

A CHALLENGE TO THE LEGALITY OF TITLE III OF LIBERTAD AND AN INTERNATIONAL RESPONSE

INTRODUCTION

On February 24, 1996, two unarmed United States (U.S.) civilian aircraft were tragically shot down by the Cuban military in international airspace with no jurisdictional justification for the outrageous act.¹ Prior to this incident, President Clinton opposed the proposed Helms-Burton Act² which among other things, contained a provision giving U.S. nationals the right to sue foreigners who “traffic” in property confiscated by the Cuban government on or after January 1, 1959, for monetary damages.³ However, in response to the tragedy, President Clinton signed into law on March 6, 1996, the legislation creating harsh sanctions on those not conforming to U.S. policy against Cuba.⁴ As a result, the United States currently stands in the face of worldwide criticism on the grounds that the Helms-Burton Act is a violation of international law and oversteps U.S. jurisdictional boundaries.⁵

Proponents of the Helms-Burton legislation support its legality and jurisdictional basis on the grounds that U.S. properties were illegally expropriated by the Cuban government and, thereafter, U.S. nationals were never fairly compensated for their property interests. As a result, the United States recognizes \$15 billion dollars in outstanding claims, including compounded interest.⁶ According to the United States, the effects of these property claims that U.S. nationals hold against the Cuban government permit jurisdiction under Title III; therefore, justifying its international legality.⁷ If however;

1. Peter Tarnoff, Transcript of White House Briefing on ICAO Report, (June 20, 1996), *reprinted in* U.S. NEWSWIRE, June 21, 1996.

2. See Steven Greenhouse, *Bill to Tighten Economic Embargo on Cuba is Passed with Strong Support on the House*, N.Y. TIMES, Sept. 22, 1995, at A8 (Secretary of State Warren Christopher indicating that President Clinton would veto the legislation).

3. Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C.A. § 6021-6091 (West Supp. 1997) [hereinafter LIBERTAD].

4. *Background on the Helms-Burton Bill* (visited Sept. 28, 1996) <<http://www.usis-canada.usia.gov/helms.htm>>.

5. Teresa Gutierrez, *U.S. v. Cuba, Helms Burton Act Arouses Worldwide Anger* (visited Sept. 28, 1996) <<http://www.workers.org/cuba/helms.html>>; See also *U.S. Allies Give Good Advice on Cuba*, CHI. TRIB., June 10, 1996, at 14; *Europeans Try to Unify Against U.S. Actions*, THE COM. APPEAL, Sept. 10, 1996, at 8B.

6. *Quid Pro Quo*, THE ECONOMIST, Nov. 16, 1996, at 8. [hereinafter *Quid Pro*].

7. Monroe Leigh, Prepared Statement Before the Senate Foreign Relations Western Hemisphere Subcommittee, (July 30, 1996) *reprinted in* FED. NEWS SERVICE, July 30, 1996.

the United States truly endorses its own logic [in justifying these claims under Title III], it has no excuse but to allow a claim against itself for the properties seized during and after its own revolutionary war. Some 50,000-60,000 British loyalists fled the 13 states for Canada, leaving behind property . . . compound[ing] this at a modest 8% and the United States owes \$6.3 trillion. [Thus] maybe Canada and Britain should endorse Helms-Burton, let the Americans make sweeping, legal pontifications supporting it and then hold them to their word, agreeing to pay their claim when they pay ours.⁸

This note discusses the legality of Title III under the recently enacted Cuban Liberty and Democratic Solidarity Act (LIBERTAD), otherwise referred to as the Helms-Burton Act, giving U.S. nationals the right to sue foreigners who traffic in property confiscated from them by the Cuban government. First, a brief history leading up to the enactment of LIBERTAD including a synopsis of the relations between the United States and Cuba will be presented. However, the main focus of the note will be directed at the legality of Title III of the Act in the international scheme. Specifically, it will be suggested that Title III is inconsistent with international law, constitutionally unsound, and not in furtherance of U.S. policy.

Because no jurisdictional grounds exist for U.S. courts to adjudicate claims against Cuba for activities taking place in Cuba by the Cuban government, Title III is a violation of international law. In addition, the Act of State Doctrine precludes U.S. courts from sitting in judgment on the activities of the Cuban government conducted within its own territory. Moreover, Title III violates the U.S. Constitution by its provision barring U.S. courts from applying the Act of State Doctrine because of the constitutional encroachment of power into the Executive and Legislative branches of government resulting from the Judicial branch deciding issues of foreign affairs.

Furthermore, even if it is possible that the United States has not encroached upon international law, policy reasons suggest that enforcement of the Act is not in the interest of the United States. This is because the actual effects of Title III operate to create a loophole for the U.S. Trade Embargo with Cuba for certain U.S. claimants. In addition, the original purpose of the Act, to promote political reforms in Cuba, will not be accomplished by Title III. Finally, negative policy implications of Title III are apparent through proposed counter-measures the U.S.'s major allies are in the process of instituting.

8. *Quid Pro Quo*, *supra* note 6, at 8.

I. DESCRIPTION OF TITLE III

Title III of LIBERTAD provides a cause of action for U.S. nationals whose property was confiscated in Cuba by the Cuban government. The law states that “any person that, after the end of the 3-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any U.S. national who owns the claim to such property for money damages.”⁹ As well as attempting to protect U.S. nationals’ property rights wrongly taken by the Cuban government, the law extends to protect property rights of American nationals who were Cuban nationals *at the time* their property was confiscated.¹⁰

LIBERTAD was enacted primarily to promote the transition from a communistic Cuba to a democratic regime.¹¹ Accordingly, Title III furthers

9. 22 U.S.C.A. § 6082(1)(A) (West Supp. 1997). 22 U.S.C.A. § 6023(12)(A) & (B) (West Supp. 1997) define property 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 [T]he term ‘property’ does not include real property for residential purposes unless, as of the date of the enactment of this Act . . . (i) the claim to the property is held by a United States national and the claim has been certified under Title V of the International Claims Settlement Act of 1949; or (ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba.

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

22 U.S.C.A. § 6023(13)(A) (West Supp. 1997). See 22 U.S.C.A. § 6023(B) (West Supp. 1997) for a description of activities that do not constitute trafficking.

10. 22 U.S.C.A. § 1643l (West Supp. 1997) provides that in interpreting Title III of the Act, a U.S. District Court may determine a claim resulting from the confiscation of property by the Cuban government “whether or not the U.S. national qualified as a national of the United States . . . at the time of the action by the Government of Cuba.”

11. H.R. REP. NO. 104-468, sec. 3, at 3 (1996). In addition, the congressional record indicates that the purposes of LIBERTAD include:

[1] to assist the Cuban people in regaining their freedom and prosperity . . . in joining the community of democratic countries . . . ; [2] to strengthen international sanctions against the Castro government; [3] to provide for the

this objective by isolating foreign investment in Cuba and, thereby, applying economic pressure on the country. Thus, by creating the opportunity for property claimants to sue in U.S. courts under Title III, the United States accomplishes two objectives. First, it provides an opportunity for restitution to U.S. nationals whose property was "wrongly" confiscated. But more importantly, by doing so it also provides a jurisdictional means to impose a secondary boycott on foreign countries, forcing them to partake in U.S. isolationist foreign policy regarding Cuba or face U.S. sanctions.

II. HISTORY OF POLITICAL RELATIONS BETWEEN THE UNITED STATES AND CUBA

The beginning of unstable U.S. relations with Cuba surfaced following Castro's rise to power in 1959 after the fall of the Batista regime.¹² With Castro's rise to power came a shift from a capitalist regime to one of communism resulting in a decrease in U.S. involvement with Cuba in the years to follow.¹³ As part of the restructuring of the Cuban government after Castro took power, the Fundamental Law of the Republic was adopted providing a legal basis for Cuban confiscatory decrees.¹⁴ Subsequently, the Agrarian Reform Law was passed affecting foreign property owners by a redistribution of land ownership in Cuba which provided compensation for victimized land owners but was found compensatorily insufficient by the United States.¹⁵ Additionally, in 1959 a mineral law requiring the re-registration of mining claims and a petroleum law were adopted in Cuba.¹⁶ These enactments along with the increased trading relations between Cuba

continued national security of 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 . . . ; [4] to encourage the holding of free and fair democratic elections in Cuba . . . ; [5] to provide a framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and [6] to protect the United States nationals against confiscatory takings . . . [of] property . . . by the Castro regime.

Id.

12. ROBERT QUIRK, *FIDEL CASTRO* 209 (1993).

13. LOUIS PEREZ, JR., *CUBA AND THE UNITED STATES: TIES OF SINGULAR INTIMACY* 239-40 (1990). A reduction in U.S. imports occurred from \$543 million in 1959 to \$224 million in 1960. *Id.* at 240 (citing SUSAN SCHROEDER, *CUBA: A HANDBOOK OF HISTORICAL STATISTICS* 433 (1982)).

