

1996

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### Recommended Citation

Ratchik, Jonathan R. "Cuban Liberty and the Democratic Solidarity Act of 1995." American University International Law Review 11 no. 2 (1996): 343-373.

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# CUBAN LIBERTY AND THE DEMOCRATIC SOLIDARITY ACT OF 1995

Jonathan R. Ratchik\*

## INTRODUCTION

Fidel Castro is reinventing Cuba.<sup>1</sup> In an attempt to revitalize the Cuban economy and save socialism, Castro has implemented limited economic reforms.<sup>2</sup> These reforms have gained the attention of foreign investors seeking to do business in Cuba.<sup>3</sup> If successful, these measures may provide Castro with the hard currency he needs to maintain his dictatorship, and thereby prolong the misery of the Cuban people.<sup>4</sup>

To stem the flow of foreign investment to Cuba and accelerate the demise of Castro's regime, Senator Jesse Helms (R-NC) and Representative Dan Burton (R-IN) have co-sponsored the Cuban Liberty and Democratic Solidarity Act of 1995 (LIBERTAD).<sup>5</sup> This bill would strengthen the United States economic embargo against Cuba,<sup>6</sup> protect

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1. *Castro's Compromises: In a Candid Conversation, a Defiant Revolutionary Explains How He is Facing Up to Socialism's Failures*, TIME, Feb. 20, 1995, at 57 [hereinafter *Castro Interview*].

2. *Id.* at 60. Castro declared that "[o]ur main objective is to preserve the revolution: our independence and the achievements of socialism." *Id.*

3. See *infra* notes 40-42, 146-47 and accompanying text (discussing the state of the Cuban economy).

4. See *infra* notes 101, 115 and accompanying text (discussing hard currency in Cuba).

5. S. 381, 104th Cong., 1st Sess. (1995); H.R. 927, 104th Cong., 1st Sess. Version 2 (1995). On September 21, 1995, the House of Representatives enacted its version of LIBERTAD by a vote of 294-130. William E. Gibson & Deborah Ramirez, *Tougher Embargo on Cuba Forges On; GOP House Bill Sails to Passage*, SUN-SENTINEL (Ft. Lauderdale), Sept. 22, 1995, at 1A.

6. S. 381, *supra* note 5, §§ 101-09; H.R. 927, *supra* note 5, §§ 101-08.

American property rights abroad,<sup>7</sup> and establish a framework for American support for a post-Communist Cuba.<sup>8</sup>

This Comment explores the legal ramifications of LIBERTAD. Part I places LIBERTAD in a historical context and discusses the bill's provisions. Part II focuses on the two most controversial provisions of the bill and how they relate to the international obligations of the United States. Furthermore, Part II examines the merits of maintaining the economic embargo against Cuba. Part III offers suggestions on how to improve LIBERTAD. This Comment concludes by expressing support for LIBERTAD as an effective means of bringing Castro's dictatorship to an end.

## I. HISTORICAL BACKGROUND

### A. HISTORY OF CUBA'S CONFISCATION OF UNITED STATES PROPERTY IN CUBA

The United States has maintained an economic embargo against Cuba since the early 1960s. Following Fidel Castro's ascension to power in 1959,<sup>9</sup> the Cuban Government began restructuring the character of the Cuban economy.<sup>10</sup> The adoption of the Fundamental Law of the Republic<sup>11</sup> provided the legal basis for Cuba's confiscatory decrees.<sup>12</sup> The first such decree<sup>13</sup> that affected foreign property owners was the Agrari-

7. S. 381, *supra* note 5, §§ 301-03; H.R. 927, *supra* note 5, §§ 301-03, 401; *see also* H.R. 927 104th Cong., 1st Sess., Version 1, §§ 301-04, 401 (1995).

8. S. 381, *supra* note 5, §§ 201-06; H.R. 927, *supra* note 5, §§ 201-06.

9. DIANNE E. RENNACK & MARK P. SULLIVAN, CUBA: U.S. ECONOMIC SANCTIONS, CONGRESSIONAL RESEARCH SERVICE REPORT NO. 95-248 2 (1995) [hereinafter RENNACK]. Castro and his "26th of July Movement" had vigorously opposed the dictatorship of Fulgencio Batista, eventually forcing the latter to flee Cuba in 1958. *Id.* The United States recognized the revolutionary government on January 6, 1959. *Id.*

10. *See* LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, 88th Cong., 1st Sess., EXPROPRIATION OF AMERICAN-OWNED PROPERTY BY FOREIGN GOVERNMENTS IN THE TWENTIETH-CENTURY 16 (Comm. Print 1963) [hereinafter EXPROPRIATION IN THE TWENTIETH-CENTURY] (outlining the Cuban Government's confiscatory measures aimed at American property in Cuba).

11. MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY 71 (1976) (citing *Ley Fundamental de la Republica*, 5-123, Feb. 7, 1959 GACETA OFICIAL (Feb. 7, 1959) [hereinafter *LFR*]).

12. *See* GORDON, *supra* note 11, at 71 (citing *LFR*, art. 24) (amending what was Article 24 of the 1940 Cuban Constitution to provide for the confiscation of property belonging to "collaborators" of the Batista dictatorship). For other amendments to Article 24, *see infra* note 27.

13. GORDON, *supra* note 11, at 116. Prior to the Agrarian Reform Law, the

an Reform Law (LRA),<sup>14</sup> which redistributed the ownership of land in Cuba.<sup>15</sup> Although the LRA provided compensation for property owners who lost their land,<sup>16</sup> the United States expressed concern over the form of compensation.<sup>17</sup>

Cuba's confiscatory policies did not cease with the enactment of the LRA. On October 26, 1959, the Cuban Government passed a new mineral law requiring the re-registration of mining claims,<sup>18</sup> followed a month later by a new petroleum law.<sup>19</sup> Such measures strained relations between the United States and Cuba and raised fears that the United States would use Cuba's sugar quota as a means of pressure.<sup>20</sup>

Relations between the United States and Cuba deteriorated further in 1960. The dispute over mineral taxes between United States companies

Cuban Government had "intervened" in a number of foreign-owned businesses, the most notable of which was the Cuban Telephone Company. *EXPROPRIATION IN THE TWENTIETH-CENTURY*, *supra* note 10, at 16. Under the act of intervention, the government assumes the managerial positions of a business. *GORDON*, *supra* note 11, at 116. Although an act of intervention itself is not a violation of international law, it involves a greater degree of control than the strictest regulation. *Id.* The point at which an act of intervention becomes a confiscation is unclear. *Id.* at 117. Where the intervention does not achieve its objectives, the government will likely be under an obligation either to nationalize the business or return it to its former owners. *Id.*

14. *GORDÓN*, *supra* note 11, at 75 (citing *Ley de Reforma Agraria* May 17, 1959 [LRA], Decreto No. 1426, GACETA OFICIAL (EDICIÓN EXTRAORDINARIA) (May 17, 1959)).

15. *Id.* at 75. The LRA limited property holdings to "small and medium size farms, co-operatives, and special development acreages allowed to exist in the best interests of Cuban economic progress." *Id.*

16. *EXPROPRIATION IN THE TWENTIETH-CENTURY*, *supra* note 10, at 16. The LRA provided compensation through 20-year bonds at 4 1/2% interest. *Id.*

17. *GORDON*, *supra* note 11, at 124. In a note to the Cuban Government, the United States Department of State recognized the right of a foreign nation to take property for public purposes. *Id.* (citing *U.S. Informs Cuba of Views on Agrarian Reform Law*, 40 DEP'T ST. BULL. 958 (1959) [hereinafter DEP'T ST. BULL.]). This right, however, "[was] coupled with the corresponding obligation . . . that such taking will be accompanied by payment of prompt, adequate, and effective compensation." *Id.* (quoting DEP'T ST. BULL., at 958).

18. *Id.* at 79 (citing *Ley* 617, Oct. 27, 1959, GACETA OFICIAL (Oct. 30, 1959)). The new law caused United States companies to abandon their undeveloped claims. *Id.* at 80. In addition, the new law imposed a 25% tax on exports, which the United States deemed as confiscatory. *Id.* at 136.

19. *Id.* at 82 (citing *Ley* 635, Nov. 20, 1959, GACETA OFICIAL (Nov. 23, 1959)). The petroleum law levied a 60% royalty on all oil production, effectively forcing United States companies to cease their operations. *Id.*

20. *Id.* at 83.

and the Cuban Government had become a major issue.<sup>21</sup> The second major controversy of that year concerned the processing of imported Soviet oil.<sup>22</sup> On May 17, 1960, the Cuban Government demanded that United States oil companies process the Soviet oil.<sup>23</sup> When United States oil refineries refused to do so, the Cuban Government seized the refineries.<sup>24</sup>

The reaction of the United States to Cuba's latest round of confiscations was severe. On July 6, 1960, the United States Congress amended the Sugar Act of 1948, giving the President the authority to establish the Cuban sugar quota.<sup>25</sup> Just prior to President Eisenhower's announcement of his decision to suspend Cuba's sugar quota,<sup>26</sup> the Cuban Government passed a decree authorizing the expropriation of United States owned property.<sup>27</sup> More so than any of Cuba's previous confiscatory acts, this decree violated the norms of international law regarding the taking of property.<sup>28</sup> Cuba enacted its last significant expropriatory

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21. *Id.* at 91. The Cuban Government also demanded that all processing of nickel take place in Cuba, as opposed to the 65 percent which had been the practice. *Id.*

22. *Id.* Castro had re-established full diplomatic relations with the Soviet Union on May 7, 1960, which Batista had severed following his 1952 coup. RENNACK, *supra* note 9, at 2. This resumption of diplomatic ties followed a significant trade agreement between the two countries in February of that same year. *See* GORDON, *supra* note 11, at 87 (outlining the provisions of the Cuban-Soviet trade agreement).

23. EXPROPRIATION IN THE TWENTIETH-CENTURY, *supra* note 10, at 17.

24. GORDON, *supra* note 11, at 96. Castro accused American oil companies of, among other things, charging monopolistic prices and forging a criminal plan to boycott Cuba. *Supporting Democracy in Cuba: Hearings on S. 381 and H.R. 927 before the Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Ignacio E. Sanchez, Att'y, Kelley Drye & Warren), available in WESTLAW, 1995 WL 357720 [hereinafter Sanchez] (citing Resolution No. 1, GACETA OFICIAL, Aug. 6, 1960).

