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Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*

To echo the shibboleth of Chile's future international lawyers: "In the global marketplace of economic interdependence, the United States needs hemispheric free trade just as much as Latin America."

I. Introduction

In a recently published article, Malcolm Wilkey, former federal judge for the U.S. Court of Appeals for the District of Columbia Circuit and former

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**A shorter, newsletter version of this article appears in an earlier American Bar Association (ABA) publication. See Craig R. Giesze, *Helms-Burton in Light of Common Law and Civil Law Legal Traditions*, Vol. 26, No. 2 ABA INT'L. NEWS 1, 23 (Spring 1997).

U.S. Ambassador to Uruguay, arrives at a startling legal conclusion: that the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, commonly referred to as *Helms-Burton*, is consistent with international law.¹ According to Ambassador Wilkey, who is a U.S.-trained common law lawyer, *Helms-Burton* creates "an unusual but perfectly legal procedural enforcement device" to obtain compensation for American property expropriated by the Castro government in Cuba.²

By contrast, many Latin American and European lawyers, trained in a legal system that traces its modern-day origins to the Napoleonic Civil Code of 1804, contend that *Helms-Burton* violates international law.³ Their principal attack focuses on the so-called extraterritorial application of the U.S. law.⁴ These civil law jurists, and even some common law lawyers from the United States, Canada, and England, also argue that *Helms-Burton* violates the new General Agreement on Tariffs and Trade (GATT) of 1994,⁵ the new World Trade Organization (WTO) Agreements,⁶ and the North American Free Trade Agreement (NAFTA).⁷ In particular, the European Union has invoked the new alternative dispute resolution (ADR) mechanism of the WTO, contending that *Helms-Burton* is inconsistent with U.S. international obligations arising under the new GATT and WTO accords.⁸ As

1. Malcolm Wilkey, *Helms-Burton: Its Fundamental Basis, Validity, and Practical Effect*, ABA INT'L. NEWS, Spring 1997 at 17; U.S. Const. art. I, § 8 (authorizing the U.S. Congress to enact domestic laws defining and punishing offenses that violate international law by expressly codifying the "Law of Nations" into the Constitution); *Filartiga v. Pena-IRALA*, 630 F.2d 876, 886 (2d Cir. 1980) ("The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the [U.S.] Constitution demonstrates that it became part of the common law of the United States upon the adoption of the Constitution.").

2. Wilkey, *supra* note 1, at 17.

3. Interview with Prof. Hugo Llanos, Professor of International Law, Catholic University of Chile (Aug. 7, 1996) [hereinafter Interview with Prof. Llanos].

4. *Id.*

5. General Agreement of Tariffs and Trade 1994, *entered into force*, Jan. 1, 1995 [hereinafter GATT 1994].

6. Agreement Establishing The World Trade Organization, *entered into force*, Jan. 1, 1995 [hereinafter WTO Agreement]. The WTO, which replaced the GATT as an institutional organization, oversees the implementation of the new GATT of 1994 and the WTO Agreements negotiated and concluded during the Uruguay Round of multilateral trade negotiations. See WTO Agreement, art. II. The principal vehicle designed to ensure effective implementation and oversight is the new WTO alternative dispute resolution (ADR) mechanism, which contemplates both bilateral and multilateral country consultations and arbitration panel reviews. See generally WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, *entered into force*, Jan. 1, 1995.

7. North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept. 6, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (pts. 1-3) & 32 I.L.M. (pts. 4-8 & annexes), *entered into force*, Jan. 1, 1994 [hereinafter NAFTA]; Jeffrey Snyder, Stefano Agostini, *New U.S. Legislation to Deter Investment in Cuba: A First Glance*, J.W. TRADE L., June 1996, 41-43 (asserting that *Helms-Burton* is inconsistent with U.S. international obligations arising under the GATT of 1994, the WTO Agreements, and the NAFTA).

8. See <http://www.CNN.com> (Nov. 22, 1997).

of the writing of this article, the United States has declined to commit to participate in any aspect of the WTO dispute-resolution process.⁹

This article analyzes *Helms-Burton* in accordance with the governing principles of international law. Specifically, it seeks to determine whether the inherent differences between the common law and civil law legal traditions—namely, distinct reasoning techniques, different rules of statutory construction, and inconsistent legal doctrines concerning the territorial application of national legislation—explain, in part, the diametrically opposed conclusions of Ambassador Wilkey and the majority of the civil law jurists in Latin America and Europe. Alternatively, this article attempts to ascertain whether certain nonlegal factors, such as international political considerations, account for the sharp divergence in opinion concerning *Helms-Burton*.

To undertake this comparative analysis, the Law School at the Catholic University of Chile, located in Santiago, Chile, assembled a binational team of American and Chilean law professors and students at its newly created Legal Center for Inter-American Free Trade and Commerce (Centro JURICI-Chile).¹⁰ In conducting their inquiry, the Centro JURICI researchers first examined the historical facts that motivated the United States Congress to enact *Helms-Burton*. Next, our unique team of common law and civil law analysts interpreted the controversial statute to determine whether the United States, in theory, can enforce any of its provisions or legal remedies on an extraterritorial basis; that is, outside the legal boundary of U.S. national territory. Our comparative legal researchers then analyzed another facet of the extraterritoriality issue, as well as the legal standard governing foreign government expropriations and nationalizations, in accordance with the traditional sources of international law. Finally, our binational legal team scrutinized *Helms-Burton* under the new GATT of 1994, the new WTO Agreements, and the NAFTA.

Based upon these criteria, the Centro JURICI-Chile analysts determined, on balance, that the International Court of Justice (ICJ), a WTO panel, or a NAFTA arbitration tribunal should uphold *Helms-Burton* in accordance with international law, regardless of whether the international judges, panelists, or arbitrators were from common law or civil law countries. This conclusion stands even if the WTO ever ultimately rules against the United States and issues a panel decision that

9. *Id.*; Telephone Interview with Ms. Shari Villarosa, Special Assistant, Office of the Under Secretary for Economics, Business and Agricultural Affairs, U.S. Dept. of State, Washington, D.C. (Jan. 20, 1998) (explaining that the European Union has merely invoked the ADR mechanism of the WTO as a threat, without formally filing a WTO complaint, while the Clinton Administration has maintained that it will not participate in any formal WTO dispute-resolution proceeding concerning *Helms-Burton*) [hereinafter Interview with Villarosa].

10. Centro JURICI-Chile functioned as a *de facto* entity within the Catholic University of Chile during the latter part of 1996 and the early part of 1997. On June 6, 1997, the current Dean of the Law School at the Catholic University of Chile officially authorized the creation of Centro JURICI-Chile. See Catholic University of Chile Internal Memoranda (June 6, 1997; December 19, 1996).

attempts to strike down the controversial statute. Despite these conclusions, our unique team of common law and civil law analysts also found that the legality of *Helms-Burton* is not the ultimate issue underlying the current debate. Rather, the heart of the controversy turns on the fact that the United States failed to consult with its Latin American and European trading partners and, instead, unilaterally enacted a law that affects certain business transactions throughout the Western Hemisphere.

For this reason, we concluded that legal analysis alone is not sufficient to settle the *Helms-Burton* conflict in accordance with international law. In light of these legal results, this article proposes three policy options for the United States to evaluate to ensure that the polemic law—in combination with the recent failure by the U.S. House of Representatives to approve fast-track negotiating authority—jeopardizes neither the Second Summit of the Americas nor the continued growth of free trade alliances in the Western Hemisphere. To echo the shibboleth of Chile's future international lawyers at the Catholic University of Chile: "In the global marketplace of economic interdependence, the United States needs hemispheric free trade just as much as Latin America."

II. Historical Background

In January of 1959, Fidel Castro, backed by a group of Cuban revolutionaries, overthrew the Batista government in Cuba.¹¹ During its first weeks of existence, the Castro government carried out a massive expropriation campaign in Cuba, nationalizing property and assets owned by U.S. citizens and Cuban nationals, including banks, commercial property, manufacturing facilities, residential property, and tourist resorts.¹² Many adversely affected Cuban nationals fled the island as political refugees, the majority of whom subsequently claimed political asylum in the United States and later were naturalized as U.S. citizens.¹³ Consistent with his anti-American foreign policy, Castro has refused to compensate the previous owners of the confiscated property ever since 1959, even though Cuban law in force at that time required the Cuban government to indemnify both Cuban citizens and foreign nationals alike for the expropriation of private investments.¹⁴

11. See H.R. 927, § 4(4)(A), Tit. III, § 301(3), 104 P.L. 114; 110 Stat. 785; *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) [hereinafter *Banco Nacional de Cuba*]; *Banco Nacional de Cuba v. Sabbatino*, Receiver, 376 U.S. 398 (1964) [hereinafter *Sabbatino*].

