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GATT AND NAFTA v. THE HELMS-BURTON ACT: HAS THE UNITED STATES VIOLATED MULTILATERAL AGREEMENTS?

I. INTRODUCTION

Although the Castro Government has survived for over thirty-six years, with the fall of the Soviet Union the regime has attempted to save its socialist state, ironically, by introducing a limited amount of capitalism. In addition, recently Castro has cautiously allowed a small amount of foreign investors into Cuba.¹

But in an attempt to thwart Castro's efforts, the United States Congress passed and the President signed the Cuban Liberty and Democratic Solidarity (Libertad) Act (the "Helms-Burton Act" or the "Act") on March 12, 1996.² Although the Act strengthens international sanctions against Cuba and makes investors decide whether they want to trade with the United States or Cuba,³ its overall objective is to remove Castro from power in Cuba and give the Cuban people the opportunity to experience the democratic process.⁴

1. See Jorge L. Dominguez, *The Americas: Helms Bill on Cuba Won't Hasten Democratic Transition*, WALL ST. J., April 28, 1995, at 13. "Castro has publicly stated that he hates to do what he feels he now has to do. He has [done so] . . . because he finds himself stuck, cornered, [and] compelled."

2. 22 U.S.C.A. §§ 6021-91 (Supp. II 1996). Cuban Liberty and Democratic Solidarity (Libertad) Act [hereinafter CLDS].

3. 22 U.S.C.A. §§ 6081-91. Subchapters III and IV imply that the United States wants foreign investors to decide whether they want to trade with the United States or Cuba.

4. Although § 6022(3) of the Act does not explicitly state that its objective is to oust Castro, the fatal effect amounts to that. Purposes include:

[A]ssist[ing] the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere, . . . strengthen[ing] international sanctions against the Castro government, . . . provid[ing] for the continued national security of

The Act attempts to meet its objective by: prohibiting any product that ever touched Cuban soil from entering the United States; allowing United States nationals to sue any foreign person who profits from property confiscated by Castro; and denying to any person who profits from confiscated property a visa to enter the United States.⁵ Since its passage, Canada⁶ and Mexico, and the European Union (EU) have raised concern over whether the Act violates the North American Free Trade Agreement (NAFTA)⁷ and the General Agreement on Tariffs and Trade (GATT),⁸ respectively. This comment analyzes whether the Act violates NAFTA and GATT. Although I only address the EU concerning GATT, the analysis applies to all GATT members except Canada and Mexico. These two countries have chosen to attack the Act under NAFTA.

the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States, . . . encouraging the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers, . . . provid[ing] a policy frame work for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba, . . . and protect[ing] United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime. 22 U.S.C.A. § 6022(3) (Supp. II 1996).

5. CLDS, *supra* note 2. Section 6040 of the Act prohibits any merchandise from entering the United States that is of Cuban origin, has been located in or transported through Cuba, or is made from an article that was grown, produced, or manufactured in Cuba. Section 6082 of the Act provides a civil remedy to those United States nationals whose property Castro confiscated and a foreigner profits from. Section 6091 denies entry into the United States to anyone who profits from the confiscated property of a United States national.

6. In recent years, Canadian companies have been among the most active foreign investors in Cuba. See Peter Zimite, *U.S.-Cuba: Pressure Mounts on Clinton to Waive Helms-Burton*, INTER PRESS SERV., June 14, 1996, at 1. One company in particular, Sherritt International, has been extremely successful. It has a joint venture in nickel mining in Cuba, and expects to boost its operation in eastern Cuba with a \$150 million investment. See Rick Haliechuk, *U.S. to Blacklist Toronto Miner over Cuban Venture*, MONTREAL GAZETTE, June 23, 1995, at D3. However, Sherritt has been targeted by the United States Treasury Department, which notified the company that it is prohibited from dealing with any United States nationals. See *CUBA: U.S. Blacklists Canadian Mining Firm*, CARIBBEAN UPDATE, Aug. 1, 1995, available in 1995 WL 2297183.

7. The North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

8. The General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 33 I.L.M. 1154 [hereinafter GATT].

II. BACKGROUND

Any discussion concerning the United States trade embargo against Cuba must begin in 1959. In that year Fidel Castro became the dictator of Cuba, and although he did not announce that he was a Marxist-Leninist until the end of 1961, he began socializing the economy in 1959.⁹ The Castro Government passed several laws socializing the Cuban economy, but between 1959 and 1960 the Cuban Government passed the Land Reform Act which essentially confiscated property of foreigners.¹⁰ Also, in response to the United States suspension of Cuban import quotas of sugar, Castro announced the expropriation of all United States-owned property in Cuba.¹¹

Ever since 1963, the United States has had an embargo against Cuba.¹² However, it did not have a severe effect on the island nation until the demise of the Soviet Union.¹³ Today, more than 650 foreign companies have invested in excess of 2.1 billion dollars in Cuba.¹⁴ Although Castro is "highly suspicious" of foreign capital, he wants the foreign investment.¹⁵ Cuba has announced that the Act has not affected its economy,¹⁶ but it has announced that the embargo has hurt potential investors who are waiting to see what will happen.¹⁷

9. See INTERNATIONAL COMMISSION OF JURISTS, CUBA AND THE RULE OF LAW 6 (1962).

10. See *id.* at 5.

11. See *id.* See also *Dances with Wolves*, ECONOMIST, Apr. 6, 1996, at 1. Officially the Cubans seized about six million dollars, but unofficially, the estimates are sixty billion dollars.

