Spring 1997

LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from within Liberal International Relations Theory

David Fidler

Indiana University Maurer School of Law, dfidler@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the International Law Commons

Recommended Citation

LIBERTAD v. Liberalism:
An Analysis of the Helms-Burton Act from within
Liberal International Relations Theory

DAVID P. FIDLER

Professor Fidler's article examines the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, more well known as the Helms-Burton Act, from within liberal international relations theory. He takes as his starting point the controversy that the Helms-Burton Act has produced among liberal, democratic states. Professor Fidler outlines the major tenets of the liberal tradition in international relations thinking: promoting economic interdependence, international law, international institutions, and democracy. He then looks at the arguments made by opponents of the Helms-Burton Act from within each of these liberal tenets, showing how opponents believe the Helms-Burton Act undermines economic interdependence, violates international law, by-passes international institutions, and does little to promote democracy in Cuba. Professor Fidler next places the arguments of the proponents of the Helms-Burton Act within the same four tenets of the liberal tradition and explores in detail the arguments put forward that the Helms-Burton Act conforms with, and even progressively develops, international law. The article moves to consider that the two sides in the Helms-Burton controversy belong to distinct perspectives within the liberal tradition. The proponents of the Helms-Burton Act exhibit the tendencies of liberal realism, while the opponents of the Act reflect the teachings of liberal internationalism. Locating the opponents and proponents of the Helms-Burton Act within these two competing perspectives within the liberal tradition helps explain the firestorm that has developed between liberal states over this piece of American legislation. Finally, Professor Fidler offers a proposal to bridge the gap between liberal realism and liberal internationalism in a policy towards Cuba that attempts to bring the warring Helms-Burton factions

* Associate Professor of Law, Indiana University School of Law, Bloomington. I would like to thank my research assistant, Peter Daniel DiPaola, for his help in preparing this article. The ideas in this article were first aired at an international conference sponsored by the Indiana University Center for the Study of Global Change entitled, “NAFTA: Three Years Later” held November 15-16, 1996. Many thanks to Brice M. Clagett of Covington & Burling for his comments on earlier drafts of this article.
together on how to exercise economic power against Castro, the proper role for international organizations and international law, and an ethical convergence for providing some compensation for the victims of Castro's illegal expropriations of property.
INTRODUCTION

The enactment of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the "Helms-Burton Act" or the "Act") has produced a firestorm in the relations between the United States and some of its closest allies and trading partners. The Helms-Burton Act has placed strain on the so-called "liberal alliance" of democratic States that spans the North American hemisphere and much of Europe. Some international relations scholars have argued that relations among the States in this "liberal alliance" are different from relations between liberal and non-liberal States, particularly because democratic States do not wage war on each other. While the Helms-Burton Act will not lead to war among liberal States, it has provoked from many democracies a hostility and vehemence rarely seen in the relations among liberal States.

The controversy between the United States and other democratic States over the Helms-Burton Act is interesting because it has created something of a paradox for liberal thinking about international relations. Canada, Mexico, the democratic Member States of the European Union, and other States accuse the United States of violating a plethora of liberal principles on international relations through the enactment and implementation of the Helms-Burton Act. Yet, the world's oldest and most prominent liberal State enacted the Helms-Burton Act in accordance with the democratic process in pursuit of bringing democracy to Cuba and upholding international law. Both the proponents and opponents of the Helms-Burton Act lay claim to the liberal tradition of thinking about international relations, which is why it makes for an interesting episode to analyze from within the liberal tradition of international relations theory.

In this article, I undertake to examine the Helms-Burton Act and the controversy it has caused through the tenets of the liberal tradition. My analysis involves six steps. First, I briefly describe the factual background to

---

2. See, e.g., Michael W. Doyle, Kant, Liberal Legacies, and Foreign Affairs, Part I, 12 Phil. & Pub. Aff. 205 (1983); Michael W. Doyle, Kant, Liberal Legacies, and Foreign Affairs, Part II, id. at 323.
the enactment of the Helms-Burton Act. Second, I briefly summarize the major tenets of the liberal tradition of international relations thinking. Third, the connection between the opposition to the Act and the liberal tradition is explored. Fourth, I explore how the principles contained within the Helms-Burton Act relate to the liberal tradition. Fifth, I present the controversy over the Helms-Burton Act as a clash between liberal realism and liberal internationalism. Finally, I offer a proposal to bring the liberal realist and liberal internationalist strands on the Helms-Burton Act together to rejuvenate the liberal tradition and the promise of freedom for Cubans.

I. BACKGROUND TO THE HELMS-BURTON ACT

The controversy over the Helms-Burton Act belongs to the long and acrimonious history of U.S.-Cuban relations after Fidel Castro came to power in 1959. After coming to power, Castro adopted Marxist policies and aligned himself with the Soviet Union. Part of Castro's implementation of socialist policy was the expropriation of foreign-owned property—much of it owned by American nationals or corporations. The Cuban government has never provided compensation for this expropriated property as required by international law.

Since 1962 the United States has maintained an economic embargo on Cuba. Over the decades, the wisdom of the American embargo on Cuba has been questioned because the United States stands virtually alone in its economic strategy towards Cuba. While many of America's best allies, like Canada and Great Britain, may have disagreed with the embargo policy, the right of the United States to pursue this policy was never questioned as a

3. See Brice M. Clagett, Title III of the Helms-Burton Act is Consistent with International Law, 90 AM. J. INT'L. L. 434, 434-435 (1996) (noting "the massive confiscations of property by the Castro regime in the early 1960s" and that "[t]he claims of preconfiscation U.S. nationals alone as certified by the Foreign Claims Settlement Commission, including interest, now total more than $6 billion.") [hereinafter Clagett, Title III].

4. Id. at 434 (noting Cuba has not made reparation for the massive confiscations of property).


7. The controversy over the wisdom of the embargo is currently a hot topic of debate. See, e.g., Susan Kaufman Purcell, The Cuban Illusion: Keeping the Heat on Castro, FOREIGN AFF., May/June 1996, at 159 (arguing that a strong U.S. embargo is the best way to achieve democracy and an open economy in Cuba); Wayne S. Smith, Cuba's Long Reform, FOREIGN AFF., Mar./Apr. 1996, at 99 (advocating ending the embargo to promote capitalism and democracy in Cuba).
matter of international law. Over the years, Presidents have modified the embargo to tighten or loosen it as the chief executive determined would serve American foreign policy.

While many other democratic States engaged in trade with Cuba, Castro’s Marxist ideology kept Cuba firmly allied and very dependent on the Soviet Union. When the Soviet Union collapsed, Cuba faced an economic crisis. In 1992, Congress found that “[e]vents in the former Soviet Union and Eastern Europe have dramatically reduced Cuba’s external support and threaten Cuba’s external support and threaten Cuba’s food and oil supplies.” Through the Cuban Democracy Act of 1992, Congress moved to tighten the economic embargo on Cuba by eliminating licenses to foreign subsidiaries of U.S. companies exporting to Cuba. In a foreshadowing of the opposition to the Helms-Burton Act, many countries criticized the Cuban Democracy Act as an unlawful attempt by the United States to exercise its jurisdiction extraterritorially. The Cuban Democracy Act also imposed sanctions against countries providing assistance to Cuba and laid down United States policy toward a transitional Cuban government and toward a democratic Cuban government. Congress’ objective in the Cuban Democracy Act was to increase the pressure on the Castro regime when it was facing economic and financial crisis.

---

8. The U.S. embargo of Cuba is a primary boycott, which “does not usually raise issues of international law, because the boycotting state is exercising its jurisdiction in its own territory or over its own nationals.” Lowenfeld, supra note 6, at 429.
9. See id. at 421-22 for a discussion of how presidents have modified the embargo for foreign policy purposes.
10. See Clagett, Title III, supra note 3, at 434 (noting that “the collapse of the Soviet Union and the resulting termination of Soviet aid to Cuba... has created severe economic and financial problems for the regime.”).
12. Id. § 6005(a).
14. See Cuban Democracy Act, supra note 11, § 6003(b).
15. See id. § 6006.
16. See id. § 6007.
Castro responded to the crisis by liberalizing Cuba’s foreign investment laws in an attempt to lure foreign direct investment as a way to stimulate economic growth.\textsuperscript{17} The prospect that foreign investors could be purchasing or otherwise utilizing illegally expropriated American property prompted the Clinton Administration to warn other governments in 1993 that “[c]are should be taken by prospective investors to ensure that property the Cuban government attempts to sell or otherwise dispose of is not the subject of a claim by a U.S. national.”\textsuperscript{18} Thus, the United States had placed the international community on notice that the use by foreign investors of illegally expropriated American property in Cuba would be a matter of concern to the United States.\textsuperscript{19} Nevertheless, Cuba began to attract foreign investors.\textsuperscript{20}

In February 1995, Senator Jesse Helms and Representative Dan Burton introduced legislation directly aimed at deterring foreign investment in Cuba by (1) subjecting foreign companies that “traffic” in expropriated property in Cuba to claims by U.S. nationals, and (2) denying visas to any person trafficking in such expropriated property and to the spouses and children of such person.\textsuperscript{21} The Clinton Administration openly opposed this proposed legislation, and then-Secretary of State Warren Christopher warned that he would recommend that President Clinton veto it.\textsuperscript{22} The Helms-Burton legislation made little progress after its introduction until the Cuban government shot down two unarmed civilian planes on February 24, 1996.\textsuperscript{23} After this event, which provoked worldwide condemnation of the Cuban
action, the Helms-Burton legislation accelerated towards passage in both houses of Congress. President Clinton agreed to sign the bill into law if the legislation allowed the President to postpone litigation in U.S. courts against alleged traffickers in expropriated property subject to a claim by a U.S. national. Congress included such a provision in the final legislation, and President Clinton signed it on March 12, 1996. The Act provides two different ways to punish third-state nationals who traffic in illegally expropriated property formerly owned by a U.S. national: (1) Title III subjects traffickers to civil claims that can be filed in U.S. courts by U.S. nationals who were American nationals at the time of the illegal expropriations, or were Cuban nationals at that time who have subsequently been naturalized as U.S. citizens; and (2) Title IV instructs the U.S. government to deny visa applications for traffickers and their family members.

President Clinton took action to postpone lawsuits under the Act until January 1997 on July 17, 1996. On January 3, 1997, President Clinton suspended for another six months the effective date for lawsuits under Title III of the Act. The President cannot, however, suspend Title IV of the Act. As of early January 1997, the U.S. State Department has used Title IV to punish a Mexican telecommunications company and a Canadian mining company for their involvement in Cuba, and was investigating twelve other companies for trafficking in violation of the Helms-Burton Act.

II. THE LIBERAL TRADITION IN INTERNATIONAL RELATIONS THINKING

The ink was not dry from President Clinton’s signature on the Helms-Burton Act when liberal States began to attack it vigorously. The suspensions of the private cause of action by President Clinton on two occasions has not produced a weakening in the opposition of liberal States to

24. See Helms-Burton Act, supra note 1, § 306(b)(1).
25. Id. at Title III.
26. Id. at Title IV.
the Helms-Burton Act." Before discussing the opposition of liberal States to the Helms-Burton Act, I need to describe briefly the main tenets of the liberal tradition of thought on international relations. The liberal tradition "refers to a body of thought the core of which is the liberty of the individual. . . . Liberalism posits . . . that international relations is not fundamentally about obtaining power as a shield against anarchy but is about protecting individual liberty at home while fostering individual liberty overseas." The liberal tradition has developed certain strategies for fostering the objectives of individual liberty at home and abroad. The most solidly established strategies within the liberal tradition are: the promotion of economic interdependence, international law, international institutions, and the protection and spread of democracy.

A. Promoting Economic Interdependence

A fundamental aspect of the liberal tradition has been the faith in the beneficial consequences for international relations of economic interdependence between States and peoples. The policy of free trade allows individuals and their private enterprises to bind peoples and States together in a tight, peaceful relationship that is mutually beneficial. As Robert Gilpin has stated:

In essence, liberals believe that trade and economic intercourse are a source of peaceful relations among nations because the mutual benefits of trade and expanding interdependence among national economies will tend to foster cooperative relations. . . . A liberal international economy

33. See David P. Fidler, War, Law & Liberal Thought: The Use of Force in the Reagan Years, 11 ARIZ. J. INT'L & COMP. L. 45, 57 (1994) (noting that "[i]nterdependence is one of the oldest and most famous of the liberal progressive ideas for changing the political conditions in international relations.") [hereinafter Fidler, War, Law & Liberal Thought]. See also Scott Burchill, Liberal Internationalism, in THEORIES OF INTERNATIONAL RELATIONS 25, 35-36 (Scott Burchill & Andrew Linklater eds., 1996) (discussing importance of international trade to liberal thought).
will have a moderating influence on international politics as it creates bonds of mutual interests and a commitment to the status quo.\textsuperscript{34}

While the liberal faith in economic interdependence has suffered setbacks in the history of international relations,\textsuperscript{35} free trade has emerged in post-Cold War international relations as one of the hottest ideas on the international agenda.\textsuperscript{36} The United States has been very active in promoting free trade and economic interdependence in the post-Cold War era by entering into the North American Free Trade Agreement ("NAFTA"), pushing hard for the completion of the Uruguay Round of negotiations that produced a revised General Agreement on Tariffs and Trade ("GATT") and the new World Trade Organization ("WTO"), deciding to engage communist China primarily through trade and investment, and participating in talks to expand free trade principles in the Americas, between the United States and the European Union, and in Asia.

B. Promoting International Law

Another strong theme in the liberal tradition is the promotion of international law. The liberal tradition has long included a belief in legal progress in international relations, a process in which international law provides a basis for independent States to pursue their interests according to the rule of law rather than the rule of the powerful.\textsuperscript{37} International law offered liberalism a way not only to ameliorate armed conflict but also to build the necessary framework to encourage States and their citizens to embrace free trade and the resulting economic interdependence.\textsuperscript{38}

The United States has a long tradition of fostering the rule of law in international relations. Eugene Rostow has argued that "[f]rom the day that

\textsuperscript{34} ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 31 (1987).

\textsuperscript{35} See Fidler, Caught Between Traditions, supra note 32, at 443 (discussing the weakening of the faith in economic interdependence in liberal thought during the 20th century).

\textsuperscript{36} Id. at 444; Burchill, Liberal Internationalism, supra note 33, at 43 ("As the end of the century approaches, the world economy more closely resembles the prescriptions of Smith and Ricardo then at any previous time.").

