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# Trade Policy and Election-Year Politics: The Truth About Title III of the Helms- Burton Act

*Leslie R. Goldberg\**

## INTRODUCTION

Fidel Castro holds “an ‘Olympic record’ in surviving assassination plots.”<sup>1</sup> Not only has the Cuban dictator survived numerous attempts on his life, he has also weathered the U.S. embargo and the collapse of the Communist bloc. Although Castro now faces yet another challenge to his regime, his “Olympic record” in surviving assassination plots will likely remain firmly intact.

The newest challenge to Castro’s regime is the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, generally referred to as the Helms-Burton Act, which was enacted into law on March 12, 1996.<sup>2</sup> Title III of the Act, which came into effect on August 1, 1996,<sup>3</sup> creates a private right of action allowing U.S. nationals whose property was confiscated by the Cuban government on or after January 1, 1959 to file suit in U.S. federal court against any U.S. or foreign entity that “traffics”<sup>4</sup> in such

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\* Juris Doctor Candidate, Northwestern University School of Law, 1998. The author wishes to thank Monica Vaca for her insightful comments.

<sup>1</sup> Kevin Fedarko, *Open for Business*, TIME, Feb. 20, 1995, at 50.

<sup>2</sup> The Cuban Liberty and Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified as 22 U.S.C. § 6021-91 (1996)) [hereinafter Helms-Burton Act].

<sup>3</sup> Section 306(b)(1) of the Helms-Burton Act provides that the President may suspend the August 1, 1996 effective date of Title III if “the President determines . . . that the suspension is necessary to the national interest of the United States and will expedite a transition to democracy in Cuba.” Helms-Burton Act, *supra* note 2, § 306(b)(1). However, on July 16, 1996, President Clinton decided not to postpone Title III’s effective date of August 1, 1996. *Sanctions: Clinton Delays Lawsuits Under Title III of Helms-Burton*, 13 Int’l Trade Rep. (BNA) 1158 (July 17, 1996) [hereinafter *Clinton Delays Lawsuits*].

<sup>4</sup> A person “traffics” in confiscated property if that person:

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of

property.<sup>5</sup> The drafters of the Helms-Burton Act claim that Title III will protect the property rights of U.S. citizens whose property was wrongfully confiscated by the Cuban government.<sup>6</sup> The drafters also contend that Title III will discourage foreign business investment in Cuba and thereby expedite the collapse of Castro's regime.<sup>7</sup>

Unfortunately, the passage and enforcement of Title III's private right of action has enraged the United States' trading partners and closest allies, which regard it as an improper effort to extend U.S. sanctions against Cuba to other countries in a flagrantly extraterritorial manner.<sup>8</sup> Inspired by a feeling that the United States is trying to bully them into submission, the European, Mexican, and Canadian governments have responded by adopting retaliatory counter-measures to the Act, and the European Union has challenged the law before the World Trade Organization ("WTO").<sup>9</sup>

In an attempt to diffuse tensions with key U.S. trading partners, President Clinton suspended the right to bring lawsuits under Title III for six months on July 16, 1996.<sup>10</sup> On January 3, 1997, July 16, 1997, and January 16, 1998, President Clinton ordered further six-month suspensions of Title III's private right of action and indicated in all instances that he would con-

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confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses or otherwise acquires or holds an interest in confiscated property; (ii) engages in a commercial activity using or otherwise benefiting from confiscated property; or (iii) causes, directs, participates in or profits from trafficking . . . by another person or otherwise engages in trafficking . . . through another person.

Helms-Burton Act, *supra* note 2, § 4(13)(A).

The term "traffics" does not include:

(i) the delivery of international telecommunications signals to Cuba; (ii) the trading or holding of securities publicly traded or held, unless the trading is with or by . . . a specially designated national; (iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or (iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

*Id.* § 4(13)(B).

<sup>5</sup>Helms-Burton Act, *supra* note 2, § 302(a)(1)(A). Traffickers will incur liability under Title III after a three-month grace period beginning on the provision's effective date. *Id.* Thus, the practical effect of allowing Title III to come into effect on August 1, 1996, is that liability will accrue for any act of trafficking that takes place on or after November 1, 1996. *Clinton Delays Lawsuits, supra* note 3.

<sup>6</sup>Helms-Burton Act, *supra* note 2, § 3; *Clinton Delays Lawsuits, supra* note 3.

<sup>7</sup>Helms-Burton Act, *supra* note 2, § 3; *Clinton Delays Lawsuits, supra* note 3.

<sup>8</sup>*See infra* notes 121-33 and accompanying text.

<sup>9</sup>*Id.*

<sup>10</sup>*Clinton Delays Lawsuits, supra* note 3. Sections 306(c)(1)(B)-(C) of the Helms-Burton Act authorize the President to suspend the right to file lawsuits under Title III for renewable periods of up to six months once Title III has taken effect if the President determines "that such suspension is necessary to the national interest of the United States and will expedite the transition to democracy in Cuba." Helms-Burton Act, *supra* note 2, § 306(c)(1)(B)-(C).

tinue to suspend the provision every six months so long as the United States' allies continue efforts to promote democratic changes in Cuba.<sup>11</sup>

The purpose of this comment is to demonstrate that Title III's private right of action should not only be postponed but permanently repealed. This comment will illustrate that President Clinton's move to indefinitely suspend Title III's private right of action does not resolve the underlying problems of the law, namely: (1) that Title III does not provide an effective means to accomplish either of its objectives; (2) that Title III's passage and enforcement has resulted in a tit-for-tat legal retaliation against the United States from its strongest trading partners; and (3) that Title III's attempt to impose U.S. foreign policy on other nations violates international law, the General Agreement on Tariffs and Trade ("GATT"), and the North American Free Trade Agreement ("NAFTA").

Part I of this comment chronicles the historical events leading to the promulgation of the Helms-Burton Act. Part II provides an overview of Title III of the Helms-Burton Act. Part III then analyzes Title III and describes why Title III will not protect the property rights of U.S. citizens or deter enough foreign business investment in Cuba to expedite the collapse of Castro's regime. Next, Part IV details the tit-for-tat legal retaliation that has stemmed from Title III's enactment, and Part V discusses the legality of Title III's private right of action. Finally, Part VI recommends that Title III's private right of action should be permanently repealed and proposes an alternative mechanism that would accomplish Title III's objectives.

## I. HISTORICAL EVENTS LEADING TO THE PROMULGATION OF THE HELMS-BURTON ACT

This section chronicles the historical events leading to the promulgation of the Helms-Burton Act. These events include: (1) the Cuban government's confiscation of foreign and domestic property in Cuba during the early 1960s; (2) the U.S. government's certification of claims against the Cuban government; (3) the enactment of the U.S. embargo against Cuba and its resulting impact on Cuba's economy; and (4) the Cuban government's shooting down of two unarmed civilian aircrafts, belonging to "Brothers to the Rescue," a Miami-based anti-Castro group, on February 24, 1996.

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<sup>11</sup> Steven Lee Myers, *One Key Element in Anti-Cuba Law Postponed Again*, N. Y. TIMES, Jan. 4, 1997, at A1; Barry Schweid, *Clinton Decides to Waive Cuba Sanctions Again*, ASSOCIATED PRESS POL. SERV., July 16, 1997; *Clinton Extends Title III of Helms-Burton Act*, NAT'L J.'S CONGRESS DAILY, Jan. 16, 1998. The impetus behind the second six-month suspension appears to be the European Union resolution, adopted on December 2, 1996, which urges Cuba to improve its policies on human rights and political freedoms. See Myers, *supra*. Although the European Union has not pledged to curtail trade with Cuba, it has promised to suspend all of its agreements with Cuba if Castro's regime commits a serious breach of human rights in the future. Stanley Meisler, *Clinton Extends His Suspension of Anti-Castro Law Another 6 Months*, L.A. TIMES, Jan. 4, 1997, at A6.

A. The Cuban Government's Confiscation of Foreign and Domestic  
Property in Cuba

Shortly after Fidel Castro overthrew the dictatorship of Fulgencio Batista in 1958, the Cuban government promulgated a series of laws that led to the confiscation of foreign and domestic property in Cuba.<sup>12</sup> The first such law was the Agrarian Reform Act of 1959, which was passed by Castro's government in June 1959.<sup>13</sup> The Agrarian Reform Act limited ownership of land in the agricultural and cattle industry to small and medium sized farms and cooperatives; all large farms in excess of 400 hectares were expropriated by the Cuban government.<sup>14</sup> Shortly thereafter, in October 1959, Castro's regime passed a new mineral law which required owners of mineral and mining rights to re-register their claims with the Cuban government within 120 days.<sup>15</sup> Because the law's conditions made it all but impossible for anyone to comply, the Cuban government ultimately confiscated a large number of the mineral and mining rights held by individuals in Cuba.<sup>16</sup> Moreover, although petroleum was not subject to the mining law,<sup>17</sup> many foreign-owned oil refineries were subsequently confiscated by Castro's government pursuant to a petroleum law which was adopted in November 1959.<sup>18</sup>

The rate of confiscations of foreign and domestic property in Cuba accelerated after the Cuban government entered into a trade agreement with the Soviet Union in February 1960.<sup>19</sup> Pursuant to the agreement, the Soviets agreed to purchase five million tons of sugar over a period of five years from the Cuban government.<sup>20</sup> In exchange, the Cuban government agreed to buy the Soviets' crude oil, rather than oil imported from Western oil companies.<sup>21</sup> However, in June 1960, the agreement was hampered when U.S. oil companies in Cuba refused to process the crude oil sent from the Soviets.<sup>22</sup> Castro retaliated by seizing the refineries that had refused to process the Soviet's crude oil.<sup>23</sup>

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<sup>12</sup> See DIANNE E. RENNACK & MARK P. SULLIVAN, CUBA: U.S. ECONOMIC SANCTIONS, CRS REPORT NO. 92-631F, at 2 (1995). On January 6, 1959, Castro's regime was officially recognized by the United States as being the legitimate government of Cuba. *Id.*

<sup>13</sup> MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY 75-77 (1976).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 79.

