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Trafficking in Confiscated Cuban Property: Lender Liability Under the Helms-Burton Act and Customary International Law

S. Kern Alexander*

The Cuban Liberty and Democratic Solidarity Act ("Helms-Burton Act") provides for extra-territorial jurisdiction and sanctions against foreign companies which traffic in confiscated U.S.-owned Cuban property. The Helms-Burton Act provides U.S. nationals with a private right of action in U.S. courts against foreign persons and companies which benefit from the use of confiscated property. The Act also authorizes the exclusion from U.S. territory of any corporate officers, directors, or controlling shareholders, including their spouses and minor children, of companies which derive any economic benefit from the use of

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confiscated Cuban property. Moreover, section 103(a) of Title I of the Act imposes civil liability and criminal sanctions against U.S. lending institutions and U.S.-controlled foreign institutions which knowingly make any loans to persons who traffic or benefit from the use of confiscated Cuban property.

Part I of this article will focus on the events which led to passage of the Helms-Burton Act and on how some countries have responded. Part II will analyze the civil liability provisions of Title III of the Act, with particular emphasis on how they affect lending institutions which finance transactions involving confiscated property in Cuba. Part II will also discuss the potential penalties and fines which the U.S. government may impose against U.S. or U.S.-controlled banks which finance transactions in Cuba. Part III will describe the alien exclusion provisions of Title IV and how they are applied to officers and directors of non-U.S. companies which traffic in confiscated Cuban property. Part V argues that Titles III and IV of the Act violate certain principles of customary international law.

I. The Helms-Burton Act - Background

On March 12, 1996, President Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act ("The Act"). The Act, better known as the Helms-Burton law, purports to increase pressure on the Cuban government by tightening the thirty-five year old U.S. trade embargo against Cuba. Title III of the Act contains sweeping language which permits U.S. nationals whose property was expropriated without compensation by the Castro regime to sue in U.S. federal court foreigners who traffic or benefit from the use of such confiscated property. Title IV of the Act requires the revocation of travel visas issued by the U.S. government to any foreign person who is the officer, director, or controlling shareholder of a business entity which does business

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3. Section 401(a), (Grounds for Exclusion), 110 Stat. 822 (codified at 22 U.S.C. § 6091(a) (1996)). The revocation of visas under Title IV also applies to the family members of the officials of companies which have benefitted from the use of expropriated property. Id.
4. Id. § 6033(a).
6. The Helms-Burton Act was named after Senator Jesse Helms (R-NC) and Representative Dan Burton (R-IN) who were the primary sponsors of the Act in the U.S. Congress.
affecting expropriated property in Cuba. These provisions have already angered U.S. trading partners and have prompted some to enact retaliatory measures against U.S. exporters.

In addition, the Act codifies the existing trade embargo, which has imposed sanctions through executive orders since 1962, and increases direct and indirect economic sanctions against Cuba. The four major provisions of the Act have the stated purposes of: (1) increasing international sanctions against the present Cuban government; (2) assisting Cuba in the transition to a democratically-elected government; (3) protecting the property rights of United States nationals who had Cuban property expropriated by the Castro government after the 1959 revolution; and (4) excluding from U.S. territory aliens who control the confiscated property of U.S. nationals in Cuba or who traffic in such confiscated property. The latter two provisions of the Act are found respectively in Title(s) III and IV and have been widely criticized by several states as an illegal attempt by the United States to extend its law extra-territorially in violation of customary international law and of U.S. treaty obligations.

The Clinton Administration initially opposed a more moderate version of the Helms-Burton bill primarily because it appeared to violate international law and would likely prompt retaliation from U.S. trading partners. However, after two Cuban M.I.G.s

8. Section 401(a), supra note 3.
9. See Mexican President Ernesto Zedillo's assertion that Helms-Burton violates the North American Free Trade Agreement. C. Gopinath, India: Extraterritoriality; Not a Problem for the U.S., BUS. LINE, Aug. 8, 1996, available in 1996 WL 11678398. The Organization of American States (OAS) voted 23 to 1 with 10 abstentions to pass a resolution condemning Helms-Burton as violative of sovereignty. Id.
12. See Andreas Lowenfeld, Agora: The Cuban Liberty and Democratic Solidarity Act (LIBERTAD), 90 AM. J. INTL’ L. 419 n.3 (1996) (quoting letter from Secretary of State Warren Christopher to House Speaker Newt Gingrich, dated Sept. 20, 1995). Secretary of State Christopher wrote that “H.R. 927 [the House version of the Helms-Burton law] would actually damage prospects for a peaceful transition, . . . [and] would jeopardize a number of key U.S. interests around the globe.” Id.
intercepted and shot down two small civilian planes piloted by four Cuban-American citizens in the Florida straits in February 1996, President Clinton, under political pressure, reversed his policy and signed a more stringent version of the bill into law. While the law may be aimed at blocking new foreign investment in Cuba, it has instead caused much concern amongst many U.S. trading partners and has prompted some of them to enact retaliatory measures.

The civil liability provisions of Title III of the Act impose money damages upon any person who traffics in or derives any benefit from the use of confiscated Cuban property. Title III creates a private right of action against “persons” who “traffic” in property that was once owned by U.S. nationals or entities but was expropriated without compensation by the Cuban government after the 1959 revolution. The language in Title III is so broad and sweeping that it would permit a U.S. national who has a claim for confiscated Cuban property to bring a civil action against a U.S. or foreign lending institution which directly or indirectly finances any

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13. The two unarmed civilian aircraft were Cessna 337's operated by the Florida-based Cuban-American organization “Brothers to the Rescue”; the airplanes were shot out of the sky by missiles launched from MIG-23 and MIG-29 fighter planes belonging to the Cuban Air Force. Stanley Meisler, Cubans Gleeful, U.S. Transcript of Attack Shows, L.A. TIMES, Feb. 28, 1996, at 1.


15. See Gopinath, supra note 9.


17. Section(s) 301, 302, 303, (codified at 22 U.S.C. §§ 6082, 6083, 6084, & 6085 (1996)). U.S. nationals include U.S. companies, individual U.S. citizens, and political asylum refugees from Cuba who later became naturalized citizens of the United States. In addition, Section 4(13) defines “traffic”:
   (A) A person traffics in confiscated property if that person knowingly and intentionally
   (i) Sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
   (ii) Engages in commercial activity using or otherwise benefiting from confiscated property, or
   (iii) Causes, directs, participates in, or profits from, trafficking (as described in clause(s) (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clauses (i) or (ii)) through another person, without the authorisation of any United States national who holds a claim to the property.

transactions involving confiscated Cuban property. Moreover, Title III explicitly rejects the Act of State Doctrine and empowers U.S. courts to adjudicate the property claims arising from the Cuban government's expropriations of property located within Cuban territory which occurred after January 1, 1959.

In addition, Title IV of the Act imposes broad immigration clauses which exclude from U.S. territory aliens who have confiscated the Cuban property of U.S. nationals or have trafficked in or derived economic benefit from such property. The provision is broad in the sense that it defines excludable aliens to include not only the individuals responsible for the property-taking but also anyone who directed or supervised a confiscation or trafficked in or benefitted from the use of confiscated property. This provision thus applies to corporate officers and controlling shareholders of companies that have been "involved" in the expropriation of, or trafficking in, such property.

The primary purpose of the Helms-Burton law is to increase pressure on third-country nationals to stop investing in Cuba and to reduce or eliminate their holdings of expropriated Cuban assets. By exposing third-country nationals to liability, the Act essentially permits U.S. claimants to enforce their property rights under international law by authorizing U.S. courts to adjudicate their claims and award damages.

Although Helms-Burton has become U.S. law, the President has the authority to suspend or waive the filing of private claims under Title III for six month intervals if the President determines that to do so is in the U.S. national interest. The Act requires

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18. Section 103(a), Helms-Burton Act, 110 Stat. 790 (codified at 22 U.S.C. § 6082 (a)(4)(A)). Section 103(a) prohibits any "U.S. national, permanent resident alien, or U.S. agency" from knowingly extending any "loan, credit, or other financing" to any person for the purpose of "financing transactions involving any confiscated property the claim to which is owned by a U.S. national as of the date of enactment of this Act. Id. See also 31 C.F.R. Part 515.208 (1997).

19. Section 302(a)(6), Helms-Burton Act, 110 Stat. 815 (codified at 22 U.S.C. § 6082(a)(6)). Section 302(a)(6) provides that "no court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action brought under paragraph (1)." Id.