12. See Cuban Assets Control Regulations 31 C.F.R. § 515.204 (1996). See also *Dances with Wolves*, *supra* note 11, at 1. Cuba figures that the embargo has cost about forty-four billion dollars.

13. See *Dances with Wolves*, *supra* note 11, at 1. See also 141 CONG. REC. H9328, 9338 (daily ed. Sept. 20, 1995) (statement of Rep. Diaz-Belart). The Soviets subsidized the Cuban economy with about six billion dollars annually.

14. See *Their Men in Havana*, ECONOMIST, Apr. 6, 1996, at 1. *Investors Pour Millions into Cuba, Tourists Spur Island's Economy*, SAN DIEGO UNION-TRIB., Apr. 28, 1996, at I2. Although sugar was once Cuba's mainstay, its production is down 55 percent. Tourism, however, is thriving. In 1995 nearly three quarter of a million tourists from Europe, Canada, and Latin America visited the Island and they spent \$1.1 billion. Cuba expects those numbers to rise, and more than double within four years.

15. *Investors Pour Millions into Cuba, Tourists Spur Island's Economy*, *supra* note 14, at 2. *Cuba's Business Laws Puts Off Foreigners*, WALL ST. J., Oct. 10, 1995, at 16. Since 1990 foreign investment has amounted to \$736.9 million. The major investors are Mexico (\$250 million), Spain (\$125 million), Canada (\$100 million), Italy (\$87 million), U.K. (\$50 million), and the Netherlands (\$40 million).

16. See Gary Borg, *Havana: U.S. Law Having no Effect*, CHI. TRIB., June 7, 1996, available in 1996 WL 2678941, at 1. Cuban officials stated that as of June 6, 1996, no foreign investors have pulled out.

17. See The Cuban Liberty and Democratic Solidarity Act, 142 CONG. REC. E371-01, E371 (1996). Cuba's foreign minister denounced the Act as a "law against humanity," and stated that foreign investors would be "daring" to invest in Cuba now because of the potential of it being

In December of 1994, after the Republicans took control of the United States Senate, Senator Jesse Helms, Chairman of the Foreign Relations Committee, hinted that he wanted Americans who had their property seized by Castro compensated by countries that benefit from it.¹⁸ Senator Helms introduced a bill tightening sanctions against Cuba by barring aid to countries that help Cuba.¹⁹ The Cuban Liberty and Democratic Solidarity (Libertad) Act passed in the House,²⁰ and a "watered-down" version passed in the Senate²¹ on September 21, 1995 and October 25, 1995, respectively. But on February 24, 1996, Cuban Migs shot down two unarmed "Brothers to the Rescue"²² planes, killing four people.²³ Although President Clinton vigorously opposed the bill originally, he announced on February 26, 1996, that he would work with Congress to find a compromise.²⁴ After a conference with the Clinton Administration, the Senate, on March 5, 1996, passed a conference report which included tough new sanctions.²⁵ The President signed the bill on March 12, 1996.²⁶ He stated that the Act "is a clear statement of our determination to respond to attacks on United States nationals and of our continued commitment to stand by the Cuban people in their peaceful struggle for freedom."²⁷ Within days of the signing, both Mexico and Canada announced they were going to chal-

"in the pipeline."

18. *See id.* at E371. The legislation has been in the United States Congress for a year, but the downing of the two civilian aircrafts gave it a tremendous boost.

19. *See Helms and Cuba Sanctions*, N.Y. TIMES, Feb. 9, 1995, at 5.

20. *See House Approves Cuba Liberty Act to Tighten Embargo Against Castro*, 12 INT'L TRADE REP. 1606 (1995).

21. *Senate Passes Watered-Down Cuba Bill After Property Provision Dropped*, 12 INT'L TRADE REP. 1771 (1995).

22. "Brothers to the Rescue" is a Cuban exile group that flies over the Florida Straits looking for Cuban refugees and advocates the military overthrow of Castro.

23. *See Kevin Fedarko & Tammerlin Drummon, This Cold War is Back as U.S.-Cuba Relations Hit a New Low, Castro Tells Why His Air Force Shot Down Civilians*, TIME, Mar. 11, 1996, at 36.

24. *See Clinton Says He Will Try To Reach Compromise on Helms-Burton Cuba Bill*, 13 INT'L TRADE REP. 332 (1996).

25. *See New U.S. Legislation on Cuba Trade May Violate NAFTA, Canadian Aide Says*, 13 INT'L TRADE REP. 368 (1996). The Senate passed the House-Senate conference report by a vote of 74-22.

26. *See President Signs Cuba Sanctions Bill After it Passes House by Big Margin*, 13 INT'L TRADE REP. 421 (1996). The bill passed in the House by a vote of 336-86.