\textsuperscript{37} See Fidler, War, Law & Liberal Thought, supra note 33, at 55 (discussing liberal ideas about legal progress in connection with the use of force).

\textsuperscript{38} Id. at 59 (noting that "international law was central to interdependence by free trade" in Kant's liberal thinking).
American Presidents and Secretaries of State emerged as actors in world politics, they became important spokesmen for international law, and contributed disproportionately to its development. In fact, controversies about U.S. foreign policy are often given extra fuel by accusations that the United States is acting in violation of international law.

C. Promoting International Institutions

A third trait in the liberal tradition is the support liberal States have given, particularly in the twentieth century, to the creation and maintenance of international institutions. In liberal thought, Kant and Bentham first introduced the idea of international organization. While the nineteenth century saw no progress towards the creation of formal international organizations, liberal States during the twentieth century have led the way in the creation of multilateral international institutions, like the League of Nations and the United Nations; multilateral international processes, like GATT; and regional organizations, like the European Community ("EC") and the North Atlantic Treaty Organization. The liberal tradition seems to contain a belief "in the necessity of leadership by liberal democracies in the construction of a peaceful world order through multilateral cooperation and effective international organization." The appeal to international institutions is sometimes referred to in international relations theory as "institutionalism," which reflects "the belief that 'rules, norms, principles and decision-making procedures' can mitigate the effects of anarchy and allow states to cooperate in the pursuit of common ends." While institutionalism is sometimes

40. See, for example, the controversy about the Reagan administration's policies and actions towards Nicaragua and its reaction to Nicaragua's filing of a claim with the International Court of Justice that the U.S. was violating international law by pursuing such policies, discussed in Fidler, War, Law & Liberal Thought, supra note 33.
41. See Fidler, Caught Between Traditions, supra note 32, at 420-23 (discussing Kant's and Bentham's ideas on international organization).
42. Id. at 424 (discussing lack of progress prior to World War I toward an international organization empowered to deal with international peace and security), Mark W. Zacher & Richard A. Matthew, Liberal International Theory: Common Threads, Divergent Strands, in CONTROVERSIES IN INTERNATIONAL RELATIONS THEORY: REALISM AND THE NEOLIBERAL CHALLENGE 107, 117 (Charles W. Kegley, Jr. ed., 1995) (noting that international cooperation through international organizations "did not become a central thesis in the thinking of the great majority of liberals until after World War I.")
presented as a separate theory from liberalism, the dominant role played by liberal States in the creation of international institutions in this century makes institutionalism part of the liberal tradition.

The liberal attachment to international institutions has been particularly pronounced in the post-Cold War era in connection with the pursuit of economic interdependence. The EC has moved toward completion of the common market in the early 1990s. The United States, Canada, and Mexico created NAFTA to promote hemispheric free trade; and the United States and other democracies pushed for the establishment of the WTO to provide institutional support and progress for GATT's liberal trade principles. These international institutions stand as powerful monuments to the liberal tradition in that liberal States have utilized international law to promote economic interdependence.

D. Protecting and Promoting Democracy

The final fundamental tenet of the liberal tradition is the protection of existing democratic States and the encouragement of the spread of democratic ideas, values, practices, and institutions throughout the international system. The protection and promotion of democracy serves a number of liberal objectives: (1) democracies protect civil and political rights of individuals through constitutional or statutory law; (2) democracies allow individuals to elect their leaders, thus providing for self-government; (3) democracies encourage market economies because of the importance accorded to individual property rights; and (4) democracies are less likely to wage war on each other than with non-democratic States, making the spread of democracy the spread

45. See id. at 724 n. 25.
46. See Fidler, Caught Between Traditions, supra note 32, at 430 (placing attachment to international organizations with respect to issues of peace and security within the liberal tradition); Robert O. Keohane, International Institutions and State Power: Essays in International Relations Theory at vii, 9 (1989) (discussing "Neoliberal Institutionalism" and how liberalism includes a prominent role for international institutions).
47. Zacher & Matthew, supra note 42, at 122-23 (discussing the liberal thesis that "the prospects for greater international peace and comity rests on the growth of liberal democratic governments.").
49. Anne-Marie Slaughter, International Law in a World of Liberal States, 6 EUR. J. Int'l L. 503, 509 (1995) ("Liberal States are States with some form of representative democracy . . . .").
50. Id. ("Liberal States are States with . . . a market economy based on private property rights . . . .").
of international peace. The liberal tradition believes that the protection and promotion of democracy in international relations secures individual liberty at home while increasing individual liberty internationally through representative government, human rights protections, opportunities to engage in economic interdependence, the stability and predictability of the international rule of law, the fading likelihood of war and all its horrors, and the possibility of effective cooperation on global issues within international institutions.

A measure of the prominence of promoting democracy in the liberal tradition is that this objective is seemingly the only thing about which proponents and opponents of the Helms-Burton Act agree. The Helms-Burton Act explicitly sets out to stimulate a transition to democracy in Cuba. Opponents agree wholeheartedly with this fundamental objective but vehemently disagree with the means adopted to achieve this end.

E. Applying the Liberal Tradition

While an outline of the fundamental tenets of the liberal tradition may seem simple, the liberal tradition is not as unified as the outline suggests. As Stanley Hoffmann has observed, liberals have historically been divided on how to deal with the real world of international relations. The differences among liberals often arise over whether, when, and how to apply the tenets of the liberal tradition in the circumstances of a concrete situation. The Helms-Burton Act controversy is another manifestation of the division among liberals about the application of the tenets of the liberal tradition to real world foreign policy challenges.

51. Id. (Liberal States "are far less likely to go to war with one another than they are to go to war with non-liberal States ... ").
52. See Helms-Burton Act, supra note 1, § 3(1), (4)-(5).
53. The U.S. special envoy for the Helms-Burton Act admitted during his efforts to persuade America’s allies and trading partners of the importance of the Act that there was "a 'divergence of philosophical attitudes' over how to bring democracy to Cuba." Eizenstat Sent Packing by Allies, CARIBBEAN & CENTRAL AMERICA REPORT, Oct. 3, 1996, at 2.
III. OPPOSITION TO THE HELMS-BURTON ACT FROM LIBERAL PRINCIPLES

A. Economic Interdependence

Opponents of the Helms-Burton Act accuse it of undermining the liberal objective of economic interdependence. This accusation takes three forms.

1. Policy Towards Cuba

Many of the opponents of the Helms-Burton Act disagree with the general policy taken by the United States towards Cuba. They believe that the economic embargo strategy is the wrong way to go about bringing democracy to Cuba. As Wayne Smith has observed, Canada, European democratic States, and Latin American States "believe engagement and trade will do more to encourage Cuban reform than efforts to isolate it politically and strangle it economically." The rest of the "liberal alliance" seems to prefer mellowing Cuba towards democracy through economic interdependence, while the United States under the Helms-Burton Act is prohibited from using the awesome power of commerce to change the future of the Cuban people. Many in the American business community would rather have a chance to contribute to the gradual transformation of Cuba than sitting on the sidelines watching companies from other countries establish footholds in a potential emerging market.

Opponents of the Helms-Burton Act detect inconsistency in the American approach to Cuba and the approach to communist China, where U.S. foreign policy employs the economic interdependence strategy to encourage the gradual reform of China. The use of economic interdependence is, in fact, a much riskier strategy because China is such a large country with potential to become a rival great power. Cuba, on the other hand, is very vulnerable to American economic and cultural power, making economic interdependence a logical, low-risk policy to provide the Cuban people with a brighter future.

55. Smith, supra note 7, at 105. See A Frozen Approach to Cuba, N.Y. TIMES, Jan. 10, 1997, at A32 (arguing that "[w]hat hope now exists for expanding liberty in Cuba and preparing the transition to a post-Castro era lies in the constructive use of international economic and commercial leverage, not in trying to bludgeon the rest of the world into joining America's lonely and counter productive economic embargo.").
Opposition to the American embargo of Cuba also taps into the sentiment that, in an age of economic globalization where ideological conflicts are dead, the Cold War mentality behind the embargo and the Helms-Burton Act is anachronistic. If, as the Helms-Burton Act professes, the ultimate goal is to engage Cuba in economic interdependence, then the wiser strategy is to put aside Cold War hatreds of communism and begin building the Cuban path to democracy through economic interdependence.

2. Hemispheric Economic Interdependence

Canada, Mexico, and Latin American States have been particularly offended by the Helms-Burton Act because it strikes a blow against the general movement, initiated by NAFTA and expanded through the idea of an American hemispheric free trade zone, towards hemispheric economic interdependence. Opponents claim that the Helms-Burton Act seeks to punish nationals of other States in the American hemisphere for trying to bring democracy and prosperity to Cuba through trade and investment. Rather than engaging its partners in the hemispheric free trade project in constructive ways about Cuba, the United States has responded in the Helms-Burton Act with arrogant *yanqui* flexing of superior power.

3. General Economic Interdependence

The arguments made against the Helms-Burton Act in the context of the American hemisphere also apply on a much larger scale because Title III of the Act strikes a blow at European efforts to engage Cuba economically. In its letter to the United States requesting consultations under the dispute settlement mechanism of the WTO, the EC stated that "a number of provisions [of Helms-Burton] . . . have the intent and effect to restrain the liberty of the EC to export to Cuba or to trade in Cuban origin goods, as well as restrict the freedom of EC registered vessels and their cargo to transit through U.S. ports." Further, Title IV of the Act uses a very illiberal approach because it seeks to punish innocent individuals in democratic States for acts committed by Castro thirty-five.

57. *Quoted in* Brice M. Clagett, *Who is Breaking International Law--The United States, or the States that Have Made Themselves Co-Conspirators with Cuba in its Unlawful Confiscations?*, 30 GEO. WASH. J. INT’L L. & ECON. (forthcoming 1997) (manuscript at 35, on file with author) [hereinafter Clagett, *Who is Breaking International Law*]. This article is an expanded and updated version of Clagett, *Title III*, supra note 3.
seven years ago. Punishing a child of a Canadian business person who seeks to engage in economic interdependence with Cubans by denying that child entry into the United States to visit Disneyland has no foundation in the liberal tradition.\(^\text{58}\) The attitude of Titles III and IV of the Helms-Burton Act is far out of tune with the process of economic interdependence that the liberal tradition has promoted for many years.

B. International Law

A major theme in the criticisms of the Helms-Burton Act has been that it violates international law. These criticisms also mean that opponents believe the Helms-Burton Act undermines the liberal tradition's commitment to the rule of law in international relations. The legal arguments against the Act usually take two forms.

1. The Helms-Burton Act Violates Treaty Law

The European Union has argued that the Helms-Burton Act violates GATT and the General Agreement on Services ("GATS").\(^\text{59}\) It requested consultations with the United States and then the establishment of a dispute settlement panel under the WTO to consider its complaints.\(^\text{60}\) The EC has alleged that Titles III and/or IV of the Helms-Burton Act violate a number of principles of GATT and GATS.\(^\text{61}\) First, the EC claims that the Act violates the

58. See Lowenfeld, supra note 6, at 429 ("It is hard to believe that Ms. Jones, the daughter of a corporate executive from Toronto, might be stopped at the border when she returns from her summer vacation for her junior year at Vassar, but that is what the statute says.").

59. The EC alleges that the Helms-Burton Act's trade restrictions on goods of Cuban origin and the refusal of visas and exclusion of non-U.S. nationals from the United States violates Articles I, III, V, XI, and XIII of GATT and Articles I, III, VI, XVI, and XVII of GATS. World Trade Organization Homepage, (visited Mar. 4, 1997) <http://www.wto.org/wto/dispute/bulletin.htm> [hereinafter WTO Homepage]. The reference to Article I of GATS should probably be Article II because Article I consists only of definitions. The EC also alleges that, if these measures do not violate GATT or GATS, they nullify or impair expected benefits under GATT and GATS and impede the attainment of GATT objectives. Id. Jennifer Hillman, General Counsel in the Office of the United States Trade Representative testified to a U.S. Senate subcommittee that "the European Union's claims lie solely with respect to title IV... They have made a series of allegations with respect to their view that title IV is in violation of the GATS." Libertad Hearing, supra note 13, at 16 (testimony of Jennifer Hillman). The formal EC complaint encompasses, however, both GATT and GATS.


61. WTO Homepage, supra note 59 (listing GATT and GATS provisions allegedly violated).
most-favored-nation treatment found in GATT and GATS.62 This claim alleges that the United States, through the Helms-Burton Act, does not accord to products or services originating in the EC advantages, favors, privileges, or immunities granted by the United States to other contracting parties of GATT and GATS.63 Second, the EC alleges that the Act violates the national treatment principle because it accords preferential treatment for American goods, services, and service providers.64 Third, the EC believes that the Act violates Article V of GATT, which contains the freedom of transit principle for goods and vessels passing through the United States on their way to another destination.65 Fourth, the EC claims that the Act violates the prohibition on quantitative restrictions on the importation of any product of the territory of another contracting party66 as well as the requirement to apply any quantitative restrictions in a nondiscriminatory fashion.67 Finally, the EC argues that even if the Helms-Burton Act does not violate GATT or GATS it still nullifies or impairs the attainment of objectives under GATT.68 The EC complaint implicitly includes the argument that the United States cannot justify breaches of GATT under the general exemptions69 or the national security exemption.70


63. GATT, art. I(1) (requires that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."). GATS, art. II(1) (requires that "[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.").

64. GATT, art. III(1) (requires that laws and regulations "should not be applied to imported or domestic products so as to afford protection to domestic production."). GATS, art. VI (requires application of general measures affecting trade in services in a reasonable, objective, and impartial manner), and GATS, art. XVII (requires national treatment in connection with specific market-access commitments).

65. GATT, art. V.

66. GATT, art. XI.

67. GATT, art. XIII.

68. See GATT, art. XXIII(1)b (stating dispute settlement process can be triggered if the application by another contracting party of any measure, whether or not it conflicts with GATT, nullifies or impairs the attainment of any GATT objective). For similar provision in GATS, see GATS, art. XXIII(3).