21. Id.


23. Presidential authority to suspend the private right of action under Title III derives from sections 306(b) and 306(c)(1)(b) of Title III, which provides that: the President may suspend the right to bring an action under this title with respect to confiscated property for a period of not more than 6
the President to make this determination every six months beginning in July 1996. The first of these waivers went into effect on July 16, 1996, when President Clinton suspended authorization for filing actions, presumably to avoid the immediate rash of filings and consequent reaction from other countries. President Clinton has maintained the suspension of claims under Title III since then and has stated that he will not permit private claims to be brought under Title III for the duration of his presidency.

The international reaction to Helms-Burton has been overwhelmingly negative. Most countries contend that the Act violates international law. Canada and Mexico both claim that the Act violates U.S. obligations under North American Free Trade Agreement ("NAFTA"), and both countries have taken domestic legislative action to counter the Act. The Canadian Parliament responded by amending existing blocking laws to make it illegal for Canadian businesses, including Canadian subsidiaries of U.S. companies, to comply with the provisions of the Act. In addition, the Canadian Parliament has enacted an amendment to its Foreign Extraterritorial Measures Act ("FEMA") to provide Canadian companies a means to countersue in Canadian courts to recover damages awarded by U.S. courts under Title III of the Act. In early September 1996, Mexico's Senate unanimously approved a Helms-Burton "antidote" law which fines Mexican companies that allow themselves to be fined under Helms-Burton.

The Council of Ministers of the European Union ("E.U.") has formally approved a Regulation which is intended to neutralize the

months if the President determines and reports in writing to the appropriate congressional committees at least 15 days before suspension takes effect and that such suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.

24. Id. See also 22 U.S.C. § 6064(a).
26. Id.
27. Gopinath, supra note 9.
29. Id. See also Alan Toulin, Canada to Retaliate in Kind to Anti-Cuban Law, FIN. POST, June 18, 1996, at 1. See discussion about the British Protection of Trading Interests Act in Gabriel M. Wilner, International Reaction to the Cuban Democracy Act, 8 FLA. J. INT'L L. 401 (1993).
extra-territorial application of the Helms-Burton law in the European Community and to block the application of any other U.S. economic sanctions laws which apply to European businesses that seek to do business with U.S.-targeted countries. The regulation authorizes nationals of European Community states to file countersuits in European courts against plaintiffs who have filed actions against them under Title III of the Act. Similarly, it allows E.U. persons who are subjected to U.S. government enforcement actions for breach of U.S. sanctions laws to file countersuits in European courts against the U.S. government for any damages or penalties imposed as a result of the U.S. action. Moreover, the regulation effectively blocks the recognition and enforcement within the E.U. of any judgment by a court or tribunal outside the Community which gives effect to the U.S. legislation. It also makes non-compliance with a judgment under the Act obligatory and permits E.U. persons and companies to recover the amounts obtained by U.S. nationals under the Title III of the Act.

In addition, Canada, Mexico and the European Union have threatened to employ the dispute resolution mechanisms of international trade agreements against the U.S. to determine whether Helms-Burton violates U.S. treaty obligations. For example, Canada and Mexico have invoked the dispute resolution procedures of Article 1105 of the NAFTA to determine whether the sanctions of Title(s) III and IV treat Canadian and Mexican investors in accordance with international law. In October 1996, the E.U. commenced dispute resolution procedures in the World Trade Organization ("WTO") by requesting formal bilateral consultations with the United States for possible U.S. violations of

32. See E.U. Council Regulation, supra note 31, at art. 5.
33. Id. at art. 6.
34. Id. at art. 5.
35. Id. at arts(s) 5 & 6.
WTO provisions regarding restrictions on international trade.\(^{37}\) Shortly thereafter, E.U. ministers warned the U.S. government that, if it attempted to impose penalties or sanctions against E.U. persons or companies for violating U.S. economic sanctions, it would freeze U.S. assets in Europe and impose visa requirements on U.S. executives and their families in mirror image to the Helms-Burton Act. In April 1997, the E.U. suspended its WTO action for six months after it had reached agreement with the U.S. on a set of “binding disciplines” for negotiating a settlement on the use of U.S. economic sanctions against E.U. nationals for benefiting from the use of confiscated Cuban property. By October 1997, the E.U. and United States had failed to reach a settlement and referred the matter for review by the Organization of Economic Cooperation and Development (“OECD”). After extensive negotiations, the United States and E.U. announced an agreement at the OECD G8 Summit on May 18, 1998, in which, \textit{inter alia}, President Clinton agreed to press Congress for changes in both Title(s) III and IV of Helms-Burton in return for the European Union’s establishing a system to discourage Europeans from investing in confiscated Cuban property by denying them subsidies, risk insurance and diplomatic advocacy.\(^{38}\) Moreover, the agreement provides that an international registry be established to list the claims of those who had property illegally expropriated so that governments may be put on notice when their nationals seek assistance for investment ventures in property that was illegally confiscated.\(^{39}\) The E.U.-U.S. agreement will fail to accomplish its objectives, however, if


\(^{38}\) James Bennett, To Clear Air With Europe, U.S. Waives Some Sanctions, N.Y. TIMES, May 19, 1998, at A6. Specifically, the United States agreed to request Congress to amend Title III so that the President could indefinitely waive the filing of lawsuits by U.S. nationals against those profiting from the use of expropriated property. \textit{Id.} Similarly, President Clinton undertook to request Congress to amend Title IV to authorize the President to waive indefinitely the revocation of travel visas by the State Department against foreign nationals who profit from the use of expropriated property. \textit{Id.} Under current law, the State Department is required to investigate all foreign companies doing business in Cuba and to make a list of all foreign nationals who are known to benefit from the use of expropriated property with the ultimate aim of denying the right to travel in the United States. See \textit{infra} notes 112-115 and accompanying text.

\(^{39}\) \textit{Id.}
Congress is unwilling to make the requested changes in the Helms-Burton law.

II. Trafficking in Expropriated Assets: Imposing Civil Liability

The Helms-Burton Law contains provisions that should be of concern to U.S. lending institutions, non-U.S. companies and foreign banks that engage in business transactions in Cuba. As discussed, the Act, inter alia, authorizes a federal cause of action against persons who “traffic” in, or benefit from the use of confiscated U.S. property in Cuba and requires the exclusion from entry into the United States of such persons, their agents, and the members of their immediate family. If the person is a corporate entity, its officers, principals, and controlling shareholders are excludable, along with any family members.

A. Lender Liability

Lender liability is an elastic concept which can cover a range of liabilities involving various transactions amongst many different parties. In the context of banking, lender liability may arise in a variety of situations including the following: negligent lending practices, failing to exercise reasonable care and skill, and liability as a constructive trustee. Liability may also be imposed against banks and other lending institutions as a result of legislation, in particular economic sanctions legislation imposed against certain targeted countries. Most U.S. economic sanctions laws impose civil and criminal liability against U.S. lending institutions for financing transactions involving certain targeted countries and specially designated nationals of targeted countries. The Cuban Assets Control Regulations (“CACRs”) were issued by the U.S. Government on July 8, 1963, pursuant to the Trading with the Enemy Act of 1917 in response to the deterioration of diplomat-

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40. See generally Parker Hood, Lender Liability Under English Law, in BANKS, LIABILITY AND RISKS, 70-78 (Ross Cranston, ed., 1995).
ic relations between the United States and Cuba. The Office of Foreign Assets Control ("OFAC") of the Department of Treasury administers the CACRs, which impose civil and criminal penalties against U.S. persons, companies, banks or U.S.-controlled foreign entities which do business in Cuba. The civil and criminal liability provisions of the CACRs are separate and cumulative to any rights a private claimant may have under Helms-Burton to seek damages against "any person" who has benefitted from the use of expropriated property.

The broad and sweeping language of Title III of the Helms-Burton Act would impose civil liability and damages against "any person" who "trafficks" in or benefits from the use of confiscated Cuban property. The term "person" is defined as "any person or entity, including any agency or instrumentality of a foreign state." Accordingly, section 302(a)(1)(A) of Title III imposes subject matter jurisdiction against any person (U.S. or foreign) who traffics in or benefits from the use of confiscated Cuban property on or after January 1, 1959. Section 4(4) defines "confiscated" to include:

the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of the property, on


46. See 31 C.F.R. § 515.320. This regulation states that a "Domestic bank" for purposes of OFAC regulation is "any private bank or banker subject to supervision and examination under the banking laws of the United States or of any State, territory or district of the United States." Id.