12. See H.R. 927, § 4(4)(A), Tit. III, § 301(3), 104 P.L. 114; 110 Stat. 785; *Banco Nacional de Cuba*, 406 U.S. at 759; *Sabbatino*, 376 U.S. at 398. See *infra* note 127 and accompanying text (explaining the difference between, as well as the legal standard governing, a foreign government expropriation and nationalization).

13. See H.R. 927, § 4(4)(A), Tit. III, § 301(3)(B)(iii); H.R. 104-202, at 42.

14. See H.R. 927, § 4(4)(B); H.R. 104-202, at 42. By 1972, the U.S. and Cuban-American owners of the nationalized property had filed 5,911 legal claims, valued at approximately \$1.8 billion, with the U.S. Foreign Claims Settlement Commission. See *infra* note 127 and accompanying text (explaining the difference between, as well as the legal standard governing, a foreign government expropriation and nationalization).

A few years after the expropriations, during the Kennedy Administration, Fidel Castro provoked the most serious threat to U.S. national security during the Cold War. In 1962, Castro installed Soviet-made nuclear missiles on the Caribbean island and aimed their warheads at the United States, triggering what became known as *The Cuban Missile Crisis* that nearly escalated into a nuclear world war.¹⁵ In the midst of this conflict, and in response to the Castro government's continued refusal to pay any compensation for the controversial expropriations, the Kennedy Administration imposed a regulatory embargo on trade and commerce between Cuba and the United States.¹⁶ The trade embargo prohibited, with certain minor exceptions, virtually all commercial, economic, and financial transactions between Cuba and U.S. corporate and natural persons.¹⁷

Following this drama, U.S.-Cuba tensions remained relatively dormant for almost two decades. Tensions reemerged during the Carter Administration when the Castro regime unleashed a mass exodus of Cuban refugees onto the southern shores of Florida.¹⁸ These same tactics increased hostilities between the countries during both the Reagan and Bush Administrations.¹⁹

During the Bush Administration, the former Soviet Union empire crumbled, together with the subsidy program that had bestowed approximately \$5 billion annually upon the Castro government.²⁰ Consequently, the Cuban economy experienced a sharp decline that reached crisis proportions by 1993.²¹ To obtain desperately needed foreign exchange and encourage economic development in Cuba under these circumstances, Castro embarked upon an ambitious program to attract foreign investment from Asia, Europe, and Latin America.²² The Castro regime lured potential foreign investors by offering them the opportunity to purchase equity interests in, to manage, or to enter into joint ventures using the expropriated property previously owned by U.S. nationals.²³ Castro offered these properties to would-be purchasers at below fair-market-value prices.²⁴

On February 24, 1996, tensions between the Castro government and the United States reached another all-time high.²⁵ "Brothers-to-the-Rescue," a Miami-based humanitarian organization, sent three airplanes on a volunteer mission to search for Cuban refugees in the straits of Florida.²⁶ The crew members were unarmed

15. See H.R. 927, Tit. I, § 111(a)(9).

16. Snyder & Agostini, *supra* note 7, at n.8.

17. *Id.*

18. Craig R. Giesze, ABA INT'L. NEWS, Spring 1997, at 23.

19. *Id.*

20. See H.R. 927, § 2(1).

21. *Id.*

22. Snyder & Agostini, *supra* note 7, at 38.

23. See H.R. 927, Tit. III, § 301(5).

24. See *infra* notes 188-191 and accompanying text (explaining that the sale of goods, services, or property by a foreign government at prices below their fair market or book value constitutes an unfair foreign government subsidy practice under the new WTO Subsidy Agreement).

25. See H.R. 927, Tit. I, § 116(a).

26. *Id.*

and were flying in a routine mission similar to hundreds of missions flown since 1991.²⁷ Although the best evidence available suggests that all three airplanes were well within the international fly zone, the Castro government launched two MIG fighter jets that shot down two of the "Brothers-to-the-Rescue" airplanes.²⁸ One of the planes shot down was flying more than eighteen miles north of the Cuban exclusion zone or approximately thirty miles from the Cuban coastline.²⁹ Pablo Morales, Carlos Costa, Mario de la Peña, and Armando Alejandre were killed in the incident.³⁰

III. The *Helms-Burton* Legislation: Enforcement of Legal Remedies Within the National Territory of the United States

In direct response to this illegal action under international law, as well as to the public outcry in the United States, Senator Jesse Helms and Representative Dan Burton pushed the Cuban Liberty and Democratic Solidarity Act through Capitol Hill.³¹ "Condemn[ing] the act of terrorism by the Castro regime in shooting down the Brothers to the Rescue aircraft,"³² the U.S. Congress emphasized that one of the purposes of *Helms-Burton* is "to provide for the 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, and . . . mass migration [of Cuban refugees] to the United States."³³ Another articulated purpose of the law is "to protect United States nationals against confiscatory takings and wrongful trafficking in property confiscated by the Castro regime."³⁴

Helms-Burton avails itself of four major statutory vehicles to achieve these legislative purposes. Title I of the statute codifies into U.S. law the regulatory embargo imposed against Cuba since 1962 and enforced by the U.S. Government at its border.³⁵ Title I also contains provisions that require the U.S. Executive Branch to withdraw foreign financial assistance from countries and international organizations that provide nonhumanitarian support to the Castro regime.³⁶ Similarly, Title II of *Helms-Burton* codifies provisions designed to foster the transition to a democratically elected government in Cuba through the operation of economic-incentive programs administered by the United States within its national territory.³⁷

27. *Id.*

28. *Id.*

29. See H.R. 927, Tit. I, § 116(a).

30. *Id.*

31. *Id.*; Snyder & Agostini, *supra* note 7, at 38.

32. H.R. 927, Tit. I, § 116(b)(1).

33. H.R. 927, § 3(3).

34. H.R. 927, § 3(6).

35. H.R. 927, Tit. I, § 101(b).

36. H.R. 927, Tit. I, § 102(b).

37. H.R. 927, Tit. II.

Title III of *Helms-Burton* is by far the most polemic feature of the law. It authorizes current U.S. nationals deprived of their property and assets by the Castro expropriations, including individuals who were Cuban citizens at that time,³⁸ to file civil lawsuits before U.S. federal courts to obtain compensation for their loss in accordance with international law.³⁹ Potential defendants include foreign governments, companies, and individuals that knowingly and intentionally "traffic" in property confiscated by the Castro regime.⁴⁰ In clarifying a significant misunderstanding concerning Title III of the law, Ambassador Wilkey explains that "Helms-Burton does not ask U.S. courts to adjudicate title to real property in Cuba,"⁴¹ but rather "provides a right of action in the U.S. courts to compel the foreign purchasers to pay the original [U.S.] owners for the title they have already obtained from the Castro regime."⁴² President Clinton has legally suspended the implementation of Title III on four separate occasions for a period of six months each time.⁴³

Title IV of *Helms-Burton* requires the U.S. Executive Branch to deny entry to, and to exclude from U.S. national territory, any foreign national seeking to enter the United States who knowingly and intentionally "traffics" in expropriated property previously owned by a current U.S. citizen.⁴⁴ Such a foreign national can include a foreign corporate officer, principal, or controlling shareholder of

38. H.R. 104-202, at 31.

39. H.R. 927, Tit. I, § 302. To prosecute a lawsuit under Title III of *Helms-Burton*, a current U.S. national must satisfy three legal conditions: (1) that the plaintiff has a legal claim to compensation for property confiscated by the Castro regime and subsequently "trafficked" by a foreign defendant (*i.e.*, federal subject-matter jurisdiction); (2) that the claim in question exceeds \$50,000, exclusive of interest, court costs, and attorneys' fees; and (3) that the relevant U.S. federal district court has personal jurisdiction over the foreign government, company, or individual that "traffics" in confiscated property. H.R. 927, Tit. III, § 302(a),(b),(c). To satisfy this last requirement, a plaintiff must establish, at the time the legal claim arises under *Helms-Burton*, that the defendant foreign government, company, or individual has some kind of "minimum contacts" with the U.S. state (*i.e.*, forum state) in which the U.S. federal district court is located. *See Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). If, for example, the defendant has a corporate domicile or residence, including a subsidiary, business office, or agent in the forum state, or regularly conducts purposeful business activities in that state, then the "minimum contacts" test is met. *See Antone v. General Motors Corp.*, 64 N.Y.2d 20 (1984) (ruling that residence is one factor that can establish "minimum contacts" with the forum state); *McGowan v. Smith*, 52 N.Y.2d 268, n.2 (1981) (explaining concept of "purposeful activities"). Ambassador Wilkey explains the procedural operation of Title III of *Helms-Burton* in the following manner: "If the rightful owner can bring the foreign purchaser into a U.S. court, the deprived owner can demand compensation by way of the purchase price or rent for the use of the property. Note that the procedural remedy in the U.S. court does not purport to adjudicate title to the real property in Cuba, only to force the receiver of the stolen goods to pay the rightful owner fair compensation." Wilkey, *supra* note 1, at 4.

