. *Id.*

124. Tom Carter, *EU Members Get Warning on Cuba; State Drafting Sanctions Watch List*, WASH. TIMES, May 9, 1996, at A15.

125. See Julian Beltrame, *Canadian Executives Face United States Ban*, OTTAWA CITIZEN, May 24, 1996, at A1 (noting that Sherritt executives received warning letters over the summer of 1996 from the United States Department of State stipulating that they and their minor dependants could be excluded from American territory as a direct result of the company's choice to continue its business operations in Cuba on property deemed to be the subject of a claim certified by the FCSC); see also Heinzl, *supra* note 104, at A9 (describing Sherritt's situation). In May of 1996, the Department of State placed a sample draft of such an advisory letter on the Internet at: <<http://www.usia.gov/topical/econ/libertad/libdosal.html>>.

126. See *First Visa Denials Under Helms Burton Due By End of June, United States Official Says*, 13 Int'l Trade Rep. (BNA) 1050 (June 26, 1996) (describing the State Department's "reason to believe" standards of evidence for making the determination of trafficking as lower than a judicial standard).

127. See *Cuba: Mining Firm Comments on Helms-Burton*, CARRIBBEAN UPDATE, Sept. 1, 1996, available in LEXIS, News Library, CURNWS File (noting the public statement of Holmer Gold Mines, an Alberta based company, that it has avoided "trafficking" and, therefore, Helms-Burton is not applicable to any of its operations in Cuba).

128. Berger Briefing, *supra* note 90 (listing four companies that have chosen to divest their holdings in Cuba rather than suffer liability under Helms-Burton: Paradors Nacionales from Spain, Cemex from Mexico, Redpath from Canada, and ING from the Netherlands); see Juanita Darling & Craig Turner, *Tightened U.S. Sanctions on Trade With Cuba Begin to Have Impact*, L.A. TIMES, July 15, 1996, at A2 (stating that the Helms-Burton Act pits nations' pride against their economic interests); Peter Morton, *Nervous Canadian Banks Loosen Their Cuban Ties*, FIN. POST, June 28, 1996, at 10 (explaining that Canadian business will not be able to comply with both Canadian law and the Helms-Burton Act).

129. An Act to Amend the Foreign Extraterritorial Measures Act, Bill C-54, 35th Parl. (1996).

eign power from application in Canada.<sup>130</sup> For example, in response to the 1992 Cuban Democracy Act (CDA), Canada issued a blocking order that forbids Canadian subsidiaries of United States companies from complying with CDA and ceasing trade in goods with Cuba.<sup>131</sup> In January 1996, the Canadian Parliament amended this 1992 order to include the protection of trade in services between Canada and Cuba.<sup>132</sup> FEMA also allows the Canadian government to limit and control the participation of Canadian nationals in the proceedings of a foreign tribunal.<sup>133</sup> Thus, if Ottawa determines that the tribunal is acting in a manner adverse to Canadian trade and investment interests, it may prohibit or restrict the Canadian national's production of documents as requested by the foreign tribunal.<sup>134</sup> Furthermore, FEMA authorizes the Attorney General and the Secretary of State for External Affairs to require any person in Canada to provide notice to the Canadian government upon receipt of information or communication from a foreign government relating to measures with potential extraterritorial ramifications.<sup>135</sup>

The House of Commons introduced another amendment to FEMA on October 9, 1996, designed specifically to counteract Helms-Burton's Title III.<sup>136</sup> The Canadian Senate assented to the legislation on November 28, 1996, and it entered into force on January 1, 1997.<sup>137</sup> The coming into force of the FEMA amendment sets the stage for a test of wills between Canada and the United States, given the

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130. See *id.* § 8(1) (stating that the Canadian Attorney General may declare that any judgment likely to affect Canadian interests or sovereignty in an adverse manner shall not be recognized or enforceable on Canadian soil or in its courts of law).

131. Foreign Extraterritorial Measures (United States) Order, C. Gaz. 1992.II.4048. By prohibiting American owned or controlled corporations registered in Canada from complying with the CDA, the order effectively nullified the law's attempt to force United States subsidiaries into compliance with an economic embargo against Cuba. *Id.* The Order also required such corporations to report to the Canadian Attorney General any attempt to influence their trade with Cuba generated by an American authority pursuant to the CDA. *Id.*

132. Foreign Extraterritorial Measures (United States) Order, 1992, amendment, C. Gaz., 1996.II.611.

133. FEMA Amendment, § 3(1).

134. *Id.*

135. *Id.* § 5(1)(a). The statute not only requests that any Canadian national in receipt of such information inform Ottawa, but also authorizes the Canadian government to prohibit the Canadian national from complying with any directive from the foreign government. *Id.* § 5(1)(b).

