

THE CONFLICT OF UNITED STATES SANCTIONS LAWS WITH OBLIGATIONS UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT*

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INTRODUCTION

The French government has criticized¹ the United States for the extraterritorial scope of the United States Iran and Libya Sanctions Act of 1996 (ILSA).² For a variety of foreign policy reasons, the ILSA, among other things, prohibits any foreign company (person) investing more than twenty million dollars in energy production in Iran from receiving several United States benefits, such as export licenses for American products and Export-Import Bank assistance.³

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1. See Joe Kirwin et al., *French Oil Firm's Investment in Iran Heightens Trade Tensions with U.S.*, 14 Int'l Trade Rep. (BNA) 1675 (Oct. 1, 1997) (mentioning the French criticism).

2. Pub. L. No. 104-172, 110 Stat. 1541-1551 (1996), 50 U.S.C.A. § 1701 Historical and Statutory Notes (West Supp. 1997). The ILSA is often referred to as the D'Amato Act, after its principal sponsor, Senator Alfonse M. D'Amato (R-New York). See Kirwin et al., *supra* note 1, at 1675. The European Union (E.U.) has stated it will withdraw from discussions with the United States regarding the Helms-Burton Act or Cuban Liberty and Solidarity (LIBERTAD) Act of 1996, see 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997), if the United States imposes sanctions under the ILSA. The law allows the President to waive sanctions if the nation hosting the targeted company (i.e., France for Total) agrees to take certain "substantive measures" against Iran, which may include economic sanctions. Pub. L. No. 104-172, 110 Stat. 1541 (1996), 50 U.S.C.A. § 1701. France is obviously not interested in allowing the United States to direct French foreign policy towards Iran. For U.S.-E.U. LIBERTAD Act discussions on other sanctions topics discussed at the same meetings as the ILSA issues, see *infra* note 6.

3. Pub. L. No. 104-172, 110 Stat. 1541, 1543 (1996), 50 U.S.C.A. § 1701. The ILSA is not the primary basis for prohibiting commercial contacts with Iran and Libya, just as the LIBERTAD Act is not the primary basis for prohibiting commercial contacts with Cuba. Trade with all three nations, and others such as Iraq, is subject to controls issued by the Treasury Department and enforced by the Office of Foreign Assets Control. See

The French oil giant Total, S.A. (Total), undoubtedly is quite willing to trade the ability to receive various American trade benefits in exchange for its position of doing business in Iran free of competition from all American oil companies.⁴ Because of the ILSA, no United States companies were able to compete for a two billion dollar gas development investment in the South Pars Field, which was awarded to Total.⁵ Total cannot possibly be displeased with the United States sanctions.⁶ The French rebuke of the United States for enacting the ILSA may well mask delight that United States law has further distanced Conoco as competition for United States foreign investment projects in Iran.

The Canadian government has criticized the United States for the extraterritorial scope of the United States Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD).⁷ For a variety of

31 C.F.R. pt. 500 (1997). Iran is specifically subject to the Iranian Foreign Assets Control Regulations. See 31 C.F.R. pt. 535 (1997).

4. Even before ILSA's enactment, the United States company Conoco withdrew from an investment in the Iranian Sirri Field project, allowing Total to take over this \$610 million project. See Kirwin et al., *supra* note 1, at 1675.

5. See *id.*

6. See *id.* (noting that the President of Total, Thierry Desmarest, said that the benefits to Total of the project outweighed any potential disputes with the United States). The Total project reportedly also involves Gazprom of Russia and Petronas of Malaysia. See *id.* The United States has also been investigating petroleum related projects in Iran by the Canadian company Bow Valley Ltd., and the Indonesian company, Bakrie. See Gary G. Yerkey, *U.S. Will Decide "as Soon as Possible" Whether to Hit Foreign Firms Over Iran Deal*, 14 Int'l Trade Rep. (BNA) 1870 (Nov. 26, 1997). If the United States imposes sanctions under the ILSA against the Canadian firm, Canada may decide to challenge the ILSA as well as the LIBERTAD Act under the North American Free Trade Agreement (NAFTA) dispute resolution provisions. See Peter L. Fitzgerald, *Pierre Goes On-Line: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1, 84 (1998) (citing Debra Beachy, *Sanctions on Cuba Rile Mexico, Europe; But U.S. Trade Too Important to Lose*, HOUS. CHRON., May 31, 1996, Bus. at 1).

7. See generally Kim Campbell, *Helms-Burton: The Canadian View*, 20 HASTINGS INT'L & COMP. L. REV. 799, 806-08 (1997); Christine Stewart (Canadian Secretary of State for Latin America and Africa), *Helms-Burton and International Business: Legal and Commercial Implications*, Keynote Address Before the FOCAL Conference Proceedings (May 16 & 17, 1996), in CANADIAN FOUND. FOR THE AMERICAS AND THE CENTER FOR INT'L POLICY (visited May 15, 1998) <http://www.dfait-maeci.gcca/english/news/statem-1/96_state/96_023e.htm>. The LIBERTAD Act is often referred to as the Helms-Burton Act, after its two sponsors, Senator Jesse Helms (R-N.C.) and Dan Burton (D-N.J.). See Bengt Ljing, *E.U. Formally Questions U.S. Policy Toward Cuba, Requests WTO Procedure*, 13 Int'l Trade Rep. (BNA) 719 (May 1, 1996). In 1996, the E.U. initiated dispute resolution proceedings under the World Trade Organization (WTO), challenging the LIBERTAD Act. See *id.* Initial consultations failed and a dispute panel was formed. See *E.U. Suspends Effort to Challenge in WTO Helms-Burton Legislation*, 14 Int'l Trade Rep.

foreign policy reasons, the LIBERTAD Act, among other things, prohibits the United States from issuing any visas for entry into the United States to the officers, principals, or shareholders with a controlling interest in any entity trafficking in confiscated property.⁸ The prohibition extends to a spouse, minor child or agent of the excludable persons⁹ trafficking in confiscated property.¹⁰ The Cana-

(BNA) 742 (Apr. 23, 1997) [hereinafter *E.U. Suspends Effort*]. The process was suspended by the E.U. when the United States and the E.U., in April 1997, concluded an Understanding Between the United States and the E.U. in which the Parties agreed to seek a consensus on acquisitions and dealings with confiscated property. See *European Union-United States Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act*, reprinted in 36 I.L.M. 529, 529 (1997). The United States also promised to seek an amendment to the LIBERTAD Act Title IV visa denial provisions, which would grant the President waiver authority. See *id.* at 530. The E.U. stated it would resume the WTO case unless the parties reached a binding settlement in planned October 1997 discussions. See *E.U. Suspends Effort*, *supra*, at 742. Those talks brought forth only a commitment for talks in January 1998, which were inconclusive. See, e.g., Gary G. Yerkey, *U.S., E.U. Are Still Far Apart in Talks over Helms-Burton Dispute*, *Officials Say*, 15 Int'l Trade Rep. (BNA) 146 (Jan. 28, 1998). The United States has continually rejected E.U. demands that European companies should be exempt from any future extraterritorial United States laws. See *U.S.-E.U. Helms-Burton Dispute Resolution Unlikely Before December*, *Official Says*, 14 Int'l Trade Rep. (BNA) 1834 (Oct. 22, 1997).

8. The Helms-Burton Act (or Legislation) is also the Cuban Liberty and Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.A. § 6091(a)(3) (West Supp. 1997). Also excluded are those who have directly confiscated, directed, or overseen the confiscation of certain property in Cuba, and those who traffic in such property. See *id.* § 6091(a)(1)-(2).

The LIBERTAD Act is not the primary basis prohibiting commercial contacts with Cuba. Cuba is under controls issued by the Treasury Department and enforced by the Office of Foreign Assets Control Regulations. See 31 C.F.R. pt. 500 (1997). Additionally, Cuba is subject to the Cuban Assets Control Regulations. See *id.*; see also Cuban Assets Control Regulations: Indirect Financing in Cuba, Civil Penalties, 61 Fed. Reg. 37,385, 37,385 (1996) (to be codified at 31 C.F.R. pt. 515) (indicating that the Office of Foreign Assets Control amended the Cuban Assets Control Regulations to make them consistent with the LIBERTAD Act). See generally Clara David, *Trading with Cuba: The Cuban Democracy Act and Export Rules*, 8 FLA. J. INT'L L. 385, 385 (1993) (discussing the role of the Office of Foreign Assets Control). Finally, the Cuban Democracy Act controls Cuba as well. See Cuban Democracy Act of 1992, 22 U.S.C.A. §§ 6001-6010 (West Supp. 1997). Furthermore, the Cuban Democracy Act tightens controls on trade with Cuba, especially through the use of foreign subsidiaries in third nations. See International Business Law Symposium, *Trading with Cuba: The Cuban Democracy Act and Export Rules*, 8 FLA. J. INT'L L. 335 (1993).

9. See 22 U.S.C.A. § 6091(a)(4).

10. See *id.* The word "trafficking" is a carefully selected word to give such conduct a negative image. The LIBERTAD Act defines "traffics" as when one:

knowingly and intentionally (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) engages in a commercial activity

dian mining company Sherritt International Corp. undoubtedly is quite willing to have its corporate families denied admission to enter the United States in exchange for its position of doing business in Cuba free of competition from any American companies.¹¹ Sherritt is prepared to invest \$500–675 million in Cuba, much of it in the Moa Bay nickel project, which was formerly the business of New Orleans-based Freeport-McMoRan, Inc.¹² Sherritt cannot possibly be displeased with the United States sanctions. The Canadian rebuke of the United States for enacting the LIBERTAD Act may well mask a delight that United States law has further distanced American companies as competition for foreign investment projects in Cuba.¹³

using or otherwise benefiting from confiscated property, or (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

Id. § 6023(13)(A) (West Supp. 1997). The definition additionally identifies certain conduct that does not constitute trafficking. *See id.* § 6023(13)(B).

11. The United States first denied visa privileges under the LIBERTAD Act to both the Sherritt International Corp. in Canada, and to Grupo Domos in Mexico. *See Sherritt Raises Capital to Invest More in Cuba*, CUBA NEWS, Dec. 1996, at 8. Sherritt is participating in a nickel project at Moa Bay once owned by the United States Freeport McMoRan company, *see id.*, and Grupo Domos planned to participate in a telecommunications project which allegedly would use expropriated properties of IT&T, *see Confiscated Properties at Issue*, CUBA NEWS, June 1996, at 7. In November 1997, visa denials were issued to the BM Group, an Israel-owned citrus company, for use of confiscated properties in Cuba. *See Nancy Dunne, Israeli Executives Warned*, FIN. TIMES (U.S.A.), Nov. 18, 1997, at 6. These denials were ironic; Israel has been the only nation consistently voting with the United States against annual United Nations General Assembly Resolutions condemning the United States extraterritorial extension of its laws and specifically the sanctions laws. *See infra* note 222, for the results of the United Nations voting.

Sherritt has long been the principal Canadian target of United States efforts to curtail Canadian investment in Cuba. In 1995, the Treasury Department blacklisted four joint venture mining companies owned by Sherritt (two in Alberta, two in Cuba), which meant that they could not sell their products in the United States. *See Ana Radelat, "Blacklist" Will Be Selective, not Comprehensive*, CUBA NEWS, June 1996, at 7. Sherritt responded by altering the corporate organization of their enterprises to limit the sanctions to the Cuban companies. *See Sherritt Ventures Barred by Treasury*, CUBA NEWS, July 1995, at 3. Cuba had actually owned half of each of the two companies operating in Canada. *See Sherritt Earnings up*, CUBA NEWS, Nov. 1997, at 3.

12. *See Peter Fritsch & Jose de Cordoba, Canadian Company Lays Big Bets on Cuba*, WALL ST. J. (Europe), Oct. 8, 1997, at 4; *Merrill Goozner, U.S. Laws Fail to Scare Canada Firms out of Cuba, Helms-Burton Act Ignored as Trade Between 2 Picks up*, CHI. TRIB., June 16, 1997, at 4.

13. The LIBERTAD Act has not brought foreign investment to a halt in Cuba, as it intended. *See Saying Boo to Helms-Burton — Cuba's Snook at Helms-Burton*, ECONO-

The ILSA and the LIBERTAD Act, predictably, have caused foreign governments to denounce the extraterritoriality of unilateral sanctions imposed by the United States.¹⁴ But those foreign corporations that do business in Cuba, Iran, or other nations that are the subject of United States sanctions by structuring their operations so as to avoid sanctions against the foreign parent, are pleased and amused by United States laws that free them from any competition from American companies.¹⁵ The United States sanc

MIST, Oct. 19, 1996, available in 1996 WL 11247217. The Canadian KWG Resources Inc., agreed in mid-1997 to a \$297 million (U.S.) investment in the Cupey nickel mine, a project which was abandoned by the Russians in 1992, and again by the Canadian Falconbridge Ltd. company in 1996, after the LIBERTAD Act was passed. See *Cuba: Joint Venture \$300,000,000 Investment Aimed at Completing Nickel Mine Construction Project*, KWG Resources [Canada] & Commercial Caribbean Nickel, ESP-BUS. OPPORTUNITIES LATIN AM. & CARIBBEAN, Aug. 1, 1997, available in 1997 WL 9762450. Even American companies are increasingly reacting to the sanctions laws. A coalition of more than 670 United States companies have formed USA Engage, to fight the increase of sanctions which harm United States business. See *USA Engage* (visited Mar. 5, 1998) <<http://www.usaengage.org/>>. For the comments of the Ingersoll-Rand CEO, who is the Chair of the National Foreign Trade Council, which created USA Engage, see James E. Perrella, *The Wrong Choice of Weapons*, J. COMM., May 30, 1997, at 8A. A European-American Business Council study found that 94% of United States companies surveyed were hurt by the United States sanctions against other nations. See Gary G. Yerkey, *U.S. Sanctions Against Other Nations Have Hurt U.S. Companies, Study Says*, 14 Int'l Trade Rep. (BNA) 1710 (Oct. 8, 1997). European companies were especially concerned about the LIBERTAD Act visa denials, suggesting they would cause the European companies to reduce investment in the United States and cut back United States jobs. See *id.* These business groups have gained attention in Congress; several attempts have been made to require Congress to consider the impact on the United States economy of any new sanctions. See Gary G. Yerkey, *Legislation Likely to be Introduced Limiting United States' Use of Sanctions*, 14 Int'l Trade Rep. (BNA) 1479 (Sept. 3, 1997).

There have been a number of planned investments in Cuba by foreign companies which have been withheld. Cementos Mexicanos (CEMEX) withdrew a planned investment, the Canadian sugar refining subsidiary of Tate & Lyle Int'l (UK) ceased buying Cuban sugar, and Spain may terminate a guarantee program to Spanish exporters trading with Cuba. See Colum Lynch, *Last Tango in Havana*, BUS. LATIN AM., June 10, 1996, at 1. But the Tate & Lyle decision seemed based on other reasons than the LIBERTAD Act, and the Spanish government decision may not have been related to the LIBERTAD Act, but to generally poor repayment by Cuba for imports. See *id.*

14. See generally Pawel K. Chudzicki, Comment, *The European Union's Response to the Libertad Act and the Iran-Libya Act: Extraterritoriality Without Boundaries?*, 28 LOY. U. CHI. L.J. 505, 531, 538 (1997). The list of those nations and organizations which have denounced either the extraterritoriality of United States laws in general, or the LIBERTAD or ILSA in particular, increases monthly. See *infra* notes 222-52.

15. Perhaps the best example is the hotel business in Cuba, especially in the tourist area of Varadero. See Saturnino E. Lucio II & Nicolás Crespo, *Impact of the Helms-Burton Law (The Cuban Liberty Act) on Cuban Tourism*, 7 CUBA TRANSITION 131, 135 (1997) (indicating that Varadero is a popular tourist destination). In 1995, tourism moved

tions laws are a matrix of paradoxes and inconsistencies. Intended to support democracy without dictators, they instead reflect a kind of United States dictatorial democracy, which has been rejected both in the nations under sanctions and in nearly every democratic nation. They give the good name of boycotts a bad image.

Primary boycotts imposed by the United States preventing American persons from trading abroad draw relatively little criticism, except from the target.¹⁶ Nearly every nation has at one time or another decided not to trade with another nation, usually to convince the boycotted nation to alter some policy. Iran, Libya, and Cuba, predictably, oppose the United States boycott against them.¹⁷

ahead of sugar in earning dollars. See Juan J. López, *Implication of the U.S. Economic Embargo for a Political Transition in Cuba*, 7 CUBA TRANSITION 238, 252 (1997). By 1997, tourism brought in an estimated \$1.3 billion (U.S.). See Jorge F. Pérez-López, *The Cuban Economy in mid-1997*, 7 CUBA TRANSITION 1, 6 (1997). Numerous foreign investments have been made in new luxury hotels, with no competition from large United States hotel companies. See *id.* Comparing the hotels in Cancun, Mexico, with those in Varadero, Cuba, illustrates the extensive hotel competition in Cancun with the names of every familiar United States and European hotel chain on the hotel buildings lining the beach, and the absence of such competition in Cuba, with only the names of those same European hotel chains on the hotels in Varadero. See Charles Suddabay, *Cuba's Tourism Industry*, 7 CUBA TRANSITION 123, 128 (1997).