40. H.R. 927, Tit. III, § 302(a)(1).

41. Wilkey, *supra* note 1, at 18.

42. *Id.*

43. Giesze, *supra* note 18, at 23; <http://www.CNNenEspanol.com> (Jan. 16, 1998).

44. H.R. 927, Tit. IV, § 401(a). In April of 1997, the U.S. Executive Branch and the Ambassadors of the European Union reached an agreement in principle that would require the Clinton Administration to persuade the U.S. Congress to repeal Title IV of the law in exchange for European support of *Helms-Burton*. *See* <http://www.CNN.com> (April 29, 1997).

a company that has been “trafficking” in such property.⁴⁵ Title IV also covers spouses, minor children, and agents of such a foreign national.⁴⁶ The law allows a foreign individual who initially “traffics” in confiscated property to enter the United States, but only on the strict condition that his or her company sells its interests in such property (e.g., Mexico’s CEMEX) or chooses to compensate the rightful owner for his or her loss.⁴⁷ Despite these provisions, the U.S. Secretary of State will grant an entry visa to a foreign individual or family members in cases involving a medical emergency.⁴⁸

Contrary to a worldwide misconception, *Helms-Burton* demonstrates that the U.S. Congress carefully drafted this statute to be applied within its sovereign territory and enforced at the U.S. border. By its express language, *Helms-Burton* does not attempt to regulate or prohibit any trade and commerce between Cuba and any country other than the United States. As a result, corporate and natural persons from several nations that have openly criticized the U.S. law—namely, Argentina, Brazil, Canada, Chile, France, Great Britain, Italy, Mexico, and Spain—are all free to engage in bilateral commercial activities with the Caribbean island.

Rather than seeking to regulate trade between Cuba and third countries, *Helms-Burton* attempts to achieve, within U.S. national territory, two fundamental goals guaranteed by international law: (1) to create a procedural enforcement device for U.S. federal courts to compel payment of compensation due and owing under international law to the legitimate American owners of the property confiscated by the Castro regime;⁴⁹ and (2) to require the U.S. Executive Branch to deny any foreign corporate individual who directly or indirectly enjoys the fruits of the confiscated property the privilege of entering into the United States, absent compensation to the rightful American owner of the seized property.⁵⁰

Thus, *Helms-Burton*, by its express terms, is applicable only within the national territory of the United States and is enforceable only at the U.S. border. As

45. *Id.*

46. *Id.*

47. See H.R. 927, Tit. IV, § 401(b)(2). In March of 1996, CEMEX, Mexico’s leading cement producer, sold its interest in Cuban property that the Castro government had previously confiscated from U.S. investors. CEMEX made the sale in question to avoid the application of Titles III and IV of *Helms-Burton* against the company itself, as well as against corporate officers, principals, and controlling shareholders of the firm. See *infra* notes 188-191 and accompanying text (discussing policy argument that favors imposing sanctions against foreign companies that purchase the Cuban assets at issue at prices below their fair market or book value, because the purchase price does reflect a compensation payment made to the legitimate U.S. owners of the confiscated property as required by international law). Similarly, Grupo Domos, another Mexican firm, sold its legal interest in expropriated Cuban property previously owned by a current U.S. citizen to avoid the continued application of Title IV of the *Helms-Burton* (i.e., denial of U.S. entry visas) against its corporate executives. See <http://www.CNNenEspanol.com> (Jan. 16, 1998).

48. H.R. 927, Tit. IV, § 401(c).

49. See H.R. 927, Tit. III, §§ 301(1),(8),(9), 302.

50. See H.R. 927, Tit. IV, § 401.

emphasized by Ambassador Wilkey, "[t]his is not extraterritoriality but the essence of the principle of sovereignty" with regard to a nation's right to control its borders.⁵¹ Contrary to international attacks, *Helms-Burton* does not constitute the extraterritorial application of U.S. law with respect to its enforcement, because the United States enforces the law at its border and within its national territory. Both common law and civil law analyses lead to the same legal conclusion.

Why, then, is there an outcry by civil law jurists in Latin America and in Europe concerning the extraterritoriality issue? Ambassador Wilkey answers this question: "What confuses those [civil law lawyers] who scream 'extraterritorial effect' is that they focus on where the confiscation took place and not where the remedy is applied," inside the United States.⁵² Yet what may appear to be "confusion" to a U.S. common law lawyer may actually represent well-established legal doctrine in the civil law world.⁵³

These observations prompt the following international legal question: does international law authorize a country, such as the United States, to enact a domestic law and to enforce it within its own sovereign territory based upon illegal activity occurring in another country? In examining this question, the Centro JURICI-Chile analysts paid special attention to the fundamental distinctions between civil law and common law doctrines pertaining to the territorial application of national legislation. The Centro JURICI researchers also addressed the legal question posed above in accordance with the traditional sources of international law, as codified in the Vienna Convention on the Law of Treaties⁵⁴ and Article 38 of the Statute of the International Court of Justice.⁵⁵ These sources of law encompass: international

51. Wilkey, *supra* note 1, at 17. For this reason, entry by foreign nationals into any country, whether the United States, Canada, Mexico, or Chile, is a privilege rather than an individual legal right. See SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 489, 492 (2d ed. 1982); *id.* (quoting *Re Immigration Act and Hanna*, Supreme Court of British Columbia, Canada, 21 West. Wk. Rp. 400) (re-emphasizing well-established principle of international law, as articulated by the late "Honourable W.L. Mackenzie King, Prime Minister of Canada . . . that it is not a 'fundamental human right' of an alien to enter Canada. It is a privilege. It is a matter of domestic policy."). Accordingly, the denial of that privilege, when grounded upon illicit commercial activity, is not a violation of international law, but rather represents the maximum expression of a nation's sovereignty. *Id.*

52. Wilkey, *supra* note 1, at 17.

53. See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 1, 10 (1982) ("Law is a form of cultural expression and is not readily transplantable from one culture to another without going through some process of indigenization (sic). French law is as much a reflection of the French culture as Russian law is a reflection of Russian culture.").

54. Vienna Convention on the Law of Treaties, Preamble, opened for signature, May 23, 1969, *entered into force*, Jan. 27, 1980, (1971) *microformed on* CIS § S385-13 (Congressional Info. Serv.). Although the United States is not a party to the Vienna Convention on the Law of Treaties, the U.S. Senate has declared that the Convention is an "authoritative guide to current treaty law and practice." *Treaties and Other International Agreements: The Role of the United States Senate*, 103d Cong., 1st. Sess., *microformed on* CIS § S385-25, at 20 (1993) (Congressional Info. Serv.).