136. See Juliet O'Neill, *Liberals Introduce 'Antidote' Law to Combat U.S. Anti-Cuba Legislation*, OTTAWA CITIZEN, Sept. 17, 1996, at A3 (highlighting the provisions that allow the Attorney General to issue blocking orders against United States court judgments and allow Canadian companies and citizens to pursue countersuits in Canadian courts to recover judgments and court fees, even before the conclusion of the American suit).

137. FEMA Amendment; see also CANADIAN DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, LEGISLATION TO COUNTER HELMS-BURTON ACT TO COME INTO FORCE JANUARY 1 (1996).



strength of the FEMA amendment's response to Title III.

Canada's legislative response to Helms-Burton is an effective counter to the American law for three reasons. First, the amendment significantly extends FEMA's applicable scope from Canada's geographic boundaries to jurisdictions "related to the enforcement of a foreign trade law or a provision of a foreign trade law set out in the schedule."<sup>138</sup> Thus, Canadian blocking orders may reach Canadian-Cuban commerce taking place in Cuba.

Second, the amendment creates a cause of action in Canada for entities suffering adverse Helms-Burton judgments in American courts.<sup>139</sup> The so-called "clawback" provision allows these parties<sup>140</sup> to seek to recover the amount of the adverse judgment and any attendant expenses.<sup>141</sup> This feature of the FEMA amendment, while appealing to Canadian entities potentially subject to suit under Title III, carries with it the threat of fueling a cycle of expensive litigation between American and Canadian claimants.<sup>142</sup>

Third, the amendment increases the amount the Canadian government can

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138. FEMA Amendment, § 3(1). The statute provides:

Where, in the opinion of the Attorney General of Canada, a foreign tribunal has exercised, is exercising or is proposing or likely to exercise jurisdiction or powers 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 jurisdiction or powers that *is or are related to the enforcement of a foreign trade law or a provision of a foreign trade law set out in the schedule*, the Attorney General of Canada may, by order, prohibit or restrict . . .

*Id.* (emphasis added). The original FEMA statute did not contain the emphasized material and thus was applicable in narrower instances. *Id.*

139. *Id.* § 8.1.

140. *See id.* (providing a right of action for a party who is "a Canadian citizen, a resident of Canada, a corporation incorporated by or under a law of Canada or a province or a person carrying on business in Canada").

141. *Id.*

142. *See* Ann Davis, *Cuba Suit Figures Spark a Spirited Debate*, NAT'L L.J., Aug. 28, 1995, at A14 (noting that estimates of the financial cost to the American court system alone fluctuate from U.S. \$2 million to U.S. \$1.9 billion). If President Clinton lifts Title III's suspension and allows claimants to file lawsuits, it could cause permanent damage to the courts of both systems as follows: 1) A United States district court hands down a judgment against a Canadian business entity deemed to be "trafficking" under Title III; 2) the Canadian company refuses to comply with the judgment in the face of stiff financial penalties from Ottawa; 3) the Canadian company sues the American party in Canadian courts to recover the amount of the judgment against it and accompanying court costs; and 4) in the end, both parties may find themselves without compensation for their property loss or court costs. Jeff Sallot, *Past Retaliation Over Cuba Had No Effect on United States Stand*, GLOBE AND MAIL, June 19, 1996, at A3. If one party is unable to collect from its counterpart, it may attempt to attach its counterpart's physical property located in its domestic jurisdiction to satisfy the judgment. *Id.* One problem from the Canadian perspective, however, is that few Cuban exiles have attachable assets in Canada, while many Canadian companies are involved extensively in both the United States and Cuba. *Id.*

levy as fines for noncompliance with FEMA.<sup>143</sup> This effectively prevents Canadian businesses from ignoring FEMA, in favor of the laws of a foreign jurisdiction, when subject to the jurisdiction of non-Canadian laws which impose higher financial penalties. The increase in fines is of such a forceful nature that it should prove to be a significant deterrent from non-compliance with FEMA. The amendment increased fines for conviction on indictment from Can. \$10,000 to Can. \$150,000 for an individual and Can. \$1.5 million for a corporation.<sup>144</sup> Fines for summary conviction rose from Can. \$5,000 to Can. \$15,000 for an individual and Can. \$150,000 for a corporation.<sup>145</sup>

Should the president of the United States reinstate Title III, Canada is armed with the legal countermeasures of FEMA.<sup>146</sup> These countermeasures will enable Ottawa to protect its citizens and investment interests in Cuba and attempt to recoup financial losses suffered as a result of an adverse judgment, but will do nothing to respond to Title IV.<sup>147</sup>

### C. CANADIAN MEASURES AGAINST HELMS-BURTON IN NAFTA DISPUTE RESOLUTION FORA

Canada's arguments that Helms-Burton violates the North American Free Trade Agreement (NAFTA) are sufficiently compelling to warrant attention. Chapter 20 of NAFTA outlines the tripartite process by which a party may seek

143. FEMA Amendment, § 7(1).

144. *Id.* § 7(1)(a).