16. For example, the International Court of Justice held that the United States trade embargo against Nicaragua did not violate customary international law. See *U.S. Embargo on Nicaragua Did Not Violate Obligations Under GATT, Dispute Panel Rules*, 3 Int'l Trade Rep. (BNA) 1368 (Nov. 12, 1986).

17. While primary boycotts involving two nations may give rise to opposition for such reasons as human rights (i.e., denial of access to medicines and food) or even a perceived international law right to trade, customary international law generally allows one nation to decide not to trade with or invest in another nation.

Cuba continues to use the United States boycott as a reason for its poor economic situation, although this is often denied by United States policy. The Economic Resolution of the 5th Congress of the Communist Party of Cuba, states:

This opportunity and the belief that the economic difficulties of the special period would be the ideal scenario for intensifying its blockade to try to destroy the Revolution led the United States government to put the so-called Torricelli Act into effect in 1992 and, faced with its obvious failure, to promulgate the infamous Helms-Burton Act almost four years later and to persist with all its might and influence in internationalizing the blockade. That administration is wagering a real economic war against Cuba, which includes every kind of pressure on governments, international economic and financial organizations, companies and individuals, . . . the United States government's systematic pressure has prevented us from arriving at solutions that would contribute to normalizing our external financial situation.

Economic Resolution of the 5th Congress of the Communist Party of Cuba, GRANMA INT'L, Feb. 15, 1998, at 5 (quoting from Part I, Economic Development Since the 4th Congress).

Given the United States' permanent economic war against Cuba, the dynamics

Boycotts usually are enforced by sanctions. A nation imposing a primary boycott imposes sanctions on its own persons. Thus, American individuals and companies attempting to trade with boycotted nations may be subject to civil and criminal sanctions. Where a unilateral primary boycott against a nation does not achieve its goals, there is a temptation to expand the boycott to persons beyond the borders of the boycotting nation by convincing or coercing other nations to join the boycott. The primary boycott thus becomes a secondary boycott. There is no better contemporary example of a failed boycott than the United States boycott of Cuba.¹⁸ There is also no better example of attempts to convince and coerce other nations to join a boycott than the United States boycott of Cuba. Canada and Mexico, principal trading partners of Cuba, have joined with the United States in forming the free-trade-promoting North American Free Trade Agreement (NAFTA).¹⁹ Whether the United States sanctions laws conflict with United States' obligations under the NAFTA is an important question, and one which the United States is determined shall not be given full consideration by a NAFTA dispute resolution panel, at least not with any United States participation.

and trend of international financial flows and the strong competition among underdeveloped countries to obtain these, it is realistic to expect that, in the near future, the current restrictions for the country will increase in terms of sources of external finance and a suitable solution to the problems of external debt.

Id. (quoting from Part II, Economic Policy in the Cuban Economy's Recovery Phase). "The existence of the economic war being waged against our country by the United States government and the conditions prevailing in the world economy make it impossible to set out in precise dates when we can achieve the aims we are proposing and for which we must fearlessly struggle." *Id.* (quoting from Part III, Prospects of the Cuban Economy) (newspaper on file with the author). With such public expression of the United States' responsibility for the poor economic conditions in Cuba, it is surprising to continue to hear from United States government supporters of the embargo that Castro does not use the blockade to remain in power.

18. The United States government denies such failure. It is obliged to do so — it would serve little purpose to maintain a boycott where failure of its mission is admitted. One problem with the United States boycott of Cuba is that it has not been consistent over the years with regard to its goals. There is considerable literature which appears overwhelmingly supportive of the failure of the Cuban boycott. *See, e.g., Helms-Burton and U.S. Embargo Do Little to Limit Cuban Trade, Canadian Envoy Says*, 14 Int'l Trade Rep. (BNA) 231 (Feb. 5, 1997); Jorge I. Dominguez, *Helms Bill on Cuba Won't Hasten Democratic Transition*, WALL ST. J., Apr. 28, 1995, at A13; J.F.O. McAllister, *Will a Tighter Embargo Really Bring Castro Down?*, TIME, Feb. 20, 1995, at 52.

19. *See* NAFTA, Dec. 17, 1992, Can.-Mex.-U.S., reprinted in 32 I.L.M. 289 (entered into force Jan. 1, 1994).

Foreign governments become concerned in two instances when another nation's unilateral primary boycott is enlarged. The first concern arises when the boycotting nation begins to expand the definition of *its* citizens to encompass its corporations' subsidiaries incorporated abroad. The second concern occurs when the boycott is extended to persons who are unquestionably citizens of third nations. The Cuban Assets Control Regulations and the Cuban Democracy Act are examples of the first action; the LIBERTAD Act is an example of the second. Foreign governments, including those of Canada and Mexico, have reacted negatively toward both enlargements of the United States boycott, principally by enacting blocking laws, which are intended to counter the extraterritorial effect of United States law.²⁰

Many foreign governments have criticized the extension of the United States unilateral primary boycott of Cuba to a secondary level. But suppose political goals of Canada or Mexico resulted in those nations enacting laws similar to the LIBERTAD Act, with a potential impact on the United States parallel to that imposed by the LIBERTAD Act on Canada or Mexico. The United States government assuredly would declare the offending laws inappropriate and violations of international law. The Congress did just that in 1979, by passing the antiboycott provisions of the Export Administration Act.²¹ Those provisions were intended to prohibit American

20. See, e.g., European Union Blocking Measure — Council Regulation 2271/96, art. 1, 1996 O.J. (L 309) 1; Foreign Extraterritorial Measures Act (FEMA), R.S.C., ch. F-29, § 5 (1985) (Can.), reprinted in 24 I.L.M. 794 [hereinafter FEMA]; An Act to Amend the Foreign Extraterritorial Measures Act, Bill C-54 (1996), reprinted in 36 I.L.M. 115 (1997); Mexican Blocking Measure — “Ley de proteccion al comercio y la inversion de normas extranjeras que contravengan el derecho internacional” [Commerce and Foreign Standards Investment Protection Law Contravening the International Law], D.O., Oct. 23, 1996, reprinted in 36 I.L.M. 133 (1997) (noting that the introductory notes by Jorge A. Vargas in the International Legal Materials are excellent).

21. Pub. L. No. 96-72, 93 Stat. 503, 503-536 (1979) (codified as amended at 50 U.S.C.A. app. § 2407 (West 1991 & Supp. 1997)). For the extensive regulations, see generally 15 C.F.R. pt. 769 (1997).

Brice M. Clagett, a Covington & Burling partner and supporter of the LIBERTAD Act, has distinguished the United States antiboycott laws from the LIBERTAD Act provisions by defining the former as prohibiting secondary boycott participation and the latter as not prohibiting or penalizing trade with Cuba, but only addressing persons who are traffickers in stolen property. See Brice M. Clagett, *Title III of Helms-Burton: Who Is Breaking International Law — The United States, or the States that Have Made Themselves Co-Conspirators with Cuba in its Unlawful Confiscations?* 11, 12 (Feb. 6, 1997) (unpublished manuscript copy, on file with the *Stetson Law Review*)

persons from complying with Arab demands to support the Arab boycott of Israel.²² Can the United States have it both ways? Whatever technical distinctions may be made between the American antiboycott provisions prohibiting United States persons from joining a secondary boycott the United States disfavors, and the ILSA and LIBERTAD Act provisions coercing third nations to participate in a secondary boycott the United States favors, the United States is viewed from abroad as inconsistent in its policy toward boycotts.²³

When evaluating the fairness of one nation's attempt to impose conduct on third nations, it is useful to reverse the facts. An opportunity arose for this Author after a dinner at an American Society of International Law Annual Meeting program, soon after the adoption of the Cuban Democracy Act. Representative Robert Torricelli of New Jersey was the speaker. He was a principal backer of the Cuban Democracy Act, which attempted to curtail foreign subsidiaries of United States companies from trading with Cuba.²⁴ In a small

[hereinafter *Breaking International Law*]; see also Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434, 437-40 (1996) (noting that an expanded version of this article exists in the unpublished article above).

Those who disagree with characterizing Title III as a secondary boycott believe that it does not interfere with the affairs of any foreign nation, but only creates a private cause of action on behalf of those persons whose property has been expropriated and is being used by a foreign company. See *Breaking International Law*, *supra*, at 12. If such is the case, it would allow secondary boycotts to be so drafted in the future, and possibly also allow a wide range of conduct which might normally be considered an interference with foreign affairs, to be drafted as private causes of actions and escape the imprimatur of violations of international law.

22. See generally Fitzgerald, *supra* note 6, at 49-60 (discussing the United States' reaction to the Arab boycott). However, the language does not refer to that specific boycott by any mention of Israel or any Arab nations. The provisions prohibit a United States person from complying with, furthering, or supporting a boycott by a foreign country against another foreign country which is friendly to the United States. See 50 U.S.C.A. app. § 2407(a)(1) (West 1991 & Supp. 1997).

23. See, e.g., Manfred Wolf, *Hitting the Wrong Guys: External Consequences of the Cuban Democracy Act*, 8 FLA. J. INT'L L. 415, 415-18 (1993).

24. See generally 22 U.S.C.A. §§ 6001-6010 (West Supp. 1997). Such trade had been allowed since August 1975, when § 515.559 was added to the Cuban Assets Control Regulations, allowing licenses to United States owned or controlled foreign subsidiaries to trade with Cuba. See 31 C.F.R. pt. 515 (1997). The licenses were routinely granted and were more for record keeping than regulation of trade. In 1991, the United States issued 284 licenses totalling \$718 million for trade with Cuba (\$383 million exports to Cuba, \$335 million imports). See Helen J. Simon, *U.S. Allies Angered by New Cuba Bill*, BUS. LATIN AM., Oct. 26, 1992, at 365. For example, Carrier sold about \$10 million annually worth of air conditioning products to Cuba through its subsidiaries in Mexico and Spain. The CDA ended the issuance of such licenses, but has not fully ended such trade.

group, I presented this scenario to him:

Company ALPHA is chartered in New Jersey. It is wholly owned by a U.K. company, which is owned exclusively by English shareholders. ALPHA has 250 New Jersey-resident (and registered voter) employees, all in Representative Torricelli's district. It has received instructions from the London parent to comply with a new U.K. law prohibiting trade with Canada, in view of Canada's recent confiscation of several U.K.-owned properties, for which Canada has refused to pay compensation. The stated purpose of the legislation is to change the Canadian leadership, which is determined to make Canada a socialist state. That leadership remains quite friendly to the United States, mainly because of the huge trade between the two nations, on which Canada is dependent. ALPHA does about eighty percent of its business in Canada. Compliance with the U.K. order will mean closing the plant, with 250 of Representative Torricelli's constituents out of work.

I asked Representative Torricelli what he would do when asked by the New Jersey resident and United States citizen president of ALPHA whether the plant must comply with the United States order. He said it would *of course* have to comply; the United States would respect the U.K. order because the New Jersey company was owned by the U.K. parent. I told him I did not believe him. I suggested that what he would do would be to protest the U.K. action as interference with the New Jersey company, regardless of the control attributable to U.K. ownership. He would claim interference with United States sovereignty because the subsidiary was chartered in New Jersey, was on United States territory, and employed almost exclusively American citizens. That protest would be very similar to the protests lodged by many nations opposed to the United States sanctions laws Representative Torricelli promoted at the request of his large Cuban-American constituency.²⁵

25. Rep. Torricelli also told me that he did not believe that the United States would "go after" any foreign company abroad, even a subsidiary of a United States company, which traded with Cuba. The law apparently was only to satisfy constituents by its passage, not by its enforcement. If so, his response to the hypothetical ought to have been to ignore the U.K. demand because they would never really enforce it. Such form of sanction legislation seems quite dangerous if it falls into the hands of officials who believe it is to be enacted and enforced as "real" law.

Wal-Mart Canada, Ltd., the Canadian subsidiary of the United States Wal-Mart parent, withdrew and then resumed the sale of Cuban made pajamas from Canadian

The usual purpose of sanctions laws is to achieve specific political goals. But some of the United States sanctions laws appear to have little heritage in any broadly debated *political* issue. President George Bush publicly opposed and vetoed the Cuban Democracy Act in the non-election year of 1991.²⁶ Congress introduced it again in 1992.²⁷ During the presidential campaign in 1992, after Bill Clinton promised his support of the bill during a speech in Miami, President Bush reversed his position.²⁸ The electoral votes of Florida were the concern, not Cuban policy.²⁹ Mr. Clinton won the election, but did not win Florida's electoral votes.³⁰ Later, as president, he first opposed the LIBERTAD legislation.³¹ If Florida's electoral votes were likely to again go to the Republicans, there was no need to allow Cuban policy to be made in Miami. But he began to believe that Florida electoral votes were not beyond his reach,³² and supported the legislation in the turmoil following the downing of the Brothers to the Rescue planes off the coast of Cuba in February 1996 during the presidential campaign.³³ The experiences with the Cuban Democracy Act and the LIBERTAD Act demonstrate that some sanctions may serve political goals, rather than reflecting debated national goals. But if the Cuban sanctions laws are characterized as trade controls used to achieve *political* goals, what is meant by polit-

outlets. See *Treasury Reviewing Wal-Mart Canada Decision to Sell Cuban-Made Pajamas*, 14 Int'l Trade Rep. (BNA) 522 (Mar. 19, 1997). The United States Treasury Department began a review of the sales, which generated comments from the Canadian government that stopping the sales may have constituted a violation of the Canadian FEMA, which imposes substantial fines on Canadian corporations that comply with the United States LIBERTAD Act. See *id.* The resumption of sales followed consultations with legal advisors and Canadian government officials, and drew no further action from the United States. See *id.*

26. See John King, *Bush Signs Cuba Restrictions Amid Political Fanfare*, ASSOC. PRESS, Oct. 23, 1992, available in 1992 WL 5322534.

27. See *id.*

28. See *id.*

29. See *id.*

30. See *Final Election Results: Florida Through Louisiana*, USA TODAY, Nov. 5, 1992, at 8A.

31. See *Mexican Executives Face U.S. Travel Ban Under Helms-Burton Law Unless They Severe [sic] Cuban Ties*, VANCOUVER SUN, Aug. 20, 1996, available in 1996 WL 5018296 [hereinafter *Mexican Executives Face Travel Ban*].

32. Republican backed proposals viewed as reducing medical care for the elderly outraged the large retirement population of Florida, and the Florida electoral votes seemed within reach of the Democrats.

33. See *Mexican Executives Face Travel Ban*, *supra* note 31.

ical goals is more accurately characterized as *electoral* goals.

Whether the expressed political goals of sanctions laws, such as ending the Castro regime³⁴ have been achieved, and whether the laws have had detrimental economic consequences for United States businesses are legitimate subjects of investigation. But this Symposium is to focus on the *legality* of these sanctions, as is appropriate for a gathering of jurists. The focus of this Article is even narrower. It addresses the legality of United States sanctions measured against United States commitments as a Party to the NAFTA.³⁵

34. Throughout the 1970s and much of the 1980s, the political goals of the United States did not include the removal of Castro. They were threefold: the withdrawal of Cuban troops from Africa; the cessation of inciting revolution abroad — especially in South America; and a willingness to discuss the expropriation compensation issue. The political goals changed, however. For reasons which had nothing to do with the embargo, Cuba ended its activities in Africa and South America. Castro was even willing to discuss the expropriation issue, although conditioned on removal of the embargo. It became apparent that to some conservative Cuban-Americans, the embargo could only end after Castro was gone. See *End Embargo, Say Cuban-Americans*, REC. N. N.J., Aug. 22, 1995, at B08 (illustrating the Cuban view that Castro is not Cuba, rather Cuba is the people). While the original political goals had some support in other nations, the fixation on the removal of Castro has received little support abroad.

While Cuban exiles are the major political force seeking an “immediate” end to the Castro regime, they are the reason for its survival. Cuba has three main sources of hard currency other than borrowing, which is no longer a very viable alternative due to Cuba's lack of creditworthiness. See López, *supra* note 15, at 250. Tourism brings in about \$1.3 billion annually, but some 40 percent is needed to buy imports (towels, soaps, food, etc.) for the tourist industry, and an additional amount is paid to foreign investment joint venture partners. See Pérez-López, *supra* note 15, at 6. Sugar brings in about \$1 billion, but about 35–40 percent is needed to buy imports (fertilizer, equipment, etc.). See Jose Alvarez, Competition and Complementarity in Agriculture Between Cuba and Florida: The Case of Sugar, Remarks at the Conference on the Role of the Agricultural Sector in Cuba's Integration into the Global Economy and Its Future Economic Structure: Implications for Florida and U.S. Agriculture 5 (Mar. 31, 1998) (transcript copy available from the author); see also James E. Ross, Cuba: Overview of Foreign Agribusiness Investment, Remarks at the Conference on the Role of the Agricultural Sector in Cuba's Integration into the Global Economy and Its Future Economic Structure: Implications for Florida and U.S. Agriculture 27 (Mar. 31, 1998) (transcript copy available from the author). Cuban exiles send about \$800 million directly to family members in Cuba, which requires no imports. See Jorge A. Sanguinety, *The Structural Transformation of the Cuban Economy: A Report of the Last Twelve Months*, 7 CUBA TRANSITION 8, 10 (1997). Were that \$800 million to be stopped, there would be many more cries for a new regime than currently are heard. See *id.*

35. See NAFTA, *supra* note 19. The NAFTA was implemented in the United States in the North American Free Trade Agreement Implementation Act (1993), Pub. L. No. 103-182, 107 Stat. 2057–2225, 19 U.S.C.A. §§ 3301–3473 (West Supp. 1997). Although labeled a trade agreement, the NAFTA has political and economic dimensions, and attempting to limit inquiry to legal questions often is impossible without reference to political and economic goals.

