COMMENTS

LIBERTAD or Liberty? Breaking the Law in the Name of Democracy

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I. OVERVIEW

On April 17, 2019, the Trump Administration made an unprecedented decision: to lift the suspension of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, also referred to as the Helms-Burton Act.[1] The Act, one of six statutes and

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1. *See* Michael R. Pompeo, U.S. Sec'y of State, Remarks to the Press (Apr. 17, 2019), www.state.gov/remarks-to-the-press-11; *see also* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton Act), 22 U.S.C. §§ 6021-6091 (2012). The Act is commonly referred to as the Helms-Burton Act in reference to its two principle sponsors: North Carolina Senator Jesse Helms and Indiana House Representative Dan Burton. *See also* Brian Eiselman, Comment, *Cuba Libre: A Verb? A Noun? Or a Cocktail?*, 18 SAN DIEGO INT'L L.J. 325, 327 (2017).

regulations that make up the U.S. embargo on Cuba,[2] allows any "person" to be sued in a U.S. federal court for "trafficking" confiscated property that previously belonged to U.S. nationals.[3] Since the legislation obtained congressional approval, all U.S. Presidents, including President Trump in 2017 and 2018, have made uninterrupted use of the executive power to suspend Title III enforcement in recognition of the widespread allegations that the Title's extraterritorial jurisdiction violates international law.[4] Nevertheless, Title III is not the only problematic section of the Helms-Burton Act.[5] Notably, Title IV also substantially encroaches upon international law.[6]

This Comment will analyze the various implications of the LIBERTAD Act. First, Part II provides a background relating to the circumstances leading up to Helms-Burton, as well as an introduction to the Act itself. Part II also discusses the international climate in which the Act was introduced and breaks down each of its Titles. Next, Part III details the prolonged denunciation of the Helms-Burton Act and discusses the various legal arguments made regarding its potential implications upon international law. Thereafter, Part IV assesses the implementation of the LIBERTAD Act and the viability of such arguments.

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2. *See* Helms-Burton Act, 22 U.S.C. §§ 6021-6091; *see also* 50 U.S.C. § 4305 (2015) (empowering the President to initiate and maintain economic sanctions against hostile nations); Foreign Assistance Act of 1961, 22 U.S.C. §§ 2370(a)(1)-(a)(2) (1961) (prohibiting assistance to all communist countries, including Cuba, and to any other countries that aid Cuba, and indefinitely suspending all trade with Cuba); Cuban Democracy Act, 22 U.S.C. §§ 6001-6010 (1992) (forbidding U.S. nationals from traveling to Cuba, U.S. nationals from sending remittances to Cuba, and foreign subsidiaries of U.S. entities from trading with Cuba); Cuba Assets Control Regulations, 31 C.F.R. § 515 (1963) (freezing all Cuban assets in the United States and mandating the U.S. Treasury to regulate all commercial interactions with Cuba, including authorized travel); Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. §§ 7201-7211 (2000) (first piece of legislation relaxing the enforcement of the embargo and regulating permitted trade of agricultural and medical supplies).

3. *See* Helms-Burton Act, 22 U.S.C. §§ 6021-6091.

4. Pompeo, *supra* note 1; Joan Foas, *Spain Rejects Possible Lawsuits Against Foreign Firms in Cuba*, REUTERS (Apr. 3, 2019, 1:24 PM), https://af.reuters.com/article/worldNews/idAFKCN1RF2CX.

5. *See* U.N. Secretary-General, *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, U.N. Doc. A/73/85 (Aug. 29, 2018), at 8-158 [hereinafter, *Necessity*]; *see also* Eiselman, *supra* note 1, at 333.

6. *See Necessity*, *supra* note 5; *see also* Eiselman, *supra* note 1, at 333.

II. THE BACKGROUND: WELCOME TO CUBA, MAYBE . . .

A. The Road to LIBERTAD

Relations between the United States and Cuba have been plagued with suspicion and hostility since 1959, the year Fidel Castro overthrew the regime of Fulgencio Batista.[7] Under Batista, due to various trade agreements, the United States enjoyed substantial control over the Cuban economy.[8] Likewise, when Castro overthrew the U.S.-backed regime, he was determined to assert Cuba's independence from the United States; however, in doing so, Castro quickly aligned with the Soviet Union.[9] With Cold War tensions driving American foreign policy, Cuban events such as the 1959 agrarian reform, increased taxes on U.S. imports, and the 1960 trade agreement with the Soviet Union quickly embittered Washington.[10] The U.S response, threatening to decrease imports, was regarded by Castro as an act of economic war.[11] In retaliation, the communist regime nationalized all property owned by United States.[12]

By this time, an intense anti-Castro movement had developed in America; accordingly, in 1961, President Eisenhower ended diplomatic relations with Cuba and instituted a ban on nearly all U.S. exports to Cuba.[13] President Kennedy later expanded the ban into a full economic embargo that included freezing all Cuban assets in the United States and stringent travel restrictions.[14]

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7. *See* PATRICK J. HANEY & WALT VANDERBUSH, THE CUBAN EMBARGO: DOMESTIC POLITICS OF AMERICAN FOREIGN POLICY 13-16 (2005).

8. *Id.*

9. *Id.* at 13-16; *see also* William Leogrande & Julie Thomas, *Cuba's Quest for Economic Independence*, 34 J. LATIN AM. STUDY 325, 326-27 (2002).

10. *See* Gary Prevost, *Fidel Castro and the Cuban Revolution*, 24 HEADWATERS: FAC. J. C. SAINT JOHN'S U. 19, 22-26 (2007); *see also* Leogrande & Thomas, *supra* note 9, at 331-32.

11. *See* HANEY & VANDERBUSH, *supra* note 7, at 13-16.

12. *Id.* at 15. Contemporary multilateral agreements such as the Energy Charter Treaty, NAFTA, the European Convention on Human Rights, and the World Bank Guidelines on the Treatment of Foreign Direct Investment all recognize that a sovereign State is entitled to nationalize or expropriate foreign assets, including foreign investments for the public interest. That being said, customary international law emphasizes four prerequisites for a lawful expropriation: (1) there must be a public purpose for the taking; (2) it must be done in accordance with due process; (3) the law must be neutral on its face; and (4) there must be just compensation. It is important to note, expropriation itself is not illegal; however, where it does not meet the requirements it may be illegal. GUIGUO WANG, INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE 391-92 (2015). In the current instance, Fidel Castro failed to provide any compensation to the property owners of the appropriated property, thus lending to the U.S. position that such property was "illegally confiscated." Prevost, *supra* note 10, at 22-26.

13. *See* HANEY & VANDERBUSH, *supra* note 7, at 16.