47. See Section 103(a), Helms-Burton Act, 110 Stat. 794, (codified at 22 U.S.C. § 6033 (a) (1996)). Section 103(a) prohibits any U.S. person or entity from knowingly extending any "loan, credit, or other financing" to any person for the purpose of financing "transactions involving any confiscated property the claim to which is owned by a US national." Id. See also § 302(a)(1)(A), Helms-Burton Act, 110 Stat. 815 (codified at 22 U.S.C. § 6082 (a)(1)(A) (1996)). Title III authorizes a private action against "any person" who "traffics in property that was confiscated by the Cuban government." Id. This civil liability is in addition to the civil and criminal penalties which the U.S. government may impose against a U.S. person or U.S.-controlled company that does business with a Cuban national, the Cuban government, or any property that was confiscated by the Cuban government. See infra discussion in text about Cuban Assets Control Regulations at 31 C.F.R. § 515.300 (1997).


or after January 1, 1959 – (i) without the property having been returned or adequate and effective compensation provided; or (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure.\(^{50}\)

Moreover, section 4(13) of the Act states that a person “traffics” in confiscated property if “that person knowingly and intentionally:

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) engages in a commercial activity using or otherwise benefitting 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,\(^{51}\)

without the authorization of any United States national who holds a claim to the property. The definition excludes residential property unless it is subject to a claim certified by the FCSC or is occupied by an official of the Cuban government or ruling party. The Act also exempts from the definition of trafficking, *inter alia*, the trading or holding of securities which are publicly traded or held unless the activity is by or with a Cuban person or entity on the Office of Foreign Assets Control’s Specially Designated Nationals List.\(^{52}\)

The Act, however, does impose liability on any person who “engages in a commercial activity using or otherwise benefitting from confiscated property” or “causes, directs, participates in, or profits from, trafficking,” which is broadly defined as benefitting directly or indirectly from the use of confiscated property. This broad definition would most probably include the extension of credit, loans, or the financing of transactions involving confiscated Cuban property. Therefore, a French bank which finances a business transaction enabling two Europeans to invest in confiscated Cuban property would incur civil liability to a U.S. national who

\(^{50}\) Section 4(4), Helms-Burton Act, 110 Stat. 789 (codified at 22 U.S.C. § 6043 (a)).


\(^{52}\) 31 C.F.R. § 515.560(b) & (c) (1995).
had a claim against the Cuban government for confiscating its property on or after January 1, 1959.\textsuperscript{53}

In addition, section 103(a) of Title I prohibits any "United States national, a permanent resident alien, or a United States agency" from knowingly extending any "loan, credit, or other financing" to any person for the purpose of "financing transactions involving any confiscated property the claim to which is owned by a United States national as of the date of enactment of this Act."\textsuperscript{54} Moreover, section 103(c) makes any U.S. person or agency which finances transactions involving confiscated Cuban property subject to the civil and criminal penalties of the Cuban Assets Control Regulations.\textsuperscript{55} The prohibitions against financing transactions involving confiscated property under Title I and the potential for civil liability and damages under Title III significantly increased the risk and liability of financial institutions which either directly or indirectly finance transactions in Cuba.\textsuperscript{56}

The Act defines property in section 4(12) as "any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest."\textsuperscript{57} A United States national, according to Section 4(15), is "any United States citizen," or "any other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has its principal place of business in the United States."\textsuperscript{58}

\textsuperscript{53} As a preliminary issue, the French bank could contest whether the U.S. court could exercise personal jurisdiction over it in such a proceeding, but this argument would fail if the French bank had any type of presence in the United States, such as a branch office, agency, or representative office. In determining the issue of personal jurisdiction, the court may consider the type of presence the bank has in U.S. territory and whether that presence is sufficiently related to its overseas business transactions involving confiscated Cuban property. This article does not focus on the issue of personal jurisdiction; it merely discusses the potential for liability and damages that could be imposed against non-U.S. and U.S. persons who do business in Cuba.

\textsuperscript{54} Section 103(a), Helms-Burton Act, 110 Stat. 794 (codified at 22 U.S.C. § 6033(a) (1996)).

\textsuperscript{55} Section 103(c), Helms-Burton Act, 110 Stat. 794 (codified at 22 U.S.C. § 6033(c) (1996)).

\textsuperscript{56} Id. Some of the terms involved in this definition are further defined in the Act, but others are not.

\textsuperscript{57} Section 4 (15), Helms-Burton Act, 110 Stat. 791 (codified at 22 U.S.C. § 6048(a)(15)).

\textsuperscript{58} Id.
The Act, however, does not define what constitutes a "claim" or what it means to "own" such a claim. Because of this lack of definition, lending institutions to which section(s) 103(a) and 302(a) may apply will need to develop means for determining whether any property in Cuba that might in the future be involved in one of their lending transactions was subject, on the date of enactment of the Act, to an expropriation claim by a U.S. national. If the property at issue is included in one of the expropriation claims certified by the Foreign Claims Settlement Commission ("FCSC") under the Cuban Claims Programme, the determination by the lending institution is relatively straightforward. However, there are potentially hundreds of thousands of individuals who were not U.S. nationals when their properties were seized by the Cuban government and who therefore fail to qualify to have their claims certified by the FCSC under the Cuban Claims Programme; the programme only permits certification of claims to those persons who were U.S. nationals at the time their properties were expropriated. These uncertified claimants have never had the opportunity to assert their claims in a public forum and their identity is not generally known. If those individuals are deemed to "own claims" to these properties as of the date of enactment of the Act, then any property in Cuba could be subject to an undisclosed expropriation claim by a U.S. national. Thus, the potential liability for lending institutions which finance transactions which are either directly or indirectly related to the use of expropriated property is enormous.

The Office of Foreign Assets Control in the Department of Treasury has issued notices to all U.S. and foreign banks with offices in the United States that they may be subject to the civil and criminal liability provisions of the Helms-Burton Act and the CACRs, and that they are required to exercise extreme caution to avoid knowingly handling or processing any loans or credits to persons doing business with expropriated property in Cuba. The effect of section 302(a) of Title III is to impose civil liability on any


bank or lending institution which "knowingly" provides financing of any sort to any person who is using the loan or credit to do business in a manner which affects expropriated property. The Act defines "knowingly" as having "knowledge or having reason to know." The language of this provision is so broad that it will impose liability on U.S. or foreign banks which make loans to any person who directly or indirectly derives an economic benefit from the use of expropriated properties. For example, if a Florida bank makes a loan to a French tobacco wholesaler who then purchases tobacco from an expropriated Cuban farm and then sells the tobacco in China and uses the proceeds to payoff the loan, the bank would qualify as trafficker and risk being sued by the former landowners—a U.S. national—even though none of the tobacco was sold in the United States. The bank would also risk being subjected to an enforcement action by the OFAC which may result in additional civil and criminal penalties.

Some foreign banks and U.S. financial institutions have already been placed on notice by prospective claimants under Title III and by the OFAC that they are deriving proceeds from loans to foreign nationals whose business activities affect expropriated property in Cuba. The officers, directors, and shareholders of U.S. financial institutions and U.S.-controlled foreign institutions should therefore be aware of the civil liability provisions of the Helms-Burton Act.

1. Enforcement of the Cuban Assets Control Regulations.—Before Helms-Burton, the 1992 Cuban Democracy Act had expanded the scope of the U.S. trade embargo of Cuba to include not only U.S. companies and their overseas branches, but also all foreign subsidiaries of U.S. companies, which included all foreign banks and finance companies in which U.S. lending institutions held a controlling interest. OFAC defined control to be any majority ownership interest by a U.S. person in a foreign entity; if there is no majority owner, U.S. control is determined by whether a U.S. person can exercise effective managerial or supervisory control over the foreign entity. For example, OFAC would determine that a U.K. bank was subject to the jurisdiction of the CACRs if one of its shareholders or directors was a U.S. national who had the authority to exercise managerial control over the bank’s lending

decisions. This enhanced extra-territorial jurisdiction of the CACRs prohibits all U.S. institutions and U.S.-controlled foreign banks from engaging in any trade or commercial activity, either direct or indirect, with Cuba. A U.S.-controlled bank which violates the CACRs may be subject to civil and criminal penalties. Moreover, the Helms-Burton Act codified the Cuban Democracy Act and the CACRs, thereby subjecting all banks and lending institutions subject to U.S. jurisdiction to potential civil and criminal liability. Any bank or finance company which violates these provisions is at risk for substantial monetary fines and possible criminal prosecution. Specifically, penalties for violating the CACRs range up to ten years in prison, one million dollars in corporate fines, and two hundred and fifty thousand dollars in individual fines.