Although this Article makes frequent references to Cuba and the LIBERTAD Act, the principal concern is the effect of the NAFTA on United States sanctions laws. The sanctions laws of the most interest to Canada and Mexico are those affecting their trade with Cuba. Certainly Canada and Mexico believe they ought to be free from United States sanctions for trade with Iran, Libya, or other pariahs as defined by the United States, but at least for the present, the Cuban issue is the issue "on the table."³⁶

UNILATERAL VERSUS MULTILATERAL SANCTIONS

This Symposium is titled "Economic Sanctions, Trade Controls, and Foreign Policy." I read the title as if prefaced by "Unilateral." Absent from our discussion are multilateral sanctions, such as those initiated by the United Nations against South Africa some years ago, or those imposed against Iraq by the U.N. Security Council, or even group sanctions, such as those by regional trade organizations or multinational organizations. Multilateral sanctions are far easier to deal with because they evolve from debated, collective political or economic goals, and not from unilateral economic, political or electoral goals. They create far less foreign opposition because of their collective nature. Additionally, as the number of participants in collectively imposed sanctions increases, the number of third party non-participants who may be adversely affected declines. When the sanctions are imposed by a substantial majority of the members of the United Nations, there is usually little opposition.³⁷

This Symposium addresses sanctions imposed by the United States to achieve political goals not fully shared abroad.³⁸ The in

36. With the United States government inquiry regarding the Canadian company Bow Valley Ltd.'s proposed investment in Iran raising the possibility of sanctions under the ILSA, Iran may join Cuba as nations in which Canada demands the United States refrain from interfering with proposed investments. See Gary G. Yerkey, *Administration to Ask Congress to Fund Middle East Development Bank, Official Says*, 14 Int'l Trade Rep. (BNA) 2052 (Nov. 26, 1997).

37. But it may be very vocal opposition, such as by the United States prior to its joining the U.N.'s trade sanctions against South Africa. See Rosalyn Higgins, *The United Nations Role in Maintaining International Peace: The Lessons of the First Fifty Years*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 135, 145 (1996).

38. The United States may be quietly admired, however, for setting a moral tone. The same has been true with the United States Foreign Corrupt Practices Act. See 15 U.S.C.A. §§ 78dd-1 to -2 (West Supp. 1997). Twenty years after enactment, the Act was adopted internationally on December 18, 1997. See *The Organization for Economic*

creasing number of unilateral United States sanctions laws and the recent history of political subdivisions enacting sanctions laws³⁹ have generated serious conflicts both with specific nations, for example, our NAFTA partners Canada and Mexico, and with international organizations such as the European Union (E.U.), the United Nations, and the Organization of American States (OAS).⁴⁰ The increasing extraterritorial tenor of United States sanctions laws, expressed most clearly in ILSA and the LIBERTAD Act, has increased the debate in the United States and abroad regarding both the political and economic advisability, as well as the legality, of such unilateral acts. The focus has tended to shift from a general discussion of the compatibility of the extraterritorial application of laws with

Cooperation and Development of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, reprinted in 37 I.L.M. 1 (1998).

39. See President's Export Council, *Unilateral Economic Sanctions: A Review of Existing Sanctions and Their Impacts on U.S. Economic Interests with Recommendations for Policy and Process Improvement* (visited Mar. 5, 1998) <<http://eabc.org/study.html>>. State and local government sanctions have not gone unnoticed abroad. The Massachusetts law sanctioning Myanmar (Burma) has been challenged by Japan and the E.U. in the WTO, but they have not yet asked for a panel. See *E.U. and Japan Still Weighing Action on Massachusetts Burma Procurement Penalties*, 15 Int'l Trade Rep. (BNA) 44 (Jan. 14, 1998) [hereinafter *E.U. and Japan Still Weighing*]. The law imposes pricing penalties on companies which trade with Burma and wish to participate in Massachusetts government procurement. See MASS. ANN. LAWS ch. 7, §§ 22G–22M (Law. Co-op. Supp. 1997). The United States Trade Representative announced that the United States would defend Massachusetts. See Tiffany Danitz & Jennifer G. Hickey, *Globalizing the Trade Traps*, WASH. TIMES, Feb. 16, 1998, at 20. An interesting note is that while the European Commission requested consultations under the WTO, the European Parliament apparently urged the Commission to impose economic sanctions on Myanmar and not challenge the Massachusetts law. See *E.U. & Japan Still Weighing*, *supra*, at 44. See generally David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175, 204–06 (1997) (analyzing the Burma sanctions and concluding that state and local governments are not appropriate bodies for legislating foreign policy).

Florida has adopted a unique “mini-LIBERTAD Act,” called the Cuban Freedom Act. See FLA. STAT. §§ 288.851–288.855 (1997). The Florida Act mirrors some of the federal provisions, including similar findings about Fidel Castro and the Cuban government. See *id.* § 288.853(1). Violations of the federal Cuban Assets Control Regulations, providing financing to a United States citizen or foreign person who has purchased or invested in property owned by a United States citizen that was expropriated by Cuba, or importing into Florida any sugars, syrups, or molasses that come from a nation which the President has determined to be importing those items, all constitute third degree felonies in Florida. See *id.* § 288.853(6)(a). There was very little public discussion of the proposal, and there has been little notice of its presence among the litany of sanctions legislation.

40. For a discussion of the conflicts between specific nations and international organizations, see *infra* notes 222–52.

notions of sovereignty, to the seeming belligerency of specific provisions targeting specific nations. These laws appear as mandates involuntarily deputizing foreign nations and their enterprises to carry out political goals by unwilling participation in a secondary boycott. Such laws are subject to challenge, both as violations of international law and as conflicting with other United States commitments, such as trade obligations with friendly nations under the NAFTA and in the World Trade Organization (WTO). This Article concentrates on only two of those friendly nations, our closest neighbors, who are sometimes said to have been “condemned” to share lengthy borders with the United States.⁴¹ Across those borders are transferred goods and services in such proportions that trade, if not neighborliness, ought to make Canadians and Mexicans our closest friends.⁴² The gloss of friendship apparent at the signing of the NAFTA on December 17, 1992,⁴³ has been tarnished by United States sanctions laws enacted since, especially the Cuban Democracy Act and the LIBERTAD Act.⁴⁴ It is ironic that while Mexico, Canada, and the United States each willingly ceded some sovereignty in exchange for economic gains from the NAFTA, the subsequent imposition of United States sanctions regarding trade with Cuba has caused Mexico and Canada to reinforce their sovereignty by national blocking legislation.⁴⁵ The conflict has two dimensions. First is the specific conflict of provisions of the NAFTA with the Cuban Democracy Act and the LIBERTAD Act.⁴⁶ Second is the general conflict between the spirit of free trade reflected throughout the

41. See generally ROBERT A. PASTOR & JORGE G. CASTAÑEDA, LIMITS TO FRIENDSHIP: THE U.S. AND MEXICO 284–313 (1988); ALAN RIDING, DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS 316–39 (1985). This is often stated in Mexico as “Pobre Mexico, tan lejos de Dios y tan cerca de los estados unidos,” (Poor Mexico — so far from God and so close to the United States). RIDING, *supra*, at 318 (indicating this saying is usually attributable to President Porfirio Díaz of Mexico). It might be stated by Cubans as “Pobre Cuba, tan lejos de Dios y tan cerca de Miami.”

42. We have often viewed Mexico as less than equal and Canada as a mirror image without its own identity. See, e.g., Michael W. Gordon, *Mythical Stereotypes: Dealing with Mexico as a Lawyer*, 37 J. LEGAL EDUC. 279, 281 (1988); Michael W. Gordon, *Mexico and the United States: Common Frontier-Uncommon Relationship*, 18 CALIF. W. INT'L L.J. 171, 172 (1987).

43. See NAFTA, *supra* notes 19, 34, and accompanying text.

44. For a discussion of the Cuban Democracy Act and LIBERTAD Act, see *supra* notes 6–7.

45. See *supra* note 20 (discussing Canada and Mexico's blocking legislation).

46. For the NAFTA's conflicting provisions, see *infra* notes 52–67.

NAFTA and the limit on trade throughout the sanctions laws.⁴⁷

*THE THEORY OF THE NAFTA AND THE ROLE
OF SANCTIONS*

The NAFTA was founded on a mix of theories including freer trade accomplished by some transference of sovereignty.⁴⁸ The latter is illustrated by the NAFTA's replacement of national courts with binational panels to solve Agreement disputes.⁴⁹ Nowhere in the Agreement is there a chapter or even *specific* section directly devoted to one Party enacting trade laws to achieve foreign policy goals regarding a non-Party, but which, to be effective, impact a NAFTA Party's relations with the non-Party.⁵⁰ However, the NAFTA does contain a provision allowing a Party to engage in a boycott prohibiting the use of another Party's territory to circumvent the boycott.⁵¹

*THE NATIONAL SECURITY DEFENSE UNDER THE NAFTA AS
AN OBSTACLE TO A RULING ON THE LEGITIMACY OF
UNITED STATES SANCTIONS*

The legitimacy of sanctions like those described above is questionable under several theories. But those theories may never be tested. Article 2102 of the NAFTA allows a Party to enact laws for national security reasons.⁵² The WTO Agreement contains a simi

47. See *infra* notes 127–84 (analyzing sanctions law with the NAFTA provisions).

48. Although not covered in the Agreement, two reasons for its enactment were people and oil. The United States was concerned that too many of the former and an uncertain supply of the latter crossed the border into the United States.

The word “freer” is used because the NAFTA is really an agreement which regulates trade; it does not establish truly free trade among the Parties. But the concept of regulation does not mean that any one Party may unilaterally regulate the trade of another Party.

49. See generally NAFTA, *supra* note 19, arts. 2008–2017 (detailing the panel proceedings).

50. Were the NAFTA negotiations to have followed, rather than preceded, the enactment of the LIBERTAD Act, the secondary boycott sanctions contained in the LIBERTAD Act would have been condemned by Canada and Mexico as unacceptable trade practices, and specifically prohibited in the NAFTA.

51. See NAFTA, *supra* note 19, art. 309(3); see also *infra* notes 148–51. The NAFTA Implementation Act states that where a NAFTA provision is inconsistent with United States law, the United States law shall prevail. See 19 U.S.C.A. § 3312 (West Supp. 1997).

52. See NAFTA, *supra* note 19, art. 2102. The Article states:

Subject to Articles 607 (Energy-National Security Measures) and 1018 (Govern-

lar provision.⁵³ The United States has stated it will use these provisions in response to any challenge under either the WTO or the NAFTA.⁵⁴ If, in a NAFTA proceeding, the United States formally

ment Procurement-Exceptions), nothing in this Agreement shall be construed

.....

(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment;

(ii) taken in time or war or other emergency in international relations;

or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices;

Id.

53. See GUIDE TO GATT LAW AND PRACTICE, WORLD TRADE ORG. § I (1995) [hereinafter GATT/WTO]. The WTO provision proclaims:

Nothing in this Agreement shall be construed

.....

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations;

Id.

54. The E.U. requested a dispute panel to challenge the LIBERTAD Act under the WTO and asked the Director General to name the panelists if the United States attempted to block the panel formation. See *E.U. Proposes Naming Panel to Handle WTO Complaint Against Helms-Burton*, 14 Int'l Trade Rep. (BNA) 230 (Feb. 5, 1997). A three-member panel was named by the Secretary General. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Agreement Establishing the World Trade Organization, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 8, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND Vol. 31, reprinted in 33 I.L.M. 1125, 1225 (1994). The United States had stated that were a panel to be convened, the United States would not show up because the WTO lacked jurisdiction to hear an issue involving United States national security. See Frank James, *U.S. Says It Will Snub Trade Panel's Hearing on Cuban Sanctions*, CHI. TRIB., Feb. 21, 1997, at 6. The panel would normally have completed its work in about six months, but negotiations seeking to resolve the conflict deferred the implementation of the panel. See *supra* note 7 (discussing the failed negotiations). Separate from the national security exception, the United States objected to the panel because it might jeopardize United States Congressional support for the entire WTO. The European response was that the WTO was created to deal with these types of disputes. See James, *supra*, at 6.

claims that Cuba is a threat to its national security,⁵⁵ a view which has little support in the United States,⁵⁶ the challenging party might not be able to counter because each Party reserves the right to determine what actions "it considers necessary."⁵⁷ The Party appears to be the only judge of its own actions. This means a NAFTA or WTO panel might not consider the arguments, explored below, relating to United States sanctions laws and their impact on such NAFTA and WTO obligations as most-favored-nation treatment and nondiscrimination, if the panel first concluded the national security defense foreclosed it. But the panel might decide to examine each argument, then that, regardless of conclusions on the specific provisions, the national security defense precluded a final ruling against the United States. The United States might refuse to participate beyond its presentation of the defense.⁵⁸ That action would be consistent with the United States refusal to participate in the Nicaraguan case before the International Court of Justice after the United States lost on the issue of jurisdiction.⁵⁹ Using the national security defense in

55. Such threat is admitted in a specific provision in the LIBERTAD Act, regarding "international peace and security." See 22 U.S.C.A. § 6021(14). A similar argument may be made regarding Iran with respect to the challenge to the ILSA.

56. The meaning of "national security" in either the NAFTA or the WTO does not suggest that the nations be on the brink of war, nor does it suggest that no other nation has the right to have an armed force. See *supra* notes 52-53 (comparing the NAFTA and the WTO security provisions). Perhaps the most likely claim would be that an "emergency in international relations" exists, but any reasonable interpretation of that provision ought to require some legitimate threat to the Party raising the defense. *Id.* Cessation of diplomatic relations should not constitute an emergency in international relations, especially when the nations maintain relations through special interest sections with staffs similar to what they would have were diplomatic relations to be restored.

57. The same language appears in both the NAFTA and WTO national security provisions. See NAFTA, *supra* note 19, art. 2102(1)(b); GATT/WTO, *supra* note 53, art. XXI(b).

58. The United States might not even be willing to participate in the selection of a NAFTA panel. The NAFTA provides for selection when one Party does not participate in the process of suggesting names. See NAFTA, *supra* note 19, art. 2011; see also Michael Wallace Gordon, *NAFTA Dispute Panels: Structure and Procedures*, in HANDBOOK OF NAFTA DISPUTE SETTLEMENT (Ralph H. Folsom et al. eds., forthcoming 1998) (manuscript unpaginated and on file with author).

59. See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Thomas M. Franck, *Appraisals of the ICJ's Decision: Nicaragua v. United States*, 81 AM. J. INT'L L. 116, 117 (1987); see also Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 603, 622-30 (1987). Canada or Mexico might consider challenging the United States sanctions laws in the International Court of Justice.

the WTO to defend the LIBERTAD Act, especially in view of the United States experience as of early 1998 (seventeen wins and one loss),⁶⁰ would both increase the ill feeling toward the United States regarding its attitude on interpreting trade provisions as foreign policy issues, and jeopardize the future success of the WTO for dealing with trade issues. National security could come to include vague meanings of “economic security,” which might be used in future WTO cases like those the United States has won, such as beef hormones and the E.U.,⁶¹ and publishing and Canada.⁶² Even bananas could assume national security proportions.⁶³

ALTERNATIVE APPROACHES TO UNITED STATES SANCTIONS LAWS AS IN CONFLICT WITH THE NAFTA

Assuming either that the United States does not raise the national security defense in a NAFTA challenge, or that the defense is not found to prevent consideration of possible violations of the NAFTA by the United States sanctions laws, there are at least three approaches with respect to challenging United States sanctions laws under the NAFTA. First is that these laws constitute a violation of international law, thereby violating the NAFTA under Article 102(2).⁶⁴ Second is that the entire tenor of the NAFTA is to further open trade where not specifically restricted, and that sanctions laws such as the LIBERTAD Act violate the “objectives” of Articles 101 and 102(2).⁶⁵ Third is that there are specific violations of several

The United States would most likely refuse to participate on jurisdictional grounds. A challenge under either the WTO or the NAFTA is the better choice, even with the prospect of the national security defense.

60. See Whitt, *supra* note 59, at 617–20 (discussing the history and use of the national security defense).

61. See *U.S. Set to Request WTO Panel in Beef Hormone Dispute with E.U.*, 13 Int'l Trade Rep. (BNA) 767 (May 8, 1996).

62. See *GAO Report Investment in U.S. Publishing, Cable Television Shows Canadian Holdings*, 5 Int'l Trade Rep. (BNA) 670 (May 4, 1988).

