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The Legality of the Helms-Burton Act under NAFTA:

An Analysis of the Arguments the United States, Canada, and Mexico May Present to a Chapter 20 Dispute Resolution Panel

*Stephen V. Iglesias*¹

I. Introduction.

This comment explores the legality of the Helms-Burton Act sanctions under the North American Free Trade Agreement. In sum, the Helms-Burton Act penalizes Mexico and Canada for maintaining economic relations with Cuba. For purposes of my analysis, I will assume the United States, Mexico, and Canada are presenting their cases to a dispute resolution panel convened under Chapter 20 of the NAFTA. Part II summarizes the objectives of the Helms-Burton Act and provisions in contention. Part III provides a history of property confiscation in Cuba. Part IV examines the legality of the Act under Article 1105 of NAFTA, which mandates compliance with international law. I will consider the act of state doctrine, international human rights law, international property expropriation law, and extraterritorial jurisdiction. Part V examines force majeure and the doctrine of necessity and how claims under the Helms-Burton Act are not precluded due to these principles. Parts VI, VII and VIII analyze the legality of the Helms-Burton Act under various NAFTA provisions. Part IX analyzes legality under provisions of the General Agreement on Tariffs and Trade pursuant to Article 103 of NAFTA.

II. What Is the Helms-Burton Act?

On March 12, 1996, President Clinton signed the Helms-Burton Act into law as a direct response to the downing of two U.S. civilian aircraft by the Cuban Air Force.² The Act imposes direct and indirect economic sanctions on Cuba, designed to hasten the dissolution of Fidel Castro's dictatorship, punish the Cuban government for engaging in human

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 2. Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C.A. §§ 6021-91 (West Supp. 1996)) [hereinafter Act]. Section 116 of the Act condemns the attack on the U.S. planes. 22 U.S.C.A. § 6046. The planes were operated by "Brothers to the Rescue", which is a Cuban-American humanitarian organization based in Miami.
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rights violations, and promote a shift to democracy in Cuba.³ Sanctions apply directly through the codification of executive orders comprising the 35-year old U.S. embargo against Cuba into law.⁴ Via Titles I, III, and IV, the Act applies indirect sanctions by punishing both foreign businesses in Cuba using confiscated U.S. property and countries importing Cuban sugar for re-export.⁵ These indirect sanctions prevent Cuba from attracting desperately needed foreign investment to compensate for the loss of its economic lifeline, the former Soviet Union.⁶

Title I bans the importation of sugar from countries that re-export Cuban sugar.⁷ According to Title I, the NAFTA does not override U.S. sanctions against Cuba.⁸

Title III allows U.S. nationals to sue anyone in the U.S. federal court who traffics in their confiscated Cuban property for the fair market value of that property, so long as the confiscation occurred on or after January 1, 1959.⁹ Section 4 defines the terms property, trafficking, and who qualifies as a U.S. national.¹⁰ The confiscation need not violate any

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3. See 22 U.S.C.A. § 6022 (West Supp. 1996); *Sanctions: President Signs Cuba Sanctions Bill After it Passes House by Big Margin*, 13 Int'l Trade Rep. (BNA)11 (Mar. 13, 1996). The purposes of the Act are—(1) to assist the Cuban people in regaining their freedom and prosperity, as well as joining the community of democratic countries that are flourishing in the Western Hemisphere; (2) to strengthen international sanctions against the Castro government; (3) to provide for continued national security of the United States in face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States; (4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers; (5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.
 4. 22 U.S.C.A. §6032(h) (West Supp. 1996); see also Michael M. Phillips, *Senate Passes Bill to Tighten Cuba Embargo*, WALL ST. J., Mar. 6, 1996, at A22.
 5. See Saturino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995: An Initial Analysis*, 27 U.MIAMI INTER-AM. L. REV. 325 (1996).
 6. Jonathan R. Ratchik, Note, *Cuban Liberty and the Democratic Solidarity Act*, 11 AM. U. J. INT'L L. AND POL'Y 343,345 (1996).
 7. 22 U.S.C.A. § 6040(c) (West Supp. 1996).
 8. 22 U.S.C.A. § 6040(b) (West Supp. 1996). Congress notes that United States accession to the North American Free Trade Agreement does not modify or alter the United States sanctions against Cuba. The state of administrative action accompanying that trade agreement specifically states the following: (1) "The NAFTA rules of origin will not in any way diminish the Cuban sanctions program ... Nothing in NAFTA would operate to override this prohibition." (2) "Article 309(3) [of the NAFTA] permits the United States to ensure that Cuban products or goods made from Cuban materials are not imported into the United States from Mexico or Canada and that the United States products are not exported to Cuba through those countries."
 9. 22 U.S.C.A. § 6082(a)(1)(A) (West Supp. 1996). Fair market value of the property is the greater of either the current market value of the property or the value of the property when confiscated plus interest. Court costs and reasonable attorneys' fees are also recoverable.
 10. 22 U.S.C.A. § 6023 (West Supp. 1996). (12) The term "property" means any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future or contingent right, security, or other interest therein,
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law for purposes of Title III action, so long as a "claim" to the property exists.¹¹ For two years after the Act goes into effect, only claimants under the U.S. Foreign Settlement Claims Commission can invoke the benefits of Title III.¹² A Title III claim is not available unless the property is worth at least \$50,000.¹³

Title IV punishes aliens who traffic in confiscated property by denying them U.S. entry visas and prohibiting them from living in the United States.¹⁴ The definition of aliens includes any person, corporate officer, principal, shareholder with a controlling interest in a trafficking entity and the spouse, minor children and agents of the trafficker.¹⁵

Canada and Mexico claim the Act violates U.S. obligations under the NAFTA.¹⁶ In addition to taking preliminary action to convene a NAFTA dispute resolution panel under Chapter 20 of the NAFTA, both countries have taken domestic legislative action to counter

including any leasehold interest. (B) For purposes of title III of the Act, the term "property" does not include real property used for residential purposes unless, as of the date of the enactment of this Act—(I) the claim to the property is held by a United States national and the claim has been certified under title V of the International Claims Settlement Act of 1949, or (ii) the property is occupied by an official of the Cuban Government of the ruling political party in Cuba. (13) As used in Title III, and except as provided in subparagraph (B), a person "traffics" in confiscated property if that person knowingly and intentionally— (i) sells, transfers, distributes, dispenses, brokers, manages or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) engages in commercial activity using or otherwise benefitting from confiscated property, (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) through another person, without the authorization of a United States national who holds claim to the property. (B) The term "traffics" does not include—(i) the delivery of international communications signals to Cuba; the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national; (iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or (iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is an official of the Cuban government or the ruling political party in Cuba. (15) The term "United States national" means (A) any United States citizen; or (B) any other legal entity which is organized under the law of the United States, or of any state, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has its principle place of business in the United States.

