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The Helms-Burton Act and Transnational Legal Process

By WILLIAM S. DODGE*

The Helms-Burton Act[1] is little more than a year old, yet it has already become one of the most controversial and widely discussed pieces of international legislation in decades.[2] It has provoked strong objections from many of the United States' closest allies and treaty partners. The European Union has challenged Helms-Burton as a violation of

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1. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (Mar. 12 1996) (codified at 22 U.S.C. § 6021-91) [hereinafter "Helms-Burton Act"].

2. *See* Brice M. Clagett, *Title III of Helms-Burton: Who is Breaking International Law–The United States, or the States That Have Made Themselves Co-Conspirators with Cuba in its Unlawful Confiscations*, 30 GEO. WASH. J. INT'L L. & ECON. (forthcoming Fall, 1997) [hereinafter Clagett, *Who Is Breaking International Law*]; David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297 (1997); Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996); Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434 (1996); Brice M. Clagett, *A Reply to Professor Lowenfeld*, 90 AM. J. INT'L L. 641 (1996); Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325 (1995-96); David S. De Falco, Comment, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: Is the United States Reaching Too Far?*, 3 J. INT'L LEGAL STUD. 125 (1997); W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289 (1997); Jonathan R. Ratchik, Note and Comment, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM U. J. INT'L L. & POL'Y, 343 (1996); Anthony M. Solis, Comment, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L.J. 709 (1997); Brian J. Welke, Comment, *GATT and NAFTA v. The Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361 (1997); *see also* Steven E. Hendrix, *Tensions in Cuban Property Law*, 20 HASTINGS INT'L & COMP. L. REV. 1 (1996); Matias F. Travieso-Dias, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659 (1996); Matias F. Travieso-Dias, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L ECON. L. 217 (1995).

GATT, and a showdown with the United States over the issue–temporarily averted in April of this year–still threatens to cripple the new dispute resolution procedures of the World Trade Organization ("WTO"). At the same time, the Act has raised a host of fascinating international legal issues, not just under treaties like GATT and NAFTA but under customary international law as well.[3]

The articles in this symposium issue make important contributions to our understanding of the legal and policy issues surrounding Helms-Burton. David Kaye, an attorney-advisor at the State Department, explains the relationship between Helms-Burton and the espousal of international claims.[4] He argues that Helms-Burton is consistent with international claims law and that international law allows the United States to attribute liability to nationals of third States for trafficking in property expropriated by Cuba, taking issue with the contrary opinion of the Organization of American States' Inter-American Juridical Committee ("IAJC") on each of these points.[5] John Yoo, a law professor at Boalt Hall, tackles the question whether Helms-Burton is consistent with international law limitations on jurisdiction to prescribe and with the United States' treaty obligations under NAFTA and GATT.[6] He also argues that Helms-Burton unwisely uses the federal courts as instruments of foreign policy, which not only threatens the neutrality and legitimacy of the federal courts but also compromises U.S. foreign policy by vesting decisions with judges who cannot respond flexibly to political developments and do not (at least until the issue works its way to the Supreme Court) speak with one voice.[7] Robert Muse, an attorney representing several U.S. corporations holding claims against Cuba, argues that Title III of Helms-Burton violates the "nationality of claims" principle in international law by extending its right of action to U.S. citizens who were Cuban nationals at the time their property was taken.[8] Kim Campbell, the former At-

3. *See infra* notes 69-76 and accompanying text.

4. David Kaye, *The Helms-Burton Act: Title III and International Claims*, 20 HASTINGS INT'L & COMP. L. REV. 726, 736 (1997).

5. *Id.* at 736-40. For the IAJC's opinion on Helms-Burton, see Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act (Aug. 27, 1996), 35 I.L.M. 1322 (1996).

6. John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms- Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 742, 746-54 (1997).

7. *Id.* at 754-64.