55. Statute of the International Court of Justice, art. 38, *entered into force*, Oct. 24, 1945. 1977 Yearbook of the United Nations 1190. The United States is a signatory to the Statute of the International Court of Justice. *Id.*

treaties, agreements, and conventions; customary international law, including customs and usage among nations; international judicial decisions; general principles of national law espoused by the civilized nations of the world; and the writings of eminent international legal scholars, jurists, and commentators.⁵⁶

IV. Extraterritoriality in Accordance with Civil Law, Common Law, and International Law

A. THE CIVIL LAW AND COMMON LAW TRADITIONS

The civil law system currently in effect in Latin America and on the European continent has its genesis in the written codes of Roman canon law, as refined by the French Napoleonic Code of 1804.⁵⁷ A fundamental difference that cuts at the heart of the principal dichotomy between the civil law tradition and its common law counterpart pertains to the powers of judges in each legal system.⁵⁸ In sharp contrast to the broad discretionary or "equitable powers" enjoyed by American common law judges to interpret statutes and to resolve disputes,⁵⁹ the discretion of civil law judges is extremely limited. In fact, a civil law judge—

56. Statute of the International Court of Justice, art. 38.

57. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 1-3, 16, 26-30, 37-38, 50-51, 58, 89, 96, 142-144 (2d ed. 1985); James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J. 85, 87-88 (1993). The traditional year that marks the commencement of the civil law tradition is "450 B.C., the supposed date of publication of the XII Tables in Rome." MERRYMAN, at 2. The civil law system "is today the dominant legal tradition in most of Western Europe, all of Central and South America, many parts of Asia and Africa, and a few enclaves in the common law world (Louisiana, Quebec, and Puerto Rico)." *Id.* at 3-4. In keeping with the Roman and French legal traditions, written constitutions, specific statutes or decrees, criminal, civil, and commercial codes, as well as international treaties, generally constitute the exclusive source of law in civil law countries today. *Id.* at 23-24. In other words, judicial decisions are generally not a source of law in the civil law heritage. *Id.* at 47.

58. See MERRYMAN, *supra* note 57, at 49-50.

59. See U.S. CONST. art. III, § 2 (recognizing judicial "equitable powers" by expressly providing that "[t]he judicial Power shall extend to all Cases, in Law and Equity. . . ."); *Marbury v. Madison*, 5 U.S. (Cranch) 137, 2 L.Ed. 60 (1803) (illustrating the creation of judicial review and the genesis of *stare decisis* through partial reliance on judicial "equitable powers"). For an excellent analysis of the historical development of judicial "equitable powers" in the English common law tradition, see MERRYMAN, *supra* note 57, at 50-51 (The common law in England, "at first dynamic and creative . . . eventually developed into a rigid, circumscribed set of procedures and remedies . . . [h]owever, an individual dissatisfied with the remedy . . . in the royal courts . . . could petition the king for relief . . . [and] [f]rom time to time the king himself . . . acted on such petitions, but before long the task was delegated to a royal official, called the chancellor . . . [who] was given the power to vary the operation of the law in the interests of fairness . . . By gradual degrees the chancellor became a court of chancery . . . So for several centuries two separate systems of justice existed in England: the law courts and the common law on one side, and the chancery courts and equity on the other . . . Eventually the separate systems of courts of law and equity were abolished, and the jurisdictions and principles merged . . . The surviving common law tradition consequently consists of both the original common law and the tempering influence of equity . . . A comparative law scholar has remarked that the civil law today is what the common law would look like if there had never been a court of chancery in England.") (emphasis supplied).

whether Chilean, French, Mexican, or Peruvian—has no inherent equitable powers to assist her in interpreting the governing code or statute.⁶⁰

Given the traditional lack of equitable interpretative powers in the civil law system, contemporary civil law judges and lawyers are trained during their formative years to become strict constructionists of the law in accordance with a quasi-scientific approach to jurisprudence.⁶¹ They must literally interpret and strictly apply legal principles in accordance with deductive-reasoning techniques,⁶² doctrinal writings, and legal dogma.⁶³ Reliance on simple common sense, derived from daily human experiences, generally does not form part of the civil law analytical framework.⁶⁴

60. See EDUARDO GARCÍA MAYNEZ, *INTRODUCCIÓN AL ESTUDIO DEL DERECHO* 387 (44th ed. 1992); MERRYMAN, *supra* note 57, at 14-18, 29-30; *id.* at 49-50 ("But in the civil law tradition, to give discretionary power to the judge threatens the certainty of the law . . . judges have no inherent equitable power."). The absence of discretionary or equitable powers to interpret codes or statutes traces its modern-day origins to the Napoleonic Code of 1804. *Id.* at 14-18, 29-30. Believing that the corrupt judiciary was one of the causes of the French Revolution, Napoleon and his drafters sought to correct such abuses by severely curtailing the interpretative powers of judges. They did so by drafting the Napoleonic Code in accordance with the Montesquieu principle of strict separation of powers. *Id.* at 16, 36. This political and legal philosophy—an overall distrust of the judiciary—is a hallmark of the Latin American civil law tradition. See Smith, *supra* note 57, at 87-88.

61. See MERRYMAN, *supra* note 57, at 37-38, 50-51; Smith, *supra* note 57, at 87-88; GARCÍA MAYNEZ, *supra* note 60, at 334. As articulated by the late Eduardo García Maynez in his book entitled *Introducción al Estudio del Derecho*, the leading textbook used by first-year law students in Mexico, "[the] judge is tied to the legal texts [of the law]. . . ." *Id.* at 334. In other words, civil law judges usually cannot make a move outside the parameters of the statute or the statutory scheme. See, e.g., *CIVIL CODE OF THE REPUBLIC OF CHILE* arts. 19, 23 (preventing judges from taking into account equitable, fairness, or common-sense considerations "[w]hen the literal meaning of the statute is clear").

62. The absence of equitable powers in the civil law heritage compels judges, perforce, to employ deductive-reasoning techniques and to interpret the controlling code in strict accordance with its *literal meaning*. See Smith, *supra* note 57, at 87-88. Simply put, "[t]he whole process of judicial decision is made to fit into the formal syllogism of scholastic [deductive] logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows. . . ." MERRYMAN, *supra* note 57, at 36.

63. See Smith, *supra* note 57, at 88 ("For centuries, civil lawyers have been taught to discover legal principles as articulated over time by legal scholars and incorporated into positive law by legislators. Civil lawyers are trained to apply [deductive] logic. Specific results are derived from general principles.").

64. See Smith, *supra* note 57, at 87-88 ("As one commentator has noted, '[t]o paraphrase Holmes by inversion, the life of the civil law has not been experience but logic. . . .'). Peruvian civil law judges represent an extreme example of strict constructionists. As explained by Professor Dale Beck Furnish, a leading U.S. expert on Peruvian civil law, "Peruvian doctrine does not admit any possibility of departure from the code provision as written." Dale Beck Furnish, *Court and Statute Law in Peru*, 28 AM. J. COMP. L. 487 (1980). In fact, this legal doctrine "is given added immediacy in Peru by sanctions against the crime of *prevaricato*, the malfeasance of public officials, including the actions of a judge who fails to apply the law as written." *Id.* Hence, if a Peruvian civil law judge departs from the express terms of a code or statute, she may be guilty of the crime of *prevaricato*. *Id.* Consequently, Peruvian judges generally pay strict adherence to the express language of a statute even in cases in which a literal interpretation produces an absurd or harsh result. *Id.* Although Chilean judges are potentially subject to the crime of *prevaricato*, the Chilean Constitution does not expressly apply this sanction to pure statutory construction. See CONST., art. 76 (Chile).

Even the so-called application of the law to the facts of the case is actually a misnomer in a civil law environment.⁶⁵ Indeed, the legal exercise in question—especially in the judicial branch of the government—typically constitutes nothing more than a relatively mundane and unintellectual task.⁶⁶ Stated otherwise, in contrast to the rigorous analysis that characterizes the application of U.S. law before an American court, civil law analysis usually consists in the mere mechanical application of the law. As explained by Professor John Henry Merryman, a leading U.S. scholar on the subject, “[j]udicial service [in the civil law countries] is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative”.⁶⁷

The picture of the judicial process that emerges is one of fairly routine activity. The judge becomes a kind of expert clerk. He is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic [deductive] logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows. . . .⁶⁸

In a legal world devoid of equitable interpretative powers, the straightforward and mechanistic application of codes and legal principles by judges and lawyers almost always dominates the resolution of any legal conflict.⁶⁹ Of course, strict adherence to the express terms of a statute, based on the rigid

65. See MERRYMAN, *supra* note 57, at 37-38, 50-51; Smith, *supra* note 57, at 87-88.

66. See MERRYMAN, *supra* note 57, at 37-38, 50-51; *id.* at 36-37 (“The net image is of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one. . . .”).

67. *Id.* at 38.

