Unrealized Goals and Unintended Consequences: Why the Helms-Burton and Iran-Libya Sanctions Laws Are Counterproductive to the Interests of the United States

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I. INTRODUCTION

The United States government recently enacted the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996,[1] and the Iran and

1. Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C.A. §§ 6021-6091 (West. 1997)) [hereinafter Helms-Burton]. This piece of legislation is commonly referred to as the Helms-Burton Act. This is in reference to the co-sponsors of the bill, Senator Jesse Helms (R-NC), and Representative Dan Burton (R-IN).

Libya Sanctions Act of 1996.[2] These two statutes pressure foreign nationals to follow United States trade and investment laws for the ultimate purposes of ending the dictatorial regimes of Cuba, Iran, and Libya. A further goal of the statutes is to protect United States nationals from terrorist attacks.[3] The statutes were enacted in response to the hostile relationships the United States has had with the governments of Cuba, Iran, and Libya for several decades.

In the recent past, terrible tragedies involving United States nationals have reminded the Americans of these hostile relationships, and have helped to mobilize public opinion in support of these pieces of legislation. With respect to Cuba, the unfriendly relationship resurfaced to the forefront of America's attention on February 24, 1996, when Cuban fighter planes shot down two United States civilian aircraft over international waters.[4] With respect to Iran and Libya, the problems reemerged with the bombing of the military barracks in Dhahran, Saudi Arabia on June 25, 1996, and the downing of TWA Flight 800 on July, 17, 1996. In both cases, there is speculation that Iranian or Libyan terrorists caused the tragedies.[5]

But despite the noble goals of Helms-Burton and Sanctions Act, the statutes are misguided in that they fail to target the specific actors that have harmed the United States. By pressuring foreign nationals of major trading partners into discontinuing their business dealings with the three states, the United States government shows that it has targeted the states

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2. Pub. L. No. 104-172, 110 Stat. 1541 (1996) (to be codified at 50 U.S.C. § 1701) [hereinafter Sanctions Act].

3. *See* Helms-Burton, *supra* note 1, § 3; *see also* Sanctions Act, *supra* note 2, § 3; HOUSE COMM. ON INTERNATIONAL RELATIONS, CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1995, H.R. REP. NO. 104-202, 104th Cong., 1st Sess., at 30 (1995) [hereinafter H.R. REP. HELMS-BURTON]; HOUSE COMM. ON INTERNATIONAL RELATIONS, IRAN AND LIBYA SANCTIONS ACT of 1996, H.R. REP. NO. 104-523, 104th Cong., 2d Sess., pt.1, at 8 (1996) [hereinafter H.R. REP. SANCTIONS ACT].

4. Despite the strong reaction of the United States condemning Cuba's actions, the incident continues to be controversial. The United States contends that Cuba violated norms of international law by downing the civilian aircraft in international airspace. However, Cuba argues that the aircraft had intruded Cuban airspace during that flight, and in several previous flights. Cuba feels that their actions were justified acts of self-defense under international law because the pilots of the civilian aircraft, members of a Miami-based exile group called "Brothers to the Rescue," had flown over Cuban territory several times in the past and dropped leaflets urging rebellion against Fidel Castro, despite numerous warnings from the Cuban military. *See generally* Mike Clary, *Cuban Fighters Down 2 Planes Owned by Exiles*, L.A. TIMES, Feb. 25, 1996, at A1.

5. *See* Bruce W. Nelan, *Taking on the World: Clinton Says the New Long Arm of Uncle Sam is Striking at Terrorists, but Those Getting Hit Are America's Friends Abroad*, TIME, Aug. 26, 1996, at 26. *But see* John J. Goldman & Eric Malnic, *A Mission Engulfed in a Vacuum of Uncertainty*, L.A. TIMES, July 6, 1997, at A1 (reporting that the National Transportation Safety Board cannot determine the cause of the explosion of TWA Flight 800 one year after the tragedy).

of Cuba, Iran, and Libya as harmful actors in the international community. In addition, the statutes indicate a belief that the method for achieving political change within these states is to weaken their overall macroeconomic health.[6] Unfortunately, the United States government has confused these "states" as actors in the international community with the individual Cuban, Iranian and Libyan nationals responsible for the United States harm.[7] If one thinks of a state as a distinct actor in the international community, then these three states have not been the distinct and major cause of the harm to the United States. Within Cuba, the actors that actually have caused harm to the United States are Fidel Castro and certain members of his government, and not the Cuban state itself. Within Iran and Libya, the actors who harm the United States are the nationals who commit terrorist attacks and the members of the governments who offer support for those attacks. They are not the states of Iran and Libya.

If, as the United States government believes, the three states are the harmful actors, then the solution is to impose macroeconomic sanctions in order to cripple each entire state. However, because the three states have not been the actors that have actually caused harm, the United States macroeconomic sanctions are over-inclusive in terms of targeting harmful actors, and result in two problems in international law. First, Helms-Burton and Sanctions Act include extraterritorial provisions that assert jurisdiction over matters in which the United States has a weak link in relation to other countries. These provisions impose secondary boycotts against the three countries by pressuring foreign nationals into ceasing business activities within the economies of the three states. Such provisions conflict with international jurisdictional norms and sound public policy arguments against imposing secondary boycotts. Second, the pressure the United States government places on foreign nationals as a result of Helms-Burton and Sanctions Act causes the United States to

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6. *See* H.R. REP. HELMS-BURTON, *supra* note 3, at 24; *see also* H.R. REP. SANCTIONS ACT I, *supra* note 3, at 9 (quoting Senate testimony of Under Secretary of State Peter Tarnoff).

7. The "state," as an actor in the international community is an entity containing a permanent population, a defined territory, a government, and a capacity to enter relations with other states. *See* JOSEPH G. STARKE, STARKE'S INTERNATIONAL LAW 85 (I.A. Shearer ed., 11th ed. 1994); *see also* MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 88-89 (1961).

Kaplan and Katzenbach write: "The state has a social existence, which continues throughout changes of government personnel and of governments themselves. Government is simply one aspect, although a most important one, of the state." *See id*. at 88. The state as an actor cannot be defined by the actions of certain nationals or members of the government because these private actors merely account for a small portion of what constitutes a "state." Thus, the nationals that actually carry out harmful attacks against the United States or offer support to these activities are not the "states" in and of themselves.

violate its obligations under two important international agreements: the General Agreement on Tariffs and Trade (GATT)[8] and the North American Free Trade Agreement (NAFTA).[9]

Because the "harmful actors" have been mistargeted by the Helms-Burton and Sanctions Acts, problems have been created in international law. The Acts subject the United States to potential retaliatory action from major trading partners and a loss of reputation in the international community. Member states in the GATT and NAFTA may retaliate by filing claims with the dispute settlement bodies of the two institutions. Major trading partners of the United States may also impose domestic statutes of their own that retaliate against United States nationals conducting business within their respective countries, and sanction their own nationals who abide by the United States laws. Furthermore, the global community will probably lose confidence in the United States as a country that abides by, and respects international law. This will likely harm the United States ability to conduct international negotiations, and lead to a decline in the United States international economic position.[10]

In addition to the worsening of the United States international economic position, Helms-Burton and Sanctions Act will fail to realize the United States political goals of removing the dictatorial regimes in Cuba, Iran, and Libya. Not only will the two statutes fail to bring the political benefits of changed regimes, but they will actually worsen the international political situation for the United States in that international law conflicts will draw third-party countries into these political struggles with Cuba, Iran, and Libya. Such third-party countries will likely assume a position against the United States. As a result, the current political situation will worsen because the existence of third-party countries acting in conflict with the United States will render the current struggles with the three countries even more difficult to resolve.

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8. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

9. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 605 [hereinafter NAFTA].

10. *Cf.* PAUL A. SAMUELSON, ECONOMICS 692 (9th ed. 1973) (articulating the idea that international trade negotiations increase the economic welfare of all involved countries by creating a mutually profitable division of labor).

II. AN OVERVIEW OF THE STATUTES

A. Helms-Burton

1. History

The relationship between the United States and Cuba has been hostile since the Cuban Revolution of 1959. Following the revolution, Castro assumed power and implemented confiscatory measures against private property owners, several of whom were United States nationals.[11] The Castro government passed an agrarian reform law that redistributed land,[12] and seized property from businesses in the mining, telecommunications, and petroleum sectors.[13] The Castro government also passed new tax laws that increased taxes to the point of eliminating the viability of many of the private businesses in Cuba.[14]

The United States government believed that these confiscations conflicted with norms of international law because the Cuban government did not provide adequate compensation for the takings.[15] President Eisenhower responded by suspending Cuba's sugar quota in 1960,[16] and Congress later passed the Foreign Assistance Act of 1961.[17] This placed an embargo on all trade between Cuba and the United States.[18] From the mid-1960s to the passage of Helms-Burton, a United States trade and

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11. *See* LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS, 88th Cong., 1st Sess., EXPROPRIATION OF AMERICAN-OWNED PROPERTY BY FOREIGN GOVERNMENTS 16-17 (Comm. Print 1963) (estimating that, at the time of the report, United States nationals had lost over one billion dollars as a result of the Cuban government's confiscations) [hereinafter LEGISLATIVE REFERENCE SERV.].

12. *See* MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY 75 (1976) (citing Ley de Reforma Agraria, May 17, 1959 (LRA), Decreto No. 1426, Gaceta Oficial (Edicion Extraordinaria) (May 17, 1959)).

13. *See id*. at 79, 82 (citing Ley 617, Oct. 27, 1959, Gaceta Oficial (Oct. 30, 1959); Ley 635, Nov. 20, 1959, Gaceta Oficial (Nov. 23, 1959)).

14. *See id*. at 80. *See generally* Jonathan R. Ratchik, Note, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 344-47 (1996) (detailing Cuba's confiscatory measures and new tax laws following the Cuban Revolution of 1959).

15. *See* GORDON, *supra* note 12, at 124-25. The custom in international law generally holds that a country can legally confiscate private property if it is done for a public purpose, is non-discriminatory, and is accompanied by the payment of appropriate compensation. *See, e.g.*, STARKE, *supra* note 7, at 271. The Cuban government discriminated against United States companies and made a poor attempt to compensate by paying 20-year bonds that would be funded by Cuban sugar sales to the United States. *See* LEGISLATIVE REFERENCE SERV., *supra* note 11, at 10; *see also* GORDON, *supra* note 12, at 141-46.

16. *See* GORDON, *supra* note 12, at 98 (citing to Proclamation No. 3355, 25 Fed. Reg. 6414 (1960)).

17. Pub. L. No. 87-195, § 620(a), 22 U.S.C.A. § 2370(a) (1996).

18. *See id.* GORDON, *supra* note 12, at 98.

investment embargo against Cuba evolved in the form of executive orders.[19]

2. Goals

Congress passed Helms-Burton on March 6, 1996, and on March 12, 1996, the President signed it into law. This piece of legislation was implemented for the purpose of helping to end Castro's reign and bring democracy to Cuba.[20] The bill's supporters believed that increasing the economic sanctions against Cuba and protecting United States nationals from the wrongful trafficking in their confiscated property would deter foreign nationals from trading with and investing in Cuba.[21] This would make the United States embargo much more effective in bringing about the demise of Castro, and help return freedom, democracy, and a respect for human rights to Cuba.