8. Robert L. Muse, *The Nationality of Claims Principle of Public International Law and the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 767, 769-81 (1997).

torney General and Prime Minister of Canada, emphasizes Canada's commitment to democracy and human rights in Cuba through a policy of engagement like the United States' policy toward China and Vietnam.[9] Helms-Burton, she argues, is an unacceptable attempt to impose the U.S. policy toward Cuba on other nations and undermines the concept of an international system based on rules.[10] The Mexican Government criticizes Helms-Burton and the U.S. embargo of Cuba as violations of international law and calls for their immediate repeal.[11]

In this introduction to the symposium, I offer a brief overview of the Act and the foreign responses to it–both public and private.[12] The pattern of U.S. extraterritorial regulation, foreign response, and U.S. accommodation is a familiar one to international lawyers, and I compare the controversy over Helms-Burton to the *Fruehauf* case of the mid-1960s and the Soviet Pipeline dispute of the early 1980s.[13] Finally, I use Helms-Burton to illustrate the dynamic that Professor Harold Koh has termed "transnational legal process," in which public and private actors interact to make, interpret, enforce and internalize international law.[14]

I. An Overview of Helms-Burton and Foreign Responses

President Clinton signed the Helms-Burton Act into law on March 12, 1996, shortly after the Cuban Air Force shot down two Cessna planes flown by Brothers to the Rescue, a Cuban-American organization. The stated purposes of the Act are twofold: first, to speed the replacement of the Castro regime with a democratic government in Cuba;[15] and second,

9. Kim Campbell, *Helms-Burton: The Canadian View*, 20 HASTINGS INT'L & COMP. L. REV. 786, 792-93 (1997).

10. *Id.* at 789-92.

11. *Mexico's Position Regarding the Helms-Burton Act and Cuba*, 20 HASTINGS INT'L & COMP. L. REV. 794 (1997).

12. *See infra* notes 15-49 and accompanying text.

13. *See infra* notes 50-59 and accompanying text; *see also* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Unilateralism*, 39 HARV. INT'L L.J. (forthcoming Winter, 1998) (discussing the pattern of extraterritorial regulation, foreign response, and eventual accommodation in the antitrust context).

14. *See infra* notes 60-86 and accompanying text. *See generally* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) [hereinafter Koh, *Transnational Legal Process*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review) [hereinafter Koh, *Why Do Nations Obey?*].

15. Helms-Burton Act § 3(1)-(5).

to protect the rights of U.S. nationals whose property was expropriated by the Cuban government.[16]

Titles I and II of the Act focus on changing the government in Cuba. Title I freezes the economic embargo on Cuba as it existed on March 1, 1996, removing the President's previous authority to modify those restrictions.[17] It further directs the Administration to oppose any termination of Cuba's suspension from the Organization of American States ("OAS") and to oppose Cuba's admission to international financial organizations like the International Monetary Fund, the World Bank, and the Inter-American Development Bank.[18] It requires the Secretary of the Treasury to withhold from any international financial institution that approves a loan or other assistance to Cuba an amount equal to the amount of that loan or assistance[19] and calls for reduced aid to states of the former Soviet Union that furnish assistance or engage in nonmarket trade with Cuba.[20] Title II of Helms-Burton authorizes the termination of the economic embargo against Cuba once the President certifies that a transition government is in power.[21] "Transition government" and "democratically elected government" are defined in great detail.[22]

Titles III and IV of the Act focus on the property rights of U.S. nationals. Title III is the most controversial aspect of Helms-Burton. It permits any U.S. national who has a claim for property confiscated by Cuba since January 1, 1959 to bring suit in U.S. courts against any person who "traffics" in such property.[23] "Trafficking" is defined broadly to include buying, leasing, managing, using and even "benefiting from" confiscated property.[24] The trafficker is liable for the entire amount of the claim[25] and in many instances for treble damages.[26] Thus, an English company buying sugar from a Cuban state enterprise that operates a plantation expropriated from a U.S. national may be liable for damages

16. *Id.* § 3(6).
17. *Id.* § 102(h).
18. *Id.* §§ 104(a) & 105.
19. *Id.* § 104(b).
20. *Id.* § 106.
21. *Id.* § 204.
22. *Id.* §§ 205-206.
23. *Id.* § 302(a).
24. *Id.* § 4(13).
25. *Id.* § 302(a)(1).
26. *Id.* § 302(a)(3).

in an amount three times the value of the plantation.[27] If the threat of such liability seems as though it might chill foreign investment in and trade with Cuba, that is precisely the point. Congress intended to discourage foreign investment in Cuba both to deny the benefits of foreign investment to the Castro regime and to prevent foreign investment from clouding the title to confiscated property making restitution of that property to U.S. nationals more difficult.[28] Title IV of the Act is further designed to discourage foreign investment in Cuba by excluding from the United States officers and controlling shareholders of foreign companies that traffic in confiscated property, as well as their spouses and minor children.[29]