11. *Implementations of the Cuban Sanctions: Legal and Practical Implications of Title III of the Helms-Burton Law Before the Senate Subcomm. On Western Hemisphere and Peace Corps Affairs*, (1996)(statement of Robert L. Muse, attorney).
 12. 22 U.S.C.A. § 6082(a)(5)(C) (West Supp. 1996).
 13. *Id.* § 6082(b). According to Muse "[a]pproximately 800 claims [meet the \$50,000] threshold, but because these claims may reflect such things as confiscated inventories, bank deposits, vehicles, etc. [that is, property long since dissipated, and therefore, incapable of being "trafficked" in] the actual number of certified claims that would qualify for suit under Title III is probably, at best, no more than 300-500." *Supra* note 11, at 4.
 14. 22 U.S.C.S. § 6091(a) (West Supp. 1996).
 15. *Id.* § 6091(B)(4).
 16. Bachman et al., *Anti-Cuba Sanctions May Violate NAFTA*, GATT, 96 NAT'L L.J. C3 (1996).
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the Act. Canadian Bill C-54 proposes to amend its Foreign Extraterritorial Measures Act to allow the issuance of "blocking" orders to prevent the enforceability of judgments made under the Act in Canadian courts.¹⁷ The proposal includes a "clawback" provision, which allows Canadian companies to recover awards and court costs in Canadian court.¹⁸ Mexico's Chamber of Commerce passed similar "antidote" legislation on September 25, 1996.¹⁹

III. Historical Perspective on Cuban Property Confiscation.

Upon assuming power in 1959, Fidel Castro immediately began to shift both domestic and foreign property ownership to the government in order to implement a socialist economic system.²⁰ The Fundamental Law allowed the Cuban government to confiscate private property.²¹ In 1959, the Agrarian Reform Law led to the confiscation of farms larger than 400 hectares.²² The Agrarian Reform Law was the first to effect foreign-owned property.²³ The confiscated property was converted into agricultural cooperatives managed by the Cuban Institute of Agrarian Reform.²⁴ Under the Law, sugar companies could only operate if Cuban citizens owned the companies' stock.²⁵

Although the Law provided compensation to affected property owners, the compensation plan "was illusory and from the outset could not have adequately compensated the foreign owners"²⁶ To fund the compensation plan, Castro asked the United States to increase their sugar quota from 3 million to 8 million tons.²⁷ The United States refused, since the demand for additional sugar did not exist in the United States and it was felt that an increase in the purchase of Cuban sugar would harm domestic sugar producers.²⁸

The United States officially accepted the Agrarian Reform Law on June 11, 1959 through an official letter to Cuba.²⁹ Although the United States did acknowledge Cuba's right to confiscate property for public purposes, the letter stated "this right is coupled with the corresponding obligation [of] prompt, adequate and effective compensation."³⁰ However, Cuba did not compensate the landowners of expropriated property and contin-

17. Roland P. Wiederaenders, III, *Rock and a Hard Place: Helms-Burton Summary and Responses*, 2 NAFTA L. REV. 121, 131-33 (Fall 1996).

18. 13 Int'l. Trade. Rep. (BNA) 25 (June 19, 1996).

19. 'Antidote' Bill to Helms-Burton Approved by Mexican Lawmakers, 13 Int'l Trade Reporter (BNA) 40 (Oct. 9, 1996).

20. Kern Alexander & Jon Mills, *Resolving Property Claims in Post-Socialist Cuba*, 27 LAW & POL'Y INT'L BUS. 137,142 (1995).

21. *Id.*

22. *Id.*

23. John W. Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C.J INT'L L. & COM. REG. 66,69 (1995).

24. *Id.*

25. *Id.* at 70.

26. *Id.*

27. *Id.*

28. *Id.* at 71.

29. *Id.*

30. *Id.*

ued to confiscate property in a "random and offensive manner."³¹

United States approval of the Agrarian Reform Law did not dissuade Cuba from turning its attention to the confiscation of U.S. property.³² U.S.-Cuban relations deteriorated in 1960 with the dispute over Cuba's importation of Soviet oil and mineral taxes the Cuban government imposed on U.S. companies.³³ When the United States refused to process Soviet Oil in its refineries, the Cuban government seized them.³⁴

In response, President Eisenhower eliminated the Cuban sugar quota.³⁵ Cuba followed by implementing the Nationalization Law, aimed at the nationalization of all U.S. owned property.³⁶ Although the Nationalization Law provided for compensation to U.S. property owners, this never occurred.³⁷ Moreover, the prospect of a lower sugar quota in the United States bolstered economic relations between Cuba and the Soviet Union.³⁸ The Soviet Union signed a five-year trade agreement with Cuba to import.³⁹

On October 13, 1960, the United States banned exports to Cuba except for "nonsubsidized foodstuffs, medicines and medical supplies."⁴⁰ Cuba responded on October 25, 1960, by confiscating remaining U.S. property.⁴¹ On February 6, 1962, President Kennedy imposed a full economic embargo on Cuba.⁴² Congress expanded the Trading With the Enemy Act of 1917, which allows the President to restrict international trade during war and peacetime emergencies.⁴³ Pursuant to the Trading With the Enemy Act, the U.S. Department of the Treasury issued the Cuban Assets Control Regulations to restrict Cuba's access to its assets in the United States and to prevent U.S. citizens from doing business in Cuba.⁴⁴

31. *Id.* at 71. In 1959 alone, Cuba seized property belonging to more than 5,000 individuals and 500 companies. Tensions heightened due to Castro's persistent threats against the United States. U.S. property owners were regularly harassed by Cuban officials. The Cuban government refused to respond in a positive way to repeated U.S. efforts to seek a friendly solution to the problem of expropriation.

32. *Id.*

33. Ratchik, *supra* note 6, at 345, 346.

34. *Id.* at 346.