In addition, section 103(a) of Helms-Burton prohibits U.S. lending institutions from "knowingly" extending credit for transactions involving expropriated property in Cuba to which a U.S. national owns a claim. The requisite degree of knowledge is the actual knowledge or the reason to know standard. This standard is not specifically defined in the CACRs, but it is reasonable to infer that actual knowledge could come directly from the claimant or through official notice from U.S. government agencies. The notice can also probably be imputed to the lender if, through the exercise of reasonable diligence, it could have ascertained the existence of an expropriation claim against the property. Similarly, the CACRs prohibit any person or "banking institution" from transferring credit or payments between banks or persons "with respect to any property subject to the jurisdiction of the United States" and that involves property in which the Cuban government or one of its nationals has an interest.

2. International Public Financial Institutions.—The Act requires the Secretary of Treasury to instruct U.S. directors of international financial institutions such as the World Bank, International Monetary Fund and the Inter-American Development

67. 31 C.F.R. Part 201. See also 22 U.S.C. § 6032 (a) (1)&(2).
Bank to "use the voice and vote of the United States" to oppose the admission of Cuba in these institutions.71 Further, the Act provides that if any financial institution approves a loan or other assistance to the Cuban Government over the opposition of the United States, the Secretary of the Treasury shall be required to withhold from such institution payment of a corresponding amount of increase in the capital stock contribution by the United States to that institution.72

In addition, the Act reiterates certain provisions of the Cuban Democracy Act of 1992 which authorizes, but does not require, the U.S. government to withhold assistance of any kind to any country which provides assistance to Cuba.73 The Act broadens the definition of assistance to include forgiveness of debt owed by Cuba or acceptance of equity interest in Cuban government property in exchange for cancellation of Cuban debt.74

B. Trafficking in Confiscated Cuban Property: Procedural Issues

The Act defines "trafficker" as any alien (company or individual) who benefits from the use of Cuban property confiscated after the 1959 Cuban revolution.75 The definition of trafficking in expropriated property includes "the buying and selling" of expropriated property and "engag[ing] in commercial activity using or otherwise benefitting from confiscated property,"76 This sweeping provision would subject any foreign company to a lawsuit in U.S. court if that company had direct or indirect business dealings affecting expropriated, property in Cuba. For instance, if a French company purchased sugar from a French wholesaler who, in turn, had purchased the sugar from a Cuban plantation which had been expropriated and the company processed the sugar into a product which it sold for a profit, such a sale would constitute commercial activity which benefits from expropriated property. The French company, therefore, could be held liable for damages

73. See infra notes 31-37 and accompanying text.
74. Id.
76. Helmes-Burton Act, 110 Stat. 815 § 302(a) (codified at 22 U.S.C. § 6082(a)).
CONFISCATED CUBAN PROPERTY

in U.S. court, even if it had purchased the sugar from a non-Cuban and had made no sales of the sugar product into the United States.

1. Claimant Eligibility.—Title III of the Act establishes a private right of action for any U.S. national to file a claim in U.S. federal courts against any third-country national who “traffics” in expropriated property. The Act defines U.S. national not only as a person who was a U.S. citizen at the time their property was expropriated, but also as a person who became a U.S. citizen after the expropriation occurred. The Act divides the universe of eligible U.S. nationals who are entitled to file civil rights of action into three categories. First, there are the individuals and entities whose claims were certified by the FCSC under the Cuban Claims programme. Second, there are the U.S. nationals who were not eligible to file claims under the Cuban Claims programme. Third, there are the individuals and entities who were eligible to file claims under the Cuban Claims programme but failed to do so, or who had filed claims but had them denied by the FCSC. Each will be addressed separately below.

The following discussion assumes that there is property in Cuba that is defined under Section 4(4) of the Act as “confiscated property,” and that the activities of the third-country national would fall under the very broad definition of “trafficking” in such property. Section 4(13) of the Act states that a person “traffics” in confiscated property if “that person knowingly and intentionally” sells, disposes, transfers, or engages in “commercial activity using or otherwise benefiting from confiscated property.” Section 302(a)(1)(A) of Title III imposes civil liability and damages against any person who “traffics in property which was confiscated by the Cuban Government on or after January 1, 1959.”

As mentioned earlier, the number of eligible claimants includes not only certified claimants under the FCSC programme, but also any U.S. national “who acquires ownership of the claim before” the date of enactment of the Act. Therefore, if a certified claimant has assigned her ownership of a claim to a third party before the enactment of the Act, the third party has the right to bring an

action in place of the certified claimant.\textsuperscript{80} Moreover, nothing in the Act prohibits a group of non-U.S. nationals who have no connection whatsoever to the United States but who have claims for expropriated property in Cuba from forming a U.S. corporation and assigning their claims to that corporation to be asserted in a Title III action. In fact, some U.S. lawyers in Florida have formed such a corporation on behalf of Spanish claimants who still hold unresolved property claims against the Cuban government.\textsuperscript{81}

\textit{a. Certified Claimants.}—The Act makes it very easy for a certified claimant to sue and obtain a judgment against a third-country national trafficing in confiscated property in Cuba. A certified claimant has the right, under Section 302(a) of the Act, to bring a civil action for damages in a United States federal court against "any person" who, after the end of a three-month grace period beginning on the effective date of Title III of the Act,\textsuperscript{82} "traffic[s] in property that was confiscated by the Cuban government on or after January 1, 1959" to which the plaintiff has a certified claim.

There are several time periods, however, that constrain this right of action. First, Title III was initially intended to become effective on August 1, 1996.\textsuperscript{83} Second, the statute provides a three-month waiting period after Title III becomes effective in which no liability attaches to conduct that would otherwise be considered "traffic[ing]." Third, the President has authority to suspend the effective date of Title III for discrete six-month periods if the President "determines and reports in writing to the appropriate congressional committees at least fifteen days before such effective date that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."\textsuperscript{84} The President may keep the suspension in effect for consecutive periods of six months,\textsuperscript{85} or may reimpose the suspension after Title III has become effective.\textsuperscript{86} The suspen-

\textsuperscript{80} 22 U.S.C. § 6040-41. The third party claimant must be a U.S. national. \textit{Id.}

\textsuperscript{81} See Kenneth Bachman et al., \textit{Anti-Cuba Sanctions May Violate NAFTA, GATT}, Nat'l L.J. C3, Mar. 11, 1996.

\textsuperscript{82} Section 4(13), Helms-Burton Act, 110 Stat. 790 (codified at 22 U.S.C. § 6023(13)(B)(i)).

\textsuperscript{83} Section 306(a), Helms-Burton Act, 110 Stat. 821 (codified at 22 U.S.C. § 6082(a)).

\textsuperscript{84} Section 306 (b)(1) (codified at 22 U.S.C. § 6063(b)(1)).

\textsuperscript{85} 22 U.S.C. § 6063 (b)(2).

\textsuperscript{86} \textit{Id.}
sion of claims expires automatically at the end of each six month period, unless the President renews the suspension not less than fifteen days before the expiration of the previous period. During any period in which the filing of claims is permitted under Title III, the President may immediately reimpose the suspension as to claims not yet filed and impose a stay as to claims which are pending in court. Moreover, at any time, the President may rescind any suspension of the applicability of Title III by “reporting to the appropriate committees that to do so will expedite a transition to democracy in Cuba.”

Beginning in July 1996, President Clinton utilized his authority under Section 306 (b)(1) to suspend the right to file claims under Title III against parties which are allegedly trafficking in expropriated property. The effect of the suspension was to impose a “cooling off” period in which foreign nationals were given the opportunity to limit their liability under the law by disposing of expropriated assets so that negotiations could continue between the United States and its trading partners over the best approach to bring about political and economic reform in Cuba. An example will illustrate the application of the law. If the President had permitted Title III to go into effect on August 1, 1996, a certified claimant would have been prohibited from bringing a claim until November 1, 1996. During this three-month grace period, claimants have the option of giving notice to alleged traffickers that they are subject to suit in U.S. court unless they cease dealing in confiscated property. If the alleged trafficker continues dealing in confiscated property on November 1, 1996—the expiration of the three-moth grace period—a claim will accrue for statute of limitations purposes against the defendant and an action may be brought.