145. *Id.* § 7(1)(b).

146. See *supra* notes 129-145 and accompanying text. In addition to FEMA and its 1996-97 amendments, see Bill C-339, The United Empire Loyalists Land Reclamation Act (Godfrey-Miliken Bill), 35th Parl., 2d Sess. (1996) (proposing to compensate descendants of United Empire Loyalists who fled the United States when their property was confiscated without compensation in the American Revolution; to establish a right of action in Canadian courts to bring suit against those trafficking in such property; and to exclude such traffickers from Canada); *60 Minutes: 1776 And All That* (CBS television broadcast, Oct. 20, 1996) (transcript on file with author) (reiterating, with humor, the Canadian position that Helms-Burton offends their sense of sovereignty). The Bill is a tongue-in-cheek protest of Helms-Burton. See, e.g., *Canada: People and Places—Canadians Get in On the Act*, LLOYD'S LIST, July 29, 1996, available in LEXIS, NEWS Library, CURNWS File; David Crary, *Canadian Bill Mocks Helms-Burton*, WASH. TIMES, Oct. 23, 1996, at A11; Clyde H. Farnsworth, *In Canadians' Retort on Trade, Politics of the Absurd*, N.Y. TIMES, July 28, 1996, at 6; Graham Fraser, *Two MPs Mock Helms-Burton Law*, GLOBE AND MAIL, July 25, 1996, at A11; Howard Schneider, *Canada Spawns a Helms-Burton Spoof; Lawmakers Seek Restitution for Those Whose Kin Fled United States Revolution*, WASH. POST, July 25, 1996, at A24; Walter Stewart, *Fighting Fire With Fire*, TORONTO SUN, June 24, 1996, at 11.

147. See *Canadian Parliamentarians Criticize Anti-Helms-Burton as Ineffective*, 13 Int'l Trade Rep. (BNA) 1496 (Sept. 25, 1996) (expressing the frustrations of members of Parliament at the lack of legislative response to Title IV of Helms-Burton, which currently affects numerous Canadians).

redress under the auspices of the trade agreement's dispute resolution procedures.<sup>148</sup> The process begins with consultations, moves to mediation, and may proceed to a third phase of non-binding arbitration.<sup>149</sup> The day that President Clinton signed Helms-Burton into law, the Canadian International Trade Minister wrote to the United States Trade Representative, formally requesting consultations under NAFTA.<sup>150</sup> Canada informed the United States of the bases for its challenge to Helms-Burton during consultations held in Washington on April 26, 1996.<sup>151</sup>

Canada alleges, *inter alia*, that Title III of Helms-Burton destabilizes the climate for international investment in a fashion that is inconsistent with Chapter 11 of NAFTA, which focuses on investment, services, and related matters.<sup>152</sup> Specifically, Canada claims that Helms-Burton violates Article 1102's nondiscrimination obligations and Article 1105's minimum standards of treatment.<sup>153</sup> Article 1102 provides that each NAFTA party is to accord national treatment to Canadian, Mexican, and American investors and their investments.<sup>154</sup> Canadian officials contend that, given the American prohibition on the investment of capital in Cuba as a result of the economic embargo, Title III amounts to *de facto* discrimination against Canadian and Mexican investors engaged in activities that are legal in their home states.<sup>155</sup>

The American response is that no provision of Helms-Burton forbids Title III from application against an American found to be "trafficking."<sup>156</sup> On balance, this position is weaker because, given the uncontroverted fact that the economic

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148. NAFTA, *supra* note 8, ch. 20. Article 2005 of NAFTA provides that a Party may choose to pursue redress under the dispute resolution mechanisms of either NAFTA or the General Agreement on Tariffs and Trade 1947, art. XXIII:2. *Id.* art. 2005.6. Once the Party selects a forum, however, it must pursue that forum to the exclusion of any other. *See id.* (referencing Articles 2005.3 and 2005.4 for varying procedures for disputes relating to environmental and conservation agreements, sanitary and phytosanitary measures, and standards related measures).

149. *See id.* arts. 2006-08 (describing the procedures for consultation, initiation of formal conciliation and mediation, and requests for arbitral panels); FOLSOM & FOLSOM, *supra* note 8, at 222 (explaining the tripartite process of consultation, mediation before the NAFTA Free Trade Commission, and arbitration before a five-member panel of experts).