69. GATT, art. XX.

70. GATT, art. XXI. While this article was in press, the EC and the United States reached an agreement under which the EC would suspend its WTO complaint against the United States over the Helms-Burton Act in exchange for U.S. action to exclude European companies from the Act's application. Bruce Barnard, EU Approves Accord with US over Cuba, But Tensions Remain, J. COM., April 17, 1997, at 2A. The EC's suspension of the WTO complaint is conditional on the United States keeping its end of the
Similarly, Canada and Mexico have complained publicly that the Helms-Burton Act violates NAFTA. While the Canadians and Mexicans believe they have valid claims under NAFTA, neither had formally started NAFTA dispute settlement procedures as of this writing. Clagett cites a high-ranking Canadian official as indicating that Canada would invoke Article 1105(1) on minimum standard of treatment, Article 1102 on national treatment, and Article 1110 on expropriation and compensation. Each of these articles are in the investment chapter of NAFTA. If Canada or Mexico invoked these articles, it would be arguing that the Helms-Burton Act, if applied to Canadian or Mexican investments in the United States, would (1) violate international law on the treatment of foreign investors; (2) violate the national treatment principle by treating Canadian and Mexican investments less favorably than American investors; and (3) constitute an unlawful expropriation of foreign investment.

2. The Helms-Burton Act Violates Customary International Law

Opponents of the Helms-Burton Act also claim that it violates numerous principles of customary international law. The legal opinion of the Inter-American Juridical Committee of the Organization of American States ("OAS Inter-American Juridical Committee") is, to date, the most formal statement on the nonconformity of the Act with customary international law, but
criticisms have also been voiced in influential international legal periodicals.79 The arguments that the Act violates customary international law focus on Title III and come in two forms.

a. Protecting Property Rights

The OAS Inter-American Juridical Committee found that Title III of the Helms-Burton Act violated customary international law because such law does not recognize a private right of action against nationals using expropriated property in conformity with the laws of the expropriating State, and where the appropriated asset is not within the jurisdiction of the State of which the claimant is a national.80 As the OAS Inter-American Juridical Committee observes, the liability of individuals for trafficking in expropriated property is "unrecognized by the international law on this subject.["]81 International law places liability for the violation of customary international law on the Cuban government but has not accorded liability of any kind to nationals of third States that make use of illegally expropriated property.

Further, the OAS Inter-American Juridical Committee argues that the Helms-Burton Act attempts to transfer liability from the Cuban government to the nationals of third States through the "trafficking" concept.82 Since international law imposes no duty on the nationals of third parties not to traffic in illegally expropriated property, the Helms-Burton Act transfers without justification the liability of the Cuban government to individuals innocent of any wrong under international law. The Helms-Burton Act thus violates the principle of *nulla poena sine lege* because it purports to punish individuals where no wrong has been committed under international law, which violation can hardly be consistent with liberal concerns about the liberty and rights of individuals. Even if, as proponents of the Act claim,83 international law regulated the use of illegally expropriated property by third-state nationals, such regulation to date has only amounted to States refusing to recognize title to "hot property" but has not ever recognized the right of a State to create a

79. See Lowenfeld, supra note 6.
80. OAS Committee Opinion, supra note 78, ¶¶ 5(a) and 6(d).
81. Id. ¶ 6(c) ("The claimant State does not have the right to attribute liability to nationals of third States for a claim against a foreign State.").
82. Id. ¶ 6(c) ("The claimant State does not have the right to attribute liability to nationals of third States for a claim against a foreign State.").
83. See infra note 142 and accompanying text.
private cause of action to subject third-state nationals to the entire compensatory damages attributable to the foreign State in question.

States whose nationals have been subject to expropriations that violate international law have taken action against nationals of the State that undertook the illegal expropriation. Such actions are clearly countermeasures against the State that first wrongfully expropriated because such counter-expropriations without compensation would otherwise be illegal under international law. The Helms-Burton Act targets, however, third-state nationals on one or both of two theories: (1) the third-state nationals are themselves culpable under international law for trafficking (but see above analysis arguing that no such rule exists); and/or (2) the third-state nationals are agents of the Cuban government in their aiding and abetting the continued violation of international law. If the agency theory were plausible, then the United States would not need the Helms-Burton Act because a provision in the Foreign Sovereign Immunities Act already makes an agent of a State that has expropriated property in violation of international law subject to the jurisdiction of the U.S. courts if the agency owns such expropriated property and engages in commercial activity in the United States. The agency theory is not plausible because attributing agency to third-state nationals for trafficking in illegally expropriated property has no foundation in international law.

What do opponents of the Helms-Burton Act say when confronted with the argument that international law, through the source of general principles of law, includes a duty not to profit knowingly by using illegally stolen property? The implication of this question is that the Act’s opponents seem willing to allow a third-state national to do something under international law that is prohibited under domestic law. Responses to this argument could take various forms. First, as suggested above, international law probably allows States to refuse to recognize title to illegally expropriated property. Second, “general principles of law” are infrequently used as a source for international

84. See, e.g., Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 113 (1966) (“The unquestioned right of a state to protect its nationals in their persons and property while in a foreign country . . . must permit initial seizure and ultimate expropriation of assets of nationals of that country in its own territory if other methods of securing compensation for its nationals should fail.”).
86. See Oppenheim’s International Law, supra note 5, at 1175-76 (discussing treatment of commercial agents of states in international law).
87. See infra note 152 and accompanying text.
law, so it should be approached with great caution, particularly where State practice provides no support for the principle alleged to be general in domestic legal systems. A great deal of State practice suggests that some States have considered the expropriation of foreign-owned property without adequate, effective, and prompt compensation not to be in violation of international law. Thus, a distinction might be made between the government taking property for public purposes and individuals stealing property for personal gain within some domestic legal systems. As Brownlie argues, in connection with "the law relating to expropriation of private rights, reference to domestic law might give uncertain results and the choice of models might reveal ideological predilections."

Third, international law does not necessarily incorporate every principle of law that is widely shared in domestic legal systems. For example, most domestic legal systems prohibit murder, but international law does not contain a general prohibition against murder. Fourth, leaping from the domestic prohibition on knowingly using stolen property to an international legal duty not to traffic in illegally expropriated property is legalistic and does not account for the different political context of international relations. The intent of the domestic fencer of stolen property is to continue to deny the original owner his right to that property. Part of the intent of the third-state nationals investing in Cuba is ostensibly to bring democracy and prosperity to Cuba. The creation of liability under international law for trafficking in illegally expropriated property deters individuals from contributing to economic interdependence—one of the most powerful parts of the liberal tradition. The Helms-Burton Act "criminalizes" policy differences and punishes individuals guilty of no wrong in the process, neither of which can be justified within the liberal tradition.

Even if international law recognized a duty applying to third-state nationals not to traffic in illegally expropriated property, the Helms-Burton Act still violates international law because it deprives third-state nationals of due process of law to "contest the bases and quantum of claims that may affect his property." The potential damages that are set out in the Helms-Burton Act

88. See IAN BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 16 (4th ed. 1990) (noting that international tribunals show considerable discretion in using general principles of law).
89. OPPENHEIM'S INTERNATIONAL LAW, supra note 5, at 922-24 (discussing legal uncertainty about the proper standard of compensation under international law).
90. BROWNLE, supra note 88, at 17.
91. OAS Committee Opinion, supra note 78, ¶ 6(g).
92. See Helms-Burton Act, supra note 1, § 302(a)(1).
make third-state nationals liable for the entire amount for which the Cuban
government is liable, plus thirty-seven years of interest, plus a possible trebling
of all damages. This sort of punishment bears no relation to the activity of a
third-state national operating a minor investment in Cuba for less than one
year. The liability for violating a purported international legal duty not to
traffic has to be tailored to the specific gain of the third-state national from
such trafficking, rather than the liability of the Cuban government, before
proponents can claim that this international legal duty serves liberal ends.

The OAS Inter-American Juridical Committee adds a final conclusion to
its international legal analysis of the protection of property: the enforcement
of claims under Title III of the Act against third-state nationals would “itself
constitute a measure tantamount to expropriation and result in responsibility
of the claimant State.” In other words, in trying to shift liability from the
Cuban government to third-state nationals, the United States could be
engaging in illegal expropriations under international law, for which it can be
held accountable by third States.

b. Extraterritorial Legislation

The other major international legal attack on the Helms-Burton Act is that
it constitutes an attempt at extraterritorial legislation that violates principles of
customary international law on prescriptive jurisdiction. This attack has taken
two different but related forms.

i. The Act is a Secondary Boycott

Lowenfeld argues that the Helms-Burton Act is in intent and effect a
secondary boycott of Cuba because it attempts to force the nationals of third
States to participate in the American embargo on Cuba by subjecting such
nationals to liability in U.S. courts. As Lowenfeld observes, the United
States has long opposed the Arab secondary boycott of Israel and has enacted

93. As Lowenfeld puts it, the liability prescribed under the Helms-Burton Act “may result in damages
equal not to defendants’ gain but to plaintiffs’ loss, plus interest for some thirty-five years, all subject to
trebling.” Lowenfeld, supra note 6, at 430.
94. OAS Committee Opinion, supra note 78, ¶ 6(h). This would support any use by Canada or
Mexico of NAFTA Article 1110 against the United States.
95. Lowenfeld, supra note 6, at 429-30. See also Peter Morici, The United States, World Trade, and
. .”).
legislation prohibiting U.S. companies from complying with it. Lowenfeld argues that

the exercise of jurisdiction by the United States . . . to impose a secondary boycott on Cuba, like the exercise of jurisdiction by members of the Arab League to impose a secondary boycott on Israel, is contrary to international law, because it seeks unreasonably to coerce conduct that takes place wholly outside of the state purporting to exercise its jurisdiction to prescribe.\footnote{97}

Proponents of the Act respond by pointing out that it does not prohibit trading with or investing in Cuba as long as such activities do not result in trafficking of illegally expropriated property subject to the Act.\footnote{98} Theoretically, opponents concede, this argument rings true; but it rings hollow in practice because the amount of Cuban property subject to claims by U.S. nationals and Cuban-Americans, combined with the incredibly broad scope of the term “trafficking” and with the potential liability created by the Act, in substance produce a secondary boycott effect on Cuba.\footnote{99} In fact, it is not far-fetched to argue that Congress has chosen to pursue the objective of Cuban democracy through a secondary boycott strategy that is illegal under international law.\footnote{100}

\textit{ii. Illegal Exercise of Prescriptive Jurisdiction}

A related but slightly different approach is found in the argument that the Helms-Burton Act constitutes an illegal exercise of prescriptive jurisdiction

\footnote{96. Lowenfeld, supra note 6, at 430.}
\footnote{97. Id. Clagett states that Lowenfeld does not argue that secondary boycotts violate customary international law. Brice M. Clagett, \textit{A Reply to Professor Lowenfeld}, 90 AM. J. INT’L L. 641, 642 (1996) [hereinafter Clagett, \textit{A Reply}]. The quotation provided in the text clearly shows, however, that Lowenfeld believes that secondary boycotts, like the Arab and Cuban varieties, violate international law.}
\footnote{98. See infra note 174 and accompanying text.}
\footnote{99. Lowenfeld, supra note 6, at 428-29 (discussing impact of the Helms-Burton Act on foreign businesses doing or contemplating doing business in Cuba).}
\footnote{100. This argument is plausible because proponents of the Act claim the objective is not to win lawsuits, but to deter trade and investment with Cuba so that Castro’s regime crumbles. A leading Cuban-American supporter of the Act bluntly argued exactly this point: “We’re not doing this to win lawsuits. The main objective is to drive foreigners out of Cuba.” \textit{Quoted in Scarecrow: Cuba and the United States}, ECONOMIST, Apr. 13, 1996, at 36.}
and thus is not in conformity with international law. Under customary international law, the exercise of extraterritorial jurisdiction must (1) have a legitimate basis, and (2) be exercised reasonably.\textsuperscript{101} The basis for the Helms-Burton Act seems to be what is called the "effects doctrine": a State has jurisdiction to prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory."\textsuperscript{102} The Helms-Burton Act explicitly recognizes this jurisdictional basis.\textsuperscript{103} Lowenfeld challenges, however, the use of the effects doctrine by the Act.\textsuperscript{104} He argues that the Cuban government, not the persons possibly subject to U.S. jurisdiction under the Act, was the author of the effects in the United States against which the Act takes aim.\textsuperscript{105} Thus, "the effort to place Helms-Burton within the effects doctrine is no more than a play on words."\textsuperscript{106}

The OAS Inter-American Juridical Committee and Lowenfeld both argue that the Helms-Burton Act is an unreasonable exercise of extraterritorial jurisdiction and thus violates international law.\textsuperscript{107} According to the \textit{Restatement}, a State wanting to exercise extraterritorial jurisdiction has to balance its interests against the legitimate and reasonable interests of other States.\textsuperscript{108} The OAS Inter-American Juridical Committee bases its conclusion on the lack of any norm in international law that suggests it is reasonable to exercise jurisdiction over third-state nationals for trafficking in illegally expropriated property.\textsuperscript{109} Lowenfeld takes a more common sense approach by noting that no U.S. governmental official or business person would find Helms-Burton-like legislation passed by France and exercised over U.S. nationals for their trafficking in illegally expropriated property in Vietnam to be a reasonable exercise of jurisdiction.\textsuperscript{110} Clearly, Lowenfeld and the OAS Inter-American Juridical Committee believe that the legitimate and reasonable interests of other States in preserving trade with Cuba outweighs U.S. interests.

\textsuperscript{101} \textit{Restatement (Third) of the Foreign Relations Law of the United States}, §§ 402 and 403 [hereinafter \textit{Restatement}].
\textsuperscript{102} \textit{Id.} § 402(1)(c).
\textsuperscript{103} Helms-Burton Act, supra note 1, § 101.
\textsuperscript{104} Lowenfeld, supra note 6, at 431.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} OAS Committee Opinion, supra note 78, ¶ 9; Lowenfeld, \textit{supra} note 6, at 430-32.
\textsuperscript{108} \textit{Restatement}, supra note 101, §403.
\textsuperscript{109} OAS Committee Opinion, \textit{supra} note 78, ¶ 9.
\textsuperscript{110} Lowenfeld, \textit{supra} note 6, at 431-32.
in subjecting third-state nationals to extraterritorial legislation that exorbitantly
punishes them for the wrongs committed by Cuba.

3. **Summary on International Law**

Although proponents of the Helms-Burton Act argue that it promotes the
international rule of law, opponents believe that the violations of existing
treaty law and customary international law outweigh any actual service the Act
might provide for international law. For opponents of the Act, it stretches
credibility for proponents to claim that the Helms-Burton Act upholds
international law by subjecting third-state nationals to liability in U.S. courts
when in the process of doing so it violates treaties and established rules of
customary international law. Opponents of the Act believe that the liberal
commitment to international law does not need “friends” like Jesse Helms and
Dan Burton.