3. Sections of Helms-Burton

Title I of Helms-Burton tightens the current economic sanctions against Cuba. It includes sections that codify the enforcement of the economic embargo,[22] prohibit indirect financing of Cuba by United States nationals,[23] and oppose Cuban entry into international financial institutions[24] and the Organization of American States.[25] Title I also imposes a secondary boycott on foreign nationals that conduct business with Cuba in that it prohibits the importation of goods from any country that have been partially produced in Cuba.[26]

Title II establishes a program to offer assistance to Cuba once the President has determined that a transition to democracy has begun.

Title III protects property rights of United States nationals by providing them with a cause of action in federal court against anyone who traffics in property illegally confiscated after the Cuban Revolution.[27] This cause of action is available to United States nationals who were nationals at the time their property was confiscated,[28] as well as United

19. *See* Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325, 327 (1996).
20. *See* Helms-Burton, *supra* note 1, § 3; H.R. REP. HELMS-BURTON, *supra* note 3, at 23.
21. *See* H.R. REP. HELMS-BURTON, *supra* note 3, at 24-25.
22. *See* Helms-Burton, *supra* note 1, § 102(h).
23. *See id.* § 103(a).
24. *See id.* § 104.
25. *See id.* § 105.
26. *See id.* § 110.
27. *See id.* § 302.
28. *See id.* § 303(a)(1).

States nationals who were Cuban citizens at the time of the confiscations, but who have since become United States nationals.[29]

Title IV instructs the Secretary of State to deny visas to any foreign national who traffics in confiscated property. Regardless of whether a person traffics individually, or as part of the duties of a corporate officer, that person, as well as his immediate family, shall not be permitted to enter the United States.[30] Title IV also provides a broad definition of "traffic" that includes the transferring, distribution, disposal, purchase, receipt, investment or improvement of confiscated property.[31]

B. Sanctions Act

1. History

The United States relationship with Iran and Libya has grown increasingly hostile since members of the governments of the two states began the trend of sponsoring terrorist activities. For nearly a quarter of a century, Libyan leader Muammar Qadhafi supported and sponsored terrorist acts around the world.[32] During this time, members of the Libyan government sponsored Libyan nationals and other terrorist groups in their attacks against United States nationals, and nationals of other countries.[33] The terrorist attacks culminated in 1988 with the bombing of Pan Am Flight 103 over Lockerbie, Scotland, in which 270 civilians perished. Evidence later revealed that two Libyan nationals committed the attack with help from members of the Libyan government.[34] When the United States and the United Kingdom issued warrants for the arrest of these individuals, the Libyan government refused to respond to the requests and extradite the individuals for trial.[35]

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29. *See id.* § 303(a)(2).

30. *See id.* § 401(a).

31. *See id.* § 401(b)(2).

32. *See* Scott S. Evans, *The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine*, 18 MD. J. INT'L L. & TRADE 21, 24-25 (1994) (discussing Libya's involvement in state-sponsored terrorism since 1970).

33. *See id*. Members of the Libyan government have supported, for example, an attempt to assassinate President Reagan in 1981. *See also* James Kelly, *Searching for Hit Teams: There Was No Proof, but There Was Sufficient Reason to Believe*, TIME, Dec. 21, 1981, at 16 (detailing the bombing of the Rome and Vienna airports in 1985); Doyle McManus, *Clearer Picture of Gunmen Reflects Creed of Violence*, L.A. TIMES, Dec. 31, 1985, at 8 (detailing the bombing of a discotheque in West Berlin in 1986); *Disco Bombing Suspect Libya Trained: Germans*, CHI. TRIB., Aug. 1, 1986, at 6.

34. *See Tracking Terrorists, CIA Analyst Links Libya to Bombing of Flight 103*, ST. TR. MSP., June 24, 1991, at A1.

35. General norms of international law do not require states to extradite their nationals in the absence of a bilateral treaty. Thus, the United States and United Kingdom do not appear to have a claim that Libya somehow has violated international law in its refusal to surrender the

Certain members of the Iranian government have sponsored terrorist activities for nearly the same length of time. On November 4, 1979, a group of Iranian nationals seized the United States Embassy in Tehran and took United States nationals as hostages. While the new government of Iran, led by the Ayatollah Khomeini, did not plan the seizure of the Embassy, government officials supported the Iranian students who took the hostages, and replaced those students in the negotiation efforts with the United States before the United Nations and the International Court of Justice.[36]

The United States government responded to the trend of terrorist attacks against its nationals by imposing economic sanctions on the Libyan and Iranian states.[37] The President ordered the prohibition of oil imports from Iran and Libya to the United States,[38] and the prohibition of

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suspected bombers for trial. However, these two nations have claimed that Libya does owe them a duty to extradite the suspected attackers based on two arguments.

First, the norms of international law regarding extradition in crimes relating to aircraft may be changing in that the United Nations Security Council adopted two resolutions that condemned the bombing and sanctioned Libya for not surrendering the suspects. *See* S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg., U.N. Doc. S/RES/731 (1992); S.C. Res 748, U.N. SCOR, 47th Sess., 3063d mtg., at 2, U.N. Doc. S/RES/748 (1992) [hereinafter Resolution 748]. These resolutions show the global community's strong feelings against these types of crimes and possibly a willingness to grant the United Nations power in forcing states to extradite suspected criminals.

Second, the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 8, 24 U.S.T. 564, 974 U.N.T.S. 177, which Libya, the United States, and United Kingdom are signatories, requires states to either prosecute suspected offenders of aircraft disasters or extradite the suspects to a state willing to prosecute. *See generally* Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH J. INT'L L. 222 (1993) (discussing the aspects of extradition under international law).

36. *See* S.C. Res. 457 U.N. SCOR, 34th Sess., 2716th mtg. at 24, U.N. Doc. S/INF/35 (1979); *see also* United States Diplomatic and Consular Staff in Tehran (United States v. Iran) 1979 I.C.J. 7 (Dec. 15). *See generally* ANDREAS F. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS 540-44 (2d ed. 1983).

37. The United States government used three avenues to respond to Iranian and Libyan-sponsored terrorism. First, the United States government appealed to international bodies like the International Court of Justice and the United Nations. *See supra* note 36. Second, the United States government engaged in strategic military strikes against Iran and Libya. The United States armed forces attempted a military rescue of the hostages in Iran on April 25, 1980. *See* Richard Harwood, *Series of Mishaps Defeated Rescue in Iran*, WASH. POST, Apr. 26, 1980, at A1. Further, the United States instituted an air strike against Libya on April 14, 1986 in response to the bombing of the disco in Germany. *See* Helen Thomas, *How Reagan Decided to Attack*, UPI, Apr. 15, 1986, *available in* LEXIS, Nexis Library, UPI file. Third, the United States government imposed economic sanctions on the states of Iran and Libya. This paper will only focus on the United States economic responses to the terrorist acts of Iranian and Libyan nationals. *See infra* notes 38-40 and accompanying text.

38. President Carter terminated crude oil imports from Iran on November 12, 1979, pursuant to section 232(b) of the Trade Expansion Act of 1962. Pub. L. No. 87-794, 76 Stat. 872, § 232, 19 U.S.C.A. § 1862(b) (Supp. 1996). *See* Proclamation No. 4702, 3 C.F.R. 82 (1980), *reprinted in* 50 U.S.C. § 1701 at 148 (1982). President Reagan issued a similar restriction against

exports to these countries of all goods that did not have a humanitarian purpose.[39] The President also used the IEEPA to freeze Iranian and Libyan assets in the United States.[40]

2. Goals

Congress passed the Sanctions Act on July 23, 1996, and on August 5, 1996, the President signed it into law. The United States government enacted this statute in an effort to stop what it referred to as state-sponsored terrorism, and to prevent these radical governments from obtaining nuclear weapons.[41] In an effort to place unprecedented pressure on the governments of Iran and Libya, the United States government adopted extraterritorial provisions that would sanction foreign nationals who had invested more than forty million dollars in the energy sector of either country. Congress included this provision to force foreign governments to impose tough sanctions against the two countries, and to pressure foreign companies to choose between investing in the United States and investing in Iran and Libya.[42]

3. Sections of Sanctions Act

Section IV of Sanctions Act states that the President can impose sanctions on foreign nationals who violate the provisions of the statute.[43] The President may waive the sanctions with respect to nationals of other countries if he determines that the country of the foreign national is undertaking substantive economic sanctions against Iran and Libya.[44]

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oil imports from Libya on March 11, 1982. *See* Proclamation No. 4907, 47 Fed. Reg. 10,057 (1983). Section 232(b) permits the President to restrict imports in situations where national security is threatened.

39. President Reagan stated on January 7, 1986, that he was suspending exports to Libya with the exception of goods designed to relieve human suffering pursuant to powers granted under the International Emergency Economic Powers Act. *See* Pub. L. No. 95-223, 91 Stat. 1626 (codified as amended at 50 U.S.C. §§ 1701-06 (1994)) [hereinafter IEEPA]; Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986).

40. The Treasury Department effectively froze Iranian assets in the United States when it issued the Iranian Assets Control Regulations pursuant to executive authority under the IEEPA on November 15, 1979. *See* 31 C.F.R. § 535 (1994). President Reagan issued an Executive Order on January 8, 1986. *See* Exec. Order 12,544, 3 C.F.R. 183 (1987), *reprinted in* 50 U.S.C. § 1701 (1991).

41. *See* Sanctions Act, *supra* note 2, § 3; H.R. REP. SANCTIONS ACT I, *supra* note 3, at 8.

42. *See* HOUSE COMM. ON INTERNATIONAL RELATIONS, IRAN AND LIBYA SANCTIONS ACT OF 1996, H.R. REP. NO. 104-523, 104th Cong., 2d Sess., pt. 2, at 10 (1996). *See* Jerry Gray, *Foreigners Investing in Libya or in Iran Face U.S. Sanctions*, N.Y. TIMES, July 24, 1996, at A1 (quoting Congressman Benjamin A. Gilman (R-NY), chairman of the House International Relations Committee, who stated that foreign nationals now have a choice of investing in Iran and Libya or in the United States).

43. Sanctions Act, *supra* note 2, § 4(d) (1).

44. *See id.* § 4(c).

Section V discusses the violations that will cause the imposition of sanctions. The President shall impose two of the six sanctions on any individual investing forty million dollars or more in the energy sectors of Iran[45] or Libya.[46]

Section VI describes the six possible sanctions that the President may impose on an individual who violates the statute. The President may instruct the Export-Import Bank to refuse to grant, or prohibit any United States financial institution from making, loans that would be used for projects connected to a sanctioned person.[47] He may also prohibit United States exports to a sanctioned individual,[48] or prohibit the individual from importing goods into the United States.[49] Additionally, the United States government cannot procure goods or services from a sanctioned person.[50] Likewise, a sanctioned person who owns, or who is otherwise substantially involved with, a financial institution cannot deal in United States debt.[51]

III. PROBLEMS WITH THE STATUTES IN INTERNATIONAL LAW

A. Prescription of Law Outside the United States

The extraterritorial prescriptions of United States law contained in Helms-Burton and Sanctions Act create problems in international law in two respects. First, Title III of Helms-Burton is an unreasonable application of United States law abroad in that it grants federal courts in the United States jurisdiction to hear property rights claims in the presence of a minimal effect within the United States, and when other countries have stronger links to the transactions in question. Furthermore, Title III may not even facilitate a remedy for harmed United States nationals because it may meet constitutional difficulties under United States law. Second, Title I of Helms-Burton and sections five and six of Sanctions Act prescribe United States law outside its territory in a manner that creates secondary boycotts against the three countries.

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45. *See id.* § 5(a).