27. Statement by President William J. Clinton Upon Signing H.R. 927, 32 WEEKLY COMP. OF PRES. DOC. 479 (Mar. 18, 1996). The President had the option of postponing the effective date of the bill which was August 1, 1996, for six months. On July 16, 1996, the President decided not to postpone it, although he did exercise his option to suspend one of the most controversial sections of the Act—the right to bring suit—for six months. *See Clinton Delays Lawsuits Under Title III of Helms-Burton*, 13 INT'L TRADE REP. 1158, July 17, 1996.

lunge several of the Act's provisions under Chapter 20 of NAFTA.²⁸ Although the European Union was "deeply troubled" over the Act, it waited to announce its intentions.²⁹ Nonetheless, one month after the President signed the bill, the EU formally protested.³⁰ In addition, Cuba has also attacked the Act in the World Trade Organization ("WTO").³¹

III. THE HELMS-BURTON ACT'S PROHIBITION ON PRODUCTS IMPORTED FROM CUBA AND ITS APPLICATION TO NAFTA AND GATT

Subchapter I of the Helms-Burton Act, unlike Subchapters III and IV, addresses several topics.³² But it is § 6040 of Article I that possibly violates NAFTA and GATT. That section continues the United States' long standing policy³³ of prohibiting the importation of any product that originated in Cuba. Section 6040

prohibits the entry of, and dealings outside the United States in, merchandise that . . . is of Cuba origin; . . . is or has been located in or transported

28. *See U.S. Agrees to Talk with Canada, Mexico, on Helms-Burton Sanctions Measures*, 13 INT'L TRADE REP. 476 (1996). Chapter 20 of NAFTA covers Dispute Settlement Procedures.

29. *European Union May Not File WTO Case Against U.S. Over Cuba Bill, Aide Says*, 13 INT'L TRADE REP. 560 (1996).

30. *See EU Protests Helms-Burton Law, Asks U.S. to Delay Implementation*, 13 INT'L TRADE REP. 682 (1996). The EU delivered a formal complaint to the President on April 16, 1996, asking the President to delay implementation of the Act.

31. *See Cuba Renews WTO Attack on U.S. Bill Aimed at Curbing Foreign Investment*, 13 INT'L TRADE REP. 647(1996). The Cubans argue that the Act "violates the Uruguay Round provisions on most-favored-nation treatment to other countries, the agreement on Trade-Related Investment Measures, and the agreement reached last year on liberalizing financial services."

32. Section 6034 opposes Cuba's membership in international financial institutions; Section 6036 denies assistance to the independent states of the former Soviet Union for assisting Cuba militarily with Cuba's Cienfuegos nuclear facility; Section 6039 supports democratic and human rights groups and international observers; Section 6041 withholds assistance to foreign countries supporting Cuba's Juragua nuclear plant; and Section 6046 condemns Cuba's attack on the civilian aircraft.

33. *See The Cuban Liberty And Democratic Solidarity Act*, 141 CONG. REC. S17097-02, S17098. The United States embargo against Cuba started in 1962 with Proclamation 3447 which was pursuant to the Foreign Assistance Act of 1961. *See Proclamation 3447*, 27 Fed. Reg. 1085 (1962). *See also Foreign Assistance Act of 1961*, 75 Stat. 445. Also, the Cuban Assets Control Regulations codifies the embargo. It states that:

no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise . . . [i]s of Cuban origin, . . . or has been located in or transported from or through Cuba, . . . or [i]s made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba. Cuban Assets Control Regulations 31 C.F.R. § 515.204 (1996).

through Cuba; or . . . is made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba.³⁴

Critics of the Act argue that it is extraterritorial in nature and amounts to a secondary boycott against Cuba.³⁵ But there are also International law experts who feel the Act is not a secondary boycott.³⁶

A. *Canada and Mexico's Complaint Under NAFTA*

Although neither Canada nor Mexico have officially announced what articles of NAFTA that § 6040 violates, they will probably argue that it is inconsistent with Chapter 3, Article 309(1) of NAFTA. That article denies a NAFTA member the right to prohibit the importation of a good from another country. Article 309(1), in pertinent part, states:

Except as otherwise provided in the Agreement, no Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party, . . . except in accordance with Article XI of the GATT. . . .³⁷

Since § 6040 clearly denies Canada and Mexico the right to import any product that ever touched Cuban soil, it would appear § 6040 violates Article 309(1). But Article 309(3)(a) gives the United States the right to prohibit the importation of a good from a member if that good came from a non-member and the United States prohibits the importation of that good directly. The article states that:

[i]n 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. . . .³⁸

And the United States does prohibit the importation of sugar from Cuba.³⁹ Thus, since the United States prohibits the importation of goods directly from Cuba, it can prohibit their importation through Canada or Mexico without violating Article 309(1).

34. CLDS, *supra* note 2, § 6040(a)(1-3).

35. See e.g., Debra Beachy, *Sanctions on Cuba Rile Mexico, Europe/But U.S. Trade too Important to Lose*, HOUS. CHRON., May 31, 1996, available in 1996 WL 5601734, at 2. Malcolm Rifkind, Britain's Foreign Minister, stated that "[n]o one country has the right to tell companies in another country how they should behave in third countries."

36. Monroe Leigh claims that it is not a secondary boycott since the law does not interfere with the affairs of a foreign nation; rather it merely creates a private cause of action for those whose confiscated property is being used by foreign companies. Remarks of Monroe Leigh, June 24, 1996, at 16 (unpublished manuscript, on file with author).