150. Allan Thompson, *NAFTA Invoked in Cuba Dispute*, TORONTO STAR, Mar. 13, 1996, at A6.

151. Hankey, *supra* note 117, at 36.

152. *Id.*

153. *Id.*

154. NAFTA, *supra* note 8, art. 1102.1. The language provides that "[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." *Id.*

155. Hankey, *supra* note 117, at 36.

156. *See* Kenneth L. Bachman et al., *Anti-Cuba Sanctions May Violate NAFTA, GATT*, NAT'L L.J., Mar. 11, 1996, at C3 n.12 (noting, however, that Helms-Burton will most likely be applied to foreigners).

embargo prohibits Americans from direct trade with Cuba, the American government is unlikely to apply Helms-Burton to an American national.<sup>157</sup>

Article 1105.1 of NAFTA requires uniform, equitable, and fair treatment of investments made by investors of NAFTA parties in accordance with international law.<sup>158</sup> Thus, any challenges to Helms-Burton based on an asserted violation of international law also could support a charge that Helms-Burton violates Article 1105.<sup>159</sup> Canada protests what it interprets as the illegal assertion of American jurisdiction over Canadian investment in and trade with Cuba.<sup>160</sup> The Canadians also could assert that the pursuit of any successful claim in American courts under Title III is tantamount to an expropriation of Canadian investment property and interference with the right to conduct free trade in contravention of Article 1110.<sup>161</sup>

Canada is concerned that Title IV of Helms-Burton may constitute a violation of Chapter 26 of NAFTA, which deals with the entry and free movement of business persons<sup>162</sup> between the borders of Canada, Mexico, and the United States.<sup>163</sup> The American government potentially could defend Title IV by invoking national security or existing authorities exceptions to NAFTA.<sup>164</sup>

For purposes of Canadian-American relations, the existing authorities argu-

157. *Id.*

158. NAFTA, *supra* note 8, art. 1105.1. "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." *Id.*

159. See discussion *supra* part IIA (regarding Canadian claims that, *inter alia*, Helms-Burton is an assertion of extraterritorial jurisdiction that violates the international law of claims, espousal, and settlement).

160. Hankey, *supra* note 117, at 36.

161. *Id.* (referencing NAFTA, art. 1110). This Article stipulates that:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); (d) on payment of compensation in accordance with paragraphs 2 through 6.

NAFTA, *supra* note 8, art. 1110.

162. See NAFTA, *supra* note 8, art. 1603 (providing that "[e]ach Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security"); see also CANADIAN DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, CANADA, THE NORTH AMERICAN MARKET AND NAFTA (1996) (visited Oct. 22, 1996) <<http://www.ustr.gov/reports/nte/1996/canada.html>> (highlighting that, from the perspective of the Canadian government, the key provisions of NAFTA are the elimination of tariffs, national treatment, secure market access, dispute settlement, government procurement, business travel, and intellectual property rights).

163. Hankey, *supra* note 117, at 36.

164. Bachman, *supra* note 156, at C3. There also is a question regarding whether the national security provision of NAFTA, Article 1603: Grant of Temporary Entry, is self-judging or subject to determinations by a NAFTA dispute resolution panel. *Id.*

ment recognizes that NAFTA parties must let businesspersons from other NAFTA countries into their geographic territory when such persons otherwise comply with existing immigration regulations on temporary entry in effect as of January 1, 1989.<sup>165</sup> Correctly, Canada would state that Helms-Burton was ineffective at that date, and therefore, it may not stand as reasonable grounds to exclude a business person from American soil.<sup>166</sup> The following reply of the United States evidences the interjection of foreign policy into the American immigration code. The United States could rely on a provision of immigration law that, when broadly construed, allows the government to exclude from its territory "any aliens or of any class of aliens [if their entry] . . . would be detrimental to the interests of the United States."<sup>167</sup> Such a rebuttal provides a legally valid defense of American actions, but one that bespeaks of *ex post facto* justification.

The same critique also exists regarding a second defense of Title IV under a national security exception to NAFTA.<sup>168</sup> The United States could argue that its actions are justified according to Article 2102 of NAFTA, which allows actions that any Party "considers necessary for the protection of its essential security interests."<sup>169</sup>

Finally, Washington contends that NAFTA dispute resolution fora are inappropriate venues in which to bring Helms-Burton grievances.<sup>170</sup> The American position is that Helms-Burton is a foreign policy issue and NAFTA is an institution designed to address trade disputes, such as allegations of dumping and the reduction of tariff and non-tariff barriers to the free movement of goods and services.<sup>171</sup>

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165. See *id.* and accompanying text (noting that Canada and the United States define "existing" to include when the Canada-United States Free Trade Agreement entered into force in 1989).

166. *Id.*

167. 8 U.S.C. § 1182(f).

168. See *United States Agrees to Talk With Canada, Mexico on Helms-Burton Cuba Sanctions Measure*, 13 Int'l Trade Rep. (BNA) 476 (Mar. 20, 1996) (describing Cuban actions affecting United States national security interests). The use of "national security" as a defense for any action under NAFTA establishes a precedent that the United States may be unwilling to set, fearing a slippery slope that other nations will follow in the future by attempting to base every decision on considerations of national security. Lowell R. Fleischer, *NAFTA Round-Up*, LATIN AM. L. & BUS. REP. (Aug. 31, 1996), available in LEXIS, Newsletter Library, CURNWS File.