46. *See id.* § 5(b). This section also allows the President to impose sanctions if an individual violates Resolution 748 or 883 of the United Nations Security Council. Resolution 748, adopted March 31, 1992, prohibits nations from allowing air traffic with Libya and prohibits nations from conducting business with Libya in the aviation and weapons technology sectors. *See* Resolution 748, *supra* note 35. Resolution 883, adopted November 11, 1993, calls on United Nations member states to freeze financial resources of the Libyan government or Libyan nationals in their territory. S.C. Res. 883, U.N. SCOR, U.N. Doc. S/RES/883 (1993).

47. *See* Sanctions Act, *supra* note 2, §§ 6(1), 6(3).

48. *See id.* § 6(2).

49. *See id.* § 6(6).

50. *See id.* § 6(5).

51. *See id.* § 6(4).

1. Jurisdiction to Hear Property Claims Under Title III of Helms-Burton

Title III of Helms-Burton empowers federal courts in the United States jurisdiction to hear property rights claims by United States citizens for property that the Cuban government confiscated after the revolution. This provision will have serious consequences for foreign companies because those businesses that maintain contacts in Cuba could become liable in United States if they engage in one of the many activities the statute considers "trafficking." Title III is controversial, and several of the United States major trading partners have threatened retaliatory measures if the provision is enacted.[52] This hostility towards Title III caused the President to delay its implementation for three consecutive six month periods.[53]

a. How Title III Works

Title III allows property suits to proceed against foreign nationals in federal courts by explicitly rejecting the act of state doctrine.[54] This doctrine, in its basic form, states that courts in the United States will not hear claims that call into question acts of a foreign state.[55] The act of state

52. *See* Jim Lobe, *U.S.-Cuba: Clinton Delays Lawsuit Provisions in Helms-Burton*, INTER PRESS SERV., July 16, 1996, at 1 (stating that diplomatic pressure from major trading partners caused President Clinton to suspend Title III for six months).

53. *See* Stanley Meisler, *Clinton Extends His Suspension of Anti-Castro Law Another 6 Months*, L.A. TIMES, Jan. 4, 1997, at A6; *see also Clinton Waiver Blocks Lawsuits Against Cuba*, BOSTON GLOBE, July 17, 1997, at A8 (discussing President Clinton's decision to suspend the implementation of Title III due to positive steps the global community is taking to pressure the Cuban government for a transition to democracy). Helms-Burton gives the President the authority to delay the implementation of Title III if he determines that a suspension is in the national interest of the United States. *See* Helms-Burton, *supra* note 1, § 306(b)(1).

54. *See* Helms-Burton, *supra* note 1, § 301(6). The relevant language states: "No court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits[.]" *Id*.

55. In 1897, the Supreme Court first established the idea that acts of a foreign government were protected from lawsuits in the United States. *See* Underhill v. Hernandez, 168 U.S. 250 (1897) (holding that the acts of military commanders were considered the acts of the Venezuelan government and thus, were protected from adjudication in United States courts). They later articulated a common law rule and discussed the policy justifications for the act of state doctrine. *See* Banco Nacional de Cuba v. Sabbatino Receiver, 376 U.S. 398 (1964), *cert. denied*, 390 U.S. 956 (1967), *reh'g denied*, 390 U.S. 1037 (1967) (holding that the act of state doctrine denied a United States company's claim that it was not obliged to reimburse the Cuban government for goods received on account of Cuba's confiscation of the goods prior to shipment violated international law).

In *Sabbatino*, the Supreme Court created a legal rule that United States courts would not hear questions of acts of a foreign state if the state was in existence at the time of the lawsuit, the United States recognized the state, and there was no agreement within the political branches of the United States government as to the international legal standard. *See id.* at 428. The court stated the policy desire to maintain the separation of powers doctrine, and claimed that if there

doctrine has evolved into the current legal standard whereby courts will not consider invoking the doctrine unless the President determines that a judgement on the merits would harm United States foreign policy interests.[56]

Without this provision of Helms-Burton, the claims of United States nationals for the confiscated property trafficked between foreign corporations and the Cuban government would be subject to possible acts of state protection. If, in a Title III suit, the President would have suggested that adjudication in federal court would contradict United States foreign policy interests,[57] the court would have had the option of

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was a general consensus among the political branches for a codification of a particular international law principle, then the courts would hear a case in accordance with the desires of the political branches. *See id*. But if the Executive and Legislature did not agree to the appropriate international legal standard, then the courts would presume the validity of an act of a foreign sovereign and apply the act of state doctrine. *See id. See generally* Ronald Mok, Comment, *Expropriation Claims in United States Courts: The Act of State Doctrine, The Sovereign Immunity Doctrine, and the Foreign Sovereign Immunities Act. A Roundup for the Expropriated Victim*, 8 PACE INT'L L. REV. 199 (1996) (detailing the common law and statutory developments of the act of state doctrine).

56. Congress reacted unfavorably to the *Sabbatino* decision because the Supreme Court basically held in favor of Cuba despite the apparent injustices of the recent expropriation of American property. This politically unpopular opinion led to the enactment of the Second Hickenlooper Amendment. *See* 22 U.S.C. § 2370(e)(2) (1994). This statutory language sought to reverse the judicial assumption towards applying the act of state doctrine. It did so by stating that courts could not apply the act of state doctrine in property rights cases. However, courts did still have discretion to apply the doctrine if the Executive made an affirmative suggestion to the court hearing the matter that the act of state doctrine is necessary to advance the foreign policy interest of the United States. The relevant language states:

> [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of . . . international law . . . [but the law] . . . shall not be applicable . . . [if] the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interest of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Id. When the Supreme Court remanded the *Sabbatino* case, the Court of Appeals held that because of the Second Hickenlooper Amendment, the act of state doctrine did not apply because the expropriation was a violation of international law and the President did not oppose adjudication on the merits. *See* Mok, *supra* note 55, at 212-13 (citing Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1967), *reh'g denied*, 390 U.S. 1037 (1967)).

57. President Clinton has been reluctant to support Title III, and has suspended its implementation for three six-month periods. *See supra* note 53 and accompanying text. Thus, the President may have suggested to the court in a Title III case that they ought to apply the act of state doctrine in the interest of foreign policy. This would not have been a certainty because expressing a dislike for Title III and taking an affirmative step to attempt to block a Title III suit are different steps for a President to take. But President Clinton's hesitation in supporting Title III suggests that he probably would have recommended act of state protection against these claims if Congress had not included section 301(6) in Helms-Burton.

invoking the act of state doctrine and dismissing the claim. Thus, Helms-Burton's elimination of the possibility of act of state protection allows United States nationals to file suits against those who traffic in confiscated property with the insurance that federal courts will adjudicate the suits on the merits. This raises problems for the United States under international law, as well as under domestic constitutional law.

b. International Law Problems

The elimination of the act of state doctrine in Title III claims does not, on its face, contradict international law. In *Sabbatino*, Justice Harlan noted that the act of state doctrine is not a universally recognized part of international law, and that several countries do not have similar provisions in their domestic laws.[58] However, by allowing these types of suits to proceed in federal courts, Helms-Burton's elimination of the act of state protection leads to problems for the United States in terms of adhering to international norms for claiming jurisdiction. The elimination of the act of state doctrine allows the United States to prescribe and enforce laws outside its territory in cases involving property exchanges between the Cuban government and foreign nationals. This extraterritorial application of United States law is not consistent with international norms of jurisdiction, or with the United States domestic rule regarding the prescription of laws outside the territorial boundaries. Furthermore, the elimination of the act of state doctrine allows the United States to espouse the claims of its nationals who were Cuban nationals at the time of the confiscations. This practice conflicts with the international norm that nations will only espouse claims when there exists a genuine link between the espousing state and the harmed individual.

i. International Norms of Jurisdiction and the Espousal of Claims

The Permanent Court of International Justice outlined the international legal standard for extraterritorial jurisdiction in the Lotus Case of 1927.[59] The court stated that a nation may exercise jurisdiction

58. *Sabbatino*, 376 U.S. at 421-22.

59. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). This case came before the Permanent Court of International Justice as a result of a collision on the high seas between a French vessel, the Lotus, and a Turkish vessel, the Boz-Kourt. The Turkish vessel sank and eight Turkish nationals died. The Lotus sailed to Constantinople, where the French lieutenant who was on watch during the collision went ashore to give evidence. The Turkish authorities, however, arrested him, and he was tried and sentenced in a criminal proceeding. The governments of both countries agreed that the Permanent Court of International Justice should resolve the issue of whether Turkey had jurisdiction over the French national. The court found

outside its territory provided that the exercise does not conflict with a principle of international law, and provided that the nation maintains some concern over the matter in question.[60] Moreover, the burden of proof is on the complaining state to show that the extraterritorial prescription violated a principle of international law.[61] In more recent times, general international norms have also placed a burden on the state prescribing law abroad to demonstrate an appropriate basis for the extraterritorial jurisdiction or to demonstrate that the prescription of law outside the territory is reasonable.[62]

The International Court of Justice discussed the international norm regarding a state's espousal of the claims of its nationals in the *Nottebohm Case* of 1955.[63] The court stated that nations may espouse the claims of their nationals. However, whenever another nation challenges a state over its ability to espouse a claim, international tribunals will find for the challenging state and disallow the espoused claim if the state does not have a genuine link and superior connection to the national in which it seeks to espouse the claim.[64] The court wrote that the circumstances behind an individual's naturalization in an espousing state and a person's association to the espousing state were important factors to determine the existence of a genuine link.[65]

ii. United States Rule: The Restatements

The Third Restatement of Foreign Relations law summarizes the United States rule towards prescribing extraterritorial jurisdiction.[66] A

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that Turkey did not violate international law in instituting proceeding against the negligent French officer in the Lotus Case. *See id.*

60. *See id.* at 35.

61. *See id.* at 37.

62. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW 822 (2d ed. 1987).

63. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6). This case came before the International Court of Justice as a result of the government of Liechtenstein's efforts to espouse the claim of Nottebohm against the government of Guatemala for the seizure of his property and the denial of entry into Guatemala. Nottebohm was a German citizen who had taken up residence in Guatemala in 1905. Immediately prior to the outbreak of World War II, Nottebohm undertook the proper naturalization procedures and became a citizen of Liechtenstein. However, when war broke out, he was detained in the United States as an enemy alien and his property was forfeited by the government of Guatemala. Upon his release in 1946, Nottebohm went to live in Liechtenstein after being denied entry into Guatemala. The government of Liechtenstein then filed a claim with the International Court of Justice, arguing that Guatemala's seizure of Nottebohm's property and denial of entry into the country contradicted with international law. The court found for Guatemala, holding that Liechtenstein did not have the authority under international law to espouse the claim of Nottebohm. *See id*.

64. *See id.* at 23.

65. *See id.*

66. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS §§ 402-403 (1987) [hereinafter RESTATEMENT THIRD].

nation may prescribe jurisdiction if conduct outside its territory has, or is intended to have, a substantial effect within its territory,[67] provided the exercise of jurisdiction is reasonable.[68] The Restatement view is considered an extension of the traditional international law jurisdiction because more remote effects within a nation warrant extraterritorial jurisdiction if the act in question is reprehensible and directly effective.[69]

iii. Title III Conflicts with the Interpretations of International Legal Norms

Title III conflicts with international norms as established by international tribunals, as well as the United States rule on the use of extraterritorial jurisdiction. To demonstrate this, one merely needs to look to the purposes of Title III, as articulated in the statutory language and in the legislative history. First, in devising Title III, Congress sought to provide a remedy to United States nationals who had property unjustly confiscated after the Cuban Revolution.[70] Employing this justification, the United States may have a claim that the extraterritorial application of law provides an appropriate and reasonable basis. United States nationals lost billions of dollars worth of property after the revolution,[71] which likely had an impact upon economic development and commerce within the United States with respect to lost investment capital.[72]

However, by employing this purpose argument as a justification for extraterritorial jurisdiction, the United States encounters difficulties. The

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67. *See id.* § 402(1)(c); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (establishing a standard whereby United States courts may exercise jurisdiction over any party to an agreement if the agreement subsequently harms United States markets, regardless of a particular party's involvement in the United States); Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983) (holding that the securities misrepresentations that foreign national defendants made to the foreign national plaintiff in the United States were material enough to warrant subject matter jurisdiction); Continental Grain Ltd. v. Pacific Oilseeds Inc., 592 F.2d 409 (8th Cir. 1979) (finding subject matter jurisdiction in the United States because defendant's conduct "involved the use of instrumentalities of interstate commerce in the United States" and because the alleged fraud directly caused plaintiff's loss).