C. **International Institutions**

What frustrates other liberal democracies about the Helms-Burton Act with
respect to the liberal attachment to international institutions is the United
States’ willingness to launch the Act in disregard of key international
institutions like NAFTA and WTO. There is no record of the United States
raising its concerns about trafficking in illegally expropriated property in the
forums provided by NAFTA and WTO. The United States’ willingness to
legislate first and answer questions later reflects an arrogance unbecoming a
liberal State in the era of globalization and economic integration. As Peter
Morici argues, the Helms-Burton Act hurts longstanding American efforts to
discipline international trade through institutions and rules and “undermines
America’s ability to negotiate rules for trade that assure its exports and
multinational corporations freer and fairer treatment abroad because it calls
into question United States resolve to live by the rules it prescribes for

---

111. The cable disseminated by the Clinton administration in 1993 could not, it might be argued by
opponents of the Act, be considered full diplomatic engagement of major trading allies by the United States
over an issue of such controversy and importance to all involved.

112. *Libertad Hearing, supra* note 13, at 15 (testimony of Jeffrey Davidow, Assistant Secretary of
State for Inter-American Affairs, that foreign governments “make the argument that this is an issue to be
handled on a multilateral effort, a cooperative international effort, rather than what they view as a unilateral
action by the United States.”).
The diplomatic journeys of Under Secretary of State Eizenstat, who tried to discuss the Act with outraged Canadians, Mexicans, and Europeans, might have been more productive if the United States had prepared the diplomatic ground before the bill actually passed through the legislature. NAFTA and WTO would have been convenient forums for such diplomacy. In this respect, the Helms-Burton Act emanates from that influential faction of elected officials that distrust multilateralism and prefer American unilateralism. It is no secret that Jesse Helms, for example, fits this description.

In addition, the final passage and presidential signature on the Act represented an unseemly, unprincipled reaction to the downing of the Brothers to the Rescue airplanes, driven not by a commitment to liberal multilateralism but by the hunt for votes in a general election year. The Clinton Administration had consistently opposed the Helms-Burton bill until Castro's destruction of the American aircraft, at which point President Clinton abruptly reversed his position for fear of looking weak and losing Florida's electoral votes in November 1996. The Cuban shooting down of the planes did not, overnight, turn the Helms-Burton legislation into a prudent policy because it remained substantively the same as it accelerated through Congress to the President's desk. The liberal commitment to international institutions was conveniently ignored in order to shore up presidential re-election prospects.

Finally, the whole American approach to Cuba can be seen at odds with the liberal belief in the utility of international organizations. The American embargo on Cuba includes denying Cuba any role or place in important international institutions until Cuba has a democratic government. This approach to Cuba seems inconsistent compared to the efforts the United States has made trying to integrate communist China into international organizations. That the same strategy is still rejected in American dealings

---

113. Morici, supra note 95, at 88.
114. On Eizenstat's diplomatic efforts, see Cuba and the United States: No, no, no, no, ECONOMIST Sept. 7, 1996, at 40.
115. See Jesse Helms, Saving the U.N.: A Challenge to the Next Secretary-General, 75 FOREIGN AFF., Sept.-Oct. 1996, at 2, 7 (arguing that "[e]ither the United Nations reforms, quickly and dramatically, or the United States will end its participation.").
116. See infra note 196 and accompanying text.
117. Chas. W. Freeman, Jr., Sino-American Relations: Back to Basics, 104 FOREIGN POL'Y (Fall 1996), at 4 (noting how "Washington sought to expand the effectiveness of these institutions and to transform China from a threat to the existing world order into a stabilizing element of it.").
with Cuba seems to reflect motives estranged from the long-term objectives of liberal thought on international relations.

D. Democracy

Although the crass politicking for votes that taints the Helms-Burton Act weakens the argument that it is about promoting democracy in Cuba, opponents of the Act usually do not doubt that proponents of this law hope that it will help bring democracy to the Cuban people. Opponents of the Act seem to believe that the best way to promote democracy in Cuba and protect it in the United States and elsewhere is to liberalize trade rather than restricting it and punishing those who engage in it, utilizing international law rather than violating it, and engaging in 'constructive diplomacy in international institutions rather than ignoring them.' For opponents, the only link between the Helms-Burton Act and the liberal tradition is the claim that it protects and promotes democracy. But, under the liberal tradition, the end does not justify the means.

Opponents of the Helms-Burton Act also sense in the Act a lack of historical sensibility in its proponents. In the deadly game of power politics played during the Cold War, American isolation of Cuba may have made sense. But with communism a dead ideology, and with Castro’s days numbered, liberal States could bring democracy to Cuba not by reliving the Cold War but by unleashing the awesome power of economic interdependence disciplined by international law and cooperation through international institutions. Viewed from this perspective, the Helms-Burton Act seems like the last spasm of a Cold Warrior mentality lost in a world where the past is not a reliable guide for a future to be dominated by economic globalization and integration.

118. Lowenfeld concluded his critique of the Act as follows: "Perhaps all this could be forgiven if the Helms-Burton Act could really bring about liberty and democracy in Cuba. I see no reason to believe that it will do so." Lowenfeld, supra note 6, at 434.
IV. THE HELMS-BURTON ACT’S PRINCIPLES AND THE LIBERAL TRADITION

A. Economic Interdependence

The Helms-Burton Act does not make use of the liberal belief in economic interdependence in connection with U.S.-Cuba relations, at least while Castro retains power. Title I of the Helms-Burton Act strengthens the economic embargo of Cuba by tightening enforcement of the embargo and prohibiting indirect financing by Americans of transactions involving expropriated property subject to a claim by a U.S. national. Congress has determined that economic interdependence will not be a strategy used to mellow Castro and smooth the way to democratic government in Cuba. The accusation of inconsistency leveled at the American embargo of Cuba compared with the American embrace of China does not faze proponents of the Act because the plea for consistency forgets that foreign policy principles always operate in different political and economic contexts. Proponents of the Act probably do not think they have to apologize for treating the Chinese and Cuban matters differently based on their radically different contexts.

The Helms-Burton Act does, however, utilize the strategy of economic interdependence in connection with a “transition government or democratically elected government in Cuba.” The Helms-Burton Act specifically defines what a “transition government” and a “democratically elected government” mean for purposes of renewing economic intercourse between the United States and Cuba. Under Section 204, Congress has authorized the President to take steps to suspend the economic embargo of Cuba after the President determines that a transition government is in power. When the President determines that a democratically elected government is in power in Cuba, the President shall report to Congress on policy objectives regarding trade relations with a democratic Cuba, including extending most-favored-nation treatment to Cuba, bringing Cuba within the U.S. General System of Preferences or the preferential trading rights created under the Caribbean Basin

119. Helms-Burton Act, supra note 1, § 102.
120. Id. § 103.
121. Id. § 202(a) (instructing the President to “develop a plan for providing economic assistance to Cuba at such time as the President determines that a transition government or a democratically elected government in Cuba . . . is in power.”).
122. Id. § 205.
123. Id. § 206.
124. Id. § 204(a).
Economic Recovery Act, and negotiating free trade agreements (involving possible Cuban accession to NAFTA).\textsuperscript{125} Once the Castro regime is gone, the Helms-Burton Act commits the United States to creating economic interdependence between the American and Cuban peoples.

B. International Law

The Helms-Burton Act includes many provisions that purport to promote international law. While the controversy about the Act has largely focused on the issue of expropriated property, the Helms-Burton Act appeals to other areas of international law. In addition, the Helms-Burton Act contains an interesting mixture of traditional international legal positions and innovative ways of thinking about international law.

1. Expropriated American Property

A major purpose behind the Helms-Burton Act is "to protect United States nationals against confiscatory taking and the wrongful trafficking in property confiscated by the Castro regime."\textsuperscript{126} The United States has long maintained that Cuba's expropriations of American-owned property without adequate, effective, and prompt compensation violates international law; and the Helms-Burton Act likewise refers to the "wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government."\textsuperscript{127} Further, a requirement for a determination of a transition government\textsuperscript{128} and a democratically elected government\textsuperscript{129} is progress towards settling the outstanding claims of U.S. nationals for wrongfully expropriated property. The Helms-Burton Act clearly promotes adherence to the international legal principle that expropriations of foreign private investments may only be done in good faith pursuance of a public purpose, without discrimination on the basis of nationality, and with the payment of adequate, effective, and prompt compensation.\textsuperscript{130} The Helms-Burton Act does not break new ground in

\textsuperscript{125} Id. § 202(h)(1).
\textsuperscript{126} Id. § 3(6).
\textsuperscript{127} Id. § 301(2).
\textsuperscript{128} Id. § 205(b)(2)(D).
\textsuperscript{129} Id. § 206(6).
supporting international legal rules on expropriations of foreign private investment. In addition, the economic embargo serves as one way the United States has tried to enforce the international law on expropriations.

What is new about the Helms-Burton Act is the domestic judicial remedy established to enforce the international law on expropriations. The new remedy is, of course, the private right of action the Helms-Burton Act gives to U.S. nationals with a claim to wrongfully expropriated Cuban property to sue foreign individuals and companies that “traffic” in such expropriated property. Enforcement of the international legal rules on expropriation also includes the denial of visas to persons who “traffic” in expropriated property. Congress established these enforcement procedures because it believes that “[t]he international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property.”

The international legal bases for the new civil remedy in Title III and the visa denial authority in Title IV need to be carefully examined because they have been challenged by opponents of the Act. As regards Title IV, the Act’s critics focus on the wisdom of the policy of denying visas rather than on the legality of the American attempt to do so. As Monroe Leigh has argued, “international law, in the absence of a specific agreement to the contrary, does not question the full discretion of a nation to control admission to its territory.” Nor does Title IV constitute impermissible extraterritorial

---


132. Helms-Burton Act, supra note 1, § 302(a).

133. Id. § 401.

134. Id. § 301(8). For an interesting discussion of the development in international law of procedural advances enabling private persons to have direct access to effective international dispute settlement of investment disputes, see Elihu Lauterpacht, International Law and Private Foreign Investment, 4 IND. J. GLOBAL LEGAL STUD. 259 (1997).

135. An exception to this may come under NAFTA’s provisions on temporary entry for business persons. See NAFTA, supra note 74, ch. 16. Under Article 1603, however, NAFTA parties retain power to refuse to grant entry “under applicable measures relating to public health and safety and national security.” NAFTA, supra note 74, art. 1603(1).

legislation because its effect is confined to U.S. territory and is justified "by the United States' interest in excluding from its physical territory those who have acted in concert with the Castro regime to interfere with U.S. nationals' ownership rights." Title IV seems, therefore, consistent with relevant international law.

The legal controversy really involves Title III, which as we saw earlier has been criticized as a violation of international law. The case for Title III's conformity with international law has been most forcefully made by two senior American international lawyers—Brice Clagett and Monroe Leigh. Clagett and Leigh agree that Title III is fully consistent with principles of customary international law. Clagett also argues that Title III does not violate GATT or NAFTA. In addition, Clagett is keen to emphasize that aspects of Title III represent a progressive development in international law.

a. Customary International Law on Expropriated Property

No opponents of the Helms-Burton Act deny that Cuba violated international law in expropriating foreign-owned property without paying compensation. The controversy arises over the international legal consequences of third-state nationals investing in and profiting from illegally expropriated property. The OAS Inter-American Juridical Committee stated that customary international law does not prohibit third-state nationals from investing in and profiting from illegally expropriated property. Clagett strongly takes issue with this interpretation of customary international law by pointing to "[a] wealth of authority [that] supports the view that confiscations that violate international law are not effective in passing title to property, and a state is under no obligation to recognize a title acquired by such a confiscation." Customary international law does, therefore, have rules that regulate trafficking in illegally expropriated property.

137. Id. at 27 (prepared statement of Monroe Leigh).
138. See, e.g., Helms-Burton Hearing, supra note 18, at 184 (testimony of Brice Clagett); Libertad Hearing, supra note 13, at 43 (testimony of Brice Clagett); id. at 22 (testimony of Monroe Leigh); Clagett, A Reply, supra note 97; Clagett, Title III, supra note 3; Clagett, Who is Breaking International Law, supra note 57.
139. OAS Committee Opinion, supra note 78, ¶ 6(e) ("Any use by nationals of a third State of expropriated property located in the expropriating State where such use conforms to the laws of that State . . . does not contravene any norm of international law.").
140. Clagett, Who is Breaking International Law, supra note 57 (manuscript at 15).
As mentioned earlier, a counterargument to this point is that the customary rule to which Clagett refers only addresses recognition of title but does not provide authority for the United States to subject individuals of third States to liability in American courts for dealing in illegally expropriated property. Clagett and Leigh have argued, however, that international law provides ample authority for the United States to enact and apply the private cause of action for U.S. nationals in Title III. First, Clagett and Leigh both point out that the notion of private causes of action for violations of international law is not novel because domestic law and courts in the United States and elsewhere recognize such causes of actions.\footnote{Libertad Hearing, supra note 13, at 23 (testimony of Monroe Leigh); Clagett, Who is Breaking International Law, supra note 57 (manuscript at 15-16, n.31) (citing recognition of private causes of action based on international human rights violations in courts of Germany, the Philippines, Belgium, and the United States).} In connection with victimized U.S. nationals, Title III is more conservative than the private right of action recognized by U.S. federal courts under the Alien Tort Claims Act\footnote{Alien Tort Claims Act, 28 U.S.C. §1350 (1997).} for violations of the international legal prohibition against torture by a non-U.S. national against another non-U.S. national.\footnote{See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d. Cir. 1980) (holding that Paraguayan national violated the international legal prohibition against torture in subjecting another Paraguayan national to torture).} Thus, the Helms-Burton Act can claim two strong bases under customary international law for creating the private cause of action in Title III: (1) the protective principle, a "traditional international legal concept," that "permits a state to exercise jurisdiction when crimes 'are directed against the security of the state' or threaten 'the integrity of governmental functions'";\footnote{Libertad Hearing, supra note 13, at 29 (prepared statement of Monroe Leigh quoting the Restatement).} and (2) the precedents for private causes of actions that exist for violations of fundamental human rights, of which the right to own property is one.\footnote{See, e.g., Universal Declaration of Human Rights, Dec. 8, 1948, art. 17, HR/PUB/90/1 (1990); European Convention on Human Rights, Mar. 20, 1952, Protocol I art. 1, 213 U.N.T.S. 221; American Declaration of the Rights and Duties of Man, Final Act of the Ninth International Conference of American States, Resolution XXX (1948), art. XXIII; American Convention on Human Rights, Nov. 22, 1969, art. 21, 9 I.L.M. 673; African Charter on Human and Peoples' Rights, art. 14, OAU Doc. CAB/LEG/67/3/Rev. 5, adopted Jun. 7, 1981, reprinted in 21 I.L.M. 58 as the Banjul Charter on Human and Peoples' Rights.}

Opponents of the Act might argue that the attempt to justify Title III on the precedents set in the context of torture stretches customary international law
farther than State practice and *opinio juris* actually go. In fact, the outpouring of hostility towards the Helms-Burton Act constitutes a great deal of State practice that asserts that a State does not have a right to subject third-state nationals to private causes of action for trafficking in illegally expropriated property. While State practice may allow a State to disregard claims to title to property acquired through an illegal confiscation, no State practice exists—except the Helms-Burton Act—that recognizes the legitimacy of private rights of action against third-state nationals trafficking in illegally expropriated property. Proponents of the Act have three responses to this line of argument. First, Clagett argues that, before the Helms-Burton Act, the only impediment to suits in the United States against those trafficking in illegally expropriated property was the federal act of State doctrine, under which federal courts do not pass judgment on the legality of official acts of a foreign government on its territory. The Act specifically excludes application of the act of State doctrine in claims filed under Title III. Since the act of State doctrine is not a rule of international law, nothing in international law thus prohibited U.S. nationals from filing private actions against traffickers in U.S. courts. And given that the opponents of the Act bear the burden of proving that international law prohibits such actions, private causes of action for trafficking in illegally expropriated property have a solid basis in international law.