169. See NAFTA, *supra* note 8, ch. 21, art. 2102 (providing the basis for defense of American actions on national security grounds).

170. See Stuart Eizenstat, Special Representative of the President and Secretary of State for the Promotion of Democracy in Cuba, Remarks at a Press Conference at the United States Mission to the European Union, Brussels, Belgium (Sept. 4, 1996) (transcript on file with author) [hereinafter Eizenstat Remarks] (describing the belief of the United States that injection of a political and policy issue into a trade forum is counterproductive). Eizenstat explained the American desire to support, rather than weaken, NAFTA at a time when it is the subject of considerable debate in the domestic political scene. *Id.*

171. *Id.*

### III. RECOMMENDATIONS

#### A. LEGISLATIVE CONSIDERATIONS

Given Canada's recent antidote legislation and NAFTA challenge, the United States should perform a cost-benefit analysis to decide if Titles III and IV of Helms-Burton are worth the deteriorating relationship with its primary trading partner. Evidence exists that Helms-Burton is accomplishing its goal of deterring foreign investment in Cuba.<sup>172</sup> The question remains: At what cost?

On a macro level, complete dislocation of the solid Canadian-American relationship is unthinkable. Arguably, there are no better allies in the world than Canada and the United States whose interests frequently converge.<sup>173</sup> The two countries trade extensively, and the Canadian and American economies are increasingly linked in a post-NAFTA world.<sup>174</sup> For many years, the two allies co-existed and prospered with divergent Cuban policies in place.<sup>175</sup> On a micro level, however, Helms-Burton has generated a great deal of bilateral friction that the Canadians perceive as undermining expectations seemingly settled under NAFTA.<sup>176</sup> The strength of the Canadian reaction underlines the seriousness of the current collision course and the requirement of continued attention from Ottawa and Washington.

Congress should consider severing Titles III and IV of Helms-Burton from the law.<sup>177</sup> Alone, Titles I and II serve as forceful policy statements, but as their focus is on the United States-Cuba relationship, they do not risk further alienation of American trading partners.<sup>178</sup> Titles III and IV unwisely make other foreign policy objectives of the United States subservient to the goal of Castro's downfall.<sup>179</sup>

After the international uproar surrounding Helms-Burton,<sup>180</sup> the American

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172. See Heather Scofield, *Canadian Firms in Cuba Duck For Cover*, MONTREAL GAZ., May 23, 1996, at E2 (noting, *inter alia*, that some Canadian companies are finding it difficult to obtain letters of credit from their banks due to increased fears of litigation in the United States).

173. See discussion *supra* part I (detailing the close relationship between Canada and the United States).

174. See discussion *supra* part I.A (describing further the Canadian-American relationship).

175. See discussion *supra* part I.B.1-2 (recounting the relationships with and divergent policies of Canada and the United States toward Cuba).

176. See discussion *supra* parts IIA-C (detailing the Canadian response that Helms-Burton violates the international agreement).

177. Helms-Burton, *supra* note 2, § 5.

178. See discussion *supra* part I.B.3 (detailing Titles I and II of the Helms-Burton Act).

179. H.R. REP. NO. 104-202, at 53 (1995), *reprinted in part in* 1996 U.S.C.C.A.N. 527, 551.

180. See discussion *supra* part I.B.3 (describing international uproar concerning Helms-Burton).

government will lose face if it does not somehow enforce Title III. On several occasions, the Clinton Administration declared its firm intention to give complete effect to all provisions of the law.<sup>181</sup> Given this fact, the legislative branch is likely to be unwilling to sever Title III completely from the law. Proponents of Title III view it as a brilliant legal tool, allowing liability for "trafficking" to accrue, while providing the American president with a renewable right to suspend the ability to sue. This situation allows a claimant to prepare a case, while holding the Sword of Damocles over the head of a foreign defendant who never knows whether the president will extend the suspension or disallow any further continuance and cause the "trafficker" to become amenable to suit overnight in an American court. President Clinton's January 1997 statement that he intends to suspend Title III indefinitely<sup>182</sup> appears to be an effort to walk the middle ground and obtain measurable progress in allied efforts to promote democracy in Cuba in exchange for the continued deferral of Title III.

This perspective may provide a second, more practical option for the United States. If Congress is unwilling to sever Title III, President Clinton should consider its permanent suspension.<sup>183</sup> Such an alternative would allow the United States to save face, while easing the concerns of Canada and other members of the international community. To retain dignity on this matter, the United States must successfully obtain concrete measures from both our European and Canadian al-

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181. See Stanley Meisler, *U.S. Allies Are Up in Arms Over Law on Cuba Trade*, L.A. TIMES, June 7, 1996, at A2 (referencing the statement by State Department spokesman, Nicholas Burns, that Helms-Burton is settled American law and the United States government fully intends to implement it to the best of its ability).