68. *See* RESTATEMENT THIRD, *supra* note 66, § 403(2). However, even if the exercise of extraterritorial jurisdiction is reasonable, a nation has an obligation to analyze any conflicting jurisdictional interests that may result from the imposition of extraterritorial jurisdiction. *See id.* § 403(3). In other words, when a state seeks to prescribe jurisdiction outside its territory, it may overlap with another country's territorial jurisdiction, in which case both states have a duty to evaluate which state has the greater jurisdictional interest. *See id.*

69. *See* STARKE, *supra* note 7, at 189. Professor Starke points out that the United States view is controversial within the international community because it extends jurisdiction beyond international norms. *See id.*

70. *See* Helms-Burton, *supra* note 1, § 301(11); H.R. REP. HELMS-BURTON, *supra* note 3, at 39.

71. *See* LEGISLATIVE REFERENCE SERV., *supra* note 11, at 16-17.

72. *See* Helms-Burton, *supra* note 1, § 301(2).

confiscations occurred nearly four decades ago. But while the United States condemned the takings and placed an embargo on Cuba, the United States government has not attempted to hold either the wrongdoers or those trafficking in the confiscated property liable in federal courts, until Helms-Burton. This forty-year lag between the harmful act and the creation of a remedy calls into question the severity of the impact that the confiscations have had on commerce within the United States. The relatively late enactment of Helms-Burton further detracts from the United States government's claim that the purpose of Title III is to remedy past injustices suffered by its nationals. In other words, if the confiscations harmed the United States economy, to an extent that necessitated a remedy, one must question why Congress waited forty years to create this statutory remedy.

Because of the first purpose articulated in Helms-Burton proves somewhat dubious, the true purpose of Congress for creating Title III may in fact be to deny Cuba the needed investment capital for an economic recovery and, thus, pressure the demise of the Castro regime.[73] If Congress's true purpose for Title III was, in fact, to pressure the demise of a ruthless dictator, then the United States can neither show an appropriate basis nor meet a test of reasonableness, for the extraterritorial application of law.

The argument, that the existence of a dictator who consistently violates human rights harms the United States moral conscience to a point that would permit the extraterritorial jurisdiction is weak. The fact that most countries in the world do not find the Cuban government's human rights violations morally reprehensible enough to warrant a total embargo renders the United States embargo unreasonable within the guise of the global community. What the United States considers to be a series of human rights violations may not be similarly viewed by the world at large. Furthermore, in recent years the United States government has assumed a tolerant position in terms of permitting trade with other countries where the governments violate the human rights of their population.[74] Thus, the United States cannot offer a sound basis or

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73. Helms-Burton, *supra* note 1, § 301(6) (A); H.R. REP. HELMS-BURTON, *supra* note 3, at 39.

74. For example, on May 27, 1994, President Clinton announced that the United States would de-link human rights from the annual review of Most-Favored-Nation trading status towards China. *See* White House, Office of the Press Secretary, *President in Press Conference on China MFN Status*, May 26, 1994, *available in* 1994 WL 209851 (White House). On June 24, 1997, Congress approved the renewal of Most-Favored-Nation status to China by a vote of 259 - 173, despite the Chinese government's poor human rights record. *See* 1997 House Roll No. 231 (rejecting H.J. Res. 79, disapproving the extension of nondiscriminatory treatment (Most-Favored-Nation treatment) to the products of the People's Republic of China); *see also* COUNTRY

reasonable argument that moral outrage over Cuban human rights violations warrants the attempt to eliminate Castro via pressure from extraterritorial jurisdiction.

Finally, the United States does not maintain a genuine and superior link to the group of United States nationals who were Cuban citizens at the time of the confiscations. In *Nottebohm*, the International Court of Justice determined that Nottebohm became a natural citizen of Liechtenstein merely to escape punishment in Guatemala for being a German citizen, and that he had no desire to disassociate himself with Germany.[75] Similarly, one can argue that many Cuban nationals did not become United States citizens after the Cuban Revolution out of a desire to be "Americans"; rather, many did so to avoid punishment in Cuba, and, since then, have not disassociated themselves with their native country. Thus, the claims by such a group of United States nationals sustains a much stronger connection to Cuba than the United States. The United States, similarly, does not maintain a genuine and superior connection, and would open itself to a challenge in an international tribunal for the passage of Title III, and the espousal of its nationals' claims who were Cuban citizens at the time of the confiscations.

c. Constitutional Law Problems

Congress did not explicitly violate the Constitution when it rejected the act of state doctrine in property rights cases under Helms-Burton. The majority in *Banco Nacional de Cuba v. Sabbatino Receiver* stated that the act of state doctrine was not grounded in the Constitution.[76] However, the mere fact that Congress was constitutionally justified in eliminating the act of state doctrine in Helms-Burton does not silence serious normative questions regarding constitutional law and the separation of powers doctrine. As the act of state doctrine currently stands, all three branches of government play a role in determining the appropriate course of action for United States foreign policy.[77] With Helms-Burton, Congress has

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REPORT ON HUMAN RIGHTS PRACTICES FOR 1996: CHINA, 105th Cong., 1st Sess., (Jt. Comm. Print 1997). *See generally Who's Coddling Now? Bill Clinton Broke a Promise to Stand Up for Human Rights, So Abuses Flourish in a China Unshackled from Trade Worry*, S.F. EXAMINER, Mar. 10, 1996, at B10 (describing a casual attitude of the United States government towards human rights violations in China).

75. *See* Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 25-26 (Apr. 6).

76. 376 U.S. 398, 423 (1964).

77. Congress set the bounds by which the Judiciary may apply the act of state doctrine, and gave the President authority to influence the Judiciary's application with the passage of the Second Hickenlooper Amendment. *See* 22 U.S.C. § 2370 (e) (2) (1994). The President attempted to influence not only the Judiciary's ability to determine whether to apply the act of state doctrine, but also the Judiciary's ultimate determination as to whether they should decide a case on the merits. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-

disregarded this power-sharing scheme, and has taken control over determining the foreign policy course of action for dealing with Cuban expropriations of American property.[78] The question of whether Congress should have the ability to eliminate the role of the other branches in determining a foreign policy course of action raises the constitutional issue of separation of powers between the three branches of government.

The Constitution is vague with respect to its grants of Congressional and the Executive powers to conduct foreign policy.[79] Courts have avoided hearing these cases because the question is so political in nature.[80] Thus, when these issues have come before the courts, the

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Maatschappij, 173 F.2d 71 (2d Cir. 1949) (discussing the possibility of the "Bernstein Exception" whereby the court would not apply the act of state doctrine if the State Department suggested that an adjudication on the merits would not harm foreign policy interests). The Supreme Court then limited the President's effort to influence the judicial decision by rejecting the "Bernstein Exception" in a five-justice plurality and limited Congress's control by construing the Second Hickenlooper Amendment to apply in cases where the specific expropriated property is in question. *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 777, 780 (1972) (Brennan, J., dissenting). *See generally* Mok, *supra* note 55, at 213-14 (describing the five-justice plurality of First National City Bank).

78. This apparent congressional monopoly over choosing the best foreign policy course of action to solve the Cuban expropriation problem may be illusory in that the Supreme Court has not fully resolved the issue of the President's authority to settle claims of United States citizens against a foreign government with an executive agreement. *See infra* Part III.B.1.a (describing the nature of executive agreements). In Dames & Moore v. Regan, 453 U.S. 654 (1981), the Supreme Court suggested that the President has inherent power to settle claims that stems from his power to recognize states and to enter into international agreements. *See id.* at 682-83 (citing United States v. Pink, 315 U.S. 203 (1942), and Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951)). However, they refused to grant a broad rule giving the President plenary power to settle claims. *See id.* at 688. The Supreme Court recognized that because they relied on the ambiguous International Settlement Claims Act of 1949, 22 U.S.C. § 1621-45 (1982), as a source of the President's power, they did not provide a constitutional resolution as to the sources and limits of the President's power. They left open the possibility that a future act of Congress could clearly conflict with the President's power to settle a particular claim and cause the court to disprove a settlement agreement. *See generally* Evan Todd Bloom, Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 COLUM. L. REV. 155, 163 (1985) (discussing the unresolved constitutional issue of the President's inherent powers to settle claims).

The Supreme Court has yet to resolve the constitutional issue of whether the President has settlement authority in spite of a congressional statute stating an intent to resolve such claims in federal courts. Thus, this paper cannot say for certain that Helms-Burton has removed the President from all decision-making capabilities regarding United States foreign policy and settling the United States nationals' claims of wrongful confiscation of property by the Cuban government.

79. *See* John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56-AUT LAW & CONTEMP. PROBS. 293, 304-05 (1993) (citing U.S. CONST. art. I, § 8 and U.S. CONST. art. II, § 2-3).

80. *See, e.g.*, United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). In the *Curtiss-Wright* case, the Supreme Court showed its desire to avoid a broad constitutional determination of foreign policy powers by articulating a very narrow holding. The court simply dealt with the issue of whether the Congress could delegate to the President through a Joint Resolution, the

opinions have been narrow and have avoided making broad interpretations of the Constitution.[81]

Despite the Supreme Court's desire to avoid this political issue, it has, on occasion, provided sound policy reasons in favor of granting broad control to the Executive in dealing with foreign policy matters. In dicta from the *Curtiss-Wright*, the majority stressed the importance of flexibility in the foreign policy arena, and the need to provide the President with the resources and expertise to negotiate with foreign powers and make foreign policy decisions without facing rigid congressional restraints.[82] The court reasoned that a strong and independent President was the best vehicle through which the United States could realize foreign policy success.[83]

While the dicta in *Curtiss-Wright* does not grant the President broad constitutional powers to conduct foreign policy, it articulates the fundamental policy reasons in favor of granting the Executive control over foreign policy decisions, as opposed to granting Congress such broad powers. The court noted that the President is the best-equipped actor to deal with foreign policy matters and, thus, he should enjoy discretion in this field to avoid foreign policy embarrassments.[84]

Unfortunately, the elimination of the act of state doctrine weakens the judicial and presidential discretion in the foreign policy arena. Title III rejects the notion that the President can oppose an adjudication on the merits, and request act of state protection, as well as the notion that courts can impose the act of state doctrine if the President opposes a judgement. This appears to weaken the Judiciary's role in foreign policy, and limits the President's influence in deciding the best course of action for United States foreign policy. Thus, it runs against the sound public policy articulated in *Curtiss-Wright*.

While Helms-Burton does not expressly violate the Constitution, it does raise normative questions about the separation of powers and the

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ability to declare illegal the selling of arms to Bolivia. *See id*. at 315. The narrow framing of the issue avoided making a broad constitutional decision of executive versus congressional control over foreign policy matters.