68. *Id.* at 36. The following hypothetical illustrates typical statutory construction in a civil law milieu in Latin America. Assume that a Mexican statute in Monterrey, Mexico, codifies the following rule of law: “All dogs and cats within the city limits must wear collars, have a chain attached thereto, and be accompanied by their owner or other adult with the chain in hand. In the event that a dog or cat does not meet all of these requirements, such domestic animal shall be put to sleep immediately.” Assume, further, that *Fido* is a dog that is found within the city limits and does not have a collar, chain, or master. Employing deductive-reasoning techniques, a civil law judge would routinely apply the general legal principle codified in the statute (*i.e.*, major premise) to the fact that *Fido* is a dog without a collar, chain, or owner (*i.e.*, minor premise) and conclude that *Fido* must be put to sleep. The judge could not even question the apparent harshness of this legal result, because the choice of the governing legal remedy falls within the exclusive domain of the legislature in accordance with the doctrine of strict separation of powers. See, *e.g.*, CIVIL CODE OF THE REPUBLIC OF CHILE art. 23 (prohibiting judges from taking into account, *inter alia*, the “repugnance of a provision” for purposes of “expanding or restricting its interpretation”).

69. Interview with Prof. Llanos, *supra* note 3. Consider the following hypothetical in light of the collar-and-chain statute from footnote 68 that attempts to regulate stray dogs and cats. See *supra* note 68. Assume that a wolf and a jaguar enter the city limits of Monterrey, without a collar, chain, or master. Assume, further, that the legislature has not codified a statutory provision regulating wolves, jaguars, or other wild animals, that no published judicial decision exists that squarely addresses the issue, and that no general principle of law, other than reasoning by analogy, emerges from the statutory landscape. Based on these facts, a Peruvian civil law judge, for example, constrained by the sanction covering *prevaricato* (see *supra* note 64), would probably rule that both the wolf and

application of deductive reasoning, can produce practical difficulties and even absurd results when gaps or ambiguities exist in the relevant law.⁷⁰ A constitutional check designed to ensure that questionable judicial decisions grounded on literal statutory construction do not disrupt the delicate balance of power in the civil law legal tradition is to preclude court decisions from having any *stare decisis* effect.⁷¹ Accordingly, as a general rule, judicial decisions in the

the jaguar fall outside the statutory scheme. Indeed, based upon a cold parsing of the statute using deductive-reasoning techniques, neither a "wolf" nor a "jaguar" is a "dog" or a "cat"; so, neither should be put to sleep. Although a Mexican and a Chilean judge might conceivably apply the collar-and-chain rule to the wolf—reasoning by analogy that no significant difference exists between viscous domestic dogs, such as a Doberman pinscher, and a wolf—both judges would find the jaguar to fall outside the statutory scheme, because jaguars and domestic cats are readily distinguishable.

70. For a U.S. common law lawyer, the civil law ruling in the previous footnote, *see supra* note 69, especially the Peruvian judgment, would appear to produce an absurd result. A stray wolf and jaguar—which by nature are wild animals that generally pose a greater threat to public safety within the city limits than domestic animals—would be legally free to roam the streets, without a collar, chain, or owner. By contrast, dogs and cats—which by nature are domestic animals that generally pose less of a risk to the general public—would be strictly prohibited from wandering the streets in the absence of a collar and chain. *See, e.g.,* Gerhard Karras y Cia v. Friedemberg S.A., REVISTA GENERAL DE DERECHO Y JURISPRUDENCIA DE MÉXICO 5, 116 (1934) (publishing decision in which the Mexican Supreme Court interpreted the Mexican Commercial Code and the credit contract between the parties rather dogmatically, despite a sharp devaluation of the Mexican peso relative to the U.S. dollar, and required the U.S. creditor to bear the entire loss caused by the exchange-rate fluctuation, reasoning that "the rise and fall in exchange rates and their effect on payment is an economic phenomenon that is independent . . . of the amount of the contract claim."); Tribunal Constitucional Decision No. 207, dated Feb. 10, 1995, Vol. 22, No. 3 REVISTA CHILENA DE DERECHO 535-554 (publishing decision in which the Tribunal Constitucional of Chile ignored the underlying purpose, as well as the political, economic and historical context, of a law that the National Congress sought to amend and, instead, strictly interpreted the controlling legal provisions so as to strike down the proposed amendment as unconstitutional, producing the absurd result of permitting private commercial banks to continue to avoid complying with their obligation of paying off their "subordinate debt" owed to the Chilean Central Bank); *contra* Banco Central de Chile v. Rojas Gandulfo Adolfo y Otros, No. 1356-95 (1995) (publishing constitutional protection action decided by the Appellate Court of Santiago, affirmed in all material respects by the Chilean Supreme Court, where the Appellate Court rejected a literal interpretation of the governing statute and flexibility construed the law in accordance with its fundamental purpose, its historical and economic context, and common sense to avoid the absurd result of allowing a private commercial bank to continue to shirk its obligation concerning its "subordinate debt" owed to the Chilean Central Bank).

71. *See* MERRYMAN, *supra* note 57, at 47 ("judicial decisions [generally] are not a source of law [in the civil law tradition]. It would violate the rules against judicial lawmaking if decisions of courts were to be binding on subsequent courts. . . ."). In the Republic of Chile, judicial decisions rendered by the nation's Supreme Court and all lower courts have no *stare decisis* effect and, as a consequence, are binding only on the parties that litigated the controversy before the relevant court. *See* CONST. art. 80 (Chile). Therefore, even if Chile's Supreme Court were to rule that a specific law or legal provision were unconstitutional, the court's decision would be limited to the "particular case." *Id.*; *contra* Marbury v. Madison, 5 U.S. (Cranch) 137, 2 L.Ed. 60 (1803). In contrast to the circumscribed powers of Chile's highest court, those of the country's Constitutional Tribunal (Tribunal Constitucional) are somewhat broader. Article 82 of the Chilean Constitution authorizes the Tribunal Constitucional to set aside, on a general basis, *inter alia*, "organic constitutional laws," "legal provisions" legislated thereunder, and "legal precepts" interpreting the Constitution, whenever the tribunal determines that such "laws" or "precepts" run counter to the tenets of the 1980 Political Constitution. *See* CONST. art. 82(1) (Chile). Nevertheless, the jurisdictional ambit of the Tribunal Constitucional is expressly limited to constitutional challenges involving, among other legal norms, legislative provisions ap-

civil law heritage are binding only on the parties that actually litigated the dispute before the relevant tribunal and typically have no precedential value in future cases or controversies.⁷²

The well-documented distinctions between the two major legal traditions of the world, including differences pertaining to judicial powers, rules of statutory construction, and legal reasoning techniques, are particularly relevant with respect to the proper sphere of application and enforcement of national legislation. One traditional legal principle deeply embedded in the civil law culture is that national courts have limited jurisdictional reach. In accordance with a stringent territorial requirement established by long-standing civil law doctrine, national courts can generally assert their jurisdiction and apply their national laws only to persons, property, or illegal activities that are physically present or have actually occurred within the narrow geographical boundaries of that country.⁷³ Therefore, in the eyes of civil law jurists, the application of national legislation to address "illegal" activity occurring in another country usually constitutes the "extraterritorial" application of national law.⁷⁴

proved by the National Congress that have not yet been signed into law by the President. *Id.* Modeled after the constitutional review systems of many civil law nations of the European continent, Chile's *Tribunal Constitucional* does not form part of the judicial branch of the government, compare CONST. chp. VI, arts. 73-80 (Chile) with CONST. chp. VII, arts. 81-83 (Chile), but rather has been referred to as a "headless fourth branch of the government" or a "negative legislator." See Interview with Prof. Arturo Fermandois, Professor of Economic Constitutional Law, Law School, Catholic University of Chile (Oct. 31, 1997) [hereinafter Interview with Prof. Fermandois]. See also Chaná, Evans de la Cuadra, Lecaros, Vergara, Alvarez, Evans, *Estudio Crítico de las Doctrinas Jurídicas Contenidas en la Sentencia del Tribunal Constitucional de 10 de Febrero de 1995*, Vol. 22, No. 3 REVISTA CHILENA DE DERECHO 559, 568 (1995) (emphasizing that decisions rendered by the Chilean Supreme Court, all inferior courts, and the *Tribunal Constitucional* lack *stare decisis* effect).