35. *Id.*

36. Smagula, *supra* note 23, at 72, 73.

37. *Id.*

38. *Id.*

39. *Id.* at 73; See also Shari-Ellen Bourque, Note, *The Illegality of the Cuban Embargo in the Current International System*, 13 B.U. INT'L L.J. 191,194 (1995). Cuba also entered sugar sales agreements with East Germany, Poland and China.

40. Smagula, *supra* note 23, at 74.

41. *Id.* at 75.

42. *Id.*

43. *Id.* at 76; Trading With the Enemy Act of Oct. 6, 1917, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app.1-44(1988)). The Trading With the Enemy Act originally allowed the President to restrict wartime trade with Germany and the Austro-Hungary Empire. *Id.*

44. *Id.* The Cuban Assets Control Regulations prohibits "transactions [that] involve property in which [Cuba], or any national thereof, has...any interest of any nature whatsoever, direct or indirect" by "any person subject to the jurisdiction of the United States. The CACR provides substantial civil and criminal penalties for violations." *Id.* at 76-77.

Furthermore, the Foreign Assistance Act of 1961 was passed and states the United States will not provide aid to Cuba, unless U.S. nationals are compensated for their property.⁴⁵ In 1964, Congress amended the International Claims Settlement Act of 1948 to create the Foreign Settlement Claims Commission described in Part I.⁴⁶ This Commission was established to permit U.S. nationals to file property claims against the Cuban government.⁴⁷

IV. The Helms-Burton Act Must Comply with General Principles of International Law Under NAFTA.

Article 1105(1) of NAFTA requires that "each Party [to the NAFTA] shall accord to investments of investors of another party treatment in accordance with international law"⁴⁸

A. THE ACT OF STATE DOCTRINE DOES NOT APPLY TO THE HELMS BURTON ACT IN LIGHT OF THE SABBATINO AMENDMENT.

The Helms-Burton Act may violate the act of state Doctrine.⁴⁹ The act of state doctrine prevents United States federal courts from reviewing the legality of official public acts of foreign governments within their borders.⁵⁰ Applying this doctrine, the United States may not be able to grant relief for Cuban property confiscation claims, since these confiscations were official acts of the Cuban government. Canada and Mexico may argue claimants must look to Cuban courts for a remedy.

Banco Nacional de Cuba v. Sabbatino is the seminal U.S. Supreme Court case dealing with the doctrine.⁵¹ In *Sabbatino*, Cuba nationalized a Cuban company that sold sugar to an American commodities broker.⁵² To secure consent for the sugar shipment, the broker entered into a new contract with the Cuban government and its shipping agent, Banco Nacional.⁵³ When the broker paid the original owner of the sugar company instead of

45. *Id.* (citing 22 U.S.C.A. § 2370 (West 1990)). No assistance shall be furnished under this [Act] to any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation of Cuban sugar into the United States or to receive any other benefit under any law of the United States, until the President determines that such government has taken appropriate steps according to international law standards to return to United States citizens...or to provide equitable compensation to such citizens and entities for property taken...on or after January 1, 1959, by the government of Cuba. *Id.*

46. Ratchik, *supra* note 6, at 347.

47. *Id.*

48. North American Free Trade Agreement, drafted Aug. 12, revised Sept. 6, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (entered into force Jan. 1, 1994)[hereinafter "NAFTA"].

49. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L. L. 419 (1996).

50. 2 RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 683-6 (1995).

51. 376 U.S. 398 (1964), *rev'd*, 243 F. Supp. 957 (S.D.N.Y. 1965).

52. *Id.* at 403.

53. *Id.* at 404.

Banco Nacional's agent, Banco Nacional sued the broker for conversion.⁵⁴ The broker moved for summary judgment on the grounds that Banco Nacional did not have a property interest in the sugar, because expropriation of the Cuban sugar corporation violated international law.⁵⁵ Banco Nacional invoked the act of state doctrine to prevent a U.S. court from reviewing the legality of the expropriation.⁵⁶ The U.S. Supreme Court reversed the Court of Appeals and held the "judicial branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government."⁵⁷

The passage of the Sabbatino Amendment (or Second Hickenlooper Amendment) to the Foreign Assistance Act led to the reversal of *Sabbatino* in *Banco Nacional de Cuba v. Farr*.⁵⁸ The Sabbatino Amendment states the act of state doctrine does not preclude judicial or legislative action when the property taking violates international law.⁵⁹ Courts have strictly interpreted the Sabbatino Amendment and do not apply it often.⁶⁰

While it is arguable the doctrine is customary international law enforceable under Article 1105, one must remember the act of state doctrine is a product of U.S. case law.⁶¹ Because Article 1105 does not speak to obligations under U.S. domestic law, but international law, the doctrine may not have applicability under the NAFTA, unless it has the status of customary international law.

B. THE HELMS-BURTON ACT VIOLATES INTERNATIONAL LAW BECAUSE CLAIMANTS WHO WERE CUBAN CITIZENS AT THE TIME OF EXPROPRIATION CANNOT SEEK A REMEDY IN THE UNITED STATES.⁶²

International law permits a state to assert a claim against a foreign state on behalf of an injured party only when the claimant was a citizen of the protecting state at the time the injury occurred.⁶³ The Helms-Burton Act may be inappropriate, because international law may require claimants who were Cuban citizens at the time of expropriation to pursue their claim in Cuban courts, absent "the state's breach of a fundamental norm of international law."⁶⁴ According to Mills and Alexander, "expropriation of property without com-

54. *Id.* at 406.

55. *Id.*

56. *Id.*

57. *Id.* at 428.

58. FOLSOM & GORDON, *supra* note 50, at 686; 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d. Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

59. *Id.* at 685.

60. *Id.* The Second Circuit only applies the Sabbatino Amendment when the expropriated property enters the United States. But, the D.C. Circuit held the Amendment is not limited to the Second Circuit interpretation. *Id.*

61. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 323(4th ed. 1990).