Second, knowingly dealing in stolen goods is universally recognized as illegal under domestic systems of law. Liability for trafficking in property expropriated in violation of international law can be seen as a principle of international law through the source of a general principle of law. The argument that liability for trafficking in illegally expropriated property is not a principle of international law through the channel of general principles of law rests on the assertion that international law is uncertain as to the standard

---

149. SS Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 31 (Sept. 7, 1927) (stating that in general, international law is permissive unless it can be shown to prohibit the activity in question).
150. *Libertad Hearing, supra* note 13, at 28 (prepared statement of Monroe Leigh: "I am unaware of any nation that does not in its domestic law impose criminal penalties on those who knowingly receive property wrongfully taken from its owner."); Clagett, *Title III, supra* note 3, at 437 ("Traffickers are fully aware that they are dealing in tainted property. It can be presumed that the culpability of dealing in stolen goods is a familiar concept to them from their own legal systems.").
151. Statute of the International Court of Justice, art. 38(1)(c) (June 26, 1945).
of compensation. Proponents of the Helms-Burton Act might respond that opponents might have a point if Castro had paid some compensation; but, given that no compensation has been paid, it is reasonable to use analogies to domestic law all over the world that support the imposition of liability on those knowingly trafficking in illegally expropriated property.

Third, proponents of the Helms-Burton Act find opposition to it difficult to understand because allowing third party nationals to traffic knowingly in illegally expropriated property without liability undermines international law on the protection of foreign investment and the right to own property. If a government knows that it can expropriate foreign-owned property without adequate or any compensation and then sell that property to third party nationals, the international law on protecting foreign investments suffers. Proponents of the Act argue that it enforces international law rather than subjecting it to continued abuse. In addition, allowing third-state nationals to traffic knowingly in illegally expropriated property with impunity directly undermines the right to property. The liberal objective of economic interdependence among States and peoples requires that States and peoples protect foreign investments and support the right to property. In the eyes of proponents, the Helms-Burton Act's enforcement of international law on foreign investment and property rights contributes significantly to the liberal goal of economic interdependence.

b. Customary International Law on Prescriptive Jurisdiction

Opponents of the Act have argued that it violates customary international law on the exercise of prescriptive jurisdiction because it does not have an adequate basis and it is an unreasonable exercise of such jurisdiction. Proponents vigorously defend the Act's conformity with customary international law on the exercise of prescriptive jurisdiction. Leigh argues, for example, that the territoriality principle gives legitimacy to both Titles III and IV of the Act. As for Title III, Leigh states that it "allows lawsuits only

152. SORNARAJAH, supra note 130, at 315.
153. Libertad Hearing, supra note 13, at 32 (prepared statement of Monroe Leigh on the Act's enforcement of international law); Clagett, Title III, supra note 3, at 437-38 (arguing in favor of Title III's enforcement of international law).
154. Libertad Hearing, supra note 13, at 32 (prepared statement of Monroe Leigh, arguing that "the Act acknowledges the importance of property rights to the safeguarding of democratic freedom.").
155. See Lowenfeld, supra note 6, at 431-32.
156. Libertad Hearing, supra note 13, at 27 (prepared statement of Monroe Leigh).
against those traffickers who enter or operate within the U.S."\textsuperscript{157} Similarly," Leigh notes, "Title IV has no effect on owners of companies engaged in trafficking who do not attempt to enter the United States."\textsuperscript{158}

Customary international law also recognizes as a basis for exercising prescriptive jurisdiction extraterritorially "conduct outside its territory that has or is intended to have substantial effect within its territory."\textsuperscript{159} In arguing against the Act, Lowenfeld asserted that "the effect against which the legislation is directed . . . was caused by the Government of Cuba, not by the persons over whom jurisdiction is sought to be exercised."\textsuperscript{160} Proponents of the Act point not only to the effect of the illegal expropriations but also to the adverse effects of third-state nationals trafficking in such expropriated property.\textsuperscript{161} Proponents of the Act cannot, as Lowenfeld does, dismiss the effects on U.S. nationals of third-state nationals knowingly dealing with illegally expropriated property.

Monroe Leigh argues that the "jurisdictional basis of the Helms-Burton Act is further supported by the principle of protective jurisdiction, another traditional international legal concept."\textsuperscript{162} Under the protective principle, a State has jurisdiction to prescribe law with respect to "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."\textsuperscript{163} The protective principle provides a jurisdictional basis for laws that punish espionage, counterfeiting, forgeries of official documents, perjury before consular officials, and conspiracy to violate immigration or customs laws.\textsuperscript{164} To this list, Leigh would add trafficking in illegally expropriated property because such trafficking "undermines U.S. foreign policy and commerce by enabling the Castro regime to perpetuate itself at the expense of the property's rightful owners."\textsuperscript{165}

\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{RESTATEMENT}, supra note 101, § 402(1)(c).
\textsuperscript{160} Lowenfeld, supra note 6, at 431.
\textsuperscript{161} \textit{Libertad Hearing}, supra note 13, at 28 (prepared statement of Monroe Leigh, arguing that "[t]he effects of the Cuban expropriation and the subsequent trafficking in expropriated properties have had a wide impact within the United States.").
\textsuperscript{162} \textit{Id.} at 29 (prepared statement of Monroe Leigh). Clagett does not discuss the protective principle as a jurisdictional basis for the Act.
\textsuperscript{163} \textit{RESTATEMENT}, supra note 101, § 402(3).
\textsuperscript{164} \textit{Id.} § 402, cmt. f.
\textsuperscript{165} \textit{Libertad Hearing}, supra note 13, at 29 (prepared statement of Monroe Leigh).
When a basis for the exercise of extraterritorial jurisdiction exists under customary international law, the State exercising the jurisdiction must do so reasonably, which, according to Clagett, means that a State “must balance its interests against those of other states, and refrain from applying its laws when the legitimate and reasonable interests of another state are greater.” Clagett argues that Cuba “has no legitimate interest, which other states need or should respect, in confiscating property without compensation and profiting from foreign investment in that property.” The other State with interests in the matter would be the State whose national is subject to claims under the Act. As Clagett asserts, the U.S. interest in protecting the property rights of its nationals is greater and more legitimate than the other “state’s interest in protecting its national’s ability to traffic in confiscated property . . . .” The liberal objectives of fostering economic interdependence and property rights also weighs heavily in the balance in favor of the United States.

c. The Helms-Burton Act as a Lawful Countermeasure

In defending Title III of the Act, Clagett argues that Title III can also be seen as a countermeasure taken by the United States against Cuba in response to its continued violation of the property rights of U.S. nationals. As a countermeasure against Cuba, Title III seeks to prevent Cuba from profiting from the sale or other disposition of illegally expropriated property. Although Clagett does not address Title IV, it could also be seen as part of the countermeasure package of the Act. A critical response to the countermeasures argument might be that the Act targets third-state nationals, not Cuba, for punishment. Countermeasures are justified against these individuals, proponents of the Act may respond, because they are actively aiding and abetting Cuba’s violations of international law. Clagett pushes the countermeasures argument one step further by claiming that the United States would be justified in taking countermeasures directly against the

166. Clagett, Title III, supra note 3, at 436.
167. Id.
168. Id.
169. Id.
170. Id. Clagett refers to them as “joint tortfeasors and co-conspirators” of Cuba. Clagett, Who is Breaking International Law, supra note 57 (manuscript at 18).
governments of those nationals trafficking in illegally expropriated property for their complicity in Cuba’s violations of international law. 171

2. Secondary Boycotts and Customary International Law

Lowenfeld criticized the Act for amounting to a secondary boycott, which he believes violates international law. Both Leigh and Clagett deny that (1) the Act is a secondary boycott, and (2) it is clear that secondary boycotts violate international law. 172 As Clagett notes, “there is nothing in Title III that proscribes or penalizes trade with Cuba as such.” 173 Leigh observes that “[f]oreign nationals who do business in the U.S. are not forbidden from doing business in Cuba.” 174 If foreign companies have a hard time finding trade and investment opportunities in Cuba that would not involve trafficking in illegally expropriated property, then it is the scale of Castro’s violation of international law, not the Act, that is to blame. 175 Even if the Act was interpreted as constituting a secondary boycott, Leigh argues that “[t]here is little, if any, authoritative support for the proposition that secondary boycotts are generally forbidden under international law.” 176

3. The Helms-Burton Act and Treaty Law

a. GATT

As noted earlier, opponents of the Act claim that it violates provisions in GATT, GATS, and NAFTA. Clagett has responded to these claims of treaty law violations by arguing that the Act does not violate these treaties. 177 His response to the GATT accusations is that the EC mischaracterizes Title III “as a restraint on trade rather than an imposition of private civil liability for knowingly and intentionally receiving or dealing in tainted property.” 178

171. Clagett, Title III, supra note 3, at 436.
172. See Libertad Hearing, supra note 13, at 29-31 (prepared statement of Monroe Leigh discussing secondary boycott issue); Clagett, Who is Breaking International Law, supra note 57 (manuscript at 11-12) (discussing secondary boycott argument).
173. Clagett,谁 is Breaking International Law, supra note 57 (manuscript at 11).
175. Clagett, A Reply, supra note 97, at 641.
176. Libertad Hearing, supra note 13, at 30 (prepared statement of Monroe Leigh).
177. Clagett, Who is Breaking International Law, supra note 57 (manuscript at 33-36).
178. Id. (manuscript at 36).
Although Clagett does not analyze the EC complaint because no detailed complaint has been made public, he finds "it hard to see the relevance of any of these provisions to Title III [because it] . . . is simply not a trade regulation." To fill out this position, the major items of the EC complaint concerning GATT will be analyzed from the pro-Helms-Burton perspective.

The EC asserts that the Act violates the most-favored-nation principle of Article I of GATT. The EC is, in essence, arguing that the United States accords some advantage, favor, privilege, or immunity to the goods of another GATT contracting party that it denies to the EC through the Act. First, as Clagett suggests, Title III of the Act does not regulate trade in goods; so it is hard to see how exactly the Act denies EC-origin products most-favored-nation treatment. Second, the Act applies to the traffickers of all States, not just the EC. In that respect, the Act treats all U.S. trading partners and their nationals exactly the same, which is what the most-favored-nation principle seeks to accomplish.

The EC also claims that the Act violates the national treatment principle of GATT Article III ostensibly by treating American goods more favorably than EC-origin goods. Given that American companies face a total ban on doing business with Cuba, it is not clear why the EC believes that its products are treated in a discriminatory manner vis-à-vis American products in the United States because of the Act.

According to the EC, the Act also violates the prohibition on quantitative restrictions in GATT Article XI. Here the theory might be that EC products containing Cuban-origin ingredients or components are effectively prohibited from importation into the United States by the Act. One response to this claim is that the Act does not regulate imports into the United States but rather subjects traffickers in illegally expropriated property to civil liability in the United States. If the Act is considered to have the equivalent effect of an import prohibition, the United States could argue that such a de facto import prohibition is justified by the Article XX(a) exemption for measures "necessary to protect public morals" or the Article XXI "national security" exemption.

179. Id. (manuscript at 36 n.79).

180. Id. (manuscript at 36) (suggesting this exemption to cover any possible violation of GATT).

The complaint that the Act violates GATT Article XIII's requirement to apply any quantitative restrictions in a nondiscriminatory manner seems ill-founded because either (1) the Act does not prohibit imports, or (2) the Act applies equally to goods from all other GATT contracting parties.

Finally, the argument that the Act nullifies or impairs the attainment of GATT objectives even though it might not violate any GATT provision could be seen as a weak argument because (1) this type of argument has rarely succeeded in GATT practice, and (2) protecting the right of third-state nationals to profit knowingly from illegally expropriated property cannot be considered a GATT objective that the Act nullifies or impairs.182

b. NAFTA

Clagett also takes on the accusations that Title III of the Act violates NAFTA. First, he rejects the national treatment claim that the Act discriminates against Canadian and Mexican companies by subjecting them, but not American companies, to Title III because American companies face civil and criminal liability for doing business with Cuba.183 Second, he argues that any claim under NAFTA Article 1105(1), which requires the United States to treat Canadian and Mexican investments in accordance with international law, would fail because Title III does not violate international law.184 Third, Clagett finds the argument that judgment rendered against Canadian and Mexican investments in the United States would be illegal expropriations themselves without merit because "[a] rule against unlawful expropriation does not . . . immunize foreign investors from civil liability to private parties under a law of general application validly enacted by the government of the host state."185

182. Clagett argues: "Trading in drugs, slaves or contraband is not free of 'restraint' under GATT or otherwise; why should trading in stolen property be any more so?" Clagett, Who is Breaking International Law, supra note 57 (manuscript at 36).
183. Id. (manuscript at 35).
184. Id. (manuscript at 34).
185. Id. (manuscript at 35). Clagett also finds the potential invocation of NAFTA's rule against uncompensated expropriation ironic because Title III "does no more than to ask Canada and its companies to recognize the consequences of the same rule in their dealings with Cuba . . . ." Id.
4. Upholding Human Rights: Expropriated Cuban Property

Another major purpose behind the Helms-Burton Act is to promote fundamental human rights and freedoms as found in international law. The Act clearly sets out the human rights abuses perpetuated by Castro’s regime. Even opponents of the Helms-Burton Act concede that Castro is a brutal dictator with no respect for fundamental human rights. For proponents of the Helms-Burton Act, the spectacle of liberal States and nationals of such States propping up a brutal tyrant by encouraging investors to make profitable use of illegally expropriated property must seem well outside the liberal tradition.