81. *See id.*

82. *Id*. at 320. Justice Sutherland wrote:

> It is quite apparent that if, in the maintenance of our international relations, embarrassment-perhaps serious embarrassment-is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiations and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

Id.

83. *See id.*

84. *See id.*

appropriate method for the United States to manage its foreign policy. This problem could surface in a Title III suit and, thus, cast a shadow on the ability of Helms-Burton to provide a remedy to injured United States nationals. After all, the Supreme Court could use these normative policy arguments to weaken Title III's impact, or eliminate it completely, should the opportunity present itself.

2. Secondary Boycott Provisions of Helms-Burton and the Sanctions Act

Both Helms-Burton and the Sanctions Act contain extraterritorial provisions that impose secondary boycotts on Cuba, Iran, and Libya. Title I of Helms-Burton and sections five and six of the Sanctions Act impose secondary boycotts in that they do not allow foreign nationals, who conduct certain types of business activities in Cuba, Iran, or Libya, to conduct business with United States nationals.[85] This has significant repercussions for foreign companies because it forces them to choose between doing business in the United States and doing business in Cuba, Iran or Libya.

a. How the Extraterritorial Sanctions Work

Title I of Helms-Burton prohibits sugar imports from foreign companies that obtain sugar products from Cuba and re-export them to the United States.[86] This applies the United States trade embargo abroad in that it sanctions foreign nationals who do not follow United States laws by denying them a part of the United States sugar import quota.

Sections V and VI of the Sanctions Act grant the President the authority to impose sanctions on foreign nationals who invest forty million dollars or more in the Iranian or Libyan energy sectors.[87] This constitutes an extraterritorial application of United States investment laws, and a secondary boycott, in that it threatens foreign firms with the

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85. Andreas Lowenfeld characterizes Title III of Helms-Burton as a secondary boycott because it has a similar effect of coercing foreign nationals into taking certain actions by using the threat of potential litigation. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 430 (1996). This point is open to debate because, while Title III may have the effect of a secondary boycott in that it deters certain conduct by foreign nationals outside the territory, it does not explicitly prohibit foreign nationals that traffic in confiscated property from conducting business in the United States. This Article has elected to use a more traditional definition of secondary boycott as an instrument that seeks to influence conduct of foreign nationals outside the territory by threatening to prohibit violators from conducting any business within the territory. Thus, the Article discusses separately Title III's attempt to influence behavior of foreign nationals through the threat of lawsuits. See *supra* Part III.A.1.

86. Helms-Burton, *supra* note 1, § 110(c)-(d).

87. Sanctions Act, *supra* note 2, § 5-6.

denial of access to United States markets if they do not comply with the investment embargoes.

b. Problems in International Law

The question of whether the U.S. secondary boycotts conflict with international legal norms is far more complex than the Title III jurisdiction issue because the global community has not necessarily established a customary norm against the use of secondary boycotts. However, even if a customary norm does not exist, there is a strong policy argument that the United States should not conduct secondary boycotts under the statutes because they create the potential for a negative global response, and a worsening of the U.S. international economic and political positions.

i. Customary Norms of International Law

Customary international law exists when states feel legally obligated to follow a body of norms.[88] States generally find this sense of legal obligation in judicial decisions, national legislation, and statements by government officials.[89] For the jurisdictional issue of holding foreign nationals liable in domestic courts for acts committed outside the territory, the global community established customary international norms. International tribunals, as well as the U.S. courts and Restatements, all helped to establish customary norms of jurisdiction by producing judicial decisions and legal writings.[90] However, the issue of secondary boycotts creates a different challenge in that the same level of evidence of a customary international norm does not exist. While the international community generally responds to secondary boycotts with hostility, there has been little in the way of solidifying a customary norm.

One event that may have created a sense of legal obligation to refrain from secondary boycotts was the UN response to the United States Cuban Democracy Act of 1992.[91] This statute imposes a type of secondary boycott in that it bans, from United States ports, ships that have conducted trade in Cuban ports within the past six months.[92] The United Nations responded to the United States by condemning the Democracy Act, and the General Assembly adopted a resolution entitled, "Necessity

88. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 244-45 (2d ed. 1995).

89. *See id.*

90. *See id.*

91. Pub. L. No. 102-484, 106 Stat. 2572, § 1702-12 (codified as 22 U.S.C. §§ 6001-6010 (1992)) [hereinafter Democracy Act].

92. *See id.* § 1706(b)(1).

of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba."[93] This resolution reaffirmed the UN belief in the right to co-exist and conduct international trade, and condemned the U.S. action.[94]

While this resolution appears to have given states some sense of a legal obligation not to impose secondary boycotts, it most likely did not create a customary norm of international law. First, the United States, to date, has not repealed the Democracy Act, suggesting that the United States Congress does not find there to be a legal conflict with the UN resolution. Furthermore, the resolution did not address the important issue of whether the U.S. action conflicted with international law.[95] It was essentially little more than a condemnation that lacked force to bring about change. Thus, the UN resolution is a weak example of evidence to support a custom, suggesting that a legal obligation to refrain from secondary boycotts does not exist in international law.

ii. Public Policy

Even though an international norm against secondary boycotts may not exist, the United States government freely adopts such provisions in domestic statutes. While the global community has not mobilized to create a customary norm on secondary boycotts, nations have historically acted with hostility when others have attempted to impose secondary boycotts.

Examples include the Arab League's secondary and tertiary boycott of Israel after the Arab-Israel War of 1948, and the Arab Oil Embargo after the 1973 Arab-Israel War. Following the 1948 war, the Arab League devised a three-tiered boycott of Israel, in which the second and third tiers placed any firm throughout the world that traded with Israel on a "blacklist," and denied trade between Arab League countries and any firm that conducted business with a "black-listed" company.[96] The Arab League continued its controversial practice of extraterritorial embargoes

93. G.A.Res. 19, U.N. GAOR, 47th Sess., Supp. No. 19 at 18, U.N. Doc. A/47 L.20/Rev. 1 (1992).

94. *See id.*

95. *See* Gabriel M. Wilner, *International Reaction to the Cuban Democracy Act*, 8 FLA. J. INT'L L. 401, 407 (1993) (noting that the General Assembly omitted a discussion of Democracy Act's validity under international law in order to gain the necessary support for the resolution, as many countries were hesitant to side against the United States given the poor human rights record in Cuba).

96. *See* Clinton E. Cameron, Note, *Developing a Standard for Politically Related State Economic Action*, 13 MICH. J. INT'L L. 218, 243 (1991). *See generally* LOWENFELD, *supra* note 36, at 313-21.

after the 1973 war with Israel. After the war, the Arab League placed an oil embargo on any country that supported Israel during the war.[97]

The global community and, in particular, the western oil-consuming powers have offered severe criticism of the Arab League's extraterritorial boycott provisions.[98] The United States played a leading role in condemning the Arab League's actions,[99] and enacted into law a series of congressional steps[100] that led to the antiboycott legislation of the Tax Reform Act of 1976[101] and the Export Administration Amendments of 1977.[102] These statutes prohibit United States companies from following secondary and tertiary boycotts.[103] They also include reporting requirements and sanctions provisions that impose penalties on United States nationals who follow the boycotts.[104]

The Arab League example demonstrates the negative consequences of adopting secondary boycotts. Despite the fact that international legal norms do not exist, nations treat boycotters with hostility, and usually impose some form of counter-measure that places the boycotting nation in a negative international position.[105] Thus, if not international norms, public policy should prevent the United States from imposing secondary boycotts against Cuba, Iran, and Libya in its domestic legislation.

B. Helms-Burton and the Sanctions Act Conflict with the United States International Obligations under GATT and NAFTA

1. United States Obligations under GATT and NAFTA

The first step in determining the U.S. international obligations is to examine the nature of the GATT and NAFTA agreements. This is important because the meaning of GATT and NAFTA dictate the U.S.

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97. *See* Cameron, *supra* note 96, at 243.

98. *See id.* at 244.

99. *See id.* (citing Bernard Gwertzman, *Kissinger Warns Arab on Oil Ban*, N.Y. TIMES, Feb. 7, 1974, at 1, 8).

100. *See* Howard N. Fenton III, *United States Antiboycott Laws: An Assessment of Their Impact Ten Years After Adoption*, 10 HASTINGS INT'L & COMP. L. REV. 211, 232-45 (1987) (discussing various attempts within Congress to create a statutory response to the Arab League's boycott between 1960 and 1977).

101. Pub. L. No. 94-455, 90 Stat. 1649 (codified at I.R.C. § 999 (1988 & Supp. IV 1992)) [hereinafter TRA].

102. Pub. L. No. 95-52, 91 Stat. 235 (codified as re-enacted at 50 U.S.C. app. § 2403 (1986), expired in 1990 and incorporated into the IEEPA, 50 U.S.C. § 1701-06 (1994)) [hereinafter EAA].

103. *See* EAA, 50 U.S.C. app. § 2407(a).

104. *See* EAA, 50 U.S.C. app. § 2407; TRA, I.R.C. § 999(b).

105. *See infra* Parts IV, V. These later sections discuss in detail the retaliatory measures that nations may adopt in response to extraterritorial statutes and the harm they can cause a nation in terms of damage to its international economic and political positions.

obligations to follow the agreements from both a domestic law and international law viewpoint.

a. The Nature of GATT and NAFTA

GATT and NAFTA are congressional-executive agreements that became part of domestic law through subsequent implementing legislation.[106] A congressional-executive agreement is one in which the President negotiates an international agreement pursuant to a congressional delegation of negotiating authority, and the Congress, on occasion, enacts a subsequent statute in order to give the agreement force in domestic law.[107]

GATT and NAFTA are both non self-executing international agreements and,[108] thus, require subsequent implementing legislation.

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106. Neither GATT nor NAFTA are treaties in that they did not require the President to receive the advice, and consent of two-thirds of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2. Despite the fact that congressional-executive agreements are not considered treaties, they are valid under the Constitution, and considered an acceptable form of international negotiation in the United States. Constitutional scholars and national leaders generally have agreed that the President and Congress have inherent and plenary powers in the Constitution that allow them to bind the United States to these types of agreements. *See* Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945); *see also* B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (finding that the Tariff Act of 1897 was considered a "treaty" under United States law despite the fact that it did not follow the constitutional procedure of a treaty); United States v. Belmont, 301 U.S. 324, 331 (1937) (stating that treaties as defined under the Constitution, as well as other international negotiations and compacts, have supremacy over state laws).

This constitutional interpretation began in the early twentieth century, as the citizens of the United States began to feel the effects of advancements in weapons technology and an inter-linked global economic structure. *See* McDougal & Lans, *supra* note 108, at 183-84. In response to these changing conditions, the citizens demanded that the government have an active and rapid foreign policy that could secure American interests abroad. *See id*. at 185-86. The increased desire for rapid and decisive responses in international affairs acted as a policy force behind the adoption of parallel procedures for implementing international obligations into domestic law. *See id.* The President could still enter into treaties with the advice and consent of two-thirds of the Senate, or could negotiate congressional-executive agreements pursuant to the inherent and plenary powers of the President and Congress. *See id*. at 187.

107. International agreements can either be "self-executing" or "non self-executing." A self-executing agreement has direct effect in United States law, while non self-executing agreements require implementing congressional legislation before they become part of domestic law. An agreement is self-executing if the framers intended for the agreement to have a direct effect in the United States. *See* Sei Fujii v. State, 242 P.2d 617 (Cal. 1952) (holding that provisions of the United Nations Charter were not self-executing because the United States did not intend to negotiate an agreement that would have direct effect in United States law). However, if Congress states an intention that an agreement be non self-executing when they grant the President negotiating authority, then the agreement is non self-executing and requires implementing legislation.