14. Jonathon R. Ratchik, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 *AM. U. J. INT'L L. & POL'Y* 343, 344 (1996).

15. *Id.* at 344-45.

16. *Id.* at 345

and the Soviet Union led to increased tensions between Cuba and the United States.¹⁷

In response to these rising tensions, the United States began reducing its sugar quota from Cuba, and finally in 1960, Congress passed the American Sugar Bill which totally eliminated the U.S. sugar quota.¹⁸ Subsequently, the beginning of Cuban confiscation of U.S. property began, and Congress responded with the Foreign Assistance Act of 1961 which authorized the President of the United States to impose an economic embargo against Cuba.¹⁹ Thereafter, in 1962 President Kennedy, acting in accord with the Foreign Assistance Act and the Trading with the Enemy Act,²⁰ instituted a complete trade embargo against Cuba.²¹

In order to validate and certify property claims held by U.S. nationals whose property had been wrongly confiscated by the Castro regime, the United States amended the International Claims Settlement Act of 1948 to provide a mechanism for U.S. nationals to file claims against the Cuban government.²² Despite this measure by the United States, Cuba failed to satisfy any of these claims.²³

17. *Id.* See also QUIRK, *supra* note 12, at 316-19 (The Soviet Union was providing many economic benefits to Cuba.).

18. QUIRK, *supra* note 12, at 319.

19. Foreign Assistance Act of 1961, 22 U.S.C.A. § 2370(a)(1) (West Supp. 1997).

20. Jerry W. Cain, Jr., *Extraterritorial Application of the United States' Trade Embargo Against Cuba: The United Nations General Assembly's Call for an End to the U.S. Trade Embargo*, 24 GA. J. INT'L & COMP. L. 379, 381 (1994). The Trading with the Enemy Act authorizes the President of the United States to impose sanctions against any country in time of crisis. President Truman in 1950, pursuant to the Trading with the Enemy Act, "declared a national emergency caused by what he perceived as a growing Communist threat." *Id.* Then following the Foreign Assistance Act, President Kennedy in 1962 passed the economic embargo with Cuba based on "the Truman proclamation of a national emergency." *Id.*

21. Proclamation [No.] 3447, 27 Fed. Reg. 1,085 (1962), *reprinted in* 31 C.F.R. § 515 (1996).

22. 22 U.S.C.A. § 1643 (West Supp. 1997). The statute defines U.S. nationals as "any United States citizen; or (B) any other legal entity which is organized under the laws of the United States" 22 U.S.C.A. § 6023(15)(A) & (B) (West Supp. 1997). However, under Title III U.S. nationals, who at the time of confiscations of their properties were not U.S. nationals are entitled to bring suit. 22 U.S.C.A. § 6083(c)(1) (West Supp. 1997).

23. *Supporting Democracy in Cuba: Hearings on S. 381 and H.R. 927 before the Senate Comm. on Foreign Relations*, 104th Cong. (1995) (statement of Ignacio E. Sanchez, Atty., Kelley Drye & Warren) available in WESTLAW, 1995 WL 357720 [hereinafter Sanchez]. Total number of Cuban claims validated was 5911 at a total of 1.8 billion dollars. MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 153 (1976).

III. ANALYSIS OF TITLE III AND ITS LEGALITY

A. *Jurisdiction under Title III*

International challenge to the legality of Title III (Act) has been primarily based upon the theory that the United States does not have the jurisdictional authority to prescribe law to those outside its borders.²⁴ Title III's paramount problem with respect to international law is that there are no grounds for the U.S. courts to assert jurisdiction over U.S. nationals' claims to expropriated property by the Cuban government with respect to the statute. It is accepted doctrine that:

- a state has jurisdiction to prescribe law with respect to:
- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
 - (b) the status of persons, or interests in things, present within its territory ["territoriality principle"];
 - (c) conduct outside its territory that has or is intended to have substantial effect within its territory ["effects doctrine"];
 - (2) the activities, interests, status, or relations of its nationals outside as well as within its territory ["passive personality doctrine"]; and
 - (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests ["protective principle"].²⁵

Since expropriation of property within Cuba clearly does not take place in the United States, there can be no basis for jurisdiction under subsection (1)(a) or (b). While the majority of those who support the Act assert the existence of jurisdiction under subsection (c), the effects doctrine, it will be suggested that even though effects within the United States may exist, those

24. David Fox, *Washington Faces Renewed EU Attack Over Cuba*, REUTERS FIN. SERVICES, May 30, 1996. See also, Ratchik, *supra* note 14, at 364 n.119 (citing Letter from Wendy R. Sherman, Assistant Secretary of Legislative Affairs to Benjamin A. Gilman Chairman, House Comm. on Int'l Relations (Apr. 28, 1995) reprinted in CUBA POLICY OR CUBA FOLLY?: FACTS ABOUT THE HELMS-BURTON LEGISLATION TO TIGHTEN THE EMBARGO AGAINST CUBA 5 (United States-Cuba Foundation & Cuban Committee for Democracy ed., 1995) stating "LIBERTAD'S extraterritorial application would be difficult because it transcends accepted international procedures and would be difficult to defend under international law."

25. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) [hereinafter RESTATEMENT].

effects are not reasonable, as required by internationally accepted doctrine in order to prescribe jurisdiction. Furthermore, it will also be shown that the doctrines of passive personality and protective principle are also inappropriate means for asserting jurisdiction under Title III.

While it is accepted international doctrine that a state has jurisdiction to prescribe law with respect to conduct or activities that have a substantial effect within its territory,²⁶ that effect must be reasonable.²⁷ However, even when it may be reasonable for a state to exercise jurisdiction over a person or activity "but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction."²⁸ If the other state's interest is greater than the state considering exercising jurisdiction, then it should defer to that state.²⁹

Some proponents of the Act claim that Title III's exercise of jurisdiction does not violate international law because "the actual implementation of the Act operates within the territorial boundaries of the United States That is, Title III of the Act allows lawsuits only against those traffickers who enter or operate within the U.S."³⁰ A careful reading of the Act prescribes no such restrictions. Lawsuits are permitted against "any person that . . . traffics in property which was confiscated by the Cuban Government."³¹ No language within the Act states that lawsuits

26. *Id.*

27. Reasonableness is defined by evaluating the following relevant factors:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between the state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state . . . and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

Id. § 403(2).

28. *Id.* § 403(3)

29. *Id.*

30. Leigh, *supra* note 7.

31. 22 U.S.C.A. § 6082(1)(A) (West Supp. 1997).

are allowed only against traffickers who enter or operate within the United States.³² The Act states that U.S. courts have jurisdiction to preside over U.S. nationals who have causes of action against any foreigners who are trafficking in confiscated U.S. property, regardless of whether those alleged traffickers are entering or operating within the United States.³³

The other justification for jurisdiction over U.S. nationals' causes of action under the Act is that the acts of foreigners trafficking in the confiscated property have "substantial effects" within the United States.³⁴ These effects within the United States include economic effects from the U.S. citizens injured as a result of the Cuban takings and subsequent trafficking of taken property, the complication of potential future return of these properties, and the undermining of U.S. foreign policy relating to free commerce.³⁵ While admittedly, there may be effects within the United States from Cuban confiscation of U.S. citizens' property, this admission does not automatically provide the United States with jurisdiction to intervene in settling disputes with U.S. nationals and foreigners who are "trafficking" in such property. The exercise of jurisdiction must additionally be reasonable and if conflicting interests exist between the two states, the state with the least interest should defer to the other state.³⁶

Because exercise of jurisdiction by the United States is not reasonable, the United States should not review property claims in Cuba against foreigners trafficking in such properties. First, such jurisdiction is not reasonable because it prescribes law to territories outside its borders. The "trafficking" by foreign nationals referred to in Title III occurs entirely outside the borders of the United States. Secondly, such jurisdiction prevents Cuba from developing and providing its own definition of property.³⁷ While the United States claims that it has a reasonable interest in exercising jurisdiction in order to provide remedies to its nationals who have been damaged by the trafficking,³⁸ the purposes of the Act suggest that

32. *Id.*

33. See Pascal Fletcher, *Sherrit Snubs US and Sends its Men to Havana*, FIN. TIMES, Sept. 12, 1996, at 28 for an example of a Canadian mining group who has over 200m (1128.2m) dollars invested in Cuba in mining, oil, exploration, agriculture, and tourism and has become the target of U.S. sanctions under the Act with no reference to whether the Canadian company enters or operates within the United States.

34. See RESTATEMENT § 402(1)(c).

35. Leigh, *supra* note 7. See also Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434, 435-38 (1996).

36. RESTATEMENT § 403(3).

37. Ratchik, *supra* note 14, at 363. The Cuban Constitution provides that all property belongs to the state. Sanchez, *supra* note 23 (citing ALBERT P. BLAUSTEIN & GIBERT H. FRANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CUBA 9 (Pamela S. Falk ed. & trans., 1993)).