37. NAFTA, *supra* note 7, ch. 3, art. 309(1).

38. NAFTA, *supra* note 7, ch. 3, art. 309(3)(a).

39. See Cuban Assets Control Regulations, *supra* note 12.

B. *The EU's Complaint Under GATT*

The EU, unlike Canada and Mexico, most likely has a valid complaint concerning § 6040. The EU has been vocal in its opposition to this section, calling it a secondary boycott.⁴⁰ There are several articles of GATT which the EU may argue the Act violates. Although the EU has not officially stated what their arguments are, it has publicly declared that the Act violates GATT, Articles I, III, V, XI, and XII;⁴¹ all of the violations apply to § 6040 of the Act.⁴² The British Government has announced its opposition to the Act and has stated that the Act “is a straightforward attempt to interfere in the commercial decisions of foreign companies about the sourcing of raw materials.”⁴³ “[I]f enacted, it would represent a *prima facie* breach of US obligations under the WTO, . . . specifically of Article XI of the GATT, which prohibits the imposition of new quantitative restrictions by any member country on imports from another.”⁴⁴

Article I of GATT pertains to Most-Favored-Nation (MFN) status, and although MFN status appears in several articles of GATT, it is Article I that contains the major non-discriminatory clause.⁴⁵ With respect to importation, the article provides that:

any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the *like product* (emphasis added) originating in or destined for the territories of all other contracting parties.⁴⁶

In essence, “Most-Favored-Nation status prohibits discrimination obstacles to trade by providing that, in general, no member country is to be accorded treatment less favorable than that accorded to any other member country.”⁴⁷

Most likely, the EU will argue that the Helms-Burton Act is discriminatory against “like products.”⁴⁸ That article prohibits any dis-

40. See Beachy, *supra* note 35, at 2; Leigh, *supra* note 36, at 16.

41. See European Delegation of the European Union Commission to the United States, EU Requests Consultation with the US on the Helms-Burton Legislation, EU DELEGATION OF THE EUR. COMM'N TO THE U.S. PRESS RELEASE, May 3, 1996.

42. The EU has not stated that these apply to § 6040, but they cannot apply to § 6082—dealing with the confiscation of property—or § 6091 dealing with denial of visas.

43. Aide Memoire, British Embassy Washington, July 13, 1995, at 2 (on file with author).

44. *Id.*

45. See JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 258 (1969).

46. GATT, *supra* note 8, art. I(1).

47. Kenneth L. Bachman, et al., *Anti-Cuba Sanctions May Violate NAFTA, GATT; Provisions of the Helms-Burton Bill Penalizing Dealers in Seized Property Would Impede Trade*, NAT'L L. J., Mar. 11, 1996, at C3.

48. GATT, *supra* note 8, art. I(1).

crimination based on the country of origin against "like products." The Act allows sugar, for instance, with its origin from an EU member to enter the United States, but not sugar from Cuba. The Act also prohibits an EU member from exporting chocolate with Cuban sugar in it to the United States, since the sugar in the chocolate is a characteristic of the product. Several cases suggest that a member may discriminate against a product based on its characteristics, but not on the characteristics of the "country of origin."⁴⁹ But the Act prohibits the importation of sugar, or any product, that originates from Cuba. Thus, the Act discriminates only on a characteristic of the product from an EU member, and not on the characteristic of the originating EU member. Arguably, then, it appears that the EU does not have a valid argument to challenge § 6040 under GATT Article I.

Article XI of GATT provides that no member shall restrict the importation of goods through "quotas, import or export licenses or other measures."⁵⁰ Specifically, the article states that:

No prohibitions or restrictions other than, duties, or other charges, whether made effective through quotas, import or export license or *other measures* (emphasis added), shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.⁵¹

There are exceptions to this, but § 6040 of the Act does not fit within any of them.⁵² Most likely, § 6040 falls within the "other measures" language of Article XI. The United States restricts the importation of Cuban goods through legislation which is "other measures" and violates GATT Article XI.

The EU also mentioned in its request for formal consultation with the United States that § 6040 violates Article XIII.⁵³ Article XIII states in relevant part:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party, . . .

49. JACKSON, *supra* note 45, at 259. One case involved a French internal tax that targeted automobiles with "large horsepower, which allegedly turned out to be almost exclusively United States made."

50. GATT, *supra* note 8, art. XI(1).

51. *Id.*

52. GATT, *supra* note 8, art. XI(2)(a), (b), and (c)(I-II). One exception, Article XI(b)(2), does allow a member to prohibit the importation of a good that is a commodity and the reason for the prohibition is for its regulation for its classification, grading, or marketing." Even though the United States requires importers of sugar to certify that it is not from Cuba, this certification process does not fall within "classification, grading, or marketing." Thus, the exception does not apply.

53. See European Delegation of the European Union Commission to the United States, *supra* note 41.

unless the importation of the like product of all third countries . . . is similarly prohibited or restricted.⁵⁴

The Helms-Burton Act applies not only to all members, it applies to all non-members also; it applies to *every* nation. The Act does not single out any "contracting party." Thus, since the Act does not prohibit only EU members from importing products made with Cuban sugar, the EU does not have a valid argument that § 6040 violates Article XIII.