The response of foreign companies to Helms-Burton has been mixed.[30] In late July of this year, the state-owned Italian telecommunications company STET agreed to make a one-time payment to ITT for authority to invest in the Cuban telephone system formerly owned by ITT, thereby avoiding sanctions under Title IV.[31] The United States also points to Cementos Mexicanos' (Cemex's) withdrawal from a contract to manage a cement plant in Cuba and ING Bank's decision not to renew $30 million in loans to Cuba's state-owned sugar trading company as evidence of the law's impact.[32] On the other hand, both Cemex and ING are still involved in other activities in Cuba.[33] In February of this year, Wal-Mart pulled Cuban pajama's off the shelves of its stores in Canada, but resumed the sales to avoid penalties under a Canadian law prohibiting compliance with the U.S. embargo of Cuba.[34] And while Helms-

27. *See* Lowenfeld, *supra* note 2, at 426 (offering this example).

28. Helms-Burton Act § 301(6).

29. *Id.* § 401(a).

30. Pascal Fletcher, *War of Words over Impact on Cuba of Helms-Burton*, FIN. TIMES, Mar. 12, 1997, at 4.

31. *U.S. Ends Probe as ITT and STET Reach Pact Over Cuban Property*, WALL ST. J., July 24, 1997, at B7; Guy de Jonquieres & Robert Graham, *STET Secures Helms-Burton Waiver*, FIN. TIMES, July 24, 1997, at 5.

32. Fletcher, *supra* note 30; *see also* Gordon Cramb & Pascal Fletcher, *U.S. Law Forces ING out of Cuban Sugar*, FIN. TIMES, July 5, 1996, at 5.

33. Fletcher, *supra* note 30.

34. John Urquhart, *Wal-Mart Puts Cuban Goods Back on Sale*, WALL ST. J., Mar. 14, 1997, at A3. Wal-Mart potentially faced U.S. liability not under Helms-Burton but under the earlier Cuban Democracy Act of 1992, 106 Stat. 2575 (1992) (codified at 22 U.S.C. § 6001-10). The Canadian law forbidding compliance with both Helms-Burton and the Cuban Democracy Act is the Foreign Extraterritorial Measures Act, as amended.

Burton has deterred new investment by some large Canadian companies with significant U.S. assets, smaller Canadian companies seem to be filling the gap.[35]

On the governmental level, the foreign response to Helms-Burton has been swift and vehement. The European Union objected immediately to the Act[36] and Canada and Mexico requested consultations with the United States under Chapter 20 of NAFTA.[37] While Canada and Mexico have yet to challenge Helms-Burton formally as a violation of NAFTA,[38] the European Union did challenge the Act as a violation of GATT.[39] Meanwhile, the OAS General Assembly, over the objection of the United States, directed the Inter-American Juridical Committee to examine the validity of Helms-Burton under international law, and the Committee concluded that Helms-Burton violated international law.[40] Moreover, the European Union, Canada, and Mexico all adopted laws to counteract Helms-Burton by forbidding their nationals from complying with the Act and permitting their nationals to "clawback" any awards

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See Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the Helms-Burton Act (Oct. 9, 1996), 36 I.L.M. 111 (1997).

35. *Canadian Firm to Develop Cuban Mine*, 14 INT'L TRADE REP. 1247 (July 16, 1997). At least one large Canadian company that has been subjected to sanctions under Title IV of Helms-Burton, Sherritt International, has pressed forward with additional investments in Cuba. Pascal Fletcher, *Sherritt Defies U.S. Sanctions*, FIN. TIMES, Jan. 28, 1997, at 6.

36. *See* European Union: Démarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act (Mar. 5, 1996 and Mar. 13, 1996), 35 I.L.M. 397 (1996).

37. *See Sanctions: U.S. Agrees to Talk with Canada, Mexico on Helms-Burton Cuba Sanctions Measure*, 13 INT'L TRADE REP. 12 (Mar. 20, 1996). Consultations among the NAFTA countries failed to resolve Canada's and Mexico's complaint. *See Sanctions: NAFTA Designates Confer on Complaint Against Helms-Burton Under Chapter 20*, 13 INT'L TRADE REP. 27 (July 3, 1996).