38. See generally 22 U.S.C.A. § 6022(6) (West Supp. 1997).

the real goal of the passage of the Act was to deprive the Cuban government of foreign investment in an effort to force Cuba to return to a democratic regime³⁹ while incidentally providing relief to property claimants. This is further evidenced by the fact that the law contains a provision to nullify all U.S. claims in the event that Cuba begins actions to reverse its governmental structure to a democracy.⁴⁰ Congress, in offering the bill to the President to sign, even acknowledged that jurisdiction under Title III was controversial with respect to whether valid jurisdictional grounds existed and as a result, offered the President discretion with regard to the implementation of its provisions.⁴¹ President Clinton has in fact delayed the implementation of Title III for six months and is likely to make further delays.⁴² Furthermore, exercise of jurisdiction is not reasonable when taken in connection with foreign allies who have an economic and trade interest in Cuba. Because of Title III's passage, worldwide criticism has evolved, and some of our closest allies have even adopted counter-measures to rebut Title III's effect while others continue to enact similar counter-measures believing that the legislation is a violation of international law.⁴³ Thus, it is not reasonable for the United States to risk its foreign trade and economic relations with its closest allies over a property issue unsettled as to its legality.

Additionally, the United Nations Charter suggests that it would be unreasonable for the United States to exercise jurisdiction under Title III by its firm position on abstaining from an activity that may have the effect of impinging upon another state's sovereignty. For example article 1, paragraph 2 of the United Nations Charter asserts that signatory nations are held to "principles of non-intervention and both expressly and implicitly forbid extraterritorial application of laws which would thereby violate another country's sovereignty."⁴⁴ Furthermore, the United Nations Charter commands that all members respect the sovereignty of all other signatory nations.⁴⁵ Such a strong position by the United Nations demonstrates, in an international sense, that any overstepping of territorial jurisdiction will not be tolerated.

While arguably the effects felt within the United States of Cuban expropriation claims are to some degree existent, justification that an

39. 22 U.S.C.A. § 6022 (West Supp. 1997).

40. 22 U.S.C.A. § 6082(h)(1)(B) (West Supp. 1997).

41. *European Commission President Jacques Santer Underlines EU's Deep Concern with Helms-Burton Legislation to President Bill Clinton*, EUR. UNION NEWS (visited July 12, 1996) <<http://www.eurunion.org/eu/news/press/pr41-96.htm>> .

42. Jonathan Freedland, *Clinton Likely to Hold Fire on Cuba*, THE GUARDIAN, Nov. 12, 1996, at 12.

43. *See Antidote Law Introduced to Combat Anti-Cuban Legislation*, NEWS WAVES, (visited Sept. 28, 1996) <<http://www.southam.com/nmc/waves/depth/trade/cubamenu.html>> .

44. Cain, *supra* note 20, at 386.

45. U.N. CHARTER art. 2, para 1.

assertion of jurisdiction by the United States is reasonable is not strong enough. A balancing test may be performed to weigh which sovereign may more reasonably assert jurisdiction. In a narrow view, it may seem logical that the reasonableness for asserting jurisdiction based on legitimate property interests favor the United States;⁴⁶ but, viewed in a broader international scheme, that evaluation fails. It fails not only based upon the application of strict adherence to the international view against extraterritorial jurisdiction, but more importantly because of policy interests of both the United States and third countries. The United States assertion of jurisdiction under Title III affects worldwide trading partners with the United States as well as Cuba. The position that Title III claims impose upon countries, especially those who rely heavily on trade with Cuba, is unreasonable. These countries are effectively being forced to not invest in Cuba or face sanctions imposed by U.S. suits under Title III. Third countries that trade with Cuba are put in a position of uncertainty and hesitation when considering purchasing Cuban assets because the wrong purchase may subject them to a Title III suit.⁴⁷ More importantly, however, is the position in which the United States puts itself while allowing such claims to proceed. No major ally of the United States supports such action under Title III and furthermore, they vehemently object to it.⁴⁸ Not only is this opposition voiced by countries worldwide, but some have instituted counter-measures to rebut the effect of Title III on their respective nationals who stand to suffer under the legislation.⁴⁹ These countries assert that along with the exercise of extraterritorial jurisdiction, Title III is also a restraint on free trade. These Title III effects on U.S. relations with its major allies provide the strongest support that such an assertion of jurisdiction by the United States under Title III is unreasonable.

Finally, U.S. Title III jurisdiction cannot be justified either under the "passive personality" or "protective" principles. First, the passive personality principle for asserting jurisdiction provides that "a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national."⁵⁰ Because this principle for jurisdiction has been increasingly

46. Clagett, *supra* note 35, at 436 (asserting that the balancing test results favor the United States' assertion of jurisdiction over such claims).

47. ROBERT C. HELANDER, CREDITOR'S RIGHT: CLAIMS AGAINST CUBAN CONFISCATED ASSETS IN INVESTING IN CUBA: PROBLEMS AND PROSPECTS 37, 42 (1994).

48. See Maria Sanz, *U.S. Increasingly Isolated Over Cuba Policy*, AGENCE FRANCE PRESSE, Nov. 13, 1996; David Fox, *Washington Faces Renewed EU Attack Over Cuba*, REUTERS FIN. SERVICE, May 30, 1996.

49. See Teresa Gutierrez, *U.S. v. Cuba, Helms-Burton Act Arouses Worldwide Anger* (reprinted from July 25, 1996) <<http://www.workers.org/cuba/helms.html>>; *Euro MPs Call for Retaliatory Measures on Helms-Burton and Iran-Libya Sanctions*, PR NEWSWIRE, July 10, 1996.

50. RESTATEMENT § 402 cmt. g.

recognized in cases of terrorism and other types of organized attacks but not in ordinary torts or crimes,⁵¹ it is not applicable for justifying jurisdiction for property claims of U.S. nationals.

Secondly, the protective principle is also an inapplicable basis of jurisdiction under Title III. Under this principle of jurisdiction, the United States can assert jurisdiction over those who are not its nationals but commit offenses outside its territory when the offenses are "directed against the security of the state" or threaten "the integrity of governmental functions that are generally recognized as crimes by developed legal systems."⁵² Proponents of Title III argue that "Cuba—as a potential nuclear platform, a source of terrorism and illegal immigration, and a scene of human rights abuses" is a security threat to the United States.⁵³ If the cause of action under Title III was directed at specifically punishing activities by the Cuban government relating to potential nuclear activities or acts of terrorism that had occurred, jurisdiction may be justified. Title III, however, merely provides a cause of action for U.S. nationals who were wronged by the Cuban government through the confiscation of their property in Cuba. Expropriating U.S. property in Cuba, while seemingly a wrong act, does not directly threaten the security of the United States as would an act of terrorism or potential nuclear activity. Note that the actual offense under Title III is wrongfully expropriating U.S. property by the Cuban government. The protective principle has traditionally been aimed at offenses such as "espionage" that *directly* threaten U.S. security.⁵⁴ Thus, Cuba's nationalization of property does not rise to the level of an offense that could create a national security threat to the United States necessary to invoke the protective principle of jurisdiction.

Because none of the internationally recognized bases of jurisdiction exist for adjudicating claims under Title III, application of the legislation is a violation of international law. The only theory that arguably could apply for justifying jurisdiction under Title III would be that the confiscation of U.S. property had "effects" within the United States. However, these effects are not substantial. More importantly, even though effects exist, assertion of jurisdiction would not be reasonable primarily because of the aforementioned policy reasons. Therefore, there is no jurisdictional grounds for Title III, and thus, Title III constitutes a violation of international law on the grounds of its extraterritorial application.

51. *Id.* Section 1202 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. § 2231 (1994) illustrates how the United States has applied this jurisdictional doctrine in the severe circumstances of terrorism. This particular Act makes it a crime to kill, or attempt to conspire to kill a national of the United States outside U.S. territory.

52. RESTATEMENT § 402 cmt. f.

53. Leigh, *supra* note 7.

54. RESTATEMENT § 402 cmt. f.

B. *Act of State Doctrine and Constitutionality of Title III*

In addition to the lack of a jurisdictional basis for adjudicating claims, Title III is in direct conflict with the Act of State Doctrine which requires every state to respect the independence of every other sovereign state.⁵⁵ While proponents of the statute rely on the Hickenlooper Amendment⁵⁶ to demonstrate the inapplicability of the Act of State Doctrine in respect to U.S. nationals' claims against the Cuban government for expropriated property, questions remain unanswered as to how narrowly the Hickenlooper Amendment was intended to be construed. Regardless, even if the Hickenlooper Amendment does require holding the Act of State Doctrine inapplicable to the claims addressed by Title III, the statute remains unconstitutional due to the provision that *mandates* the Act of State Doctrine to be inapplicable. This is because such provisions encroach upon authority of the Executive and Legislative branches in foreign affairs.⁵⁷ Thus, it will be suggested that Title III is inconsistent with the Act of State Doctrine as well as the subject of "constitutional underpinnings."