25. GORDON, *supra* note 11, at 97 (citing 7 U.S.C. § 1158 (1960), 74 Stat. 330 (1961)).

26. *Id.* at 98 (citing Proclamation No. 3355, 25 Fed. Reg. 6,414 (1960)). President Eisenhower had reduced Cuba's remaining quota from 739,752 tons to 39,752 tons. *Id.* at 99.

27. *Id.* at 98 (citing *Ley 851*, July 6, 1960, GACETA OFICIAL (July 7, 1959)). The day before Cuba enacted the expropriation decree, Castro amended Article 24 of the Cuban Constitution to allow for confiscation "by competent authority" and for a cause of "national interest." Sanchez, *supra* note 24 (citing INT'L COMM. OF JURISTS, CUBA AND THE RULE OF LAW 87 (1962)). The Cuban Government cited "economic and political aggression on the part of the United States" as its reason for adopting the expropriating measure. *Id.*

28. *See* GORDON, *supra* note 11, at 141-46 (contending that Cuba's Nationalization Law violated international law because it was discriminatory, retaliatory, and

measures affecting foreign property on October 13, 1960.<sup>29</sup> Laws 890 and 891 affected the confiscation of the last significant foreign-owned businesses,<sup>30</sup> as well as that of many Cuban companies.<sup>31</sup>

In response to Cuba's confiscation of American-owned property, Congress enacted the Foreign Assistance Act of 1961,<sup>32</sup> which authorized the President to impose an economic embargo against Cuba.<sup>33</sup> Congress broadened the embargo with the passage of the Cuban Assets Control Regulations<sup>34</sup> to restrict Cuba's access to its assets in the United States and to prohibit United States citizens and corporations from conducting business transactions with Cuba.<sup>35</sup>

In addition to imposing an economic embargo against Cuba, the United States Congress took measures to determine and validate property claims against Cuba. In 1964, Congress amended the International Claims Settlement Act of 1948 to enable United States nationals<sup>36</sup> to file claims against the Cuban Government.<sup>37</sup> To date, Cuba has not compensated any of the claimants.<sup>38</sup>

without prompt, adequate and effective compensation).

29. *Id.* at 146.

30. *Id.* at 103 (citing *Ley* 890, Oct. 30, 1960, GACETA OFICIAL (EDICION EXTRAORDINARIA) (Oct. 13, 1960); *Ley* 891, GACETA OFICIAL (EDICION EXTRAORDINARIA) (Oct. 13, 1960)). These measures increased the value of confiscated property from \$800 million to over \$2 billion. *Id.*

31. *Id.* at 146.

32. Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a)(1) (1994) [hereinafter FAA]. Section 620 of the Act specifically proscribed giving any assistance to the government of Cuba. Congress envisioned "assistance" to include all trade between the United States and Cuba. Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 620, 75 Stat. 424, 444-45 (1961).

33. Proclamation No. 3447, 3 C.F.R. § 4173 (1962).

34. 31 C.F.R. § 515.101 *et. seq.* (1994).

35. RENNACK, *supra* note 9, at 16. The Cuban Assets Control Regulations also restricts cash remittances and travel to Cuba. *Id.*

36. 22 U.S.C. § 1643 (1994). The Cuban Claims Act defined the term "national" as, among other things, "[A] natural person who is a citizen of the United States . . ." *Id.* § 1643a(1).

37. *Id.* § 1643d(a). As opposed to LIBERTAD, the Cuban Claims Act limited the jurisdiction of the FCSC to the hearing of claims of persons who were United States nationals on the date of their property loss. *Id.* § 1643c(a).

38. Sanchez, *supra* note 24. The total amount for all final claims under the Cuban Claims Act was \$1.8 billion. The FCSC validated 5,911 claims, valued at \$1.8 million. GORDON, *supra* note 11, at 153; see MARK P. SULLIVAN, CONGRESSIONAL RESEARCH SERVICE, CUBA-U.S. RELATIONS: SHOULD THE U.S. INCREASE SANCTIONS ON CUBA? 11 (1995) (noting that the value of all claims today is estimated at \$6 billion).

## B. THE SITUATION IN CUBA TODAY

Due to the breakup of the Soviet Union and the fall of communism in Eastern Europe, Castro currently finds himself without those who were his primary benefactors during the Cold War.<sup>39</sup> This loss of support has had a devastating effect on Cuba's economy<sup>40</sup> and population.<sup>41</sup> Accordingly, Castro has implemented economic reforms in an attempt to create new domestic revenue sources.<sup>42</sup> Cuba has not, however, accompanied this market liberalization with similar improvements in the area of human rights.<sup>43</sup> The Cuban Government still denies its population the most fundamental human rights concerning free speech and freedom to associate.<sup>44</sup>

C. PROVISIONS OF THE CUBAN LIBERTY AND  
DEMOCRATIC SOLIDARITY ACT OF 1995

On February 9, 1995, Senator Helms (R-NC) introduced the Cuban Liberty and Democratic Solidarity Act of 1995.<sup>45</sup> The Act's purposes

39. *Hearings on U.S. Policy Toward Cuba Before the Subcomm. on Western Hemisphere of House Comm. on International Relations*, 104th Cong., 1st Sess. (1995) (statement of Peter Tarnoff, Under Secretary of State for Political Affairs), available in WESTLAW, 1995 WL 306730 [hereinafter Tarnoff]. Before 1989, the Soviet Union provided between \$4 and \$6 billion in annual subsidies to the Cuban economy. *Id.*

40. *Id.* The Cuban economy's output has contracted by over 50% since 1989. *Id.*

41. *Id.* State ration coupons only provide enough food for half a month, and the high price of gasoline has forced many Cubans to travel by bicycle. *Id.*

42. See Deborah Ramirez, *Cuba to Introduce Capitalism, Taxes; Castro Regime Prepares to Legalize Small, Profit-Oriented Enterprises*, SUN-SENTINEL (Ft. Lauderdale), June 1, 1995, at 1A (noting recent economic reforms legalizing small, family-operated businesses, and permitting certain professionals to hold consulting jobs). Cuba's plan to tax these enterprises, however, suggests that Cuba enacted the measures more out of a need for revenue, than as a commitment to capitalism. The government still bans the private hiring of workers, and only the original producers (as opposed to middle men) may sell their products in the market. See also Mark M. Klugmann, *The Americas: Socialism Breaks Down as Cubans Grasp for Greenbacks*, WALL ST. J., Apr. 7, 1995, at A15 (reporting that Cuba has two economies—socialist trade using the peso, and clandestine capitalist activities using the United States dollar).

43. See Tarnoff, *supra* note 39 (detailing the Cuban Government's human rights abuses).

44. See *id.* (referring to a United States Dept. of State Country Report on Human Rights Practices for 1994 which detailed the "deplorable state of basic freedoms in Cuba").

45. S. 381, *supra* note 5. On February 14, 1995, Representative Burton (R-IN)

are: to strengthen the economic embargo against Cuba; to encourage free and fair democratic elections in Cuba; to develop a plan for furnishing assistance to a transition government or a democratically elected government; and to protect the property rights of Americans abroad.<sup>45</sup>

Title I of LIBERTAD contains provisions aimed at strengthening the economic embargo against Cuba. It provides for, *inter alia*: the prohibition on the importation of sugars, syrups, and molasses from countries which purchase such goods from Cuba;<sup>47</sup> the opposition to Cuba's membership in international financial institutions (IFIs) and the reduction in United States payments to such institutions that provide loans or other assistance to Cuba;<sup>48</sup> and the withholding of aid from any independent state of the former Soviet Union found to be providing assistance to military and intelligence facilities in Cuba.<sup>49</sup>

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introduced the House of Representative's version of the bill. H.R. 927, *supra* note 5.

46. S. 381, *supra* note 5, § 109; *see infra* notes 58-86 and accompanying text (discussing international ramifications of the Senate's provision); *see also* H.R. 927, 104th Cong., 1st Sess. § 108 (1995) (containing restrictions on the importation of Cuban sugar products). *But see* H.R. 927, 104th Cong., 1st Sess., Version 5 (1995) (eliminating in the House of Representative's final version of LIBERTAD earlier provisions restricting the importation of sugar products from countries which import such products from Cuba).

47. S. 381, *supra* note 5, § 109. The House's final version of LIBERTAD eliminated earlier provisions restricting the importation of sugar products from countries which import such products from Cuba. *See* H.R. 927, 104th Cong., 1st Sess. § 108 (1995) (containing restrictions on the importation of Cuban sugar products). For a discussion of the international ramifications of the Senate's provision, *see infra* notes 58-86 and accompanying text.

48. S. 381, *supra* note 5, § 104; H.R. 927, *supra* note 5, § 104. The Administration has expressed concern that section 104 could "infringe on the President's constitutional responsibilities to conduct foreign policy." Letter from Wendy R. Sherman, Assistant Secretary of Legislative Affairs, to Benjamin A. Gilman, Chairman, House Comm. on Int'l Relations (Apr. 28, 1995), in CUBA POLICY OR CUBA FOLLY?: FACTS ABOUT THE HELMS-BURTON LEGISLATION TO TIGHTEN THE EMBARGO AGAINST CUBA (United States-Cuba Foundation and Cuban Committee for Democracy, 1995) [hereinafter Sherman]. Sherman also points out that withholding contributions from IFIs could violate IFI charters. *Id.* at 3.

49. S. 381, *supra* note 5, § 106; H.R. 927, *supra* note 5, § 105. This withholding of financial assistance is specifically aimed at deterring support for the intelligence facilities at Lourdes and Cienfuegos. S. 381, *supra* note 5, § 106; H.R. 927, *supra* note 5, § 105. The Clinton Administration does not support components of § 106 because it feels assistance to Russia is essential in order to promote reform and stability there. Sherman, *supra* note 48, at 3-4. Furthermore, Lourdes provides Russia with a means of verifying arms-control agreements. *Id.* at 4; *Contra Hearings on S. 381 Before the Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess.