14. *Id.*

Relations further decayed over decades as Congress incrementally added a number of sanctions against Cuba; the escalating conflict reached its pinnacle on February 24, 1996, when the Cuban Air Force shot down two American commercial planes, killing four innocents.[15] Feeling that this event compelled a draconian response,[16] President Clinton signed the Helms-Burton Act into law, despite domestic concerns regarding the legislation's international implications.[17] Accordingly, nearly twelve administrations have pursued policies aimed at economically and diplomatically isolating Cuba; as such, the Trump Administration's 2019 decision seems perfectly aligned with sixty years worth of tradition.[18]

B. Deconstructing Helms-Burton

While at first glance the Helms-Burton Act may resemble any other legislation regarding American foreign policy, upon closer inspection, it reveals itself as a multilateral mandate to economically and diplomatically isolate Cuba.[19] The Act is composed of four titles and its stated purposes are to put increased economic pressure on the Castro regime, encourage internationally supervised "free and fair democratic elections in Cuba," develop a policy framework for furnishing aid to a transition or democratically elected government, and protect the property rights of Americans abroad.[20]

Title I of the Act aims, among other things, to isolate Cuba from all international commerce.[21] To this end, it demands that the President internationally promote the embargo "and should instruct the United States Permanent Representative to the United Nations to propose and seek within the Security Council, a mandatory international embargo."[22] Further, Title I requires the President to enforce the economic embargo of Cuba by sanctioning any countries assisting[23] Cuba, withhold foreign

15. Eiselman, *supra* note 1, at 327-28.

16. *See* HANEY & VANDERBUSH, *supra* note 7, at 105 ("Even Richard Nuccio, then the president's Special Advisor for Cuba Policy, admitted that 'President Castro created a veto-proof majority for the Helms-Burton Bill.'").

17. Eiselman, *supra* note 1, at 328; *see also* HANEY & VANDERBUSH, *supra* note 7, at 102.

18. HANEY & VANDERBUSH, *supra* note 7, at 95.

19. *See* Helms-Burton Act, 22 U.S.C. §§ 6021-6091 (2012).

20. *Id.* § 6022.

21. *See id.* § 6031.

22. *Id.*

23. Assistance to Cuba is defined as monetary aid including loans, leases, concessional sales, grants, reduced tariffs, "an exchange, reduction, or forgiveness" of Cuban debt in exchange for an interest in any property, or investment backed by the Cuban Government. *See* Cuban Democracy Act, 22 U.S.C. § 6003 (1992).

assistance from countries supporting Cuba's nuclear capabilities, and oppose Cuban membership in international financial institutions[24] as well as Cuban participation in the Organization of American States (OAS).[25]

Title II outlines the termination of the economic embargo.[26] Its provisions define the future of U.S. policy, the requirements for the discontinuation of the embargo, and the factors for determining "a transition government and democratically elected government in Cuba."[27] Termination prerequisites include the legalization of political activity, the allowance of investigations by international human rights organizations, and the return of all nationalized property to U.S. citizens, or for the compensation thereof.[28]

Title III, the most controversial provision, deals with U.S. property interests in Cuba.[29] Specifically, 22 U.S.C. § 6082 holds any person "trafficking"[30] property confiscated by the Cuban Government before, on, or after the implementation of the Act, "liable to any United States national who owns the claim to such property."[31] The term property is defined

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24. Helms-Burton Act, 22 U.S.C. § 6041(ii)(b). For this reason, Cuba is currently barred from membership of the World Bank, International Finance Corporation (IFC), International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA), the International Centre for the Settlement of Investment Disputes (ICSID), and other multilateral institutions. *See* AMNESTY INT'L, AMR 25/007/2009, THE US EMBARGO ON CUBA: ITS IMPACT ON ECONOMIC & SOCIAL RIGHTS (2009), https://www.amnestyusa.org/pdfs/amr25007 2009eng.pdf.

25. Helms-Burton Act, 22 U.S.C. § 6035. Under the Obama Administration, the United States consented to the revocation of a 1962 resolution that expelled the Cuban government due to its Soviet ties during the Cold War. *See* Carlos Alberto Montaner, *The OAS Should Not Have Lifted the 1962 Suspension of Cuba's Membership*, AM. Q. (2009), https://www.americasquarterly.org/carlos-alberto-montaner-no-cuba.

26. *See* Helms-Burton Act, 22 U.S.C. §§ 6062-6066.

27. *Id.*

28. *Id.* §§ 6065, 6067.

29. *See id.* § 6023(13).

30. The definition of "trafficking" for purposes of the Helms-Burton Act is very broad.

> A person "traffics" in confiscated property if that person knowingly and intentionally—
> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
> (iii) causes, directs, participates in, or profits from, trafficking (as described . . .) by another person, or otherwise engages in trafficking (as described . . .) through another person, without the authorization of any United States national who holds a claim to the property.

See id. § 6023(13).

31. *Id.* § 6082(a)(1), (a)(4).

expansively; it includes "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," with the sole exception of residential property.[32] Further, Title III provides a formula for calculating damages.[33] Persons found liable for trafficking confiscated property will be responsible for court costs and attorney's fees plus triple the highest estimated value of the expropriated property plus interest, irrespective of the amount of benefit derived by the person transacting with the relevant Cuban property.[34] The Title III cause of action is available to any claimant who is currently a U.S. national, whether a U.S. citizen at the time of confiscation or not, and whose amount in controversy is greater than $50,000, "exclusive of interest, costs, and attorney's fees."[35] Additionally, Title III explicitly proscribes judicial application of the Act of State Doctrine.[36]

Finally, Title IV of the LIBERTAD Act requires the Secretary of State to deny a visa to a foreign national trafficking confiscated property.[37] The Act further requires that any corporate officer, principal, or shareholder who maintains a controlling interest in an entity that is trafficking such property to also be excluded from entering the United States.[38] Moreover, Title IV extends the exclusion or expulsion of the United States from the individual or officer to his or her respective family members as well.[39]

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32. *Id.* § 6023(12).

33. *See id.* § 6082(a)(1)(A)-(C).

34. *See id.* § 6082(a)(1)(C) ("Damages for which a person is liable . . . are money damages in an amount equal to the sum of—(i) the amount determined under paragraph (1)(A)(ii), and (ii) 3 times the amount determined applicable under paragraph (1)(A)(i)."). Section 6082 states the following:

> (i) the amount which is the greater of—
> (I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission . . . plus interest;
> (II) the amount determined [by a court appointed surveyor] plus interest; or
> (III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and
> (ii) court costs and reasonable attorneys' fees.

Id.§ 6082(a)(1)(A).

35. *Id.* § 6023(15).

36. *Id.* § 6082(a)(6). The Act of State Doctrine allows courts to decline adjudication of a case where the acts at issue occurred within another sovereign state's territory. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 400-01, 406, 420-21 (1964). Arguably allowing Congress to expressly limit the judiciary's minimal role in international relations has separation-of-powers implications; however, such arguments shall not be addressed in this Comment.

37. *See* Helms-Burton Act, 22 U.S.C. § 6091.

38. *Id.*

39. *Id.*

III. IT'S U.S. AGAINST THE WORLD

The majority of international law, whether customary[40] or constituted by agreement, derives from general principles common to the major legal systems of the world.[41] The eighteenth century "law of nations" developed into the nineteenth century doctrines, which are modernly regarded as "international law."[42] This globalization contributed to a perception of common inter-state interests and the development of international organizations, such as the United Nations, which in turn impacted policy choices so as to foster mutual accommodation.[43] To this end, the LIBERTAD Act generated significant foreign protest upon enactment.[44] Decades later, adversaries to the legislation continue to object that the Act exercises extraterritorial jurisdiction in violation of commonly accepted principles of international law.[45] The embroilment generally focuses on the United States' legal obligations as established under customary international law, international agreements, and domestic law.[46]

On August 29, 2018, the Secretary-General of the United Nations released a report reproducing the replies of Governments, organs, and agencies of the United Nations in response to the U.S. embargo on Cuba.[47] The report contained detailed statements by 163 governments and thirty-four organs and agencies of the U.N. system, respectively condemning the

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40. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 (AM. LAW INST. 1987). Customary law is established by the practice of states in their relations with one another following from a sense of legal obligation. *Id.*

41. *Id.* § 102(1).