63. See *European Parliament Votes to Stall Commission Changes in Banana Regime*, 12 Int'l Trade Rep. (BNA) 1737 (Oct. 18, 1995) (noting that in the first interpretation under the WTO General Agreement on Trade in Services (GATS), the WTO ruled, in both a panel and on appeal, that the E.U.'s banana regime was inconsistent with the WTO obligations).

64. See NAFTA, *supra* note 19, art. 102(2). A challenge that the sanctions laws violate international law would not be effective — the challenge must be based on some NAFTA article.

65. See *id.* arts. 101 & 102(2).

trade provisions of the NAFTA, such as national treatment or nullification and impairment provisions, or rules on the transit of business persons, in the application of the sanctions laws.⁶⁶ Secondary considerations include which of the above theories is most likely to be enforced,⁶⁷ and whether the NAFTA dispute process was intended to address either of the first two concepts.

INTERNATIONAL LAW AND SANCTIONS LAW

Customary International Law

Customary international law is a problematic concept for one trained and experienced more in the application of statutory rules.⁶⁸ According to many scholars, customary international law is binding on all nations, and, in theory, is above constitutional law in the hierarchy of sources of law.⁶⁹ But the reality is that few believe that many nations, including the United States, are likely to subordinate constitutional law principles to the amorphous and uncertain rules of customary international law. Not only is customary international law thus effectively subordinated to national constitutional law principles, and quite probably to treaties,⁷⁰ but it is further thought by some to be inferior to statutory law.⁷¹ In addi

66. *See id.* arts. 2004–2006. It is not clear whether Canada or Mexico might use Chapter 20 to obtain a decision on the lawfulness of the LIBERTAD Act Title III without there first being a judgment in the United States upon which execution is sought against Canadian or Mexican property in the United States. Because the language of section B of Chapter 20 speaks to the “interpretation or application of this Agreement,” and the “avoidance or settlement of all disputes,” the better reading seems that there is no requirement that there be an actual case with such a judgment creditor seeking execution. *Id.* art. 2004. The existence of the LIBERTAD Act has caused some Canadian and Mexican companies to suspend planned investments in Cuba, which gives these companies reason to ask their governments to challenge the law. For a discussion of the effect of LIBERTAD on Canadian investments in Cuba, see *supra* note 13.

67. Customary international law does not have the place in most legal systems that treaties occupy. The United States Constitution addresses treaties, but is silent on customary international law. *See* U.S. CONST. art. VI, § 2.

68. *See, e.g.*, MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW 66–108 (1997).

69. *See infra* notes 70–71, for opposing opinions regarding the hierarchy of customary international law.

70. *See* The Paquette Habana, 175 U.S. 677, 700 (1900) (indicating that treaties are generally given higher status than customary rules as sources of international law). If the NAFTA is not viewed as a treaty, perhaps the inclusion of principles of international law in its provisions would at least elevate the status of customary international law to treaty status for the purpose of application of the NAFTA.

71. *See id.* *But see* Advisory Opinion No. 17, Greco-Bulgarian Communities Case,

tion to having such an uncertain place in the hierarchy of law, customary international law also bears the burden of uncertain definition.

To what rules of customary international law might the Parties be subject, even in the absence of any reference to them in the NAFTA? Customary international law has two elements, recognition as a general practice and acceptance as a rule of law.⁷² Canada and Mexico are likely to argue that it applies to two aspects of sanctions law, the excessive extraterritorial effect, and the secondary boycott characteristics. Both of these might also be part of a more general charge of interference with the sovereignty of Canada and Mexico. There are other possible challenges, including the lawfulness of the mandate of the United States in Title III of the LIBERTAD Act⁷³ that Canada and Mexico participate in the expropriated property claims between United States nationals and Cuba, and even between Cubans and Cuba.⁷⁴

Especially complex in analyzing customary international law is the determining what constitutes general practices⁷⁵ and what is acceptance.⁷⁶ Does inconsistency among nations' practices affect the status? Are nations that reject the principle nevertheless bound?

The first customary international law argument likely to be presented in a NAFTA challenge is that the United States sanctions laws exceed permissible limits of the exercise of extraterritorial jurisdiction.⁷⁷ The idea is more often referred to as the principle of territoriality, and often joined with a discussion of the nationality

1930 P.C.I.J. (ser. B), No. 17, at 32 (Jul. 31) (postulating that international law prevails over local law); Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679, 690 (1969) (stating: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.")

72. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

73. See 22 U.S.C.A. §§ 6081–6083 (West Supp. 1997).

74. See *id.* (meaning persons who were Cubans and not United States nationals at the time of the expropriations, but who later became United States nationals).

75. Must the practices be acts, or are assertions or statements sufficient? Who may act or speak for a state? Do acts of an internal nature establish general practices applicable to the international area?

76. How many nations must accept this general practice? What if they are accepted by all the most advanced nations, but rejected by the developing nations — is weight given to economic development level? Is weight given to population — does China have a greater say than Cuba?

77. See generally EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 225–33 (Karl. M. Meessen ed., 1996).

principle.⁷⁸ Jurisdiction of one nation's laws to govern conduct abroad was earlier more closely linked with territory than it is today.⁷⁹ The critical issue has become at what point in the extraterritorial exercise of either legislative or enforcement jurisdiction a nation so conflicts with another state's sovereignty as to constitute a breach of customary international law. Unfortunately, many American jurists tend to espouse as principles of international law the United States Restatement of Foreign Relations, or theories advanced by American scholars.⁸⁰ This practice is obviously inconsistent both with the theory of the nature of international law in general, and with the evolution of customary international law.

The principal international case dealing with extraterritorial jurisdiction is the Permanent Court of International Justice's *Lotus* decision.⁸¹ The court stated that one nation may not "exercise its power in any form in the territory of another State."⁸² But the court was unwilling to find a general prohibition in international law disallowing states from extending their laws and the jurisdiction of their courts to persons, property, and acts outside the nation's

78. See, e.g., Chudzicki, *supra* note 14, at 508–11. A state may exercise jurisdiction over its nationals who are temporarily residing abroad under the principle of nationality. See *id.* But it may not extend that regulation to foreign nations, as the LIBERTAD Act attempts to do. See *id.* The nationality principle often conflicts with the territoriality principle, if one views the latter as establishing an absolute prohibition of any foreign initiated activity within another nation's borders. See *id.*

79. See *id.* at 509 (referring to Justice Marshall's opinion that a state's jurisdictional and territorial boundaries should coincide). With regard to the application of anti-trust law, the famous Holmes territorially based decision in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), was considerably limited, or altered, with the adoption of an effects test, beginning with *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). The use of an effects test may be gaining some approval abroad. The European Community accepted a form of effects test in Cases 89, 104, 114, 116, 117, & 125-129/85, *A. Ahlström Osakeyhtiö v. Commission*, 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901 (1988). See James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289, 319 (1991).

80. See *Breaking International Law*, *supra* note 21, at 7 (citing principally the Restatement (Third) of Foreign Relations Law, Professor Andreas Lowenfeld's Hague lectures, and Monroe Leigh's testimony at the hearings on the LIBERTAD Act, as "principles" of international law justifying extraterritorial jurisdiction). Clagett goes on to refer to some limited international authority. See *id.* An international tribunal is unlikely to make any reference to the Restatement, unless it is trying to identify the source of a United States perspective on international law.

81. *The S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

82. *Id.* at 18.

territory.⁸³ Finding the law to be undeveloped at the time of the case (1927), the court allowed states some latitude to develop rules which a state regarded as "best and most suitable."⁸⁴ Resting permission to exercise extraterritorial jurisdiction on a nation's sovereignty, the *Lotus* decision has been the basis for limited extraterritorial jurisdiction.⁸⁵ The case is of marginal use in defining current customary international law, as nations in the last seven decades have expanded their activities across borders with new technology. With permission to exercise limited extraterritoriality a generally accepted principle, the task for a NAFTA panel is to determine the current status of those limits.

Does the *magnitude* of the expropriations by Cuba justify a greater extraterritorial application of United States law than otherwise would be permitted? However intriguing this argument may be, it has no support in international law. Perhaps one might argue that customary international law requires the use of proportionality in reacting to foreign acts, but that means *limiting* one's actions, not expanding them.⁸⁶ With regard to boycotts, sometimes referred to as retorsion or measures of self-help, international law allows a nation to retaliate in response to an unfriendly act. What that response may be is the question. Expulsion of diplomats or even breaking diplomatic relations are viewed as acceptable. Unilateral economic sanctions are, for the most part, thought to be short of the kind of aggression condemned by the U.N. Charter, unless they raise serious questions of human rights.⁸⁷ Nations tend to believe they have

83. *See id.* at 19.

84. *Id.*

85. *See* Chudzicki, *supra* note 14, at 510.

86. Suggesting that Title III of LIBERTAD is justified because international law enforcement mechanisms are weak and ineffective is a dangerous argument. *See Breaking International Law, supra* note 21, at 12–14. Expropriations usually require more patience than one would find ideal. Years, and even decades, often have passed between expropriations and compensations. No one doubts that there will one day be some measure of accounting for the Cuban expropriations of United States property. Very few would agree that in the interim the United States ought to be able to take the self-help measures against third nations which are permitted under the LIBERTAD Act. *See* 22 U.S.C.A. § 6082 (West Supp. 1997).

87. The impact of the United States embargo on Cuban health and nutrition may raise human rights issues. Even before the LIBERTAD Act, the Cuban Assets Control Regulations and the Cuban Democracy Act were viewed as having some harmful impact on Cuban health and nutrition. *See* THE IMPACT OF THE U.S. EMBARGO ON HEALTH AND NUTRITION IN CUBA, AMERICAN ASS'N FOR WORLD HEALTH 1–30 (1997). The report was undertaken by an interdisciplinary medical team which visited medical centers in Cuba

an absolute right to terminate trade as retaliation for any disputed act.⁸⁸ The United States is probably on good ground in refusing to trade with Cuba, especially since it has left some small openings for humanitarian trade in food and medical supplies. But the extension of this retaliation to a secondary boycott is a very different situation. It intersects and perhaps merges with the above discussion of the permissible limits of extraterritorial laws.

What is curious about the United States laws is that supporters argue a kind of "implied collectiveness" about them, as if the United States were the surrogate for the world in a morally justified crusade to rid Cuba or Iran or others of oppressive leaders. Some offer words to suggest that our actions are driven by a higher norm, which other nations seem insufficiently able to comprehend. Such "implied collectivity" of sanctions is insupportable in law.⁸⁹ Our sanctions are clearly unilateral, and must be able to stand on their own if they are to be justified by customary international law principles.

Might it be argued that Cuba has no right to respond to the United States' acts of extraterritoriality because of Cuba's extensive violation of international law in expropriating property?⁹⁰ But it is not Cuba that is the principal complainant regarding the sanctions

and interviewed 160 professionals. *See id.* But health and nutrition supplies are readily available from nearly every other nation than the United States. The problem may be more involved with Cuba's poor international credit than with the embargo.

88. Terminating trade in retaliation would probably pass scrutiny under the proportionality doctrine, but one would need to know more of the "offense" for which trade was halted. *See Harmelin v. Michigan*, 501 U.S. 957, 962-94 (1991) (stating that there is no constitutional guarantee of a proportionality principle which allows judges to evaluate the penalty of the sentence in relation to the offenses committed, except possibly in capital punishment cases). Certainly the Cuban property confiscations would qualify as serious "offenses."

89. Furthermore, it would be hard to justify "implied collectively" of sanctions under concepts of natural law or *jus cogens* laws based on a higher norm. *See Alfred Verdross, Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 55 (1966) (defining *jus cogens* as the "norms with which treaties must not conflict").

90. Cuba enacted the Ley de reafirmacion de la dignidad y soberania Cubana (Law Reaffirming the Dignity and Sovereignty of Cuba), Ley No. 80 of Mar. 1, 1997, *reprinted in* 36 I.L.M. 472 [hereinafter *Law Reaffirming the Dignity*], as a response to the LIBERTAD Act. *See López, supra* note 15, at 6. Article 1 declares the LIBERTAD Act unlawful and without any juridical effect. *See Law Reaffirming the Dignity, supra*, art. 1. The Cuban law consists of 14 articles, several of which are directed specifically to provisions of the LIBERTAD Act. For example, Article 4 disallows any person who uses the procedures under the LIBERTAD Act from participating in future negotiations in Cuba for compensation for expropriated properties. *See id.* art. 4.

laws, it is other nations, such as Canada and Mexico and the European Union.⁹¹ The fact that the other state is not Cuba, but third nations subject to the LIBERTAD Act, is often overlooked. Canada and Mexico are not complaining that Cuba is being improperly treated,⁹² they are complaining that Canada and Mexico are improperly the subject of the extraterritorial application of the United States sanctions laws.⁹³ Attempting to justify the United States law by references to balancing United States interests with Cuban interests or self-help against Cuba for its unlawful expropriations overlooks the real issue of the impact on third nations. To argue that third nations are aiding Cuba and thus assuming the mantle of international pariahs is to carry the argument beyond what any respectable international jurist would accept.⁹⁴

If the effects test may be used to justify extraterritorial application of a nation's laws,⁹⁵ what direct, substantial, and foreseeable effect occurs in the United States when, for example, a Canadian company doing business in Cuba has been assigned to use as its administrative offices a house expropriated from a Cuban citizen who emigrated and became a United States citizen? Any effect in the sense of economic loss to the Cuban individual arose from the Cuban act, not from the subsequent, incidental Canadian use. Too often the Cuban acts of expropriation are assumed to have had no impact on the title to the property. When an expropriation is not followed by

91. See *Breaking International Law*, *supra* note 21, at 2. These nations think that the blame of Cuba for its acts of expropriation is cast upon third nations. See *id.*

92. Although Canada and Mexico may believe that the primary boycott by the United States against Cuba ought to be terminated because the boycott has not been effective, they have not argued that the primary boycott is unlawful.

93. See *Breaking International Law*, *supra* note 21, at 2.

94. It is difficult to find any support for the view that Canada and other nations, which have adopted blocking and clawback laws that might be used in response to the United States Cuban sanctions laws, are therefore unlawful abettors of Cuba which denies them any right to claim interference with their sovereignty. *But see Breaking International Law*, *supra* note 21, at 38.

95. "Section 18 [of the Restatement (Second) of Foreign Relations Law of the United States (1965)] states that American laws are not given extraterritorial application except with respect to conduct that was, as a 'direct and foreseeable result,' a 'substantial' effect within the United States." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). However, the United States Supreme Court has rejected the "foreseeability" and "substantiality" requirements under the Restatement's effect test and recognized that an effect is "direct if it follows as an immediate consequence of the defendant's . . . activity." *Id.*

proper compensation,⁹⁶ to assume that title has not passed may be incorrect. But that view is at the heart of the LIBERTAD Act and the arguments of its few supporters.⁹⁷ Only if the property has remained owned by its pre-expropriation owners do the arguments that a later user is a trafficker in stolen property have any merit. But if the property is viewed to have passed to the expropriating government, with proper compensation an outstanding and unresolved issue, then any users of expropriated property in Cuba cannot be charged as traffickers.⁹⁸

Title III of the LIBERTAD Act attempts to establish the third nation company as a participant in the act of expropriation.⁹⁹ The company becomes a “trafficker” in “stolen” goods.¹⁰⁰ A distributor

96. The view by some in the United States that compensation must be “prompt, adequate and effective” is a version of international law not accepted widely outside of the United States, nor by all jurists within. See Oscar Schachter, Comment, *Compensation for Expropriation*, 78 AM. J. INT’L L. 121, 121 (1984). “Appropriate” or “just” are other suggested possibilities. The literature arising out of the expropriations of the 1950s and 1960s is extensive. See, e.g., 3 CORNELIUS F. MURPHY, JR., THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 49–68 (Richard Lillich ed. & contrib., 1975).

97. See *Breaking International Law*, supra note 21, at 15–16.

98. This is a difficult issue and far too complex and debated to further develop in this article. See, e.g., F.A. MANN, STUDIES IN INTERNATIONAL LAW, 373–90, 420–65 (1973); Ignaz Seidl-Hohenveldern, *Title to Confiscated Foreign Property and Public International Law*, 56 AM. J. INT’L L. 507, 508–09 (1962). It is mentioned only because it is central to the debate, and those who ignore it may find their arguments wholly unacceptable. The issue will be reached when there is some ultimate negotiation regarding the property question. If compensation is provided, is it payment for a long past taking and transfer of title, or a long past taking with a current transfer of title at the time of the compensation? If restitution of properties is part of the settlement, does it consist of an acknowledgement that title never transferred to the government, or a return of title to the former owner? These questions are too delicate to justify making the kind of assumptions upon which the LIBERTAD Act is based. A further distinction may be made between the actual passage of title within the expropriating nation, and the right of foreign nations to refuse to recognize that title with regard to activities in its nation. For example, sugar already processed on an expropriated plantation and “sold” to someone in a third nation may very likely be characterized as stolen goods in that third nation. But a dispute settlement body may refuse to so characterize the property, believing the expropriating nation’s act was determinative in transferring title, with the failure of compensation constituting a separate issue between the expropriating nation and the expropriated person. The law remains unsettled.