Title II provides for United States assistance to a free and independent Cuba. It permits the President to provide assistance to the Cuban people after a transition<sup>50</sup> or a democratically-elected government<sup>51</sup> comes to power.<sup>52</sup> In addition, Title II terminates the economic embargo against Cuba upon a presidential determination that a democratically-elected government is in power in Cuba.<sup>53</sup>

Title III contains measures designed to protect American property rights abroad. It includes a provision in which aliens, who traffic<sup>54</sup> in property that the Cuban Government has confiscated from United States citizens and corporations, are denied entry into the United States.<sup>55</sup> In addition, Title III creates for United States citizens a federal cause of action against any person or government that traffics in confiscated

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(1995) (statement of William Resenau), *available in* WESTLAW, 1995 WL 360365 (contending that raising the Lourdes issue would not threaten arms control agreements, such as START II). Such arguments, Resenau feels, are less powerful today than they were during the Cold War. *Id.* Raising the Lourdes issue, however, could jeopardize the ability of the United States to gather sophisticated signals intelligence. *Id.*

50. S. 381, *supra* note 5, § 205; H.R. 927, *supra* note 5, § 206. Both bills define a transition government as a government that has, *inter alia*: freed all political prisoners; committed itself to the establishment of an independent judiciary; made progress toward respecting internationally recognized human rights as set forth in the Universal Declaration of Human Rights; organized free and fair elections; and has taken appropriate steps to either return confiscated property to United States citizens, or provide adequate compensation. S. 381, *supra* note 5, § 205; H.R. 927, *supra* note at 5, § 206.

51. S. 381, *supra* note 5, § 206; H.R. 927, *supra* note 5, § 207. Pursuant to both bills, a democratically elected government is a government that, *inter alia*: is elected under free and fair elections under the supervision of internationally recognized observers; shows respect for the basic civil liberties and human rights of Cuban citizens; and is substantially moving toward a market-oriented economy. S. 381, *supra* note 5, § 206; H.R. 927, *supra* note 5, § 207.

52. S. 381, *supra* note 5, § 202; H.R. 927, *supra* note 5, § 202. When a democratically-elected government comes to power in Cuba, section 202 allows the President to provide economic assistance through such organizations as the Export-Import Bank of the United States; the Overseas Private Investment Corporation; the Trade and Development Agency; and Peace Corps Activities. S. 381, *supra* note 5, § 202; H.R. 927, *supra* 5, § 202.

53. S. 381, *supra* note 5, § 204; H.R. 927, *supra* note 5, § 205.

54. S. 381, *supra* note 5, § 301; H.R. 927, *supra* note 5, § 301; *see infra* note 94 (defining what constitutes trafficking).

55. *See infra* notes 90-96 and accompanying text (analyzing the trafficking provisions).

property.<sup>56</sup> Title III extends claimant rights to United States nationals who were not nationals at the time of confiscation.<sup>57</sup>

## II. ANALYSIS

### A. LIBERTAD'S PROHIBITION ON THE IMPORTATION OF SUGAR PRODUCTS FROM COUNTRIES WHICH IMPORT SUCH PRODUCTS FROM CUBA UNDER GATT

LIBERTAD endeavors to strengthen United States economic sanctions against Cuba. In its attempt to further isolate the Castro regime, however, LIBERTAD risks violating United States obligations under the General Agreement on Tariffs and Trade (GATT).<sup>58</sup> For example, Title I of LIBERTAD, which prohibits countries that first import sugar, syrups or molasses from Cuba, from then exporting these products into the United States,<sup>59</sup> would violate Article XI of GATT.<sup>60</sup> Such a prohibition

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56. S. 381, *supra* note 5, § 302; H.R. 927, *supra* note 5, § 302. Money damages would be the greater of the amount determined by the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949 plus interest, or the fair market value of the property and could be treble either amount if the trafficker had notice of the claim and a copy of § 302. S. 381, *supra* note 5, § 302(a); H.R. 927, *supra* note 5, § 302(a).

57. S. 381, *supra* note 5, § 303(B); H.R. 927, *supra* note 5, § 303(B); *see infra* notes 110-14 and accompanying text (noting the Equal Protection Clause of the United States Constitution mandates that LIBERTAD give Cuban nationals, who became citizens after the confiscation of their property, the right to pursue their claims in federal court).

58. *See generally* Sherman, *supra* note 48, at 4 (contending that our trading partners will argue that LIBERTAD is inconsistent with United States obligations under the Uruguay Round Agreements and North American Free Trade Agreement).

59. Jorge I. Domínguez, THE HELMS AND BURTON BILLS ON CUBA: AN EARLY ASSESSMENT, POLICY BRIEF (Inter-American Dialogue, Washington D.C.) May 1995 at 4 [hereinafter Domínguez]. Article XI of GATT specifically provides:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale of any product destined for the territory of any other contracting party.

The General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI, ¶ 1, 61 Stat. (5), (6), 55 U.N.T.S. 194 [hereinafter GATT]. Annex I defines "import restrictions" as including "restrictions made effective through state trading operations." GATT, Annex I, Ad. arts. 11-14, 18.

60. S. 381, *supra* note 5, § 109. Title I also provides for the reallocation of a

would fall under the "other measures"<sup>61</sup> proscribed under Article XI of GATT.<sup>62</sup> Opponents of the provision also argue that it imposes what

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country's sugar quota where that country imports sugars, syrups, or molasses from Cuba in violation of the sanctions. *Id.* § 109(d). The prohibition on the importation of Cuban sugar, syrups, or molasses does not apply to countries that indicate they will not import such products from Cuba until free and democratic elections take place there. *Id.* § 109(b).

61. *Id.* The term "other measures" is "comprehensive" and applies to "all measures . . . prohibiting or restricting the importation, exportation or sale for export of products . . ." GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 287 (6th ed. 1994) [hereinafter GATT INDEX] (quoting *Japan—Trade in Semi-conductors: Report of the Panel*, GATT Doc. L/6309, ¶¶ 104-09 (May 4, 1988), reprinted in 35 Supp. Basic Instruments and Selected Documents (BISD) 116 (1989) [hereinafter *Japan Report*]). Furthermore, the legal status of a measure is not always determinative as to whether it falls under the purview of Article XI:1. *Id.* (quoting *Japan Report*, ¶ 117) (finding the Japanese Government's "administrative guidance" to be a restriction under Article XI). This "guidance" consisted of measures which pressured the semi-conductor industry into not exporting their products below company-specific costs, and which were indistinguishable from mandatory requirements. *Id.*

62. Compare S. 381, *supra* note 5, § 109 (regulating the importation of sugar products from countries which import such products from Cuba) with GATT INDEX, *supra* note 61, at 292 (examining the United States Marine Mammal Protection Act, 16 U.S.C. § 1371a(2)(B) (MMPA) which regulates the importation of tuna products into the United States). Pursuant to the MMPA, a country which harvested yellowfin tuna in the Eastern Tropical Pacific Ocean (ETP) has to prove to United States authorities that its overall taking of marine mammals is comparable to that of United States vessels operating in the same region. *Id.* Furthermore, just as LIBERTAD would restrict the importation of sugar or sugar-related products from countries which import such products from Cuba, MMPA prohibits the importation of yellowfin tuna and yellowfin tuna products from "intermediary nations" which imported such products from countries which did not abide by the regulations. *Id.* Moreover, like LIBERTAD, MMPA provides an exception to those nations that proved that they prohibit the importation of tuna and tuna products from countries that cannot export directly to the United States. *Id.*

In its report, the Panel noted that the United States, under the authority of the MMPA, prohibits the importation of tuna and tuna products from Mexico whose vessels used purse seine nets in the ETP. GATT INDEX, *supra* note 61, at 292 (quoting *United States—Restrictions on Imports of Tuna: Report of the Panel*, GATT Doc. DS21/R, ¶¶ 5.17-18 (unadopted), reprinted in 39 Supp. BISD 155 (1993)). The Panel found that the "direct import prohibition [of Mexican tuna and tuna products] and the provisions under which it [was] imposed were inconsistent with Article XI:1." *Id.* Moreover, the Panel also found to be inconsistent with Article XI:1 those provisions that restricted the importation of tuna and tuna products from "intermediary nations" to be in violation of Article XI:1. *Id.*

amounts to a secondary boycott against Cuba,<sup>63</sup> in contrast to the traditional policy of the United States concerning such boycotts.<sup>64</sup>

In addition to violating Article XI, the prohibitions of section 109 regarding the importation of Cuban sugar products may also violate the Most-Favored-Nation (MFN) obligations of the United States under GATT. Article I, which is the primary non-discrimination clause in GATT,<sup>65</sup> requires members to treat "like products" with equal preference.<sup>66</sup> By treating sugar purchased from Cuba differently than sugar

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63. Domínguez, *supra* note 59, at 4.

64. See Tarnoff, *supra* note 39 (comparing LIBERTAD's prohibition on sugar products from countries that import Cuban sugar, to the Arab League boycott on Israel that the United States "vigorously opposed"). Tarnoff states that such measures could set a damaging precedent threatening the commercial interests of the United States. *Id.*

65. GATT, *supra* note 59, art. I. In addition to Article I, other nondiscrimination clauses apply to, *inter alia*, internal mixing requirements, marks of origin, and state trading. *Id.*

If, as asserted previously, LIBERTAD is inconsistent with the requirements of Article XI, however, the question of its discriminatory impact is immaterial. See *supra* notes 58-64 and accompanying text (contending that LIBERTAD institutes an impermissible quantitative restriction under GATT); see also GATT INDEX, *supra* note 61, at 32 (quoting the 1988 Panel Report on "Japan—Trade in semi-conductors") (refraining from "examining the alleged discriminatory aspects of a restriction after having found it to be inconsistent with Article XI").