62. Alexander & Mills, *supra* note 20, at 156-157.

63. *Id.*

64. *Id.* Peremptory norms are fundamental principles (*ius cogens*) that include prohibitions against slavery, piracy, unlawful use of force, and certain basic political and social rights enumerated in the international human rights conventions. When the domestic state has violated a peremptory norm of international law against one of its nationals, a foreign state may invoke its diplomatic protection on behalf of the aggrieved individual. The foreign state's right of diplomatic protection derives from the obligation of all states *erga omnes* (to the

pensation does not rise to the level of violation of a peremptory norm."⁶⁵

Following the ruling in *Barcelona Traction*, a corporation incorporated in Cuba may not have standing to sue in the United States.⁶⁶ This rule only allows the country of incorporation to provide diplomatic protection.⁶⁷ However, shareholders of U.S. companies organized under the laws of Cuba may be entitled to Helms-Burton Act protection under a theory stated by the *Barcelona Traction* Court in dicta.⁶⁸ This theory states, "the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company."⁶⁹

In *Barcelona Traction*, the Spanish subsidiary company of a Canadian company organized under Canadian law was mostly owned by Belgian shareholders.⁷⁰ The Spanish company was expropriated by the Spanish government, which the shareholders claimed injured them.⁷¹ The Canadian government refused to intervene, so Belgium brought a claim before the International Court of Justice on behalf of the shareholders.⁷² The court held that only Canada could sue since the company had its corporate headquarters in Canada and was organized under Canadian law.⁷³ Since the company was not registered in Belgium, the interest of the Belgian government was too remote.⁷⁴

C. THE ACT UPHOLDS INTERNATIONAL HUMAN RIGHTS LAW BY PROTECTING THE RIGHT TO OWN PROPERTY.

Under Article 17 of the Universal Declaration of Human Rights, international human rights law recognizes the right to own and to not be arbitrarily deprived of property.⁷⁵ While this may be true, the Declaration is not a self-executing treaty under the holding in *Sei Fuji v. State*.⁷⁶ In *Sei Fuji*, the California District Court of Appeals held that California's Alien Land Law was unenforceable because it violated the human rights provision of the United Nations Charter.⁷⁷ The court found the law discriminatory under the Charter,

world community) not to violate peremptory norms of international law, because all states suffer injury as a result of such violations. By contrast, when an individual suffers as the result of its state's violation of customary international law, but the violation itself does not rise to the level of a breach of a peremptory norm, a foreign state may not invoke diplomatic protection. In the latter case, a state may only assert the claim of an individual if it has a diplomatic link with the aggrieved party. *Id.* at 157 n.93.

65. *Id.* (citing Case Concerning the Barcelona Traction, Light, and Power Co., Ltd. (Belgium v. Spain) Second Phase, 1970 I.C.J. 3 (Feb. 5)[hereinafter *Barcelona Traction*]).

66. *Id.* at 157.

67. *Barcelona Traction*, 1970 I.C.J. at 42.

68. Alexander & Mills, *supra* note 20, at 160.

69. *Barcelona Traction*, 1970 I.C.J., at 48.

70. *Id.* at 7.

71. *Id.* at 8.

72. *Id.* at 11.

73. *Id.* at 42-5.

74. *Id.*

75. G.A. Res. 217A(III), U.N. GAOR 3d. Comm., 3d. Sess., pt. 1 at 71, U.N. Doc. A/810, at 71 (1948).

76. 242 P.2d 617 (Cal. 1952).

77. *Id.* at 619.

which it held was a U.S. treaty.⁷⁸ The Supreme Court of California reversed and held the Charter was not a self-executing treaty, which would give it the power to nullify state law.⁷⁹

Sei Fuji may be countered. First, the Universal Declaration of Human Rights may be recognized as customary international law.⁸⁰ If the Declaration is customary international law, presumably, it would be binding on a NAFTA dispute panel. Secondly, just because the Declaration is non-binding in a U.S. court does not make it non-binding on a NAFTA dispute panel. But, Canada and Mexico will have a strong argument that United Nations resolutions and charters that do not rise to the level of customary international law are nothing more than "mere recommendations."⁸¹

D. INTERNATIONAL LAW ENTITLES VICTIMS OF FOREIGN PROPERTY CONFISCATION TO COMPENSATION FROM THE CONFISCATING COUNTRY.

1. *Hull Doctrine.*

The Hull Doctrine requires a state that expropriates foreign property to provide "prompt, adequate, and effective compensation."⁸² This doctrine forms the basis of the modern "just compensation" standard, which requires that "in absence of exceptional circumstances ... an amount equivalent to the value of the property taken ... paid at the time of the taking ... in a form economically usable by the foreign national."⁸³

2. *Chozrow Factory—The Foundation of Modern International Expropriation Law.*

In *Chozrow Factory*, Germany claimed that Poland violated the 1922 Geneva Convention concerning upper Silesia when it confiscated German industrial property in that area.⁸⁴ The Permanent Court of International Justice held Poland's action violated the Geneva Convention and international law.⁸⁵ In light of this violation, the court required "payment of a sum corresponding to the value of which restitution in kind would bear [together with] the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."⁸⁶ In other words, the damages must be significant enough to "wipe out all consequences of the illegal act and re-establish the situa-

78. *Id.*

79. *Id.* at 622.

80. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 16-7.

81. Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post Cold War Assessment of the Legality and Utility of the Thirty-Five Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901 (1995).

82. Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474,475 (1991).

83. *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 712(1987) [hereinafter RESTATEMENT (THIRD)]).

84. Smagula, *supra* note 23, at 88.

85. *Id.*

86. M.H. Mendelson, *What Price Expropriation? Compensation for Expropriation: The Case Law*, 79 AM. J. INT'L L. 414 (1985).

tion which would, in all probability have existed if that act had not been committed.”⁸⁷ The court also pronounced a compensation formula for lawful expropriation which is “the value of the undertaking at the moment of dispossession, plus interest to the day of payment.”⁸⁸ The United States may cite *Chozrow Factory* to support treble damages under Title III.⁸⁹

3. “Just” v. “Full” Compensation.