108. Congress, in granting the President authority to negotiate these agreements, expressed intent that they not be self-executing. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1103, 19 U.S.C. § 2903(a) (1) (C) (Supp. 1996) [hereinafter Omnibus Act].

Congress originally authorized the President to negotiate United States participation in GATT in the 1945 renewal of the Reciprocal Trade Agreement Act of 1934.[109] For the Uruguay Round in 1992-94,[110] the latest round of GATT negotiations, Congress gave the President the authority to negotiate the passage of the Omnibus Act.[111] Congress then implemented this agreement into United States law with the passage of the Uruguay Round Agreements Act of 1994.[112] Similarly, Congress authorized the President to negotiate for the extension of the Canada-United States Free Trade Agreement of 1988[113] into NAFTA in the Omnibus Act.[114] Congress implemented NAFTA into domestic law with the passage of the NAFTA Implementation Act of 1993.[115]

b. United States Obligations to Follow GATT and NAFTA

i. United States Law

In terms of domestic law, the United States is not obliged to follow these congressional-executive agreements in implementing subsequent domestic statutes. Essentially, the implementing legislation made the GATT and NAFTA agreements part of United States domestic statutory law. The effect of this method of inducting international agreements into domestic law is that they carry the same weight in the United States as other federal statutes.

This renders international agreements vulnerable to negation by a subsequent inconsistent congressional statute. *Lex posterior derogat priori*, or the last-in-time doctrine, states that inconsistent federal statutes that follow an international agreement will supersede the international agreement.[116] The Supreme Court first upheld the last-in-time doctrine in

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109. Pub. L. No. 73-316, 48 Stat. 943 (codified at 19 U.S.C.A. § 1351(a) (1) (Supp. 1996). Congress passed subsequent statutes which authorized the President to participate in each subsequent round of GATT negotiations. The Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, 19 U.S.C. § 1821(a) (1) (1988), gave the President authority to negotiate the Kennedy Round of 1964-67. The Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1982, § 101, 19 U.S.C. § 2111 (1988), authorized the President to participate in the Tokyo Round of 1974-79.

110. Reprinted in 33 I.L.M. 1140, 1144 (1994) (establishing the World Trade Organization (WTO)) [hereinafter Uruguay].

111. 19 U.S.C.A. § 2902 (Supp. 1996).

112. Pub. L. No. 103-465, 108 Stat. 4809, § 101(a) (1994) (to be codified at 19 U.S.C. § 1671).

113. Canadian-U.S. Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281, 293.

114. 19 U.S.C.A. § 2902 (Supp. 1996).

115. Pub. L. No. 103-182, 107 Stat. 2060, § 101, 19 U.S.C. § 3311(a) (1) (Supp. 1996).

116. *See* William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L.J.427, 461 (1995); *see also* RESTATEMENT THIRD, *supra* note 66, § 115(1) (a). *But cf.* Cook v. United States, 288 U.S. 102, 120 (1933); Transworld Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); United States v. P.L.O., 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988) (holding that a subsequent domestic statute must show a clear

Cherokee Tobacco,[117] and has subsequently affirmed this position.[118] Thus, despite the fact that GATT and NAFTA became binding law in the United States with the implementing legislation, their effect can be superseded by subsequent inconsistent statutes.

ii. International Law

Despite the fact that United States law allows for Congress to negate the effect of an international agreement by passing subsequent inconsistent statutes, international law binds countries to their agreements. The Vienna Convention on the Law of Treaties codified the customary international law practice of binding states to international agreements. [119] The convention states that international law does not distinguish between international agreements and treaties,[120] and that any agreement made between two member states creates a binding obligation.[121] Article 26 states that treaties are binding on the parties and must be performed in good faith.[122] Article 46 states that inconsistent domestic law does not release parties from their obligations under international agreements unless the pertinent domestic law is fundamentally important.[123] Thus, despite the legal ability to pass subsequent inconsistent statutes within United States law, international law indicates that the United States cannot pass statutes that disrupt valid international agreements.

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legislative intent to contradict the international agreement or the statute will be construed in a manner such that it does not conflict with the international obligations).

117. 78 U.S. (11 Wall.) 616 (1870).

118. *See, e.g.*, Edye v. Robertson, 112 U.S. 580, 599 (1884) ("The Head Monkey Cases"); Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) ("The Chinese Exclusion Case"); United States v. Dion, 476 U.S. 734, 745 (1986); *see also* Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 226 (1993); Aceves, *supra note* 116, at 461.

119. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONG. 39/27 (1969) [hereinafter Vienna Convention]. The United States was not a signatory to the convention. However, the United States has recognized the convention as an authoritative guide to the law of treaties. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 15 (1988).

120. Vienna Convention, *supra* note 119, art. 2(a).

121. *See id*. arts. 26, 46; *see* STARKE, *supra* note 7, at 267 (stating that a nation may not escape its international obligations by passing a subsequent inconsistent domestic statute).

122. *See* Vienna Convention, *supra* note 119, art. 26. This article states: "Every treaty in force is binding upon the parties to it and must be performed in good faith." *Id*.

123. *See id*. art. 46. This article states that the question of "fundamental importance" depends on the normal practice of states and an objective measurement of good faith. *See id*. While the United States may feel that the freedom to invoke subsequent inconsistent statutes is of fundamental importance, the world community's objective interpretation does not agree. *See* Clyde Mitchell, *The New Sanctions Act*, NEW YORK L.J, Aug. 21, 1996, at 3.

2. Helms-Burton and the Sanctions Act's Violations of GATT and NAFTA

The subtle distinction between United States and international law illustrates the difficulty in assessing the validity of Helms-Burton and the Sanctions Act. The United States government did not violate its domestic law by enacting these two statutes, but it did act in contravention to international law by enacting statutes inconsistent with the obligations under GATT and NAFTA. This section will highlight the inconsistencies between the two statutes and the U.S. obligations under the two agreements.

a. GATT

Helms-Burton and the Sanctions Act conflict with two of the most fundamental provisions of GATT: the Most-Favored Nation (MFN) principle[124] and the limitation on quantitative restrictions.[125] GATT provides exceptions that allow member states to act inconsistently with these principles,[126] but the United States does not meet these exceptions.

i. MFN Principle

Article I of GATT describes the MFN principle by stating that a contracting party must treat "like products" from other contracting states equally in terms of the level of restriction placed on importation or exportation.[127] Additionally, a contracting party has only to give MFN treatment to products that originate in the territory of another contracting party.[128]

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124. GATT, *supra* note 8, art. I.

125. *Id*. art. XI.

126. *See, e.g.*, *id*. arts. XX, XXI.

127. *See id*. art. I. This article states that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." *Id.*

The issue of what constitutes a "like product" is a controversial and debatable topic throughout the GATT agreement. For the purpose of resolving Article I controversies, the general definition has a broad scope and tends to revolve around a country's tariff classification. *See* GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 35 (6th ed. 1994) [hereinafter GATT INDEX]. Another method for defining "like products" in an Article I controversy is to look at the end-use of the product in question. *See* Spain-Tariff Treatment of Unroasted Coffee: Report of the Panel, GATT Doc. L/5135, § 4.7 (June 11, 1981), *reprinted in* 28 Supp. BISD 102 (1982). This means that goods that are defined within the same tariff classification or have the same end-use must receive equal treatment with regards to import restrictions. *See id*.

128. There are two generally acceptable methods to determine the country of origin. The "substantial transformation" approach determines where the most recent substantial transformation took place. *See* Superior Wire v. United States, 696 F. Supp. 472, *aff'g*, 867 F.2d 1409 (Fed. Cir. 1989) (determining whether the product was transformed into a new and different

Helms-Burton's restriction on sugar imports with Cuban contributions conflicts with the MFN principle. The language of Helms-Burton suggests a broad requirement that no sugar product with any Cuban contribution be admitted in the United States.[129] Helms-Burton's rule of origin requirement extends far beyond the "substantial transformation" and "value added" approaches of GATT. The MFN principle may consequently be violated because contracting parties, who attempt to export sugar products to the United States that contain a small percentage of Cuban input, will likely receive disparate treatment from other contracting parties who have the same tariff classification and end-use, but no Cuban input in the product.

Similarly, the Sanctions Act's provision, allowing the President to impose sanctions to restrict imports from foreign nationals who violate the statute, conflicts with the MFN principle.[130] If the President imposes this sanction on a foreign national of a GATT member state, the United States will violate the MFN principle. By imposing import restrictions on the products of these foreign nationals, and by not imposing similar restrictions on the like products from the companies of all member states, the United States violates the provisions of the GATT.

ii. Limits on Quantitative Restrictions

Article XI of the GATT disallows the use of quotas and licenses by contracting parties to limit imports from other contracting parties.[131] This article also contains a "catch-all" provision that disallows "other measures" that restrict imports.[132]

Helms-Burton's restrictions on sugar containing Cuban components appear to fall within the category of "other measures" in Article XI. With

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article in the intermediary country). The "value-added" approach determines the country of origin by analyzing the most recent country that contributed a certain percentage of value to the product. *See* United States v. Murray, 621 F.2d 1163 (1st Cir. 1980) (analyzing whether a procedure in the chain of production added value to the good).

129. *See* Helms-Burton, *supra* note 1, § 110(c); *see also* H.R. CONF. REP. NO. 104-468, 104th Cong., 1st Sess., at 50 (1995).

130. Sanctions Act, *supra* note 2, § 6(6).

131. GATT, *supra* note 8, art. XI. This article states that:

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

Id.

132. *See id.*; *see also* GATT INDEX, *supra* note 129, at 287 (stating that the term "other measures" applies to all measures that restrict the "importation, exportation or sale for export of product").

Helms-Burton, the United States essentially places a mandatory import requirement on sugar products that enter from other contracting parties.[133] This acts as a measure that restricts imports, and thus violates Article XI of GATT.

The Sanctions Act's provision that allows the President to impose import restrictions also violates the provisions of Article XI. The United States, again, places a mandatory import requirement on foreign firms that sell products to the United States.[134] These requirements may restrict imports from certain nationals of member states that also invest in Iran and Libya. This may constitute an "other measure" under Article XI of GATT.

iii. Exceptions

Given that Helms-Burton and the Sanctions Act conflict with these two provisions of GATT, the question becomes whether the United States meets an exception that would allow for the adoption of these statutes. GATT provides several exceptions that allow member states to avoid their obligations. First, Article XX lists general exceptions that countries may rely on to adopt measures inconsistent with GATT.[135] It allows for exceptions that a contracting party deems necessary to protect public morals,[136] as well as for exceptions that deny the products of prison labor.[137]

Second, Article XXI allows contracting parties to escape GATT obligations for the purpose of national security.[138] This article states that contracting parties are not obliged to follow the GATT agreement if they are protecting their security interests relating to nuclear materials, the trafficking of arms, or any action taken during an international crisis.[139]

The United States may claim that the provisions of Helms-Burton meet the public morals, and prison labor exceptions of Article XX. Cuba maintains a poor human rights and worker rights record.[140] Helms-Burton highlights these problems, and states that the goal of the statute is

133. Helms-Burton, *supra* note 1, § 110.

134. *See* Sanctions Act, *supra* note 2, § 6(6).

135. GATT, *supra* note 8, art. XX. Member states may use these measures provided they are justified, not arbitrary or discriminatory, and not a veiled attempt to restrict international trade. See id.

136. *See id.* art. XX(a).