The Act of State Doctrine (Doctrine) is a federal choice of law rule that has the effect of precluding the application of U.S. law in favor of the foreign law.⁵⁸ While the Doctrine has been recognized as early as 1674 in England,⁵⁹ the major modern U.S. case ruling upon the effect of the Doctrine was *Banco Nacional de Cuba v. Sabbatino*.⁶⁰ In *Sabbatino*, the Cuban government, acting pursuant to Cuban Law 851 in issuing Executive Power Resolution No. 1, expropriated all "property and enterprises, and . . . rights and interests arising therefrom, of certain listed companies," including a company (C.A.V.) organized under Cuban law whose capital stock was

55. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

56. 22 U.S.C.A. § 2370(e) (West Supp. 1997).

57. See U.S. CONST. art. II, § 1; U.S. CONST. art II, § 2

58. Frederic L. Kirgis Jr., *Understanding the Act of State Doctrine's Effect*, 82 AM. J. INT'L L. 58, 58 (1988) (citing Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967)). See also *Sabbatino*, 376 U.S. at 418 (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 309 (1918))(stating the Act of State Doctrine: does not deprive the courts of jurisdiction once acquired over a case. It requires only that when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.).

59. Donald T. Kramer, LL.B., Annotation, *Modern State of the Act of State Doctrine*, 12 A.L.R. FED. 707, 715 (citing *Blad v. Bamfield* (1674) 3 Swanst. 604, 36 Eng. Reprint 992).

60. *Sabbatino*, 376 U.S. at 398.

owned principally by U.S. residents.⁶¹ C.A.V. was in the process of shipping an order of sugar, placed by a U.S. broker, Farr Whitlock & Co. (Farr), in the United States. The expropriation of the ship and its contents occurred prior to its sailing from Cuba. After the expropriation the Cuban government insisted that Farr re-contract with it for the sale of the sugar. Following the sale of the sugar by the Cuban Government to Farr, C.A.V., the original owner, contacted Farr claiming it was entitled to the proceeds. C.A.V. then proposed a deal whereby Farr would turn over the proceeds from the sale to the rightful recipient, and in turn C.A.V. would reimburse Farr for any expense as well as provide them with ten percent of the proceeds as a bonus for cooperating. After refusing to turn over the proceeds of the sale to the Cuban bank, a lawsuit in U.S. district court was filed against Farr for return of the proceeds.

The district court, although recognizing the continuing vitality of the Act of State Doctrine, found it inapplicable in the instant case because it dealt with an alleged violation of international law.⁶² Subsequently, the Court of Appeals for the Second Circuit affirmed the district court's ruling.⁶³ Additionally, it held that the Bernstein exception, which provides for the inapplicability of the Act of State Doctrine in instances where the Executive branch clearly indicates that it does not object to a court's review of the validity of a foreign state's act, was applicable.⁶⁴ The Court cited two state department letters that demonstrated the U.S. government had no objection to the U.S. courts deciding the effectiveness of the Cuban expropriation decrees. After reversing the decision of the court of appeals, the Supreme Court applied the Act of State Doctrine and held that the validity of the expropriation decrees could not be challenged by U.S. courts and must be presumed valid.⁶⁵ In holding the Act of State Doctrine controlling, the Court stated the famous words iterated in *Underhill v. Hernandez* that:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will

61. *Id.* at 400-03. Because the Cuban government found the passing of the American Sugar Act of 1948 which allowed the President of the United States to direct a reduction in the sugar quota to be an act of aggression, the Cuban government adopted Law No. 851 that authorized the Cuban President and Prime Minister to take counter-measures against the United States. Pursuant to such authority, Executive Power Resolution No.1 was issued providing for the compulsory expropriation of certain U.S. property interests. *Id.* at 403 n.3.

62. *Id.* at 406.

63. *Id.* at 407.

64. *Id.* Bernstein letters are letters from the Department of State stating that a judicial review of a foreign state's act would not disrupt foreign affairs or relations of the country. The Bernstein Exception to the Act of state doctrine was first recognized in *Bernstein v. Van Heyghen Frerer*, 163 F.2d 246, cert. den., 332 U.S. 772 (1947).

65. *Sabbatino*, 376 U.S. at 428.

not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁶⁶

The Court further explained that the underlying purpose of the Doctrine is to avoid possible danger of destroying amicable relations and peace between nations by disallowing one sovereign state to review and perhaps condemn the actions of another state.⁶⁷ In addition, the court recognized that the Act of State Doctrine, while not required by international law, does not forbid application of the Doctrine where the act in question violated international law.⁶⁸

Finally, it was acknowledged that while the Act of State Doctrine is not required by the Constitution of the United States, it does have "constitutional underpinnings."⁶⁹ These constitutional underpinnings arise from the federal separation of powers issue inherent in the nonapplication of the Doctrine and the danger of different branches of government making decisions regarding foreign affairs.⁷⁰ Historically, the Doctrine has expressed the "strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole."⁷¹ Thus, it would be dangerous for the Judicial branch to make decisions regarding the actions of other sovereign states since such decisions may impede upon the power of the Executive branch in conducting foreign affairs. For example, decisions made by the Judiciary could "interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached."⁷²

Although the Supreme Court's holding in *Sabbatino* contradicts the effects of Title III, advocates of the law find support for its legality in the

66. *Id.* at 416 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

67. *Id.* at 417-18 (citing *Oetjen*, 246 U.S. at 303-04).

68. *Id.* at 422.

69. *Id.*

70. *Id.*

71. *Id.* at 423.

72. *Id.* at 432. Such danger of interfering with the powers of the Executive branch could arise where

the Executive branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.

Id.

Hickenlooper Amendment passed shortly after the decision in *Sabbatino*.⁷³ The Hickenlooper Amendment to the Foreign Assistance Act of 1964 (Amendment) provides that:

no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state based upon a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law⁷⁴

In addition, the Amendment also provides that these provisions for barring the Act of State Doctrine, however, are not applicable in any case where the "President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf . . . with the court."⁷⁵ Thus, the Hickenlooper Amendment essentially only codified the Bernstein exception to the Act of State Doctrine.

Despite the Hickenlooper Amendment, Title III is still in conflict with the Act of State Doctrine and contains constitutional problems. It is noteworthy that the purpose of the Hickenlooper Amendment was to "reverse in part the recent decision of the Supreme Court in *Banco de Nacional de Cuba v. Sabbatino*."⁷⁶ Thus, as a result, the Amendment was intended to carry with it specific limitations. For example, the Amendment is inapplicable where there is no violation of international law or where the President declares his objection to its application in the interest of foreign affairs.⁷⁷

First, Title III grants U.S. nationals who were Cuban nationals at the time of the confiscation standing to bring suit as a U.S. citizen injured by the Cuban expropriations.⁷⁸ This provision in Title III, however, makes the Hickenlooper Amendment inapplicable to these claims because Castro's expropriations of Cuban nationals' property would not constitute a violation of international law. It is an accepted doctrine that any acts of a sovereign state "against its own nationals do not give rise to . . . [violations] of

73. Leigh, *supra* note 7.

74. 22 U.S.C.A. § 2370(e)(2) (West Supp. 1997).

75. *Id.*

76. S. REP. (Foreign Relations Committee) No. 1188 (1964).

77. 22 U.S.C.A. § 2370(e)(2) (West Supp. 1997).

78. 22 U.S.C.A. § 16431 (West Supp. 1997).

international law."⁷⁹ Thus, the Hickenlooper Amendment would be inapplicable in such circumstances⁸⁰ and the Act of State Doctrine would remain in full effect. Therefore, U. S. courts adjudicating these specific types of claims under Title III would do so contrary to the *Sabbatino* decision reached by the Supreme Court.

Secondly, while the Hickenlooper Amendment seems to overcome the effect of the Act of State Doctrine, and thus quash arguments that U.S. courts should decline to review actions based upon U.S. nationals' losses from Cuban expropriated property, some authority suggests that the effect of the Hickenlooper Amendment was intended to be much narrower.⁸¹ Specifically, it has been asserted that the Amendment (in reversing the decision in *Sabbatino*) was limited to claims of title to American-owned the property nationalized by foreign governments in violation of international law when property or its proceeds are subsequently *located in the United States*. For example, in *Compania de Gas De Nuevo Laredo v. Entrex Inc.*, the court held that "the Hickenlooper Amendment is inapplicable because neither the nationalized property nor its proceeds are located in the United States."⁸² This holding directly supports the proposition that the Hickenlooper Amendment was intended solely to reverse *Sabbatino* because *Sabbatino* specifically dealt with proceeds from a sugar sale that *were in the United States*. Thus, authority supports the narrower interpretation of the Hickenlooper Amendment. Because Title III claims do not require the property or proceeds of the Cuban expropriations to be *in the United States*,

79. *F. Palicio y Compania, S. A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966); see also *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962) (stating that "[a]cts of a state directed against its own nationals do not give rise to questions of international law."); *United States v. Belmont*, 301 U.S. 324, 332; *Pons v. Republic of Cuba*, 294 F.2d 925 (1961), *cert. den.*, 368 U.S. 960 (1962). As a sovereign state, a government has a right to appropriate private property for public property uses when there is a need for the public welfare. *The Navemar*, 90 F.2d 673 (1937).