42. MORTIMER SELLERS, REPUBLICAN PRINCIPLES IN INTERNATIONAL LAW, THE FUNDAMENTAL REQUIREMENTS OF A JUST WORLD ORDER 30 (2006); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 101 ("A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.").

43. *See* SELLERS, *supra* note 42, at 45; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 101.

44. *See* Steven Lee Myers, *Clinton Troubleshooter Discovers Big Trouble from Allies on Cuba*, N.Y. TIMES, Oct. 23, 1996, at A1; *see also* Anneke van Dok-van Weele, *U.S. Should Quit Bossing Its Friends*, INT'L HERALD TRIB. (July 1, 1997), https://www.nytimes.com/1997/07/01/opinion/IHT-us-should-quit-bossing-its-friends.html. Netherlands' minister for foreign trade called the Helms-Burton Act an unacceptable tragedy. Dok-van Weele, *supra*; *see, e.g.*, John M Goshko, *3 Allies Join Call Against Cuba Embargo: EU Unites to Protest Helms-Burton Law*, WASH. POST, Nov. 13, 1996, at A19 (discussing international reaction to Helms-Burton); *see also* Taylor J. Michael, *The United States' Prohibition on Foreign Direct Investment in Cuba—Enough Already*, 8 LAW & BUS. REV. AM. 111, 122-24 (2002) (same).

45. *See* sources cited *supra* note 44.

46. *See Necessity, supra* note 5.

47. *Id.*

embargo as unlawful.[48] Then on November 18, 2018, during its seventy-third session, the United Nations General Assembly adopted a resolution titled "Necessity of Ending the Economic, Commercial, and Financial Embargo Imposed by the United States of America Against Cuba."[49]

The resolution, approved by a vote of 189-2,[50] reiterated that the United Nations continues to oppose the blockade against Cuba and declared that the Assembly has provisionally included a similar resolution in the agenda of its seventy-fourth session.[51] Prior to adopting the twenty-seventh consecutive resolution denouncing the embargo, the Assembly concluded its debate on the matter, in which over thirty delegates spoke before the General Assembly to urge the United States to terminate the embargo as it impinged upon international law.[52]

The United Nations is neither the only international organization that has spoken out nor the only forum through which foreign governments have rejected the promulgation and application of the United States' embargo on Cuba.[53] Regardless of the delegate, year, or forum, U.N. Member States, organs, and agencies all maintain that the LIBERTAD Act's extraterritorial reach violates principles of international law, including the sovereign equality of States, nonintervention and noninterference in another country's foreign affairs, and the freedom of international trade and navigation.[54]

In addition to claims that the Helms-Burton Act violates customary international law, various countries and commercial entities have argued

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48. *Id.* at 8-9 (describing the embargo as a secondary boycott, an extraterritorial international policy mandate, "a flagrant, systematic and widespread violation," coercive and immoral, "a criminal act," "a genocidal embargo that . . . not only violates the sovereignty of that State but also the sovereignty of all other States," etc.).

49. G.A. Res. 73/8 (Nov. 1, 2018).

50. Press Release, General Assembly, Amid Demands for Ending Unilateral Coercive Measures, Speakers in General Assembly Urge United States to Repeal Embargo Against Cuba, U.N. Press Release GA/12085 (Oct. 31, 2018) [hereinafter Unilateral Coercive Measures]. Only the United States and Israel voted against the resolution; there were no abstentions. *See id.*

51. G.A. Res. 73/8, *supra* note 49.

52. Unilateral Coercive Measures, *supra* note 50.

53. Eiselman, *supra* note 1, at 334-35, 334 n.58 (mentioning condemnations made by the European Union, Organization of American States, United Nations, and the governments of a variety of American allies); *see also* OAS Annual Report of the Inter-American Juridical Committee to the General Assembly 38-39, Aug. 29, 1996 [hereinafter Inter-American] (citing opinion of the Inter-American Juridical Committee elaborating on the recently passed resolution, "Freedom of Trade and Investment in the Hemisphere," which enumerates the ways in which the Helms-Burton Act "does not conform to international law").

54. G.A. Res. 73/8, *supra* note 49; *see also* Eiselman, *supra* note 1, at 333 ("International opposition to the Helms-Burton Act primarily stems from the perceived far-reaching extraterritorial application of U.S. law that interferes with sovereign trade rights.").

that the Act violates various international agreements, such as the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT), which created the World Trade Organization (WTO).[55] Some of the United States' disgruntled trading partners, such as Canada, Mexico, and the European Union (EU), have implemented blocking or retaliatory legislation.[56] The LIBERTAD Act's incompatibility with such agreements has not only resulted in international condemnation but also in a domestic debate over the legal status of international agreements.[57] Moreover, Helms-Burton's express circumvention of the Act of State Doctrine has raised further debate over the compatibility of domestic law and the effective denial of the judiciary's limited function in international relations.[58]

IV. LEGAL OR ILLEGAL? DO WE EVEN CARE?

The U.S. embargo on Cuba ignited an international controversy upon enactment that has endured decades.[59] The international community had been denouncing for years prior to its passing, and the passing of the LIBERTAD Act only added fuel to the fire.[60] Many feel that Helms-Burton completely overstepped U.S. authority, arguing the Act's extraterritoriality breaches customary international law, international agreements, as well as domestic law. But how viable are such allegations, and do they really matter?[61]

A. Customary International Law

Customary law, as one recognized source of international law, functions as substantive U.S. law.[62] In *Murray v. The Schooner Charming Betsy*, Supreme Court Chief Justice John Marshall developed a principle, known as the "The Charming Betsy Principle," regarding customary

55. *See* G.A. Res. 73/8, *supra* note 49; *see also* Eiselman, *supra* note 1, at 336.
56. *See* Eiselman, *supra* note 1, at 334 n.49.
57. *See id.* at 344 n.106.
58. *See* Helms-Burton Act, 22 U.S.C. § 6082(a)(6) (2012).
59. *See* G.A. Res. 73/8, *supra* note 49.
60. *See id.*
61. *See id.*
62. The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §§ 111(1), cmt. b (AM. LAW INST. 1987) (recognizing customary law as federal law); *see also* CURTIS BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 143-45 (2d ed. 2015) (discussing cases in which courts have treated the law of the nations as part of common law). The Supreme Court of the United States has held that "international law is part of our law" and that in searching for reliable evidence defining the law "resort must be had to the customs and usages of civilized [sic] nations." BRADLEY, *supra*, at 145.

norms of international law as a canon of statutory construction.[63] The Charming Betsy Principle maintains that, whenever possible, domestic legislation should be construed in such a manner so as not to conflict with international law.[64] Based on this principle, one could argue that the LIBERTAD Act does not expressly forbid trade with Cuba and thus does not unlawfully regulate the acts of other sovereign nations in violation of customary international law.[65] At the same time, The Charming Betsy Principle is an American principle; foreign statutory interpretations are unlikely to be so kind.[66] To this end, critics label the Helms-Burton Act as a secondary boycott,[67] arguing that the legislation does not just forbid trade with or investment in Cuba domestically (a primary boycott) but also coerces foreigners into doing the same through a "U.S. or them" trade ultimatum.[68]

Nevertheless, modern courts have not found international law to be a persuasive authority.[69] Specifically, in cases where a piece of legislation does conflict with international law, courts have often held that upper-level executive officers have the domestic legal authority to violate customary international law.[70] Accordingly, it appears completely inconsequential whether we employ The Charming Betsy Principle because President Trump is legally entitled to violate customary law in his faithful execution of Title III, so why force it?[71]

With that in mind, it is then interesting to note that Title III of the Helms-Burton Act expressly relies upon the authority of customary

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63. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 406 (AM. LAW INST. 2018) (codifying The Charming Betsy Principle). The Restatement Fourth has only partially replaced the Restatement Third.