72. See CONST. art. 107(II) (Mex.) (1995) (codifying Mexico's judicial principle of "relativity" in *amparo* actions); LEY DE AMPARO art. 76 (Mex.) (1995). A notable exception to the general rule against *stare decisis* in the civil law world is Mexico. Binding precedent (*i.e.*, *jurisprudencia obligatoria*) is created when the Mexican Supreme Court renders five consecutive and consistent judicial decisions that resolve the same specific legal issue in the same manner. See LEY DE AMPARO arts. 192, 193 (Mex.) (1995) (codifying Mexico's rule of limited *stare decisis* effect). All lower federal, state, local, military, and administrative courts are legally obligated to follow such *jurisprudencia obligatoria* in future decisions. *Id.*

73. See, e.g., CIVIL CODE OF THE REPUBLIC OF CHILE art. 14 ("The law is obligatory for all inhabitants of the Republic, including foreigners."); *id.*, art. 16 ("Real and personal property located in Chile is subject to Chilean law, even though the owners are foreign and do not reside in Chile."); CIVIL CODE OF THE FEDERAL DISTRICT OF THE UNITED MEXICAN STATES art. 12 ("Mexican laws govern all people within the Republic, as well as acts and events that occur within its national territory or jurisdiction and which are subject to such laws. . . ."); *id.*, art. 14 ("The determination of the applicable law shall be undertaken in accordance with the following provisions: . . . (II) The legal status and capacity of natural persons shall be governed by the law of the place of their domicile; (III) The constitution, maintenance, and extinction of real property rights . . . and personal property, shall be governed by the law of the situs of such property, even though the owners thereof are foreign; (IV) The formalities of juridical or legal acts shall be governed by the law of the place in which such acts are consummated . . . ; and (V) . . . the legal effect of acts and contracts shall be governed by the law of the place of their execution, unless the parties have validly designated the applicability of another law"). See also Interview with Prof. Llanos, *supra* note 3.

74. Interview with Prof. Llanos, *supra* note 3.

In marked contrast, the U.S. and Canadian legal systems, which trace their historical origins to the common law tradition of judge-made English law,⁷⁵ are much more flexible with respect to the interpretation and application of the controlling legal principles.⁷⁶ Unlike their civil law counterparts, modern-day common law jurists, especially those from the United States, are trained to interpret and flexibly apply legal principles in accordance with inductive-reasoning techniques.⁷⁷ U.S. common law lawyers and judges learn to analyze disputes using a case-by-case approach based on balancing tests that take into account legal and nonlegal factors alike.⁷⁸ They weigh evidence in light of practical considerations,

75. See MERRYMAN, *supra* note 57, at 3. According to Professor Merryman, "[t]he date commonly used to mark the beginning of the common law tradition is A.D. 1066, when the Normans defeated the defending natives at Hastings and conquered England." *Id.* The common law system "is today the legal tradition in force in Great Britain, Ireland, the United States, Canada, Australia, and New Zealand, and has substantial influence on the law of many nations in Asia and Africa." *Id.* at 4. For an excellent analysis of the origins of the common law tradition, see *id.* at 50-51 ("The Norman conquerors of England . . . quickly set about centralizing the government, including the administration of justice, [and created] royal courts and a system of royal justice that gradually displaced the old feudal courts and rules . . . the judges of the royal courts developed new procedures and remedies and a new body of substantive law," which later became known as the "common law").

76. See *id.* at 37-38, 50-51; Smith, *supra* note 57, at 87-88. The inherent flexibility in the common law system stems in large part from the broad discretionary or equitable powers enjoyed by judges to interpret statutes and to resolve disputes. See MERRYMAN, *supra* note 57, at 36-37, 51-52 ("As to judicial discretion, common law judges traditionally have inherent equitable powers: they can mold the result in the case to the requirement of the facts, bend the rule where necessary to achieve substantial justice, and interpret and reinterpret in order to make the law respond to social change . . . Hence the common law judge is less compelled by prevailing attitudes to cram the dispute into a box built by the legislature than is his civil law counterpart. Even when the case involves application of a statute, the common law judge has some measure of power to adjust the rule to the facts.") (emphasis supplied).

77. See MERRYMAN, *supra* note 57, at 37-38, 50-51; Smith, *supra* note 57, at 87-88. Pure statutory construction is not the only alien aspect of the civil law tradition for a U.S. common law jurist. The so-called application of the law to the facts of the case is fundamentally different as well. The main difference here—namely, inductive versus deductive reasoning—cuts at the very heart of the principal dichotomy between the two legal traditions. In contrast to their civil law brethren, U.S. judges employ the inductive-reasoning approach to resolve legal problems, inferring general principles of law from specific principles found in, *inter alia*, the U.S. Constitution, statutes, legislative history, and previous judicial decisions. See Smith, *supra* note 57, at 87-88.

78. See MERRYMAN, *supra* note 57, at 37-38, 50-51; Smith, *supra* note 57, at 87-88; CHARLES ABERNATHY, *LAW IN THE UNITED STATES: CASES AND MATERIALS* 3, 3-51 (1995). If, for example, a U.S. judge were to address a legal issue in the complete absence of a controlling statutory provision, she would instinctively commence the inductive-reasoning process, attempting to draw a general principle of law from, *inter alia*, the following legal and nonlegal criteria: (1) relevant legislative history, intent, and purpose of the governing statute; (2) specific court rationales and legal holdings from previous judicial decisions; (3) analogous legal principles derived from related statutes; (4) general principles of law codified in the Restatement of Law, if applicable; and (5) the judge's own practical experience and common sense. After having sifted through the particularities of each of these specific or individual sources, an American judge would look for the one common thread running through each of these criteria in order to craft the general principle of law (*i.e.*, major premise of the legal syllogism) necessary for the resolution of the contested legal issue. The U.S. common law judge then would apply this general principle of law—inductively reasoned—to the facts of the particular controversy (*i.e.*, minor premise) and decide the legal issue accordingly. Unlike

rather than taking a scientific approach to the law.⁷⁹ Reliance on simple common sense, grounded in the Anglo-American concept of "reasonableness," is the hallmark of common law analysis.⁸⁰

Consequently, U.S. common law reasoning requires lawyers and judges, as a threshold matter, to divine the legislative purpose of the governing statute in order to evaluate any legal controversy.⁸¹ Flexibly balancing the underlying legislative intent against the statutory language, in light of judicial precedent, analogous legal principles, and daily human experiences, constitutes the intellectual challenge that distinguishes U.S. common law analysis from civil law jurisprudence.⁸² Blind ad-

her civil law counterpart, a U.S. common law judge would not be hamstrung by the absence of statutory law, because she possesses inherent equitable powers to interpret statutes. *See* CONST. (U.S.), art. III, § 2; MERRYMAN, *supra* note 57, at 36-37, 51-52.

79. *See* MERRYMAN, *supra* note 57, at 37-38, 50-51, 58, 89, 96, 142-144; Smith, *supra* note 57, at 87-88; ABERNATHY, *supra* note 78, at 3-51.

80. *See* MERRYMAN, *supra* note 57, at 37-38, 50-51; Smith, *supra* note 57, at 87-88; *Frigalimont Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116, 120 (S.D.N.Y. 1960) (publishing decision by Judge Friendly in which the flexible adherence to a reasonable market assumption—" [p]laintiff must have expected the defendant to make some profit . . . certainly it could not have expected defendant deliberately to incur a loss"—assisted the court in interpreting an ambiguous contract term in favor of the seller); *contra* Gerhard Karras y Cia, *supra* note 70 (illustrating the rigid application of the governing legal provisions, whereby the Mexican Supreme Court, in the words of Judge Friendly, expected the U.S. creditor deliberately to incur a loss in the event of a currency devaluation in direct contravention of reasonable market or commercial considerations and common sense).

81. *See* MERRYMAN, *supra* note 57, at 37-38, 50-51; Smith, *supra* note 57, at 87-88. Reasoning inductively, a U.S. common law judge confronted with the hypothetical facts from footnote 69, *see supra* note 69 (potential application of the Mexican collar-and-chain statute for dogs and cats to wolves and jaguars), would first scrutinize the plain language of the statute and then would posit the following practical question: "Why did the Mexican legislature in Monterrey pass the collar-and-chain law for dogs and cats?" After examining the relevant legislative history, an American judge would discover that the underlying legislative rationale of the collar-and-chain rule was "to protect citizens and pedestrians walking the streets of Monterrey from being bitten by stray dogs or cats." In addition, the American judge would find that the legal remedy in the statute, according to the Mexican legislators, constitutes the only practical mechanism that can achieve this legislative purpose; that is, (1) owners would have an incentive to keep their dogs and cats at home and off the streets; (2) the death penalty would better ensure that those domestic animals on the street have collars, chains, and masters; and (3) the actual implementation of the legal remedy would eliminate any stray dogs and cats from the streets of Monterrey.