80. See 22 U.S.C.A. § 2370(e)(2) (West Supp. 1997).

81. See *supra* text accompanying note 82. See also *Occidental v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 112, *aff'd*, 461 F.2d 1261 (stating that the Act of State Doctrine exception is "by its terms extremely narrow, and in all other cases the act of state doctrine remains the law of the land").

82. 686 F.2d 322, 327 (5th Cir. 1982). The court in that case, analyzing the history of the Hickenlooper Amendment, recalled the decision in *Banco de Nacional de Cuba v. First National City Bank of New York*, 431 F.2d 394, 399-402 (2d Cir. 1970), when Chief Judge Lumbard, commenting on the legislative history of the Amendment, stated that "Congress intended it to be limited to cases involving claims of title with respect to American owned property nationalized by a foreign government in violation of international law, when the property or its assets were subsequently located in the *United States*." *Id.* at 327 (emphasis added). See also *Menendez v. Saks and Co.*, 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd on other grounds sub nom.*; *United Mexican States Relator v. Ashley*, 556 S.W.2d 784 (Tex. 1977).

the applicability of the Act of State Doctrine as enumerated by the Supreme Court in *Sabbatino* is warranted; thereby, U.S. courts are barred from judging the validity of such Cuban expropriation decrees.

Thirdly, and most importantly, the major issue confronting the validity of Title III in relation to the Act of State Doctrine is its "constitutional underpinnings." Because Title III *mandates* the inapplicability of the Act of State Doctrine, it is unconstitutional due to conflicts with the separation of powers of the U.S. federal government as proscribed in the U.S. Constitution. Title III states that "[n]o court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action."⁸³ This provision is in direct conflict with the Constitution of the United States because it puts the Judicial branch in a position to directly encroach upon the Executive's constitutional power to conduct foreign affairs.⁸⁴

The Supreme Court in *Sabbatino* found the Act of State Doctrine to provide protection from the threat of "constitutional underpinnings" that could arise between branches of government in a system of separation of powers.⁸⁵ The Supreme Court stated that "the President alone has the power to speak or listen as a representative of the nation."⁸⁶ This power reserved to the President allows for one voice to represent the nation on the issue of foreign affairs in an effort to provide a more effective and efficient method for dealing with foreign states.⁸⁷ The Court in *Sabbatino* was concerned about the affect of dissimilar institutions [making and implementing] particular kinds of decisions in the area of international relations. Specifically, the concern lies in the Judicial branch passing upon decisions of foreign acts that may "hinder rather than further this country's pursuit of goals both for itself and for the community of nations"⁸⁸ The passing of judgment on the acts of foreign states might interfere or worse yet embarrass the President in his conducting of foreign affairs. Such a judgment by the judiciary might occur when "such an impact would be contrary to our national interest."⁸⁹ For example, the President in negotiating for reform of

83. 22 U.S.C.A. § 6082(a)(6) (West Supp. 1997).

84. See U.S. CONST. art. II.

85. *Sabbatino*, 376 U.S. at 423.

86. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). See also *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (stating that the "foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry."); *Banco de Cuba v. Farr*, 243 F. Supp. 957, 997 (S.D.N.Y. 1965) (referring to the Constitution's entrustment of foreign affairs to the executive and legislative branches).

87. See *Curtiss-Wright Export Corp.*, 299 U.S. at 319.

88. *Sabbatino*, 376 U.S. at 423.

89. *Id.* at 432

the Cuban government may decide to suspend all existing claims.⁹⁰ Clearly, a judicial decision during such time would be contradictory to the exercise of Executive authority in suspending such claims as well as serving as an embarrassment and a possibly offensive act towards the expropriating country.

The concern of Judicial encroachment upon the Executive branch is also apparent in the Hickenlooper Amendment. At the same time the Hickenlooper Amendment provided for the inapplicability of the Act of State Doctrine, it also provided for an exception to this inapplicability by giving the President final say in whether the courts would apply the Act of State Doctrine in a given situation.⁹¹ This fallout provision provided a safeguard to constitutional concerns of the judicial branch deciding on activities related to foreign affairs by allowing the Executive to intervene and require the Judicial branch to apply the Act of State Doctrine in times where there could be national embarrassment because of dual policy. The problem with LIBERTAD is that it does not provide such a fallout provision to ensure the Executive has the final say as to foreign affairs decisions. Thus Title III, by totally barring the application of the Act of State Doctrine could be characterized as an unconstitutional prohibition upon the courts because it violates the separation of powers doctrine.⁹²

IV. PRACTICAL AND POLICY EFFECTS OF TITLE III

While Part II of this note suggests that no internationally recognized grounds exist to assert jurisdiction under Title III, that the Act of State Doctrine precludes adjudicating such claims, and that Title III is in violation of the U.S Constitution, additional grounds dictate against implementation of the Act. These grounds include the practical effects resulting from Title III's implementation, including a loophole in the current trade embargo with Cuba for certain claimants as well as promoting our own policy interests in leading Cuba to a democratic political system. Additionally, policy concerns exist regarding our relations with our major allies such as the European Union, Canada, and Mexico.

90. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981), where President Carter, as part of the settlement of the hostage situation in Iran, took a number of actions affecting the claims of American creditors against Iran including suspending all contractual claims pending in American courts. The Supreme Court in that case held that the suspension of claims was within the President's constitutional authority. *Id.*

91. 22 U.S.C.A. § 2370(e)(2) (West Supp. 1997) states that the Act of State Doctrine would be applicable when the "President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States."

92. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 181(2d Cir. 1967).

A. *Creation of a Loophole to U.S. Trade Embargo with Cuba*

LIBERTAD is not the appropriate mechanism for promoting a democratic regime in Cuba. Proponents of the law stand firm on the theory that tough sanctions imposed on foreigners trafficking in Cuba will serve as a deterrent for international investment in Cuba, thereby isolating Cuba and creating economic pressures.⁹³ Such isolation and economic pressures, proponents maintain, will further push Cuba towards a democratic government.⁹⁴ However, Title III will far from have this effect and will instead only play into the hands of Castro "by creating an expansive loophole for property claimants, especially wealthy Cuban Americans, to circumvent the embargo."⁹⁵

First, it is noteworthy to recognize that certain attorneys who represent U.S. companies with major claims under Title III, such as the attorneys for both the National Association of Sugar Mill Owners of Cuba, the Cuban Association for the Tobacco Industry, and Bacardi rum company, were instrumental in advising the drafters of LIBERTAD.⁹⁶ These advising attorneys, whose present clients were victims of the Cuban government's confiscation of U.S. nationals' property, intend to assert claims against their respective traffickers.⁹⁷ While under Title III these attorneys are able to file suit in US. district court on behalf of their clients against their foreign traffickers, it is more likely that these parties will reach out-of-court settlements.⁹⁸ The advantages of these settlements would include the

93. Clagett, *supra* note 35, at 435-36.

94. H.R. CONF. REP. NO. 104-142, at E308-309 (1996) (statement of the Honorable Jack Reed of Rhode Island in the House of Representatives) [hereinafter Reed Statement]. The purpose of the legislation has been described as an effort to "discourage foreign business investment in Cuba, thus undermining the island's financial recovery which, the bill's supporters naively hope, will result in a collapse of the Castro regime." *Id.* at E309 (quoting Louis F. Desloge, *The Great Cuban Embargo Scam- A Little- Known Loophole Will Allow the Richest Exiles to Cash In*, WASH. POST, Mar. 3, 1996, at N07).

95. H.R. CONF. REP. NO. 104-142, at E271-72 (1996) (statement of the Honorable Doug Bereuter of Nebraska in the House of Representatives) [hereinafter Bereuter Statement] (quoting Desloge, *supra* note 94, at N07).

96. *Id.* at E272.