Therefore, if Title III had gone into effect on August 1, 1996, a certified claimant was prohibited from bringing a civil action against a foreign party before November 1, 1996, assuming the foreign party was “trafficking” in confiscated Cuban property at that time. However, President Clinton’s suspension of claims under Title III has had the effect of postponing the time at which claims may be brought. This works to the disadvantage of a foreign party

87. Section 306 (c), Helms-Burton Act, 110 Stat 821 (codified at 22 U.S.C. § 6063(c)).
88. Id.
who may be subject to suits by certified U.S. claimants because the
President can revoke the suspension period without notice, and
once the suspension period has expired or has been revoked there
is no three-month grace period for the foreign defendant to prepare
against any potential claims.

2. **Damages.**—Under Title III of the Act, persons who traffic
in expropriated property will be liable for money damages to any
U.S. national who holds a claim to such property. The amount
of liability imposed is based on the value of the expropriated
property, not on the value of the property which the defendant
benefitted from or used. With respect to the defendant, this is
the most onerous section of Title III. For example, if a Mexican
company purchased ten thousand dollars of tobacco from a
confiscated Cuban farm which had been valued at one million
dollars, the company would be liable not for the value of the
tobacco sold into the United States but for the value of the
confiscated farm—one million dollars. There is no connection
whatsoever between the amount of liability imposed and the
economic benefit derived from the trafficking activity. Moreover,
after being placed on notice that he is trafficking in confiscated
property, if the alleged trafficker refuses to settle with the claimant
and then is determined to be liable, the defendant’s liability could
reach three times the value of the expropriated property plus
attorney’s fees, interest and costs.

Once a lawsuit has been filed under Title III, the certified
claimant can recover from the defendant up to three times the
greater of the amount certified to the claimant by the FCSC plus
interest, or the fair market value of the confiscated property.
Under the statute, the fair market value of the property can be
calculated as either the current value of the property, or the value
of the property when confiscated, plus interest. The claimant
can also recover “court costs and attorneys fees.” In determin-
ing the value of expropriated property for purposes of recovery,
there will be a presumption in favour of the amount certified by
the FCSC; such a presumption can be rebutted by “clear and

§ 6082(a)(3)).
91. Id.
(a)(1)).
convincing evidence” that the fair market value is the appropriate amount of liability.95

3. Claims’ Limitations.—Title III requires that certified claimants who file suits against third parties must be seeking the return of expropriated property or compensation worth at least $50,000. This minimum amount in controversy is calculated on the principal value of the claim “exclusive of interest, costs, and attorneys’ fees.”96 This section, however, contains an inherent inconsistency: on the one hand, it defines the $50,000 minimum claim to be “exclusive of interest,” but on the other it states that “[i]n calculating $50,000 for purposes of the preceding sentence, the applicable amount under subclause (I), (II), or (III) of subsection (a)(1)(A)(i) may not be tripled as provided in subsection (a)(3).” The latter sentence, referring as it does to the amount computed under subclauses (I), (II), and (III), implies that interest is to be included in the computation.

Another limitation on the ability of claimants to file suit is a two-year statute of limitations. Under Title III, actions may not be brought more than two years after the trafficking giving rise to the action ceased. For the person who has been dealing in or benefitting from expropriated property, this is significant because when they cease dealing in such property, a two-year period begins to run beyond which no Title III lawsuit may be brought with respect to that property. Furthermore, this statute of limitations period may begin to run while the presidential suspension is in effect. The suspension period becomes, therefore, a window of opportunity in which the trafficker may not be sued for benefitting from confiscated property but has the opportunity to dispose of such property and thereafter to eliminate her Title III liability after the two year limitations period has expired.

Subject to these limitations, the Act imposes strict liability on third parties deemed to be trafficking in confiscated properties in Cuba.97 Assuming that federal jurisdiction can be asserted over the third party defendant, the plaintiff needs to establish two elements in order to prove liability: 1) that the defendant was “trafficking” in the properties at issue after plaintiff’s right of action accrued under the statute, and 2) that the last act of “trafficking” occurred two years or less before the initiation of the

96. 22 U.S.C. § 6082(b).
97. Id.
action. With regard to damages, the plaintiff can recover costs, attorneys' fees, and three times either the certified amount of the claim or the fair market value of the property, if that can be established.  

4. Parties Who Failed to Certify Their Claims.—The statute explicitly limits the ability of two types of potential claimants to bring civil suits under Title III: the first type is U.S. nationals who were eligible to file a claim with the FCSC under the Cuban Claims Programme but failed to do so, and the second is U.S. nationals who filed a claim with the FCSC but had their claim denied. The first type of claimant is barred altogether from bringing an action under Title III. The second type of claimant is not precluded from bringing a court action against a third country national, but the court must accept the findings of the Commission on the claim as conclusive in the action under this section. Presumably, this second type of claimant can bring an action but would have to submit additional evidence beyond that determined by the FCSC to be insufficient to prove ownership of the property in question or the amount of the loss sustained.

5. Newly-Identified Claimants.—The Act allows U.S. nationals who were not eligible to file an expropriation claim with the FCSC under the Cuban Claims Programme to bring an action for damages against third-country nationals who are allegedly “trafficking” in properties that were confiscated by the Cuban Government. Such actions, however, would be subject to the conditions and limitations discussed above for certified claimants, plus other limitations.

First, the action may not be filed “before the end of the two-year period beginning on the date of enactment of this Act.” This period would replace the three-month wait period applicable to certified claimants, and would be independent of any suspensions in the effective date of Title III imposed by the President. Thus, if President Clinton had not suspended the right to sue, the earliest date in which actions could have been brought by non-certified U.S. nationals would have been March 12, 1998 (date of enactment). If the President had lifted the suspension before March 12,

99. Id.
1998, these claimants would have had to wait until then to bring their actions. If the presidential suspension had remained in effect beyond March 12, 1998, these uncertified claimants could have filed their claims immediately upon the suspension being lifted. For example, if the President lifts the suspension on January 1, 1999, any conduct constituting trafficking on that date will permit the alleged trafficker to be sued immediately or, within a two-year period thereafter, in U.S. court. The suspension, however, has remained in effect since July 1996.

Second, in an action by a non-certified U.S. claimant, the plaintiff would have to establish ownership of the property in question and the amount of the claim. The Act allows the court to appoint a master, "including the Foreign Claims Settlement Commission," to make determinations regarding the amount and ownership of the claim.\(^{101}\)

Third, a non-certified U.S. claimant is not entitled to recover treble damages from a third country defendant unless, after the three-month period following the effective date of the Act, the claimant gives notice of his claim to the foreign national trafficking in the property at issue.\(^{102}\) If the party so notified continues to traffic thirty days after receiving the notice, then the U.S. claimant can recover treble damages in an action against the foreign party. Again, assuming for example that the effective date of the Act is August 1, 1998, a non-certified U.S. claimant could give notice after November 1, 1998 of its claim to the potential defendant; thirty days after receiving such notice (i.e., as early as December 1, 1998) the foreign party could become liable to the claimant for treble damages, although, as noted above, a lawsuit could not be instituted until March 1998—two years after enactment of the Act.

The possibility of recovering treble damages should be strong incentive for a potential non-certified claimant to reveal himself early in the process, but not before the end of the three-month period after Title III becomes effective. The thirty-day period would not begin to run if the claimant puts the defendant on notice before the suspension period has ended. It is also important for the non-certified claimant to put the defendant on notice because such notice serves to satisfy the requirement that the foreign party


engage in the activities constituting trafficking "knowingly and intentionally."\textsuperscript{103} In the absence of such disclosure, it would be difficult for the plaintiff to establish that the foreign party had knowledge of the existence of a claim.