66. GATT, *supra* note 59, art. I, ¶ 1. Article I provides, in part, "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." *Id.*

There is no single definition in GATT as to what constitutes "like products." JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 260 (1969) [hereinafter JACKSON]. The definition's scope varies according to the context in which it is used. See *id.* at 263 (noting the differences in interpretation when the term is used within articles I, VI, and XI). With regard to Article I, the definition of "like products" takes on a broader scope and is more in accordance with tariff classifications. *Id.*; see GATT INDEX, *supra* note 61, at 35 (noting that the London session of the Preparatory Committee and the Havana Conference suggested that GATT members could use tariff classifications when determining the likeness of products). For problems associated with using tariff classifications in determining the "likeness" of two products, see GATT INDEX, *supra* note 61, at 38-39 (quoting *Canada/Japan—Tariffs on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber: Report of the Panel*, GATT Doc. L/6470, ¶¶ 5.7-10, 5.13-15 (July 19, 1989), reprinted in 36 Supp. BISD 167 (1990)) (expressing Canada's concern over the dependence on tariff classifications). Problems arise when a contracting party does not identify a product in its tariff classification system. *Id.* Furthermore, such classification systems do not accommodate new prod-

purchased elsewhere (two "like products"),<sup>67</sup> LIBERTAD fails to grant equal preference, and therefore violates Article I of GATT.<sup>68</sup>

Whether the United States must afford MFN treatment to the sugar products of countries that purchase sugar from Cuba depends on the origin of such products.<sup>69</sup> There are two approaches in defining the origin of a good: the "substantial transformation" approach,<sup>70</sup> and the "value-added" approach.<sup>71</sup> Section 109 is problematic because it disregards a sugar product's country of origin.<sup>72</sup> Rather, this section seems to prohibit the importation of sugar products from any country that purchases sugar from Cuba, regardless of the origin of the product intended for exportation to the United States.<sup>73</sup> This restriction is a cause for

ucts. *Id.*

67. Compare JACKSON, *supra* note 66, at 263 (citing *Brazilian Internal Taxes*, GATT Doc. CP.3/42, ¶ 7 (June 30, 1949), reprinted in 2 BISD 181, 183 (1952)) (letting stand a discriminatory tax on imported cognac where it contained different ingredients than domestic cognac) with *id.* at 262-63 (citing *Treatment by Germany of Imports of Sardines*, GATT Doc. G/26, ¶ 12 (Oct. 31, 1952), reprinted in 1 Supp. BISD 53, 57 (1953)) (differentiating between "like product" and "directly competitive or substitutable products" that did not apply to Article I).

68. See GATT INDEX, *supra* note 61, at 37 (quoting *Spain—Tariff Treatment of Unroasted Coffee: Report of the Panel*, GATT Doc. L/5135, ¶¶ 4.4-10 (June 11, 1981), reprinted in 28 Supp. BISD 102 (1982)) (discussing how a Spanish decree which classified unroasted coffee and varied its tariffs based on the classifications was discriminatory because the coffee was considered "like products" for purposes of Article I).

69. See GATT, *supra* note 59, art. I, ¶ 1 (affording MFN treatment to like products "originating in . . . the territories of all other contracting parties") (emphasis added).

70. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 143 (1989) [hereinafter *WORLD TRADING SYSTEM*]. Under the substantial transformation approach, a product originates in the country that most recently exported it, if within that country it underwent a "substantial transformation." *Id.* Unfortunately, there is no consensus as to what constitutes a substantial transformation, leaving room for conflicting definitions. JACKSON, *supra* note 66, at 467 (citing GATT, 2 Supp. BISD 55-56, ¶¶ A, B, C (1954)) (defining substantial transformation as when the products obtain a new individuality); *id.* at 468 (stating that each member country largely decides for itself where a good originates for purposes of MFN treatment); see *WORLD TRADING SYSTEM*, *supra*, at 143 (referring to a test that determines whether a product changed enough as to warrant a different tariff classification).

71. *WORLD TRADING SYSTEM*, *supra* note 70, at 143. In the value-added (or the percentage-value) approach, the origin of a product is the last country which contributed a certain percentage of value to the product. *Id.*

72. S. 381, *supra* note 5, § 109(a).

73. *Id.* In a letter to the Canadian Prime Minister, the Canadian Sugar Institute

concern among the trading partners of the United States,<sup>74</sup> and threatens to disrupt a significant flow of trade between Canada and the United States.<sup>75</sup>

An argument in favor of the United States position can be made that prohibiting the importation of sugar-products from countries that purchase sugar from Cuba is permissible within the framework of GATT. Article XX of GATT provides numerous exceptions through which a member can avoid its obligations under GATT.<sup>76</sup> These exceptions include, *inter alia*, measures that are intended to protect public morals,<sup>77</sup> and those relating to products resulting from prison labor.<sup>78</sup> In this case, refusing to accept sugar-products from countries that import Cuban sugar evinces our disapproval with the continuing violation of human<sup>79</sup> and worker rights in Cuba.<sup>80</sup>

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charged that LIBERTAD would punish Canadian companies that had no relations with Cuba, and would regulate business activity taking place within Canada. *Sanctions: Canadian Sugar Caucus Supports Fight Against U.S. Restrictions on Cuban Trade*, 12 Int'l Trade Rep. (BNA) 662 (Apr. 12, 1995) [hereinafter *Canadian Sugar Caucus*].

74. See *Sanctions: Administration has Concerns About Some Parts of Cuba Bill*, 12 Int'l Trade Rep. (BNA) 549 (Mar. 22, 1995) (describing a European commissioner's assertion that LIBERTAD would have "negative spill-over effects"); see also *Canadian Sugar Caucus*, *supra* note 73, at 662 (detailing Canada's objections to LIBERTAD's import ban on sugar products from countries purchasing Cuban sugar).

75. See Leo Ryan, *Canada Protests Efforts to Widen Embargo on Cuba*, J. COM., Apr. 13, 1995, at 1A (quoting Sandra Marsden, president of the Canadian Sugar Institute) (estimating that LIBERTAD threatens more than \$370 million in Canadian sugar and food-product exports); David Adams, *Pressure is on to Strengthen Cuba Sanctions*, ST. PETERSBURG TIMES, May 28, 1995, at 1A (noting that should Canada implement retaliatory measures, LIBERTAD risks jeopardizing \$400 million in American sugar exports to Canada).

76. See WORLD TRADING SYSTEM, *supra* note 70, at 741 (reviewing the exceptions a contracting party may invoke in order avoid its GATT obligations).

77. GATT, *supra* note 59, art. XX, ¶ a. A member cannot apply such exceptions, however, in an arbitrary or discriminatory manner, or as a veiled attempt to restrict international trade. *Id.*

78. *Id.* art. XX, ¶ e.

79. See e.g., Tarnoff, *supra* note 39 (detailing lack of human and political rights in Cuba).

80. See *Hearings on S. 381 Before the Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Otto J. Reich, President U.S.-Cuba Business Council), available in WESTLAW, 1995 WL 364642 [hereinafter Reich] (commenting on Cuba's violation of International Labor Organization conventions, concerning the use of forced labor, the right to organize, and employment discrimination).

In addition, Article XX of GATT permits contracting parties to adopt measures in order to accommodate other laws and regulations.<sup>81</sup> The measure, however, must be necessary to ensure compliance with the laws.<sup>82</sup> Furthermore, the laws with which the measure secures compliance<sup>83</sup> must not be inconsistent with other GATT provisions.<sup>84</sup> The

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81. GATT, *supra* note 59, art. 20(d). See generally, GATT INDEX, *supra* note 61, at 529 (quoting *United States—Section 337 of the Tariff Act of 1930: Report of the Panel*, GATT Doc. L/6439, ¶¶ 5.22-23 (Nov. 7, 1989), reprinted in 36 Supp. BISD 345 (1990)) (dealing with the European Economic Community's assertion that section 337 of the Tariff Act of 1930 was not "necessary to secure compliance with" United States patent law). The party, which contends that certain measures are permissible under Article XX(d), has to demonstrate that the measures are "necessary" to secure compliance with other laws consistent with GATT. *Id.* at 519 (quoting *Canada-Administration of the Foreign Investment Review Act: Report of the Panel*, GATT Doc. L/5504, ¶ 5.20 (Feb. 7, 1984), reprinted in 30 Supp. BISD 140 (1985)).

82. See GATT INDEX, *supra* note 61, at 533-34 (quoting *United States—Measures Affecting Alcoholic and Malt Beverages: Report of the Panel*, GATT Doc. DS23/R, ¶¶ 5.40-43 (June 19, 1992), reprinted in 39 Supp. BISD 206 (1993)) (examining United States regulation requiring beer importers to distribute their products through in-state wholesalers). The United States maintained that the regulation was "necessary to secure compliance" with state excise tax laws. The Panel concluded, however, that the regulation was not necessary for purposes of Article XX(d) because the United States had alternative measures that were not inconsistent with GATT and that it could have employed. *Id.*

83. Differences existed as to whether the term "secure compliance" meant that the measures available in question had to "prevent actions inconsistent with the obligations set out in laws or regulations, [or whether "secure compliance"] supports a more expansive interpretation according to which it would also cover a measure that prevents actions that are consistent with laws or regulations but undermine their objectives?" GATT INDEX, *supra* note 61, at 535 (quoting *EEC—Regulation on Imports of Parts and Components: Report of the Panel*, GATT Doc. L/6657, ¶ 5.12 (May 16, 1990), reprinted in 37 Supp. BISD 132 (1991)). In light of the text of Article XX(d), the Panel concluded that the Article applied only to measures that secured compliance with laws or regulations, and not their objectives. *Id.* Similarly, in light of the purpose of Article XX(d), the Panel concluded that securing the objectives of a law or regulation would be overly broad. *Id.* Moreover, where a contracting party could not attain the objectives of a law or regulation by enforcing the obligations of that law, such a broad interpretation would permit the imposition of measures that, although securing the objectives of the law, would be incompatible with GATT. *Id.*

84. See GATT INDEX, *supra* note 61, at 536 (quoting *Japan—Restrictions on Imports of Certain Agricultural Products: Report of the Panel*, GATT Doc. L/6253, ¶ 5.2.2.3 (Feb. 2, 1988), reprinted in 35 Supp. BISD 163 (1989)) (finding the "enforcement of laws and regulations providing for an import restriction made effective through an import monopoly inconsistent with Article XI:1 was not covered by Article XX(d)").