97. *Id.* Gutierrez, one of the representative attorneys, had been quoted as saying that he and his clients "are eyeing a Kentucky subsidiary of British-American Tobacco (B.A.T.) that produces Lucky Strike cigarettes. B.A.T. has a Cuban joint venture with the Brazilian firm Souza Cruz to produce tobacco on land confiscated from his clients." *Id.* In addition, "Bacardi would be able to sue Pernod Ricard, the French spirits distributor, currently marketing Havana Club rum worldwide. Bacardi claims that Pernod Ricard's rum is being produced in the old Bacardi distillery in the city of Santiago de Cuba." *Id.*

98. The Act permits settlements without the approval from the United States by providing that "an action . . . may be brought and may be settled . . . without obtaining any license or other permission from an agency of the United States." H.R. 927 § 302(a)(7). Thus, "[t]hese agreements do not need the blessing of the U.S. government. This is the

opportunity for both parties to avoid prolonged litigation time and cost. However, a likely result of these settlements would be to provide a profit sharing agreement whereby the U.S. national would take a percentage of the profits produced from the foreign national doing business in Cuba.⁹⁹ Therefore, the U.S. trade embargo would be circumvented by these "certain" claimants that choose to take a portion of the profits of these trafficking foreign investors rather than pursue full-scale litigation against them in U.S. district court. Thus, a loophole to the U.S. trade embargo against Cuba is created in Title III.¹⁰⁰ In addition, the legislation could

encourage a massive *influx* of new *foreign investment* in Cuba. Armed with the extortionist powers conferred by the legislation, former property holders could shop around the world for prospective investors in Cuba and offer them a full release on their property claim in exchange for a 'sweetheart' lawsuit settlement entitling them to a piece of the economic action. Thus, the embargo is legally bypassed and everyone laughs all the way to the bank.¹⁰¹

B. *Not in Furtherance of Policy of the Embargo*

Aside from the practical effects of creating a loophole for avoiding the trade embargo with Cuba, Title III does not further the policy articulated in LIBERTAD of leading Cuba to a democratic regime.¹⁰² As stated in the congressional record, the purpose of the act is to "take proactive steps to encourage an early end to the Castro regime."¹⁰³ The President's support for LIBERTAD has been practically non-existent, until the unarmed civilian aircraft was shot down.¹⁰⁴ However in response to such a tragedy in an election year, the President was persuaded to sign into law the Act which includes, among other things, authorizing lawsuits against foreigners

million dollar loophole in Helms-Burton." Bereuter Statement, *supra* note 95, at E272.

99. Bereuter Statement, *supra* note 95, at E271-72.

100. *Id.*

The bottom line is that Clinton, in the name of getting tough with Castro, has endorsed a bill that allows the embargo to be evaded and protects Cuban Americans who want to legally cut deals to exploit their former properties in Cuba while the rest of the American business community must watch from the sidelines.

Id. at E272.

101. Reed Statement, *supra* note 94, at E309 (emphasis added).

102. H.R. REP. NO. 104-202, at 22 (1995).

103. *Id.*

104. Greenhouse, *supra* note 2, at A8.

investing within Cuba.¹⁰⁵ As a result, “[t]he President has properly sought and won international condemnation for an act that flouts international law and norms,”¹⁰⁶ thus strengthening his political support by those Americans enraged by the hostile act as well as those Cuban Americans standing to vote in the United States.¹⁰⁷

Defenders of Title III look towards the protection of property interests of U.S. nationals; however, a realistic look at the legislative intent of LIBERTAD and the timing of its signing by the President suggest that the real goal of Title III was not only to provide relief to property claimants injured by the confiscation of their property in Cuba, but primarily to institute an affirmative measure to economically isolate Cuba in pursuit of leading it to a democratic system.¹⁰⁸ Such policy, however, does not justify the United States’ acquisition of jurisdiction over Title III claims illegally or creation of an economic boycott restricting investment by foreigners in Cuba. Proponents of Title III intend to accomplish their objective of leading Cuba out of its communist regime and restoring fundamental human rights to its people by economically isolating Cuba from its trading partners that replaced the economic support the Soviet Union left behind when it overthrew the communist government. After articulating the effect property confiscation had on its victims, Brice Clagett, a specialist in international law, articulates the real motive of Title III:

[B]ecause of the proximity of Cuba to the United States and the history of relations between the two countries, Cuba’s persistence in suppressing democracy, violating human rights and refusing to satisfy international law claims against it has substantial impact on the United States in a variety of ways It [the United States] has reasonably concluded that discouraging foreign investment in tainted Cuban property is an appropriate and proportionate means toward that goal.¹⁰⁹

To the contrary, evidence suggests that the effects of this isolation will not have the intended effect and not further the legislative intent of the

105. David Fox, *EU Counters Helms-Burton Act*, REUTERS WORLD SERVICE, Oct. 28, 1996 (EU diplomats believe that Clinton signed the bill in order to retain the Presidency in an election year and that it was a good probability that he will further suspend the Act in the new year.).

106. H.R. REP. NO. 104-142, at H1298 (1996) (statement of Mr. Skaggs—*Illegal Cuban Shootdown Warrants Punishment of Castro, But Not Despite Long-Term United States Interests*).

107. *EU/US: EU Hopes Clinton Re-Election Will Smooth Relations*, EUR. REPORT, Nov. 9, 1996.

108. Clagett, *supra* note 35, at 435-36.

109. *Id.*

Act.¹¹⁰ For example, Congressman Joe Moakley visited Cuba before the enactment of LIBERTAD for the purpose of: (1) trying to find ways to improve relations between the U.S. and Cuba; and (2) trying to seek out ways to help and support the Cuban people and promote human rights.¹¹¹ After meeting with a variety of people in Cuba, including Castro, top government officials, church leaders, dissidents, foreign diplomats, U.S. officials, and ordinary Cuban citizens, Moakley reported that “[t]he bill [LIBERTAD] will not help Cuba’s transition to a market economy and could only retard the very forces of freedom and openness the United States wishes to encourage.”¹¹²

Furthermore, none of the U.S.’s major trading partners share the view that “strangling the Cuban economy is the best way to promote democracy” in

Cuba.¹¹³ The general view among countries is that the effects of Title III actually do not lead Cuba to democratic and economic reforms, but rather, have an opposite effect by a “prompted wave of sympathy for Havana.”¹¹⁴ The true consequences of Title III are to make “the Cuban dictator such [a] welcome guest (around the world) [by] the US policy of blackballing him.”¹¹⁵ In addition, Pope John Paul II, who helped defeat communism in his native Poland and who has made efforts to help facilitate reforms in the Cuban regime by increased dialogues, has publicly attacked Title III as a means of thwarting these desired results.¹¹⁶ Specifically, Pope John Paul II is “convinced that a safe political climate must be created to ensure a peaceful power transition to democracy in Havana, whenever it occurs, applying the same successful philosophy and diplomacy he used with Moscow and Eastern

110. S. REP. NO. 104-142, at S3408-3409 (1996) (statement of Mr. Simon).

111. H.R. REP. NO. 104-142, at H877 (1996) (statement by Congressman Joe Moakley) [hereinafter Moakley Statement].

112. *Id.* at H878.

113. *EU Plans to Hit Back at US Over Cuba Laws on Point of Collapse*, AGENCE FRANCE PRESSE, Oct. 28, 1996. See also Marjorie Olster, *U.S. and Spain Air Differences on Cuba*, THE REUTER EUR. BUS. REPORT, Nov. 17, 1996 (Spain, vehemently rejecting Title III sanctions, also does not believe economic trade embargo and isolationist policies are way to achieve political reform goals.).

114. Sanz, *supra* note 48; “*We Exhort the Government of the United States of America to Reconsider the Application of the Law*,” AGENCE FRANCE PRESSE, Nov. 12, 1996 (Spanish Prime Minister, Jose Maria Aznar, stating his belief that the actual effect of Title III will be the opposite of the effect the U.S. intends).

115. Sanz, *supra* note 48.

116. *CNN World Today* (CABLE NEWS NETWORK BROADCAST, Nov. 16, 1996). See also *Italy Says Castro is “Open to Dialogue” on Reforms*, REUTERS FIN. SERVICES, Nov. 18, 1996 (Italian Foreign Minister Lamberto Dini also has been cited as saying that he has found Castro open to dialogue regarding political reforms and human rights.).

Europe.”¹¹⁷ The only real effect of Title III will be to anger our closest allies to the point that they institute countermeasures to rebut the effects of the legislation and in the long run hurt U.S. interests.¹¹⁸

As the situation stands now, the restrictive policies against Cuba leave the U.S. completely out of the picture as far as getting “serious about improving relations [with Cuba].”¹¹⁹ Long-term economic opening and continued engagement with Cuba by countries such as Canada and those in the European Union and Latin America have led to positive political developments such as: (1) “authorization of free trade zones” (allowing some firms to contract their own labor rather than relying on the Cuban government to supply it); (2) “the loss of full state control over the economy and flourishing illegal markets;” and (3) “the government’s authorization of some self-employment and farmers’ markets.”¹²⁰ These advancements evidence Castro’s desire to “allow an economic policy shift despite his distaste for capitalism.”¹²¹ Thus, tightened economic policies may reverse and certainly will not encourage any advancement on the part of the Cuban government towards positive political developments.

In addition, the legislation has provided Castro with a tool to “rally nationalist support,” even from Cubans who otherwise oppose the government’s policies. More importantly, LIBERTAD has essentially sent

117. Tad Szulc, *Clinton’s Cuba Problem*, INT’L HERALD TRIB., Nov. 12, 1996. Pope John Paul II has begun an increased dialogue with Castro and strongly believes that the Catholic Church is achieving more success towards political reform in Cuba than the U. S. through all its economic sanctions. *Id.*

118. H.R. REP. NO. 104-142, at E1247 (1996) (statement of the Honorable Lee Hamilton of Indiana in the House of Representatives) [hereinafter Hamilton Statement]. Title III has enraged the EU and major trading partners of the United States. In the United Nations Assembly on Nov. 12, 1996, an overwhelming majority of countries present (137 countries) voted against the 30-year economic embargo against Cuba and called for its lifting while only three countries, including the United States, voted for the resolution. The results evidence the strong opposition to isolationists policies against Cuba. *UN General Assembly Condemns US. Embargo Against Cuba*, DEUTSCHE PRESSE-AGENTUR, Nov. 12, 1996.