182. See Thomas W. Lippman, *Clinton Suspends Provision of Law That Targets Cuba*, WASH. POST, Jan. 4, 1997, at A1, A18 (noting Clinton's statement that he expected to extend the suspension of the right to sue if America's friends continue increased efforts to promote democracy in Cuba). But see Thomas W. Lippman & Howard Schneider, *Clinton "Skeptical" on Canada-Cuba Pact*, WASH. POST, Jan. 24, 1997, at A26 (noting that on Jan. 23, 1997 Canada and Cuba announced the development of a fourteen point program of co-operation on human rights issues and Clinton's response was muted); see also Douglas Farah, *Cuba Signs Broad Pact With Canada: Ottawa's Envoy Blasts U.S. Law, Offers Co-operation on Rights*, WASH. POST, Jan. 23, 1997, at A1, A22 (describing a proposed program of seminars and academic exchanges); *Commerce and Terrorism . . . Commerce and Human Rights*, WASH. POST, Jan. 24, 1997, at A22 (arguing for an even greater connection between commerce and human rights than that which the allies have demonstrated thus far in their dealings with Cuba following the second to the most recent suspension of Title III).

183. See Anthony Wilson-Smith, *Clinton's Concession*, MACLEAN'S, July 29, 1996, at 14 (noting the statement of a senior adviser to Canadian Prime Minister Jean Chretien that a Clinton victory in the recent presidential election supports the chances for an indefinite postponement of Title III). The Canadians were hoping for such a development all along. Canada, however, has thus far verbalized continued disappointment in the continued existence of Helms-Burton and reiterated its opposition to the law's alleged extraterritorial imposition of United States foreign policy onto other nations. Lippman, *supra* note 182, at A1.

lies to work with Cuba in the promotion of democracy.<sup>184</sup>

If Title IV remains in force, United States lawmakers should reconsider the definition of who is liable for exclusion under this provision. As written, Title IV is overbroad and excludes minor children and spouses along with "traffickers."<sup>185</sup> Congress should consider deleting family members from Section 401(4).<sup>186</sup> The current construction can only serve to further alienate American allies.

## B. FOREIGN POLICY CONSIDERATIONS

The United States should reconsider Cuba's place in contemporary American strategic policy and determine its relative importance vis-à-vis other global priorities.<sup>187</sup> The United States frequently states its goal of working multilaterally for the economic advancement and political liberalization of the Cuban

184. See Thomas W. Lippman & Paul Blustein, *Administration Offers Compromise to Europeans Over Helms-Burton Act*, WASH. POST, Apr. 11, 1997, at A23 (describing a Clinton Administration proposal to press Congress to dilute Titles III and IV in exchange for the European Union postponing its WTO complaint for six months and accepting the premise that corporations should not profit from investing globally in properties taken by governments without compensation); see also Paul Blustein & Thomas W. Lippman, *Trade Clash on Cuba is Averted: U.S.-Europe Pact Seeks to Ease Helms-Burton*, WASH. POST, Apr. 12, 1997, at A1, A20 (noting that the understanding emerged at the eleventh hour, immediately prior to the April 14, 1997 deadline for the Europeans to file their first WTO submission). Any understanding, however, is tentative and lacking key details such as exactly what European "action against dealings in property confiscated by Havana and other regimes" means, and the breadth of any proposed extension of trade restrictions beyond Cuba. *Id.* This development amounts to the buying of time, and it remains to be seen what role Canada will play.

185. Helms-Burton, *supra* note 2, § 401(a)(4).

186. See Ratchik, *supra* note 52, at 371 (exploring this issue in regards to a previous version of the law (S.381, § 301(a)(D)(IV)) and also considering the opposing viewpoint that, perhaps, including such dependents increases the pressure on foreign investors to reconsider their business dealings with Cuba). As it now stands, Section 401(a)(4) excludes from the United States persons who have nothing to do with business decisions. *Id.* Thus, Congress could amend Section 401(a)(4) to read as follows:

(4) is an agent of any person described above. The Secretary of State may waive this prohibition on a case-by-case basis when he determines that it is in the national interest to do so.

If the word "agent" is inserted after "controlling shareholder" in Section 401(a)(3), Congress could delete Section 401(a)(4) entirely. This would make logical sense, as Section 401(a)(3) pertains to business relationships, and it is unnecessary to include family members with those who have a professional relationship with Cuba and who make financial and strategic decisions on behalf of a corporate entity. Congress could amend Section 401(a)(3) to read as follows:

(3) is a corporate officer, principal, controlling shareholder, or agent for a company or entity involved in such confiscations or conversions or trafficking.