99. See 22 U.S.C.A. §§ 6081–6085 (West Supp. 1997).

100. See *id.* § 6023(13) (West Supp. 1997). Trafficking is not clearly defined in the LIBERTAD Act. “Traffics” includes any knowing and intentional dealing in, use of or benefiting from confiscated property or causing, directing, or profiting from trafficking by others. See *id.* The definition has no outer limits and one can imagine carrying it to absurd situations. Should all the commercial products on sale in the former Havana Hilton, such as Fodors travel guides, subject their companies to liability?

from, for example, France, who purchases Havana Club rum produced in a factory in Cuba formerly owned by an American company and expropriated without compensation, might expect to encounter obstacles in selling that rum in the United States. However, a person growing roses on that site, after the factory burned down subsequent to the expropriation and the land was assigned to a French investor for growing roses for export, would be shocked to encounter obstacles in selling those roses abroad, *even in the United States*. Is the French rose grower a trafficker, a person profiting from the expropriated property of others? The difficulty with the trafficking provision is more than its scope; it is also its undisguised attempt to characterize the foreign person as a criminal.

Should property in Cuba used by a company from Canada or Mexico be considered "stolen"? Cuba clearly violated international law in failing to provide compensation to the original owner.¹⁰¹ It has cured that violation with most nations other than the United States by way of settlements and has offered to discuss the issue with the United States when the embargo is ended.¹⁰² Perhaps of most importance is the question of due process by an action in the United States against assets unrelated to the claimant's former properties in Cuba. The trafficking provision may never be tested in a United States court. The President exercised his authority under the Act to defer the right to bring actions under Title III.¹⁰³ But

101. See 22 U.S.C.A. § 6023(4)(A)(i).

102. However, even under the 1962 United States Sabbatino or Second Hickenlooper Amendment to the Foreign Assistance Act of 1961, see 22 U.S.C.A. § 2370(e)(2) (West 1990), its effects are delayed when the President determines its application is not in the best interests of the United States, such as when the expropriating nation is willing to or in the process of negotiating compensation. See generally 22 U.S.C.A. § 2151-2429a-1 (West 1990); see also Michael W. Gordon, *The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations Other than the United States*, 5 LAW. AM. 457 (1973).

103. See 22 U.S.C.A. § 6085(c)(1)(B) (West Supp. 1997). The President chose not to defer the implementation of Title III, which he had the power to do. See 22 U.S.C.A. § 6085(b)(1). Thus, the clock began to tick three months after August 1, 1996, because only trafficking that occurs after that date is subject to challenge, but only if the President fails to continue to defer the initiation of suits under Title III for successive six-month periods. See *id.* The President has continued the waiver at each successive six-month period. See, e.g., Rossella Brevetti & Peter Menyasz, *Clinton Delays Lawsuits Under Title III of Helms-Burton*, 13 Int'l Trade Rep (BNA) 1158 (July 17, 1996); Rossella Brevetti & Peter Menyasz, *Clinton Extends His Suspension of Title III of Cuba Law*, 14 Int'l Trade Rep. (BNA) 42 (Jan. 8, 1997) [hereinafter *Clinton Extends Suspension*]; Gary G. Yerkey & Rossella Brevetti, *President Again Bars U.S. Citizens from Suing Foreign*

deferrals will not prevent a NAFTA dispute panel from viewing Title III as inconsistent with customary international law.

One organization has expressed doubt about the lawfulness of Title III. The Inter-American Juridical Committee of the Organization of American States, at the request of the OAS General Assembly, issued a unanimous, nonbinding opinion that the LIBERTAD Act was inconsistent with international law, and that Title III was specifically inconsistent with customary international law.¹⁰⁴ Among the committee members were representatives from the three nations most concerned with the LIBERTAD Act, Canada, Mexico, and the United States, represented by three distinguished persons, Jonathan Fried, Jose Luis Siqueiros, and Keith Highet, respectively. The committee stated:

Claims 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. Products grown or produced on such property do not under customary international law constitute expropriated property.¹⁰⁵

The claimant State does not have the right to attribute liability to nationals of third States for the use of expropriated property located in the territory of the expropriating State where such use conforms to the laws of this latter State, nor for the use in the territory of third States of intangible property or products that do

Firms Active in Cuba, 15 Int'l Trade Rep. (BNA) 91 (Jan. 21, 1998) [hereinafter *President Again Bars U.S. Citizens*]. The President suspended the initiation of suits by a Presidential Statement. See, e.g., the Statement for January 3, 1997, 36 I.L.M. 216 (1997).

Persons who were Cubans at the time of the expropriations, but who have become United States citizens, may not bring Title III claims until after March 1998. See 22 U.S.C.A. § 6082(2)(5)(C) (West Supp. 1997). But such claims are also subject to the President's deferral. See 22 U.S.C.A. § 6085(b)(1).

There have been efforts to remove the President's discretion under Title III, in the form of legislative proposals to amend the LIBERTAD Act and remove Presidential discretion. See *President Again Bars U.S. Citizens*, *supra*, at 91 (giving the example of H.R. 2179 introduced by Rep. Bill McCollum (R-Fla.)).

104. See *Organization of American States: Inter-American Judicial Committee Opinion Examining the U.S. Helms-Burton Act*, Aug. 27, 1996, reprinted in 35 I.L.M. 1322, 1324-34 [hereinafter *OAS Opinion*] (responding to the Resolution AG/DOC.3375/96 of the General Assembly of the Organization, entitled "Freedom of Trade and Investment in the Hemisphere").

105. See *id.* ¶ 5(d).

not constitute the actual asset expropriated.¹⁰⁶

However ingenuous may be the concept of Title III in attempting to coerce some reckoning of the Cuban expropriations, perhaps the most frequent response to it is that it is simply the wrong way to go about addressing the issue. It allows an aggressive pursuit of property of uncertain title,¹⁰⁷ intentionally uses indiscrete labels characterizing third nation persons as criminals,¹⁰⁸ allows persons who were citizens of the expropriating nation but have become citizens of the United States to have standing in United States courts for what most sense is an issue between these persons as Cubans and the Cuban government,¹⁰⁹ imposes damages well beyond the value of the “trafficked” property,¹¹⁰ and draws third nations and their nationals into an issue that is principally a Cuba-United States dispute.¹¹¹

The Title III trafficking provisions are not the only parts of the LIBERTAD Act which may be challenged as an excessive extension of extraterritoriality, or as being otherwise inconsistent with principles of customary international law. The OAS Opinion also found the attribution of liability to nationals of third states,¹¹² the use of domestic courts to resolve state-to-state claims,¹¹³ the espousal of claims on behalf of persons not nationals at the time of injury,¹¹⁴ the imposition of damages greater than for compensation and interest,¹¹⁵

106. *See id.* ¶ 6(d).

107. *See* 22 U.S.C.A. §§ 6081–6085 (West Supp. 1997).

108. *See id.* §§ 6023(13), 6081(5)–(11), 6082, 6091.

109. *See id.* § 6082(a)(5)(C). Clagett offers arguments in justification of allowing lawsuits by Cuban-Americans. *See Breaking International Law, supra* note 21, at 39–49. His arguments are based on principles of human rights that are not fully established, and the idea that Title III does not award compensation for expropriations, but awards compensation for violations of a kind of United States tort law, even though the tortfeasors are labelled criminals. *See id.*

110. *See* 22 U.S.C.A. § 6082(a)(1). Title III allows recovery of the full value of the expropriated property, not just the value of the property which is the basis for jurisdiction. *See id.* In some cases damages may be trebled. *See* 22 U.S.C.A. § 6082(a)(3)(C)(ii).

111. *See* 22 U.S.C.A. § 6032(a) (West Supp. 1997). Behind much of this belief is the deferral of Cuba-U.S. foreign policy to Cuban-American interest groups. One can hardly blame these interest groups, which have effectively used the United States political process to achieve their goals. However, one can easily blame the United States government for allowing such deferrals to achieve personal political goals rather than national policy goals.

112. *See OAS Opinion, supra* note 104, ¶ 6(c).

113. *See id.* ¶ 6(a).

114. *See id.* ¶ 6(b).

115. *See id.* ¶ 6(f).

and the deprivation of due process allowing a foreign national to contest the basis and amount of the claim all to violate international law.¹¹⁶ A final concern suggested that a law such as the LIBERTAD Act might itself constitute an expropriation.¹¹⁷

Each of the separate statements of the OAS committee may alone justify a conclusion that the LIBERTAD Act violates customary international law, or they may collectively be considered elements of an excessive extraterritorial application of the United States law. The OAS Opinion acknowledged a nation's right to exercise some extraterritorial jurisdiction, but only where the foreign act has a "direct, substantial, and foreseeable effect" in the nation's territory and when its exercise is "reasonable."¹¹⁸ Regrettably, the Opinion did not explore the edges of this "effect" and "reasonableness" standard. The committee's view was that the United States law went beyond those edges.¹¹⁹

The President's deferral of Title III actions may contain a hidden benefit. It may preclude a United States court from addressing the issue of a violation of customary international law. Aside from the preference for making international law in international tribunals and courts rather than United States legislative bodies and courts, some United States courts, especially the United States Supreme Court, have been unimpressive in expressing the nature of international law. The 1993 *Hartford Fire Insurance Co. v. California*¹²⁰ decision asserts a fairly strong position that courts must give full effect to laws with extraterritorial reach, at least until there is a "true conflict" with the foreign nation.¹²¹ That true conflict was not very carefully defined. It appears to mean that when the United States exerts extraterritorial effect to its laws, customary international law limits the exertion when a United States entity is compelled by foreign law to do an act violating United States law, or where it is impossible for the party to comply with the laws of both

116. *See id.* ¶ 6(g).

117. *See id.* ¶ 6(h).

118. *See OAS Opinion, supra* note 104, ¶ 8(e). The *OAS Opinion* expressed what it believed to be six norms of international law pertaining to the extraterritorial application of law. *See id.* ¶ 8(a)–(f). The Committee applied these six norms and concluded that the trafficking provisions were not justified. *See id.* ¶ 9(a)–(b).

119. *See id.* (referring to the Introductory Note written by Seymour Rubin).

120. 509 U.S. 764 (1993).

121. *See id.* at 798–99.

the United States and the foreign state.¹²² United States laws with extraterritorial effect, beginning with the 1898 Sherman antitrust laws and reaching apogee with the LIBERTAD Act, have generated reactions in many foreign nations in the form of blocking and claw-back laws,¹²³ and multilateral reactions in the form of numerous condemnations by international organizations.¹²⁴ This would seem to fully meet the creation of a “true conflict” standard, and suggest a considerable degree of consistency of foreign opinion regarding a violation of customary international law by the United States. *Hartford Fire Insurance Co.* was not a very clear expression of international law, at least partly because of its provincial focus on United States understanding and misunderstanding of the nature of international legal obligations.

General Principles of International Law

If customary international law principles are difficult to discern, general principles of international law are even more so. Article 38(1)(c) of the Statute of the International Court of Justice of the United Nations refers to general principles “recognized by civilized nations.”¹²⁵ Principles evolving from municipal law may indeed become general principles from their frequency of use by a broad range of civilized nations, but there is conflict as to whether they become international legal principles without some concurrence of states as to their attainment of such status. While principles of commercial law, and especially expropriation and compensation, may be fertile areas for a discussion regarding their role in the NAFTA, a NAFTA tribunal may be reluctant to delve into such debated, sensitive, and often hostile territory.¹²⁶ It is quite pos

122. *See id.* at 799.

123. *See, e.g., supra* note 20 (discussing Canada and Mexico's blocking laws).

124. For an example of one organization's reaction, see *supra* note 12.

125. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187. Although there is debate, it is likely that this statute means principles generally applied in national legal systems.

126. *See, e.g., NAFTA, supra* note 19, art. 2009(2)(a) (providing that Chapter 20 panels possess expertise or experience in “law, international trade, other matters covered by this Agreement or the resolution of disputes arising under international trade agreements”). There is no reference to public international law. Where a dispute is likely to involve a public international law argument, the Parties might seek to appoint a panel, especially the chair, which includes persons learned in public international law. Contrastingly, one or more of the Parties might wish to avoid such appointment, in the hope

sible that a NAFTA dispute panel would focus on customary international law in a manner similar to the approach of the OAS committee and avoid a discussion of general principles of international law.

*OBJECTIVES OF THE NAFTA AS A WHOLE AND THEIR
RELATION TO SANCTIONS*

Articles 101 and 102

The NAFTA may be given more credit than it deserves. It ought to be viewed in the context of the much larger dimension of changing relationships of trade and investment between Mexico and the United States.¹²⁷ After Mexico defaulted on its international debt in 1982,¹²⁸ the restrictive legislation, regulations, and policies governing foreign trade and investment that Mexico had adopted and refined from the late 1960s until the consequences were understood in the early 1980s, were slowly replaced by more trade- and investment-tolerant, if not incentive, rules.¹²⁹ The dislocations in the Soviet Union and Eastern Europe in the late 1980s and the eco-

that the public international law question would not be explored in depth. Several NAFTA panels, including the sole NAFTA Chapter 20 panel to date, have included distinguished public international law experts.

127. I exclude Canada from this because Canada has not had a very extensive trading or investment relationship with Mexico. See Michelle A. Kaiser, *The Impact of NAFTA on the United States Computer Industry: Why Trade Reforms Will Spark Increased Exports to Mexico*, 12 J. MARSHALL J. COMPUTER & INFO. L. 467, 472 (1993) (noting that Canada and Mexico do not trade extensively). Indeed, while a free trade agreement extending the 1989 Canada-United States Free Trade Agreement (FTA) south was much debated after the CFTA was initiated by the parties, Canada joined what was likely to become a Mexico-United States FTA only after Mexico and the United States had begun discussions. See Philip E. Koehnke, Comment, *North American Free Trade: Mexico, Canada and the United States*, 12 CHICANO-LATINO L. REV. 67, 67 (1992); see also Symposium, *Some Observations About the NAFTA*, 7 FLA. J. INT'L L. 363 (1992) [hereinafter *Observations About NAFTA*]. Canada wanted to avoid two separate trade agreements, Canada and the United States and Mexico and the United States, which would establish a hub-spoke relationship with the United States the hub and other Western hemisphere nations the spokes. See *Observations About NAFTA*, *supra*, at 368. Since the creation of the NAFTA, Canada has considerably increased its trade with Mexico. See *id.* (indicating all NAFTA participants should benefit from the Agreement).

128. See Enrique Rangel, *Debt Remains an Albatross for Mexico Government, Consumers Still Owe Creditors Millions*, DALLAS MORN. NEWS, Feb. 27, 1997, at 1A.

129. See Ewell E. Murphy, Jr., *Access and Protection for Foreign Investment in Mexico Under Mexico's New Foreign Investment Law and the North American Free Trade Agreement*, 10 ICSID REV.- FOREIGN INV. L.J. 54, 95 (1995).

conomic successes of the Asian Four Tigers,¹³⁰ made Mexico reevaluate its policies. By the early 1990s, when the NAFTA negotiations were under way, Mexico had already rescinded much of its restrictive trade and investment legislation. Thus, the NAFTA furthered a process already begun, it did not initiate that process. What that means to the issue of unilateral sanctions is that the progression toward freer trade that was in place among Canada, Mexico, and the United States, and was furthered by the NAFTA, constitutes a movement in a direction in contrast to that taken by the unilateral United States sanctions against Cuba enacted after forming the NAFTA. The Cuban sanctions are both trade restrictive and unilateral clashes with the concept of a free trade area embodied in Article 101 of the NAFTA,¹³¹ and with the stated objectives of the NAFTA in Article 102.¹³²

None of Article 102's objectives specifically refer to one Party's obligations to another Party with respect to non-NAFTA nations,¹³³ but it may be fair to view these objectives as including an implied obligation not to interfere with another Party's trade with non-NAFTA nations.¹³⁴ Further, this "Objective" Article 102 states that the provisions of the Agreement are to be interpreted in light of the stated objectives *and* "in accordance with the applicable rules of

130. See Kathryn L. McCall, Comment, *What Is Asia Afraid of? The Diversionary Effect of NAFTA's Rules of Origin on Trade Between the United States and Asia*, 25 CAL. W. INT'L L.J. 389, 403-04 (1995) (using the nickname to refer to the nations of Hong Kong, Taiwan, Singapore, and South Korea).

131. See NAFTA, *supra* note 19, art. 101. Article 101 states: "The Parties to this Agreement, consistent with Article XXIV of the *General Agreement on Tariffs and Trade*, hereby establish a free trade area." *Id.*

132. See *id.* art. 102(1). Article 102(1) states that some of the objectives of this Agreement are to: "(a) eliminate barriers to trade in, and facilitate the cross-border movement of goods and services between the territories of the Parties; (b) promote conditions of fair competition in the free trade area . . ." *Id.* The Article concludes with the statement that the Agreement is to be interpreted "in light of its objectives . . . and in accordance with applicable rules of international law." *Id.* art. 102(2).

133. See *id.* art. 102(1). Some of the objectives conflict with unilateral sanctions, however. For example, if Mexico sells trucks to Cuba which include bumpers from the United States, the cross-border movement of these bumpers from the United States to Mexico is likely to cease. While it may be legitimate for the United States to refuse to allow Cuba the benefit of trade with the United States, at what point may that prohibition be unreasonable? Were the trucks 90 percent United States content, such prohibition might be acceptable. But what if only the bolts which attach the bumpers to the truck are United States parts?