<sup>16</sup> *Id.* at 79-82.

<sup>17</sup> *Id.* at 80.

<sup>18</sup> *Id.* at 80-82.

<sup>19</sup> RENNACK & SULLIVAN, *supra* note 12, at 2; GORDON, *supra* note 13, at 85.

<sup>20</sup> GORDON, *supra* note 13, at 88.

<sup>21</sup> *Id.*

<sup>22</sup> RENNACK & SULLIVAN, *supra* note 12, at 2; GORDON, *supra* note 13, at 94.

<sup>23</sup> RENNACK & SULLIVAN, *supra* note 12, at 2; GORDON, *supra* note 13, at 95.

On July 6, 1960, an angered President Eisenhower responded to Castro's actions by significantly reducing Cuba's sugar quota in the United States.<sup>24</sup> On the same day, Castro retaliated by passing a decree which authorized the confiscation of all properties in Cuba owned by U.S. citizens.<sup>25</sup> Shortly thereafter, on October 13, 1960, the Cuban government passed the Urban Reform Act, which authorized the confiscation of virtually all the remaining foreign and domestic business property in Cuba.<sup>26</sup> Thus, by 1961, Castro's regime had effectively confiscated all the private property in Cuba's productive sector.<sup>27</sup>

## B. The Certification of Claims Against the Cuban Government

Although the United States recognizes the law of eminent domain and acknowledges that foreign nations have the right to take property for public purposes, it is well established that such a right is "coupled with the corresponding obligation . . . that such taking [be] accompanied by payment of prompt, adequate, and effective compensation."<sup>28</sup> Because the vast majority of the U.S. citizens whose property was confiscated by the Cuban government have not been compensated for their losses,<sup>29</sup> U.S. courts have held that the Cuban government's confiscation of U.S. property without compensation was a violation of international law.<sup>30</sup>

Thus, in order to provide the Secretary of State with accurate information on the U.S. nationals' claims against the Cuban government and thereby facilitate the future settlement of such claims, the U.S. Congress amended Title V of the International Claims Settlement Act of 1949 on October 16, 1964.<sup>31</sup> The amendment: (1) enabled U.S. nationals who had

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<sup>24</sup> Presidential Proclamation No. 3355, 25 Fed. Reg. 6414 (1960); RENNACK & SULLIVAN, *supra* note 12, at 2; GORDON, *supra* note 13, at 98-99.

<sup>25</sup> RENNACK & SULLIVAN, *supra* note 12, at 2; GORDON, *supra* note 13, at 99-101.

<sup>26</sup> GORDON, *supra* note 13, at 103. The Urban Reform Act effectively nullified leases pertaining to urban property and prohibited the free alienation of such property. *Cuban Liberty and Democratic Solidarity Act: Hearings on S. 381 and H.R. 927 Before the Subcomm. on W. Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong. 132 (1995) (statement of Ignacio E. Sanchez, Att'y, Kelly Drye & Warren, available in WESTLAW, 1995 WL 357720 [hereinafter Sanchez]).

<sup>27</sup> GORDON, *supra* note 13, at 106.

<sup>28</sup> *Id.* at 124.

<sup>29</sup> Matias F. Traviesco-Diaz, *Alternative Remedies in a Negotiated Settlement of U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L BUS. L. 659, 662 (1996).

<sup>30</sup> *Id.* at 664-5 (citing *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir. 1985)); FOREIGN CLAIMS SETTLEMENT COMM'N, FINAL REPORT OF THE CUBAN CLAIMS PROGRAM 69 (1972) [hereinafter FCSC FINAL REPORT].

<sup>31</sup> FCSC FINAL REPORT, *supra* note 30, at 70; 22 U.S.C. § 16431 (1996). The International Claims Settlement Act of 1949 "created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds." *Dames & Moore v. Reagan*, 453 U.S. 654, 680 (1981).

property taken without compensation by the Cuban government on or after January 1, 1959 to file claims against the Cuban government; and (2) authorized the Foreign Claims Settlement Commission ("FCSC") to assess the value and legitimacy of the U.S. nationals' claims.<sup>32</sup>

Accordingly, between 1965 and 1972, individuals who had property confiscated by the Cuban government on or after January 1, 1959, and who were either U.S. citizens at the time their property was taken, or corporations or other legal entities that were organized under the laws of the United States at the time of the taking, were eligible to file claims with the FCSC.<sup>33</sup> In total, the FCSC certified 5,911 claims, valued at \$1.8 billion.<sup>34</sup> Although

<sup>32</sup> *Id.* at 69.

<sup>33</sup> *Id.* at 70, 79, 95, 97. Thus, unlike the Helms-Burton Act, individuals who became U.S. citizens after their property was confiscated by the Cuban government were not eligible to file claims with the FCSC. See Michael W. Gordon, *The Cuban Claims Act: Progress in the Development of a Visible Valuation Progress in the FCSC*, 13 SANTA CLARA L. REV. 625, 640 (1973).

<sup>34</sup> FCSC FINAL REPORT, *supra* note 30, at 412. Of the certified claims, 898 were owned by corporations and 5,013 by individuals. *Id.* The total amount of the 898 claims held by corporations was valued at \$1,578,498,839.55; the total amount of the 5,013 claims held by individuals was valued at \$221,049,729.14. *Id.* The total value of the claims today, calculated to reflect a six percent increase in interest each year since 1960, is \$15 billion. *Cuba: Saying Boo to Helms Burton*, ECONOMIST, Oct. 19, 1996, at 49 [hereinafter *Saying Boo To Helms-Burton*]. For a final analysis of the U.S. certified claims against the Cuban government, see Charts A and B below.

Chart A: Final Analysis of the U.S. Certified Claims Against Cuba:

Value of Certified Claim	Number of Certified Claims Held by Corporations	Number of Certified Claims Held by Individuals	Total Number of Certified Claims
\$1,000 or less	63	1252	1315
\$1001-\$5000	195	1701	1896
\$5,001-\$10,000	100	640	740
\$10,001-\$25,000	134	593	727
\$25,001-\$50,000	89	325	417
\$50,001-\$100,000	51	208	259
\$100,001-\$250,000	77	145	222
\$250,001-\$500,000	56	74	130
\$500,001-\$1,000,000	41	33	74
Over \$1,000,000	92	39	131
TOTAL	898	5,013	5,911

Source: Foreign Claims Settlement Comm'n, Final Report of the Cuban Claims Program 413 (1972).

the Cuban government has reached compensation agreements with Mexican, British, Canadian, French, Italian, Spanish, and Swiss citizens who had property confiscated by Castro's regime on or after January 1, 1959,<sup>35</sup> no such compensation has been paid to the U.S. certified claimants.<sup>36</sup>

### C. The U.S. Embargo Against Cuba

In response to the Cuban government's confiscation of U.S. properties in Cuba and its growing alliance with the Soviet Union, President Kennedy imposed a full trade embargo against Cuba on February 3, 1961.<sup>37</sup> The economic restrictions imposed by the U.S. embargo remained in force throughout the 1960s. However, during the 1970s, the Ford and Carter Administrations sought to normalize relations with the Cuban government by easing the embargo's restrictions.<sup>38</sup> Accordingly, U.S. subsidiaries in foreign countries were given permission to trade with Cuba, and restrictions on travel to Cuba were loosened.<sup>39</sup>

The loopholes created during the Ford and Carter Administrations were closed in 1992 when the U.S. Congress enacted the Cuban Democracy Act

*Chart B: Final Statistics on the Cuban Claims Program:*

Filed Claims:

Type	Number Filed	Amount Claimed
Corporate	1,146	\$2,855,993,212.69
Individual	7,670	\$490,413,058.67
Totals	8,816	\$3,346,406,271.36

Denied Claims:

Type	Number Filed	Amount Denied
Corporate	248	\$1,277,494,373.14
Individual	947	\$269,363,329.53
Totals	1,195	\$1,546,857,702.67

Awarded Claims:

Type	Number Filed	Amount Claimed
Corporate	898	\$1,578,498,839
Individual	5,013	\$221,049,729
Totals	5,911	\$1,799,548,568

*Source:* Foreign Claims Settlement Comm'n, Final Report of the Cuban Claims Program 412 (1972).

<sup>35</sup> *Saying Boo to Helms-Burton*, *supra* note 34.

<sup>36</sup> Sanchez, *supra* note 26, at 133.

<sup>37</sup> Presidential Proclamation No. 3447, 22 U.S.C.S. § 2370 note; 27 Fed. Reg. 1085 (1962).

<sup>38</sup> The Cuba Freedom Pages, *Factual Report: U.S. Embargo* (visited Oct. 20, 1996) <<http://www.jmbco.com/embargo.htm>> [hereinafter *Factual Report*].

<sup>39</sup> *Id.*



("CDA").<sup>40</sup> The CDA both pressured the Cuban regime through tough economic sanctions and provided humanitarian aid to the Cuban people.<sup>41</sup> "Track one" of the CDA strengthened the U.S. embargo by preventing foreign subsidiaries of U.S. corporations from trading with Cuba.<sup>42</sup> At the same time, "track two" decreased the isolation of the Cuban people by opening up telephone, mail, and other forms of communication to and from Cuba, and by allowing medicine and other forms of humanitarian assistance from the United States to enter Cuba.<sup>43</sup>

#### D. The Impact of the U.S. Embargo on Cuba's Economy

Prior to 1992, the U.S. trade embargo against Cuba did not have a drastic impact on Cuba's economy because Cuba annually received between \$4 to \$5 billion in the form of assistance and subsidies from the Soviet bloc.<sup>44</sup> However, Cuba lost these subsidies when the Soviet bloc fell in 1992.<sup>45</sup> The loss of Soviet aid, coupled with the enactment of the CDA, caused the value of Cuba's imports to decline by seventy-five percent and Cuba's Gross National Product to diminish by a third.<sup>46</sup> The effect on Cuba's economy has been devastating.<sup>47</sup>

In order to acquire capital and thereby bolster Cuba's failing economy, Castro's regime has been forced to solicit foreign business investment in Cuba; Castro's regime now offers foreign investors the opportunity to enter into joint ventures using Cuban property and assets — some of which were

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<sup>40</sup>The Cuban Democracy Act (CDA) of 1992, Pub. L. No. 102-484, Title XVII (codified as 22 U.S.C. § 6001-10 (1992)) [hereinafter CDA].