137. *See id.* art. XX(e).

138. *Id.* art. XXI.

139. *See id.* art. XXI(b).

140. *See* COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996: CUBA, 105th Cong., 1st Sess. (Jt. Comm. Print 1997).

to bring about democratic reform in Cuba.[141] Thus, the United States could justify the restrictions on sugar imports as a protection of public morals, and a denial of goods produced with prison labor.

However, the United States would have a difficult task convincing a GATT panel that its actions pursuant to Helms-Burton meet these two general exceptions. The recent actions of the President and Congress suggest that human and worker rights in general do not influence international trade policy in the United States.[142] The indifference in the government over the link between human and worker rights and international trade policy would cause a GATT panel to question the United States sincerity if it were to make this claim.

With regards to the Sanctions Act, the United States may claim that the statute meets the Article XXI security exception. Iranian and Libyan nationals have made numerous threats to U.S. national security interests in sponsoring and conducting terrorist activities and attempting to obtain nuclear weapons.[143] The Sanctions Act states its goal as bringing an end to the security threats caused by Iran and Libya.[144] Thus, the United States could justify the denial of certain imports in terms of national security.

The United States would have difficulty arguing this to a GATT panel. While petroleum products may supply military establishments, there is a causal problem in showing a connection between investment in the petroleum sector and the supply to military establishments. Iran and Libya use their petroleum resources for other purposes besides building their armed forces.[145] Moreover, even if Iran and Libya had no domestic production of petroleum products, they would still have the capability of supplying their military establishments with oil through imports. These two facts illustrate that the United States would have a causation problem in light of an attempt to argue for a national security exception.

b. NAFTA

The Helms-Burton and Sanctions Acts also conflict with U.S. obligations under NAFTA. Like GATT, NAFTA contains a National

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141. Helms-Burton, *supra* note 1, § 2-3; H.R. REP HELMS-BURTON, *supra* note 3, at 23.

142. *See supra* note 74 and accompanying text.

143. *See* Sanctions Act, *supra* note 2, § 2-3; *see also* H.R. REP. SANCTIONS ACT I, *supra* note 3, at 8.

144. Sanctions Act, *supra* note 2, § 3.

145. *See* ECONOMIST INTELLIGENCE UNIT, COUNTRY REPORT: IRAN 3 (3d Quarter 1996) (estimating that Iran exports $14.3 billion worth of petroleum annually); *see also* ECONOMIST INTELLIGENCE UNIT, COUNTRY REPORT: LIBYA 3 (3d Quarter 1996) (estimating that Libya exports $7.5 billion worth of petroleum products annually). These figures show that Iran and Libya use their petroleum reserves for purposes beyond supplying military establishments.

Treatment clause that requires like products to be treated equally.[146] By denying imports from foreign firms that invest in Iran and Libya, the United States may violate its obligations under NAFTA.[147]

NAFTA also contains a provision that permits the free movement of workers.[148] This provision states that each party shall allow business persons to travel freely within the territories of the other member states.[149] Title IV of Helms-Burton restricts foreign nationals from entering the United States if they are involved in the trafficking of property confiscated by United States nationals.[150] This means that Mexican and Canadian business persons who traffic in the confiscated property, or who work for companies that traffic in confiscated property, no longer enjoy the ability to enter the United States.[151] This provision conflicts with the United States obligations under NAFTA.[152]

IV. RESULTS OF THE INTERNATIONAL LAW PROBLEMS OF HELMS-BURTON AND THE SANCTIONS ACT

The problems under international law that result from Helms-Burton and the Sanctions Act will have two negative consequences for the United States. First, foreign states will retaliate against the United States for implementing statutes that conflict with international law. Second, the United States will suffer a loss of reputation in the global community for enacting such problematic statutes.

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146. *See* NAFTA, *supra* note 9, art. 301. The relevant provision states that member states shall afford, "treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part." *Id.* art. 301(2).

147. For a discussion of how Sanctions Act may violate the MFN principle, see Part III.B.2.a.i. NAFTA allows member states to restrict trade between other member states of goods that have value-added from non-member countries. *See id.* art. 309(3). Thus the provisions of Helms-Burton that restrict the importation of goods with Cuban value-added probably do not conflict with the U.S. obligations under NAFTA. However, this does not necessarily mean that the United States has not committed a violation. NAFTA also requires member states that place these restrictions on imports do so, "with a view to avoiding undue interference with or distortion of pricing, marketing and distribution arrangements in another Party." *Id.* art. 309(4). Canada or Mexico could argue before a NAFTA dispute panel that the United States did not follow the spirit of this article in devising Helms-Burton's sanctions against Cuba.

148. *Id.* ch. 16.

149. *See id.* art. 1603. The NAFTA agreement states, "[E]ach Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security[.]" *Id.* art. 1603(1).

150. Helms-Burton, *supra* note 1, § 401.

151. *See id.*

152. NAFTA, *supra* note 9, art. 1603. This provision does allow member states to restrict the movement of business persons if it would adversely affect the settlement of a labor dispute or the employment of a person involved in the dispute. *See id.* art. 1603(2). However, it does not include as a justification for denying the movement of workers the trafficking in confiscated property. *See* Ratchik, *supra* note 14, at 367.

A. Retaliation

Helms-Burton and the Sanctions Act's problems under international law will cause major trading partners to impose two types of retaliatory measures against the United States. First, they will file claims with GATT and NAFTA dispute settlement organizations. Second, they will implement domestic legislation that neutralizes the coercive force of the U.S. extraterritorial legislation.

1. Dispute Settlement of GATT and NAFTA

The governments of GATT and NAFTA states whose nationals have been affected by Helms-Burton and the Sanctions Act may file claims with the two organizations' dispute settlement bodies. The GATT agreement includes a detailed procedure for solving disputes called the Dispute Settlement Understanding (DSU).[153] Article 4 of the DSU allows disputing parties to resolve their differences through consultations.[154] If the consultations fail to bring a resolution within sixty days, the complaining party may request the appointment of a mediator[155] or a panel[156] to hear the dispute. The adjudicatory process then resolves the dispute pursuant to Article XXIII of GATT.[157] If the complaining party can show either that benefits accruing to it under GATT are being nullified or impaired, or that the attainment of a GATT objective is being impeded, that party can secure a remedy.[158]

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153. The Uruguay Round consisted of five agreements: the Agreement Establishing the World Trade Organization, the Multilateral Trade Agreements, the Understanding of Rules and Procedures Governing the Settlement of Disputes, the Trade Policy Review Mechanism, and the Plurilateral Trade Agreement. *See* Uruguay, *supra* note 112. The Dispute Settlement Understanding [hereinafter DSU] is located in Annex 2 of the agreement.

154. *See id.* art. 4.

155. *See id.* art. 5.

156. *See id.* art. 6(1).

157. GATT, *supra* note 8, art. XXIII.

158. *See id.* The receipt of a remedy depends on the petitioner proving one of two things. First, the petitioner may show that the respondent breached a GATT obligation that caused the nullification or impairment, or the impedance of an objective. *See id.* art. XXIII(a); United States-Taxes on Petroleum and Certain Imported Substances: Report of the Panel, GATT Doc. L/6175, § 5.1.3 (June 17, 1987), reprinted in 34th Supp. BISD 136 (1988); *see also* DSU, *supra* note 155, art. 3(8) (instructing that a violation was a prima facie nullification or impairment that needed to be rebutted by the defending party). Second, the petitioner may show that the respondent did not violated a GATT obligation, but did implement a measure that caused a nullification or impairment, or an impedance of an objective. GATT, *supra* note 8, art. XXIII(b). *See also* EEC-Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Protection: GATT Doc. L/6627, §150 (Jan. 25, 1990), reprinted in 37th Supp. BISD 86 (1991).

In terms of the remedy, the DSU does not allow the complaining party to receive damages from the respondent, however it does allow the complaining party to impose sanctions on the

The European Union has, in fact, filed a complaint with GATT against the U.S. application of Helms-Burton and the Sanctions Act.[159] If the European Union can prove this violation of GATT to the DSU and show that it caused a nullification or impairment, or an impedance of a GATT objective, then the European Union will be eligible to receive a remedy. This would mean that the European Union would be able to impose a retaliatory sanction on the United States with GATT's approval.

NAFTA also contains dispute resolution procedures. It allows the complaining party the option of choosing the GATT settlement procedures of the DSU, or the distinct NAFTA settlement procedures.[160] In case of a dispute under the NAFTA procedures, the complaining party can request consultations.[161] However, if the parties do not reach an agreement within thirty days, either party may request a meeting with the Free Trade Commission.[162] If the Commission fails to reach a decision within thirty days, any party in the dispute can request an arbitral panel to hear the dispute.[163] The arbitral panel then decides whether the complaining party has had benefits accrued to it nullified or impaired, employing the same analysis as the GATT process.[164]

Canada and Mexico have both announced that they intend to file complaints against the United States with NAFTA over the implementation of Helms-Burton.[165] If they can prove a violation of NAFTA, and a nullification or impairment that resulted from the violation, NAFTA will afford them a remedy. If this happens, the United States will either have to withdraw certain sections of its law, or NAFTA will allow Canada and Mexico to suspend certain NAFTA benefits to the United States.

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respondent that are equivalent to the level of the nullification or impairment. DSU, *supra* note 153, art. 22(4).

159. *See* European Union Turns to WTO Over U.S. Curbs on Cuba, WALL ST. J., Oct. 2, 1996, at A12. The European Union has however, agreed to suspend its complaint with GATT in exchange for the United States promise that President Clinton will continue to suspend the implementation of Title III for the remainder of his term. *See also* Evelyn F. Cohn & Alan D. Berlin, European Community Reacts to Helms-Burton, NEW YORK L.J., Aug. 4, 1997, at S2.

160. *See* NAFTA, *supra* note 9, art. 2005.

161. *See id.* art. 2006.

162. *See id.* art. 2007.

163. *See id.* art. 2008.

164. *See id.* art. 2004. If the panel makes a determination in favor of the complaining party, it issues a report to the parties in order for them to reach an agreement on the withdrawal of the provision in question. *Id.* arts. 2017-2018. If the parties cannot agree, NAFTA procedures allow the complaining party to suspend benefits to the respondent that equal the effect of the harmful provision. *Id.* art. 2019.

165. *See* Clyde H. Farnsworth, *Canada Warns U.S. on Law Penalizing Cuba Commerce*, N.Y. TIMES, June 18, 1996 at D6.