United States could justify LIBERTAD's importation ban on sugar, syrups, and molasses from countries that import such products from Cuba as a necessary means of securing compliance with the Foreign Assistance Act of 1961.<sup>85</sup> Whether the United States could use alternative means to prevent Cuban sugar products from entering its territory,<sup>86</sup> or whether LIBERTAD secures compliance with laws which are consistent under the provisions of GATT, remains uncertain.<sup>87</sup>

#### B. LIBERTAD'S CREATION OF A CAUSE OF ACTION AGAINST PERSONS TRAFFICKING IN CONFISCATED AMERICAN PROPERTY

Title III of LIBERTAD will protect American property rights in Cuba. Since the collapse of the Soviet Union, Fidel Castro has sought foreign investment in order to maintain his dictatorship.<sup>88</sup> Consequently, through joint ventures with the Cuban Government,<sup>89</sup> these foreign in-

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85. Foreign Assistance Act of 1961 § 620(a)(2), 22 U.S.C. § 2370(a)(2) (1988). This section prohibits any United States assistance to Cuba including a sugar import quota until the president determined that Cuba returned or compensated United States citizens and corporations for at least 40% of previously confiscated property. *Id.*

86. See Food Security Act of 1985, § 902(c)(1), 7 U.S.C. § 1446(g) (denying quota allocations to any net importer of sugar cane or sugar beets unless the exporting country verifies that it does not import Cuban sugar products for future exportation to the United States). LIBERTAD provides a more comprehensive ban on Cuban sugar products, and therefore would be a more effective means than the Food Security Act. See *supra* note 60 and accompanying text (delineating the scope of LIBERTAD's importation ban on Cuban sugar products).

87. Compare S. 381, *supra* note 5, § 109(a) (prohibiting the importation of sugar products from countries which import such products from Cuba) with GATT INDEX, *supra* note 61, at 292 (quoting *Panel Report: United States—Restrictions on Imports of Tuna*, (1991)) (reporting that the Marine Mammal Protection Act, pursuant to which the United States implemented an embargo on imports of tuna and tuna products from "intermediary nations," was inconsistent with GATT).

88. *Hearings on S. 381 Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Sen. Comm. on Foreign Affairs*, 104th Cong., 1st Sess. (1995) (statement of Rep. Ros-Lehtinen), available in WESTLAW, 1995 WL 364637. Recent investments, however, have done little to revive Cuba's economy, which is still suffering from the loss of over \$4 billion in annual subsidies from the former Soviet Union and communist-bloc nations. David Adams, *Pressure is on to Strengthen Cuba Sanctions*, ST. PETERSBURG TIMES, May 28, 1995, at A1. Over the last five years, Cuba's economy contracted approximately 60%. S. 381, *supra* note 5, § 2(1); H.R. 927, *supra* note 5, § 2(1). Even according to unofficial Cuban estimates, the island nation's economic output plummeted by over 50% since 1989. Tarnoff, *supra* note 39.

89. Sanchez, *supra* note 24. Joint ventures derive their authority from a regulation titled "Decree-Law 50." *Id.* Enacted on February 15, 1982, Decree-Law 50 is the



vestors traffic in properties that Cuba confiscated in the early 1960s.<sup>90</sup> By enabling United States citizens and nationals to maintain a federal cause of action against any person or entity which traffics in confiscated American property,<sup>91</sup> LIBERTAD will deter foreign investors from entering into joint ventures with the Cuban Government.<sup>92</sup> Foreign investors who contemplate doing business with the Cuban Government likely will not want to risk being sued for damages in United States federal courts.<sup>93</sup>

The broad scope of Title III is essential for protecting American property rights abroad. LIBERTAD's broad definition of trafficking<sup>94</sup> has the dual effect of protecting United States property rights in Cuba and around the world.<sup>95</sup> This expanded definition holds parent companies liable should their subsidiaries traffic in confiscated property.<sup>96</sup> Moreover, it evinces Congressional intent to allow federal courts to scrutinize a company's subsidiaries which the company may establish specifically in order to escape liability.<sup>97</sup>

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means by which Castro's regime regulates foreign investment in Cuba. *Id.*

90. *Id.*

91. S. 381, *supra* note 5, § 302; H.R. 927, *supra* note 5, § 302. Federal district courts will have exclusive jurisdiction over any claim brought under section 302. S. 381, *supra* note 5, § 302(B); H.R. 927, *supra* note 5, § 302(c).

92. Sanchez, *supra* note 24.

93. SULLIVAN, *supra* note 38, at 9.

94. S. 381, *supra* note 5, § 4(7); H.R. 927, *supra* note 5, § 4(7) (defining traffic as "selling, transferring, distributing, dispensing, or otherwise disposing of property, or purchasing, receiving, possessing, obtaining control of, managing, or using property"). The October 11, 1995 House version, however, provides an exception for "the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national." H.R. 927, *supra* note 5, § 10(B)(ii).

95. SULLIVAN, *supra* note 38, at 9-10.

96. Sanchez, *supra* note 24; see CENTER FOR INTERNATIONAL POLICY, HELMS-BURTON: HOW TO SHOOT OURSELVES IN THE FOOT 2 (1995) [hereinafter CENTER FOR INTERNATIONAL POLICY] (contending that such a broad definition will expose third country companies and parent companies to suits in the United States for confiscated properties).

97. Sanchez, *supra* note 24. Because of the joint venture mechanism, a company that might otherwise be liable for trafficking in confiscated properties could claim it is merely a minority shareholder in a Cuban corporation that is involved in the trafficking. *Id.* Similarly, a parent corporation that benefits from business transactions in Cuba could create several layers of subsidiaries between itself and the subsidiary that entered into the joint venture. *Id.*

LIBERTAD's determination of who constitutes a "United States national" would further discourage foreign investment in Cuba. Pursuant to section 303, Cuban nationals who have become United States citizens could maintain a cause of action under section 302.<sup>98</sup> Not only does this cause of action increase the value of unsettled claims available for adjudication,<sup>99</sup> it also diminishes the number of properties available to potential foreign investors.<sup>100</sup> Thus, by deterring foreign investors, LIBERTAD reduces the possibility that Castro will obtain the hard currency he needs to bolster his regime.<sup>101</sup>

Opponents of LIBERTAD criticize the bill's creation of a cause of action for persons who became United States citizens after Cuba confiscated their property. By increasing the value of United States property claims against Cuba, LIBERTAD may inadvertently forestall the resolution of these claims.<sup>102</sup> This delay could result from a surge in the number of lawsuits on behalf of persons whose claims were previously nonjudiciable.<sup>103</sup>

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98. S. 381, *supra* note 5, § 303(B); H.R. 927, *supra* note 5, § 303(B); *see* Sanchez, *supra* note 24 (stating section 302's private cause of action provision extends to Cuban nationals who have become United States citizens).

99. *See* Sanchez, *supra* note 24. In August 1993, the value of confiscated properties Cuba owed to the United States amounted to approximately \$6 billion. *Supporting Democracy in Cuba: Hearings Before the Senate Foreign Relations Comm.*, 104th Cong., 1st Sess. (1995) (statement of Jose F. Alonso and Armando M. Lago), *available in* WESTLAW, 1995 WL 360387 (estimating the value of properties owed to Cuban exiles as over \$20 billion).

100. Sanchez, *supra* note 24.

101. *Moneyline: Rep. Burton Calls for Tougher Sanctions Against Cuba* (CNN television broadcast, June 1, 1995, *available in* WESTLAW, ALLNEWS Database) [hereinafter *Moneyline*]. Rep. Burton maintains that Castro uses hard currency to pay for the guards that protect him. *Id.*

102. Sherman, *supra* note 48, at 6 (explaining that the Clinton Administration maintains the value of United States property claims could increase more than sixteen-fold, from \$6 billion to as much as \$100 billion).

103. Tarnoff, *supra* note 39. United States federal courts could also anticipate foreign nationals to seek United States citizenship in order to pursue their own property claims. *Id.*; *see* Sanchez, *supra* note 24 (forecasting an influx in lawsuits due to the extension of sec. 302's private cause of action extended to Cuban nationals who have become United States citizens); *cf.* Tom Carter, *Helms Bill to Tighten Vise on Cuba Could Allow Palestinians to Sue Israel*, WASH. TIMES, May 4, 1995, at A1 (noting that some observers remark that the bill, as currently written, would allow Palestinians, who had property confiscated in Israel and became United States citizens, to seek compensation in United States courts).

## C. ESPOUSING THE CLAIMS OF CUBAN NATIONALS

Critics also charge that the provision ignores the long-established United States practice, as well as international norms, regarding the espousal of claims against foreign governments.<sup>104</sup> In the United States, the traditional mechanism through which United States citizens and nationals pursue claims against foreign governments for the confiscation of their property is the Foreign Claims Settlement Commission<sup>105</sup> (FCSC).<sup>106</sup> Prior to section 302 of LIBERTAD, Congress never authorized the FCSC to hear claims on behalf of those persons who were not United States nationals at the time of the confiscation.<sup>107</sup> Such action goes against established United States practice regarding the espousal of claims against foreign governments.<sup>108</sup> LIBERTAD also ignores the ac-

104. Sherman, *supra* note 48, at 6.

105. 22 U.S.C. §§ 1622-27 (1994). The FCSC became effective pursuant to the President's Reorganization Plan No. 1 of 1954, which abolished the War Claims Commission and the International Claims Commission and assigned their duties to the FCSC. See FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES: DECISIONS AND ANNOTATIONS 1 (1968) [hereinafter FCSC: DECISIONS AND ANNOTATIONS] (citing 5 U.S.C. § 1332, 68 Stat. 1279 (1964)).

106. See generally FCSC: DECISIONS AND ANNOTATIONS, *supra* note 105 (providing a comprehensive collection of FCSC decisions relating to claims seeking compensation for the confiscation of property). Regulations concerning the receipt and settlement of claims provide that the claimant shall be the moving party, and has the burden of proof on all issues involving the adjudication of the claim. 45 C.F.R. § 531.6 (1994); FCSC: DECISIONS AND ANNOTATIONS, *supra* note 105 (outlining the FCSC's practices and procedures of the process by which claimants pursue their claims at the Foreign Claims Settlement Commission).