According to section 712 of the Restatement (Third), international law entitles alien victims of property confiscation to “just” compensation equal to the fair market value of their property at the time of the taking.⁹⁰ If the property taking was for a public purpose, it is exempt from the compensation rules.⁹¹

“Full” compensation, which takes lost profits into account, may be available pursuant to both the precedent established in the SEDCO arbitration heard before the Iran-United States claims tribunal.⁹² *Chozrow Factory* may also support full compensation. In the SEDCO arbitration, SEDCO sued the Iranian government for confiscating their foreign business operations in Iran. SEDCO sought a remedy under the Treaty of Amity between Iran and the United States, which requires the “full equivalent of the property taken.”⁹⁴ Although Iran argued that only “appropriate” compensation is recognized under international law, the Tribunal rejected this view and held that SEDCO was entitled to “full” compensation under customary international law.⁹⁵

4. NAFTA View.

The NAFTA ignores the “full” v. “just” distinction by requiring the award of the fair

87. Norton, *supra* note 82, at 476.

88. *Id.*

89. 22 U.S.C.A. § 6082 (a)(3)(C)(ii) (West Supp. 1996).

90. RESTATEMENT (THIRD), *supra* note 83, § 712.

A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation; For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national. *Id.*

91. *Id.* Comment e states

[t]he requirement that a taking be for a public purpose is reiterated in most formulations of the rules of international law on expropriation of foreign property. That limitation, however, has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states. Presumably, a seizure by a dictator or oligarchy for private use could be challenged under this rule. *Id.*

92. Thomas J. Lang, Note, Satisfaction of Claims Against Vietnam for the Exportation of U.S. Citizens' Property in South Vietnam in 1975, 28 CORNELL INT'L L.J. 265,281 (1995).

93. *Id.* at 281-82(citing Interlocutory Award in Case Concerning SEDCO, Inc. and National Iranian Oil Co. and Iran, 25 I.L.M. 629 (Iran-U.S. Claims Tribunal, May 27, 1996).

94. *Id.* at 281.

95. *Id.*

market value of the property immediately before the expropriation occurred.⁹⁶ NAFTA does not provide for punitive damages for property expropriation.⁹⁷ Therefore, Canada and Mexico can argue treble damages are not allowed under the NAFTA.

Regardless of whether the correct measure of damages is "full" or "just", Cuba directly violates international law by refusing to provide any compensation to the property owners. Cuba refused to follow its own Agrarian Reform Laws and the Nationalization Law, which both provide for compensation by the payment of multi-year bonds.⁹⁸ The Agrarian Reform Law of 1959, which adopted Article 24 of the former Cuban Constitution, required property takings to serve a public purpose and to be compensated by "indemnity in cash."⁹⁹ But, the 1976 Constitution "codified the government's de facto policy of refusing to compensate expropriated property owners."¹⁰⁰ In light of Cuba's refusal to compensate property owners, the United States can argue Title III may serve as the only forum available for claimants to seek relief. The problem with this argument is that international expropriation law speaks to state responsibility to pay compensation, not the responsibility of private business entities.¹⁰¹ For this reason, the Helms-Burton Act may be misdirected.

E. THE ACT IS AN UNLAWFUL EXTENSION OF EXTRATERRITORIAL JURISDICTION.¹⁰²

U.S. courts hold the United States has jurisdiction in disputes arising out of conduct that has consequences or intended effects in the United States. In *Timberlane Lumber*

96. NAFTA, *supra* note 48, art. 1110.

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation or such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6; 2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. *Id.*

97. *Id.*

98. Alexander & Mills, *supra* note 20, at 142; Smagula, *supra* note 23, at 72.

99. *Id.* at 146.

100. *Id.* at 149. Article 15 of the 1976 Cuban Constitution precludes property owners of their right to ownership and compensation for expropriation.

The socialist state property, which is the property of the entire people, becomes irreversibly established over the lands that do not belong to the small farmers or to cooperatives formed by the same; over the subsoil, mines, the natural resources and flora and fauna in the marine area over which it has jurisdiction, woods, the waters, means of communication; over the sugar mills, factories, chief means of transportation; and over all those enterprises, banks, installations and properties that have been nationalized and expropriated from the imperialists, the landholders and the bourgeoisie; as well as over people's farms, factories, enterprises and economic, social, cultural and sports facilities built, fostered or purchased by the state and those which will be built, fostered or purchased by the state in the future. *Id.* at 149-50.

101. *Supra* note 90.

102. Bachman et al, *supra* note 16, at 3.

Company v. Bank of America, comity narrowed the traditional "effects test."¹⁰³ Comity requires the court to balance the interests of all the countries involved in the dispute before asserting jurisdiction.¹⁰⁴ In *Timberlane*, an Oregon general partnership invested in a Honduran company that was heavily in debt to the Honduran branch of Bank of America.¹⁰⁵ Bankruptcy proceedings were initiated and Bank of America was able to recover most of its outstanding claims against the Honduran company at the Plaintiff's (Timberlane) expense.¹⁰⁶ Plaintiff sued concurrently in Honduras and the United States.¹⁰⁷ On remand from the Court of Appeals of the Ninth Circuit, the District Court applied the effects test and found that while Defendant's actions did cause sufficient domestic effects, reopening the case in the United States after it had been reviewed by the Honduran court would be inappropriate.¹⁰⁸

The *Timberlane* Court looked to the following factors in determining whether extraterritorial jurisdiction could be asserted: (1) the degree of conflict with foreign law and policy; (2) the nationality of the parties and the principal place of business; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the effects in the United States; 5) the extent to which there is an explicit purpose to harm the United States; and, (6) the foreseeability of the effect.¹⁰⁹ Section 403 of the Restatement (Third) sets forth a reasonableness test based on the *Timberlane* factors and a traditional minimum contacts jurisdictional analysis.¹¹⁰

103. 549 F.2d 597 (9th Cir. 1976), *aff'd*, 574 F.Supp. 1453 (N.D.Cal. 1983).

104. *Timberlane Lumber Co. v. Bank of America Nat'l Trust and Sav. Ass'n*, 574 F.Supp. 1453, 1463 (N.D. Cal. 1983).

105. *Id.* at 1456.

106. *Id.*

107. *Id.* at 1459.

108. *Id.* at 1471. "Respect takes many forms as this Circuit has admonished us. Regard for the codification of its cultural, business and ethical mores, as well as the integrity of its system of justice, leads us inextricably to conclude that we need DISMISS these actions." *Id.*

109. *Supra*, note 103, at 614.