38. Sir Leon Brittain, the European Union's Trade Commissioner, has criticized Canada for stalling under NAFTA while the European Union has pressed forward with its challenge under GATT. *See Brittain Berates Canadians*, FIN. TIMES, May 2, 1997, at 4.

39. *See* United States–The Cuban Liberty and Democratic Solidarity Act: Request for the Establishment of a Panel by the European Communities, WT/DS38/2 (Oct. 8, 1996) (on file with the author).

40. *See* Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act (Aug. 27, 1996), 35 I.L.M. 1322 (1996). Mr. Kaye takes issue with several of the IAJC's conclusions. *See* Kaye, *supra* note 4, at 736-40.

against them under Helms-Burton by filing countersuits in their own courts.[41]

President Clinton sought to accommodate these foreign reactions by exercising his authority under section 306(b) of the Act to suspend Title III's right of action for six months.[42] On January 3, 1997, President Clinton announced that he would suspend Title III's right of action for an additional six months[43] and would "expect to continue suspending the right to file suit so long as America's friends and allies continue their stepped-up efforts to promote a transition to democracy in Cuba."[44]

However, these actions did not satisfy the United States' allies, and the European Union continued to press ahead with its complaint that Helms-Burton violates GATT. The United States responded that as a matter of national security Helms-Burton fell outside of GATT. Moreover, each side argued that the other's position threatened to undermine the WTO's dispute resolution procedures. The Clinton administration warned that the case could create a backlash against the WTO in Congress,[45] while the European Union argued that, if each nation were allowed to determine for itself what measures fall within GATT's national security exception, the dispute settlement procedure would be "immeasurably damaged."[46] In February, over the objection of the United States,

41. *See* Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act (Oct. 9, 1996), 36 I.L.M. 111 (1997); Mexico: Act to Protect Trade and Investment from Foreign Norms that Contravene International Law (Oct. 23, 1996), 36 I.L.M. 133 (1997); European Union: Council Regulation (EC) No. 2271/96, Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country (Nov. 22, 1996), 36 I.L.M. 125 (1997). These blocking and clawback statutes are modeled on the British Protection of Trading Interests Act, which was passed in response to the extraterritorial application of U.S. antitrust law. *See* United Kingdom: Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act, 21 I.L.M. 834 (1982). For a discussion of blocking and clawback statutes in the context of antitrust, *see* Dodge, *supra* note 13.

42. *See Sanctions: Clinton Delays Lawsuits Under Title III of Helms-Burton*, 13 INT'L TRADE REP. 29 (July 17, 1996).

43. *See Sanctions: Clinton Extends His Suspension of Title III of Cuba Law; Canada Weighs NAFTA Action*, 14 INT'L TRADE REP. 42 (Jan. 8, 1997).

44. United States: Statement of the President on Suspending Title III of the Helms-Burton Act (Jan. 3, 1997), 36 I.L.M. 216 (1997). President Clinton announced renewal of the suspension on July 16, 1997. *See U.S. Suspends Right to Sue Foreign Firms Over Cuba*, WALL ST. J., July 17, 1997, at A1.

45. Nancy Dunne, *Eizenstat Warning on Cuba Sanctions Dispute*, FIN. TIMES, Feb. 12, 1997, at 4.

46. Guy de Jonquieres, *EU Delays Clash on US Anti-Cuba Law*, FIN. TIMES, Feb. 13, 1997, at 5.

the WTO named a panel to hear the complaint.[47] But on the eve of the hearing, which the United States had threatened to boycott, the two sides concluded a memorandum of understanding under which the European Union agreed to suspend the WTO case and to negotiate first a bilateral and then a multilateral agreement to prevent companies from investing in illegally expropriated assets while the Clinton Administration promised to continue suspending Title III of Helms-Burton and to seek authority from Congress to suspend Title IV as well.[48] Whether such an agreement can be negotiated and congressional authorization to suspend Title IV can be obtained by the October 15 deadline remains to be seen.[49]

II. Deja Vu All Over Again[50]

The pattern of U.S. extraterritorial regulation, foreign response, and U.S. accomodation that one sees in the current controversy over the Helms-Burton Act is reminiscent of two earlier incidents–the *Fruehauf* case in the mid-1960s and the Soviet Pipeline dispute in the early 1980s.[51] In each of those cases, as in the case of Helms-Burton, the United States attempted to use domestic law to enlist foreign companies in the service of its foreign policy goals. In each of those cases, the United States ultimately backed away from its original position in response to foreign objections. And each of those cases helped refine the

47. Guy de Jonquieres & Nancy Dunne, *US Leaves Door Ajar in Row with EU over Cuba Trade*, FIN. TIMES, Feb. 21, 1997, at 18. The panel consists of Arthur Dunkel, the Swiss former director-general of GATT, Tommy Koh, Singapore's ambassador-at-large, and Edward Woodfield, New Zealand's former chief trade negotiator. *Id.*

48. *See* European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act (Apr. 11, 1997), 36 I.L.M. 529 (1997).