107. *Helms to Cuba: See You in Court*, NAT'L L. J., July 10, 1995, at A1. Only twice has Congress validated with the FCSC, claims of persons who were not United States nationals at the time of confiscation: once in 1958 to Italian-Americans, and again, in 1981, to Czech-Americans. *Id.* The FCSC validated their claims, however, only after persons who were United States nationals at the time of confiscation, received compensation for their loss. *Id.* But see Czechoslovakian Claims Settlement Act of 1981 § 6(a)(2)(B), 22 U.S.C. § 1642 (1988) (reaffirming the United States practice to remedy the claims of persons who were United States citizens at the time they sustained property losses, and maintaining that the Act did not establish any precedent for future claims).

108. FCSC: DECISIONS AND ANNOTATIONS, *supra* note 105, at 15 (quoting *In re Bogovitch*, Foreign Settlement Claims Comm'n, Dkt. No. Y-1757, Dec. 8. 1954). In *Bogovitch*, the FCSC denied the claim of Yugoslav citizens who inherited the estate of a United States national who had outstanding property claims against the Government of Yugoslavia. *Id.* The claimants contended that because the estate of Mr. Bogovich was unsettled, the estate still belonged to a national of the United States.

cepted doctrine of international law, that a nation can only espouse the claims of persons who were its nationals when the claim arose.<sup>109</sup>

The Constitution of the United States, however, mandates that United States citizens of Cuban origin be permitted to pursue their property claims under section 302. Forbidding United States citizens of Cuban ancestry from pursuing their property claims against foreign traffickers, while permitting other citizens to do so, would violate the equal protection guarantees of the United States Constitution.<sup>110</sup> Although legislative classifications benefit from a presumption of validity,<sup>111</sup> the Supreme Court subjects those that involve race, religion, or alienage to a higher level of scrutiny.<sup>112</sup> The purpose of section 302 is to protect

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*Id.* at 13-14. In a Proposed Decision, the FCSC held that "[a]s a rule, the Government of the United States refuses to espouse claims which have not continued to be impressed with American nationality from the date the claim arose to the date of its settlement." *Id.* at 15 (citing V. HACKWORTH, DIGEST OF INTERNATIONAL LAW 804 (1943)). For other cases addressing the nationality requirement, see *id.* at 381 (quoting *In re Foster*, Foreign Claims Settlement Comm'n., Claim No. CZ-2696, Nov. 13, 1959 (denying the claim where the claimant was not a United States national on the date of confiscation); *id.* at 459 (quoting *In re Krukowski*, Federal Settlement Claims Comm'n., Claim No. PO-9532 (Dec. No. PO-927), Sept. 2, 1964) (denying the claim of a Polish national who had taken an oath of allegiance to the United States).

These decisions highlight the rule of continuity of nationality in determining the validity of claims filed with the FCSC. Essentially, United States nationals must be in continuous possession of the property in question from the date of the loss, to the filing of the claim, for the claim to be valid. *Id.* at 468 (citing *Claim of Jadwiga Pascal*, 23 FCSC Semiann. Rep. 67 (1965) (Claim No. PO-7056, Dec. No. PO-9118)). When a national of a foreign country comes into possession of the property, for however long, the claim loses its validity. *Id.* at 267 (quoting *In re Papacostas*, Federal Settlement Claims Comm'n., Claim No. IT 10251, July 17, 1957) (denying the claim of a Greek national who inherited the property of a United States national).

109. FCSC: DECISIONS AND ANNOTATIONS, *supra* note 105, at 18. "This rule is a formulation of the principle that an injury to a national is an injury to his state which warrants the advocacy of the state in an effort to obtain redress for the wronged party." *Id.*

110. Sanchez, *supra* note 24. The equal protection component of the Fifth Amendment's Due Process Clause places the same limits on federal power as the Fourteenth Amendment's Equal Protection Clause places on state power. *Id.*

111. *Id.* Legislation that does not involve suspect classifications, must only be rationally related to a legitimate governmental interest. *New Orleans v. Dukes*, 427 United States 297 (1976).

112. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding unconstitutional under the Equal Protection Clause a Virginia statute that forbade marriages between persons on the basis of racial classifications). To withstand the Supreme Court's higher level of scrutiny, referred to as "strict scrutiny," race-conscious classifications must serve a

American property rights abroad by permitting United States citizens to sue persons who traffic in such property.<sup>113</sup> Excluding Cuban nationals who became United States citizens since the Cuban Government confiscated their property serves no legitimate interest.<sup>114</sup> Rather, it undermines the effectiveness of LIBERTAD by allowing foreign investors to traffic in a greater number of confiscated properties, without fear of accountability in a United States court. Additionally, it provides the Castro dictatorship with the hard currency it needs to survive.<sup>115</sup>

#### D. EXTRATERRITORIAL APPLICATION OF LIBERTAD

LIBERTAD's extraterritorial effect and its permissibility under international law warrant consideration. It is an accepted precept of international law that a state maintains jurisdiction to enact laws concerning conduct outside its territory which has a substantial effect within its territory.<sup>116</sup> Limitations exist, however, where the extra-territorial exercise of jurisdiction would be "unreasonable."<sup>117</sup> Where the exercise of jurisdic-

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compelling governmental interest and be narrowly tailored to meet that interest. *Richmond v. Croson*, 488 U.S. 469 (1989).

113. S. 381, *supra* note 5, § 3(4); H.R. 927, *supra* note 5, § 3(4). In addition, allowing such causes of action dissuades foreign corporations from investing in Cuba, thereby accelerating the demise of Castro's regime. *Sanchez*, *supra* note 24, at 10.

114. *Id.*

115. *RENNACK*, *supra* note 9, at 9.

116. *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 402 (1986) [hereinafter *RESTATEMENT*]; *see Grunenthal v. Hotz*, 712 F.2d 421 (9th Cir. 1983) (applying United States securities laws to transnational securities transactions). The Court found that defendant's misrepresentation concerning the ownership of a certain corporation, which took place in the United States, was "significant, material and in furtherance of the fraudulent scheme." *Grunenthal*, 712 F.2d at 425. The Court held as immaterial the fact that similar misrepresentations had previously occurred in three other countries, *id.*, and that the defendant's conduct in the United States was "based on convenience." *Id.* at 426.

117. *RESTATEMENT*, *supra* note 116, § 403. In determining whether a state's exercise of jurisdiction is unreasonable, the following factors are relevant:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and

tion by two states would be reasonable, but their prescriptions would conflict, international law requires each state to examine its interest in light of the other's.<sup>118</sup>

The reasonableness of LIBERTAD's exercise of jurisdiction over foreign persons and corporations trafficking in American confiscated property is questionable. The act of trafficking in confiscated American property takes place entirely outside the territory of the United States. In addition to being inconsistent with the "traditions of the international system," the international community has not accepted the notion that United States citizens should be permitted to sue such traffickers.<sup>119</sup> Finally, LIBERTAD disregards the Cuban Government's interest in regulating the activity in question, and conflicts with Cuba's interest in providing its own definition of property.<sup>120</sup> Thus, it would seem unrea-

- the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity;
- (h) the likelihood of conflict with regulation by another state.

*Id.* §§ 403(2)(a)-(h).

118. *Id.* § 403(3). If one state's interest in exercising jurisdiction is clearly greater than another's, the state with the lesser interest should defer to the other state. *Id.* United States courts generally adhere to the principle that absent a contrary intent, congressional legislation is only meant to apply to the territory of the United States. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Where this principle is inapplicable, courts should avoid interpreting acts of Congress as violating international law "if any other possible construction remains." *Hartford Fire Insurance Co. v. California*, 113 S.Ct. 2891, 2919 (1993) (Scalia, J., dissenting) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

119. See SULLIVAN, *supra* note 38, at 10 (quoting a Letter from the Delegation of the European Commission to the Speaker of the House (Mar. 22, 1995)) ("As a matter of principle, this assertion of extraterritorial jurisdiction is objectionable. At an operation level this measure would risk complicating not only third country economic relations with Cuba but also any transitional process in Cuba itself"); see also Sherman, *supra* note 48, at 5 (insisting that LIBERTAD's extraterritorial application would be difficult because it transcends accepted international procedures, and would be difficult to defend under international law).

120. Domínguez, *supra* note 59, at 4. Pursuant to the Cuban Constitution, all property belongs to the state. Sanchez, *supra* note 24 (citing ALBERT P. BLAUSTEIN &

sonable for the United States to exercise jurisdiction over foreign investors trafficking in confiscated American property.

Nevertheless, an argument can be made in favor of LIBERTAD's extraterritoriality. First, the bill attempts to prevent conduct that has a foreseeable effect on the property interests of Americans.<sup>121</sup> In addition, the United States not only has an interest in protecting the property rights of its nationals,<sup>122</sup> but of its corporations that owned property in Cuba.<sup>123</sup> Finally, LIBERTAD may be consistent with the "traditions of the international system" in that international law recognizes the ownership of property as a fundamental human right.<sup>124</sup> LIBERTAD's extraterritorial application, therefore, could be reasonable under international law.<sup>125</sup>

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GISBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CUBA 9 (Pamela S. Falk ed. & trans., 1993)). But see Sanchez, *supra* note 24 (professing that Castro's regime disregarded the Cuban Constitution's provisions regarding constitutional amendments, by which it ultimately confiscated private property).

121. Sanchez, *supra* note 24.

122. *Id.*

123. See *Hearings Before Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Alberto Diaz-Masvidal), available in WESTLAW, 1995 WL 357721 (outlining the property interests of oil and gas corporations in Cuba). The Cuban Government's enactment of Law 635 on November 2, 1959, effectively canceled all applications for exploration and exploitation concessions. *Id.*

124. See *Hearings Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Bruce Fein, former Assoc. Deputy Attorney Gen.), available in WESTLAW, 1995 WL 360389 [hereinafter Fein] (quoting American Convention on Human Rights of 1969, art. 21(2), 1969) ("No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law"); Sanchez, *supra* note 24 (maintaining that the protection of individual property rights is consistent with Article 17 of the United Nations Universal Declaration of Human Rights).