110. RESTATEMENT (THIRD), *supra* note 83, § 403.

(1) ... a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable; (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; (h) the likelihood of conflict with regulation by another

Applying the *Timberlane* and Restatement (Third) factors, the Helms-Burton Act may be an unreasonable exercise of jurisdiction because the property confiscations have no direct effect within U.S. borders.¹¹¹ On the other hand, through addressing property confiscation, the Act purports to regulate activity which has a direct effect within the United States. The activities stated in the Act are: 1) international narcotics trafficking; 2) Cuba's sponsorship of terrorism, and; 3) Cuba's general threat to U.S. national security.¹¹² But, the lack of a nexus between these activities and property expropriation suggests the Helms-Burton Act is an improper exercise of extraterritorial jurisdiction. Moreover, the Act misdirects punishment to foreign businesses which did not cause the aforementioned effects.¹¹³

F. TITLES I AND III REPRESENT AN ILLEGAL SECONDARY BOYCOTT WHICH VIOLATES CUSTOMARY INTERNATIONAL LAW.

A secondary boycott exists if "the secondary target is being sanctioned directly for dealing with the primary target, even though such dealings have no jurisdictional relationship to the sanctioning state."¹¹⁴ A more specific example of a secondary boycott is when state A says that if X, a national of state C, trades with state B, X may not trade or invest in A. In other words, X is required to make a choice between doing business with or in A, the boycotting states, and doing business with B, the target state, although under the law of C where X is established, trade with both A and C is permitted.¹¹⁵

The Helms-Burton Act constitutes a secondary boycott since Canada and Mexico must either change the scope of their business activities in Cuba or face Helms-Burton Act sanctions.¹¹⁶

V. Under Force Majeure and the Doctrine of Necessity, Canada and Mexico Will be Unsuccessful in Arguing that Title III Claimants Abandoned Their Claims.

Claimants failing to return to Cuba to re-claim their confiscated property may have legally abandoned their property and any claims they had regarding it.¹¹⁷ This argument may fail under force majeure, which "can be invoked to protect a party against the consequences of a wrongful act if the act was due to an irresistible force or to an unforeseen

state; (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater. *Id.*

111. Alexander & Mills, *supra* note 20, at 149.

112. 22 U.S.C.A. § 6021 (West Supp. 1996).

113. Alexander & Mills, *supra* note 20, at 149.

114. MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE §10.3.1 608 (1990).

115. Lowenfeld, *supra* note 49, at 429.

116. *Id.*

117. Alexander & Mills, *supra* note 20, at 165.

external event beyond the party's control.¹¹⁸ The event must make it impossible for the party to meet their obligations.¹¹⁹ The United States can argue Title III claimants did not abandon their property, because the Cuban revolution was an event that forced property owners to flee Cuba.¹²⁰ The revolution "induced an imminent fear of political and economic persecution among many Cubans and foreigners."¹²¹ Moreover, the Iran-U.S. Claims Tribunal will serve as persuasive authority supporting that if force majeure conditions exist, property owners do not abandon claims for their expropriated property.¹²²

The doctrine of necessity may also preserve Title III property claims.¹²³ This doctrine protects an individual committing a wrongful act if the act was done to protect "an essential interest" of the party from "grave and imminent peril."¹²⁴ The "essential interests" those who left Cuba sought to protect from danger were their lives from threats of political persecution, state-imposed dissolution and expropriation of assets.¹²⁵

Support for the force majeure defense and the doctrine of necessity is found in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.¹²⁶ Articles 13 and 14 of the Universal Declaration of Human Rights gives individuals the right to leave their country and to seek asylum in another country.¹²⁷ The International

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (citing *Motorola, Inc. v. Iran Nat'l Airlines Corp.*, 19 Iran-U.S. Cl. Trib. Rep. 73,85 (1988)). The Iranian government passed an expropriation law similar to Cuba's.

123. *Id.*

124. *Id.*; HENKIN ET AL. INTERNATIONAL LAW: CASES AND MATERIALS 565 (3d ed. 1993)(citing Article 33 of I.L.C. Draft Articles on State Responsibilities).

1. A state of necessity may not be invoked [by a party] as a ground from precluding the wrongfulness of an act of that [party] not in conformity with an...obligation of the [party] unless: (a) the act was the only means of safeguarding an essential interest of the [party] against a grave and imminent peril; and (b) the act did not seriously impair an essential interest of the State toward which [an] obligation existed. (2) In any case, a state of necessity may not be invoked by a [party] as a ground for precluding wrongfulness: (a) if the international obligation with which the act of the [offending] State is not in conformity arises out of a peremptory norm of general international law; or (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or (c) if the [action] has contributed to the occurrence of the state of necessity. *Id.*

125. *Id.*, at 565.

126. *Id.*; *Universal Declaration of Human Rights*, *supra* note 75; *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 54, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368, 372.

127. *Id.* Article 13 of the Universal Declaration of Human Rights states "1. Everyone has the right to freedom of movement and residence within the borders of each State; 2. Everyone has the right to leave any country, including his own, and to return to his country." Article 14 states "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution; 2. This right may not be invoked in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purpose and principles of the United Nations." *Universal Declaration of Human Rights*, *supra* note 75, arts. 13,14.

Covenant for Political and Civil Rights grants individuals the right to leave their country.¹²⁸ Therefore, under international human rights law, individuals and businesses that left Cuba in the face of the revolution did not abandon their property or claims to it.¹²⁹

VI. Title IV of the Helms-Burton Act May Violate Annex 1603 of NAFTA.

Title IV prohibits aliens who traffic in confiscated Cuban property from entering the United States.¹³⁰ This provision also orders the deportation of the spouses, children and agents of these trafficking aliens.¹³¹

Annex 1603 requires a NAFTA country to grant temporary entry to business persons from other NAFTA countries, as long as there is compliance with existing immigration measures applicable to temporary entry.¹³² Because Title IV of the Helms-Burton Act was non-existent at the time NAFTA entered into force, it may violate Annex 1603.¹³³

Canada and Mexico can cite the Confidential Interim NAFTA Panel Decision on the U.S.-Canada Dairy/Poultry Dispute to support this interpretation of the word "existing."¹³⁴ The United States argued that Canada's imposition of a tariff-rate quota pursuant to privileges granted under the World Trade Organization Agreement on Agriculture violated section 302 of NAFTA, since the WTO was created *after* NAFTA entered into force.¹³⁵ In ruling that Canada's imposition of a quota on U.S. dairy imports did not violate Article 302 of NAFTA, the panel held that the NAFTA did not prevent Canada from the tariff-rate quotas.¹³⁶ Canada argued that imposing the tariff-rate quota was consistent with the NAFTA since the WTO Agreement on Agriculture was incorporated into NAFTA via

128. *International Covenant on Civil and Political Rights*, *supra* note 126, art. 12(2).