The attempt to uphold human rights law has general and specific applications in the Helms-Burton Act. Generally, the Act advocates that the best way to improve human rights in Cuba is to force Castro out of power. Hence the Act tightens the blockade and attempts to deter foreign investment in Cuba. The specific applications come in two forms: (1) upholding the individual rights of U.S. nationals subject to illegal expropriations by Cuba (discussed above), and (2) the right of action the Act gives to Cubans who suffered illegal expropriations under the Castro regime and who have since become naturalized Americans. The OAS Inter-American Juridical Committee found that under international law “[t]he claimant State does not have a right to espouse claims by persons who were not nationals at the time of injury.” Clagett argues, however, that including Cuban-Americans within the Act recognizes that these individuals are victims of the violation of the human right to own property through the discriminatory confiscation of Cuban-owned private property on the basis of political opinion. Discriminatory expropriations based on political views are illegal under the international law of expropriation as well as a violation of the human right to

---

186. See, for example, § 2(15) of the Act which states: “[t]he Castro government has utilized from its inception and continues to utilize torture in various forms (including by psychiatry), as well as execution, exile, confiscation, political imprisonment, and other forms of terror and repression, as a means of retaining power.” Helms-Burton Act, supra note 1, § 2(15). See also Section 2(20): “The United Nations Commission on Human Rights has repeatedly reported on the unacceptable human rights situation in Cuba . . . .” id. § 2(20).

187. See, for example, Lowenfeld’s comment that he agrees with the Act’s findings that the Castro regime is totalitarian and repressive. Lowenfeld, supra note 6, at 433.


189. OAS Committee Opinion, supra note 78, ¶ 6(b).

190. Clagett, Title III, supra note 3, at 438.
own property.\textsuperscript{191} By giving Cuban-Americans a right of action against traffickers, the Helms-Burton Act focuses on the human rights violation suffered by individuals, not on the nationality of the individuals at the time of the human rights violation. It reflects the universality of human rights law. Traffickers are, thus, helping to perpetuate violations of a fundamental human right.

Supporters of the Act have also pointed out that Congress has previously granted rights of action in the United States to nationals of other States for human rights violations occurring entirely within the territory of another State through the Alien Tort Claims Act and in the Torture Victim Protection Act of 1991.\textsuperscript{192} The difference between these laws and the Helms-Burton Act is that the right of action given to Cuban-Americans is not directed at individuals who participated in the violations of international law under color of government authority but extends to individuals of third States who traffic in illegally expropriated property. This extension is justified because such third-state nationals knowingly seek to profit from Castro's flouting of international human rights law. The Helms-Burton Act stands for the proposition that individuals have a duty under international law not to profit knowingly from a government's violation of international human rights law. In interpreting international law to include such a duty, the Helms-Burton Act is further developing the area of international law under which individuals have international legal duties to refrain from certain activities, such as piracy,\textsuperscript{193} crimes against humanity,\textsuperscript{194} and torture.\textsuperscript{195} The Act also brings enforcement to human rights law by creating a right of action for Cuban-Americans in U.S. courts.

\textbf{C. International Institutions}

The Helms-Burton Act does not allow the United States to engage Cuba through international institutions. The Act mandates that the United States oppose Cuba's admission to international financial institutions until a

\begin{footnotes}
\item[191] \textit{Id.}
\item[192] See \textit{Helms-Burton Hearing}, supra note 18, at 142 (testimony of Bruce Fein).
\item[193] \textit{Oppenheim's International Law}, supra note 5, at 753 (noting that under international law every state has the right to punish pirates for piracy committed on the high seas).
\item[194] Id. at 998 (discussing evolution in international law of a right for states to punish foreign nationals for crimes against humanity).
\item[195] See \textit{Filartiga v. Pena-Irala}, 630 F.2d 876 (2d Cir. 1980) (U.S. federal court subjecting foreign national to U.S. jurisdiction for violating international legal prohibition on torture).
\end{footnotes}
democratically elected government is in power in Cuba. Further, the United States is to withhold payments to any international financial institution that approves financial assistance to Cuba over American opposition. Congress has also instructed the President to oppose any termination of Cuba’s suspension from the OAS until Cuba has a democratically elected government. The Act also notes that NAFTA has no effect on the U.S. embargo of Cuba. As with economic interdependence, the Helms-Burton Act does not employ the liberal strategy of utilizing international institutions until Castro’s regime has disappeared.

To the accusation that the United States abandoned multilateralism for arrogant unilateralism in passing the Act, proponents counter that the United States engaged in constructive diplomacy before the Act was ever drafted and continued to engage other States on these issues in international fora. Mention has already been made of the 1993 effort by the Clinton Administration to warn other governments about U.S. interests in Castro’s attempt to sell illegally expropriated property to foreign investors. American concerns expressed through diplomatic channels seem to have made little impact on U.S. trading partners. Clagett notes two specific examples. First, the Canadian government provides assistance to Canadian businesses seeking to invest in Cuba apparently “without the slightest concern whether these ‘opportunities’ involve investing in confiscated properties.” Second, the Italian government ultimately controls an Italian corporation that invested in the Cuban telephone system, which was confiscated from an American company. Not only have U.S. trading partners failed to prohibit their nationals from trying to profit from Castro’s larceny, but some also actively aid and abet Castro’s continued violations of international law. In addition, the United States has engaged in discussions with its trading allies subsequent to the Act’s passage “through a variety of international fora, including at the G-7 summit in Lyon, in the OECD, the World Trade Organization, and through the NAFTA.” Moreover, as analyzed earlier, the relevance of the WTO and NAFTA as fora for discussing the Act seems suspect to its proponents who do

196. Helms-Burton Act, supra note 1, § 104(a).
197. Id. § 104(b).
198. Id. § 105.
199. Id. § 110(b).
200. Clagett, Who is Breaking International Law, supra note 57 (manuscript at 10).
201. Id. (manuscript at 10 & n.19).
202. Libertad Hearing, supra note 13, at 14 (prepared statement of Jennifer Hillman, General Counsel, Office of the United States Trade Representative).
not see the issues addressed by it as trade matters.\textsuperscript{203} The Act's proponents would argue that multilateralism does not and should not mean setting aside fundamental U.S. interests to placate governments either complacent about or actively helping their nationals knowingly profit from property confiscated in violation of international law by a tyrant known for systematic and gross violations of fundamental human rights.

\textbf{D. Democracy}

\textit{1. Protecting Democracy}

The Helms-Burton Act characterizes the Castro regime as a threat to American national security\textsuperscript{204} and to international peace and security.\textsuperscript{205} Congress has also determined that the Cuban government represents a threat to liberal principles because of its human rights record, its violation of international law on expropriation, its support for terrorism, its attack on American unarmed civilian aircraft,\textsuperscript{206} and its resistance to democratic reform.\textsuperscript{207} Through these provisions, the Helms-Burton Act conforms with the liberal tradition's principle of protecting democracy.

\textit{2. Promoting Democracy}

Congress made the fundamental purpose of the Helms-Burton Act to help bring democracy to Cuba. Section 3 states that the purposes of the Act include: (1) to assist the Cuban people in regaining freedom and joining the community of democratic States; (2) to encourage the holding of free and fair elections in Cuba; and (3) to provide for an American policy framework to

\textsuperscript{203} See id. at 16-17 (noting U.S. position that neither the WTO nor NAFTA are appropriate forums to settle what is a foreign policy issue and not a trade dispute).

\textsuperscript{204} Helms-Burton Act, supra note 1, § 2(28) (finding that "[f]or the past 36 years, the Cuban Government has posed and continues to pose a national security threat to the United States."); § 3(3) (stating a purpose of the Act to(200,320),(788,801)

\textsuperscript{205} Id. § 2(14) (finding that "[t]he Castro government threatens international peace and security by engaging in acts of armed subversion and terrorism such as the training and supplying of groups dedicated to international violence."); § 2(24) (finding that "massive and systematic violations of human rights may constitute a 'threat to peace' under Article 39" of the U.N. Charter).

\textsuperscript{206} Id. § 116 (findings of Congress on the downing of the Brothers to the Rescue airplanes).

\textsuperscript{207} Id. § 2(16) (finding that "Fidel Castro has defined democratic pluralism as 'pluralistic garbage' and continues to make it clear that he has no intention of tolerating the democratization of Cuban society.").
support the Cuban people as they move through a transition government to a democratically elected government.\textsuperscript{208} Thus, the Act resonates with the liberal tradition's call for the promotion of democracy.

\textit{E. Summary}

The Helms-Burton Act rejects the use of the liberal strategies of economic interdependence and international institutions until Cuba has become democratic. The Act forcefully seeks, however, to uphold international law and to protect and promote democracy in keeping with those tenets of the liberal tradition.

\textbf{V. LIBERAL REALISM V. LIBERAL INTERNATIONALISM}

Opponents and proponents of the Helms-Burton Act both make forceful cases from within the liberal tradition. The controversy over the Act suggests that at least two different perspectives are at work within the liberal tradition. While liberals may share common goals and values, they sometimes disagree dramatically on how to achieve their shared goals and values.\textsuperscript{209} The Helms-Burton episode seems to be just a case in point as the United States faces off against other liberal States about the proper strategy towards Cuba. Two perspectives within the liberal tradition—liberal realism and liberal internationalism\textsuperscript{210}—are helpful in analyzing this controversy among liberal States because the Helms-Burton Act contains features of liberal realism, while its opponents exhibit the tendencies characteristic of liberal internationalism.

\textit{A. The Helms-Burton Act and Liberal Realism}

Liberal realism is a perspective within the liberal tradition that emphasizes the exercise of military and economic power to protect the national interest and to promote liberal interests and values in the international system. This

\textsuperscript{208} Id. § 3(1), (4), (5).

\textsuperscript{209} Fidler, War, Law & Liberal Thought, supra note 33, at 74 ("Liberals divide over what international improvements can be made, how improvements can be made, and how much improvement is really possible.").

\textsuperscript{210} I have analyzed liberal realism and liberal internationalism in the context of the use of force by states, see generally id., and of the United Nations Security Council, see generally Fidler, Caught Between Traditions, supra note 32.
perspective recognizes the teachings of the realist school of international relations theory that the anarchical nature of the international system forces States to worry about power and to exercise power in their international relations.\textsuperscript{211} Liberal realists do not, however, exhibit the grim pessimism of many classical realists, like Jean-Jacques Rousseau.\textsuperscript{212} Instead, they seek to blend together their commitment to liberal principles with an understanding of the harsh nature of international relations.\textsuperscript{213} Liberal realists play the power game in international relations "to provide security and order for the democratic community of states and stability for the pursuit of economic interdependence throughout the international system."\textsuperscript{214} The objective of the liberal realist approach "is to make the position of democracy so secure that its influence, coupled with the impact of economic interdependence, will nurture the spread of democracy and capitalism in the international system."\textsuperscript{215}

As a result of its acknowledgment of realism, liberal realism views the four fundamental strategies within the liberal tradition in a particular way. In an international system made up of liberal and non-liberal States, economic interdependence is not an end in itself but a means to making democracies more powerful and secure. Liberal realists view economic interdependence as an instrument of liberal power to be applied or denied in pursuit of national security, international order, and the spread of democracy. In its policy towards Cuba, the United States has used its economic power as a weapon against Castro by maintaining an embargo on American trade with and investment in Cuba. The Helms-Burton Act continues this policy by tightening the embargo. Castro previously balanced the American embargo by his close alliance with the Soviet Union. When that counterweight disappeared, Castro turned to other liberal States by opening Cuba to more trade and investment. Titles III and IV of the Helms-Burton Act constitute a new way in which the United States uses economic interdependence as a weapon of power because it forces nationals of other States to think twice

\textsuperscript{211} Hans Morgenthau, Politics Among Nations 5 (5th ed. 1973) (famous 20th century American realist arguing that "statesmen think and act in terms of interest defined as power.").
\textsuperscript{212} Stanley Hoffman & David P. Fidler, Introduction to Rousseau on International Relations at lxxvii (Stanley Hoffman & David P. Fidler eds., 1991) (noting that Rousseau was perhaps the most pessimistic of realists).
\textsuperscript{213} Hoffmann, supra note 54, at 394 (arguing that realists like Hans Morgenthau, George Kennan, and Raymond Aron "either smuggled in or openly injected liberal values and goals whenever they went, beyond empirical analysis, into their own attempt at showing how the jungle could be made livable . . .").
\textsuperscript{214} Fidler, Caught Between Traditions, supra note 32, at 436.
\textsuperscript{215} Id.
about investing in Cuba. For foreign companies with property or operations in the United States and interest in investing in Cuba, "the choice is between an ice cream sundae and a root canal treatment." U.S. economic power vis-à-vis Cuba is, thus, enhanced by the interdependence that exists between the United States and other liberal States.

Liberal realists also take a particular stance towards international law. For liberal realists, the key element of international law is reciprocity because it is through reciprocal behavior that "[c]ommon interests . . . can become common values represented in rules of international law." While reciprocity among liberal States usually makes international law effective in inter-liberal relations, reciprocity has frequently broken down in the relations of liberal and non-liberal States. When reciprocity breaks down in connection with a non-liberal State, liberal realists place little confidence in institutionalized procedures, like the International Court of Justice, to enforce international law. Instead, liberal realists interpret international law to give the liberal State sufficient freedom to pursue its own enforcement strategies.