<sup>41</sup>*The Clinton Administration's Reversal of U.S. Immigration Policy Toward Cuba: Hearings Before the Subcomm. on W. Hemisphere of the House Comm. on Int'l Relations*, 104th Cong. 88-89 (1995) (statement of Peter Tarnoff, Under Secretary of State for Political Affairs) [hereinafter Tarnoff].

<sup>42</sup>*Id.* at 88. In 1991, trade between U.S. subsidiaries in foreign countries and the Cuban government amounted to \$700 million for that year alone. *Id.* As a result of the CDA, trade between U.S. subsidiaries and the Cuban government amounts to nothing today. *Id.*

<sup>43</sup>*Id.* The CDA also prohibited any vessel that entered a Cuban port from loading or discharging anywhere in the United States within 180 days after departing from Cuba. CDA, *supra* note 40, §6005. This provision, among others, angered the United States' closest trading partners and allies, who viewed the Act as flagrantly extraterritorial. See Trevor R. Jefferies, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 HOUS. J. INT'L L. 75, 96 (1993). It is not clear whether the CDA was "a congressional attempt to encourage Cuban democratic reform in the aftermath of the Soviet Union's demise" or rather "a response to the influence of powerful Cuban-American groups waiting to take power when Castro either voluntarily steps down or is overthrown." *Id.* at 76.

<sup>44</sup>Tarnoff, *supra* note 41, at 85. Soviet aid constituted approximately 50% of Cuba's Gross National Product at that time. *Id.*

<sup>45</sup>RENNACK & SULLIVAN, *supra* note 12.

<sup>46</sup>*The Devil and the Deep Blue Sea*, ECONOMIST, Aug. 27, 1994, at 19.

<sup>47</sup>*Id.* Cuba's trade deficit was \$1.7 billion in 1996. Paula L. Green, *Cuba Adjusts to New Economic Order*, J. COM., Jan. 28, 1997, at 3A.

confiscated from U.S. citizens in the 1960s.<sup>48</sup> To date, there are 260 joint ventures in Cuba,<sup>49</sup> and more than 650 foreign companies (representing \$2.1 billion in foreign investment) have investments in Cuba.<sup>50</sup>

In addition to courting foreign investment, Castro's regime has also been forced to implement a number of democratic changes on the island. Since 1993, the Cuban government has legalized trade with U.S. dollars, increased the opportunity for self-employment in certain occupations, turned over state farms to cooperatives and families, and authorized farmers to sell produce on the open market.<sup>51</sup>

Unfortunately, the Cuban government has not made similar improvements in the area of human rights. Under Castro's regime, freedom of association and freedom of speech are not recognized liberties.<sup>52</sup> Individuals who oppose the regime often suffer beatings by regime-directed mobs and/or economic discrimination in the form of layoffs, blacklisting, and loss of benefits.<sup>53</sup> These tactics have had the effect of marginalizing and fragmenting the recent democratic movements from within Cuba.<sup>54</sup>

#### E. Cuba's Shootdown of Two Unarmed Civilian Aircrafts

Although the United States has continually condemned the Cuban government for its past and present violations of human rights,<sup>55</sup> the main catalyst behind the enactment of the Helms-Burton Act occurred on February 24, 1996, when Cuban MiG fighters shot down two unarmed civilian aircrafts carrying four Miami-based anti-Castro exiles.<sup>56</sup> Prior to the shoot-down, neither the Secretary of State<sup>57</sup> nor President Clinton<sup>58</sup> supported the enactment of the Helms-Burton Bill ("the Bill"). However, the brutal shootdown of the two small planes provoked strong anti-Communist senti-

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<sup>48</sup> Sanchez, *supra* note 26, at 133-34; Helms-Burton Act, *supra* note 2, § 301(6). See *Cuba: Foreign Investment Act of 1995*, 35 I.L.M. 331 (1995), for a description of the legal basis of Cuba's joint venture system.

<sup>49</sup> Green, *supra* note 47. Since the Helms-Burton Act went into effect, a total of 40 new joint ventures in Cuba have been formed. John Pearson & Gail DeGeorge, *Cuba Trade: This Hornet's Nest Is Really Buzzing*, BUS. WK., Nov.25, 1996, at 58. Moreover, an additional 143 joint ventures are currently being negotiated. *Saying Boo To Helms-Burton*, *supra* note 34

<sup>50</sup> *Their Men in Havana*, ECONOMIST, Apr. 6, 1996, at SC12.

<sup>51</sup> Fedarko, *supra* note 1.

<sup>52</sup> Tarnoff, *supra* note 41, at 86-88.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Helms-Burton Act, *supra* note 2, § 116.

<sup>57</sup> See 141 CONG. REC. S15106-01, S15108 (daily ed. Sept. 20, 1995) (statement of Warren Christopher).

<sup>58</sup> *Cutting Ourselves on Cuban Policy*, LEGAL TIMES, Mar. 11, 1996, at 26 [hereinafter *Cuban Policy*].

ment, especially in the electorally-vital state of Florida, and thereby prompted political support for the Bill to be consolidated.<sup>59</sup>

On March 5, 1996, just ten days after the shutdown, the Senate approved the Bill by a vote of 74 to 22.<sup>60</sup> Thereafter, on March 6, 1996, only eleven days after the shutdown, the House approved the Bill by a vote of 336 to 86.<sup>61</sup> Following suit, President Clinton signed the Bill into law on March 12, 1996, a mere seventeen days after the shutdown, in exchange for a "compromise waiver" which delayed Title III's effective date until August 1, 1996 and gave the President the authority to suspend Title III's private right of action for rolling periods of six months.<sup>62</sup>

President Clinton has utilized the "compromise waiver" to delay the right to bring lawsuits under Title III four times and has indicated that he will indefinitely suspend Title III's private right of action so long as other nations continue efforts to promote democratic changes in Cuba.<sup>63</sup> The next

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<sup>59</sup> *The Libertad Act: Implementation and International Law: Hearings on S. 381 and H.R. 927 Before the Subcomm. on W. Hemisphere and Peace Corps Affairs of the Senate Foreign Relations Comm.*, 104th Cong. 38 (1996) (statement of Alberto J. Mora, Att'y) [hereinafter Mora].

<sup>60</sup> 142 CONG. REC. D135, D135 (daily ed. Mar. 5, 1996).

<sup>61</sup> 142 CONG. REC. D144, D146 (daily ed. Mar. 6, 1996).

<sup>62</sup> *Cuban Policy*, *supra* note 58; *see also supra* notes 3 and 5. The "compromise waiver" put President Clinton in a win-win position. First, by signing the Helms-Burton Act into law, he gained support from many Cuban-Americans residing in Florida, a state where there are 25 electoral votes. Second, by using the "compromise waiver" to indefinitely suspend the right to bring lawsuits under Title III, he was able to strike a balance between Cuban-Americans, who generally favor the law, and the United States' trading partners, who oppose it. Indeed, it is interesting to note that President Clinton not only won Florida's 25 electoral votes in the November 1996 election, he also acquired a larger percentage of the Cuban-American vote than any other recent incumbent Democratic presidential candidate. *See* Thomas W. Lippman, *Clinton Suspends Provision of Law That Targets Cuba*, WASH. POST, Jan. 4, 1997, at A1. However, it should be noted that President Clinton's sweeping Florida victory may also be attributable to the fact that Senator Dole neglected to campaign in Florida.

<sup>63</sup> *See supra* notes 10-11 and accompanying text. The President's decision to suspend Title III, possibly indefinitely, invites speculation that he never supported the Act, but merely signed it to appease the Republican Congress and Cuban-American voters. Indeed, the speculation that special interest groups exerted pressure on President Clinton during the November 1996 election is bolstered by a report which was conducted by the bipartisan group Center For Public Integrity. *See* Tim Shorrock, *Study Eyes Money Trail Behind Helms-Burton*, J. COMM., Jan. 24, 1997, at A3. The report concludes that Cuban exiles, "supplied \$3.2 million of the \$4.4 million donated since 1979 to U.S. politicians who support the U.S. economic boycott of Cuban leader Fidel Castro." *Id.* The report goes on to note that the Cuban Foundation, which is led by Joise Mas Canosa, a well known Cuban exile, is "dollar-for-dollar the most effective lobbying group in Washington," and that the money trail "illuminates remarkable influence a relatively small faction has had on U.S. foreign policy towards another nation." *Id.* The report also asserts that through large political donations Mr. Canosa has influenced Congressional members such as Senator Helms and Representative Burton, the two sponsors of the Act, and that the "congressional staffers who drafted Helms-Burton relied heavily on lawyers and lobbyists with ties to the Bacardi spirits em-

section discusses the provisions of Title III and why Title III should not only be postponed but also permanently repealed.

## II. AN OVERVIEW OF TITLE III OF THE HELMS-BURTON ACT

### A. The Purposes of Title III

The drafters of the Helms-Burton Act contend that Castro is currently financing his totalitarian grip on Cuba by selling property and assets, some of which were illegally confiscated from U.S. citizens during the 1960s.<sup>64</sup> Thus, Title III seeks (1) to protect the property rights of U.S. citizens who had property wrongfully confiscated by the Cuban government on or after January 1, 1959 and (2) to expedite the collapse of Castro's regime by discouraging foreign business investment in Cuba.<sup>65</sup>

### B. Who Is Eligible to Bring Suit Under Title III

Title III creates a private right of action allowing "U.S. nationals" whose property<sup>66</sup> was confiscated<sup>67</sup> by the Cuban government on or after January 1, 1959 to file suit in federal court against any U.S. or foreign entity that "traffics"<sup>68</sup> in such property.<sup>69</sup> The definition of "U.S. national" in-

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pire." *Id.* Thus, in the light of the obvious political pressure to sign the Act and President Clinton's subsequent suspension of Title III, it appears that President Clinton may have signed the Act to bolster his chances of winning the November 1996 election, only to then back away from enforcing the provision in an attempt to appease the United States' most important trading partners.