129. *Id.*

130. 22 U.S.C.A. § 6091(a) (West Supp. 1996).

The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after the date of the enactment of this Act—(1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national; (2) traffics in confiscated property, a claim to which is owned by a United States national; (3) is a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim which is owned by a United States national; or (4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3). *Id.*

131. *Id.*

132. NAFTA, *supra* note 48, art. 1603. "[E]ach [NAFTA] 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, in accordance with this Chapter, including the provisions of Annex 1603." *Id.*

133. Buchman et al., *supra* note 16, at 4.

134. *Confidential Draft Shows NAFTA Win for Canada's Dairy, Poultry Farmers*, INSIDE U.S. TRADE (An Inside Washington Publication), Vol. 14, No. 30, July 26, 1996.

135. *Id.* at 20.

136. *Id.* at 28-9.

Article 710 of the U.S.-Canada Free Trade Agreement.¹³⁷ Article 710 allows the United States and Canada to “retain their rights and obligations with respect to agricultural, food, beverage and certain related goods under the General Agreement on Tariffs & Trade (GATT) and agreements negotiated under the GATT, including their rights and obligations under GATT Article XI.”¹³⁸ Article XI permits the maintenance of tariff rate quotas.¹³⁹ Canada argued that Article 710 makes rights and obligations under the GATT a part of NAFTA, whether or not they were entered subsequent to its entry into force.¹⁴⁰ The United States responded by saying that Article 710 does not apply to GATT rights and obligations created subsequent to the entry into force of the NAFTA.¹⁴¹ The Panel stated that if the U.S. and Canada intended to limit the Article 710 to GATT obligations in existence at the time the NAFTA was enacted, the word “existing” would have been used in the article.¹⁴² Using this decision as precedent, Title IV may be precluded by Annex 1603, since the Helms-Burton Act did not exist prior to the NAFTA.

VII. The Helms-Burton Act May Violate Article 1103 of NAFTA.

Under Article 1103 of NAFTA, NAFTA Parties must afford each other most-favored-nation treatment.¹⁴³ The most-favored-nation principle is a non-discriminatory principle which obligates NAFTA parties to treat each other’s investors or investments equally to their favored trading partners.¹⁴⁴

The Act may violate the NAFTA under Article 1103, because Title I discriminates against Cuban sugar imports. Refer to Section IX(B) below for a detailed discussion of this issue.

137. *Id.* at 22.

138. *Id.* at 21.

139. *Id.*

140. *Id.* at 23-4.

141. *Id.*

142. *Id.* at 22-3.

143. NAFTA, *supra* note 48, art. 1103.

144. *Id.*

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments; 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. *Id.*

VIII. The United States Can Invoke the National Security Exception Under Article 2102 to Justify the Helms-Burton Act.

The United States can look to Article 2102 national security exemption to justify its violation of the aforementioned NAFTA provisions.¹⁴⁵ National security interests the Helms-Burton Act addresses are Cuba's support of terrorism, Cuba's theft of property owned by U.S. nationals, Cuba's support of international narcotics trafficking, and mass migration of Cubans immigrants to the United States in response to deteriorating conditions in Cuba.¹⁴⁶

IX. The Act May Violate Provisions of the General Agreement on Tariffs and Trade (GATT).

Under Article 103 of NAFTA, parties agree to fulfill their obligations under the GATT and other agreements to the extent that these obligations are not inconsistent with the NAFTA.¹⁴⁷

A. THE HELMS-BURTON ACT MAY VIOLATE ARTICLE I OF THE GATT FOR NOT AFFORDING MOST-FAVORED NATION TREATMENT TO CUBAN SUGAR IMPORTS.

Article I is the most-favored nation provision of the GATT, which obligates signatory countries to be non-discriminatory in their treatment of imports.¹⁴⁸ The secondary boycott imposed by the Title I restrictions of Cuban sugar imports may violate Article I, since

145. NAFTA, *supra* note 48, art. 2102.

Subject to Articles 607 (Energy—National Security Measures) and 1018 (Government Procurement—Exceptions), nothing in this Agreement shall be construed: (a) to require any party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. *Id.*

146. 22 U.S.C.A. § 6021(13)(14), (19)(West Supp. 1996).

147. NAFTA, *supra* note 48, art. 103.

148. General Agreement on Tariffs and Trade, opened for signature, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194 [hereinafter GATT]. Article I states:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports and exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 1 and 2 of Article III, any advantage, favour, privilege or immunity granted by any contracting state 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.* (emphasis added).

Cuban imports are treated differently than products originating in other countries.¹⁴⁹ To counter this, the United States can say Title I may not violate Article I if the sugar did not undergo a "substantial transformation" in the country re-exporting the Cuban sugar¹⁵⁰. A product must undergo "substantial transformation" in an industrial process in the country to be considered an export of that country.¹⁵¹ The Act may also violate Article XI of the GATT.¹⁵² Article XI of the GATT mandates the elimination of non-tariff barriers.¹⁵³ Title I may constitute a non-tariff barrier that falls under the category of "other measures" in Article XI.¹⁵⁴

149. 22 U.S.C.A. § 6040(c) (West Supp. 1996). "The Congress notes that section 902(c) of the Food Security Act of 1985 (Public Law 99-191) requires the President not to allocate any of the sugar import quota to a country that is a net importer of sugar unless appropriate officials of that country verify to the President that the country does not import for reexport to the United States any sugar produced in Cuba." *Id.*

150. Ratchik, *supra* note 6, at 353.

151. The country of origin can be determined under the "substantial transformation" test or a product-based classification. *Superior Wire v. United States*, 669 F. Supp. 472 (Ct. Int'l Trade 1987), *aff'd*, 867 F.2d 1409 (Fed. Cir. 1989). Under the "substantial transformation" test, the country of origin of a good is where it is substantially transformed into a new and different product, having a distinctive name, character, or use. *Id.* at 477-80. In *Superior Wire*, the Plaintiff importer of Canadian steel wire sued the United States for banning the Plaintiff from importing a shipment of wire manufactured from Spanish wire rod. The United States entered a voluntary restraint agreement that barred the import of Spanish wire and wire rod into the United States. The issue was whether the shipment of Canadian wire was a Canadian or Spanish product subject to VRA prohibitions. In holding the wire was a Canadian product, the court did not find the transformation of imported Spanish wire rod into wire a substantial transformation. *Id.* The court considered whether significant value had been added to the wire in Canada, how much capital, labor and investment was required to accomplish the changes made in Canada, and whether the character of the wire changed in the Canadian manufacturing process. *Id.* In terms of production, the court found "the processing performed in Canada is a minor finishing step which may be accomplished easily anywhere with a minimal amount of effort and investment." *Id.* at 478. Under the product-based classification, which is the method used to determine origin under NAFTA, a product undergoes the equivalent of a substantial transformation if its classification undergoes a change under the Harmonized Tariff Schedule. *Id.*

152. *Bachman et al.*, *supra* note 16, at 4.