64. *See The Schooner Charming Betsy*, 6 U.S. at 118; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 406 (codifying The Charming Betsy Principle).

65. *See The Schooner Charming Betsy*, 6 U.S. at 118.

66. *See id.*

67. Malcolm Rifkind, *Punishing the Wrong Party. (Secondary Boycotts Like Those the United States Is Attempting to Impose on Cuba and Is Considering Imposing on Iran and Libya Do Not Work)*, WASH. POST, May 27, 1996, at A23; *see also* G.A. Res. 73/8, *supra* note 49; Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. 625, 626 (2008) (defining a secondary boycott); sources cited *supra* note 44.

68. *See* Ryngaert, *supra* note 67, at 626.

69. *See* BRADLEY, *supra* note 62, at 153.

70. *See id.*; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 406 (AM. LAW INST. 2018).

71. *See id.*

international law, namely, the effects doctrine.[72] If we are to understand that domestic legal authority supersedes international law, then isn't this justification a moot point?[73] Employing this rationale, one might conclude that the Helms-Burton Act truly is not legislation for American citizens, but for foreign nationals.[74] In other words, in order to ensure that a foreign national would obey domestic legislation, Congress had no choice but to rely upon customary international law.[75] This rationale is further supported by the language of the provision.[76]

While the effects doctrine includes provisions allowing for extraterritorial adjudication,[77] Congress employed language specifically referencing a State's sovereign rights to pass laws regulating "conduct outside its territory that has or is intended to have substantial effect within its territory."[78] This seems to indicate that the principle purpose of Title III is not to stimulate compensatory litigation but rather to deter foreigners from transacting with Cuba for fear of pecuniary liability.[79] To the same point, if the aim truly was just to remunerate U.S. nationals, it seems excessive to hold traffickers, that is any individual receiving "some" benefit from confiscated property, liable for triple the highest possible value of the land, plus interest, court costs, and attorney's fees.[80] Additionally, Congress also seems to have forgotten that the effects doctrine is contingent upon reasonableness.[81]

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72. Helms-Burton Act, 22 U.S.C. § 6081(9) (2012); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 409, cmt. b, reporters' note 2 (AM. LAW INST. 2018) (detailing the evolution of the effects doctrine).

73. *See* BRADLEY, *supra* note 62, at 153-54; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 406 cmt. b.

74. *See* BRADLEY, *supra* note 62, at 153-54; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 406, cmt. b.

75. *See* Helms-Burton Act, 22 U.S.C. § 6081(9).

76. *See id.*

77. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 421 ("A state may exercise jurisdiction through its courts to adjudicate . . . if . . . the person, whether natural or juridical had carried on outside the state an activity that had substantial, direct, and foreseeable effect within the state . . . or . . . the subject of adjudication is owned . . . in the state . . . ."); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 409 (discussing instances in which other countries have similarly invoked the effects doctrine).

78. Helms-Burton Act, 22 U.S.C. § 6081(9).

79. *See id.* § 6081.

80. *See id.* § 6082(a)(1)(A), (a)(1)(C) (discussion on damages).

81. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 403 (relevant law in 1996 when the Helms-Burton Act was put into place); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 405, cmt. a (discussing reasonableness as a principle for "interpreting the geographic scope of federal law . . . [that] accounts for the legitimate sovereign interests of other nations").

Under the effects doctrine, an interference with the sovereign authority of foreign states may be reasonable where certain factors are met.[82] In the case of the LIBERTAD Act, it remains unclear that *any* of the requisite reasonableness factors are met.[83] First, the "trafficking" of confiscated property, as regulated under Title III, occurs entirely beyond the territorial bounds of the United States and thus lacks any territorial link between the interfering State and the conduct being regulated.[84] Second, most traffickers are likely to be foreign nationals who, based on the Act's definition of "trafficking," have received *some* benefit from property confiscated approximately sixty years ago and thus lack the requisite minimum contacts for personal jurisdiction.[85] Third, the Helms-Burton Act is unparalleled such that the extent to which other States regulate the "trafficking" of confiscated U.S. property is rather nonexistent, especially considering that many foreigners partake in the regulated activity.[86] Fourth, foreign States' justified expectations, regarding their sovereign rights to establish the capacity in which they interact with Cuba, "might be hurt" by the extraterritorial regulation of trafficking.[87] Fifth, the unilaterality of the Helms-Burton Act and the international controversy surrounding it indicate that the regulation is of very little to no importance to the international system.[88] Sixth, threatening legal liability as a means of regulating the conduct of foreign nations is anything but consistent with international legal traditions.[89] Seventh, Title III deals with the trafficking of wrongly confiscated property that belongs to a U.S. national.[90] Unless we argue that a foreign country is interested in the nonregulation of the activity, "the extent to which another state may have an interest in regulating the activity" is tenuous at best.[91] Finally the likelihood of conflict with another State's regulation of "trafficking" is minimal.[92]

Based on these factors, the Title III interference with the sovereign authority of foreign states is unquestionably not reasonable.[93] In other

82. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 403.
83. *Id.* (enumerating factors relevant to determining reasonableness). The few factors which are "met" are those which indicate unreasonable behavior. *See id.*
84. *Id.* § 403(a).
85. *Id.* § 403(b).
86. *See id.* § 403(c).
87. *See id.* § 403(d).
88. *See id.* § 403(e).
89. *See id.* § 403(f).
90. Helms-Burton Act, 22 U.S.C. § 6081 (2012).
91. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 403(g).
92. *See id.* § 403(h).
93. *See, e.g.*, *id.* § 403.

words, Title III lacks any potential support afforded by the effects doctrine.[94] To this end, the United States is unreasonably regulating extraterritorial conduct in clear violation of customary international law.[95] While such a finding may not have ramifications on the basis of customary international law, it does breach numerous international legal obligations, as well as domestic law.[96]

B. Jus Cogens

Arguably the most important source of international law are the peremptory norms of international law, otherwise known as *jus cogens*.[97] The doctrine of international *jus cogens* generally maintains that States are obliged to respect certain deeply rooted fundamental principles regarding international law.[98] Peremptory norm status is reserved for the most fundamental rules of international law as agreed upon by the international community.[99] Examples of such norms include the right to self-determination, prohibition of forced territorial acquisition, and the prohibition of human rights violations.[100] Rules of international law reflecting such peremptory norms are binding on all States, cannot be altered unless a subsequent norm of the same standard is established, and are hierarchically superior to all other rules of law.[101]

One *jus cogen* norm is the right to self-determination of peoples.[102] Generally speaking, this norm is referring to the modern concept of popular sovereignty.[103] This concept originally grew out of the assumption that people have the right to freedom and equality on an individual level

94. *See, e.g.*, *id.*

95. *Id.*

96. *See* Ryngaert, *supra* note 67, at 626. Secondary boycotts have been outlawed domestically for decades, that is until August 2018 when the federal anti-boycott laws were repealed. However, its repeal does not counteract the fact that between 1996 and 2018, the United States was acting in breach of its own federal statute. *See* Export Administration Act of 1977, 50 U.S.C.A. § 4623, *repealed by* Pub. L. No. 115-232, div. A, tit. XVII, § 1766(a), 132 Stat. 2232 (2018); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 443, cmt. a, f, reporters' notes 1, 2 (discussing the Act of State Doctrine and domestic law ramifications).

97. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102.

98. *See id.* § 102, cmt. k, *l*.

99. *See id.*

100. *See Principles of Public International Law*, DIAKONIA, https://www.diakonia.se/en/IHL/The-Law/International-Law1/Principles/ (last visited Sept. 29, 2019).

101. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102, cmt. k, *l*; *see also* Thomas Kleinlein, *Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies*, 46 NETH. Y.B. INT'L L. 173 (2015).

102 *See* SELLERS, *supra* note 42, at 10.

103. *See id.* at 151, 175.

and on a national level.[104] The concept of sovereignty entered the lexicon of international law in the early seventeenth century and has been generally understood to mean free from any other human will.[105] Further, the sovereign independence and equality of States denotes the freedom and equality of governments.[106] In other words, this means nations are not sovereign when subject to the will of any other person or State.[107]

With this in mind, the Helms-Burton Act appears to be violating a peremptory norm of international law.[108] The LIBERTAD Act coerces foreign nationals into adhering with domestic law by way of a trade ultimatum and potential pecuniary liability for those who fail to choose "correctly."[109] The United States has absolutely no right to, directly or indirectly, tell other sovereign nations who they make transact with and in what capacity.[110] Such an international mandate invariably contradicts the sovereign independence and equality of States.[111]

This brings us back to the big "So what?" Well, unlike customary international law, the violation of *jus cogens* rules is unconstitutional and carries repercussions.[112] On the international level, these violations have resulted in retaliatory legislation.[113] To elaborate, the violation of *jus cogens* rules gives rise to *erga omnes* obligations.[114] *Erga omnes* is a Latin concept that translates as "towards all"; in other words, when fundamental principles of international law are violated, all States have the right to take action.[115] It is well established that Title III caused an international uproar.[116] Eventually, these general, vocal, and international objections

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104. *Id.* at 10 ("The concept of self-determination rested from the beginning on two related assumptions: first, that all *people* everywhere are free and equal individuals . . . and that all *peoples* everywhere should constitute free and independent states . . . .").

105. *Id.* at 10-11.

106. *Id.* at 13.

107. *Id.*

108. *See id.*

109. *See id*; *see also* Rifkind, *supra* note 67; *see also* G.A. Res. 73/8, *supra* note 49; Ryngaert, *supra* note 67, at 626 (defining a secondary boycott); sources cited *supra* note 44.

110. *See* SELLERS, *supra* note 42, at 13; Rifkind, *supra* note 67; *see also* Ryngaert, *supra* note 67, at 656.

111. *See* SELLERS, *supra* note 42, at 13; Rifkind, *supra* note 67; *see also* Ryngaert, *supra* note 67, at 656.

112. *See* Michael Byers, *Conceptualising the Relationship Between* Jus Cogens *and* Erga Omnes *Rules*, 66 NORDIC J. INT'L L. 211, 219-20 (1997).

113. *Id.* at 221-22.

114. *See id.* at 229.

115. *Id.*

116. *See* Council Regulation 2271/96, 1996, O.J. (L 309) (EC), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996R2271 [hereinafter Council Regulation]; *see also* Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29, s. 7, para. 1 (Can.); Ley de Protección

transformed into concrete reactive measures, and rightfully so based on the concept of *erga omnes* obligations.[117] Specifically, in 1996, shortly after the enactment of the LIBERTAD Act, the European Union, Canada, and Mexico each enacted blocking legislation measures.[118]

The Council of the European Union quickly passed legislation to counteract Helms-Burton.[119] The Regulation declares the LIBERTAD Act in violation of international law such that any compliance with the U.S. legislation is explicitly illegal within the EU.[120] Further, the Regulation allows Title III defendants to countersue U.S. nationals for full recovery in European Courts.[121] Similarly, Canada amended the Foreign Extraterritorial Measures Act (FEMA) allowing itself to block U.S. judgments made in respect of the Helms-Burton Act.[122] Amongst other things, FEMA prohibits compliance with a foreign law or discovery request,[123] imposes a $10,000 fine and/or imprisonment of up to five years for such compliance,[124] and allows Canadian nationals to countersue the U.S. Title III plaintiffs in Canadian courts.[125] Additionally, the Mexican Senate passed the "Law on Protection of Trade and Foreign Investments that Violate International Law."[126] Mexico's legislation prohibits citizens from cooperating with foreign authorities that are attempting to enforce extraterritorial legislation[127] and then requires the citizens to report injuries[128] under the threat of various civil penalties.[129] Finally, the Mexican Act also allows Mexican nationals to countersue U.S. nationals for full recovery in Mexican courts.[130]

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al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional [LPCINECDI] [Law on Protection of Trade and Foreign Investments that Violate International Law], art. 1, Diario Oficial de La Federación [DOF] 23-10-1996, Últimas Reformas DOF 09-04-2012 (Mex.).

117. *See* sources cited *supra* note 116.

118. *See* sources cited *supra* note 116.

119. Council Regulation, *supra* note 116.

120. *Id.* pmbl., art. 5, ¶ 1.

121. *Id.* art. 6, ¶¶ 1-2.

122. R.S.C. 1985, c. F-29, s. 7.1 ("Any judgement given under the law of the United States entitled Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 shall not be recognized or enforceable in any manner in Canada.").

123. *Id.* s. 8.

124. *Id.* s. 7, par. 1.

125. *Id.* s. 9.

126. LPCINECDI, DOF 23-10-1996, Últimas Reformas DOF 09-04-2012 (Mex.).

127. *Id.* art. 2.

128. *Id.* art. 3.

129. *Id.* art. 9.

130. *Id.* art. 6.

C. International Legal Obligations

Treaties are another source of international law by which the United States is bound.[131] The United States has a unique perspective on international agreements.[132] While most countries and international organizations use the term treaty as all-encompassing,[133] U.S. law differentiates amongst international agreements, executive agreements, and Article II treaties.[134] Further, U.S. law differentiates between self-executing and nonself-executing treaties.[135] A self-executing treaty is one that becomes judicially enforceable upon ratification; meanwhile, a nonself-executing treaty only becomes judicially enforceable through the implementation of legislation.[136]

Under Article VI of the U.S. Constitution, all treaties are the law of the land; nevertheless, treaty provisions are only given effect as federal law in domestic courts where they are self-executing or if they have been implemented by an act.[137] In other words, self-executing treaty provisions and those provisions of a nonself-executing treaty, which have been specifically implemented, would prevail in a domestic court over prior, inconsistent legislation.[138] That being said, even nonself-executing treaties

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131. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 303 (AM. LAW INST.1987). Under international law, the term "treaties" encompasses all bilateral and multilateral agreements. Under U.S. law, the term "treaties" generally refers to Article II treaties, which are entered into by the United States President and ratified by two-thirds of the Senate. *Id.*

132. *Id.*

133. Frederic Kirgis, *International Agreements and U.S. Law*, 2 AM. SOC'Y INT'L L. INSIGHTS (May 27, 1997), https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law ("Under international law a "treaty" is any international agreement concluded between states or other entities with international personality . . . if the agreement is intended to have legal effect.").

134. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 303. Under international law, the term "treaties" encompasses all bilateral and multilateral agreements. Under U.S. law, the term "treaties" generally refers to Article II treaties, which are entered into by the United States President and ratified by two-thirds of the Senate. *Id.*

135. *Id.*

136. *See* Kirgis, *supra* note 133 (noting that some provisions in an agreement may be self-executing, while other provisions of the same agreement may not be); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §§ 301-303. A treaty could be identified as either self-executing or nonself-executing by looking to various indicators, including statements that are made by Congress or the Executive regarding the treaty, language of the treaty, or if the treaty deals with a matter within the exclusive law-making power of Congress thereby indicating that Congress must create implementing legislation.

137. U.S. CONST. art. VI, cl. 2; *see* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 310 (AM. LAW INST. 2018).

138. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §§ 111(3), 115. An act of Congress and a self-executing treaty are of equal status under domestic law; in the case of any inconsistencies, the later-in-time prevails. *Id.*

have indirect effects in U.S. courts.[139] While domestic law technically allows Congress to override a preexisting international agreement, to do so would not excuse the United States from its duties to the international community such that Congress would be explicitly placing the United States in breach of its obligations.[140] To this end, the judiciary has been very hesitant to find that any domestic legislation actually intends to override a treaty provision.[141] Through applying the United States' law, as it relates to international agreements, it becomes quite clear that the Act does infringe upon U.S. international legal obligations.[142]

1. NAFTA

The North American Free Trade Agreement (NAFTA) is a congressional-executive agreement implemented in the United States by domestic legislation.[143] In other words, NAFTA is a legally binding treaty, which obligates the United States in its relations with Canada and Mexico.[144] NAFTA entered into force in 1994 to promote free trade principles amongst the nations.[145] Commentators have postulated numerous ways in which the Helms-Burton Act breaches the letter and/or the spirit of NAFTA.[146] Article 1105.1 of NAFTA states that each State must provide foreign investors "treatment in accordance with international law, including fair and equitable treatment and full protection and

139. *Id.* § 321 cmt. a.

140. *Id.* § 321 ("[T]he doctrine of *pacta sunt servanda*, which lies at the core of the law of international agreements and is perhaps the most important principle of international law . . . . includes the implication that international obligations survive restrictions imposed by domestic law.").

141. *Id.* § 115, reporter's cmt. (a).

142. Eiselman, *supra* note 1, at 333 n.52. The United States, which is bound by the U.N. Charter, is in clear violation of Article 2(1) of the U.N. Charter. Further, the United States is a member of the Organization of the American States (OAS). Article 18 of the OAS Charter, by which the United States is bound, clearly prohibits a member state from exercising extraterritorial prescriptive jurisdiction and interfering in another State's internal affairs. The United States further violates the Article 35 of the OAS Charter where the embargo way effectively obliterates any possibility of economic development in the State of Cuba. *Id.*

143. *Renegotiation of North American Free Trade Agreement (NAFTA): What Actions Do Not Require Congressional Approval?*, CRS REP. & ANALYSIS (Jan. 26, 2017, 3:10 PM), https://fas.org/sgp/crs/misc/re-nafta.pdf.

144. Natalie Maniaci, *The Helms-Burton Act: Is the U.S. Shooting Itself in the Foot?*, 35 SAN DIEGO L. REV. 897, 940-41 (1998).

145. *Id.*

146. Kenneth Bachman, *Anti-Cuba Sanctions May Violate NAFTA, GATT*, 18(28) NAT'L L.J., Mar. 11, 1996, at C3.

security."[147] Thus, any challenges to the LIBERTAD Act that are based on asserted breaches of international law may also serve as breaches of obligations under NAFTA.[148] Canadian officials have complained that Title III violates this NAFTA provision where as it amounts to de facto discrimination in singling out specific investors who are engaged in activities that are legal in their home states.[149] Canada and Mexico immediately responded by challenging the legality of Helms-Burton based on its violation of NAFTA.[150] To this end, Article 1603.1 obligates the parties to "grant temporary entry to business persons who are otherwise qualified for entry."[151] Yet again, there is a clear disparity between NAFTA and Helms-Burton provisions, yet all foreign challenges against the legislation remain futile.[152]

2. The World Trade Organization & International Agreements

In weeks leading up to the Trump Administration's declaration, the European Union publicized its intent to sue the United States at the WTO should the United States extend the U.S. embargo against Cuba in any way that could hit European companies.[153] The European Union has previously asserted that the Helms-Burton Act violates several articles of the General Agreement on Tariffs & Trade (GATT).[154] The GATT contains numerous provisions that could provide bases for challenging Helms-Burton at the WTO, including denial of most-favored-nation (MFN) treatment of foreign property interests under Article I, denial of national treatment of foreign property interests under Article III, coercive measures as a nontariff barrier to trade under Article XI, and nullification and

147. North American Free Trade Agreement Can.-Mex.-U.S., art. 1105, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

148. Bachman, *supra* note 146.

149. Eiselman, *supra* note 1, at 325 n.52.

150. Maniaci, *supra* note 144, at 940-41; *see* Anthony M. Solis, Comment, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L.J. 709, 711, 732-33 (1997).

151. NAFTA, *supra* note 147, art. 1603.1.

152. Bachman, *supra* note 146.

153. Laurence Norman & Vivian Salama, *New U.S. Policy on Cuba Sanctions Threatens EU Ties*, WALL ST. J. (Apr. 16, 2019, 3:34 PM), https://www.wsj.com/articles/new-u-s-policy-on-cuba-sanctions-threatens-eu-ties-11555421835.

154. The Articles of the GATT were originally agreed upon in 1947 and subsequently amended in 1994 as part of the Uruguay Round negotiations, which created the World Trade Organization (WTO). U.N. Conference on Trade and Development, *Dispute Settlement: World Trade Organization; GATT*, UNCTAD/EDM/Misc.232/Add.33, at 1 (2003) [hereinafter *Dispute Settlement*].

impairment of benefits under Article XXIII.[155] That being said, the GATT is generally limited to protections regarding trade in goods and the use of such goods; where the EU will have to argue that the relevant goods are foreign property interests, stronger arguments regarding Title IV, which was reimplemented in the 2019 decision, can likely be made under the General Agreement on Trade in Services (GATS).[156] For example, the EU may consider arguing that Title IV violates U.S. obligations under Article II.[157]

Under Article II of the GATS, each Member is required to "accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."[158] This MFN obligation applies generally to all services and service suppliers, as well as to both *de jure* and *de facto* discrimination.[159] Clearly the United States is violating its Article II obligations to Cuba, but the violation of its obligations to the EU could be somewhat less clear.[160] At first one may think that because there is no less favorable treatment to a trafficker of one country than to a trafficker of another country that Title IV does not

155. *See* European Union Press Release IP/96/387, European Delegation of the European Union Commission to the United States Press Release, EU Requests Consultation with the U.S. on the Helms-Burton Legislation (May 3, 1996).

156. *See* Brian J. Welks, *GATT and NAFTA v. The Helms-Burton Act,* 4 TULSA J. COMP. & INT'L L. 361, 367-69 (1997). The GATT's basic principles regarding trade in goods have been incorporated into numerous other WTO agreements, including the GATS. The GATS is a WTO treaty that entered into force as a result of the Uruguay Round negotiations, which applies to all WTO members' legislation affecting trade in services, including business activity. *See* General Agreement on Trade in Services, art. I, Apr. 15, 1994, 33 I.L.M. 1168 (1994) [hereinafter GATS]; *see also Dispute Settlement, supra* note 154.