49. There were early signs that legislators on both sides of the Atlantic were unhappy about the compromise. The European Pariliament in Strasbourg adopted a resolution deploring the agreement, *see European Union: European Parliament Angry About Handling of Bananas, Helms-Burton*, 14 INT'L TRADE REP. 915 (May 21, 1997), while the U.S. House of Representatives adopted a bill that would tighten, rather than waive, Title IV. *Sanctions: EU Warns It Will Reinstate Complaint on Helms-Burton if Congress Tightens Law*, 14 INT'L TRADE REP. 1069 (June 18, 1997).

50. Attributed to Yogi Berra.

51. Both incidents are helpfully recounted in HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, TRANSNATIONAL LEGAL PROBLEMS 983-94 (4th ed. 1994) and in ANDREAS F. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS 91-105, 268-306 (2d ed. 1983).

international law rules on prescriptive jurisdiction over foreign companies.[52]

Fruehauf involved the application of U.S. export control restrictions to a French subsidiary, S.A. Fruehauf-France, that was 70 percent owned by Fruehauf Corporation, an American company, and 30 percent owned by French interests. Fruehauf-France bid on and was awarded a contract to supply trucks for export from France without knowing their ultimate destination. That destination was the People's Republic of China, to which "persons subject to the jurisdiction of the United States" or "owned or controlled" by such persons were prohibited by U.S. law from exporting. When the U.S. Treasury Department learned of the contract, it instructed the American parent company to have Fruehauf-France cancel the contract or face criminal penalties under U.S. law. When the American parent complied, the French directors successfully petitioned a French court to appoint a temporary administrator for Fruehauf-France who would manage the company and carry out the contract. The appointment of an administrator was upheld on appeal.[53] Ultimately, the United States backed down. The Secretary of the Treasury ruled that with the appointment of a French administrator Fruehauf-France was no longer a "person subject to the jurisdiction of the United States" and thus no longer subject to U.S. export control restrictions.[54]

The Soviet Pipeline dispute involved a similar factual situation and ended the same way. After the imposition of martial law in Poland, President Reagan imposed controls on exports of oil and gas equipment and technology from the United States to the Soviet Union aimed at hindering the construction of a natural gas pipeline from the Soviet Union to Western Europe. In June 1982, he extended those controls to equipment manufactured abroad by subsidiaries of U.S. companies and by foreign-owned licensees of U.S. companies. European governments not only protested, but ordered subsidiaries of U.S. companies organized under their laws to honor their contracts and export oil and gas equipment to

52. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 414 (1987); *see also id.* Reporters' Note 3 (discussing *Fruehauf*); *id.* Reporters' Note 8 (discussing Soviet pipeline).

53. Societe Fruehauf Corp. v. Massardy, [1968] D.S. Jur. 147 (1965), *reprinted in* LOWENFELD, *supra* note 51, at 93-96.

54. STEINER, VAGTS & KOH, *supra* note 51, at 993; LOWENFELD, *supra* note 51, at 100.

the Soviet Union notwithstanding the U.S. export controls.[55] The U.S. Commerce Department in turn imposed sanctions on the European subsidiaries by denying them all export privileges.[56] As in the *Fruehauf* case, however, the United States ultimately backed down. Using Leonid Brezhnev's death as an excuse, President Reagan lifted the export controls aimed at the Soviet pipeline in November 1982.[57]