187. *The Cuban Democracy Act of 1992: Hearings on H.R. 4168 Before the House Comm. on Foreign Affairs*, 102d Cong. (1992) (statement of Jorge I. Domínguez, Gov't Prof., Harv. U.), reprinted in Krinsky & Golove, *supra* note 14, at 175.



people.<sup>188</sup> The framework established in Titles III and IV of Helms-Burton, however, is ill-suited to multilateralism as it creates enormous daily conflicts with United States allies. It, further, is ill-suited to the American constitutional system's separation of powers when it seeks to harness the judiciary to legislative or executive foreign policy goals.<sup>189</sup> Helms-Burton's imposition of the American court system between the Cuban communities in the United States and Cuba may exacerbate, rather than alleviate, tensions between the two communities during any resolution of the outstanding property claims.<sup>190</sup>

The United States should reform its outdated Cuban policy and work within a multilateral framework to negotiate the normalization of relations with Cuba.<sup>191</sup> For thirty years, the United States justified its economic policy on the grounds that Cuba allied itself with the Soviet Union and supported third world insurgencies, sometimes with the use of Cuban troops.<sup>192</sup> Today, Cuba no longer poses a realistic national security threat to the United States.<sup>193</sup>

Given that American policies isolating Cuba have failed to achieve redress for the outstanding American property claims, the United States should consider negotiating a compensation agreement with Havana.<sup>194</sup> There is an element of ur-

188. See Paige Bowers, *Special Envoy Will Push Cuba Policy to American Allies: Eizenstat to promote Helms-Burton*, WASH. TIMES, Aug. 16, 1996, at A16 (noting the statement by National Security Council spokesman Dave Johnson that operating multilaterally is generally more effective than pursuing unilateral policies).

189. Muse, *supra* note 107, at 23.

190. *Id.* at 24.

191. See H.R. REP. NO. 104-202, at 53-54 (1995), *reprinted in part in* 1996 U.S.C.C.A.N. 527, 551-52 (noting that the list of individuals opposed to Cuba's further isolation includes former President Richard Nixon, former Secretary of State Lawrence Eagleburger, former National Security Adviser Zbigniew Brzezinski, William F. Buckley, Jr., and Nobel Laureate Oscar Arias, the former President of Costa Rica); see also Christopher Marquis, *Eight Former Members of Congress Urge Ending Embargo Against Cuba*, WASH. POST, Jan. 11, 1997, at A12 (noting the recent report by former, bipartisan lawmakers detailing support for increased engagement of Cuba as a better mechanism for the effective promotion of Cuban democracy). This involves confidence building measures on both sides, such as the increase of Track II programs to increase contacts between the two civil societies, as well as Cuban movement to release prisoners of conscience or invite the International Committee of the Red Cross to inspect the island's detention facilities. *Id.*

192. Krinsky & Golove, *supra* note 14, at 135.

193. See Former Secretary of Defense, Robert S. McNamara, Remarks at a Press Briefing (Jan. 21, 1992) *reprinted in* Krinsky & Golove, *supra* note 14, at 169-70 [hereinafter McNamara] (noting that as one spending years of his life concerned with the Soviets and the Cubans, McNamara felt confident in expressing that no Cuban threat to the United States exists today). McNamara's remarks followed a series of academic exchanges in which he participated, wherein the Cubans were willing to discuss topics such as the discontinuity of their previous relationship with the Soviets, past attempts to subvert governments in the hemisphere, and Cuban aspirations for the next thirty years. *Id.*

194. See generally Traviesco-Diaz, *supra* note 95, at 659 (examining a variety of ways in which to address these claims). Most discussion of negotiated settlements revolves

agency, however, to settling the American property claims issue as soon as possible.<sup>195</sup> Legislators must rewrite United States law to legalize lifting the embargo or normalizing relations.<sup>196</sup> Compensation is further complicated by the fact that Havana is rapidly seeking, and receiving, international investment.<sup>197</sup> This clouding of the title to properties subject to American claims increases the complexity of the compensation issue<sup>198</sup> and strengthens the argument for the swift conclusion of an agreement. Critical components of any negotiated settlement include the immediate halt of further development of properties to which American claims are attached and the revision of Helms-Burton and the various antidote laws recently written by objecting nations.

The Cuban government claims it consistently acknowledged its obligation to the American property claimants and made several overtures in the past, all rejected by Washington.<sup>199</sup> Critics of this position point to past Cuban intransigence to state that Cuba is not now, and never was, interested in such a dialogue with the United States.<sup>200</sup> To such critics, one could reply that perhaps Castro's interest would be sharper now in the post Cold-War environment. The latter position finds support in a statement of Castro himself,<sup>201</sup> who may be interpreted as a pragmatist at heart.<sup>202</sup>

An extensive relationship with both the United States and Cuba<sup>203</sup> uniquely

around a date in the future when a hypothetical, post-Castro government is in power. *Id.*

195. *Id.* at 669-71.