82. *See* MERRYMAN, *supra* note 57, at 37-38, 50-51; Smith, *supra* note 57, at 87-88. After divining the legislative purpose of pedestrian safety in footnote 81, *see supra* note 81, a U.S. common law judge probably would infer that the underlying legislative rationale of the collar-and-chain-rule, in its broadest articulation, is to protect pedestrians from being bitten by *any stray animals, whether domestic or wild*. In fact, a U.S. judge likely would surmise that the reason wild animals, including wolves and jaguars, are not subject to regulation is that the Monterrey legislature never contemplated that wild animals would ever pose a serious threat to the Monterrey pedestrians. In that regard, the U.S. judge would discover that in the twenty-five days of legislative hearings dedicated to the enactment of the collar-and-chain statute, the Mexican legislators focused on five thousand (5,000) cases of stray dogs and cats roaming the streets of Monterrey. Not one word was ever mentioned about wild animals, including wolves or jaguars, because a stray wolf or jaguar had never entered the city limits of Monterrey, Mexico. Had the Mexican legislature been aware of wild animals roaming the streets of Monterrey, it is highly likely that the Mexican legislature would have enacted a broader statute.

herence to the literal language of any statute or legal principle is anathema to the U.S. common law culture.⁸³

As a result of this flexible analytical approach, strict adherence to a rigid territorial requirement concerning the exercise of jurisdiction and the application of national law is also alien to the U.S. common law tradition as well. Federal and state courts in the United States have not hesitated to assert jurisdiction and apply U.S. law based upon illicit or illegal activity occurring outside the United States, in situations where the activity in question produces substantial negative effects within the United States or bears some kind of reasonable relationship or connection to the legal "interests" of that country or to its citizens.⁸⁴

The decision rendered by the New York Court of Appeals in *Babcock v. Jackson* illustrates the rather flexible common law approach concerning the exercise of jurisdiction and the application of U.S. law to activities occurring outside the United States.⁸⁵ In *Babcock*, the plaintiff-passenger and the defendant-driver—both domiciliaries and residents of the State of New York—left the state together in the defendant's automobile to take a short vacation in Canada.⁸⁶ The defendant had registered, garaged, and insured his automobile under New York State law. While driving in the Canadian Province of Ontario, the defendant lost control of his vehicle, causing an accident in which the plaintiff sustained serious injuries.⁸⁷

Upon returning to New York, the plaintiff-passenger filed a lawsuit in a New York State court, claiming damages for the defendant's undisputed negligence.⁸⁸ The New York court asserted personal jurisdiction, because the defendant-driver was a domiciliary and resident of the State of New York.⁸⁹ The crucial legal issue was whether the court should apply Canadian law or New York State law to determine whether the plaintiff was entitled, as a matter of law, to receive compensation for damages caused by the accident.⁹⁰ Canadian and New York

83. See MERRYMAN, *supra* note 57, at 37-38, 50-51; Smith, *supra* note 57, at 87-88. In ultimately resolving the hypothetical case involving the stray wolf and jaguar roaming the streets of Monterrey, Mexico, *see supra* note 69, a U.S. common law judge, through inductive reasoning, would probably arrive at the following general principle of law that would constitute the major premise of her legal syllogism: *Any animal, whether domestic or wild, that is capable of biting pedestrians, and that does not have a collar, chain, and accompanying owner at the time of apprehension, shall be put to sleep.* A common law judge likely would emphasize that her interpretation of the collar-and-chain statute is the only one that fully achieves the underlying purpose of the legislature—namely, ensuring pedestrian safety—and would likely proceed to apply the statute to the stray wolf and jaguar (*i.e.*, minor premise), even though neither is a dog or a cat. The American judge's inherent equitable powers would empower her to modify and bend the statutory language (*i.e.*, major premise) so as to achieve the legislative intent of the law. See MERRYMAN, *supra* note 57, at 36-37, 51-52.

84. See *Strassheim v. Daily*, 221 U.S. 280, 285, 31 S. Ct. 558, 560 (1911); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

85. *Babcock*, 12 N.Y.2d at 473.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

State law had conflicting rules on this point.⁹¹ Balancing such considerations as "justice, fairness, and the best practical result,"⁹² under the circumstances, the court decided to apply New York State law.⁹³

To bolster its holding, the court emphasized that both of the litigants were New York residents; that the defendant had registered, garaged, and insured his automobile pursuant to New York State law; that the parties had begun their guest-host relationship (*i.e.*, short vacation trip) in New York; and that the dispositive legal issue addressed a legal right to damages as a matter of law, as opposed to the standard of care owed by the defendant-driver.⁹⁴ Based upon this multi-factor balancing test, the court invoked New York State law even though the accident had occurred in Canada.⁹⁵ The court specifically rejected Canadian law, reasoning that "Ontario's sole relationship with the occurrence [of the tort] is purely adventitious circumstances that the accident occurred there."⁹⁶

Babcock exemplifies that it is not unusual for U.S. courts to exercise jurisdiction and apply U.S. law to illegal or illicit activities occurring in another country. The ultimate application of U.S. law under such circumstances often turns upon such subjective criteria as a country's "concern" or "interest" in the specific legal question at hand, the special relationship that exists between the forum state and the parties involved in the legal dispute, and even the expectations of the litigants themselves.⁹⁷ The country, state, or province that has the most "contacts" with the litigants, rather than the geographical site of the legal wrong, is usually the compelling factor that influences U.S. courts when applying U.S. law to activities occurring outside the U.S. border.⁹⁸ This same flexible approach applies to legal claims involving wrongful death, airplane crashes, and breach-of-contract actions occurring outside the United States.⁹⁹

Civil law lawyers, who adhere to a stringent territorial requirement,¹⁰⁰ often cannot comprehend U.S. judicial decisions like *Babcock*.¹⁰¹ This result explains in part the radically different legal conclusions drawn by civil law jurists and

91. *Id.* at 473-74.

92. *Id.* at 475.

93. *Id.* at 475-76.

94. *Id.* at 476.

95. *Id.*

96. *Id.*

97. *Id.* at 473-76; JOSEPH W. GLANNON, *CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS* 3, 178-80 (2d ed. 1992).

98. *Babcock*, 12 N.Y.2d at 473-76; GLANNON, *supra* note 97, at 178-180.

99. *Babcock*, 12 N.Y.2d at 473-76 (discussing choice of law for automobile accidents and breach-of-contract cases); *Haydu v. Hospital for Joint Diseases Orthopedic Inst.*, 557 F. Supp. 577 (S.D.N.Y. 1983) (applying conflict-of-law principles to wrongful death claim); *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699 (1978) (explaining conflict of laws in cases involving airplane crashes); GLANNON, *supra* note 97, at 178-80.

100. See CIVIL CODE OF THE REPUBLIC OF CHILE arts. 14, 16; CIVIL CODE OF THE FEDERAL DISTRICT OF THE UNITED MEXICAN STATES arts. 12, 14; see *supra* note 73 (quoting in relevant part Chilean and Mexican code provisions).

101. Interview with Prof. Llanos, *supra* note 3.

common law lawyers like Ambassador Wilkey concerning *Helms-Burton*. Simply put, the majority of civil law lawyers are convinced that the Cuban Liberty and Democratic Solidarity Act constitutes the "extraterritorial" application of U.S. law, because it is predicated upon activities occurring in another country.¹⁰² On the other hand, many U.S. common law lawyers cannot understand the civil law stance, because the application and enforcement of *Helms-Burton* is consistent with *Babcock* and its flexible progeny.¹⁰³ Which side has the better legal argument?

B. THE INTERNATIONAL LEGAL STANDARD GOVERNING EXTRATERRITORIALITY

The answer to the previous question depends upon the controlling international legal standard in accordance with the traditional sources of international law. Has the international legal community adopted the rigid civil law criterion or the flexible common law approach regarding the exercise of jurisdiction and the application of national legislation? Our legal research and analysis point towards the common law standard. A well-settled principle of customary international law is that a sovereign nation enjoys the authority to enact, enforce, and adjudicate its national rules of law with respect to criminal or illegal civil conduct occurring outside its borders in two specific situations: (1) when such criminal conduct threatens the security of the country in question; or (2) when the criminal or illegal civil activity occurring abroad produces substantially detrimental or negative effects within the national territory of that country.¹⁰⁴

Many international judges, jurists, and legal scholars refer to the rule governing the first situation as the "protective principle" and the rule covering the second circumstance as the "objective territorial principle."¹⁰⁵ The majority of lawyers who do not grapple with international legal issues on a daily basis are unaware that national courts in common law and civil law countries alike—namely, England, the United States, India, the Federal Republic of Germany, and France—have consistently endorsed these rules of international law.¹⁰⁶ As explained by U.S. Supreme Court Justice Holmes in *Strassheim v. Daily* in 1911: "Acts done outside a jurisdiction, but . . . producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect."¹⁰⁷

102. *Id.*

103. See Wilkey, *supra* note 1, at 4, 17.

104. See SWEENEY ET AL., *supra* note 51, at 116-17 (citing *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968), *cert. denied*, 392 U.S. 936, 88 S. Ct. 2306 (1968)).