134. See *id.*

international law."¹³⁵ This suggests that any interpretation of provisions of the Agreement that might relate to and affect the use of sanctions, ought to be consistent with international law principles applicable to sanctions.

NAFTA'S SPECIFIC PROVISIONS AND UNILATERAL SANCTIONS

The LIBERTAD Act is a trade act enacted to achieve a political goal. The idea that LIBERTAD is not trade and investment legislation, but is directed to trafficking in stolen property, much like trafficking in drugs, and therefore ought not be discussed in trade and investment terms, has little support. It is disingenuous to make such an argument. The LIBERTAD Act is intended to create a chilling effect upon other nations' traders and investors (not such citizens who may be professional thieves) as to trading and investing in Cuba.¹³⁶ It affects people such as President Javier Garza Calderon of Mexico's large Grupo Domos enterprise, not outlaws such as Emiliano Zapata or Pancho Villa. The LIBERTAD Act must be tested against nations' rights to trade and invest, including the provisions of the NAFTA that express those rights.

Provisions of the NAFTA Relating to Trade in Goods

Article 301 requires one Party to "accord national treatment to the goods of another Party,"¹³⁷ following Article III of the General Agreement on Tariffs and Trade (GATT).¹³⁸ While it does not so state, the implication and negotiating history suggests that the goods referred to are goods flowing *between* NAFTA Parties, not

135. *Id.* art. 102(2).

136. *See* 22 U.S.C.A. § 6023(13). The use of the word trafficking has the same negative tones as violating the Trading with the Enemy Act of 1917, *see* 40 Stat. 411, 411-26 (1917) (codified as amended at 50 U.S.C.A. app. §§ 1-44 (West 1990 & Supp. 1997)), or the Racketeer Influenced Corrupt Organizations Act of 1970, *see* 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1997). The drafters of LIBERTAD apparently intended the word to convey a sense of reprehensible activity.

137. *See* NAFTA, *supra* note 19, art. 301.

138. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. III, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194. Because the E.U. petition to the WTO is partly based on a national treatment argument, how a WTO panel rules on this issue may be important to a Chapter 20 NAFTA panel faced with the interpretation of this Article. The same may be true for other provisions.

goods traded, for example, between Canada and Cuba.¹³⁹ The NAFTA provisions apply, however, when the Canadian-Cuban trade includes the acquisition by a Canadian company of Cuban parts, which are then included in goods manufactured in Canada for export to the United States. If the content from Cuba is sufficient so that, under the NAFTA Chapter Four Rules of Origin, the manufactured goods would not qualify as “goods of another Party,” national treatment would not apply.¹⁴⁰ But even if the goods qualify as Canadian under the NAFTA rules, they may conflict with section 110 of the LIBERTAD Act,¹⁴¹ which prohibits the importation into the United States of any product that “is made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba.”¹⁴² Foreseeing this problem, the drafters of the LIBERTAD Act included a provision that states: “The Congress notes that United States accession to the NAFTA does not modify or alter the United States sanctions against Cuba.”¹⁴³ The provision incorporates a portion of the United States statement of administrative action that accompanied the NAFTA Implementation Act. That statement, which represents the United States view of its commitment under the NAFTA,¹⁴⁴ states the NAFTA “will not affect the Cuban sanctions program.”¹⁴⁵ That statement must be read to mean the sanctions program as it existed when the NAFTA was adopted. The LIBERTAD Act had not yet been enacted.¹⁴⁶ Nothing in the NAFTA

139. A customs union among the three NAFTA Parties might have sought common tariffs for goods entering from other nations, such as Cuba. But a customs union would not have sought to allow the flow of those goods between Canada and Cuba to be controlled by the United States.

140. See NAFTA, *supra* note 19, arts. 401–415 (comprising NAFTA's Chapter Four, Rules of Origin).

141. See 22 U.S.C.A. § 6040 (West Supp. 1997).

142. See *id.* § 6040(2)(3). This language is similar to that in the Cuban Assets Control Regulations, which were part of the Foreign Assistance Act of 1961. See 22 U.S.C.A. §§ 2151–2443 (West 1996 & Supp. 1997). The Regulations prohibit persons subject to the jurisdiction of the United States from trading in goods “made or derived in whole or part of any article which is the growth, produce, or manufacture of Cuba.” 31 C.F.R. § 515.204 (1997).

143. 22 U.S.C.A. § 6040(b).

144. However, that view might be rejected by a NAFTA Chapter 20 panel as inconsistent with NAFTA language.

145. 22 U.S.C.A. § 6040(b)(1) (referring specifically to the United States Statement of Administrative Action Accompanying the North American Free Trade Agreement Implementation Act).

146. Nevertheless, the Cuban Assets Control Regulations and the Cuban Democracy

suggests that a Party might unilaterally modify its NAFTA obligations, nor impose upon other Parties a mandate to participate in the secondary boycott provisions of the Cuban sanctions program as developed in the LIBERTAD Act after the creation of the NAFTA.

The same LIBERTAD Act section continues with a statement that Article 309(3) of the NAFTA grants the United States authority to “ensure that Cuban products or goods made from Cuban materials” are not brought into the United States from Canada or Mexico.¹⁴⁷ Article 309(3) states that the NAFTA allows a boycott by a Party that prohibits the use of another Party's territory to circumvent the boycott.¹⁴⁸ But Article 309(3) refers to “goods” and does not include the reference to “parts” contained in the LIBERTAD Act section 110(a)(3).¹⁴⁹ The LIBERTAD Act section 110(b)(2) attempts to add to the language of NAFTA Article 309(3) “goods made from Cuban materials.”¹⁵⁰ It would seem reasonable to assume that the NAFTA Parties intended Article 309(3) to allow a Party to prohibit products to qualify under the Rules of Origin as a good of a NAFTA Party when much of the content of that good was from a boycotted country.¹⁵¹ But it probably was not intended to prohibit the entry of a good when the quantity of Cuban origin is de minimis, e.g., the

Act were in place. See *supra* note 8, for a discussion of this legislation.

147. 22 U.S.C.A. § 6040(b)(2). It also covers United States “products” exported to Cuba through Canada or Mexico, but curiously does not include “goods made from United States products,” as is specifically referred to for trade to the United States. The truth is that many United States products find their way into Cuba, most probably lawfully. Cuba may lawfully purchase United States made products for sale abroad, for example in Canada or Mexico, and take them to Cuba. Unless the United States manufacturer or exporter has some reason to believe the products will end up in Cuba, it has broken no law. United States law does not, and probably could not, make the “existence” of United States products in Cuba unlawful; it addresses the process of their getting to Cuba. See *id.*

148. See NAFTA, *supra* note 19, art. 309(3). Article 309(3) states:

In the event that a Party adopts or maintains a prohibition or restriction on the importation from or exportation to a non-Party of a good, nothing in this Agreement shall be construed to prevent the Party from . . . limiting or prohibiting the importation from the territory of another Party of such good of that non-Party

Id.

149. See NAFTA, *supra* note 19, art. 309(3).

150. 22 U.S.C.A. § 6040(b)(2).

151. See NAFTA, *supra* note 19, art. 309(3). It would clearly apply to goods merely transshipped from Cuba, such as raw sugar. Would it apply also to candy made with Cuban sugar? Sugar has some special provisions which would separately apply. See 22 U.S.C.A. § 6040(c)-(d).

bolt holding the bumper of an auto made in Mexico. As a practical matter, it would be difficult to determine origin in such a manner. The bolts may have been obtained by the Mexican auto manufacturer from a bolt distributor who in turn obtained them from many sources, including Cuba.

Canada and Mexico do not have very strong arguments that United States sanctions in the form of the primary boycott under the rules incorporated in the pre-NAFTA Cuban Assets Control Regulations¹⁵² and the Cuban Democracy Act¹⁵³ violate United States obligations under NAFTA Chapter Three, in view of Article 309(3). There is little difficulty with goods imported into the United States, although some imports may have some Cuban content. A greater problem exists with goods imported into Cuba from Canada or Mexico which are wholly United States made, partly United States and partly Canadian or Mexican, or fully Canadian or Mexican but using United States technology. Goods made in the United States and entering Cuba through Canada or Mexico may or may not violate United States law. If the goods are merely transshipped to Cuba through Canada or Mexico, the United States exporter is subject to penalties.¹⁵⁴ But if the goods are exported to Canada or Mexico with the expectation they will be sold and consumed in Canada or Mexico, but are then purchased by a Cuban government organization purchasing agent and shipped to Cuba, the United States exporter ought not be concerned.¹⁵⁵ If the goods are partly made in Canada or Mexico with United States components, additional issues are raised such as who owns the facility in Canada or Mexico that finishes the production.¹⁵⁶ Where goods are fully made in a third nation, but from United States technology, the issue is likely to depend on the nature of technology. Visitors to Cuba drink Coca-Cola bottled in

152. See 31 C.F.R. pt. 515 (1997).

153. See 22 U.S.C.A. §§ 6001–6010 (West Supp. 1997).

154. See 22 U.S.C.A. § 6023(13) (West Supp. 1997).

155. The latter is undoubtedly the way in which many United States products available in Cuba reach that country. But there are distributors, apparently principally based in Panama, who buy United States made goods exclusively for the Cuban market.

156. If it is a wholly-owned subsidiary of a United States company, the United States law attempts to reach its sales to Cuba. Such extraterritorial extension of United States law is rejected by Canada and Mexico, where it involves orders to a Canadian or Mexican chartered company, on Canadian or Mexican soil, with mostly Canadian or Mexican employees. The Cuban Democracy Act was primarily enacted to terminate these sales by United States owned subsidiaries located in third nations. See *supra* note 25.

many nations other than the United States.¹⁵⁷ The foreign bottling companies are locally owned, but use United States technology. While proponents of the trade embargo favor interpreting the laws to prohibit any products of any United States origin, technology included, from reaching Cuba, the language of the laws is sufficiently vague to raise doubt about concluding that any United States product available in Cuba has arrived there by some illegal process.

Any arguments that Canada or Mexico might make that relate to most-favored-nation, quantitative restrictions, or other NAFTA provisions that affect the flow of goods will confront the same Article 309(3) defenses discussed above. But there are other provisions of NAFTA which Article 309(3) does not address.

*PROVISIONS OF THE NAFTA RELATING TO INVESTMENT
UNDER CHAPTER 11*

NAFTA Article 1105(1) provides: "Each Party shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."¹⁵⁸ United States sanctions laws determined to be in violation of international law would additionally and specifically violate this commitment of the United States under the NAFTA. This provision further is consistent with NAFTA Article 102 discussed above, which is the general "Objectives" article requiring the Parties to "interpret and apply" NAFTA provisions "in accordance with applicable rules of international law."¹⁵⁹ If Title III of the LIBERTAD Act violates international law, there may be three separate violations. First is a general violation of international law separate from the NAFTA, second is a violation of NAFTA Article 1105(1), and third is a violation of NAFTA Article 102. A NAFTA challenge would likely focus on the latter two, violations of international law *as constituting* violations of specific provisions of the NAFTA.

The LIBERTAD Act extends section 302 rights to both United States nationals who were citizens at the time of the Cuban expo-

157. During a trip to Cuba in May 1994, the author saw Coca-Cola cans bottled in Canada, Mexico, and several European nations. During another trip in February 1998, numerous cans viewed throughout the island indicated production exclusively in Mexico.

158. NAFTA, *supra* note 19, art. 1105(1).

159. *Id.* art. 102(2).

priations and to Cuban nationals who became United States citizens since those expropriations.¹⁶⁰ These provisions are sometimes referred to as the Bacardi provisions, because they were allegedly at least partly the results of the lobbying efforts of the Bacardi company in Miami.¹⁶¹ The LIBERTAD Act section 302 includes some separate provisions for United States nationals who filed claims under the Foreign Claims Settlement Commission (persons who were United States citizens at the time of the expropriations), and other United States citizens (persons who were not then citizens, meaning essentially persons who were then Cuban citizens).¹⁶² Standing to challenge Title III would clearly arise when a Canadian or Mexican national became subject to a Title III judgment. But the Canadian or Mexican government might also challenge the LIBERTAD Act as itself constituting an action by the United States inconsistent with the latter's commitments under the NAFTA.¹⁶³

160. See 22 U.S.C.A. § 6082 (West Supp. 1997). The statute means essentially persons who were Cuban citizens at the time, but emigrated to the United States and have become citizens.

161. See Louis F. Desloge, *The Great Cuban Embargo Scam: A Little-Known Loop-hole Will Allow the Richest Exiles to Cash in*, WASH. POST, Mar. 3, 1996, at C01, reprinted in 142 CONG. REC. E308, E309 (1996). Some of the extensive former Bacardi properties in Cuba, including the distillery in Santiago, are apparently being used to produce Havana Club rum, which is distributed worldwide by the French spirits company Pernod Ricard. See *id.* One writer has noted that by allowing private out-of-court settlements, a company such as Bacardi might enter into a settlement with Pernod Ricard, and ironically benefit from Pernod's economic activity in Cuba. See *id.* If any payment from Pernod to Bacardi consisted of sharing royalties on the sale of Havana Club rum, would Bacardi be in violation of the United States laws prohibiting United States companies from trading with Cuba? See Stephen Fidler, Comment & Analysis, *The Long-Arm of American Law: U.S. Legislation Aimed at Punishing Fidel Castro Has Angered Washington's Trading Partners and Left Mr. Clinton with a Dilemma*, Says Fidler, FIN. TIMES (London), July 8, 1996, at 17.

Moreover, ITT has apparently obtained \$25 million from Telecom Italia SpA for the right to use the telephone system ITT installed before the Revolution. See Jean Gruss, *100 Years of Cuba, Questions Circle Seized Property*, TAMPA TRIB., Mar. 15, 1998, available in 1998 WL 2767731. That relieves the Italian company of any threat of ITT to use the LIBERTAD Act Title III provisions. See *id.*

LIBERTAD Act Title III excludes from its scope persons with claims less than \$50,000, and thus many claims of Cubans for homes or small businesses. See 22 U.S.C.A. § 6082(b). The provisions are also referred to as the "wealthy Cuban" provisions. See Desloge, *supra*, at C01.

162. See 22 U.S.C.A. § 6082.

163. See 22 U.S.C.A. § 6091(a) (West Supp. 1997). Title IV is clearly subject to challenge at the present time; both Canadian and Mexican nationals have been denied visas to enter the United States. See *United States: Department of State Standard Language Title IV Determination — Letter on Denying Visas Under the Helms-Burton Act 1996*,

The issue of the rights of persons who were Cuban citizens at the time of the expropriations to present claims for compensation for what would principally be business investments seems to rest on the nature of their citizenship at the time of the expropriation. International law rules have addressed principally the state responsibility to *foreigners* at the time of the questioned conduct, and not to citizens of that state who may become foreigners. Is there an international law principle prohibiting one nation, in this case the United States, from offering a United States forum for persons who were not its nationals at the time of the taking, in this case Cubans who have become Americans?¹⁶⁴ That raises the question whether the United States is interfering in the processing of claims by Cuba of persons who were Cuban citizens at the time of the expropriations.¹⁶⁵ Furthermore, claims have never been allowed against property other than that which was expropriated and which is within the jurisdiction of the claimant.¹⁶⁶ The OAS Juridical Committee Opinion states, "domestic courts of a claimant State are not the appropriate forum for the resolution of State-to-State claims,"¹⁶⁷ and that the "claimant State does not have the right to espouse claims by persons who were not its nationals at the time of the injury."¹⁶⁸ A challenge under the NAFTA may address this issue, since Canadians or Mexicans could be charged with trafficking.

What if the LIBERTAD Act provided only for actions by persons who were United States nationals at the time of the taking?¹⁶⁹ Some of the same arguments discussed above would apply as well to these

reprinted in 36 I.L.M. 1667, 1667 (1997) [hereinafter *Letter Denying Visas*].

164. A counter-argument may be that Cuba is entitled to deal with persons who were Cuban citizens at the time of the expropriations as a class separate from any other national group, even though emigrants became nationals of and were permitted to join those other national groups.

165. That is certainly the sense of the Cuban response to the LIBERTAD Act, the Cuban Ley de reafirmacion de la dignidad y soberania Cubana (Law Reaffirming the Dignity and Sovereignty of Cuba). See *supra* note 90 (discussing the Cuban response).

166. See *OAS Opinion*, *supra* note 104, ¶ 6(a). Property of the taking state located in the state of the persons who were expropriated is often frozen, and later may be part of a settlement.

167. *Id.*

168. *Id.* ¶ 6(b).

169. For an equal protection argument, see Jonathan R. Ratchik, Note and Comment, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U.J. INT'L L. & POL'Y 343, 364 (1996). Canada and Mexico are not concerned with who is entitled to bring claims under the LIBERTAD Act, but with the prospect that their nationals will be the subjects of the claims.

claims, such as the right to seek compensation from a third nation's assets. But the issue of a nation including post-expropriation citizens would not be present. Many United States claimants are concerned with the LIBERTAD Act because they believe that Cubans who have become United States citizens are not entitled to share in any future settlement worked out between Cuba and the United States.¹⁷⁰

Article 1102 of the NAFTA requires that “[e]ach Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors.”¹⁷¹ United States investors are not subject to Title III “trafficking” sanctions, but they are prevented by other United States law from dealing with such property. National treatment may be a difficult section for Canada or Mexico to argue regarding foreign investment.¹⁷² But it may apply when one considers that the United States prohibits its investors from participating in a secondary boycott, for example the Arab boycott against Israel, but demands that foreign investors in Canada and Mexico participate in a secondary boycott against Cuba or Iran. Usually national treatment involves a nation denying to a foreign investor what its own investors are permitted to do. This case offers the opposite, requiring the foreign investor to engage in a form of conduct the United States considers inappropriate for its own investors.