125. Sanchez, *supra* note 24. Even if LIBERTAD's exercise of jurisdiction would be unreasonable under international law, it is unlikely to dissuade United States lawmakers from enacting the bill into legislation. See *Trade Policy: Administration Believes Concerns on Cuba Bill Can be Resolved, Panel Told*, 12 Int'l Trade Rep. (BNA), 900 (May 24, 1995) (quoting Sen. Jesse Helms) (noting that many of the same arguments against LIBERTAD were heard during the debate on the Cuban Democracy Act of 1992); see also Fein, *supra* note 124 (arguing that it is immoral for international law to protect Cuba's actions that the international community recognizes as illegal).

## E. THE ACT OF STATE DOCTRINE

The act of state doctrine historically precluded United States federal district courts from questioning the validity of the acts of foreign nations.<sup>126</sup> Essentially, the doctrine instructed courts to recognize the acts of a foreign government committed within its own territory.<sup>127</sup> Neither international law,<sup>128</sup> nor the United States Constitution,<sup>129</sup> however, require the exercise of the doctrine. Rather, the act of state doctrine acts as a judicial restraint in the arena of foreign affairs.<sup>130</sup> Judicial announcements concerning the validity of a foreign government's confiscation of property could embarrass the other branches in carrying out the nation's foreign policy.<sup>131</sup>

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126. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 398 (1964).

127. *Id.* at 416 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)) (stating the traditional interpretation of the act of state doctrine). Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. *Id.* at 418 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918)) (construing the act of state doctrine to prevent our courts from questioning the details or merits of a foreign government's act).

128. *See Sabbatino*, 376 U.S. at 422 (recognizing that no international arbitral or judicial decision has ever obligated one nation to recognize the acts of a foreign government). Even though international law does not prescribe use of the act of state doctrine, it does not forbid application of the doctrine where the act in question violated international law. *Id.*

If the judiciary ruled on the lawfulness of a foreign government's decision to expropriate, it would serve to undermine the efforts by other branches to secure an adequate and just compensation for the affected citizens. *Id.* at 431. A foreign government might construe such a determination as an insulting gesture, thereby interfering and possibly damaging any settlement negotiations. *Id.* Similarly, a finding of an act's adherence to international law could strengthen the bargaining power of the nation from which the United States is attempting to extract compensation for expropriated properties. *Id.* at 432.

129. *Id.* at 423. Despite the lack of a textually demonstrable requirement, the act of state doctrine's foundations are rooted in a system of separation of powers. *Id.* It represents a concern about the ability of three distinct branches of government to enact and implement a coherent foreign policy. *Id.*

130. *See Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 974 (S.D.N.Y. 1965) (understanding the act of state doctrine as the Judiciary's respect for the Constitution's entrustment of foreign affairs and the nation's foreign policy interests to the legislative and executive branches of government), *aff'd*, 383 F.2d 166, 179-83 (2d Cir. 1967).

131. *Id.* at 975.



Although the act of state doctrine seems to preclude federal district courts from hearing the property claims of United States citizens brought under Title III, Congress can enjoin courts from using the doctrine as a discretionary measure.<sup>132</sup> With the enactment of the Hickenlooper Amendment,<sup>133</sup> Congress obviated the need for federal courts to withhold judgment on the merits of claims involving expropriations by foreign governments.<sup>134</sup> Similarly, LIBERTAD prohibits federal courts from applying the Act of State Doctrine in order to avoid making a determination of the merits of an action brought pursuant to Title III.<sup>135</sup> Thus, barring a presidential order instructing federal courts to apply the act of state doctrine, United States nationals will be free to pursue their property claims against the Cuban Government.

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132. See *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182 (2d Cir. 1967) (acknowledging Congress decision to enjoin courts from applying the act of state doctrine as a permissible exercise of its power pursuant to the Commerce and the Necessary and Proper Clauses of the United States Constitution).

133. 22 U.S.C. § 2370(e)(2). The Hickenlooper Amendment specifically provides: Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal Act of State Doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon . . . a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection.

*Id.* § 2370(e)(2).

The Hickenlooper Amendment is not applicable, however, where a foreign nation's act complies with international law, or where the President indicates that, for foreign policy reasons, a court should apply the act of state doctrine. *Id.*

134. See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965) (applying the Hickenlooper Amendment to dismiss an action by instrumentality of Cuban Government to recover proceeds from sale of cargo of sugar that the Cuban Government expropriated in Cuban territory). The district court withheld final judgment for 60 days pending the executive branch's determination as to whether the act of state doctrine should apply. *Id.* at 981. Upon receipt of a letter indicating that the President did not require the application of the doctrine, the court dismissed the case. *Banco Nacional de Cuba v. Farr*, 272 F. Supp. 836, 838 (S.D.N.Y. 1965). The court relied on an earlier decision by the court of appeals, which found Cuba's decree of expropriation to be a violation of international law because it did not provide adequate compensation, and was retaliatory and discriminatory in nature. *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1964)).

135. S. 381, *supra* note 5, § 302(c); H.R. 927, *supra* note 5, § 302(a)(6). See generally Sanchez, *supra* note 24 (finding that the act of state doctrine is inapplicable to LIBERTAD).

Section 301 of LIBERTAD also aims to limit foreign investment in Cuba. By excluding aliens from the United States who confiscated American-owned property or may have benefited from such a confiscation, the measure seeks to dissuade foreign investors from sustaining Castro's regime.<sup>136</sup> In its quest to further isolate Castro, however, section 301 may inadvertently violate the North American Free Trade Agreement (NAFTA).<sup>137</sup> Pursuant to Chapter Sixteen of NAFTA, the United States Government agreed to make it easier for business persons who are citizens of Mexico or Canada to enter the territory of the United States.<sup>138</sup> Although Chapter Sixteen establishes criteria by which a NAFTA member can refuse entry to an otherwise qualified business person,<sup>139</sup> trafficking or benefiting from confiscated American property is not one of them.<sup>140</sup> Furthermore, restricting the temporary entry of business persons from countries that are signatories to NAFTA is inconsistent with, and undermines the general objectives of, the Agree-

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136. S. 381, *supra* note 5, § 301(a); H.R. 927, *supra* note 5, § 401(a). The provision is aimed at the officers and shareholders of foreign corporations that have purchased illegally confiscated property in Cuba. *S.381—The Cuban Liberty and Democratic Solidarity Act: Helping to Create a Free and Prosperous Cuba*, Heritage Foundation Issue Bull. No. 208, Apr. 13, 1995, at 6 [hereinafter Heritage Foundation].

137. *Hearings Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Sen. Comm. of Foreign Affairs*, 104th Cong., 1st Sess. (1995) (statement of Nicolas J. Gutierrez, Jr., Esq., Secretary/Director of Nat'l Assoc. of Sugar Mill Owners of Cuba, Inc.) (on file with the *American University Journal of International Law and Policy*).

138. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

139. *Id.* art. 1603. Article 1603 specifically provides, "each Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to health and public safety and national security, in accordance with this Chapter . . ." *Id.* As provided in Article 1603 and Annex 1603, the United States would grant temporary entry to four classes of business persons: business visitors, traders and investors, intra-company transferees, and certain professionals. NAFTA Administrative Action Statement, ch. 16(A)(2).

140. *See* NAFTA, *supra* note 138, art. 1603(2) (permitting a NAFTA party to withhold the issuance of immigration documents granting temporary entry where it would interfere with the settlement of a labor dispute or the employment of a person involved in such a dispute).

ment.<sup>141</sup> NAFTA members recognized this and expressed their concern over the provision.<sup>142</sup>

#### F. MERITS OF MAINTAINING THE ECONOMIC EMBARGO AGAINST CUBA

Whether Congress should enact LIBERTAD revolves around the much broader issue of whether the United States should maintain its economic embargo on Cuba. Although both sides of the debate share a common goal,<sup>143</sup> they disagree on how best to achieve it.<sup>144</sup> Opponents of LIBERTAD contend that it continues a policy that has not worked for more than thirty-five years.<sup>145</sup> Rather than bringing Castro's dictatorship to an end, they argue, the American trade embargo gives Castro an excuse for his government's poor economic performance.<sup>146</sup> In addition, opponents of the bill, citing the recent surge of foreign investment in Cuba,<sup>147</sup> argue that American companies and investors are being left

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141. NAFTA, *supra* note 138, art. 102 (outlining the objectives of the Agreement). Restricting the entry of business persons would not promote NAFTA's goal to, *inter alia*, eliminate trade barriers and increase investment opportunities in member countries. *Id.* arts. 102(1)(a), (c).

142. See Charles Trueheart, *U.S. Alarms Canada with Cuba Shift; Ottawa Protests Bill*, WASH. POST, Apr. 1, 1995, at A17 (specifying a diplomatic note from the Canadian government to the United States expressing Canada's disapproval of LIBERTAD and its contravention of NAFTA).

143. Compare Jorge I. Domínguez, *The Americas: Helms Bill on Cuba Won't Hasten Democratic Transition*, WALL ST. J., Apr. 28, 1995, at A13 (professing that the United States seeks a democratic and prosperous Cuba) with Heritage Foundation, *supra* note 136, at 1 (supporting the peaceful transformation of Cuba into a free and prosperous nation).

144. Compare S. 381, *supra* note 5 (strengthening the economic embargo against Cuba) with H.R. 883, 104th Cong., 1st Sess. (1995) (lifting the trade embargo on Cuba).

145. Bob Hohler, *Moakley asks Clinton to End Cuba Embargo*, BOSTON GLOBE, Apr. 13, 1995, at 2. Even former President Richard Nixon advocated changing the United States policy toward Cuba. See *Notable & Quotable*, WALL ST. J., May 26, 1995, at A10 (quoting RICHARD NIXON, BEYOND PEACE 136-38 (1994)) (encouraging economic interaction between the United States and Cuba).

146. *Hearings Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Rep. Esteban E. Torres), available in WESTLAW, 1995 WL 313810. Jorge Domínguez dubbed LIBERTAD a "dictator-enabling act." Jessica Mathews, *OPIED: A Bill That Will Help Castro*, WASH. POST, Apr. 2, 1995, at C7.