153. GATT, *supra* note 148, art. XI.

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

154. *Id.*

B. THE UNITED STATES MAY BE ABLE TO AVOID ITS OBLIGATIONS UNDER THE GATT THROUGH ARTICLE XX.¹⁵⁵

Article XX permits signatory countries to avoid GATT obligations to protect public morals and to comply with other laws.¹⁵⁶ If Canada and Mexico can successfully argue that the United Nations Declaration on Human Rights and other pronouncements of international human rights law are not mandatory law, subsections (a) and (b) of Article XX may be a means by which the United States can set forth its human rights justifications for creating the Helms-Burton Act.

Note that the Helms-Burton Act addresses other human rights violations besides the deprivation of the right to property. Section 2 of the Act lists torture, execution, and political imprisonment as other human rights violations addressed by the Act.¹⁵⁷ These findings of human rights violations are supported by Sections 2(20) and 2(22), which state the United Nations Commission on Human Rights has both found severe human rights violations in Cuba and has propounded General Assembly Resolutions to address these violations.¹⁵⁸

Article XX also allows signatory countries to take measures to ensure compliance with other laws.¹⁵⁹ The United States can argue that Title I was created to ensure compliance with the Foreign Assistance Act of 1961, which prohibits the importation of Cuban sugar into the United States.¹⁶⁰

155. Ratchik, *supra* note 6, at 353.

156. GATT, *supra* note 148, art. XX.

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (d) necessary to secure compliance with law or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices; (e) relating to the products of prison labor.

157. 22 U.S.C.A. § 6021(15) (West Supp. 1996).

158. *Id.* § 6021(20),(22) (West Supp. 1996). Section 20 states “[t]he United Nations Commission on Human Rights has repeatedly reported on the unacceptable human rights situation in Cuba and has taken the extraordinary step of appointing a Special Rapporteur.” Section 2(22) states “[t]he United Nations General Assembly passed Resolution 47-139 on December 18, 1992, Resolution 48142 on December 20, 1993, and Resolution 49-200 on December 23, 1994, referencing the Special Rapporteur’s reports to the United Nations condemning violations of human rights and fundamental freedoms in Cuba.” *Id.*

159. Ratchik, *supra* note 6, at 353.

160. *Id.* (citing the Foreign Assistance Act of 1961, 22 U.S.C. § 2370 (a)(2) (1994)).

(2) Except as may be deemed necessary by the President in the interest of the United States, no assistance shall be furnished under this chapter to any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation of Cuban sugar into the United States or to receive any other benefit under any law of the United States, until the President determines that such government has taken appropriate steps according to inter-

C. THE UNITED STATES MAY BE ABLE TO AVOID GATT OBLIGATIONS UNDER ARTICLE XXI.

Article XXI allows a signatory country to circumvent its GATT obligations for security reasons.¹⁶¹ The United States can use the same justifications as under Article 2102 of the NAFTA to apply Article XXI.

D. THE HELMS-BURTON ACT MAY VIOLATE ANNEX 2004 OF NAFTA AND ARTICLE XXIII OF THE GATT BY NULLIFYING OR IMPAIRING A BENEFIT THAT BOTH CANADA AND MEXICO EXPECTED TO RECEIVE UNDER NAFTA.¹⁶²

Annex 2004 of the NAFTA considers the nullification or impairment of a benefit provided under Part Two (Trade in Goods) of the NAFTA as grounds to invoke NAFTA dispute resolution provisions.¹⁶³ Under Annex 2004, Canada and Mexico can argue the Helms-Burton Act violates the NAFTA since it denies certain trade benefits, such as most-favored nation status. This argument can also be made under Article XXIII of the GATT, which is similar to Annex 2004.¹⁶⁴

national law standards to return to United States citizens, and to entities not less than 50 per centum beneficially owned by United States citizens, or to provide equitable compensation to such citizens and entities for property taken from such citizens and entities on or after January 1, 1959, by the Government of Cuba. *Id.*

161. GATT, *supra* note 148, art. XXI.

Nothing in this Agreement shall be construed (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (iii) taken in time of war or other emergency in international relations. *Id.*

162. Bachman et al., *supra* note 16, at 5.

163. NAFTA, *supra* note 48, annex 2004.

1. If any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of: (a) Part Two (Trade in Goods), except for those provisions of Annex 300-A (Automotive Sector) or Chapter Six (Energy) relating to investment, (b) Part Three (Technical Barriers to Trade), (c) Chapter Twelve (Cross-Border Trade in Services), or (d) Part Six (Intellectual Property), is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under the Chapter. *Id.*

164. GATT, *supra* note 148, art. XXIII.

X. Conclusion.

Providing expropriation victims a convenient forum to bring their claims and the appropriate level of compensation may be key issues for the NAFTA dispute resolution panel. Does such a forum exist outside the Helms-Burton Act? Cuba has codified the denial of compensation to victims of property expropriation into its Constitution.¹⁶⁵ Therefore, a remedy in Cuban domestic court does not exist. Moreover, "hitting the deep pockets" of Canadian and Mexican corporations may be the only available means of compensation. Even if Cuba owes compensation to the victims under international law, poor economic conditions in Cuba may prevent them from fulfilling this obligation. But, the United States may lose on this point because international law only speaks to state responsibility for expropriation.¹⁶⁶

165. Alexander & Mills, *supra* note 20, at 149.

166. RESTATEMENT (THIRD), *supra* note 90.