Article 1110 is the NAFTA rule against expropriation without compensation.¹⁷³ If section 302 of Title III of the LIBERTAD Act results in a Canadian or Mexican investment in the United States being taken to satisfy a claim that lies against Cuba for the latter's expropriations, does this constitute anything more than a second uncompensated expropriation? It requires one to view the act of

170. See 22 U.S.C.A. § 6082(h). If the conditions of the LIBERTAD Act are fulfilled regarding the restoration of democracy in Cuba, rights under the trafficking provisions terminate, and thus the claims of Cuban-Americans terminate. See *id.* Claims of persons who were United States citizens at the time of the expropriations continue as they existed prior to the LIBERTAD Act. See *id.*

171. NAFTA, *supra* note 19, art. 1102(1).

172. The LIBERTAD Act may create a different treatment standard, but the treatment of Canadian and Mexican investors may be more favorable. For example, Canadian and Mexican investors may invest in Cuba, but they face civil sanctions if they traffic. See 22 U.S.C.A. § 6082(a). United States investors may not invest in Cuba and face civil and criminal sanctions for doing so. See *id.*

173. See NAFTA, *supra* note 19, art. 1110.

trafficking under Title III as being devoid of any characteristic that could give rise to civil liability,¹⁷⁴ essentially considering trafficking to be a sham and existing solely to shift the burden of collecting for the Cuban expropriation from the claimant in the United States to the Canadian or Mexican party. It is not at all clear that Cuba would or should recognize such a Canadian or Mexican party as a legitimate subrogee of the original claimant.

*TEMPORARY ENTRY FOR BUSINESS PERSONS UNDER
NAFTA CHAPTER 16*

NAFTA Article 1603 requires that “[e]ach Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to health and safety and national security.”¹⁷⁵ Annex 1603 requires that temporary entry be granted as long as the person “otherwise complies with existing” immigration laws.¹⁷⁶ “Existing” immigration laws refers to those in effect on January 1, 1994, with respect to Mexico, and on January 1, 1989, with respect to Canada.¹⁷⁷ The LIBERTAD Act postdates both.¹⁷⁸ Section 401 of Title IV of the LIBERTAD Act¹⁷⁹ requires the United States to prohibit visas to persons who have trafficked in confiscated property.¹⁸⁰ But it is not an absolute prohibition. A party is allowed to obtain entry rights upon ceasing to traffic in confiscated property.¹⁸¹

The NAFTA ought not be read to suggest that a Party may not alter its immigration laws in any manner. Certainly, national security interests would justify denying visas to other Parties' nationals.

174. The notion that the United States has the authority to enact legislation that imposes civil liability on a foreign party (i.e., Canadian or Mexican) for having undertaken an act in a third nation (i.e., Cuba or Iran) which is a lawful act in both the foreign nations, seems to stretch the concept of jurisdiction to legislate two nations too far.

175. NAFTA, *supra* note 19, art. 1603. Guidelines implementing Title IV were issued by the Department of State on June 17, 1996. *See* Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30,655 (1996); *see also* *Letter Denying Visas*, *supra* note 163, at 1667.

176. NAFTA, *supra* note 19, annex 1603.

177. *See id.* annex 1608(a)–(b).

178. *See* 22 U.S.C.A. § 6901(a) (West Supp. 1997).

179. *See id.*

180. *See id.*

181. *See* Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30,655 (1996).

Supporters of the LIBERTAD Act may argue that “existing” immigration laws allow denial of entry to persons accused of crimes, and that all the LIBERTAD Act does is deny visas to such persons. But it does much more. First, not one of the corporate officials of the two Canadian and Mexican firms that have been denied rights to visas because their enterprises are thought to be trafficking has been charged with any crime.¹⁸² More troublesome is the denial of visas to their families, a guilt by association uncommon to American legal thought.

The OAS Juridical Committee did not address the form of visa denial contained in Title IV of the LIBERTAD Act.¹⁸³ International law does not entitle free movement of peoples from one nation to another.¹⁸⁴ A nation may establish its own concepts of immigration. The LIBERTAD Act Title IV visa denial provisions may be lawful under the law of nations, however angry it may make other nations. But in participating in the NAFTA, the United States relinquished some authority to restrict business travel by persons from the other Parties. If a NAFTA panel rejected Title III of the LIBERTAD Act, ruling the trafficking provisions inconsistent with NAFTA commitments, the support for Title IV would vanish. If a person cannot be a trafficker, that person cannot be denied entry under Title IV. If Title III were upheld, however, the Title IV provisions would have to be tested under the Article 1603 language of the NAFTA stated above, with attention to the permissible alteration of immigration laws in view of the “existing” law provisions.

CANADIAN/MEXICAN REQUEST FOR DISPUTE RESOLUTION UNDER THE NAFTA

Soon after the adoption of the LIBERTAD Act on March 12, 1996, Canada and Mexico demanded negotiations with the United States.¹⁸⁵ The consultations failed to resolve the issue.¹⁸⁶ These de-

182. See, e.g., Jose de Cordoza, *Mexico's Doms Catches U.S.-Cuban Heat*, WALL ST. J., Aug. 19, 1996, at A9.

183. See *OAS Opinion*, *supra* note 104.

184. At most, there may be human rights issues when a nation denies political asylum to a person on its territory whose life is in jeopardy if deported.

185. See *Clinton Extends Suspension*, *supra* note 103, at 42.

186. See *id.* One problem with the consultations is that the LIBERTAD Act severely restricts the President's discretion to modify the sanctions against Cuba. The experience of the President with the E.U., where successive discussions following the request for a

mands did not include a formal complaint under the NAFTA, and thus did not generate consultations which would constitute the first formal stage in a Chapter 20 proceeding.¹⁸⁷ Canada and Mexico have thus far deferred initiating a request under Chapter 20 for a dispute resolution panel, at least partly because of the E.U. challenge under the WTO.¹⁸⁸ The arguments under the WTO, as Professor Spanogle discusses in his article,¹⁸⁹ include some general arguments regarding international law similar to those that would be raised under the NAFTA. The WTO challenge, if concluded in a published decision, will provide some guidance as to what might evolve under NAFTA dispute resolution. But that may not occur, because the United States has threatened to use the national security provisions of both the WTO and the NAFTA to attempt to block debate on the issue.¹⁹⁰ How a NAFTA challenge might proceed is not entirely clear. The United States cannot block the formation of a Chapter 20 panel.¹⁹¹ If the Parties do not agree on the chair of the five member panel, a

WTO dispute panel have been unsuccessful partly because while the President has promised to seek modifications of the Title IV visa restrictions, Senator Helms has sought to enforce them more severely. *See id.* If a WTO dispute panel reaches a decision adverse to the United States, Congress might be pressured to modify the laws in order to terminate whatever suspension of benefits might be imposed by the E.U. following the panel decision.

187. *See id.* A formal process under the NAFTA would require a copy of the request for consultations to be sent to its Section of the NAFTA Secretariat. *See NAFTA, supra* note 19, art. 2006(2).

188. *See generally Helms-Burton Law Guidelines Are Inadequate, Lawyer Charges*, 13 Int'l Trade Rep. (BNA) 26 d13 (June 26, 1996) (noting that Canada and Mexico are pursuing remedies under Chapter 20, but that there is no resolution yet). During the ABA International Law Section Fall Meeting held in Mexico City in October 1995, I asked fellow panelists Mark Entwistle, Canadian Ambassador to Cuba, and Federico Urruchua, Mexican Director for Latin America and the Caribbean at the Foreign Relations Secretariat, whether the NAFTA Chapter 20 process might be used by Canada or Mexico to challenge the Cuban Democracy Act. The CDA had been the topic of the panel which was just completed and had been vigorously condemned by both persons, while defended by the United States government official on the panel, Richard Nuccio. Both Ambassadors Entwistle and Urruchua responded with quite strong feelings that the NAFTA ought not be the forum in which to address such a highly charged political issue. The LIBERTAD Act changed the policy of both Canada and Mexico, but it of course added especially objectionable provisions which made it far more extraterritorial than the CDA.

189. *See John A. Spanogle, Jr., Can Helms-Burton Be Challenged Under WTO?*, 27 STETSON L. REV. 1313 (1998).

190. For a discussion of the NAFTA and WTO security provisions, *see supra* notes 52-57.

191. *See NAFTA, supra* note 19, arts. 2008, 2011.

disputing Party chosen by lot selects the chair.¹⁹² Were the United States to be the Party chosen by lot, and then refuse to select the chair, as well as refuse to select two panelists, the panelists would be selected by lot from among the roster members who are citizens of the other disputing Party.¹⁹³ The United States would probably raise the national security defense prior to the selection of the panel and refuse to participate any further in the process. In such case, the panel could be established and render its decision without any participation by the United States.¹⁹⁴ While the United States would deny the validity of any adverse decision, it might be used to justify a suspension of benefits.¹⁹⁵ A Chapter 20 panel might even consider the national security defense a permitted unilateral action, which relieves the United States from any participation in a debate it believes has national security implications, *but* nevertheless does not absolve the United States of its trade obligations under the NAFTA.¹⁹⁶ These uncertainties illustrate the undesirability of having the NAFTA dispute resolution process become overwhelmed by pseudo-national security issues.¹⁹⁷ The Chapter 20 stage that uses arbitral panels was not intended to resolve political issues.

IMPACT OF THE NAFTA SANCTIONS CONFLICT ON OTHER TRADE AGREEMENTS

The United States sanctions provisions referred to in the LIBERTAD Act predated the completion of both the NAFTA and the WTO Agreement. Because of their uniqueness to domestic law, their nature was not addressed in the negotiations of either agreement.¹⁹⁸

192. *See id.* art. 2011(1).

193. *See id.* However, when there are more than two disputing Parties, Article 2011(2) applies. *See id.* art. 2011(2).

194. Nothing in the Chapter 20 provisions prohibits a panel from continuing after a Party has withdrawn.

195. *See* NAFTA, *supra* note 19, art. 2019.

196. *See id.* art. 2102.

197. The United States has almost no support for its declaration that a national security defense to challenges of its sanctions laws regarding Cuba is justified. Cuba is simply not a threat to the United States. One concern which might threaten parts of the United States is the construction of a nuclear power facility plant at Juragua, near the southern port city of Cienfuegos. Assisted by the Soviet Union, the United States has raised doubts about the safety of the construction. This author saw the site on a weekday in February 1998, and there were no signs of current construction activity.

198. Had the LIBERTAD Act been enacted prior to the NAFTA, it seems clear that Canada and Mexico would have insisted on an exemption from the provisions of Title III

But they have proven so unacceptable to other nations that they have been raised in other trade agreement negotiations.

Current negotiations within the twenty-eight nation Organization for Economic Cooperation and Development ("OECD") illustrate how the United States sanctions laws, especially Title III to the LIBERTAD Act, will be confronted in future multilateral negotiations.¹⁹⁹ The OECD is near completion of a Multilateral Agreement on Investment (MAI).²⁰⁰ The target completion date was April 1998.²⁰¹ Canada and the E.U. believe the United States position on Cuba is incompatible with the agreement goal of a policy of nondiscrimination and national treatment of all investments.²⁰² That would mean a Canadian investment in Cuba must be respected by the United States. The United States continues to argue that any such investment ought not be on property formerly owned by a United States citizen and expropriated without compensation. While the principal conflict that must ultimately be resolved is between the expropriating nation (Cuba) and the person whose property was expropriated (the United States citizen), the LIBERTAD Act attempts to bring that conflict to a more rapid conclusion by unilateral coercive measures directed against third party nations and their investors or traders.²⁰³ The OECD negotiations have verified the objection to the United States position, threatening the successful conclusion of investment rules the United States has long supported.²⁰⁴ Unless the United States modi

and Title IV.

199. See, e.g., *Canada Considers Helms-Burton Law to Be a Deal Breaker in MAI Negotiations*, 14 Int'l Trade Rep. (BNA) 1556 (Sept. 17, 1997) [hereinafter *Canada Considers Helms-Burton*]; *Canadian Government Urged to Negotiate Extraterritorially Prohibition in MAI Pact*, 14 Int'l Trade Rep. (BNA) 1681 (Oct. 1, 1997) (discussing the negotiations that Canada is a party to and Mexico is not). The inability to settle this issue in the MAI negotiations could lead Canada to commence a specific challenge to the LIBERTAD Act under the NAFTA. See *Canada Plans Legislation to Counter Helms-Burton Law*, 13 Int'l Trade Rep. (BNA) 25 d17 (June 19, 1996) [hereinafter *Canada Plans Legislation*].

200. See *Canada Considers Helms-Burton*, *supra* note 199, at 1556.

201. See *id.*

202. This supports the view that the NAFTA provisions on nondiscrimination and national treatment provide a legitimate basis on which to challenge sanctions laws with extraterritorial secondary boycott effects. See, e.g., Leslie Crawford, *Mexicans Celebrate Victory over U.S.*, FIN. TIMES (London), Feb. 16, 1998, at 5.

203. See *Canada Plans Legislation*, *supra* note 199, at 25 d17.

204. See *Canada Will Use Delay in MAI Accord to Seek Provincial Approvals*, *Marchi Says*, 15 Int'l Trade Rep. (BNA) 337 (Feb. 25, 1998). There are other issues

fies its isolation, it threatens all future trade agreements.²⁰⁵

CONCLUDING COMMENTS

Had Canada and Mexico been able to predict the extent to which the United States might extend its embargo of Cuba, they might have demanded a provision in the NAFTA somewhat as follows:

Parties shall be prohibited from imposing upon any other Party any actions which are intended to require the other Party to comply with, further or support any boycott fostered or imposed by the Party against a country which is friendly to the other Party.

If some of these words appear familiar it is because they are adapted from the United States antiboycott provisions of the Export Administration Act.²⁰⁶ The United States antiboycott provisions clearly prohibit any United States entity from complying with, furthering, or supporting any boycott Canada or Mexico might have against a country friendly toward the United States.²⁰⁷ The LIBERTAD Act and, to a lesser degree, the Cuban Democracy Act, coerce Canada and Mexico to do what the antiboycott laws prohibit when the shoe is on the other foot. Supporters of the Cuban embargo legislation dispute labeling this legislation as secondary boycott legislation.²⁰⁸ It is doubtful that a NAFTA panel would agree.

The application of specific sections of the NAFTA as discussed

remaining in the MAI negotiations, including the concern of Canada and France that freer investment rules ought not harm national cultural standards. *See id.*

205. Whether or not it would threaten the extension of the NAFTA south to a Free Trade Area of the Americas is not clear. Most of the nations which might participate in such agreement would receive benefits from free trade with the United States far outweighing their benefits of trade with Cuba, and might be willing to overlook the issue. The most likely nations to raise the issue would be Canada and Mexico.

206. *See* 50 U.S.C.A. app. § 2407 (West 1991 & Supp. 1997).

207. *See id.* How would the United States react were the Netherlands to impose a boycott upon Indonesia, with a pseudo LIBERTAD Act law addressed to trafficking in the former properties of Dutch citizens expropriated by Indonesia in the 1960s and never adequately compensated? Would United States banks, which have a very large stake in the current and sensitive financial problems with the Indonesian government, assume the position the United States expects from Canadian and Mexican companies investing and trading in Cuba?

208. *See Breaking International Law*, *supra* note 21, arguing for support of the Cuban legislation.

above does not provide very clear answers to the question of the incompatibility of the United States sanctions laws with American commitments under the NAFTA. But the extraterritorial ambitions of the LIBERTAD Act and the ILSA are inconsistent with the goals of the NAFTA.²⁰⁹ Might the sanctions laws be rejected as illegal harassment inconsistent with the objectives of the NAFTA, as stated in Article 102?²¹⁰ It is clear that some proposed investments in Cuba by Canadians and Mexicans have been withdrawn solely because of the LIBERTAD Act.²¹¹ The reasons are rarely that they had intended to traffic in expropriated property, but that the “possible” and “unclear” effect of the Act suggested that it was simply not worth the potential confrontations with the United States over doing business in Cuba.²¹² One clear intent of the LIBERTAD Act is to create a “mist of doubt” about whether one might be affected by doing business in Cuba. The Act may discourage more business that would not qualify as trafficking than that which meets the definition.²¹³ It clearly has not discouraged all foreign business planned in Cuba, and as understanding and planning has dulled some of the teeth of LIBERTAD, investment is increasing, especially in the tourism industry.²¹⁴

209. *See id.* It is this author's view that the most likely conclusion would be that Title III violates international law for reasons paralleling those in the *OAS Opinion*, *see supra* notes 104–06, and thus violates the NAFTA since it incorporates international law. Furthermore, Title IV might be held inconsistent with the NAFTA Article 1603. *See supra* note 175, and accompanying text, for the above discussion of the NAFTA Article 1603.