196. *Id.* at 669.

197. See Claggett, *supra* note 105, at 435 (noting a 1993 communication by then Secretary of State Warren Christopher to American diplomats abroad, warning that foreign investment in properties allocated by American claims complicates restitution).

198. *Id.*

199. See Hernandez Interview, *supra* note 54 (positing Cuba's willingness to settle the outstanding claims of other nations); see also Travieso-Diaz, *supra* note 95, at n.3, n.5 (noting statements by the President of the Cuban Parliament and former Foreign Minister Ricardo Alarcon regarding Cuba's willingness to pay claims).

200. See Arturo Villar, *Cuba Shoots Down its Options*, *WORLD PAPER*, Apr. 1996, at 8, available in LEXIS, News Library, CURNWS File (noting examples from both the 1970s and 1980s in which Cuba missed opportunities for a negotiated dialogue with the United States).

201. SEBASTIAN BALFOUR, *PROFILES IN POWER: CASTRO 67-68* (1995). Balfour includes the following somewhat romantic statement by Fidel Castro:

I came to power with some preconceived ideas about the United States and about Cuba's relationship with her. In retrospect, I can see a number of things I wish I had done differently . . . . Still, even adversaries find it useful to maintain bridges between them. Perhaps I burned some of the bridges precipitately; there were times when I may have been more abrupt, more aggressive, than was called for by the situation. We were all younger then; we made the mistakes of youth.

*Id.* at 68.

202. See *id.* at 94-95 (describing Castro's actions in aligning Cuba with the Soviet Union and touting Moscow's line during the 1968 invasion of what was then Czechoslovakia as being dictated by, for example, *realpolitik* and economic concerns).

203. See discussion *supra* parts I.A., I.B.1 (detailing the relationship Canada possesses with Cuba and the United States).

places Canada in a position to function as an intermediary in any negotiations between Cuba and the United States aimed at settling the outstanding American property claims.<sup>204</sup> Assisting the Americans and Cubans in the creation of a compensation commission or a negotiated program of payment, is in Canada's best interest.<sup>205</sup> The sooner American and Cuban relations achieve a measure of normalization, the likelier it is that the United States Congress may sever Titles III and/or IV from Helms-Burton (leaving only Titles I and II as an expression of American policy). Canada, therefore, would not find itself confronted with the need to take any actions under its FEMA amendment and could perhaps even revise it.

## CONCLUSION

The goal of placating American allies is not an adequate foundation for American foreign policy choices. American legislators, however, should construct laws which express our foreign policy in a practical and effective manner. Titles III and IV of Helms-Burton are neither practical nor effective. They result in a degree of conflict with American allies that is not balanced by an adequate measure of progress in achieving the law's stated goals. Rather than effectively promoting democracy in Cuba, Titles III and IV are poorly conceived. Furthermore, what good is Title III if political concerns require it to exist in a state of indefinite suspension? Attempting to maintain a dual position regarding Title III, where the United States simultaneously lauds and suspends the provision, only serves to discredit the legislation.

Canada's antidote legislation effectively nullifies Helms-Burton and accelerates an American-Canadian collision course that disrupts the two countries' solid bilateral relationship and NAFTA expectations. The competing laws threaten the expenditure of precious resources in international dispute resolution fora, the imposition of retaliatory countersuits, and a destabilization of the climate for international investment. Canada and the United States possess the opportunity, however, to fashion a pragmatic approach for the future from the wreckage of collided Cuban policies. Since Cuba is no longer a viable national security threat to the United States<sup>206</sup> and has made progress toward market reform, the time is ripe for the United States government to listen to the voices of moderation and negotiate a

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204. *But see* PETER McKENNA, CANADA AND THE OAS: FROM DILETTANTE TO FULL PARTNER 148 (1995) (noting Canadian disinterest in acting as an intermediary in United States-Cuban relations after initially indicating that the Canadians function in such a capacity). This scenario, however, existed before either the 1992 Cuban Democracy Act or 1996's Helms-Burton. *Id.* Arguably, the extraterritorial reach of these two laws serves as an incentive for Canada to change its mind.

205. *See* Eizenstat Remarks, *supra* note 170, at 2 (discussing the notion of a *quid pro quo* whereby in exchange for concrete allied measures to press for democracy in Cuba, the United States considers the indefinite suspension of Title III (spoken of here in the context of Europe)).

206. McNamara, *supra* note 193, at 169-70.

compensation agreement with Cuba to resolve outstanding American property claims. Discretion is the better part of valor and negotiation poses a better chance of protecting the interests of American citizens who have outstanding, certified property claims than does continued, ineffective confrontation.