157. *See, e.g.*, GATS, *supra* note 157.

158. *Id.* art. II.

159. *See* U.N. Conference on Trade and Development, *Dispute Settlement: World Trade Organization; GATS*, UNCTAD/EDM/Misc.232/Add.31, at 14 (2003) [hereinafter U.N. Conference]; Appellate Body Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 223-227, 231, 233, 255(r), WT/DS27/AB/R (adopted on 25 September 1997) [hereinafter Appellate Body Report]. A measure may be said to discriminate *de jure* in a case in which it is clear from reading the text of the law, regulation or policy that it discriminates among services or services suppliers of different countries. If the measure does not appear on the face of the law, regulation or policy to discriminate, it may still be determined to discriminate *de facto* if on reviewing all the facts relating to the application of the measure, it becomes obvious that it discriminates in practice or in fact. Appellate Body Report, *supra,* ¶¶ 223-227, 231, 233, 255(r).

160. Welks, *supra* note 156, at 367-69.

actually violate MFN principles.[161] However, this would be an incomplete interpretation of the GATS.[162]

The WTO has outlined the steps to be taken for determining whether or not a measure is consistent with Article II of the GATS.[163] First, "a threshold determination must be made . . . that the measure is covered by the GATS."[164] Titles III and IV of the Helms-Burton Act is still covered by GATS; there exists a "trade in services" (commercial presence in Cuba; "one of the four modes of supply[165]), and the measure "affects" this trade in services."[166] Second, a panel must compare the treatment by the relevant suppliers of one Member with the treatment of "like service suppliers" of any other country.[167] In other words, the MFN obligation under Article II requires the United States to accord all WTO Member State's nationals (who maintain a commercial presence in Cuba) the same treatment.[168] Nevertheless, not all commercial presences equivocate to trafficking.[169] For example, if a French entity owns a hotel in Cuba on confiscated property and a Chinese entity owns another hotel not on confiscated property, only the French are guilty of trafficking, while both the French and Chinese maintain a commercial presence in Cuba.[170] To this end, Titles III and IV only deny rights to some Member State nationals, namely, those with a commercial presence in Cuba.[171] Likewise, the United States is in clear violation of its Article II MFN obligations.[172]

D. The Inescapable Consequences

The U.S. departure from its international legal obligations has caused significant strife within the international community.[173] First and foremost, the violation of *jus cogens* rules gave rise to *erga omnes* obligations, which

161. *See id.* at 375-76.
162. *See id.*
163. *Dispute Settlement*, *supra* note 154, at 16; *see* Appellate Body Report, *supra* note 159, ¶ 233.
164. U.N. Conference, *supra* note 159.
165. *Id.*
166. *Id.*
167. *Id.*; *see* Appellate Body Report, *supra* note 159, ¶ 233.
168. U.N. Conference, *supra* note 159, at 16.
169. *Id.*
170. Welks, *supra* note 156, at 367-69, 375-76.
171. *See id.*
172. *See id.* at 375-76.
173. *See* sources cited *supra* note 116.

led to retaliatory legislation.[174] The implications of these foreign regulations are huge.

First, if every person, natural or juridical, within the European Union, Canada, and Mexico has the ability to hold a Title III plaintiff liable for the pecuniary loss incurred through the Title III litigation, isn't Title III doing more harm than good?[175] Every expense, from jurors to filing fees to the attorneys' billable hours, would be doubled.[176] Second, in moving forward with Title III implementation, the United States is essentially moving forward in a litigation war.[177] In other words, the United States is knowingly putting into motion a piece of legislation that will incur retaliatory measures.[178] Yet again, it appears that the principle purpose of Title III is not to stimulate compensatory litigation but rather to deter foreigners from transacting with Cuba for fear of pecuniary liability.[179] Third, the existence of this retaliatory legislation, on top of the existing international objections, is clear evidence that U.S. allies are exasperated with U.S. behavior.[180] True, the United States, as a sovereign nation, has a right to make decisions independent of foreign opinion; however, under the influence of globalization, mutual accommodation and adherence to international law is increasingly necessary.[181] To this end, if the United States is to expect its allies to respect its voice in the international forum, there must be some respect for the voices of the allies.[182] This point is further illustrated by the British Crown's first visit to Cuba since 1959 on March 24, 2019, despite U.S. opposition.[183]

Ultimately, Helms-Burton's careless nature is ruining the United States' reputation across the international community.[184] The Act has tagged the United States as a pompous international bully who is

174. *See* Byers, *supra* note 112, at 230-31, 236.

175. *See* sources cited *supra* note 116.

176. *See* sources cited *supra* note 116.

177. *See* sources cited *supra* note 116.

178. *See* Ryngaert, *supra* note 67.

179. *Id.*

180. *See Necessity*, *supra* note 5, at 8-9 (describing the embargo as a secondary boycott, an extraterritorial international policy mandate, "a flagrant, systematic and widespread violation," coercive and immoral, "a criminal act," "a genocidal embargo that . . . not only violates the sovereignty of that State but also the sovereignty of all other States", etc.).

181. SELLERS, *supra* note 42, at 10.

182. *See Necessity*, *supra* note 5; *see also* Associated Press, *Prince Charles and Camilla Launch the First Royal Visit to Cuba Despite Requests from U.S.*, USA TODAY (Mar. 24, 2019, 8:53 PM), https://www.usatoday.com/story/life/2019/03/24/prince-charles-and-camilla-launch-first-royal-visit-cuba/3263155002/ [hereinafter *Prince Charles and Camilla*].

183. *Prince Charles and Camilla, supra* note 182.

184. *See Necessity*, *supra* note 5; *see also Prince Charles and Camilla*, *supra* note 182.

attempting to dictate the commercial decisions of foreign companies.[185] To this end, the United Nations is neither the only international organization nor country that has spoken out,[186] nor the only forum through which foreign governments have rejected of the promulgation and application of the United States' embargo on Cuba.[187] The European Commission threatened the Trump Administration that cancelling the exemption of sanctions enjoyed by European companies would unleash a self-destructing cycle.[188] To this end, the United States is just putting itself in a lose-lose situation by reimplementing Titles III and IV.[189]

On a more local level, the reimplementation of Titles III and IV will cause severe economic loss to the United States of America.[190] The threat of Titles III and IV have reduced but never stopped foreign investment in Cuba.[191] The combined revenue of companies investing in Cuba in 2018 reached approximately $500 billion and the combined market capitalization of those companies in 2018 was approximately $600 billion.[192] Trade sanctions are costing U.S. companies billions of dollars in potential revenue and enforcing Title IV is only likely to further inhibit the domestic economy.[193] In essence, the exclusionary provision effectively extends the limitation on domestic transactions.[194] A majority of potential

185. *See See Necessity*, *supra* note 5; *see also Prince Charles and Camilla*, *supra* note 182.

186. The Spanish government reiterated Spain's "sharp rejection" of Helms-Burton on the basis that it "undermines the interests of Spain and other European partners in Cuba and deteriorates relations between allied countries." *See* Bernardo de Miguel, *España pide a la UE que Reconsidere la Negociación Comercial con EE.UU. por las Sanciones a Cuba*, EL PAÍS (Apr. 17, 2019, 12:39 PM EDT), http://elpais.com/internacional/2019/04/17/actualidad/1555510950_330845.html; *see also* Joan Foas, *Spain Rejects Possible Lawsuits Against Foreign Firms in Cuba*, REUTERS: WORLD NEWS (Apr. 3, 2019, 1:24 PM), https://af.reuters.com/article/worldNews/idAFKCN1RF2CX.