<sup>64</sup> Helms-Burton Act, *supra* note 2, § 301(5) & (6).

<sup>65</sup> Tarnoff, *supra* note 41, at 92-93; Helms-Burton Act, *supra* note 2, § 301(6).

<sup>66</sup> The term "property" means "any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." Helms-Burton Act, *supra* note 2, § 4(12). Real property used for residential purposes does not constitute "property" unless: (1) the claim to the property is held by a U.S. national and it has been certified by the FCSC; or (2) the property is occupied by an official of the Cuban government or the ruling political party in Cuba. *Id.*

<sup>67</sup> The term "confiscated" is defined as

(A) the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property, on or after January 1, 1959 (i) without the property having been returned or adequate and effective compensation provided; or (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and (B) [the repudiation, default, or failure] of the Cuban Government to pay, on or after January 1, 1959 (i) a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government; (ii) a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or (iii) a debt which is incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim.

Helms-Burton Act, *supra* note 2, § 4(4).

<sup>68</sup> See *supra* note 4, for the definition of the term "traffics." Based on the definition of "trafficking," confiscated property in Cuba that is currently being used, managed, or controlled by the Cuban government (e.g., schools, hospitals, military installations, and admin-

cludes both U.S. citizens and legal entities which are organized under the laws of the United States and have their principal place of residency in the United States.<sup>70</sup> Consequently, individuals who were U.S. citizens at the time their property was taken, as well as Cuban-Americans who were Cuban nationals at the time of confiscation, can avail themselves of Title III's federal right of action.<sup>71</sup>

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istrative offices) will clearly be subject to suit under Title III. *The Libertad Act: Implementation and International Law : Hearings on S. 381 and H.R. 927 Before the Subcomm. on W. Hemisphere and Peace Corps Affairs of the Senate Foreign Relations Comm.*, 104th Cong. 64 (1996) (statement of Robert L. Muse, Att'y) [hereinafter Muse]. However, the scope of the term "trafficking" will ultimately have to be determined by the courts. *EU to Hammer U.S. Firms If Trade Law Nails Europe*, SALT LAKE TRIB., July 16, 1996, at A1 [hereinafter *E.U. to Hammer U.S. Firms*]. For example, it is open to question whether ownership of privately held stock in a corporation that is "trafficking" in confiscated property itself constitutes "trafficking." *Id.* Because ownership of publicly traded stock is exempt from the definition of "trafficking," some commentators contend that ownership of privately held stock in a corporation that is "trafficking" in confiscated property does constitute "trafficking." *Id.*

<sup>69</sup>Helms-Burton Act, *supra* note 2, § 302. Title III's federal right of action does not apply if (1) the property at issue was confiscated by the Cuban government on or after the enactment date of the Act (that is, after March 12, 1996), *Id.* § 302(a)(4)(C); or (2) if more than two years has transpired since the action giving rise to the trafficking has ceased to occur, *Id.* § 305.

<sup>70</sup>*Id.* § 4(15).

<sup>71</sup>Although the United States does not confer similar rights on U.S. citizens who are former nationals of the other 38 countries in the world where there are currently outstanding property claims, 142 CONG. REC. S1479, S1488 (daily ed. Mar. 5, 1996) (statement of Sen. Dodd), the Act's sponsors argue that the inclusion of Cuban-Americans in Title III is necessary to accomplish the Act's foreign policy objectives because the certified claims of U.S. citizens only constitute 5% of the industrial and commercial properties in Cuba, Sanchez, *supra* note 26, at 135. Thus, according to the Act's sponsors, the inclusion of Cuban-Americans will limit the scope of properties available for investment and thereby further discourage foreign business investment in Cuba. *Id.* The Act's sponsors also contend that excluding Cuban-Americans from Title III's federal cause of action would violate the Equal Protection guarantees of the U.S. Constitution. *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by race, alienage, or national origin ... [it is] subjected to strict scrutiny and will be sustained only if [it is] suitably tailored to serve a compelling state interest."); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (stating that the equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment)).

Opponents of Title III argue that including Cuban-Americans in Title III's remedy violates international law and that Cuban-Americans should adjudicate their claims in Cuban courts. See Muse, *supra* note 68 (citing *Compania v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir. 1967) ("confiscations by a state of the property of its own nationals ... do not constitute violations of international law"); *Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985) ("... international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens"); *U.S. Foreign Claims Settlement Commission*, Claim No. IT-10253, Dec. No. It-62 ("The principle of international law that eligibility for compensation requires American nationality at the time of the loss is so widely and universally accepted that citation to authority is scarcely necessary.")). Unfortu-

However, individuals who were U.S. citizens at the time that their property was taken cannot avail themselves of Title III's private right of action if they did not file a claim with the FCSC between 1965 and 1972, or if they filed a claim during that period which was denied by the FCSC.<sup>72</sup> Moreover, Cuban-Americans who were Cuban nationals at the time of the taking cannot bring claims under Title III until two years after Title III's effective date (that is, until August 1, 1998).<sup>73</sup>

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nately, under this viewpoint, Cuban-Americans would be unable to resolve their property claims because Cuban law currently prohibits exiles from asserting property claims in Cuban courts. See Alexander Mills & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 LAW & POL'Y INT'L BUS. 137, 158-59 (1985).

Finally, opponents of Title III argue that the definition of "U.S. national," which includes Cuban-Americans who were not U.S. citizens at the time of the taking but are now naturalized U.S. citizens, as well as Cuban legal entities which were not incorporated in the United States at the time of the taking but are now organized under the laws of the United States and have their principle place of business in the United States, is so broad that it allows individuals who are not currently U.S. citizens to incorporate themselves in the United States and avail themselves of Title III's federal right of action. See Letter from David Wallace, Chairman & CEO, Lone Star Industries, to Hon. Christopher J. Dodd (Oct. 5, 1995), reprinted in 141 CONG. REC. S15005, S15010 (daily ed. Oct. 11, 1995) [hereinafter Wallace Letter]; 141 CONG. REC. S15106-01, S15113 (daily ed. Sept. 20, 1995) (statement of Sen. Dodd). This scenario is entirely possible because Cuban-Americans who were Cuban nationals at the time of the taking were not eligible to file claims with the FCSC between 1965 and 1972. See *supra* note 33. Accordingly, Cuban-Americans who were Cuban nationals at the time of the taking are not precluded from availing themselves of Title III's private right of action simply because they did not previously file a claim with the FCSC.

<sup>72</sup> Helms-Burton Act, *supra* note 2, § 302(a)(5)(A)-(B).

<sup>73</sup> *Id.* § 302(a)(5)(C). The Act further provides that if Title III cases are consolidated, or if a pool of assets is created, then U.S. citizens who have claims certified by the FCSC will be entitled to full payment on their claims before the claims of Cuban-Americans are satisfied. *Id.* § 302(f)(2)(B). Despite this provision, opponents of Title III argue that the Cuban government's liability expands considerably as a result of Cuban-Americans being added to Title III's remedy, and therefore: (1) the pool of assets available to U.S. certified claimants will be diluted; (2) the prospects of U.S. certified claimants settling their claims with the Cuban government will be decreased; (3) the effective nullification of the claims of U.S. certified claimants constitutes a "taking" under the Fifth Amendment "Takings Clause"; and (4) the U.S. government (or rather, the U.S. taxpayers) will be required to pay just compensation to U.S. certified claimants. Muse, *supra* note 68, at 67; 142 CONG. REC. S1485, S1487-88 (daily ed. Mar. 5, 1996) (statement of Sen. Dodd). See also *Agins v. City of Tiburon*, 447 U.S. 225, 260-61 (1980) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."); *Langenegger v. United States*, 756 F.2d 1565, 1572-73 (D.C. Cir. 1985) (the extinguishment of a claim can amount to a "taking" of property if the involvement of the United States is "sufficiently direct and substantial;" "sufficiently direct and substantial involvement" is determined by assessing: (1) the nature of the U.S. activity; and (2) the benefit derived by the United States). But see *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983) (President's settlement of plaintiff's claims against the People's Republic of China without Plaintiff's consent did not give rise to a cause of action under the "Takings Clause" of the U.S. Constitution for the difference between what plaintiff received under the settlement and what plaintiff believed the claim was worth); *Langenegger*, 756 F.2d at 1572 (holding that the United States was not

C. Requirements That Must Be Satisfied By Eligible Title III Claimants

In order to bring a Title III suit, eligible claimants must (1) have a claim valued in excess of \$50,000 at the time of the taking;<sup>74</sup> (2) prove that the defendant(s) “knowingly and intentionally” trafficked in their confiscated property;<sup>75</sup> (3) comply with the jurisdictional and procedural requirements of 28 U.S.C. Section 1331, the general federal jurisdiction statute;<sup>76</sup> (4) effectuate service of process in accordance with 28 U.S.C. Section 1608;<sup>77</sup> and (5) pay a filing fee which is “established at a level sufficient to recover the costs of court actions.”<sup>78</sup>

D. Liability Under Title III

Title III plaintiffs may recover money damages from liable defendants in the amount which is the greater of (1) the amount certified to the claimant by the FCSC, plus interest; (2) an amount determined by the FCSC or a court-appointed master to be the value of the claim, plus interest; or (3) the fair market value of the property in question, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater.<sup>79</sup> Title III further provides that if a U.S. certified claimant gives thirty-day advance notice to the defendant before commencing a Title III action, and the defendant nonetheless continues to traffic in the property in question, then the defendant will be liable to the plaintiff for treble damages.<sup>80</sup>

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responsible under the Just Compensation Clause of the Fifth Amendment for the expropriation of a U.S. citizen's property in a foreign land when hemispheric stability was an ultimate benefit hoped for by the United States).