III. Exclusion of Aliens

Although the implementation of Title III of the Act has been suspended indefinitely by President Clinton, Title IV took effect on April 1, 1996, authorizing the exclusion of aliens who participated in the confiscation of Cuban property or who are trafficking in confiscated property. For example, in July 1996, the State Department sent letters to nine officials of the Canadian mining concern the Sherritt Corporation warning that the officials' U.S. travel visas would be revoked if they did not sever their ties with the company within forty-five days.\textsuperscript{104} When they failed to comply with the order, the State Department revoked their visas.\textsuperscript{105} Similarly, in August 1996, the State Department notified six executives from the Mexican telephone company Domos that they and their family members would be deemed undesirable aliens within forty-five days unless Domos divested itself of assets which were initially confiscated from U.S. nationals by the Cuban government.\textsuperscript{106} When these officials also failed to comply, their visas were revoked as well.\textsuperscript{107}

The basis for these actions is found in Section 401(a) of Title IV of the Act, which excludes from the U.S. aliens who have confiscated or have benefitted from the use of confiscated property. The immigration exclusions in Title IV are very broad indeed with respect to the categories of people to which they apply, the timing of sanctions, and the conduct that brings about the exclusion. The conduct includes trafficking in confiscated property, "a claim to which is owned by a United States national." Trafficking occurs, for purposes of Title IV, if a person "knowingly and intentionally" transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property. The relevant language of section 401(a) states:

\textsuperscript{103} Section 302 (a)(2)(B), Helms-Burton Act, 110 Stat. 815 (codified at 22 U.S.C. § 6082(a)(2)(B)).
\textsuperscript{104} See Assoc. Press Cable no. 1430.
\textsuperscript{105} Id.
\textsuperscript{106} U.P.I. Cable no. 1344.
\textsuperscript{107} Id.
The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after the date of enactment of this Act - (1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national; (3) is a corporate officer, principal, or shareholder with controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national; or (4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).\textsuperscript{108}

A review of the definitions of statutory terms contained in the federal regulations brings out quite vividly the sweeping effects of the exclusion provisions. The term "agent" has been interpreted by the State Department to mean a "person who acts on behalf of a corporate officer, principal or shareholder with a controlling interest to carry out or facilitate acts or policies that result in a determination under Title IV of the Act."\textsuperscript{109} This broad definition of "agent" would permit almost anyone in a subordinate or advisory role to be excluded. This would include lawyers or other professionals who are employed by a company which does business affecting expropriated Cuban property; it would also apply to attorneys or professionals who are outside advisers to such a company.

1. Definitions.—The term "confiscates" is defined as follows:

the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property — (i) without the property having been returned or adequate and effective compensation provided; or (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and (B) the repudiation by the Cuban government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay — (i) a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government; (ii) a debt which is a charge on

\textsuperscript{108} Helms-Burton Act, 110 Stat. 815 § 302 (a)(3)(B) (codified at, 22 U.S.C. 6091(a)).

\textsuperscript{109} 61 Fed Reg. 30,656.
property nationalized, expropriated, or otherwise taken by the Cuban Government; or (iii) a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim.\textsuperscript{110}

In other words, confiscation means the nationalization of property by the Cuban government under decrees that were mostly passed shortly after the Castro regime came to power. For example, under the agrarian reform law, individual ownership of land was limited to a maximum of 995 acres and corporate ownership was similarly restricted.

By newly created definition, a "corporate officer" is "the president, chief executive officer, principal financial officer (or controller), any vice president of the entity in charge of a principal business unit, division or function (such as sales, administration or finance), or any other officer or person who performs policymaking functions for the entity."\textsuperscript{111} A similar definition emphasizing the policymaking authority applies to a "principal" where the entity is a partnership. Clearly, Congress has awarded the State Department with almost limitless discretion to exclude any person with any degree of corporate authority over confiscated property.

"Traffics" means a person

knowingly and intentionally—(i)(I) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property, (II) purchases, receives, obtains control of, or otherwise acquires confiscated property, or (III) improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after the date of the enactment of this Act to manage, lease, possess, use, or hold an interest in confiscated property, (ii) enters into a commercial arrangement using or otherwise benefiting from confiscated property, or (iii) causes, directs participates in, or profits from, 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.\textsuperscript{112}

As the language indicates, any commercial or administrative contact with confiscated property can be deemed "trafficking." Indeed, such broad language penalizes the acts of foreign company officials

\textsuperscript{110} 61 Fed. Reg. at 30, 656 (citing Helms-Burton Act § 401 (b)(I)).
\textsuperscript{111} Id.
who negotiate or conduct business which has a direct or indirect effect on expropriated property in Cuba. The effect of Title IV is unparalleled in the area of exclusion law.\footnote{113}

2. \textit{Claims Review}.—Title IV has directed the Office of Cuban Affairs in the Bureau of Inter-American Affairs at the Department of State to collect information on whether property in Cuba owned by a U.S. national has been "confiscated" or whether trafficking in such "confiscated" property has occurred. For purposes of determining excludability, the State Department will examine the claims to expropriated property so long as the claimants are U.S. nationals. This broad blanket of protection extends not only to claimants who were U.S. nationals at the time their property was expropriated but also to claimants who were not U.S. citizens at the time their property was taken. The U.S. government, therefore, will be "protecting" the property rights of persons who may not have been U.S. citizens at the time the confiscation of their property occurred.

In determining whether expropriated property is subject to a claim by a U.S. national, the State Department will also consult sources (including but not limited to U.S. government agencies) regarding the identity of principals, officers, and controlling shareholders, and their agents, spouses, and minor children.\footnote{114} Once the Department of State finds that "facts or circumstances exist that would lead the department \textit{reasonably to conclude} that a person has engaged in confiscation or trafficking after March 12, 1996," then a determination of excludability under Title IV will be made.\footnote{115}

3. \textit{Prior Notification}.—Before a final determination of excludability can take effect, the guidelines provide the affected party forty-five days after the receipt of a "notification letter" to divest from a "trafficking" arrangement in order to avert the exclusion or to provide evidence that he or she is not "trafficking" in confiscated property. After the forty-five day period, the Department of State will then make its determination based upon evidence that would lead it to reasonably conclude that the alien or company involved is engaged in trafficking.\footnote{116}

\footnotesize
\begin{itemize}
\item \footnote{113. \textit{Id.}}
\item \footnote{114. Helms-Burton Act, 110 Stat. 823 § 401(b).}
\item \footnote{115. \textit{Id.}}
\item \footnote{116. \textit{Id.}}
\end{itemize}
At the discretion of the Department of State, diplomatic and consular personnel of foreign governments, and representatives to and officials of international organizations may be granted exemptions from Title IV. In addition, a medical exemption is available, as well as one for purposes of defending an action under Title III.\footnote{Id.} Unlike Title III, Title IV contains no provision permitting the President to waive its requirements in the national interests. In addition, there is no provision in the Act which authorizes removal of a bar against entry into the United States once an individual has been deemed to be excluded.

4. **Standard of Proof.**—The standard for a finding of excludability is the more relaxed legal standard of “reasonable conclusion.” After an exclusion notice is received, a non-U.S. national has forty-five days to contest the finding. Consequently, the burden of rebuttal can be quite difficult for the alien. Conversely, the burden of identifying “confiscated” property will be an onerous one for the State Department. Given the hostility with which Cuba has received the Helms-Burton Act, the Cuban government will most certainly not allow access to its corporate and financial records. Except for such rare and clear-cut cases as Sherritt and Grupo Domos—the former occupied a nickel mine that was expropriated from a New Orleans company while the latter used property that once belonged to ITT—much of the evidence submitted to the State Department will necessarily be anecdotal. The extent to which this anecdotal evidence will justify a finding of excludability remains to be seen.

In addition, for the immigration exclusion to take effect, a foreign national would need to “knowingly and intentionally” engage in the proscribed activities. It is difficult to see how a third-country entity could “knowingly and intentionally” traffic if the confiscated property at issue is subject to a claim by a non-certified claimant whose identity and status has not been previously revealed. Therefore, the risk of Section 401(a) exclusion to a third-country national doing business in Cuba materializes only when the existence of U.S. nationals with expropriation claims against the property in question is revealed or if the property is covered by a claim certified by the FCSC.\footnote{118. What is clear, however, is that once antidote laws announced by the European Union, Mexico, and Canada are implemented in retaliation for the Helms-Burton Act, U.S. executives and their families will be as undesirable abroad}
Unlike Title III, Title IV went into effect on March 12, 1996. The Department of State has used it selectively to exclude the officers, directors and controlling shareholders of major multinational companies which have significant operations in Cuba. Although the law has only been invoked on a few occasions, its application against certain British, Mexican and Canadian companies has attracted great publicity. Some experts have argued that this publicity has deterred some companies from making investments in Cuba and has caused other companies to begin liquidating existing investments. Moreover, it appears that, because of increased pressure from the U.S. Congress, the Department of State will be increasing the scope of enforcement for Title IV in the near future to include not only high profile executives of multinational companies, but also anyone who travels in the United States and conducts trade with Cuba.

IV. International Law Implications

This section contends that the Helms-Burton Act violates certain principles of customary international law, including the act of state doctrine as it is derived from the principle of sovereignty, the continuity of claim principle, the rule against secondary boycotts, and the principle of jurisdiction to prescribe.