147. In the last three years, foreign businessmen invested over \$1.5 billion in Cuba. Klugmann, *supra* note 42, at A15. In addition, the Cuban Government has signed investment-guarantee treaties with Canada, Mexico, Britain, Italy, Spain, and

behind and will be at a competitive disadvantage when Cuba eventually shifts to a market-oriented economy.<sup>148</sup>

Nevertheless, the evidence weighs in favor of maintaining the economic embargo on Cuba. Although the United States embargo did not remove Castro from power, labeling it a failure is inaccurate. Until 1989, the Soviet Union provided enormous amounts of economic assistance to Cuba,<sup>149</sup> effectively mollifying the effects of the embargo.<sup>150</sup> Only recently, with the breakup of the Soviet Union and enactment of the Cuban Democracy Act of 1992,<sup>151</sup> has the United States embargo begun to take effect.<sup>152</sup>

With regard to lost business opportunities, Cuba remains ideologically opposed to a market economy.<sup>153</sup> Castro has only instituted economic reforms out of necessity,<sup>154</sup> and many reform proposals remain

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Russia. Michael Becker, *Cuba Has Investment Interest: Nation Thinks U.S. Firms May Help End Embargo*, SUN-SENTINEL (Fl. Lauderdale), Apr. 9, 1995, at 1F. Cuba plans to enter into similar agreements with France and the Caribbean Community. *Id.*

148. See Klugmann, *supra* note 42, at A15 (quoting Canadian economist, Archibald Ritter) ("There is tremendous opportunity in Cuba and when the United States finally drops its embargo they will be playing economic catch-up for a decade.") Sensing this, approximately 30 American firms have signed nonbinding letters of intent with the Cuban Government concerning business opportunities once the embargo is lifted. Becker, *supra* note 147, at 1F (quoting Isamel Sene, Cuban ambassador).

149. See Tarnoff, *supra* note 39 (estimating Soviet subsidies to have been between \$4 and \$6 billion annually).

150. See Reich, *supra* note 80 (contending that Soviet subsidies and aid help keep Castro's regime afloat).

151. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992) (to be codified at 22 U.S.C. §§ 6001-6010). The Cuban Democracy Act (CDA) strengthened the economic embargo on Cuba by, *inter alia*, prohibiting foreign subsidiaries of United States corporations from conducting business in Cuba. *Id.* § 1706(a).

152. Reich, *supra* note 80. Cuba, which imported \$8.2 billion worth of goods in 1989, only imported \$1.9 billion in 1994. *Id.* Furthermore, the CDA reduced foreign subsidiary trade in Cuba from over \$700 million in 1992, to almost zero today. Tarnoff, *supra* note 39.

153. See *Castro Interview*, *supra* note 1, at 59 (noting Castro's intention to preserve the state's primary role in Cuba's economic development).

154. *Strengthening Sanctions Against Cuba: Hearings Before Subcomm. on Western Hemisphere and Peace Corps Affairs of Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Rep. Menendez), available in WESTLAW, 1995 WL 655280.

unimplemented.<sup>155</sup> In addition, contrary to some figures,<sup>156</sup> actual foreign investment in Cuba remains negligible.<sup>157</sup>

Finally, the United States has a moral obligation to maintain the embargo against Cuba.<sup>158</sup> Fidel Castro continues to violate the Cuban people's most fundamental human rights.<sup>159</sup> The embargo symbolizes both the United States solidarity with the Cuban people,<sup>160</sup> and America's commitment to democracy.<sup>161</sup>

### III. RECOMMENDATIONS

Congress should amend the LIBERTAD provision that levies sanctions on countries importing sugar from Cuba.<sup>162</sup> The measure punishes countries regardless of whether they export Cuban sugar to the United States.<sup>163</sup> The bill would just as effectively isolate Cuba, while averting a possible trade war with our trading partners,<sup>164</sup> by imposing sanctions only on countries that export products containing Cuban sugar to the United States.<sup>165</sup>

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155. See *Cuba Report: Reform Pace Slows as Washington Stirs New Policy Stew*, LAGNIAPPE LETTER, May 12, 1995, at 1, available in WESTLAW, ALLNEWS Database (commenting on Cuba's decision not to implement laws that would have expanded private self-employment, and a foreign investment project concerning real-estate).

156. Klugmann, *supra* note 42, at A15.

157. Reich, *supra* note 80. According to Reich, actual cash investment in Cuba, as distinguished from future investment deals, only totaled \$50 in 1992. Furthermore, many foreign corporations which intended to invest in Cuba have since changed their mind. See generally Reich, *supra* note 80 (detailing numerous foreign investment deals that never materialized).

158. See Reich, *supra* note 80 (insisting that the most compelling reason for maintaining the economic embargo against Cuba is moral, not economic).

159. Tarnoff, *supra* note 39.

160. *Supporting Democracy in Cuba: Hearings Before Subcomm. on Western Hemisphere and Peace Corps Affairs of Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Francisco J. Hernandez, President Cuban American National Foundation), available in WESTLAW, 1995 WL 364641.

161. *Id.*

162. S. 381, *supra* note 5, § 109.

163. See *supra* notes 116-35 and accompanying text. For policy reasons, Canada does not sell refined Cuban sugar to the United States. Ryan, *supra* note 75, at 2A. Nor does it sell imported Cuban sugar to the United States in the form of sugar-products. 12 Int'l Trade Rep. (BNA), *supra* note 73, at 662.

164. See *supra* notes 73-74 and accompanying text (pointing out LIBERTAD threatens to jeopardize a substantial amount of trade if its sugar provisions remain intact).

165. Section 109(B) of S. 381 could read as follows: "The sanction set forth in

Lawmakers could also improve Title II by modifying the definitions of "transition" and "democratically" elected government. As they now stand, both definitions contain strict criteria for measuring political and economic change in Cuba.<sup>166</sup> These criteria could curtail the ability of the United States to respond and adjust its policies in order to accommodate changes that may occur in Cuba.<sup>167</sup>

With regard to Title III, lawmakers might consider narrowing the provision's grounds for exclusion. In its present form, Title III prohibits the spouse or dependent of a person who confiscated American property abroad from entering the United States.<sup>168</sup> This potentially punishes people who have no relationship to any decision concerning business or investment in Cuba.<sup>169</sup> On the other hand, denying entry to the spouses and dependents may force foreign investors to reevaluate their decision to do business in Cuba.<sup>170</sup>

Finally, Congress should consider modifying Title III's amendment to the International Claims Settlement Act of 1949.<sup>171</sup> Because it enables

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subsection (A) shall cease to apply to a country if the country certifies to the President that the country will not enter, or withdraw from warehouse for consumption, into the customs territory of the United States products which contain sugar, syrups, or molasses that is the product of Cuba."

The House International Relations Committee approved an amended version of LIBERTAD which required an exporting country to certify the origin of its product. *Sanctions: International Relations Committee Approves Hotly Debated Cuba Measure*, 12 Int'l Trade Rep. (BNA) 1189 (July 12, 1995). The amended version also provided for the confiscation of falsely-certified products. *Id.* The House eliminated this provision, however, in its enacted version. *Id.*

166. S. 381, *supra* note 5, §§ 205, 206; H.R. 927, *supra* note 5, §§ 205, 206; see note 51 and accompanying text (outlining the criteria which Cuba must satisfy before it constitutes a democratically-elected government).

167. See Sherman, *supra* note 48, at 5 (insisting that LIBERTAD must afford the President greater flexibility to determine when a transition or democratic government is in place in Cuba and what level of assistance is appropriate).

168. S. 381, *supra* note 5, § 301(a)(D)(IV); H.R. 927, *supra* note 5, § 301(a)(D)(IV).

169. Sherman, *supra* note 48, at 5. For example, the provision would "deny a visa to the child of a small shareholder in a company that buys fruit grown on land owned in 1959 by a Cuban who has since become an American citizen." Jessica Mathews, *supra* note 146, at C7. The House's version would fix this problem, however, by exempting from the definition of "traffics," persons who trade or hold publicly traded or held securities. H.R. 927, *supra* note 5, § 401(b)(3)(B)(ii).

170. See Moneyline, *supra* note 101 (quoting Rep. Dan Burton) (stating that LIBERTAD will make foreign investors choose whether they want to do business with Castro, or with the United States).

171. 22 U.S.C. §§ 1621-1627.

persons who were not United States nationals on the date of their property loss to certify their claims with the FCSC,<sup>172</sup> the provision is inconsistent with both United States practice<sup>173</sup> and international law.<sup>174</sup> As an alternative measure, Congress could amend the Cuban Claims Act to set aside money to compensate persons who were not United States citizens at the time of expropriation.<sup>175</sup>

### CONCLUSION

Congressional enactment of LIBERTAD will be an important step in accelerating the fall of Fidel Castro's regime. It will deprive Castro of the hard currency he needs to run his government, and will hold foreign investors accountable for trafficking in American property which the Cuban Government illegally confiscated over thirty-years ago. Finally,

172. S. 381, *supra* note 5, § 303(B).

173. See *supra* notes 106-08 and accompanying text (discussing the nationality requirement for the determination of claims brought before the FCSC).

174. *Id.*

175. See Matias F. Travieso-Diaz, *Article: Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 223 n.22 (1995) (proposing that the Czechoslovakian Claims Settlement Act of 1981 could serve as a model for the compensation of Cuban nationals who became United States citizens after the expropriation of their property). Congress could amend section 303(B) of LIBERTAD to read as follows:

Title V of the International Claims Settlement Act of 1949 is amended by adding at the end the following new section: Sec. 514. Notwithstanding any other provision of this title, upon congressional approval of a settlement Agreement between the Government of the United States of America and the Government of the Republic of Cuba concerning the payment of claims certified under section 507 of this subchapter, the Secretary shall establish a Fund into which the amount covered into the Fund pursuant to the Agreement, shall include an account into which the remainder of amounts in the Fund shall be covered, to be available for payment on account of awards determined pursuant to section 503(c) of this subchapter.

Accordingly, Congress could amend section 503 of the International Claims Settlement Act of 1949 by including the following subsection:

Sec. 503(c): The Commission shall reopen and redetermine the validity and amount of any claim against the Government of Cuba, which resulted from actions taken by the Government of Cuba described in section 503(a), and which the Commission denied because such property was not owned by a person who was a national of the United States on the date of such nationalization or taking.

by providing United States assistance in a post-Castro Cuba, the bill will ensure Cuba's long-term prosperity as a democratic nation.