The international legal arguments made by Clagett, Leigh, and others fit the liberal realist model. Cuba's illegal expropriations clearly demonstrate that it breached and continues to breach reciprocity in the international law on foreign investments. In addition, other liberal States and their nationals are aiding and abetting Cuba's violations of international law by encouraging and participating in trafficking of illegally expropriated property—activities that also undermine reciprocity in international law. In the face of these fundamental breakdowns of reciprocity, the United States faced "the notorious weakness and ineffectiveness of international enforcement mechanisms." Proponents of the Helms-Burton Act interpret international law to permit the United States to impose not only countermeasures against Cuba but also liability in U.S. courts on third-state nationals that profit from Castro's violations of international law at the expense of U.S. nationals. International law, in the liberal realist perspective, supports the robust self-help strategy found in the Helms-Burton Act.

216. Lowenfeld, supra note 6, at 429.
217. Fidler, War, Law & Liberal Thought, supra note 33, at 75.
218. See id. at 76-77 (discussing lack of reciprocity on the international legal rules on the use of force between the United States and Soviet Union).
219. See id. at 84 (arguing that in interpreting international law on the use of force "[l]iberal realism restores to the state the vitality of its right of self-defense.").
220. Clagett, Title III, supra note 3, at 436.
Liberal realists also consider interpretations of international law that justify flouting fundamental liberal values to be misguided. 221 Liberal realism sees international law as an institution of international relations that should be used to promote liberal interests and values. This position means that liberal realists place international law in political context and avoid the tendency to divorce law from politics. 222 This trait of liberal realism manifests itself in the position expressed through the Helms-Burton Act: third-state nationals are knowingly helping keep a brutal dictator in power and are profiting from illegally expropriated property at the expense of U.S. nationals. Such behavior not only injures the United States but is also repugnant given liberal attachment to property rights, the rule of law, the importance of economic interdependence, and promoting democracy.

A specific example of the lack of political and moral context can be found in Lowenfeld's international legal attack on the Helms-Burton Act. At no point does Lowenfeld address the major thrust of the Act: third-state nationals are intentionally attempting to profit from Castro's violations of international law at the expense of U.S. nationals. Lowenfeld chooses to approach this issue legalistically, arguing, for example, that "[t]here is no necessary connection between the value of the property on which the [Helms-Burton] claim is based and the value of the transaction on which the assertion of 'trafficking' rests." 223 Liberal realism defines the core issue directly as "the immoral trafficking in stolen property that today plays a major role in keeping Castro in funds and therefore in power[.]." 224 The political and moral unreality of Lowenfeld's analysis is compounded when he acknowledges that Castro is a tyrant. 225 If Castro is a tyrant, and third-state nationals are knowingly acting to profit from his violations of international law, then the moral and political context of this issue point in the direction of using international law to redress international wrongs and oppose tyrannical ambitions.

Similar observations can be made about the OAS Inter-American Juridical Committee legal opinion. The interpretation of international law in this legal opinion leaves open huge loopholes in the international law on the protection

221. See Fidler, War, Law & Liberal Thought, supra note 33, at 78-85 (analyzing liberal realist rejection of ICJ's ruling in Nicaragua case because, among other things, the ruling weakened a democratic state's right to individual and collective self-defense against totalitarian indirect aggression).

222. See id. at 87 (discussing subordination of political reality to legal reasoning in the Nicaragua case).

223. Lowenfeld, supra note 6, at 426.

224. Clagett, Title III, supra note 3, at 440.

225. Lowenfeld, supra note 6, at 433.
of foreign investment. For example, the OAS Inter-American Juridical Committee states that "[c]laims against a state for expropriation of the property of foreign nationals cannot be enforced against the property of private persons except where such property is itself the expropriated asset and within the jurisdiction of the claimant state."\textsuperscript{226} Under this rule, third-state nationals can knowingly invest in and profit from illegally confiscated land and other forms of immovable property with impunity under international law. Such a rule does not support the international legal regime on the protection of foreign investment, which regime is important to the liberal strategy of economic interdependence.\textsuperscript{227} The rule formulated by the OAS Inter-American Juridical Committee interprets international law so as to give maximum freedom to the government that illegally expropriated property and to third-state nationals who attempt to profit from such illegal confiscations while restricting the freedom of the State whose nationals were victimized to take measures to counteract such behavior.\textsuperscript{228} Liberal realists hold that international law in this area should be interpreted to give the victimized State maximum freedom to respond to illegal confiscations and subsequent trafficking and to restrict the ability of the confiscating State and third-state nationals to profit from illegal acts.

The recent controversy about the alleged trafficking by Swiss banks of property illegally confiscated by the Nazis in the 1930s and 1940s supports the position taken by the proponents of the Helms-Burton Act. After initial hostile reactions to United States congressional hearings on this matter, Swiss representatives testified to the U.S. House of Representatives Banking Committee that "they didn't think they were trafficking in stolen property, but they would conduct a thorough investigation [and if] it turned out that by some chance any of it had crawled into their hands, they pledged their undying

\begin{footnotes}
\item[226] OAS Committee Opinion, supra note 78, ¶ 5(d).
\item[227] "International trade and investment—indeed, private business itself—cannot survive without respect for property rights." Clagett, A Reply, supra note 97, at 643.
\item[228] See Fidler, War, Law & Liberal Thought, supra note 33, at 87 (discussing liberal realist critique of ICI's Nicaragua holding that created opportunities for indirect aggression while severely restricting the rights of individual and collective self-defense against such aggression).
\end{footnotes}
determination to get it back to the real owners—or their descendants—right away.”

In connection with the liberal attachment to international institutions, liberal realism teaches that liberal States must realize the limits of such institutions when trying to deal with non-liberal States. Congress has expressed a belief that engaging Castro in various international institutions would not mellow his dictatorship. Like its attitude on economic interdependence, liberal realism views international institutions as a means to an end, not as an end in themselves.

The accusation leveled at the United States by liberal States, that it has acted unilaterally through the Helms-Burton Act and ignored a multilateral approach, touches on the perceived value of international institutions in the relations among liberal States. Although liberal realist skepticism about the potential of international institutions decreases substantially in the inter-liberal context, multilateralism still remains a means to substantive ends. Liberal realism finds no magic power in multilateralism to transform deep disagreements between liberal States into tranquil compromise. The reaction of some liberal States to the U.S. government’s arguments about the illegality and immorality of trafficking in illegally expropriated property illustrates this point. According to the U.S. Assistant Secretary of State for Inter-American Affairs, those in foreign governments who acknowledge the U.S. concern argue that the issue belongs in multilateral fora. The fora typically suggested do not, as earlier analyzed, seem relevant to the nature of the specific controversy. Multilateralism for the sake of multilateralism rarely impresses the liberal realist, particularly when the proposed fora are substantively inappropriate. For the liberal realist, the message, not the medium, is the critical issue. In connection with the Helms-Burton Act, the United States has enunciated its clear stand against trafficking in illegally expropriated property unilaterally, bilaterally, regionally, and multilaterally. From the liberal realist


230. See, e.g., Fidler, Caught Between Traditions, supra note 32, at 436 (arguing that under the liberal realist perspective “international organizations and collective security systems constitute elaborate facades of cooperation that do nothing to limit effectively the sovereignty of states with regard to international peace and security.”).

231. Libertad Hearing, supra note 13, at 15 (testimony of Jeffrey Davidow).
perspective, there is irony in the accusation of unilateralism from other liberal States when the United States made it clear to the entire world its concern about Castro's plans to use illegally expropriated property to lure foreign investment. Where was the appeal by other liberal States for multilateralism when conflict was looming? Instead of a recognition of U.S. concerns, other liberal States acted unilaterally by allowing their nationals to traffic in illegally expropriated property. The cry for multilateralism diverts attention from the fact that these liberal States and their nationals have been caught with their hands in the cookie jar.\footnote{232}

Liberal realism desires the spread of democracy in the international system.\footnote{233} Liberal realism favors promoting the spread of democracy through the exercise of power by liberal States to weaken tyrannical governments, uphold principles of international law, and foster an economic interdependence grounded in respect for property rights. Whether liberal power is exercised in international institutions is a tactical consideration rather than a strategic choice. By setting out to weaken Castro, reaffirm and enforce international law, and encourage principled economic interdependence, the Helms-Burton Act seeks the spread of democracy in keeping with liberal realist tenets.

B. Helms-Burton Opponents and Liberal Internationalism

Liberal internationalism is a perspective within the liberal tradition that emphasizes the use of international organizations to bring stability and order to international relations, and to promote economic interdependence and democracy.\footnote{234} Liberal internationalism does not accept major teachings of realism because it holds that international institutions have the potential to move States away from power considerations toward more cooperative relations. Liberal internationalism holds that international institutions

\footnote{232. Clagett, A Reply, supra note 97, at 643 ("Those enterprises that are alarmed by Title III of Helms-Burton, because they fear the consequences of having their fingers caught in the cookie jar, would be well-advised to admit their mistake and end their trafficking forthwith.").}

\footnote{233. Fidler, War, Law & Liberal Thought, supra note 33, at 103 ("The liberal realist tradition . . . holds that an increasing presence of liberal democratic states in the international system will help moderate the system and reduce the frequency and ferocity of armed conflict.").}

\footnote{234. Fidler, Caught Between Traditions, supra note 32, at 430 (stating that liberal internationalism "refers to the tradition of liberal thought that views international organization as vital to the maintenance of international peace and security."). \textit{See also} Michael J. Smith, \textit{Liberal and International Reform, in Traditions of International Ethics} 201, 215 (Terry Nardin & David A. Mapel eds., 1992) ("The liberal tradition is replete with schemes to bolster international law . . . [and] to create new international organizations.").}
"enhance cooperation by improving the quality of information, reducing transaction costs, facilitating tradeoffs among issue-areas, facilitating enforcement of accords, and enhancing states' ethical concerns.\textsuperscript{235} The central position of international organizations in liberal internationalism also elevates international law as an important priority as well. International law facilitates the creation of international institutions, and international institutions facilitate the workings of international law.\textsuperscript{236} Liberal internationalism seeks to put international organizations and international law to work to promote economic interdependence.\textsuperscript{237} The connection between international institutions and economic interdependence promoted by liberal internationalism figures very prominently in the current international system.\textsuperscript{238} Finally, key to the synergies between international organization, international law, and economic interdependence is the leadership of liberal democracies.\textsuperscript{239} The powerful combination of better international cooperation, more effective international law, and expanding economic interdependence, all overseen by liberal democracies, creates powerful incentives for democratization in the international system, which can be seen occurring today.\textsuperscript{240}

Opponents of the Helms-Burton Act sound many of the themes of liberal internationalism. Liberal States have complained that the United States ignored multilateral fora in adopting the unilateralist approach of the Helms-Burton Act. From the liberal internationalist perspective, the liberal realist emphasis on power seems anachronistic in the current international system. Opponents sense in the Helms-Burton Act a lack of perspective when it and

\textsuperscript{235} Zacher & Matthew, supra note 42, at 136.
\textsuperscript{236} Slaughter Burley describes this interdependence in this way: "Institutionalists and international lawyers subscribe to a common ontology of the international system: the actors, the structure within which those actors act, and the process of their interaction. Both groups... are describing a common agenda focused on the study of improved institutional design for maximally effective international organizations, compliance with international obligations, and international ethics." Slaughter Burley, supra note 48, at 206.
\textsuperscript{237} Fidler, Caught Between Traditions, supra note 32, at 447-48 ("International organization can help facilitate economic interdependence by promoting peaceful economic intercourse between states and by working to eliminate obstacles to freer trade and investment.").
\textsuperscript{238} Burchill, supra note 33, at 57 ("The recent proliferation of free trade agreements and associations such as NAFTA, APEC and GATT (now the WTO) and the growing importance of international organizations such as the G7, IMF and World Bank is indicative of the influence of liberal internationalism in [the] post-Cold War period.").
\textsuperscript{239} Gardner, supra note 43, at 23 (commenting on the liberal internationalism view that "the necessity of leadership by liberal democracies in the construction of a peaceful world order through multilateral cooperation and effective international organizations.").
\textsuperscript{240} Burchill, supra note 33, at 62 (noting that "[t]he spread of liberal democracies and the zone of peace is an encouraging development.").
its proponents argue that Cuba constitutes a threat to American national security and international peace. On the one hand, Castro's regime is apparently so weak that just one more shove from the United States will send it to the ash heap of history. On the other hand, Castro is a totalitarian menace to the strongest military and economic power on the face of the earth. The effort to make the Marxist mouse in the Caribbean roar seems melodramatic and signifies a mentality not in tune with American interests in multilateral cooperation in hemispheric free trade and global economic interdependence.241 A coordinated approach of liberal democracies toward Castro's final days, established in multilateral fora, would present Castro with a united democratic front rather than a squabbling cabal that he can divide and annoy. Hints at the elements of a coordinated approach have begun to appear through the smoke released by the Helms-Burton cannonades of liberal States. Both European leaders and Canadian officials have increased talk about conditioning expanded trade and investment with Cuba on Cuba improving its human rights record and moving towards democracy.242

Opponents of the Helms-Burton Act also receive with great skepticism the assertion that the United States' diplomatic position on "trafficking" was clear from the start. The Clinton administration that sent out the 1993 diplomatic cable was the same administration that sternly opposed the Helms-Burton legislation until electoral politics intervened.243 In addition, the Helms-Burton legislation was not rocketing through Congress before the Brothers to the Rescue incident, suggesting that the Act owes its existence not to American moral outrage about trafficking but to the reelection ambitions of politicians. Conveniently, proponents of the Act forget this tawdry domestic political backdrop to the Helms-Burton Act. But it is this backdrop that explains the American failure to engage in constructive multilateral diplomacy, not the

241. Morici, supra note 95, at 87 (arguing that the Helms-Burton Act "undermines the long-term goals of United States international economic policy.").

242. Anthony DePalma, A Top Canadian Visits Cuba, Nettling Washington, N.Y. TIMES, Jan. 23, 1997, at A3 (reporting on Canadian foreign minister's trip to Cuba where he raised the human rights issue); Nancy Dunne, supra note 28, at 3 (reporting that "[l]ast month European foreign ministers voted to link expanded ties to Cuba with human rights improvements and progress towards democracy."). The United States is claiming that the Helms-Burton Act "had focused the attention of European and other nations on democracy in Cuba." Myers, supra note 29, at 1 (reporting on comments of Undersecretary of State Eizenstat). See also The Cuban Tango, N.Y. TIMES, Jan. 25, 1997, at 22 (editorial arguing that Canada should use economic power to influence change in Cuba and should speak out more forcefully on human rights issues).