In each of these cases, the United States ultimately came back into compliance with international law after being challenged by other international actors. Moreover, both incidents served further to define the international law rules concerning prescriptive jurisdiction over foreign subsidiaries. Section 414 of the Restatement (Third) of Foreign Relations Law now generally limits a nation's control over foreign subsidiaries of its companies to "exceptional cases."[58] Of course, the Helms-Burton Act raises different international law issues than either *Fruehauf* or the Soviet Pipeline case. In some respects, Title III of the Act seems less justifiable than the export controls imposed in those cases because it regulates the conduct of wholly foreign companies that are not subsidiaries or even licensees of U.S. companies. On the other hand, Title III in some respects seems more justifiable because it is designed to vindicate the rights of U.S. nationals under international law rather than simply to achieve foreign policy goals. I compare Helms-Burton to those cases because all three disputes served further to define important issues of international law and all three disputes generated pressure for compliance with international law. It is this dynamic that Professor Koh has termed "transnational legal process."[59]

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55. LOWENFELD, *supra* note 51, at 295. A Netherlands subsidiary of a U.S. company attempted to raise the U.S. export controls as a defense in a breach of contract action, but the Dutch court refused to recognized the defense because it concluded that the export controls exceeded the international law limitation on the United States' jurisdiction to prescribe. *See* Compagnie Européenne des Petroles S.A. v. Sensor Nederland B.V., District Court at the Hague (Sept. 17, 1982), 22 I.L.M. 66, 72 (1983).

56. LOWENFELD, *supra* note 51, at 296.

57. *Id.* at 304.

58. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 414; *see also id.* Reporters' Note 3 (discussing *Fruehauf*); *id.* Reporters' Note 8 (discussing Soviet pipeline).

59. Koh, *Transnational Legal Process*, *supra* note 14, at 183; Koh, *Why Do Nations Obey?*, *supra* note 14, at 2626; *see also* Harold Hongju Koh, *Refugees, the Courts and the New World Order*, 1994 UTAH L. REV. 999, 1014-18 (discussing Haitian refugees case as an example of transnational legal process); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2394-2402 (1991) (discussing "the new international legal process"); ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY

III. Helms-Burton and Transnational Legal Process

According to Koh, transnational legal process has four distinctive features. First, it is "nontraditional" in the sense that it breaks down the barriers between domestic and international law and public and private law, which have long characterized international legal scholarship.[60] Second, it is "nonstatist." It does not view nation-states as the only actors who make and enforce international law, but expands its focus to include international organizations, multinational enterprises, nongovernmental organizations, and private individuals as well.[61] Third, it is "dynamic" rather than static. It "percolates up and down"–from domestic to international to domestic; from private to public to private.[62] Finally, it is "normative." It both creates rules of law and works to bring transnational actors into compliance with international law.[63] Transnational legal process breaks down many of the barriers that have sometimes limited international legal scholarship, while also attempting to answer the question "why nations obey"[64] international law.

The current dispute over the Helms-Burton Act shows transnational legal process in action. First, it cannot be neatly characterized as domestic or international, as public or private. Helms-Burton is a domestic law, which authorizes suit in a domestic forum. Yet it is designed to provide a remedy for an international law violation (Cuba's expropriation of the property of U.S. nationals) and may itself violate both customary international law and multilateral treaties like GATT and NAFTA.[65] The lawsuits authorized by Title III are suits by one private party against another (private-private), yet the genesis of the claims was the taking of private property by a government (private-public), and the Act has generated disputes between the United States and other nations (public-public).

COURSE (2 vols. 1968). *Compare* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

60. Koh, *Transnational Legal Process*, *supra* note 14, at 184.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; *see also* Koh, *Why Do Nations Obey?*, *supra* note 14, at 2645-58 (suggesting that obediance derives from a process of interaction, which leads to interpretation of international law norms and ultimately to internalization of those norms).

65. *See* Lowenfeld, *supra* note 2, at 430-32; Clagett, *Who is Breaking International Law*, *supra* note 2; Yoo, *supra* note 6, at 746-54; Welke, *supra* note 2.

Second, the key actors in the Helms-Burton dispute are not just nations-states. But for the activities of a non-governmental organization, Brothers to the Rescue, which led to the downing of two unarmed planes, Helms-Burton likely would never have become law. Multinational enterprises play a key role as potential plaintiffs and potential defendants under Title III of the Act. Helms-Burton is designed to enlist these enterprises in the United States' economic embargo of Cuba, and their willingness to comply[66] will ultimately determine its effectiveness. Individuals also play a role again as potential plaintiffs and defendants under Title III but also as persons who may be excluded from entering the United States under Title IV because their companies traffic in confiscated property. And international organizations like the WTO and the OAS[67] are intimately involved in interpreting and enforcing the rules of international law implicated by Helms-Burton.