<sup>74</sup>Helms-Burton Act, *supra* note 2, § 302(b). The Act's sponsors added the \$50,000 “amount in controversy” requirement in response to criticism that the inclusion of Cuban-Americans would cause a flood of litigation in U.S. federal courts. *See* 142 CONG. REC. S1479, S1504 (daily ed. Mar. 5, 1996) (statement of Sen. Coverdell).

<sup>75</sup>Helms-Burton Act, *supra* note 2, § 4(13). The term “knowingly” is defined as “with knowledge or having reason to know.” *Id.* § 4(9).

<sup>76</sup>*Id.* § 302(c)(1). Title III further provides that the Act of State Doctrine, which prohibits U.S. courts from adjudicating the acts of foreign governments, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), does not apply to causes of action brought under Title III, *Id.* § 302(a)(6). *See Sanchez, supra* note 26, at 136-38, for a discussion of the applicability of the Act of State Doctrine. *See also Banco de Cuba v. Sabbatino*, 376 U.S. 398 (1964); 22 U.S.C. § 2307(e)(2).

<sup>77</sup>Helms-Burton Act, *supra* note 2, § 302(c)(2).

<sup>78</sup>*Id.* § 302(h)(2)(i).

<sup>79</sup>*Id.* § 302(a)(1)(A).

<sup>80</sup>*Id.* § 302(a)(3).

### III. THE REALITY OF TITLE III

#### A. Title III Will Not Protect the Property Rights of U.S. Citizens

As mentioned previously, one of Title III's primary goals is to vindicate the property rights of U.S. citizens who had property wrongfully confiscated by the Cuban government on or after January 1, 1959.<sup>81</sup> Unfortunately, Title III does not provide an effective remedy because: (1) many U.S. citizens cannot avail themselves of Title III's private right of action due to the \$50,000 "amount in controversy" requirement; and (2) Title III's other restrictions further constrict the availability of the remedy.

##### 1. Many U.S. Citizens Cannot Avail Themselves of Title III's Private Right of Action Due to the \$50,000 "Amount in Controversy" Requirement

The Act's sponsors added a \$50,000 "amount in controversy" restriction to Title III's private right of action in response to criticism that the inclusion of Cuban-Americans would cause a flood of litigation in U.S. federal courts.<sup>82</sup> However, as a result of the "amount in controversy" requirement, gaining access to U.S. federal courts will be difficult for individuals who were U.S. citizens at the time that their property was confiscated because the FCSC has already assigned particular values to their claims. Because eighty-six percent of the U.S. claimants' property has already been certified by the FCSC as having a value of \$50,000 or less, only 816 certified claimants (fourteen percent of all certified claimants) will be able to avail themselves of Title III's private right of action.<sup>83</sup> Accordingly, 5,095 certified claims will remain unsettled.<sup>84</sup>

Moreover, although the FCSC has not already attached values to the claims of Cuban-Americans, the \$50,000 "amount in controversy" requirement will nonetheless preclude many Cuban-Americans from suing because the FCSC or a court-appointed master must determine the value of their claims at the time of the taking.<sup>85</sup> The court will not accept as conclusive any findings, orders, judgments, or decrees declaring the value of the claim unless the declaration is found pursuant to a binding international arbitration to which the United States or the claimant submits the claim.<sup>86</sup> Hence, Cuban-American claimants will not be able to evade the \$50,000 "amount in controversy" requirement merely by alleging a claim in excess of

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<sup>81</sup> Tarnoff, *supra* note 41, at 92-93.

<sup>82</sup> See 141 CONG. REC. S1479, S1504 (daily ed. Mar. 5, 1996) (statement of Sen. Coverdell).

<sup>83</sup> See *supra* note 34.

<sup>84</sup> *Id.*

<sup>85</sup> Helms-Burton Act, *supra* note 2, § 303(a)(2).

<sup>86</sup> *Id.* § 303(a)(3).



\$50,000.<sup>87</sup> Accordingly, those Cuban-Americans with claims having a value of \$50,000 or less will likewise be unable to avail themselves of Title III's private right of action.<sup>88</sup>

Because Title III provides that defendants can be liable to U.S. claimants for treble damages,<sup>89</sup> some commentators have argued that U.S. claimants will be able to gain access to U.S. courts by alleging that the amount of the damages sought is the value of the property trebled.<sup>90</sup> It is uncertain whether the courts would allow U.S. claimants to aggregate damages to satisfy the \$50,000 "amount in controversy" requirement.<sup>91</sup> The question is moot, however, because Title III in its final form does not allow treble damages to be included in the calculation of the "amount in controversy."<sup>92</sup> Moreover, even if treble damages could be included, the \$50,000 "amount in controversy" requirement would still preclude over 4,000 certified claimants from availing themselves of Title III's remedy.<sup>93</sup> Nevertheless, it is conceivable that a group of claimants with a number of minor claims, which in the aggregate do not exceed \$50,000, may be able to evade the "amount in controversy" requirement by forming a "class action" and "piggybacking" on a U.S. claimant who has a claim valued in excess of \$50,000.<sup>94</sup> However, it should be noted that this avenue of relief is speculative at best.

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<sup>87</sup> *But see* Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) ("In order for a court to refuse jurisdiction 'it [must] appear to a legal certainty that the claim is really for less than the jurisdictional amount.'").

<sup>88</sup> The Senate Foreign Relations Committee has estimated that there may be between 75,000 and 200,000 claims held by Cuban-Americans. SECRETARY OF STATE, REPORT CONCERNING THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996 (Sept. 27, 1996), reprinted in 142 CONG. REC. S12441, S12441 (daily ed. Oct. 21, 1996) [hereinafter Senate Report]. The total value of these claims has been estimated to be as high as \$94 billion. Wallace Letter, *supra* note 71, at S15010.

<sup>89</sup> Helms-Burton Act, *supra* note 2, § 302 (a)(3).

<sup>90</sup> Letter from Robert L. Muse, Attorney for Amstar Property Rights Holding, Inc., U.S. certified claimants, to June E. O'Neil, Director of CBO (Aug. 25, 1995), reprinted in 141 CONG. REC. S15005, S15013 (daily ed. Oct. 11, 1995) [hereinafter Muse Letter].

<sup>91</sup> *See* Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) (holding that punitive damage claims can be aggregated to satisfy "amount in controversy" requirement); *accord* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996); Earnest v. General Motors Corp., 923 F. Supp. 1469 (N.D. Ala. 1996); Brooks v. Georgia Gulf Corp., 924 F. Supp. 739 (M.D. La. 1996). *See also* Allen, 63 F.3d at 1335 ("In order for a court to refuse jurisdiction 'it [must] appear to a legal certainty that the claim is really for less than the jurisdictional amount.'"). *But see* Bishop v. General Motors Corp., 925 F.Supp. 294 (D.N.J. 1996) (holding that punitive damage claims cannot be aggregated to satisfy the "amount in controversy" requirement).

<sup>92</sup> Helms-Burton Act, *supra* note 2, § 302(b).

<sup>93</sup> *See supra* note 34.

<sup>94</sup> *See generally* Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV., 325, 342 n. 25 (1995) ("It is open to question whether a 'class action' by a group of U.S. nationals holding a number of minor claims, which in the aggregate exceed \$50,000, can commence a lawsuit pursuant to the Cuban Liberty Act.") (emphasis added). *See also* Stromberg Metal

2. *Title III's Other Restrictions Further Constrict the Availability of the Remedy*

Even if claimants pass the \$50,000 "amount in controversy" requirement, they will still have to overcome a plethora of other hurdles in order to avail themselves of Title III's federal right of action. First, because U.S. citizens are prohibited by U.S. law from visiting Cuba, it will be difficult for U.S. claimants to determine how their property is being used.<sup>95</sup> Accordingly, it will be hard for U.S. claimants to obtain basic information, identify potential traffickers,<sup>96</sup> and prove that defendants are "knowingly" trafficking in their property.<sup>97</sup> Second, Cuban-Americans who were Cuban nationals at the time of confiscation can only avail themselves of Title III's remedy if their claim is for real property that is being occupied by an official of the Cuban government.<sup>98</sup> Again, this problem is accentuated because it will be difficult for Cuban-Americans to ascertain how their property is being used. Third, defendants must have U.S.-based subsidiaries or other assets in the United States to meet Title III's jurisdictional requirements. Because there are only 260 joint ventures in Cuba,<sup>99</sup> and the majority of the U.S. claims pertain to property that the Cuban government has not opened to foreign investment,<sup>100</sup> it will be difficult for plaintiffs to obtain jurisdiction over traffickers.<sup>101</sup> Finally, plaintiffs will have to pay an expensive filing fee, which some commentators have estimated will amount to approximately \$4,500.<sup>102</sup> Thus, the cumulative effect is that only a small number of individuals will be able to avail themselves of Title III's federal right of action.<sup>103</sup>

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Works, Inc., 77 F.3d 928 (7th Cir. 1996); *In re Abbott Lab.*, 51 F.3d 524 (5th Cir. 1995); *Gilmer v. Walt Disney*, 915 F. Supp. 1001 (W.D. Ark. 1996); *Garza v. National. Am. Ins. Co.*, 807 F. Supp. 1256 (M.D. La. 1992); Mark Hutchenson, *Unintended Consequences: 28 U.S.C. § 1367's Effect on Diversity's Amount in Controversy Requirement*, 48 BAYLOR L. REV. 247 (1996).

<sup>95</sup> Steve Fainaru, *U.S. Firms Haven't Closed Book on Cuba*, BOSTON GLOBE, Sept. 29, 1996, at A1.

<sup>96</sup> Mora, *supra* note 59, at 41.

<sup>97</sup> See 141 CONG. REC. S15100, S15102 (daily ed. Oct. 12, 1995) (statement of Sen. Helms) (arguing that Title III will not cause a litigation explosion in U.S. courts).

<sup>98</sup> See Helms-Burton Act, *supra* note 2, § 4(12).

<sup>99</sup> Green, *supra* note 47.