119. Moakley Statement, *supra* note 111, at H878. Moakley even commented on how the dissident groups in Cuba oppose LIBERTAD and stressed that the difficulties in Cuba run much deeper than economic hardships. *Id.*

120. Hamilton Statement, *supra* note 118, at E1248.

121. *Id.* For example, see the Moakley Statement, *supra* note 111, at H877, noting observations from his trip to Cuba that an explosion of independent entrepreneurships has occurred in Cuba with roughly 208,000 independent family businesses operating in Cuba. Thus, encouraging isolation not only from the United States but from other countries around the world clearly could not be in the best interests of promoting the success of these newly started independent businesses. Implication of such new entrepreneurships is clear because people who are no longer dependent on the government for their jobs are free from economic coercion. Moakley stated he sensed that the Cuban government recognizes that these small businesses are necessary for the country’s economic viability and are accepting the political space they create. *Id.*

the message to Cuba's government that "it could repress as it pleased because there is no chance left of improving its relations with the United States."¹²² As a result, the Cuban government has no incentive to stop any repressive treatment of its citizens that preceded the enactment of LIBERTAD.¹²³ Therefore, the targeted economic effects of isolation that the United States hoped to achieve in Cuba by imposing the threat of Title III lawsuits on foreign companies will not be a catalyst to democracy. Rather, results of Title III will be felt in the United States by an increased number of lawsuits flooding our court system.¹²⁴

More important than not satisfying the policy goals of the Act, LIBERTAD is "viewed by every major country as detrimental to its relations with the United States."¹²⁵ Implementation of Title III will severely penalize foreign companies for commercial conduct geared toward a third country and in the process, will provoke trade conflicts with U.S. allies as well as mandate secondary boycotts on other nations in violation of U.S. legislation and policy.¹²⁶ Additionally, as will be discussed in the final section of this note, Title III has led to the implementation of countermeasures by our closest allies in an effort to reduce the effects of Title III lawsuits on their nationals.¹²⁷

Despite U.S. efforts to economically isolate Cuba in passing LIBERTAD, interest in Cuban investment and trade is on the rise.¹²⁸ Practically speaking, Title III will result in more harm than good to the United States. As Foreign Investment Minister Ibrahim Ferradaz commented, "US businessmen are the ones who are the first victims of the law which stops them from investing in Cuba. They are the ones who have to stand by and watch as others come in and do business, gain market shares and go home with profits."¹²⁹ Furthermore, LIBERTAD separates firms that will engage in trade with Cuba by their size. "Large international

122. Hamilton Statement, *supra* note 118, at E1248.

123. *Id.* "Within ten days of President Clinton signing the Helms-Burton Act, General Raul Castro launched attacks on various Cuban academic institutions and intellectuals, further chilling public expression and curtailing academic freedom." *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at E1247-48.

127. Richard W. Stevenson, *Canada, Backed by Mexico, Protests to US. On Cuba Sanctions*, N.Y. TIMES SERVICE (visited Sept. 28, 1996) <<http://www.latinolink.com/news/0313cuba.html>>.

128. *Cuba Thumbs Nose at US Sanctions with Bustling International Trade Fair*, AGENCE FRANCE PRESSE, Nov. 4, 1996. The Hectare-plus Havana International Trade Fair with Castro and 336 Cuban companies at hand had around 1500 international companies open booths at a trade fair in Cuba. By investing heavily in Cuba and taking an economic stake in the country, foreign nations believe, "they have more of a chance to influence Castro on change." *Id.*

129. *Id.*

firms—because they are likely to do business with the United States—[may be] discouraged from trading or investing in Cuba. But [the] smaller firms that do not operate in the U.S. market are not exposed to Helms-Burton retaliation.”¹³⁰ Thus, these smaller firms will find investment in Cuba extremely attractive.

Supporting the proposition that Title III is contrary to U.S. policy interests is strongly evidenced by a July, 1, 1996, letter written by the U.S. Council for International Business¹³¹ to the President of the United States urging him to suspend the provision.¹³² The letter articulates the view of a broad cross section of the business community including companies who stand to acquire the legal right to sue under Title III. In expressing opposition to Title III, the group addresses its position to the President by stating:

Many of our member companies had property in Cuba that was expropriated by the Castro regime. Yet, many of these companies, constituting some of the largest certified claimants, do not believe that Title III brings them closer to a resolution of these claims. To the contrary, Title III complicates the prospect of recovery and threatens to deluge the federal judiciary with hundreds of thousands of lawsuit. These companies, Title III's intended beneficiaries, support our view that Title III should be suspended Finally, we believe that if Title III were to become effective, it would drive a wedge between the United States and our democratic allies that would significantly hinder any future multilateral efforts to encourage democracy in Cuba¹³³

It is evident that the U.S. business community condemns Title III due to concerns that the provision will “poison” the United States’ trading relations around the world.¹³⁴ Likewise, the U.S. Chamber of Commerce has sharply criticized the use of trade sanctions to achieve foreign policy objectives and believes the primary focus should be determining the cost to

130. Hamilton Statement, *supra* note 118, at E1248.

131. Others behind the letter include the National Foreign Trade Council, Organization for International Investment, U.S. Chamber of Commerce, and the European-American Chamber of Commerce. Hamilton Statement, *supra* note 118, at E1247-48.

132. H.R. REP. NO. 142, at E1247-48 (1996) (The National Foreign Trade Council letter).

133. *Id.* at E1248.

134. *EU/US: Businessmen Forge Breakthrough on Testing*, EUR. REP., Nov. 13, 1996.

the U.S. economy.¹³⁵ Thus, U.S. policy interests with respect to protection of property claims cannot be justified if beneficiaries of the legislation denounce the legal measure intended to protect their interests. Aside from certain claimants that have intentions of avoiding the trade embargo and benefiting from settlement agreements with foreign nationals in Cuba discussed later, support by potential claimants under Title III has not been substantial as demonstrated by the U.S. Council for International Business letter cited above. Thus, this letter suggest that U.S. nationals with property claims in Cuba large enough to sue under Title III (greater than \$75,000 to satisfy traditional federal diversity jurisdiction), do not maintain the belief that threatening their foreign business partners with lawsuits is worth destroying business relations with them in the long run. This letter, combined with the legislative intent, provide support that U.S. policy interest in compensating victims of Cuban property confiscations is secondary to the U.S. policy interest of forcing Cuba to reform its government. Additionally, "secondary boycotts to enforce policy goals . . . [through] unilateral extraterritorial legislation does not promote international cooperation"¹³⁶ or satisfy international legal principles. Solutions are only possible when international legal principles are upheld.¹³⁷ Thus, policy interests, if entirely based on Title III as a measure to lead Cuba to a democratic regime, certainly do not justify jurisdictional and legal grounds for authorizing such suits under Title III.

B. International Reaction to Title III and Prospective Enactment of Countermeasures

While the U.S. supporters of LIBERTAD have attempted to defend the legislation as not violative of international law,¹³⁸ allies of the United States continue to protest the enactment of the law. Three major protesters of LIBERTAD that vehemently assert opposition are Mexico, Canada, and the European Union. The view taken by all those opposing the legislation is well-represented by a statement from the European Union alleging that enactment of the U.S. legislation would "represent the extraterritorial application of U.S. jurisdiction and would restrict EU [European Union] trade in goods and services with Cuba."¹³⁹

Since President Clinton signed LIBERTAD, anticipation has mounted as to whether U.S. allies would officially enact counter-measures to combat

135. *US Sanctions Laws Condemned*, FIN. TIMES, Nov. 14, 1996.

136. *European Business Concerned Over Helms-Burton Row*, EUR. REP., Nov. 1, 1996.

137. *Id.*

138. *See, e.g.*, Clagett, *supra* note 35, at 438.

139. Stevenson, *supra* note 127.

Title III lawsuits against their nationals.¹⁴⁰ Despite President Clinton's six-month delay in instituting Title III lawsuits against foreign investors in Cuba in order to persuade them to side with U.S. law, Canada has announced a retaliatory measure to combat the effects of Title III. After announcing that "the Helms-Burton law flies in the face of international legal principles," Art Eggleton, the Canadian Minister of International Trade avowed to institute an amendment to Canada's Foreign Extraterritorial Measures Act (FEMA) to counter the effects of the Helms-Burton on Canadian companies.¹⁴¹ The amendment would in essence provide Canadian companies with more legal authority to combat U. S. claims against it for its investment relations with Cuba.