2. Retaliation Statutes

Aside from the GATT and NAFTA dispute structures, foreign governments, whose nationals feel the extraterritorial effects of Helms-Burton and the Sanctions Act, may also enact domestic statutes that retaliate against the United States. These statutes can counter the coercive effects of Helms-Burton and the Sanctions Act in two ways. First, legislatures of foreign states can introduce statutes that grant their nationals a cause of action against any United States national who causes them harm by following Helms-Burton and the Sanctions Act. For example, the Council of the European Union has enacted a statute that allows nationals of member states to file claims against any United States national who causes damages through the application of Helms-Burton and the Sanctions Act.[166] The Canadian government has also announced that it plans to introduce similar legislation that will allow Canadian companies to counter-sue United States companies in Canadian courts in relation to Helms-Burton.[167]

Second, foreign countries may implement criminal sanctions against their own nationals who follow the extraterritorial provisions of the United States laws. The Canadian government, for example, has proposed an amendment to the nation's Foreign Extraterritorial Measures Act.[168] This act would allow the government to impose a $10,000 fine, and up to five years in prison, for Canadian nationals that comply with Helms-Burton.[169]

B. Reputation

Reputation is crucial for a state in the international community because it insures that other countries will abide by international norms in dealings with that country.[170] Despite the fact that international law is not often codified, and seldom contains an enforcement mechanism similar to that of the U.S. legal system, countries rely on the notion that their neighbors and trading partners will abide by international law in their relations. If one country consistently acts contrary to international law, other countries may become hesitant to enter into international negotiations with it. This is because nations consider other nations' reputations for abiding by international law in determining whether to enter into international agreements. Adherence to international law leads

166. Council Regulation No. 2271/96, art. 6, Nov. 22, 1996.
167. *See* Farnsworth, *supra* note 165.
168. S.O.R., ch. 49, § 1 (1984) (Can).
169. *See generally* Farnsworth, *supra* note 165.
170. *See* STARKE, *supra* note 7, at 14.

to the creation of a body of rules that brings predictability to international relations.[171] Such predictability, in turn, facilitates international trade and investment.[172]

1. United States Reputation after Helms-Burton and the Sanctions Act

Helms-Burton and the Sanctions Act's problems under international law probably will result in a loss of reputation for the United States in the global community. The United States government has not only acted inconsistently with international law by implementing Helms-Burton and the Sanctions Act, but has done so in a manner that contradicts its previous attitude towards certain international customs. The United States government has been an outspoken critic of the extraterritorial application of laws when its nationals faced sanctions from other countries.[173] Furthermore, the United States signed onto the MFN principle, and the limitation of the use of quantitative restrictions, when it became a member state of GATT and, later, NAFTA. Because the United States government reversed its previous positions on these issues, and has included extraterritorial provisions with little regard for obligations owed to NAFTA and GATT, it appears to be rejecting international law for the mere sake of political convenience.

This will undoubtedly have a detrimental effect on the United States ability to conduct international negotiations. Because reputation plays such a crucial role in international relations, other countries may not be as willing to enter into international agreements with the United States on a country-to-country level. Furthermore, the loss of reputation will hurt United States nationals in their efforts to conduct international trade and investment on an individual level in that foreign firms will not find trade and investment with United States firms predictable given the government's apparent disregard for international law.

2. Historical Lessons of Reputation

It is difficult to imagine the United States having trouble conducting international transactions given its status as a world superpower. However, history provides an example of the United States troubles entering into international agreements following an apparent action in contravention to international law. The apparent contradiction was the kidnapping of Humberto Alvarez-Machain and the subsequent United

171. *See id.*
172. *See id.*
173. *See supra* Part III.2.b.ii.

States Supreme Court case.[174] In the Alvarez-Machain incident, the United States government acted contrary to customary international norms against abducting foreign nationals.[175] The Supreme Court compounded the problem by issuing an opinion with an excessively literal reading of the language of the extradition treaty, and without any apparent thought to the spirit of the treaty or international norms.[176]

This apparent conflict with international law hurt the United States ability to subsequently negotiate the NAFTA agreement with the Mexican government.[177] Despite the benefits that Mexico would derive from entering a free trade agreement with the two large economies of the United States and Canada, they were not entirely willing to conclude negotiations because of the United States recent disregard of international law.[178] Indeed, the United States undermined its reputation as a country that abides by international law and, thus, curtailed its ability to conduct beneficial international negotiations.[179]

IV. FINAL REMARKS

By enacting Helms-Burton and the Sanctions Act, the United States government realized that it risked suffering economic damage in terms of lost business with major trading partners in the hopes of gaining the political benefit of changed regimes.[180] Using a cost-benefit analysis, the United States government envisioned the great political benefits of bringing democratic reforms to hostile governments and improving the safety for United States nationals around the world. Consequently, the United States was willing to suffer the potential economic costs that

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174. *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992). In 1985, Enrique Camarena-Salazar, a Drug Enforcement Administration [hereinafter DEA] agent, was tortured and killed by Mexican drug lords. The DEA believed that Alvarez-Machain, a Mexican national, participated in the murder by prolonging Camarena-Salazar life so that he could be further tortured and interrogated. In 1990, DEA officials paid a reward to have Alvarez-Machain kidnapped and flown to the United States where he was arrested.

The Supreme Court held that despite the fact that the United States and Mexico had an extradition treaty, Alvarez-Machain could not escape jurisdiction by being kidnapped and brought to the United States because the treaty in question did not specifically prohibit kidnapping. *See id.* at 664.

175. *See id.* at 670-71 (Stevens, J., dissenting).

176. *See id.* at 675 (stating that the intent of the extradition treaty between the United States and Mexico appears to have been to create "comprehensive and exclusive rules" for extradition).

177. *See* Murder and Kidnapping Are Wrong, BALT. SUN, Dec. 20, 1992, at 2H.

178. *See id.*

179. *Cf.* SAMUELSON, *supra* note 10.

180. *See* H.R. REP. SANCTIONS ACT I, *supra* note 3, at 20.

would result if the major trading partners did not give in to the pressures of the statutes.[181]

Unfortunately for the United States, costs and benefits of international actions are difficult to determine and far from precise.[182] Despite a willingness to absorb economic losses for international political gains, the United States, by acting in conflict with international legal norms, actually worsened both its international economic and political positions. First, by conflicting with international norms, the United States government subjected the nation to retaliation and a loss of reputation. This hurt the nation's international economic position by hindering trade and investment between United States and foreign nationals, and by limiting the United States government's ability to enter into international agreements.[183]

Second, the United States has hurt its international political position by enacting statutes that result in problems in international law. While the United States has suffered political problems with the governments of Cuba, Iran, and Libya, several other countries have entered the political conflicts in an adversarial position to the United States, since the adoption of the statutes.[184] Third parties, such as the European Community, Canada, and Mexico have all entered these pre-existing conflicts by filing claims against the United States with GATT and NAFTA dispute organizations for enacting the statutes. Further, several third parties have implemented domestic statutes that retaliate against United States nationals for the harmful effects that Helms-Burton and the Sanctions Act are believed to create. These third parties have not necessarily sided with Cuba, Iran, and Libya, but they have entered the international political conflicts between the United States and the three countries with a stance contrary to the United States. This has undermined the United States international political position in that the existence of third parties has complicated the conflicts, and has shifted the focus away from Cuba, Iran, and Libya, and onto the tension between the United States and the third parties.[185]

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181. *See id. See generally* LOUIS HENKIN, HOW NATIONS BEHAVE 50 (2d ed. 1979) (discussing the use of cost-benefit analyses for determining whether nations ought to adhere to international law).

182. *See* HENKIN, *supra* note 181, at 50.

183. *See* SAMUELSON, *supra* note 10.

184. *See* Jay Branegan et al., *Taking on the World Clinton Says the New Long Arm of Uncle Sam is Striking at Terrorists, But Those Getting Hit are America's Friends Abroad*, L.A. TIMES, July 6, 1997, at A1 (reporting that the National Transportation Safety Board cannot determine the cause of the explosion of TWA Flight 800 one year after the tragedy).

185. *See id.*; *see also* Stuart Anderson, Blow to Trading Partners, WASH. TIMES, July 19, 1996, at A21.

The genesis of the international economic and political problems occurred when the United States government misidentified the actors that caused harm to the United States within the two statutes. The misidentification of the state as the harmful actor caused the statutes to have an over-broad target for sanctions, resulting in excessively broad macroeconomic sanctions. This phenomenon led to the statutes' problems under international law, which created the current United States losses in its international economic and political positions.

The question then becomes what the United States government could have done to avoid the genesis of these problems in devising the two statutes, yet still achieve the political goals of bringing democratic reform to hostile governments and insuring safety for United States nationals. One possible alternative would have been for the United States government to enact statutes that offered foreign nationals economic benefits, as opposed to threats in the form of embargoes and possible litigation. If the United States government were to give foreign nationals positive economic incentives to trade with, and invest in, the United States in certain economic sectors, a natural move of foreign capital away from Cuba, Iran, and Libya and towards the United States may have occurred. If the incentives were devised properly, the United States could have faced the same losses it now faces in terms of its international economic position,[186] yet faced none of the political losses that have resulted from Helms-Burton and the Sanctions Act. Furthermore, the United States could have achieved the political benefits that the statutes sought to realize in the first place.

The realization of the United States international political goals would be possible under a system of positive economic incentives because positive economic incentives usually do not lead to problems under international law.[187] If the United States government were to enact

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186. This is premised on the idea that if the United States government is willing to sacrifice economic benefits to pressure countries into following its embargoes, then it should be willing to give economic incentives to countries that choose to conduct business with the United States to the exclusion of other countries. In either circumstance, the United States would be in the same position in terms of short-term economic losses. *Cf.* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing the idea that would later be known as the Coase Theorem, that parties in a dispute will achieve an economically optimal resolution through private bargaining); Richard Morrison, *Efficient Breach of International Agreements*, 23 DENV. J. INT'L L. & POL'Y 183, 206 (1994) (arguing that parties in an international agreement achieve an economically superior position through bargaining).

187. Offering positive economic incentives instead of pressures does not insure adherence to international law. The United States would not be able to give trade benefits in the form of tariff concessions because that would violate the MFN principle of GATT. The United States also would not be able to give tax benefits to certain imports because that would constitute a violation of the national treatment clause of GATT. GATT, *supra* note 8, art. III. However, the United States could, for example, provide new investment opportunities to foreign firms that would

statutes that adhered to international law, they would avoid the political problems that the country now faces. First, by adhering to international law, the United States would be able to freeze third parties out of its conflicts with Cuba, Iran, and Libya. Thus, instead of the confusing situation that exists today, where several third-party states have entered this conflict to denounce and try to stop the United States actions, the political conflict would be clear, unambiguous, and easier for the United States to resolve. Second, by offering positive investment incentives, the United States would face the possibility that foreign nationals would cease investing in Cuba, Iran, and Libya. This may have the effect of weakening the macroeconomic health of the three states in a manner consistent with international law and, eventually, bringing the political changes that the United States desired.

A statutory system of positive economic incentives may be a naive and idealistic idea. Cuba, Iran, and Libya all maintain natural resources, as well as other economic and political characteristics that make the countries attractive investment locations for foreign nationals. Thus, the United States government may not have the ability to deter investment in Cuba, Iran, and Libya without resorting to threats of embargoes and litigation.[188]

However, in showing the mere possibility of alternative avenues, one can see the lack of appeal of the current statutory system. Helms-Burton and the Sanctions Act both sacrifice the United States international economic position for the goal of political gain, but both have the unintended and unfortunate result of political loss. The United States could be better off by doing absolutely nothing in these cases, and that is the true tragedy of the recent statutory efforts of Helms-Burton and the Sanctions Act.

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make investment in the United States a much more attractive option than investment in Cuba, Iran, or Libya.

188. It would be possible to determine through an economic study whether the United States government could deter investment in Cuba, Iran, and Libya by merely offering foreign nationals a positive investment climate within the United States. One could analyze and quantify the attractiveness of investing in Cuba, Iran, and Libya by creating an economic model that describes the investment climate in the three countries. Once this was done, it would be possible to determine the types and magnitude of investment incentives that the United States government would need to offer in order to make foreign investors abandon projects in Cuba, Iran, and Libya.

The next question that would need to be asked would be whether the United States is willing to give that level of incentives to foreign investors in order to deter investment in Cuba, Iran, and Libya. The needed level of incentives may be more than the United States population, and thus the elected government, is willing to tolerate.

This type of analysis goes beyond the scope of this Article. The author merely intends to point out the possibility of a statutory system of positive economic incentives that do not result in problems with international law, not to discuss in great detail the viability of such a system.