Third, the Helms-Burton dispute is dynamic. It has percolated up and down from international private-public disputes to domestic private-private disputes to an international public-public dispute. It began with the international law claims of private parties against a government that had expropriated their property. Title III of Helms-Burton transformed those claims into domestic law claims by one private party against another that may be brought in a domestic forum. Helms-Burton has in turn prompted claims by foreign governments against the United States under international law in international fora.

Fourth, and perhaps most important, the dispute over Helms-Burton–like the *Fruehauf* and Soviet Pipeline cases[68]–is both shaping rules of international law and is gradually bringing transnational actors into compliance with international law. The international law rules raised by Helms-Burton are many: whether Helms-Burton violates GATT or NAFTA and the scope of the national security exception under each;[69] the international law limits on prescriptive jurisdiction;[70] what consti-

66. *See supra* notes 30-35 and accompanying text.

67. *See supra* notes 39-40, 45-49 and accompanying text.

68. *See supra* notes 51-58 and accompanying text.

69. *See* Yoo, *supra* note 6, at 751-54; Fidler, *supra* note 2, at 311-13; Welke, *supra* note 2.

70. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402 & 404 (listing recognized bases for jurisdiction to prescribe). The Helms-Burton Act asserts that Title III is based on effects jurisdiction. Helms-Burton Act § 301(9) ("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.").

tutes a "secondary boycott" and whether such boycotts are permissible under international law;[71] whether Cuba violated international law when it confiscated the property of its own citizens;[72] whether multinational enterprises violate international law when they "traffic in" confiscated property;[73] whether Helms-Burton may be justified as a "countermeasure" to remedy a violation of international law even if would not otherwise be permissible;[74] whether the blocking and clawback laws adopted by Canada, Mexico and the European Union may be justified as "countermeasures" to Helms-Burton;[75] and whether Helms-Burton violates international claims practice by espousing the claims of persons who were

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Others have asserted that Title III may be based on territorial or protective jurisdiction. *The Libertad Act: Implementation and International Law: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong., 2d Sess. 27, 29 (July 30, 1996) [hereinafter *Senate Hearing*] (statement of Monroe Leigh). The jurisdictional basis that seems to fit Title III most closely is the so-called "passive personality principle" under which a nation applies its law to an act committed outside its territory by a non-national on the ground that the *victim* was a national. The Restatement (Third) of Foreign Relations Law states that "[t]he principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402, comment *g*. *See also* Yoo, *supra* note 6, at 747-49 (arguing that Helms-Burton does not rest on a recognized basis for prescriptive jurisdiction).

71. *See* Lowenfeld, *supra* note 2, at 429-30 (characterizing Helms-Burton as a secondary boycott); *Senate Hearing*, *supra* note 70, at 29-30 (statement of Monroe Leigh) (arguing that Helms-Burton is not a secondary boycott and that secondary boycotts do not violate international law).

72. *See* Helms Burton Act § 302(a)(4)(C) (permitting U.S. nationals who were Cuban citizens at the time of expropriation to bring suit beginning two years after the date of enactment); Muse, *supra* note 8, at 769-81 (arguing that confiscations by a state of the property of its own nationals do not violate international law).

73. *See* Inter-American Juridical Committee Opinion, *supra* note 5, at para. 5(e) ("Any use by national of a third State of expropriated property located in the expropriating State where such use conforms to the laws of that State, as well as the use anywhere of products or intangible property not constituting the expropriated asset itself, does not contravene any norm of international law."); Clagett, *Who Is Breaking International Law*, *supra* note 2 (arguing that trafficking in expropriated property violates international law).

74. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 905 (a state victim of an international law violation may resort to proportional countermeasures that might otherwise be unlawful to remedy the violation, subject to the prohibitions on the threat or use of force in the U.N. Charter).

75. *See id.*

not U.S. citizens at the time the claim arose.[76] The dispute over Helms-Burton will shape the international law rules that govern each of these areas and the rules that emerge will influence not just the resolution of this dispute but the future interaction of state and nonstate actors.