187. Eiselman, *supra* note 1, at 334-35 n.58 (mentioning condemnations made by the European Union, Organization of American States, United Nations, and the governments of a variety of American allies); *see also* Inter-American, *supra* note 53 (citing opinion of the Inter-American Juridical Committee elaborating on the recently passed resolution, "Freedom of Trade and Investment in the Hemisphere," which enumerates the ways in which the LIBTERAD Act "does not conform to international law").

188. *See* Bernardo de Miguel, *Bruselas amenaza a EE. UU. con represalias si reactiva el castigo a los inversores europeos en Cuba*, EL PAÍS (Apr. 17, 2019, 7:53 AM EDT), https://elpais.com/internacional/2019/04/16/actualidad/1555435009_882095.html.

189. *See* Council Regulation, *supra* note 116.

190. U.S.-Cuba Trade and Economic Council, Inc., *Title IV-Restricting Travel into the United States* (Mar. 2019), https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/5ccae3b54785d3e1b67177bf/1556800438314/TitleIVOfLibertadActPotentialImpactByTrumpAdministrationInMarch2019.pdf.

191. *See id.*

192. *Id.*

193. *See id.*

194. *See id.*

Title IV target corporations are huge international entities, including Lufthansa, Air China, Turkish Airlines, Melia Hotels International, and more.[195] To this end, where the United States is denying commerce from Cuba and ruining its foreign relations, it honestly cannot afford to continue on this war path.[196]

Moreover, Article VI of the U.S. Constitution states that certain international agreements, namely those entered into by the U.S. President and ratified by two-thirds of the Senate, are the supreme law of the land.[197] Likewise, Article II treaties are regarded as equivalent to an act of the federal legislature.[198] However, the text of the Supremacy Clause does not resolve the relationship between federal statutes and Article II treaties.[199] In *Chae Chan Ping v. United States*, the Supreme Court held that when such a conflict does exist, "the last expression of the sovereign will must control."[200] Still, this "later in time" rule remains problematic in the context of Helms-Burton.[201]

Under the "later in time" rule, any future treaty will override Helms-Burton.[202] To this end, once the USMCA is ratified by Congress, it will clearly be the last expression of sovereign will and it maintains the same treatment obligations as NAFTA.[203] It would seem entirely counterintuitive to assert that legislation passed in 1996 was a better embodiment of congressional intent in regard to foreign relations than an international agreement just ratified.[204]

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195. *Id.*

196. *See id.*

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

198. *Id.* art. II.

199. *See id.* arts. II, VI.

200. Whitney v. Robertson, 124 U.S. 190, 194 (1888). The Court has applied the "newer in time" rule on numerous occasions. *See*, *e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 600-601 (1889); *accord* Edye v. Robertson, 112 U.S. 580, 599 (1884). Statutes express the will of the United States when either both houses of Congress have approved the statute by majority vote and it has been signed into law by the President, or when two-thirds of both houses have voted to override a presidential veto. *See* U.S. CONST. art. I, § 7. Treaties express the will of the United States when the President has manifested the consent of the United States to be bound by the treaty, after obtaining the advice and consent of at least two-thirds of the Senators present. *See id.* art. II, § 2.

201. *Whitney*, 124 U.S. at 194; *see*, *e.g.*, *Cook*, 288 U.S. at 120; *accord Edye*, 112 U.S. at 599; *see* U.S. CONST. art. I, § 7; *see also Chae Chan Ping*, 130 U.S. at 600-01.

202. *Whitney*, 124 U.S. at 194; *see*, *e.g.*, *Cook*, 288 U.S. at 120; *accord Edye*, 112 U.S. at 599; *see* U.S. CONST. art. I, § 7; *see also Chae Chan Ping*, 130 U.S. at 600-01.

203. *Whitney*, 124 U.S. at 194; *see*, *e.g.*, *Cook*, 288 U.S. at 120; *accord Edye*, 112 U.S. at 599; *see* U.S. CONST. art. I, § 7; *see also Chae Chan Ping*, 130 U.S. at 600-01.

204. *Whitney*, 124 U.S. at 194; *see*, *e.g.*, *Cook*, 288 U.S. at 120; *accord Edye*, 112 U.S. at 599; *see* U.S. CONST. art. I, § 7; *see also Chae Chan Ping*, 130 U.S. at 600-01.

Ultimately, it is only a matter of time before a Title III defendant will assert an affirmative defense that the LIBERTAD Act is invalid as it violates peremptory norms of international law.[205] Such an assertion could call for extensive judicial review of the legislation,[206] which would likely get appealed until the U.S. Supreme Court has to decide on the matter or which would generate enough discussion to bring the matter before the U.S. International Court of Trade.[207] Regardless of the forum, judicial review of the legislation would most likely result in the invalidation of the Helms-Burton Act, or at a minimum, of Titles III and IV.[208]

V. CONCLUSION

Senator Jesse Helms was quoted saying "Hasta La Bye Bye, Fidel" upon the enactment of the Helms-Burton Act in 1996.[209] In reimplementing Titles III and IV, it is almost as if the current Administration has forgotten all ramifications and, like Senator Helms, believes that full implementation of Helms-Burton will cause the downfall of the current regime in Cuba.[210] Meanwhile history proves that such beliefs are delusional; in 1996 the Helms-Burton Act harmed the U.S. Government (through a tarnished reputation) more than it did the Castro regime, which is what led to the suspensions in the first place.[211] Not to mention, "the only visible result" of six decades worth of continuous economic sanctions against Cuba "is the decreased standard of living of the Cuban peoples."[212] The question then becomes is reimplementation really worth it? Based on the seemingly endless consequences, the answer is no.[213]

Ultimately, this unreasonable U.S. regulation of extraterritorial needs to be stopped. The reimplementation of Titles III and IV will incur, inter

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205. *See* Kleinlein, *supra* note 101, at 174 ("Peremptory norms may also de-legitimise domestic legislative or administrative acts authorizing the prohibited conduct.").

206. A court with authority for judicial review may invalidate laws, acts, and governmental actions that are incompatible with a higher authority. *See About the Court*, U.S. CT. INT'L TRADE, https://www.cit.uscourts.gov/about-court#JURISDICTION%20OF%20THE%20COURT (last visited Sept. 29, 2019).

207. The U.S. Customs Courts Acts of 1980 grants the U.S. Court of International Trade the authority for judicial review regarding matters "arising out of import transactions and federal transactions affecting international trade." *See id.*

208. *See* Kleinlein, *supra* note 101, at 174 ("Peremptory norms may also de-legitimise domestic legislative or administrative acts authorizing the prohibited conduct.").

209. *See* HANEY & VANDERBUSH, *supra* note 7, at 102.

210. *See id.*

211. *See* Maniaci, *supra* note 144, at 899-900.

212. *See id.* at 947.

213. *See id.*

alia, retaliatory litigation, foreign resentment, exorbitant administrative costs, and the breach of numerous international legal obligations.[214] Clearly violation of international law comes at a very high price; Congress needs to determine which national priorities are worth the cost because "winning" the international debate regarding the Cuban embargo does not seem worth it. As the list of repercussions adds up, it only seems progressively more and more logical to revoke the reimplementation of Titles III and IV, if not entirely invalidate them.

214. *Id.* at 910-12; *see* Ryngaert, *supra* note 67, at 646-47; sources cited *supra* note 116.