Another provision of GATT that the EU claims the Act violates is Article III.⁵⁵ Article III(1) states that, "The contracting parties recognize that . . . laws . . . should not be applied to imported or domestic products so as to afford protection to domestic products."⁵⁶ In addition, Article III(7) states that:

No internal quantitative regulation relating to the mixture, processing, or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.⁵⁷

This is not required by the Act. The French, Germans, or English can put as much of their sugar as they want in their products. In addition, the Act does not prohibit a United States manufacturer from using goods that contain one hundred percent of imported sugar. The only limitation is that a country cannot use Cuban sugar to make their product if they ultimately want to import that product into the United States. Although the EU may argue that the Act's residual effect is that its member's products will be prohibited from entering the United States, it is a stretch to argue that the Act's aim is to protect domestic production of sugar.

The purpose of GATT Article III appears to prohibit members from discriminating against imported items that a United States manufacturer will use to produce a final good. And Article III(1) also prohibits any internal tax or regulation that protects domestic production. Section 6040 only prohibits products that originated from Cuba, which is consistent with longstanding United States laws.⁵⁸ This includes ingredients in products also. Section 6040 merely prohibits an EU member from importing an item that includes Cuban sugar. For instance, a German chocolate manufacture would violate the section if it exported to the United States its chocolate made with Cuban sugar that a United States manufacturer would use in its product. Thus, since the United

54. GATT, *supra* note 8, art. XIII(1).

55. See European Delegation of the European Union Commission to the United States, *supra* note 41.

56. GATT, *supra* note 8, art. III(1).

57. GATT, *supra* note 8, art. III(7).

58. See Cuban Assets Control Regulations 31 C.F.R. § 515.204 (1996).

States did not enact a "law" to protect the domestic production of sugar⁵⁹—or any other item that Cuba produces—arguably § 6040 does not violate Article III of GATT.

Another article of GATT that the EU will challenge § 6040 with is Article V, which provides for the "freedom of transit."⁶⁰ Article V states that:

[t]here shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic to or from the territory of the other contracting parties. No distinction shall be made which is based . . . on the place of origin, departure, . . . or on any circumstances relating to the ownership of goods, of vessels or of means of transport.⁶¹

The EU has a valid argument that § 6040 violates GATT, Article V, since that article states that a member cannot discriminate based on the "ownership of goods, of a vessel." Section 6040 of the Act prohibits any good that "has been located in or transported from or through Cuba."⁶² Again, although the United States has prohibited this since 1963,⁶³ it appears that this section violates Article V because it will not allow a vessel carrying goods from Cuba to enter the United States. GATT also provides that any law enacted prior to GATT shall not be affected. However, the United States promulgated the Cuban Assets Control Act in 1963 which essentially prohibits the same conduct prohibited in § 6040. Thus, since the United States had in force a law virtually identical to § 6040 prior to GATT, § 6040 does not violate Article V.

IV. THE POTENTIAL VIOLATIONS OF NAFTA AND GATT UNDER SECTION 6082 OF THE HELMS-BURTON ACT

Canada, Mexico, and the EU have also raised concerns over § 6082 of the Helms-Burton Act.⁶⁴ That section provides that:

[A]ny person that . . . traffics in property which was confiscated by the Cuban government . . . shall be liable to any United States national who owns the claim to such property for money damages in an amount equal to . . . the

59. No language in the Act can reasonably be interpreted to suggest that the United States' motive was to protect the domestic production of sugar.

60. GATT, *supra* note 8, art. V(2).

61. *Id.*

62. CLDS, *supra* note 2, § 6040(a)(1-2).

63. The United States Congress promulgated the Cuban Assets Control Regulations on July 9, 1963 which has language similar to § 6040 of the CLDS. See Cuban Assets Control Regulations, *supra* note 12.

64. (Canadian) *Government Announces Measures to Oppose U.S. Helms-Burton Act*, DEPT. OF FOREIGN AFF. AND INT'L TRADE: NEWS RELEASE, June 17, 1996, at 2. *EU Formally Questions U.S. Policy Toward Cuba, Requests WTO Procedure*, 13 INT'L TRADE REP. 719 (1996).

fair market value of that property . . . [plus] court costs and reasonable attorneys' fees.⁶⁵

Although the section's main objective is to discourage foreign investment,⁶⁶ it attempts to meet that objective by protecting the property rights⁶⁷ of Americans whose property Castro confiscated in Cuba. Since the demise of the Soviet Union, Fidel Castro has attempted to boost Cuba's economy by allowing foreign investment.⁶⁸ In fact, the Cuban Government has encouraged foreign investment through legislation.⁶⁹

But § 6082 aims to prevent such foreign investment in Cuba. For example, the Act provides that if a Canadian invests in property that a United States national claims was expropriated by the Cuban Government, that national can bring a cause of action against the Canadian investor. The section states that "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages" ⁷⁰ Moreover, if a Canadian merely benefits from confiscated property, the Canadian can be liable because the Act also states that:

[A] person "traffics" in confiscated property if that person knowingly and intentionally . . . engages in a commercial activity using or otherwise benefiting from confiscated property⁷¹

So, for example, if a Canadian "knowingly and intentionally" purchased Cuban sugar grown on expropriated property, the U.S. national who owned it could have a cause of action since the U.S. national could argue that the Canadian benefitted from the confiscated property.