Specifically, the amendments to FEMA would give "Canada's Attorney General the authority to forbid compliance in Canada with extraterritorial measures that, in his view, infringe Canadian sovereignty."¹⁴² Thus, the Canadian Attorney General could declare a judgment in a U.S. court against a Canadian company as void and refuse to enforce the U.S. judgment. In addition, the Canadian company who has a judgment and award rendered against it in a U.S. court would also have a retaliatory action to recover its loss from that award in the U.S. as well as court costs.¹⁴³ Lastly, FEMA penalties provided for in the amendment will also serve as a deterrent for Canadian countries to abide by such foreign legislation as Title III of LIBERTAD.

Other than government propositions to combat the causes of action created under Title III, Canada is taking additional boycott measures against the United States by discouraging holidays in Florida, a major revenue-

140. *Europeans Try To Unify Against U.S. Actions*, THE COM. APPEAL, Sept. 10, 1996, at 8B.

141. FEMA was originally enacted in 1985 to protect Canadian interests against extraterritorial measures. *Canada Announces Measures to Combat Helms-Burton Act*, LATIN AM. LAW AND BUS. REP., July 31, 1996.

142. *Id.*

143. Hypothetically, the following is how the counterclaims would be instituted by Canadian companies who have judgments rendered against them in U.S. courts:

- (1) U.S. national X might win a suit against a Canadian, Y, in a U.S. court under the Helms-Burton act.
- (2) If the Canadian has no assets in the United States, the U.S. national would have to ask a Canadian court to enforce the judgment. The Attorney General of Canada could issue an order blocking this process.

The Canadian, Y, could choose to sue X in Canadian courts to recoup the full amount of the award that X had won in the foreign court. This amount plus courts costs in both countries would be applied against X's assets in Canada. Thus, the Canadian proposed countermeasures would only be effective as a remedy if the U.S. claimant has assets in Canada.

producing industry in the United States.¹⁴⁴ Thus, Canada is so enraged over Title III that it is pursuing any means necessary to send a signal to the United States that it will not remain silent and tolerate what it considers a flagrant extraterritorial assertion of jurisdiction by the United States. Recognizing the harm imposed by Title III of LIBERTAD on its nationals, Canada's response to the legislation has resulted in proactive measures against it.

European reaction to Title III, like Canada, has not been supportive. The European Union, like the United States, maintains policy to promote democracy and human rights in Cuba; however, it does not believe that suits under the U.S. legislation will further that policy. Rather, the European Union feels LIBERTAD will only have the effect of hurting European businesses.¹⁴⁵ Based on its belief that suits under Title III are in violation of international law as well as the interests of its businesses, the European Union on October 28, 1996, reached political agreement on a draft of legislation to "make it illegal for Europeans to obey Washington's anti-Cuban Helms-Burton Act."¹⁴⁶ The Trade Commissioner for the European Union, Sir Leon Brittan, declared that the decision was "an historic breakthrough which shows we have the will and capacity to defend our interests."¹⁴⁷ The agreement was solidified after much negotiation with Denmark, who originally opposed it, but finally came to agreement when convinced the counter-measures did not compromise national sovereignty.¹⁴⁸

The agreed upon legislation in the European Union has been characterized as a "defensive law" rather than an "offensive law"¹⁴⁹ which seeks to block the statute and protect against the "effects of application of the extraterritorial legislation adopted by a third country."¹⁵⁰ The legislation offers European firms or individuals the opportunity to go in front of

144. David Ott, *Flexing the Muscle to Defend a Stake in Treasure Island*, THE SCOTSMAN, July 16, 1996, at 12.

145. *European Commission President Jacques Santer Underlines EU's Deep Concern With Helms-Burton Legislation to President Bill Clinton*, EUR. UNION NEWS, (visited July 12, 1996) <<http://www.eurunion.org/eu/news/press/pr41-96.htm>>.

146. Fox, *supra* note 105. The European Union has also filed a complaint as of October 29, 1996, with the World Trade Organizations, and an arbitration panel is scheduled to convene on the matter on November 20, 1996. *EU Response to US Anti-Cuba Law*, XINHUA NEWS AGENCY, Oct. 29, 1996.

147. Fox, *supra* note 105. Note that in response to the EU's actions, the United States has commented that the "Europeans should pay more attention to human rights in Cuba rather than taking retaliatory measures against the Helms-Burton Law." *EU/US: Overcomes Danish Reserve to Agree Cuba Retaliatory Measures*, EUR. REP., Oct. 30, 1996.

148. *EU Agrees Law to Counter U.S. Anti-Cuba Moves*, THE REUTER EUR. BUS. REP., Oct. 28, 1996.

149. *EU Response to Helms Burton Called "Defensive,"* THE REUTER EUR. BUS. REP., Oct. 29, 1996.

150. *Conclusions of Oct. 28-29 General Affairs Council*, THE REUTER EUR. COMMUNITY REP., Oct. 30, 1996.

European Union courts and make complaints against U.S. nationals who have sued them over Cuban property claims. Such an opportunity provides a means for the European companies to recoup the damages that U.S. companies inflicted upon them acting pursuant to Title III.¹⁵¹ In addition, the European Union regulation allows for European companies to "launch 'clawback' counter-suits against the European subsidiaries of any companies which seek to make use of the Act."¹⁵² Furthermore, the legislation forbids cooperation by European companies with any court proceedings with regard to Title III.¹⁵³

Although the European Union and Canada have led the race among other nations and have begun drafting legislation to combat the effects of Title III, other nations are sure to follow due to their strong opposition to the legislation and their support of those who have already begun instituting such measures.

V. CONCLUSION

While the destruction of two U.S. unarmed civilian aircraft in an international fly zone was an inexcusable act of the Cuban government, such an act should not be the motive for enacting legislation that hurts major U.S. allies and trading partners. Title III of LIBERTAD is a violation of international law and, in light of policy considerations, is not in the interest of the United States. First, there are no legal grounds for asserting jurisdiction under the law: none of the internationally recognized forms of asserting jurisdiction over territorial borders is applicable under Title III. Doing so is a violation of extraterritorial jurisdiction as pronounced by our closest allies. While the confiscation of U.S. property in Cuba may arguably have some "effects" within the United States territory, those effects do not rise to the level of reasonableness to justify asserting jurisdiction. Secondly, the Act of State Doctrine, promulgated by the United States Supreme Court forbids U.S. district courts from sitting in judgment on activities committed by sovereign states. Even though the passage of the Hickenlooper Amendment shortly after the decision in *Sabbatino* provided that U.S. courts could hear property claims of U.S. citizens whose property was confiscated by the Cuban government, some authority suggests that the Amendment was to be interpreted narrowly. Thus, the Amendment was intended solely to reverse the decision in *Sabbatino* where proceeds from the Cuban confiscation were brought *into* the United States.

151. *EU Response to Helms-Burton Called "Defensive"*, *supra* note 149.

152. *US Hits back at Opposition to Anti-Castro Legislation*, AGENCE FRANCE PRESSE, Oct. 29, 1996.

153. *Id.*

Regardless, Title III still presents constitutional problems since it expressly requires U.S. courts to disregard the Act of State Doctrine. Such a provision runs in the face of the U.S. Constitution's framework regarding separation of powers and the power of the Executive and Legislative branch to have final say regarding foreign affairs.

Aside from the blatant illegality of Title III, it does not achieve its practical and policy objectives. By enabling claimants to settle with foreign traffickers without a license from the U.S. government, a loophole is created for certain property claimants to avoid the over three decade long U.S. trade embargo imposed on Cuba. In addition, Title III will not achieve its policy objectives of returning Cuba to a democratic regime. Economically isolating Cuba, while angering U.S. allies and trading partners in the process, will not promote human rights or further relations with our allies. Furthermore, such policy objectives do not justify asserting extraterritorial jurisdiction on third country defendants and placing a secondary boycott on our allies in order to force U.S. policy on them.

By maintaining such a tough position against its allies as a result of the legislation, the United States must now prepare to deal with anti-boycott and counter-measure legislation from allied countries in opposition to Title III who say it is a flagrant violation of international law. The United States will also find itself defending its legislation in front of the World Trade Organization pursuant to claims that have been filed against it for violation of trade agreements.

Moreover, even if the United States can defend Title III, politically it is not worth angering our closest trading partners to the extent that they go to such extremes to implement measures to counter the effects of Title III suits. The real issue that should be brought to bear upon Title III of LIBERTAD is how it is affecting the United States' long-term relations with important trading partners and world allies as well as the internal economic ramifications that may result from Title III claims. Then the United States must ask itself whether Cuba is really worth the inevitable political ramifications that will erupt as a consequence of permitting Title III suits to commence. Furthermore, history has indicated that thirty-nine years of trade embargo and isolationist policy in Cuba has failed to produce the political reforms sought. Aside from risking worldwide political condemnation for implementation of Title III, the United States is unlikely to meet its objective of political reform in Cuba by further isolationist policies.

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