<sup>100</sup> Larry Rohter, *Cubans Can Likely Evade U.S. Sanctions* (last modified Mar. 3, 1996) <<http://www.latino.com/news/0303cubc.html>>.

<sup>101</sup> Mora, *supra* note 59, at 41-42.

<sup>102</sup> 142 CONG. REC. S1479, S1500 (daily ed. Mar. 5, 1996) (statement of Sen. Feingold).

<sup>103</sup> *Id.*

B. Title III Will Not Deter Enough Foreign Business Investment in Cuba  
to Expedite the Collapse of Castro's Regime

Title III also seeks to expedite the collapse of Castro's regime by discouraging foreign business investment in Cuba.<sup>104</sup> For the reasons set forth below, Title III will not deter enough foreign business investment in Cuba to accomplish this objective.

1. *Jurisdictional Requirements*

First, foreign companies that do not have subsidiaries or assets in the United States will not satisfy Title III's jurisdictional requirements and therefore will not face potential liability under Title III. Accordingly, they will not be discouraged from investing in Cuba.<sup>105</sup> Indeed, investment in Cuba will be attractive to small foreign companies that cannot afford to compete in the U.S. market. Because large foreign companies that have subsidiaries in the United States may be reluctant to invest in Cuba, smaller companies will have a unique opportunity to do business in Cuba without competition from larger companies. Hence, Title III may actually promote investment in Cuba that would not have otherwise occurred.<sup>106</sup> Moreover, foreign companies that have subsidiaries in the United States may choose to pull out of the United States rather than Cuba. For example, Sol Melia, a Spanish company that is building an immense hotel complex in Cuba, has announced that it is pulling its assets out of the United States in order to avoid potential liability under Title III.<sup>107</sup>

2. *The Little Known Loophole*

Another reason why foreign investors will continue to invest in Cuba is that there is great incentive to settle Title III actions because (1) plaintiffs are required to pay an expensive filing fee and obtain difficult evidentiary information; (2) defendants are confronted with the possibility of treble damages if the action is brought to fruition versus the cost of millions of dollars if they pull out of Cuba; and (3) Section 302(a)(7) of the Helms-Burton Act provides that individuals do not have to obtain a license or permission from any U.S. agency to render and enforce a Title III out-of-court settlement.<sup>108</sup> Thus, claimants and defendants are likely to render and en-

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<sup>104</sup>Tarnoff, *supra* note 41, at 92-93.

<sup>105</sup>For example, Canada's Sherritt International, a corporation which has no assets in the United States, announced on November 12, 1996, that it had raised \$506 million to finance prospective ventures in Cuba. See Pearson & DeGeorge, *supra* note 49.

<sup>106</sup>142 CONG. REC. E1247-02, E1248 (daily ed. July 11, 1996) (statement of Rep. Hamilton).

<sup>107</sup>Debra Beachy, *Sanctions on Cuba Rile Mexico, Europe*, HOUS. CHRON., May 31, 1996, at 1.

<sup>108</sup>Lois F. Desloge, *The Great Cuban Embargo Scam - A Little Known Loophole Will Allow the Richest Exiles to Cash In*, WASH. POST., Mar. 3, 1996, at 7.

force settlement judgments pursuant to Section 302(a)(7), and foreign companies are likely to perceive the settlement costs as simply another cost of doing business.<sup>109</sup> Therefore, foreign companies will continue to invest in Cuba as long as the costs of settling are less than the costs of pulling out of Cuba.<sup>110</sup> Indeed, one commentator has argued that the loophole may actually spark an influx of new foreign investment in Cuba because U.S. citizens who hold claims to property in Cuba "could shop around the world for prospective investors in Cuba and offer them a full release on their property claim in exchange for a 'sweetheart' lawsuit settlement entitling them to a piece of the economic action."<sup>111</sup> Accordingly, Title III may actually open a back door that allows some Americans to get around the U.S. embargo against Cuba because U.S. citizens and companies who are tempted to file suit in court may instead settle out of court for a percentage of any venture between a foreign company and Cuba and thereby become investors in Cuba.

References to Title III's loophole were frequently cited in the congressional debates concerning the Act's enactment.<sup>112</sup> Thus, it is apparent that both Congress and the President were aware of the loophole. Accordingly, it is interesting to note that Nick Gutierrez, an attorney who represented the National Association Sugar Mill Owners of Cuba and the Cuban Association for the Tobacco Industry, and Ignacio Sanchez, an attorney whose firm represents the Bacardi Rum Company, helped write the Act.<sup>113</sup> Thus, the enactment of Title III's loophole invites speculation that special interest groups may have exerted pressure on congressional members and the President during the Act's promulgation, which incidentally transpired during the critical months before the November 1996 election.

### 3. *Retaliatory Measures*

The final and most important reason why foreign investors will not be discouraged from investing in Cuba is that Title III's deterrent effect has been significantly weakened by counter-measures which have been adopted by U.S. trading partners. For example, on September 19, 1996, the Mexican Senate unanimously approved an antidote law to the Helms-Burton Act which is entitled "Law to Protect Trade and Investment from International Standards Violating International Law."<sup>114</sup> Pursuant to the law, a Mexican company will be fined up to \$300,000 if the company complies with the

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *See, e.g.* 142 CONG. REC. E308, E309-10 (daily ed. Mar. 7, 1996).

<sup>113</sup> Desloge, *supra* note 108.

<sup>114</sup> *Sanctions: Mexico Senate Approves Law Countering Helms-Burton Measure*, 13 Int'l Trade Rep. (BNA) (Sept. 25, 1996), available in WESTLAW, BNA-BTD database.

Helms-Burton Act and pulls out of Cuba, or if the company submits information to U.S. courts under future Helms-Burton lawsuits.<sup>115</sup>

Similarly, on November 28, 1996, the Canadian government (Cuba's largest trading partner)<sup>116</sup> passed into law a piece of legislation entitled "An Act to Amend the Foreign Extraterritorial Measures Act," otherwise known as Bill C-54.<sup>117</sup> The amendments to Bill C-54 permit the Canadian government to "block" Title III judgments from being enforced or recognized in Canada.<sup>118</sup> The amendments also contain a "clawback" provision which permits Canadian companies to seek compensation from domestic courts for awards made against them in the United States pursuant to Title III, and for reimbursement of court expenses incurred in both countries.<sup>119</sup>

Finally, on October 28, 1996, the European Union foreign ministers promulgated a regulation on behalf of the fifteen European Union member states which prohibits compliance with the Helms-Burton Act, and authorizes European companies doing business in Cuba to counter-sue offending U.S. citizens and companies in European courts to recover damages awarded in U.S. courts under Title III.<sup>120</sup> These counter-measures provide a great deal of protection to foreign investors and therefore make deterrence from investing in Cuba an unlikely scenario.

#### IV. TITLE III HAS HAMPERED RELATIONS BETWEEN THE UNITED STATES AND ITS TRADING PARTNERS

Perhaps even more problematic than the fact that the purposes behind Title III are incapable of being achieved is that Title III has hampered relations between the United States and its trading partners. Virtually all the U.S. trading partners have strenuously objected to Title III's extraterritorial effects.<sup>121</sup> Specifically, the European Union views Title III as contrary to the GATT, and has challenged the law before a dispute settlement panel of

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<sup>115</sup> *Id.*

<sup>116</sup> Howard Schneider, *Canada and Cuba: Booming Partners; Despite U.S. Obstacles, Trade, Diplomacy Flourish*, WASH. POST, Oct. 20, 1996, at A1; *Canadian Parliament Ratifies Response to Helms-Burton Law*, 13 Int'l Trade Rep. (BNA) (Dec. 4, 1996), available in WESTLAW, BNA-BTD Database.

<sup>117</sup> *Sanctions: Canada Introduces Legislation to Counter Helms-Burton Law*, 13 Int'l Trade Rep. (BNA) (Sept. 28, 1996), available in WESTLAW, BNA-BTD Database.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Stephen Bates & John Palmer, *EU United in Defiance of U.S. Curbs*, THE GUARDIAN, Oct. 29, 1996, at 14.

<sup>121</sup> Specifically, the European Union, Canada, Mexico, India, Switzerland, Australia, and the Rio Group of Latin American countries all object to the implementation and enforcement of Title III's private right of action. See *U.S. Blocks First EU Attempt to Place Helms-Burton Law Before WTO Panel*, Int'l Trade Rep (BNA) 1643 (Oct. 23, 1996); Des Clifford, *The Cuban Itch*, MINING J., Nov. 1996, at 242; Mark Tran, *Europe Takes U.S. to Court Over Cuba*, GUARDIAN, Nov. 21, 1996, at 15.

the WTO.<sup>122</sup> Similarly, the Canadian and Mexican governments have filed a complaint that Title III violates the NAFTA.<sup>123</sup> Title III has also been criticized as being a “secondary embargo,” and has been compared to the Arab boycott against corporations that traded with Israel — a boycott the United States viewed as illegal.<sup>124</sup>

Inspired by a feeling that the United States is trying to bully them, the United States’ trading partners have begun to engage in a “tit-for-tat” with the United States. Indeed, the European Union has stated that it may bar American executives who are involved in future Title III litigation from entering the fifteen European Union member states.<sup>125</sup> European foreign ministers have even begun compiling a “watch list” of U.S. companies that are potential litigants under Title III.<sup>126</sup> Moreover, the Canadian Parliament has introduced a piece of legislation entitled “The American Liberty and Democratic Solidarity (Loyalty) Bill,” generally referred to as the Godfrey-Miliken Bill, which, if enacted, would allow the descendants of Tories, whose property was confiscated without compensation by the Continental Congress during the American Revolution, to file suit in Canadian court against any entity that it is “trafficking” in such property.<sup>127</sup> The law would also forbid “traffickers” from entering Canada until the debt on the property in question is paid.<sup>128</sup>

Accordingly, it is apparent that U.S. citizens may incur more retribution than compensation pursuant to Title III.<sup>129</sup> Moreover, the actions taken by the United States’ trading partners underscore the dangerous precedent that Title III has set. Indeed, it is conceivable that an Arab country, using Title III as precedent, could allow Palestinians, whose property was allegedly confiscated without compensation by the Israeli government, to file suit in Palestinian court against U.S. companies that are “trafficking” in

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<sup>122</sup>The European Union challenged the law at the WTO Dispute Settlement Body Meeting on November 20, 1996. *Id.* On February 20, 1997, the WTO established a three-member dispute panel to pass judgment on Title III. David E. Sanger, *U.S. Won't Offer Trade Testimony on Cuba Embargo*, N.Y. TIMES, Feb. 21, 1997, at A1.