243. Morici, supra note 95, at 87 (quoting Secretary of State Christopher as stating that "granting Americans this right to sue in United States courts 'would be hard to defend under international law.'").
alleged unresponsiveness of other liberal democracies to American interests in Cuba. Under liberal internationalism, domestic politicking is not a principled reason for ignoring international institutions as a process to construct cooperative approaches to problems.

The American outrage at the alleged illegality and immorality of trafficking in expropriated property also rings hollow from the liberal internationalist view of the circumstances. First, the intent of the Helms-Burton Act is to prevent other countries from trading with and investing in Cuba. The United States seeks to unilaterally terminate the development of a process of economic interdependence among Cuba and many other States in the international system. In its weakened state, Cuba is at its most vulnerable to the process of economic interdependence that is a central engine for democratization in the international system. Second, by subjecting third-state nationals to liability in American courts, the United States has damaged economic relations between itself and other liberal States. The blocking and clawback measures passed by Canada, Mexico, and the European Union have raised the economic stakes of the dispute for all sides. From the perspective of liberal internationalism, the Helms-Burton Act's unilateral attack on economic interdependence has set off a chain reaction that has produced conflict and economic uncertainty.

Liberal internationalism also has several responses for the claims that the Helms-Burton Act conforms with international law. International legal analyses supporting the Act try to sustain its provisions by reference to traditional, long-standing rules of international law—an approach which attempts to present the Act as in no way novel or a departure from existing law. The almost universal adverse reaction to the Act suggests, at the very least, that the Act is not unexceptional as regards international law. Proponents of the Act cannot point to precedents from international law where a State has used a private cause of action to punish traffickers in illegally expropriated property for damages attributable to the expropriating State. Given the ramifications of enacting such a private cause of action, liberal internationalism requires some sort of evidence of State practice acknowledging a breach of international law by traffickers. Under liberal internationalism, international law is a process that has established parameters developed by States over centuries. Although the process is far from perfect

244. For a discussion of these measures, see Clagett, Who is Breaking International Law, supra note 57 (manuscript at 36-38).
because it relies on State consent, it nevertheless deserves respect and continued utilization to ensure its viability and stability. Such viability and stability are crucial because international law facilitates international institutions and economic interdependence. To claim as Helms-Burton proponents do, that international law prohibits trafficking in illegally expropriated property without any specific State practice on point (other than the Act) to support such a rule challenges the international legal process directly.

Liberal internationalists are not afraid to admit that international law may allow third-state nationals to traffic in illegally expropriated property, even though that may seem repugnant from the liberal perspective. The concern with the stability of the international legal process means that liberal internationalists recognize the shortcomings of international law but begin to build consensus to reform international law where reform is needed. The venue for reform should be, of course, multilateral fora, not unilateral attempts to proclaim new rules of international law. Ironically, even forceful legal advocates for the Act, such as Clagett and Leigh, indirectly acknowledge that international law in the area subject to the Act needs to be solidified in the form of a multilateral treaty.245

Liberal internationalism has a further concern with the international legal validity of the Helms-Burton Act: its treatment of citizens of third States. Proponents of the Act rail against those knowingly trafficking in illegally expropriated property, and the Act subjects them to huge potential liabilities. As the OAS Inter-American Juridical Committee stated, provisions of the Act threaten to deprive individuals and private enterprises of due process of law because of the large damages the Act allows.246 Clagett has answered this charge arguing that “[s]uch concerns implicate domestic constitutional considerations more than international law.”247 Liberal internationalists respond that due process of law is very much a concern of international human

---

245. Id. (manuscript at 31-32) (“Still better would be an international convention that codified the rule that title to property confiscated in violation of international law is invalid and that all governments, and their nationals, should recognize and respect the rights of the true owner.”); Libertad Hearing, supra note 13, at 26 (testimony of Monroe Leigh advocating negotiation “of a multilateral agreement which would internationalize the common law rule that the thief cannot convey valid title for stolen property.”).

246. OAS Committee Opinion, supra note 78, ¶ 6(g) (“The claimant state may not deprive a foreign national of the right in accordance with due process of law to effectively contest the bases and the quantum of claims that may affect his property.”).  

247. Clagett, Who is Breaking International Law, supra note 57 (manuscript at 17).
rights law. What liberal realists may refer to dismissively as "legalism" in criticisms of the Act actually represents a fundamental concern at the heart of the liberal tradition: the exercise of government authority against private interests without due process of law. Even if international law prohibits trafficking, imposing civil liability that violates due process of law and fundamental notions of fairness must be called into question.

Liberal internationalism can also detect some legalistic reasoning in the legal arguments of the Act's proponents. Take, for example, Clagett's response to the concern that a trafficker is subjected to the full liability created by Cuba plus thirty-seven years of interest attributable to Cuba—all subject to trebling—for trafficking for a few months: the trafficker is a joint tortfeasor and co-conspirator with Cuba and thus can legitimately be subject to the imposition of joint and several liability. This argument is legalistic in taking a principle of domestic law and applying it to international relations without providing any evidence that such domestic principle has ever been applied in international law. Brownlie notes, for example, that international law as regards the joint responsibility of States, let alone of States and nationals of other States, is "as yet indistinct, and municipal analogies are unhelpful." The unsettled nature of international law on State joint tortfeasors or co-conspirators stems largely from the fact that "practice is scarce." The idea that a State and a national of another country can be joint tortfeasors or co-conspirators and thus both be subject to joint and several liability suffers from State practice being even scarcer than in the State-State context. In addition, the appeal by Clagett to domestic concepts of joint and several liability for joint tortfeasors ignores the problem that even under domestic tort law, a tort committed today will not be linked in determining damages with a tort committed nearly four decades earlier. The torts have to relate to independent duties. While Castro can be seen to have behaved tortiously, international law does not appear to impose on third-state nationals a duty not to traffic in illegally expropriated property. The same applies with the criminal law concept of conspiracy: a conspirator will only be held criminally liable for

248. See OAS Committee Opinion, supra note 78, ¶ 5(f) ("The nationals of foreign states have the right to due process of law in all judicial or administrative proceedings that may affect their property. Due process includes the possibility of effectively contesting both the basis and quantum of the claim in a legal or administrative proceeding.").

249. Clagett, Who is Breaking International Law, supra note 57 (manuscript at 18).

250. BROWNLIE, supra note 88, at 456.

251. Id.
those crimes in which the conspirator actually participates. If a fencer of stolen property knowingly receives stolen property originally taken nearly four decades ago, such fencer will not be charged under the criminal law with conspiracy to commit the original theft. The crimes have to be independent and distinct. Castro may have wrongfully expropriated property and be in continuing violation of international law, but international law does not apparently prohibit trafficking in illegally expropriated property. So Clagett's assertion that imposing joint and several liability on traffickers for all the damages caused by Cuba is legitimate turns out to have a basis in neither international nor domestic legal principles.

By neglecting the advantages offered by international organizations, causing friction in the regional and global processes of economic interdependence, and interpreting international law myopically, the Helms-Burton Act frustrates the liberal democratization process by turning the liberal zone of peace into the zone of finger pointing and name calling. After the Helms-Burton episode, the leadership of liberal democracies in international organizations, economic interdependence, and international law is undermined as the whole business looks as tawdry as the domestic politicking that gave rise to the Act in the first place. As a result, liberal internationalism looks at the Helms-Burton Act as a sad moment for the liberal tradition.

CONCLUSION: A PROPOSAL TO BRIDGE THE GAP BETWEEN LIBERAL REALISM AND LIBERAL INTERNATIONALISM

I began this article by observing that the Helms-Burton Act controversy challenged liberal thinking on international relations because it pitted liberal States against each other in connection with the shared goal of bringing democracy to Cuba. I analyzed the positions for and against the Act under the four fundamental themes of the liberal tradition. Those supporting and attacking the Act fall respectively into two different perspectives within the liberal tradition: liberal realism and liberal internationalism. My analysis hopefully demonstrates that the controversies generated by the Helms-Burton Act relate to important tensions in the liberal tradition. Not only does the liberal tradition help illuminate the Helms-Burton Act but the Helms-Burton Act helps shed light on the liberal tradition.

The analysis developed in this article tells a story of division and dissension within the liberal tradition, and the reader may be uncomfortable with ending the story at this point. In this conclusion, I present a proposal to
bring the liberal realist and liberal internationalist perspectives on the Helms-Burton Act toward common ground.

Bridging the gap between liberal realism and liberal internationalism in connection with relations with Cuba has to involve convergence on the exercise of power, the roles of international organization and international law, and moral sensibilities. In connection with the exercise of power, convergence might be found in the strategy of economic interdependence. Liberal realism rejects economic interdependence as a strategy to transform Cuba by exercising American power to isolate Cuba economically. Liberal internationalism wants to coax Cuba into the family of nations through trade and commerce. A convergence could be created if: (1) liberal realism embraces economic interdependence as a strategy, and (2) liberal internationalism acknowledges that economic interdependence can be used as a weapon of power against Castro. My proposal is that the United States and its liberal allies use economic interdependence with a vengeance against Castro’s struggling regime. This strategy would not condition expanded trade and investment on democratic reforms in Cuba; it advocates for opening the floodgates of capitalism on Castro’s rickety regime. The most delicious irony in the sad history of Castro’s rule would be to see him lose power because of the forces unleashed by capitalism. Recasting liberal realism and liberal internationalism in this way would pit the Marxist dinosaur Castro against the high-powered, fast-moving forces of global capitalism. Castro would have difficulty controlling the consequences of such a liberal strategy. Cubans would begin to catch glimpses of and develop tastes for the full measure of freedom they deserve.

The next convergence has to come on the roles of international organizations and international law in opening capitalism’s floodgates on Cuba. A potential convergence can be found in using multilateral fora to negotiate an agreement among liberal States that addresses the controversy in international law exposed by the Helms-Burton dispute over third-state nationals knowingly profiting from illegally expropriated property. Both sides to the debate can point to State practice that supports their interpretation of customary international law in connection with the Helms-Burton Act. While a meticulous review of this body of State practice, and the views of the publicists interpreting it, would be worthwhile given the international legal controversy generated by the Act, Seidl-Hohenveldern’s 1962 comment that “[i]t will not lead far to count heads to see which of these views is
predominant” might still be accurate. An appropriate opportunity to attempt a convergence of the disparate legal views may be found in either the current proposals for the negotiation of a foreign investment treaty under WTO auspices or the current attention focused on this issue by revelations of trafficking in Switzerland of property illegally confiscated by the Nazis.

Finally, an ethical convergence has to be created. Unleashing the awesome power of economic interdependence and establishing international law regulating trafficking in illegally expropriated property does nothing to compensate the wrongs perpetrated against property owners by Castro. Clearly, negotiations between the United States and Cuba on a lump-sum settlement for victimized property owners will have to be undertaken as their relations normalize. Lump-sum settlements typically do not, however, provide wronged investors with adequate compensation. Allowing economic interdependence to develop does create some other possibilities to achieve better compensation. First, increased trade with and investment in Cuba will generate Cuban government revenues through tariffs and other taxes, portions of which can be set aside as a term of a normalization agreement for purposes of compensating victims of Castro’s expropriations. Second, Congress and the other legislatures of liberal States could make it a condition for private companies to trade with or invest in Cuba that they must pay out of their Cuban-originating revenues a small tax, the proceeds of which will go to compensating expropriation victims. In lieu of a tax, private companies seeking to invest in or trade with Cuba could be made to offer shares in their capital stock to expropriation victims as compensation-in-kind. The essence of these ideas is to make some serious effort to provide some compensation to victims of Castro’s larceny. Since private companies will be able to traffic legally under my proposal, they should be included as contributors to righting old wrongs. Full compensation for Castro’s illegal expropriations will, I

252. Ignaz Seidl-Hohenveldern, Title to Confiscated Foreign Property and Public International Law, 56 AM. J. INT’L L. 507, 508 (1962). But see F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 186 (1990) (claiming that “there appears to be a substantial body of judicial practice which . . . allows the dispossessed owner to recover his property” and that “[a] more comprehensive and more detailed investigation . . . would be unlikely to achieve more than to fill in rather than revise the picture that has emerged.”).

253. See Special Report: 1996 Trade Outlook, BNA International Trade Daily, Jan. 30, 1996, available in LEXIS, Nexis Library, CURNWS File (mentioning that WTO will be discussing the issue of investment and noting that the member states of the OECD are negotiating an investment agreement).

254. See Clagett, Getting Back Your Gold, supra note 229.
submit, never be achieved; but ethical, if not legal, considerations mandate some measure of compensation.

For the United States specifically, my proposal would mean a revolution in its long-standing Cuba policy. Congress would have to end the embargo and pass legislation to regulate trade and investment with Cuba that included measures of compensation as discussed above. The executive branch would have to negotiate a normalization of relations with Cuba, including a lump-sum settlement with some ongoing sinking fund obligation. The executive branch would also have to work with other States in negotiating rules to prohibit trafficking in illegally expropriated property in future cases.

Many in Congress and the Cuban-American community cannot stomach the thought of ending the embargo and allowing Castro to crow about his victory over Uncle Sam. My attempt to recast liberal realism and liberal internationalism would find no allies in anti-Castro bastions in the United States and would be heresy before the anti-Castro altar. In addition, others might be appalled at the abandonment of the moral and legal claims of the victims of Castro's perfidy to a pittance for their losses and violated human rights. Both of these positions embrace conviction to the point prudence is excluded. Any "victory" Castro claimed would be only tactical, not strategic, and it would be phryric as economic interdependence would erase the tyranny of Castro's rule. Wronged investors will never be fully compensated no matter how unjust we think partial compensation is. My proposal points to common ground on which liberal States can reconnect with their shared tradition and produce a better future for the liberal alliance by balancing prudence and conviction judiciously.

Lenin argued that socialists should encourage capitalism's development because such development would dialectically lead to capitalism's ruin. "Give them the rope by which they will hang themselves," Lenin would say. Now that Lenin's achievement is the one dangling at the end of history's noose, perhaps ending the American embargo will give Castro the rope by which the Cuban people will hang his Marxist legacy. Recasting liberal realism and liberal internationalism on Cuban policy may rejuvenate the liberal tradition and offer it a more powerful opportunity to give the Cuban people a new birth of freedom.