210. *See* NAFTA, *supra* notes 19, 132–35, art. 102.

211. *See* Jose Puertas, *Washington, Havana Dispute Helms-Burton on Law's First Anniversary*, AGENCE FR.-PRESSE, Mar. 11, 1997, available in 1997 WL 2075329.

212. *See id.*

213. This author has witnessed first hand this “mist of doubt” about doing business in Cuba, in advising both foreign owned and incorporated companies whether their present business activities in Cuba violate United States law, and how they might structure their business enterprises in Cuba and the United States so as to avoid a confrontation with United States sanctions laws. The CDA and LIBERTAD acts are clearly viewed as unreasonable intrusions on friendly foreign nation's businesses and as attempting to create an atmosphere of intimidation as a substitute for rational legislative behavior. For example, under the LIBERTAD Act, a Canadian or Mexican company investing in Cuba ought to avoid being assigned a plant or other property which was expropriated from Cubans who later became United States citizens. Using property of a Cuban who became a citizen of Canada or Mexico, or any other nation except the U.S., would not cause Title III concerns. It may not be easy to determine where an expropriated Cuban owner went after leaving Cuba.

214. *See* López, *supra* note 15, at 252.

Trade issues are often sufficiently difficult to resolve without complicating external factors. A trade conflict may be exacerbated by conflicting economic theories, such as affecting the use of countertrade or privatization of investment. The conflict may be exacerbated by conflicting political goals, such as the support for or opposition to a government. Even different cultural perceptions may affect the conflict, such as where the preservation of culture becomes little more than a trade or investment barrier. Further adding to the complexity is the fact that the economic, political and/or cultural policies and goals may appear "on the books" in one way, and be implemented in another.²¹⁵ We thus may address a maze of variables which include the following:

1. Economic policy expressed in written laws;
2. Economic policy expressed in the operational code;
3. Political goals expressed in written laws;
4. Political goals expressed in the operational code;
5. Cultural goals expressed in written laws; and
6. Cultural goals expressed in the operational code;

While these comments cannot give thorough consideration to how United States sanctions laws and policies, and foreign responding laws and policies, may be described under the above six variables, a few comments may illustrate that the sanctions issue is unusually complex.

In most trade and investment conflicts, a single trader or investor is met with the written and unwritten laws of a single nation. But in the sanctions conflict, that trader or investor may be placed in the middle of a triangle of conflicting written and unwritten laws. Consider a Canadian investor with an investment in Cuba, such as the Sherritt company.²¹⁶ Sherritt must function within the Cuban structure of written laws and the operational code in Cuba.²¹⁷

215. See Michael Wallace Gordon, *Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations*, 16 INTER-AM. L. REV. 301, 334 (1984).

216. For a discussion of the Sherritt Company, see *supra* note 11.

217. The comparison between written laws and how they are enforced is an especially interesting subject at this time. While maintaining a written and pronounced socialist theory of political economy, Cuba has issued several laws and decrees in the past few years which illustrate a slight movement towards a market economy. The operational code has been both more restrictive and less restrictive than the written law. It has been less restrictive as it has tolerated new forms of business to function outside the

Sherritt's operations function without significant control by the Canadian government. But the United States' sanctions laws added a new element for Sherritt to consider: the laws on the books in the United States and how they are actually being enforced — the operational code. To this new dimension was soon added new Canadian laws enacted to counter or nullify the effects of the United States laws on Canadian persons, including Sherritt.²¹⁸ Sherritt thus faces Cuban, Canadian, and United States laws and policies in carrying out its operations in Cuba. For many potential traders and investors, this maze has proven too complex, and trade and investment decisions have been deferred or canceled. The United States laws have discouraged some, and probably considerable, trade with and investment in Cuba by many third nation persons, including those in NAFTA partners Canada and Mexico.²¹⁹

In reality, the restrictive laws and unpredictable policies within Cuba are a greater discouragement to trade and investment than the United States sanctions laws.²²⁰ The latter deserve only partial credit for the modest levels of foreign trade with and investment in Cuba. They deserve no credit for achieving their primary goal, the demise of the Castro regime. The natural process of aging seems more likely to be the reason Castro's governance will end. When will that be? As Yogi Berra said, "It ain't over till its over."²²¹ When it is over, the United States sanctions will undoubtedly be applauded as a significant contributor to the end of the Castro regime. If indeed they are, it will be at the cost of considerable conflict with a very large number of friendly foreign nations, including our two NAFTA neighbors. Canada and Mexico may justly believe that while the first United States sanctions were directed exclusively at Cuba, as they failed in their purpose they were replaced by sanctions that in-

framework of written law, but has sometimes quickly become more restrictive as those businesses achieved successes beyond what the administration thought acceptable within the socialist framework. Long interested in the conflict of the written law and the operational code, especially in nations in transition, I am currently writing on this issue using Cuba as the subject.

218. For the Canadian blocking laws, see *supra* note 20.

219. See *supra* note 13 (indicating the United States sanctions laws have not stopped investment in Cuba).

220. It might be considered a "self-imposed embargo" more than one externally generated.

221. *Famous Yogi Berra Quotes* (visited Mar. 31, 1998) <<http://www.yogiberraclassic.org/quotes.htm>>.

creasingly drew into the embargo unwilling friends.

That leads to a final point. How can the United States be so right and so many other nations be so wrong in evaluating the Cuban Democracy Act and the LIBERTAD Act under international legal principles? A partial list of nations and organizations that have rejected these laws either as part of a general unlawful extraterritorial application of United States laws in general, or an enactment of a specific law in conflict with international law principles, includes the following:

1. There have been annual votes since 1992 adopting a series of U.N. General Assembly resolutions. Initially, they were principally directed to excessive extraterritorial application of United States laws, but more recently include a specific urging that the United States end its embargo against Cuba.²²²
2. The OAS, prior to the issuance of the Opinion of the Juridical Committee discussed above,²²³ passed a resolution at the May 1996, general assembly that referred the LIBERTAD Act to the Juridical Committee.²²⁴ Only the United States and Dominica dissented.²²⁵ The Council of the Latin American Economic System voted in July 1995, to urge the end of the embargo.²²⁶
3. The OECD, separate from the difficulty during the past year in concluding its proposed MIA,²²⁷ at the annual ministerial

222. For example, the 1997 Resolution vote was 143 in favor, 3 against and 17 abstentions; the 1996 Resolution vote was 137 in favor, 3 against, and 25 abstentions. See Robert H. Reid, *Cuba Accuses U.S. of Backpedaling on Amending Helms-Burton Act*, ASSOC. PRESS, Nov. 5, 1997, available in 1997 WL 2560423. The 1995 Resolution vote was 117 in favor, 3 against (U.S., Israel and Uzbekistan), and 38 abstentions. See *U.N. Calls Upon U.S. to End Cuban Embargo*, DALLAS MORN. NEWS, Nov. 3, 1995, available in 1995 WL 9069987. Beyond the scope of this article is a discussion of the arguments made by opponents of the LIBERTAD Act that these U.N. Resolutions have established customary international law. They are not sound arguments; there is little support for the General Assembly having any power to make international law by the enactment of one, or a succession of, Resolutions. See, e.g., Derek W. Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 245, 252-54 (1976); D.H.N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97, 111-22 (1955); Richard B. Lillich, *Economic Coercion and the New International Order: A Second Look at Some First Impressions*, 16 VA. J. INT'L L. 233, 237 (1976).

223. See *OAS Opinion*, supra note 104 (discussing specific provisions of the Opinion).

224. See *id.*

225. See Eloy O. Aguilar, *Canada, Mexico Lead Attack on Helms-Burton Law*, ASSOC. PRESS, June 4, 1996, available in 1996 WL 5386488.

226. See *Latin American Leaders to Urge End of Cuba Embargo*, DALLAS MORN. NEWS, Oct. 16, 1995, at 9A.

227. See supra notes 198-204, for a discussion of OECD actions.

meeting in May 1996, issued a final communique with an oblique but intended reference to the United States, by a comment that the organization wished to “strengthen the multilateral system . . . by avoiding taking trade and investment measures that would be in violation of WTO rules and OECD codes.”²²⁸

4. Six Central American nations' leaders joined Canadian Prime Minister Jean Chretien in a May 1996, communique expressing opposition to unilateral measures, meaning but politely omitting specific reference to the LIBERTAD Act.²²⁹

5. The Council of the European Union and the European Commission, on March 5, 1996, prior to commencing the dispute resolution process under the WTO,²³⁰ restated its opposition to the LIBERTAD Act initially expressed in a Demarche of March 13, 1995.²³¹ A 1995 letter from Sir Leon Brittan, Vice-President of the Commission, to Secretary of State Warren Christopher, warned that the proposed LIBERTAD legislation would negatively affect transatlantic relationships.²³² The European Parliament issued a resolution in April 1996 noting “deep regret and disappointment” with the LIBERTAD Act, which it viewed as “in conflict with international law and harm[ing] E.U. rights in trade and investment sectors.”²³³ The E.U. issued a communique at its summit in Florence, Italy, in June 1996, asserting a right to respond to the LIBERTAD Act and any other secondary boycott legislation with extraterritorial effect.²³⁴ The E.U. filed a complaint about the LIBERTAD Act with the WTO in September 1996, which commenced the dispute resolution process.²³⁵ The United States stated it would apply the national security exception to this complaint as

228. *Incorporates Communique Series*, AGENCE FR.-PRESSE, May 22, 1996, available in 1996 WL 3858407.

229. *See PM Gains Allies over Cuba*, CALGARY HERALD, May 17, 1996, at A19.

230. *See supra* note 7, for a discussion of the United States and E.U.'s attempted use of the WTO dispute resolution process.

231. *See European Union: Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act*, Mar. 5, 1995, reprinted in 35 I.L.M. 397 (1996).

232. *See Letter from Sir Leon Brittan, Vice President of the Commission of the European Communities, to Warren Christopher, Secretary, U.S. Department of State*, Mar. 15, 1995, reprinted in 35 I.L.M. 339 (1996).

233. *E.U. Parliament Resolution on Cuba*, Apr. 22, 1996, O.J. (C 96) 4; *see also Transatlantic Dialogue on Cuban Rocks*, EUROPEAN REP., Apr. 24, 1996, available in 1996 WL 8662797.

234. *See Lionel Barber & Robert Graham, Europe Sends Warning to U.S. over Sanctions*, FIN. TIMES (London), June 24, 1996, at 2.

235. *See supra* note 7 (indicating the E.U. filed a complaint against the LIBERTAD Act with the WTO).

well as in the NAFTA proceeding.²³⁶ European Commission President Jacques Santer in June 1996, presented E.U. objections to the proposed law to President Clinton a week before the Group of 7 ("G-7") meeting noted next below.²³⁷ An E.U. Council Regulation concerning the Extraterritorial Legislation of Third Countries was issued on November 22, 1996.²³⁸ The E.U. Council of Ministers adopted a Common Position on Cuba on December 2, 1996.²³⁹

6. The G-7 Economic Communique issued in June 1996, at Lyon, France, modified originally proposed language that protested extraterritoriality of laws to a reaffirmation of the multilateral trading system and avoidance of taking measures in contradiction to world trading rules, and expressing preferences for using dispute resolution systems to resolve differences.²⁴⁰ Prime Minister John Major of the U.K. and President Jacques Chirac of France were reported to have privately protested to President Clinton about the enactment of the LIBERTAD Act.²⁴¹ It was the European pressure that led President Clinton to suspend the initiation of suits under Title III in July 1996.²⁴²

7. The National Foreign Trade Council, Organization for International Investment, United States Chamber of Commerce, European-American Chamber of Commerce, and United States Council for International Business wrote to the Clinton administration on July 1, 1996, opposing Title III of the LIBERTAD Act and urging suspension of the date of effectiveness for suits under Title III of the LIBERTAD Act.²⁴³

8. The Rio Group summit in Bolivia in September 1996 rejected the LIBERTAD Act's extraterritorial effects.²⁴⁴

236. The status is discussed *supra* note 7. See also Evelyn F. Cohn & Alan D. Berlin, *European Community Reacts to Helms-Burton*, N.Y. L.J., Aug. 4, 1997, at 52, 52.

237. See *Clinton Will Be Forced to Make Pivotal Helms-Burton Move Next Week*, AGENCE FR.-PRESSE, July 1, 1996, available in 1996 WL 3880521.

238. See European Union Blocking Measure — Council Regulation 2271/96, 1996 O.J. (L 309) 1.

239. See *European-Union: Council of Ministers Common Position on Cuba*, reprinted in 36 I.L.M. 213 (1997).

240. See Larry Elliott, *G7 Summit in Lyon: Clinton Takes Flak over Ban on Cuba Trade U.S. Allies Expert Pressure to Stop Law Hitting Foreign Firms*, GUARDIAN, June 29, 1996, at 039.

241. See Robert A. Rankin, *Business as Usual Urged for Outlaws*, TIMES UNION, June 29, 1996, at A3.

242. See Transcript of a White House Briefing by Sandy Berger and Peter Tarnoff (July 16, 1996), available in 1996 WL 5622672.

243. See 142 CONG. REC. 1247-02 (July 10, 1996) (statement by Rep. Hamilton) (referring to the written opposition of Title III of the LIBERTAD Act).

244. See Christian Torres & Carlos Montero, *Rio Group: U.S. Attacked and Citizen*

9. The Vatican criticized the LIBERTAD Act because of its extraterritoriality and possible harmful effects on the Cuban people.²⁴⁵

10. Opposition by some individual nations has taken the form of establishing closer ties with Cuba. For example, Germany entered into a bilateral investment agreement with Cuba in May 1996.²⁴⁶ Canada and Cuba signed a Joint Declaration on Cooperation on Political, Economic, and Social Issues in January 1997.²⁴⁷ France signed a bilateral investment protection treaty in April 1997.²⁴⁸ These are significant agreements with some of Cuba's major trading partners.

11. Opposition by individual American businesses has increased. It was estimated that in 1990 representatives of more than 400 United States businesses visited Cuba.²⁴⁹ This increased to 1300 businesses in 1995.²⁵⁰ Many American firms have signed letters of intent with the Cuban government to commence business as soon as allowed under United States law.²⁵¹ That means when the embargo is lifted, not when Castro is gone.²⁵²

It is not a very sound legal argument to state that when public opinion is so out of balance, the law must side with the large majority. But under notions of comity, respect for sovereignty, diplomacy, and fundamental fairness, this imbalance speaks loudly that the United States is *perceived* to be acting inappropriately. Inappropriateness is not a legal standard, but it ought to be a signal to the United States that its policies toward Cuba, and possibly others, such as Iran, ought to exclude the coercive elements that are increasingly accept-

Participation Called for, INTER PRESS SERV., May 19, 1997, available in 1997 WL 7075431.

245. See Victor L. Simpson, *Vatican Makes First Attack on Helms-Burton*, ASSOC. PRESS, Oct. 18, 1996, available in 1996 WL 4444957.

246. See Pascal Fletcher, *German Investment Accord with Cuba*, FIN. TIMES (London), May 1, 1996, at 5.

247. See *Canada-Cuba: Joint Declaration on Cooperation on Political, Economic, and Social Issues*, Jan. 22, 1997, reprinted in 36 I.L.M. 210 (1997); see also *Helms-Burton and U.S. Embargo Do Little to Limit Cuban Trade, Canadian Envoy Says*, 14 Int'l Trade Rep. (BNA) 231 (Feb. 5, 1997).

248. See *France and Cuba Sign Investment Protection Pact*, 14 Int'l Trade Rep. (BNA) 785 (Apr. 30, 1997).

249. See, e.g., Joy Gordon, *Cuba's Entrepreneurial Socialism*, ATLANTIC MONTHLY, Jan. 1, 1997, at 18.

250. See *id.*

251. See *id.*

252. See *id.*

able to Congress and the administration for what appear to be very clear political and often electoral reasons.

However much the United States seems to be targeted by foreign nations challenging its sanctions laws, recent events have not suggested that political pressure groups in the United States will lessen their attempts to further extend the extraterritorial application of United States law. Six days before the United States and E.U. Union officials met in mid-October 1997 to discuss the E.U. threat to renew its WTO request, Sen. Jesse Helms presented an extensive demand to the State Department for details on the application of Title IV visa issuance prohibitions to support his opinion that the United States had not made sufficient denials under this provision.²⁵³ Separately, Cuban-American congressional members from South Florida have proposed new legislation which would deny the President his current discretion to grant six month waivers deferring the ability to bring actions under the Title III trafficking provisions of the LIBERTAD Act.²⁵⁴ If nothing is accomplished during the next three years, and if candidates for the presidency in the 2000 elections again view Florida electoral votes both to be critical for election and strongly affected by the South Florida Cuban-American community, laws of far greater hostility toward Cuba and friendly third nations than the laws discussed at this Symposium may be enacted.

253. See Gary G. Yerkey, *Senator Helms Asks U.S. for Documents on Cuba Law, Says President Failed to Act*, 14 Int'l Trade Rep. (BNA) 1766 (Oct. 15, 1997).

254. For a discussion of South Florida's new legislation, see *supra* note 103.