<sup>123</sup>*E. U. To Hammer U.S. Firms*, *supra* note 68.

<sup>124</sup>David L. Rabin, *Clinton Couldn't Decide Where To Jump*, NAT'L L. J., Aug. 19, 1996, at A17.

<sup>125</sup>Bates & Palmer, *supra* note 120.

<sup>126</sup>*Id.*

<sup>127</sup>Martin Dyckman, *A Thorn in the Sides of Canadians*, ST. PETERSBURG TIMES, Oct. 27, 1996, at 30. It has been reported that one woman has documented proof that her ancestors were wrongfully confiscated of 700 acres of land in what is now Washington, D.C. *Id.* Accordingly, if the Godfrey-Miliken Bill is enacted into law, then it is conceivable that President Clinton, among others, could be sued for “trafficking” in confiscated property. *Id.*

<sup>128</sup>*Id.*

<sup>129</sup>James U. Goldsborough, *Dealing with the Helms-Burton Mess*, SAN DIEGO UNION-TRIB, Oct. 10, 1996, at B16.

such property.<sup>130</sup> Similarly, the German government could pass a law allowing Chechens to sue Finnish companies that are "trafficking" in Russian property.<sup>131</sup>

Ironically, the only individual who appears to benefit from the United States' passage and enforcement of Title III is Fidel Castro himself. Title III may actually have the effect of allowing Castro's regime to remain in power because as long as Title III's private right of action remains in place, it allows Castro to continuously point to the actions of the U.S. government as the reason for Cuba's current economic crisis. Because Castro's regime currently provides free health-care and education to its citizens,<sup>132</sup> and, as discussed below, the legality of Title III's private right of action is questionable, it appears to the Cuban people that Castro is a great hero who is being unfairly attacked by the U.S. government.<sup>133</sup>

## V. THE LEGALITY OF TITLE III

As mentioned previously, the recent actions of the United States' trading partners call into question the legality of Title III's private right of action. This section analyzes the possible legal challenges to Title III's private right of action and concludes that the provision violates international law, the GATT, and the NAFTA.

### A. Possible Challenges Under GATT

Title III's private right of action violates GATT Article XI, which prohibits burdensome, non-tariff measures.<sup>134</sup> Because Title III suits must be initiated by private parties, and because many private parties will be unable to avail themselves of Title III's private right of action for the reasons detailed previously, it is likely that Title III will be enforced inconsistently as between different "traffickers."<sup>135</sup> Accordingly, Title III's private right of action introduces difficulty and uncertainty into commercial relations because foreign companies which have assets in the United States are unable to accurately assess their risk of liability for "trafficking" in confiscated property.<sup>136</sup> This uncertainty is increased dramatically as a result of President Clinton's recent move to indefinitely suspend Title III's private right

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<sup>130</sup>Walter Russel Mead, *U.S. Policy in Cuba Reeks of 1962*, TIMES UNION, Nov. 29, 1996, at A21.

<sup>131</sup>*Id.*

<sup>132</sup>William E. Debler, *Cuba's Slow Crawl*, PITTSBURGH POST-GAZETTE, Oct. 20, 1996, at B1.

<sup>133</sup>142 CONG. REC. E1247-02, E1248 (daily ed. July 11, 1996) (statement of Rep. Hamilton).

<sup>134</sup>Kenneth L. Bachman et al., *Anti-Cuba Sanctions May Violate NAFTA, GATT*, NAT'L L. J., March 11, 1996, at C3 (citing General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194) [hereinafter Bachman].

<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

of action because foreign companies must now account in their risk calculus for the possibility that Title III suits may be permitted in the future.

If the WTO panel rules that Title III is in fact a breach of WTO rules, then the United States will have to declare that Title III is vital to the U.S. national security — the only means of overriding a WTO verdict — or repeal Title III's private right of action altogether.<sup>137</sup> The Clinton Administration is currently taking the position that the WTO lacks jurisdiction over Title III because Title III is not a trade issue, but rather one of national security.<sup>138</sup> However, this argument is spurious in a post cold war era, especially with the collapse of the Soviet bloc and Cuba's resulting loss of subsidies. Moreover, the Chinese government poses a greater threat to the U.S. national security than Cuba does due to its well documented human rights abuses, its unfair trade policies, and its policy of exporting dangerous arms to terrorist regimes around the world.<sup>139</sup> Nonetheless, the U.S. foreign trade policy towards Cuba is in stark contrast with that towards China. Indeed, China currently has most favored trading status with the United States.<sup>140</sup> Finally, if the United States invokes a national security defense, then it will set a dangerous precedent for other countries to ignore WTO rulings on the same pretext.<sup>141</sup> Accordingly, the effectiveness of the WTO could be seriously hampered, and the United States could lose its ability to challenge the unfair trade practices of other countries, if it ultimately decides to invoke a national security defense.<sup>142</sup>

Fortunately, on April 11, 1997, the European Union backed away from looming confrontation with the United States and agreed to suspend its legal action against the Helms-Burton Act for six months.<sup>143</sup> In return, the Clinton Administration has agreed to try to persuade Congress to amend the Act.<sup>144</sup> However, it should be noted that this latest concession may just postpone an inevitable confrontation between the United States and the European Union because the Senate Foreign Relations Committee has vowed to block any attempt to weaken the Act.<sup>145</sup>

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<sup>137</sup> Article XXI of the GATT states that a member country may take any action "it considers necessary for its national security interests." See General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

<sup>138</sup> Sanger, *supra* note 122.

<sup>139</sup> See 142 CONG. REC. S1479, S1501 (daily ed. Mar. 5, 1996) (statement of Sen. Feingold).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Gary G. Yerkey, *U.S., E.U. Approve Plan to Resolve Dispute Over Helms-Burton, Officials Say*, 14 Int'l Trade Rep. (BNA) (Apr. 16, 1997), available in WESTLAW, BNA-BTD database.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*



### B. Possible NAFTA Challenges

Title III also violates at least two of the United States' obligations under NAFTA. First, NAFTA Article 309 prohibits restrictions on the importation or exportation of goods destined to any NAFTA country that are not in accordance with Article XI of GATT.<sup>146</sup> Thus, because Title III places restrictions on the importation and exportation of goods destined to Canada and Mexico, and because it violates Article XI of GATT, the provision likewise violates Article 309 of NAFTA.<sup>147</sup>

Second, NAFTA Article 1105 states that NAFTA countries must treat "investments of investors of another [NAFTA country] ... in accordance with international law."<sup>148</sup> Thus, Title III may violate international law, and therefore NAFTA Article 1105, because the provision allows naturalized Cuban-Americans to sue Canadian and Mexican companies in U.S. courts over properties expropriated when they were still Cuban citizens.<sup>149</sup> It is a well established and universally accepted principle of international law that eligibility for compensation requires an individual to be a national of the demanding state at the time of the loss.<sup>150</sup> This point is underscored by the fact that the FCSC itself has stated that "[t]he principle of international law that eligibility for compensation requires American nationality at the time of the loss is so widely understood and universally accepted that citation of authority is scarcely necessary."<sup>151</sup>

Although the United States does not confer similar rights to U.S. citizens who are former nationals of the other thirty-eight countries in the world where there are currently outstanding property claims,<sup>152</sup> the Act's sponsors argue that the inclusion of Cuban-Americans in Title III's private right of action is necessary to accomplish the Act's foreign policy objectives because the certified claims of U.S. citizens only constitute five percent of the industrial and commercial properties in Cuba.<sup>153</sup> Thus, according to the Act's sponsors, the inclusion of Cuban-Americans will limit the scope of properties available for investment and thereby further discourage foreign investment in Cuba.<sup>154</sup> Nonetheless, Title III still violates international law and NAFTA Article 1105 because international law does not confer retroactive rights upon naturalized citizens. Moreover, the Equal Protection guarantees of the U.S. Constitution demand that other national origin groups that have outstanding property claims, such as Iranian-

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<sup>146</sup> Bachman, *supra* note 134, at C4 (citing NAFTA, art. 309).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at C3 (citing NAFTA, art. 1105(1)).

<sup>149</sup> *Id.*

<sup>150</sup> See *supra* note 71.

<sup>151</sup> *Id.*

<sup>152</sup> 142 CONG. REC. S1478, S1488 (daily ed. Mar. 5, 1996) (statement of Sen. Feingold).

<sup>153</sup> Sanchez, *supra* note 26, at 135.

<sup>154</sup> *Id.*

Americans, Chinese-Americans, and Polish-Americans, must now be given a federal right of action similar to that provided by Title III.<sup>155</sup> Thus, because the United States does not currently provide similar rights as those provided by Title III to U.S. citizens who are former nationals of the other thirty-eight countries in the world where there are currently outstanding property claims,<sup>156</sup> the U.S. court system may soon experience an influx of Equal Protection suits. Indeed, it is interesting to note that the Senate Foreign Relations Committee of the 84th Congress denied giving settlement rights to individuals who were not U.S. citizens at the time they sustained property losses in Hungary, Romania, and Bulgaria, because the extension of such eligibility would require that similar rights be given to other naturalized Americans.<sup>157</sup>

Third, Title III may also violate international law, and therefore NAFTA Article 1105, due to its extraterritorial effect. The concept of extraterritoriality denotes one country, in this case the United States, creating and applying laws to foreign individuals and corporations whose actions are legal under their domestic laws.<sup>158</sup> According to the general precepts of international law, a country may apply its own laws outside its borders if the exercise of such jurisdiction is reasonable and the specific conduct which occurs outside the state has a substantial effect within the state itself.<sup>159</sup>

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<sup>155</sup> See *Muse*, *supra* note 68, at 57. See also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“[W]hen a statute classifies by race, alienage, or national origin . . . [it is] subject to strict scrutiny and will be sustained only if [it is] suitably tailored to serve a compelling state interest.”); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (stating that the equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment).