65. CLDS, *supra* note 2, § 6082(a)(1)(A)(i-ii).

66. H.R. CONF. REP. NO. 104-468 (1996).

67. CLDS, *supra* note 2, § 6081(1). The title recognizes that Americans have a "fundamental right to own and enjoy property"

68. The idea came from Jonathan R. Ratchik, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343 (1996).

69. See *Cuba Allows More Foreign Investment*, THE NEWS AND OBSERVER, Sept. 7, 1995, at A15. Cuba passed legislation that allows foreign investors to have one hundred percent ownership in an enterprise. Prior to that, a foreigner could own only forty-nine percent. This is a drastic break from traditional socialist doctrine. It is modeled similarly to Vietnam and China's models of socialist economies. There is still "a one party state" with strong elements of a free market economy.

70. CLDS, *supra* note 2, § 6082(a)(1).

71. CLDS, *supra* note 2, § 6023(13)(A)(ii).

A. *Canada and Mexico's Potential Argument that Section 6082 Violates NAFTA*

Although neither Canada nor Mexico have announced what chapter of NAFTA § 6082 violates, it appears their best argument arises from Chapter 11. As quoted above, § 6082 allows "any U.S. national who owns a claim" to confiscated property to bring a cause of action against a foreigner who trafficks or benefits from it.⁷² The problem is that Article 1105 of NAFTA "provides that each country must also accord NAFTA investors treatment in accordance with international law."⁷³ And under international law, it is axiomatic that a country cannot "intervene in foreign expropriation of property not belonging to . . . [its] nationals." This is especially significant, as in this instance, when the country—Cuba—confiscated property that belonged to its own citizen; that is considered domestic in nature.⁷⁴

Opponents argue that if the Act provided for a cause of action only for United States citizens who were United States nationals at the time of the taking, then § 6082 would arguably not violate NAFTA; however, the section contains no such restrictions. It allows any United States national, including Cuban-Americans who were not United States citizens when their property was expropriated, to sue a foreign investor. Thus, it does appear that this section of the Act violates NAFTA. If the Act allowed only those United States nationals who were United States citizens when their property was confiscated to sue and prohibit Cuban-Americans who were not United States citizens at the time of the taking to sue, then the section would appear not to violate NAFTA.⁷⁵

B. *No Potential Complaint From the EU Under GATT*

Like Canada and Mexico, the EU also realizes that § 6082 could "lead to legal chaos for businessmen investing in, or doing business with the U.S.A.,"⁷⁶ and it is troubled by it.⁷⁷ However, the EU also realizes that "[r]ecourse to the WTO can . . . only address" those as-

72. CLDS, *supra* note 2, § 6082(a)(1).

73. North American Free Trade Agreement Implementation Act, *available in* 1993 WL 561159, at 2.

74. *See* Bachman, *supra* note 47, at 2.

75. *See* Ratchik, *supra* note 68, at 361. In his article on the Helms-Burton Act, Jonathan R. Ratchik states that if the Act did not allow Cuban-Americans who were not United States citizens when their property was confiscated to bring a cause of action, it would violate the United States Supreme Court's holding in *Loving v. Virginia*, 388 U.S. 1 (1967) (all United States citizens must have equal protection regardless of their nationality).

76. Eric Hayes, *The Helms Burton Law: Its Influence on Foreign Economic Interests in Cuba*, Address Before Casa de America, Madrid, Spain (May 6, 1996) (on file with author).

77. *Id.* The EU, like Canada, claims that Title III violates the basic principles of international law under the "rule on nationality of claims."

pects of the Act dealing with trade.⁷⁸ Thus, the EU cannot rely on GATT to resolve any conflict it has with Section 6082 of the Helms-Burton Act.⁷⁹

V. SECTION 6091 OF THE HELMS-BURTON ACT'S INCONSISTENCIES WITH NAFTA AND GATT

Another area of concern for Canada, Mexico, and the EU is § 6091. The section is far-reaching in that it dictates that the Secretary of State shall deny a visa to . . . any alien who . . . has confiscated . . . property a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national; . . . traffics in confiscated property; . . . is a corporate officer, principle, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property . . . ; or is a spouse, minor child, or agent of a person [mentioned above].⁸⁰

A. *Canada and Mexico's Potential Argument that Section 6091 of the Helms-Burton Act Violates NAFTA*

Most likely, Canada and Mexico's main argument will come from Chapter 16 of NAFTA, specifically Article 1603. That article states that, "[e]ach party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this Chapter, including the provisions of Annex 1603."⁸¹ Annex 1603 requires that temporary entry should be granted if "the business person otherwise complies with existing immigration" laws.⁸²

Although the term "existing" has a different meaning between Mexico and the United States versus Canada and the United States,⁸³ for both, the law had to have been "existing" when NAFTA took effect.⁸⁴ In addition, Article 16 does not provide for any exceptions that the Act covers. Thus, since the Helms-Burton Act did not exist prior to NAFTA taking effect, it appears that in either case § 6091 is not con-

78. *Id.* The statement also mentioned that the EU will rely on GATS to challenge Title IV.

79. See Hayes, *supra* note 76, at 3. The EU and its members are considering blocking statutes or anti-boycott legislation.

80. CLDS, *supra* note 2, § 6091(a)(1-4).

81. NAFTA, *supra* note 7, art. 1603(1).

82. NAFTA, *supra* note 7, ch. 16, Annex 1603(A)(1), (C)(1), and (D)(1).

83. NAFTA, *supra* note 7, ch. 16, Annex 1608. As between Mexico and the United States, "existing" refers to those immigration laws in effect on the date of entry into force of NAFTA. As between Canada and the United States, "existing" refers to those immigration laws in effect on January 1, 1989.