A. Act of State Doctrine.

Under customary international law, a state has no right to enact laws which have the effect of intervening with a foreign state’s expropriation of private property located within its territory.\(^\text{119}\) This rule derives from the act of state doctrine, which has been primarily developed in the case law of the United States.\(^\text{120}\) The act of state doctrine is premised on the concept of sovereignty, which is a long-recognized principle of customary international law. The concept of sovereignty is important for understanding the act of state doctrine. Sovereignty is based on the legal equality of

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120. See ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 480 (1993). It is important to note that the act of state doctrine is a product of U.S. case law, and it can be argued that it should not have status as a principle of customary international law. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 323 (4th ed. 1990). It also has been recognized by the English House of Lords Buttes Gas & Oil Co. v. Hammer, [1982] A.C. 888, 936-38 (H.L.).
states within the international system, and holds that a state has full power to enact laws that govern its own internal affairs within its own territorial jurisdiction, but may not enact laws that govern the internal affairs of other recognized sovereign states. The Act arguably violates Cuban sovereignty because it allows a U.S. court to judge the legality of certain acts of the Cuban government in confiscating property located within Cuban territory. Moreover, the Act imposes sanctions against foreign nationals whose trading activities with Cuba occur entirely in another country with no connection whatsoever to the territory of the United States.

The United States Supreme Court applied the act of state doctrine in 1964 when it held that customary international law prohibits a state from reviewing the legality of official public acts of foreign governments within their borders. Essentially, the act of state doctrine prohibits a court in state A from sitting in judgment of the public acts of the government of state B if the effects of the public acts of state B occur solely in state B. The seminal U.S. Supreme Court case dealing with the act of state doctrine is Banco Nacional de Cuba v. Sabbatino. In Sabbatino, the Cuban government had nationalized a Cuban company which had sold sugar to a U.S. commodities broker, who, to secure consent for the sugar shipment, entered into a new contract with the Cuban government and its shipping agent, Banco Nacional. The broker paid the original owner of the sugar instead of Banco Nacional's agent, and Banco Nacional sued the broker for conversion. The broker responded that because the expropriation of the Cuban sugar corporation violated international law, Banco Nacional had no property interest in the sugar. Banco Nacional then invoked the act of state doctrine to prevent a U.S. court from reviewing the legality of its expropriation. The federal circuit court of appeals ruled for Sabbatino, but was reversed by the U.S. Supreme Court, which held that the "judicial branch will

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121. Id.
123. Banco Nacional, 376 U.S. at 398.
124. Id. at 403-04.
125. Id. at 406.
126. Id.
127. Banco Nacional, 376 U.S. at 401-04. In Banco Nacional, the Cuban government nationalized a Cuban company that sold sugar to an American commodities broker. Id.
not examine the validity of a taking of property within its territory by a foreign sovereign government."

Congress responded to the *Sabbatino* decision by enacting the Hickenlooper Amendment to the Foreign Assistance Act. The Hickenlooper Amendment states that the act of state doctrine does not preclude judicial or legislative action when the property taking violates international law. Based on the Hickenlooper Amendment, the Supreme Court reversed its earlier position on the act of state doctrine in the *Sabbatino* case by holding in *Banco Nacional de Cuba v. Farr* that the act of state doctrine is not a valid defense against the claim of a U.S. national when the expropriated property in question is located within U.S. territory. Though the doctrine has been modified through statutory changes and judicial interpretation, it still applies when tangible property is situated in the taking state at the time of the expropriation.

Opponents of Helms-Burton would argue that the act of state doctrine would prevent a state from enacting laws which have the effect of intervening with a foreign state's expropriation of private property located within its territory. By applying this doctrine, the U.S. government may be prevented from granting relief for confiscation claims, since these confiscations were official acts of the Cuban government. In light of the Hickenlooper Amendment and the *Farr* case, however, if the expropriated property is attached within U.S. territory, the act of state doctrine would not be a valid defense against those claimants who were U.S. nationals at the time the confiscations occurred. In contrast, it would be a valid defense against those who were Cuban nationals at the time of the confiscations.

It is important, however, to point out the principal argument opposing the application of the act of state doctrine as a defense under customary international law to a foreign national's claim for confiscated property. Some legal scholars have argued that the act

128. *Id.* at 428.
129. This was actually the Second Hickenlooper Amendment. The First Hickenlooper Amendment was passed in 1961 as part of the Foreign Assistance Act of 1961, which prohibits the U.S. Government from providing assistance to Cuba until Cuba provides full compensation to U.S. nationals whose property was confiscated. 22 U.S.C. § 2370 (West 1990).
130. *Id.*
132. *Id.*
133. LOWENFELD, supra note 120, at 523.
of state doctrine is contrary to the rule of law and should be rejected as a principle of international law.\textsuperscript{134} Indeed, the eminent British scholar F.A. Mann argued that international law does not require that the act of state doctrine be applied because no international tribunal, according to Mann, had ever adopted it.\textsuperscript{135} But Mann admitted that the doctrine had been accepted in Anglo-American and Dutch judicial practice.\textsuperscript{136} More important, the courts of other leading legal systems have accepted the act of state doctrine as a corollary of the principle of sovereignty and thus as a principle of international law.\textsuperscript{137}

In addition, Congress further limited the effect of the act of state doctrine by adopting Section 302(a)(6) of Title III of the Act which specifically declares the act of state doctrine inapplicable to actions brought under the Act.\textsuperscript{138} It states: 'No court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits' in an action based on a Cuban confiscation. By adopting this provision, Congress has effectively eliminated the act of state doctrine as a defense in a Helms-Burton action. Whether it is within Congress’ dominion to effectively negate a judicially recognized doctrine is a matter of dispute.\textsuperscript{139} Though the Supreme Court in Farr limited the reach of the act of state doctrine,\textsuperscript{140} the court has continually reaffirmed the existence and vitality of the doctrine. Therefore, if a Title III action reached the Supreme Court, the Court may narrowly construe Title III’s attempt to abolish the doctrine or the Court may overrule Congress entirely and apply the doctrine, especially if fairness and

\begin{thebibliography}{99}
\bibitem{134} F.A. Mann, \textit{Studies in International Law} 385 (1973).
\bibitem{135} \textit{Id.}
\bibitem{136} \textit{Id.}
\bibitem{138} 22 U.S.C. § 302(a)(6).
\bibitem{139} \textit{Id.}
\bibitem{140} \textit{E.g.}, 22 U.S.C. § 2370 (West 1990), The Second Hickenlooper Amendment to the Foreign Assistance Act of 1961; \textit{see also}, Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (creating a Supreme Court exception to the act of state doctrine for commercial activities by foreign sovereigns).
\end{thebibliography}
equity require such a result. In general, though, the Act calls into question the continuing vitality of the act of state doctrine.

Assuming for the moment though that section 302(a)(6) is invalid and the act of state doctrine applies, the Act violates the doctrine by authorizing the U.S. government to allow claimants who were Cuban citizens, or citizens of any other third country, at the time of the expropriations, to bring claims for compensation in U.S. courts. This would put the U.S. courts in the position of international arbitrator. Absent consent of the Cuban government, international law provides no authority for the U.S. government to intervene in a dispute between the Cuban government and claimants who were Cuban nationals, or third-country nationals, at the time that their property was taken.

B. *Continuity of Claim Principle*

The Act may also violate the international legal principle of "continuity of claim." This rule of customary international law permits a state to assert a claim against a foreign state on behalf of an injured party only when the claimant was a citizen of the protecting state at the time the injury occurred and remained a citizen until the claim was adjudicated. Thus a U.S. claimant who seeks the diplomatic protection of the U.S. government to assert a claim on its behalf for confiscated property must have been a U.S. citizen or national from the time of the confiscation until the time the claim is adjudicated.

Title III of the Act authorizes claimants who were Cuban citizens or nationals at the time their property was confiscated to bring claims if they are U.S. nationals at the time they file their claim for damages. Thus, a U.S. national who was not a citizen or national of the United States at the time its claim arose would be able to bring a claim under Title III. International law generally requires that, absent an international agreement to the contrary, claimants who were Cuban citizens at the time of the confiscation must seek their remedies in Cuban courts. By permitting former Cuban citizens to file claims, the Act significantly broadens the class of eligible claimants beyond the bounds of what international law allows.


In addition, according to a ruling by the International Court of Justice, it appears that U.S. shareholders of an expropriated corporation which had been incorporated in Cuba may not have standing to sue under Title III. The I.C.J. held in *Barcelona Traction* that the country of incorporation, and not the country of the shareholders' residence, has the right of diplomatic protection on behalf of a corporation which was expropriated without compensation. The *Barcelona Traction* case dealt with three countries: the country where the expropriation of corporate assets occurred (Spain), the country of corporate registration (Canada), and the country of shareholder residence (Belgium). The I.C.J. held that Canada, and not Belgium, had the right of diplomatic protection, which it chose not to exercise. The Belgian shareholders could only seek redress in Spanish courts and not by invoking the Belgian government's protection through international legal proceedings. The court noted in *dicta* that it declined to answer whether Belgium would have had standing if *Barcelona Traction* had been a Spanish corporation, but it indicated that a theory of international law has developed whereby the State of the shareholders may have the right of diplomatic protection if the "state whose responsibility is invoked is the national State of the company."