<sup>156</sup> 142 CONG. REC. S1478, S1488 (daily ed. March 5, 1996) (statement of Sen. Dodd).

<sup>157</sup> See 142 CONG. REC. S1479 (statement of Sen. Dodd).

<sup>158</sup> See BLACK'S LAW DICTIONARY 588 (6th ed. 1990).

<sup>159</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§402-3 (1987). In order to determine whether the exercise of jurisdiction is unreasonable, the following factors must be examined:

- (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 the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
  - (d) the existence of justified expectations that might be protected or hurt by the regulation;
  - (e) the importance of the 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;
- and

However, if a state applies its laws outside its borders in an extraterritorial but reasonable manner, and the state's exercise of jurisdiction conflicts with the interests of another state, then each state must examine its interests in comparison to the interests of the other state.<sup>160</sup> If one state clearly has a greater interest in exercising jurisdiction, then the state with the greater interest should defer to the state with the lesser interest in the exercise of jurisdiction.<sup>161</sup>

Thus, the pertinent question is whether Title III's extraterritorial reach is reasonable, and if so, whether another state has a greater interest in exercising jurisdiction than does the United States. The "effects doctrine" provides that "any conduct having a direct, substantial, and unreasonably foreseeable effect on U.S. commerce is deemed to be subject to U.S. jurisdiction."<sup>162</sup> Accordingly, supporters of the Act claim that the provision's extraterritorial reach is reasonable, and therefore subject to the jurisdiction of the United States, because the conduct of trafficking has a "direct, substantial, and reasonably foreseeable effect on U.S. commerce."<sup>163</sup> Therefore, even though Title III's acts of trafficking occur entirely outside the borders of the United States, and the United States' trading partners and closest allies have strenuously objected to the provision's extraterritorial reach, it is likely that the "effects doctrine" will be applied to Title III, and the provision's extraterritorial reach will be deemed legal. Nonetheless, even if the provision's reach is deemed legal, it is still unwise for the United States to enforce the provision, because, as discussed previously, Title III's implementation has set a dangerous precedent and has hampered relations between the United States and its closest trading partners.

Finally, if a NAFTA dispute settlement panel is convened to pass judgment on Title III, and the panel rules that Title III is in fact a breach of NAFTA rules, then the United States will be forced to repeal the provision altogether, or, in the alternative, overrule the panel's findings by asserting a national security defense.<sup>164</sup> Again, if the United States decides to assert a national security defense, then the floodgates could be opened for defendants in other cases to use national security as an excuse for breaking NAFTA rules.

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(h) the likelihood of conflict with regulation by another state.

*Id.* §§ 403(2)(a)-(h).

<sup>160</sup> *See id.* § 403(3).

<sup>161</sup> *Id.*

<sup>162</sup> Christopher Wall, *Cross-Boarder Dilemma: E.U. Action over Helms-Burton Would be a Mistake*, FIN. TIMES (London), July 16, 1996, at 28.

<sup>163</sup> *Id.*

<sup>164</sup> North American Free Trade Agreement, Dec. 8, 11, 14, 17, 1992, Can.-Mex.-U.S., art. 2102, 32 I.L.M. 289, 699-700 (1993).

## VI. RECOMMENDATIONS

Because of Title III's obvious defects, the provision's private right of action should not only be postponed, it should be permanently repealed.<sup>165</sup> While President Clinton's move to indefinitely suspend Title III's private right of action is certainly a step in the right direction, it does not resolve the underlying problems of the provision. In the aftermath of President Clinton's indefinite suspension, it remains problematic that Title III does not provide an effective means to accomplish either of its objectives; that Title III's passage and enforcement has resulted in a tit-for-tat legal retaliation against the United States from its strongest trading partners; and that Title III's private right of action violates international law, the GATT, and the NAFTA. Furthermore, it is disturbing on an ethical level that the United States is determined to violate international law when it pleases, yet condemns other countries for doing so.<sup>166</sup> Indeed, the United States appears to be taking advantage of its strength to bully other countries into submission with U.S. sanctions against Cuba. Thus, it is apparent that Title III's defects can be resolved only by repealing the provision altogether.

Second, the outstanding expropriation claims of the U.S. certified claimants should be resolved through the international claims settlement procedures already in place.<sup>167</sup> That is, the President should exercise his authority to act on behalf of the U.S. certified claimants and negotiate a settlement agreement with the Cuban government.<sup>168</sup> Indeed, most U.S. certified claimants would prefer that their claims be resolved through the international claims settlement procedures already in place.<sup>169</sup> That is because the majority of the U.S. certified claimants are opposed to the Helms-Burton Act, arguing that their claims were expected to be resolved eventually by negotiations with Cuba, and that the inclusion of Cuban-Americans who were Cuban nationals at the time of confiscation in Title III's private

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<sup>165</sup>On January 7, 1997, the First Session of the 105th Congress introduced HR Bill 284, which seeks to repeal the Helms-Burton Act. *Legislative Calendar*, 14 Int'l Trade Rep. (BNA) (Jan. 15, 1997), available in WESTLAW, BNA-BTD database.

<sup>166</sup>See Thomas Byron III, *Playing by the International Rules*, LEGAL TIMES, Mar. 25, 1996, at 28 ("The U.S. government weakens its position as a moral leader, and weakens the international legal system as well, when it ignores its international obligations. International law applies to every country. Like Cuba, we ignore it at our peril.").

<sup>167</sup>For an excellent discussion concerning possible remedies in a negotiated settlement of the U.S. certified claimants' outstanding property claims, see Traviesco-Diaz, *supra* note 29, at 672-683.

<sup>168</sup>See *Dames & Moore v. Regan*, 453 U.S. 654, 681, 688 (1981) (Congress has demonstrated continuing acceptance of the President's claim settlement authority); See generally *Shanghai Power Co. v. United States*, 4 Cl. Ct. 238, 239 (Cl. Ct. 1983) (In 1979, U.S. President Carter negotiated a settlement agreement regarding outstanding claims of U.S. nationals against the People's Republic of China.).

<sup>169</sup>141 CONG. REC. S1479, S1500 (daily ed. Mar. 5, 1996) (statement of Sen. Feingold).

right of action effectively dilutes their claims.<sup>170</sup> Thus, because the Cuban government has already reached compensation agreements with other countries that had claims against it,<sup>171</sup> the United States should likewise fully explore with Cuba the possibility of working out an agreement to compensate the U.S. certified citizens.

However, it should be noted that the President probably will not negotiate a compensation agreement on behalf of the U.S. certified claimants before a democratic or transitional government is in place in Cuba. That is because the United States is usually reluctant to negotiate with countries with which it has no official diplomatic relations.<sup>172</sup> Moreover, as a practical matter, the Cuban government is at present virtually bankrupt.<sup>173</sup> Accordingly, the Cuban government probably will not be able to offer a compensation agreement to the U.S. certified claimants until either the embargo is lifted or considerably more foreign investment enters Cuba.<sup>174</sup>

Third, the outstanding property claims of Cuban-Americans who were Cuban nationals at the time of confiscation should be settled through adjudication in Cuban courts. Again, it is unlikely that the claims of Cuban-Americans will be resolved before a democratic or transitional government is in place in Cuba because current Cuban law prohibits Cuban exiles from asserting property claims in Cuban courts.<sup>175</sup> However, unlike Title III, such a policy would be in accordance with international law, and it would avoid transforming the U.S. legal system into an instrument of foreign policy.

Finally, it should be noted that the Clinton Administration has taken the position that Title III's private right of action is necessary to promote democracy within Cuba. However, such a position is inconsistent with U.S. foreign policy. As mentioned previously, the Chinese government poses a greater threat to U.S. national security than Cuba does, and China has the same human rights record as Cuba does, yet China has most favored trading status with the United States.<sup>176</sup> Indeed, the Clinton Administration has taken the position that increased trade and foreign investment will promote democracy in China.<sup>177</sup> Accordingly, if the same rationale is applied to Cuba, then Title III's objective of promoting democracy in Cuba may still

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<sup>170</sup>Wallace Letter, *supra* note 71, at S15012 ("This dramatic expansion of the claimant pool would serve as a significant disincentive for a post-Castro Cuban Government to enter into meaningful settlement negotiations with the United States given the sheer enormity of the outstanding claims and the practical impossibility of satisfying all those claims.").

<sup>171</sup>*See supra* text accompanying note 35.

<sup>172</sup>*See Mills & Mills, supra* note 71, at 141-42.

<sup>173</sup>Green, *supra* note 47.

<sup>174</sup>*See generally id.*

<sup>175</sup>*See supra* note 71.

<sup>176</sup>*Id.*

<sup>177</sup>*Id.*

be accomplished even if Title III's private right of action is permanently repealed.

#### CONCLUSION

The reality is that Title III is a bad law. It does not provide an effective means either to protect the property rights of U.S. citizens or to expedite the collapse of Castro's regime. Moreover, Title III's implementation has set a dangerous precedent and has hampered relations between the United States and its trading partners. As a result, the United States' trading partners have begun to engage in a "tit-for-tat" with the United States, which may ultimately result in U.S. citizens incurring more retribution than compensation pursuant to Title III.

Accordingly, it would be in the best interest of the United States, as well as the people of Cuba, for Congress and the President to permanently repeal Title III's private right of action. Pursuant to this policy, the outstanding expropriation claims of the U.S. certified citizens should be resolved through the international claims settlement procedures already in place, and the outstanding expropriation claims of Cuban-Americans who were Cuban nationals at the time of confiscation should be resolved through adjudication in Cuban courts. Such a policy would further the U.S. foreign policy objectives outlined in Title III.