But transnational legal process is "normative" not just because it shapes rules of international law but also because it works to bring transnational actors into compliance with international law. "It predicts that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors."[77] Nations do so not just because it is in their interest to do so or because they identify themselves as law abiding states but because their violations of international law hinder their ongoing participation within the international system and because international law norms are internalized by states in their domestic and political structures.[78] In both the *Fruehauf* case and the Soviet Pipeline dispute, the United States ultimately backed away from applying its export controls in a way that was at least questionable under international law after those controls were challenged by other nations. In President Clinton's suspension of Title III,[79] one sees the same dynamic at work. The United States' violation of international law norms (whether one considers them to be existing or emerging) has been aggressively challenged by other nations and this, in turn, has pressured the United States towards compliance with international law by suspending the right of action under Title III.

Here, however, there is an important difference between Helms-Burton on the one hand and the *Fruehauf* case and the Soviet Pipeline dispute on the other. In the *Fruehauf* and Soviet Pipeline cases, the trade restriction was adopted administratively and could be repealed by the President acting alone. Because Helms-Burton was enacted by Congress, President Clinton must secure the support of both houses of Congress to modify its restrictions. Thus, the United States may not come back into full compliance with international law unless Congress as well as the President respond to the pressure being exerted by the United States' allies through diplomatic channels and in fora like the WTO and OAS. If the Helms-Burton dispute ultimately wrecks the WTO's dispute settlement procedures, congressional "meddling" in foreign affairs will inevi-

76. *See* Kaye, *supra* note 4, at 736-38.

77. Koh, *Transnational Legal Process*, *supra* note 14, at 206.

78. *Id.* at 199-205.

79. *See supra* notes 42-44 and accompanying text.

tably be blamed and the argument that the President should conduct foreign policy alone will grow stronger.

Professor Koh has previously argued persuasively that the foreign affairs power is and ought to be a power shared.[80] Ideally, the President's relationship with Congress would be such that he would formulate foreign policy in consultation with Congress and Congress would trust him with its implementation. Indeed, it appears to be the Republican Congress' distrust of President Clinton that resulted in Helms-Burton containing so little discretion for the President.[81]

But the Helms-Burton episode also raises the interesting question why the President seems to have internalized international law norms to a greater extent than Congress, at least in this instance.[82] The answer may lie in the fact that it is chiefly the Executive Branch that is engaged in interaction with other nations.[83] Or it may lie in Congress' lack of an institution comparable to the State Department's Office of the Legal Advisor or the Justice Department's Office of Legal Counsel which would advise Congress on issues of international law.[84] The question of comparative institutional competence is an old one in legal process scholarship,[85] and Helms-Burton presents a fascinating study for those inter-

80. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

81. *See* Yoo, *supra* note 6, at 765.

82. I do not mean to suggest that the President always stands on the side of international law and that Congress always stands against it. Professor Koh points to the Anti-Ballistic Missile Treaty Reinterpretation Debate as an instance of transnational legal process in which pressure from the Senate ultimately brought the President back into compliance with international law. *See* Koh, *Why Do Nations Obey?*, *supra* note 14, at 2646-48. Arguably in that case, however, the Senate was principally defending not international law but its own constitutional role in the treaty process.

83. *See id.* at 2646, 2656 (arguing that interaction promotes internalization).

84. *Cf.* KOH, *supra* note 80, at 169-71 (suggesting the creation of a congressional legal advisor to strengthen Congress' hand in foreign affairs).

85. *See, e.g.*, HART & SACKS, *supra* note 59, at 341-42; CHAYES, EHRLICH & LOWENFELD, *supra* note 59, at xii. This theme has also figured in a number of prominent international law decisions. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("The act of state doctrine . . . concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."); Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 953-55 (D.C. Cir. 1984) (discussing comparative competence of courts and the political branches to resolve conflicts of legislative jurisdiction). For a discussion of the ability of different institutions to achieve international cooperation in the regulation of international business, see Dodge, *supra* note 13.

ested in Congress' competence in dealing with issues of international law and the possibilities of institutional reform to promote such competence.

The final pages of Helms-Burton's story have yet to be written. It may end happily with the conclusion of a multilateral agreement governing investment in expropriated property[86] and the indefinite suspension or even the repeal of the Helms-Burton Act. Or it may end with the United States withdrawing from the WTO dispute resolution system as it withdrew from the compulsory jurisdiction of the International Court of Justice in the 1980s. One thing, however, is certain–whatever the ultimate resolution of the Helms-Burton dispute, it will stand as an important chapter in the development of international law and of transnational legal process.

86. *See supra* note 48 and accompanying text.