C. Secondary Boycotts

Opponents of Helms-Burton argue that it is a secondary boycott and therefore is in violation of both U.S. and international law. The prohibition against secondary boycotts has been a principle of American Law since 1977. Under the Export Administration Act, is unlawful for any 'United States person' to comply with or further, in the interstate or foreign commerce of the United States, 'any boycott fostered or imposed by a foreign country against a country which is friendly to the United States' 

144. Id.
145. Id.
146. Id.
147. Id.
149. Id.
(e.g., Cuba), then X cannot trade with state A. Essentially, state A is forcing X to choose between doing business with state A and state B, even though the law of state C, of which X is a citizen, permits X to trade with state B. The boycott of Israel by the League of Arab States is the best-known example of a secondary boycott. The United States has an anti-boycott law which prohibits U.S. companies from complying with the Arab boycott of Israel.\textsuperscript{150}

The provisions of the Act imposing private liability for trafficking in confiscated property amount to a secondary boycott of persons who deal with Cuba. Although the international law of secondary boycotts is somewhat indeterminate, it is the declared policy of the United States to oppose such boycotts. Moreover, secondary boycotts generally are considered inconsistent with international law because they fall into the category of "non-forcible countermeasures," which may be taken only in proportion to a breach of some obligation or duty owed to the invoking state.\textsuperscript{151} Liability under Helms-Burton is not based on the breach of any obligation or duty to the United States, but only on the act of trafficking in confiscated property.

On the other hand, proponents of Helms-Burton argue that the Act is not a secondary boycott because third-country nationals are permitted to trade and invest with Cuba so long as the Cuban property in which they are investing or benefitting was not expropriated without compensation. The Act imposes sanctions against those who do business with, or derive economic benefits from, expropriated property; it does not penalize a person simply for trading with Cuba. For example, if a French company purchases an interest in a Cuban joint venture which builds a hotel at a Cuban beach resort, the company avoids liability under the Act so long as the property on which the hotel was built, or the material used to build the hotel, was not confiscated.

This argument fails to point out that virtually all commercial enterprises in Cuba were expropriated by the Government in the years after Fidel Castro came to power, whether they belonged to U.S. nationals, Cuban nationals, or third-country nationals.\textsuperscript{152}


\textsuperscript{151} M.N. Shaw, INTERNATIONAL LAW 695-97 (3d Ed.1991).

Therefore, any person who deals with an enterprise which existed prior to January 1, 1959, or with an enterprise which could be regarded as a successor to such an enterprise, is exposed to liability under the Act, if it does business involving confiscated property to which a U.S. national may have a claim. Thus, the Act effectively constitutes a secondary boycott against Cuba that, like the actions of the Arab League in imposing sanctions against Israel, seeks to coerce conduct that takes place wholly outside of the nation attempting to impose its jurisdiction. Moreover, because Congress has denounced secondary boycotts by enacting anti-secondary boycott legislation, it seems illogical for it to enact a law which effectively creates a secondary boycott by imposing sanctions against third-country nationals for trading or doing business with expropriated property in Cuba.

D. Extra-Territorial Jurisdiction

The Act’s greatest encroachment on existing international law may exist in the area of “jurisdiction to prescribe.” The concept of jurisdiction to prescribe defines the extent to which a nation may extend its laws extra-territorially. Title III provides a cause of action in a U.S. court against any non-U.S. person or company that has met the requisite definition of trafficking in expropriated Cuban property. If the non-U.S. person is found within U.S. territory, the claimant can obtain in personam jurisdiction over the defendant based on acts committed by the defendant outside of U.S. territory but which affected the Cuban property rights of the claimant. The provision also allows a claimant to obtain subject matter jurisdiction over a foreign defendant who has never been present in the United States but who has benefitted from the use of expropriated property. According to this approach, a claimant may obtain a provisional remedy against a defendant by seizing or attaching any property of the defendant located within the United States, even though the defendant may never have been physically present in the United States.

This raises the obvious issue of whether customary international law permits U.S. courts to enforce its laws against defendants which have committed acts outside of U.S. territory and which have

153. LOWENFELD, supra note 120, at 46.
155. This approach is similar to obtaining in rem jurisdiction over the property of a foreign defendant located within U.S. territory.
little or no effect within the United States. Section 301(9) of Title III states: “International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.”156 The language of section 301(9) is identical to that of section 402(1)(c) of the Restatement (Third) of Foreign Relations Law.157 However, the drafters of section 301(9) failed to include the immediately subsequent section (403), which qualifies the meaning in section 402(1)(c). Section 403 of the Restatement provides a limitation on 402’s general jurisdiction to prescribe. Section 403(1) provides: “Even when one of the bases for jurisdiction under 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”158 It appears that Congress took the message of the Restatement somewhat out of context in an attempt to bolster the legal validity of Title III. Analysed within the context of the entire Restatement, though, it becomes more difficult to justify the extraterritorial extension of U.S. law to reach out to those defendants who did not act in a manner that had any effect, intended or actual, in the United States. Any effect within the United States of property expropriated in Cuba in 1959—if any effect can be identified at all—was caused by the Castro government, not by persons over whom jurisdiction is sought to be exercised under Helms-Burton. Moreover, even if an “effect” could be identified, section 403(1) directs that the exercise of jurisdiction must still not be “unreasonable.” It does not appear reasonable for the U.S. government to dictate the investment policies of foreign companies deciding whether to invest in a separate foreign country.

Finally, it is questionable whether a U.S. court could gain personal jurisdiction over every defendant in a Title III civil action.159

156. Helms-Burton Act, 110 Stat. 814 § 301(9) (codified at 22 U.S.C. § 6081(9)).
158. Id. at Section 402.
159. Even Mr. Brice Clagett, a Washington D.C. attorney, author and supporter of Helms-Burton, conceded that it will be very difficult to establish personal jurisdiction in the United States for many cases filed against foreign nationals who have no connection with the United States, or whose property in the United States is completely unrelated to the claims for expropriated property. Proceedings from
Title III permits a U.S. national who owns a claim to confiscated property in Cuba to money damages from any foreign individual or company which traffics in their former property. Presumably, some of these defendants have no relationship to or contacts with any federal district of the United States and, therefore, would not be amenable to suit in U.S. court. In addition, those foreign individuals and companies that do have contacts in the United States may not be amenable to suit in U.S. courts under current theories of personal jurisdiction if their contacts in the United States are entirely unrelated to the activity in Cuba that gave rise to the cause of action under Title III of the Act. Therefore, it is doubtful that U.S. courts would have proper personal jurisdiction over all defendants even if Helms-Burton provides the necessary subject matter jurisdiction.

V. Conclusion

The lender liability provision of the Helms-Burton law imposes substantial risk of liability and criminal prosecution to any U.S. or U.S.-controlled lending institution that makes a loan or provides a credit to a person doing business with confiscated property in Cuba. U.S. lending institutions, foreign banks, finance companies or aliens which have some type of business presence in the United States may be held liable for civil damages under Title III of the Act if they finance transactions involving confiscated property in Cuba. The severe penalties under the CACRs against persons within the jurisdiction of U.S. law and the possible private right of action against U.S. lending institutions for indirectly financing international transactions which benefit from use of confiscated Cuban property necessitate a thorough review of transnational loan portfolios inquiring as to what degree of exposure, if any, U.S. persons and entities have under the Act. Moreover, although the private right of action which is available under Title III will likely remain suspended for the duration of the Clinton administration, a new president may lift the waiver and allow the lawsuits to proceed. Consequently, international banks and other non-U.S. investors in Cuban property should be aware of the civil damages to which they are exposed in U.S. courts as a result of investing in confiscated Cuban property. Similarly, U.S.-controlled foreign banks and other entities who invest and finance transactions

involving Cuba may be subject to severe criminal and civil fines by the U.S. government. Although it appears that the extra-territorial provisions of Helms-Burton and the CACRs violate customary international law, these provisions remain in effect and will likely be upheld by U.S. courts. However, foreign nationals which are subject to the jurisdiction of these laws may have a better chance at invalidating these provision if they persuade their home governments to assert claims before international trade organizations such as the World Trade Organization.