84. NAFTA went into force January 1, 1994.

sistent with Article 16.⁸⁵ But the United States can argue that the section "is not an absolute prohibition on temporary entry,"⁸⁶ since it only applies to foreigners who "[traffic] in confiscated property of United States nationals."⁸⁷ Once the foreigner ceases to traffic in confiscated property, the prohibition is removed; so it is not permanent and it only applies to specific foreigners, not foreigners of a specific nation.

B. The EU's Potential Argument that Section 6091 of the Helms-Burton Act Violates GATT

Since GATT does not protect its members from the adverse immigration sanctions of § 6091, most likely, the EU will rely on the General Agreement on Trade in Services (GATS)⁸⁸ to complain of the provisions of § 6091.⁸⁹ Article II of GATS provides that:

With respect to any measure covered by this agreement, each member shall accord immediately and unconditionally to service and service suppliers of any other Member treatment no less favourable than that it accords to like service suppliers of any other country.⁹⁰

In addition, Article XVII states that a member—here the United States—treats service and service suppliers of another member the same as it treats its own service and service suppliers.⁹¹ Thus, the EU may argue that the United States violates these provisions because it will deny entry to a service supplier who profits from property confiscated from American nationals by Castro.

For several reasons these arguments will fail. First, Article II of GATS merely states that the United States must treat all members equally, and it does. Under the Helms-Burton Act any service or service supplier who profits from property confiscated in Cuba cannot enter the United States.⁹² Thus, § 6091 of the Helms-Burton Act treats all ser-

85. If the United States enacts the Helms-Burton Act, Canada has blocking legislation that prohibits Canadian "companies from complying with such far-reaching American laws." *Mexico, Canada Criticize U.S. Over Law*, ST. LOUIS POST-DISPATCH, June 16, 1996, available in 1996 WL 2774777, at 1.

86. Stuart E. Benson, et al., *The North American Free Trade Agreement: Legal Issues Raised By The Helms-Burton Act*, at 26 (1996) (unpublished memorandum, on file with author).

87. *Id.* at 26.

88. The General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1168 (1994) [hereinafter GATS].

89. See European Delegation of the European Union Commission to the United States, *supra* note 41, at 1.

90. GATS, *supra* note 88, art. II(1).

91. GATS, *supra* note 88, art. XVII(1). "[E]ach Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

92. CLDS, *supra* note 2, § 6091(a)(1-3).

vice providers equally. The United States, under § 6091, will not deny a visa to a service provider based on that provider's nationality or the service provided. There is no less favorable treatment to a provider from one country than a provider from another. But if a provider of services benefits from or traffics in property that Castro confiscated from a United States national, then that provider cannot enter the United States regardless of nationality. Thus, § 6091 does not appear to violate GATS Article II.

In addition, Article XVII states that the United States only has to treat member service providers like it treats its own,⁹³ and the Helms-Burton Act does. The Act states that:

[E]ach member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.⁹⁴

In fact, one could argue that Americans are treated less favorably than their EU counterpart. Americans are not only prohibited from owning or benefiting from any confiscated property, but are prohibited from owning any property in Cuba.⁹⁵ In contrast, EU members may own Cuban property; they are merely prohibited from entering the United States if it is property that Castro confiscated from a United States national. Plus, the GATS Statement of Administrative Action states that "treatment that skews the conditions of competition in favor of domestic services or service suppliers is considered to be 'less favourable.'"⁹⁶ This section does not "skew" conditions in favor of the United States. And although this is not the only way of violating the article, the GATS' framers intent was to prevent the passing of laws that discriminated against another member. Thus, § 6091 seems to comply with GATS Article XVII.⁹⁷ To comply with GATS, all that the United States must do is notify the WTO of the Helms-Burton Act.⁹⁸

93. GATS, *supra* note 88, art. XVII(1). "[E]ach member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

94. *Id.*

95. Cuban Assets Control Regulations, 31 C.F.R. § 515.560(f) (1996).

96. The Uruguay Round Agreements Act Statement of Administrative Action, *available in* 1994 WL 761795, at 6.

97. GATS, *supra* note 88, art. XVII(2). States that a member must treat service suppliers of another member identically to the way it accords treatment to its own like service suppliers.

98. GATS, *supra* note 88, art. III(1)-(2). "Each Member shall . . . promptly . . . inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement."

VI. THE UNITED STATES' DEFENSE TO ANY VIOLATION OF NAFTA OR GATT

Whether the Helms-Burton Act violates any of the above mentioned provisions of NAFTA or GATT could be irrelevant. Both NAFTA and GATT have a national security interest exception, Chapter 21 and Article XXI, respectively. These provisions allow a member to pass legislation that is inconsistent with those agreements for national security reasons.

A. *The United States' Response to a Violation of NAFTA Using NAFTA Chapter 21*

NAFTA Chapter 21, Article 2102 provides that a party can pass legislation for national security interest for an emergency dealing with international relations.⁹⁹ Under Article 2102, a "government may take action that would otherwise be inconsistent with the NAFTA in order to protect its essential security interests."¹⁰⁰ This exception is "self-judging" and "each government would expect the provision to be applied by the other in good faith."¹⁰¹ But since NAFTA is relatively new, none of its members has yet to claim a national security interest. Thus, whether the United States can validly claim a national security interest depends on whether it passed the Helms-Burton Act "to protect its 'essential' security interest."¹⁰² In the Act it explicitly states that Castro is a threat to "international peace and security"¹⁰³ and that he has "posed a national security threat to the United States" for the past thirty-six years.¹⁰⁴ Since claimed exceptions are self-judging, another NAFTA member cannot dispute an exception unless they argue that the United States passed it in bad faith. Moreover, the United States does not benefit from the Act, so a challenger will have a difficult time showing that the United States passed the Act in bad faith. If a NAFTA dispute panel finds that the United States violated NAFTA with the passage of the Helms-Burton Act, then most likely the United States can successfully invoke a national security interest exception under Chapter 21.

99. NAFTA, *supra* note 7, ch. 21, art. 2102(b)(ii). "[N]othing in this Agreement shall be construed . . . to prevent any party from taking any actions that it considers necessary for the protection of its essential security interests . . . taken [for an] . . . emergency in international relations . . ."

100. North American Free Trade Agreement Implementation Act, *available in* 1993 WL 561204, at 1.

101. *Id.*

102. *Id.*

103. CLDS, *supra* note 2, § 6021(14).

104. CLDS, *supra* note 2, § 6021(28).

B. The United States' Response to a Violation of GATT Using Chapter 21 of GATT

Even though the Helms-Burton Act violates some of the GATT articles mentioned above, the United States has two options. First, it can ask for a waiver, which is unlikely, or it can claim that the Act falls within the security exception of Article XXI.¹⁰⁵

In order for the United States to obtain a waiver in Cuba's MFN status, a three-fourths majority is required.¹⁰⁶ That is unlikely to happen, however, since virtually every member has raised concerns over its passage. The United States' best option is to claim that it passed the Act in the name of national security.¹⁰⁷ The United States has used the national security interest in the past to suspend MFN treatment.¹⁰⁸ Fortunately for the United States, the GATT panel¹⁰⁹ that reviews the exception "has decided that the underlying justification for a claim of the national security exception will not be questioned."¹¹⁰ Critics of Article XXI claim that it is overbroad and that the United States uses it for political purposes.¹¹¹ Regardless, it appears that the United States can "successfully invoke the national security exception under GATT Article XXI,"¹¹² in its attempt to undermine Castro's regime.

105. GATS, *supra* note 88, art. XXI(b)(iii). It states that, "Nothing in the Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in . . . [an] emergency in international relations"

106. Likelihood of a GATT Challenge to an Embargo on Iran, 141 CONG. REC. S17097-02, at S17099.

107. Cuban Liberty and Democratic Solidarity Act, 141 CONG. REC. H9328-02, H9344. Opponents in the United States Congress claim that the United States cannot justify a national security interest because "Cuban troops are out of Africa; Cuba is no longer supporting revolutionary movements; and its military ties to Russia are virtually non-existent and certainly, not a threat to the United States."

108. See Likelihood of a GATT Challenge to an Embargo on Iran, *supra* note 106, at S17098. In fact, some members of the GATT feel that the United States has used the exception excessively.

109. 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, 609 (1987) (A dispute does not go before the panel unless all "other efforts to resolve the dispute are unsuccessful." Once the panel is formed, "[e]ach party to the dispute makes written and oral arguments to the panel, which are subject to rebuttal." Traditionally the panel report has been unanimous. "Since 1948, it is estimated that over one hundred GATT complaint proceedings have been instigated; of these, roughly half have led to the submission of a report by the panel.").

110. Likelihood of a GATT Challenge to an Embargo on Iran, *supra* note 106, at S17099. The panel made this decision when it reviewed Nicaragua's challenge to an embargo imposed on it by the United States in 1983.

111. See *id.*

112. *Id.*

VII. CONCLUSION

The United States in its continuing attempt to oust Castro has definitely caused an uproar. Although the United States had good intentions, it may have violated some provisions of multilateral agreements that it freely entered into, particularly those provisions of NAFTA and GATT dealing with the free flow of trade and free movement of service suppliers of member countries. However, the United States did not relinquish its sovereignty when it signed NAFTA and GATT. And although the United States may suffer retaliation from the members of these agreements, the United States will do what is in its best interest.

Since the President postponed, for a second time,¹¹³ the effective date of the most controversial section until July 1, 1997, the Act can still be repealed or revised. But the Act should not be repealed and any revisions should be minimal. The Act's objective is to get Castro out of Cuba, thereby eliminating any threat he causes to the United States and giving the people of Cuba a chance to experience the democratic process. If other countries recognize this objective as valid, the Act should work. Although some of the provisions are extreme, they probably provide the most effective way of discouraging those who want to invest in Cuba from doing so: making them choose between doing business in Cuba or the United States. Thus, if people want to make a profit in the United States, they must accept that they cannot do it at the expense of United States citizens whose property was confiscated. Nor can they make a profit in this country as they assist Castro in perpetuating a suppressive regime that threatens the security of the United States.

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113. See *Clinton Extends His Suspension of Title III of Cuba Law; Canada Weighs NAFTA Action*, 14 INT'L TRADE REP. 42 (1997). The President first suspended Subchapter III on August 1, 1997, and again on Jan. 1, 1997.