105. *Id.*

106. *Id.* at 112 (summarizing court cases that endorse the "protective principle" and the "objective territorial principle").

107. *Strassheim*, 221 U.S. at 285. Many Chilean and Mexican civil law lawyers do not realize that a variant of the "effects" test, as articulated by U.S. Justice Holmes, is codified in Chilean and Mexican domestic law. See, e.g., CIVIL CODE OF THE REPUBLIC OF CHILE art. 16 (codifying long-standing principle that the "effects of [civil] contracts executed in a foreign country but performed in Chile are subject to Chilean law"); COMMERCIAL CODE OF THE REPUBLIC OF CHILE art. 113

Even the Court of Justice of the European Union¹⁰⁸ and the WTO (formerly GATT) are in agreement with this view.

In fact, the "objective territorial principle" has been one of the cornerstones of international trade regulation under the GATT/WTO since 1947. Assume, for example, that the U.S. Government decides to confer export subsidies within its national territory upon certain U.S. producers of computers in violation of the current Agreement on Subsidies and Countervailing Measures of the General Agreement on Tariffs and Trade of 1994 (GATT 1994 Subsidies Agreement).¹⁰⁹ Assume, further, that these producers sell their subsidized merchandise in the Republic of Chile. In accordance with the "objective territorial principle," Chile enjoys the international legal right under the GATT 1994 Subsidies Agreement to impose unfair trade measures pursuant to its domestic law to counteract any injurious effects occurring in Chile (*e.g.*, unemployment) caused by the importation of the subsidized U.S. merchandise.¹¹⁰ Specifically, Chile can impose countervailing duties at its border, even though the unfair international trade practice (*i.e.*, the bestowal of foreign government subsidies) occurred several thousand miles away in Washington, D.C.¹¹¹

Application of the two-prong test established by the "protective principle" and the "objective territorial principle" outlined above compels the conclusion that the enactment and enforcement of *Helms-Burton* in the national territory of the United States is consistent with international law. First, all of Castro's activi-

(enacting same legal principle); Law No. 18,840 art. 39, Diario Oficial de la República de Chile, Oct. 10, 1989 (expressly providing that the "effects of exchange-rate operations executed abroad, but performed in Chile, shall be subject to Chilean law," including the exchange-rate controls of the Chilean Central Bank); Law No. 18,525, Diario Oficial de la República de Chile, June 30, 1986 (authorizing the imposition of antidumping or countervailing duties to offset the injurious effects of unfair international trade practices in Chile); CIVIL CODE OF THE FEDERAL DISTRICT OF THE UNITED MEXICAN STATES art. 14 ("The determination of the applicable law shall be undertaken in accordance with the following provisions: . . . (IV) The formalities of juridical or legal acts shall be governed by the law of the place in which such acts are consummated. However, the formalities prescribed by this Code shall govern when the act in question produces effects in the Federal District or in the Republic in federal matters"); Mexican Foreign Trade Law, Diario Oficial de la Federación, July 27, 1993 (authorizing the imposition of antidumping or countervailing duties to offset the injurious effects of unfair international trade practices in Mexico).

108. See SWEENEY ET AL., *supra* note 51, at 113 (citing *Handelswekerij G. J. Bier and Stichting Reinwater v. Mines de Potasse d'Alsace S.A.*, Court of Justice of the European Communities (1976), 1 COMMON MARKET LAW REPORTS 284 (1977)).

109. GATT 1994 Subsidies Agreement, art. 3.1(a).

110. GATT 1994 Subsidies Agreement, art. 19(1); Law No. 18,525, art. 10.

111. GATT 1994 Subsidies Agreement, art. 19(1); Law No. 18,525, art. 10. Ambassador Wilkey illustrates this same point with a more poignant example. See Wilkey, *supra* note 1, at 17 ("Take the . . . example of a U.S. commercial plane that makes a forced landing in Iran. It is confiscated on the basis of a claim by Iran against the United States and sold to the Ukraine, which is establishing an international airline to New York. The confiscation took place in Iran, the Ukraine is a not an innocent purchaser, and when the plane lands in New York, enforcement of the remedy will take place in the United States. Does anyone doubt the result under international law?").

ties giving rise to the passage of the Cuban Liberty and Democratic Solidarity Act constitute illegal conduct in accordance with international law: aiming Soviet-made nuclear missiles at the United States constitutes terrorism and threatens the national security of the American people; shooting down American airplanes in the international fly zone is murder; causing mass migration of Cuban refugees to the United States is a violation of human rights; and taking property without offering compensation, as demonstrated below, constitutes outright confiscation.¹¹² Second, all of these illegal activities have produced substantial detrimental or negative effects within the United States.¹¹³ These legal conclusions apply regardless of whether the lawyer or judge conducting the inquiry is from a common law or civil law jurisdiction—because they are consistent with general principles of national law recognized by the civilized nations of the world—a well-established source of international law in accordance with the Statute of the International Court of Justice.¹¹⁴

Strict adherence to the international legal principle of diplomatic protection also provides the United States with additional legal grounds to enact and enforce *Helms-Burton* within its national territory.¹¹⁵ This principle of customary international law not only gives the United States the right, but also imposes an international obligation upon that country to protect its citizens and their legal interests from any illegal activity occurring anywhere in the world.¹¹⁶ As articulated by Ambassador Wilkey, “[a]ll nations recognize and exercise the right to protect their citizens against harmful acts committed outside their borders, on the high seas or within the territory of another country.”¹¹⁷

As the Permanent Court of International Justice (PCIJ), the predecessor to the modern-day ICJ, explained as early as 1924 in *Mavrommatis Palestine Concessions*, “it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels.”¹¹⁸ This universal rule of international law finds consistent and unwavering support in the 1939 PCIJ ruling in *The Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, the 1961 ratification of the Vienna Convention on Diplomatic Relations, and the 1970 ICJ decision in *Barce-*

112. See generally SWEENEY ET AL., *supra* note 51, at 120-21 (discussing generally crimes of universal interest).

113. Giesze, *supra* note 18, at 20.

114. Statute of the International Court of Justice, art. 38.

115. See SWEENEY ET AL., *supra* note 51, at 508-09, 546-47; Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After NAFTA*, 24 ST. MARY'S L.J. 1147, 1161 (1994).

116. See SWEENEY ET AL., *supra* note 51, at 508-509, 546-547; Daly, *supra* note 115, at 1161.

117. Wilkey, *supra* note 1, at 17.

118. SWEENEY ET AL., *supra* note 51, at 1122 (quoting the PCIJ decision in *Mavrommatis Palestine Concessions*).

lona Traction, Light and Power Co., Ltd. (Belgium v. Spain).¹¹⁹ It is the bond of nationality between the State and the individual which confers upon the State the concomitant right and obligation of protecting its citizens anywhere in the world through diplomatic means.¹²⁰

Even staunch *Helms-Burton* critics must concede that the U.S. Government's invocation of the doctrine of diplomatic protection, on behalf of corporate and natural persons that were U.S. citizens at the time of the Castro expropriations, is justified under international law. Nonetheless, these same detractors would probably contend that U.S. diplomatic protection is unavailable to those naturalized U.S. citizens who were Cuban nationals at that time, because *Helms-Burton* is applying diplomatic protection retroactively to these individuals. Although this argument is superficially appealing, it is somewhat disingenuous.

The general rule under customary international law provides that a claimant seeking compensation must prove that he or she continuously possessed the nationality (*i. e.*, citizenship) of the nation invoking the doctrine of diplomatic protection from the time of the occurrence of the legal injury through the espousal phase of the international claim.¹²¹ However, international judges, legal scholars, and commentators have stressed that this general rule is not etched in stone. In fact, the emerging view in the international legal community is that a reasonable departure is warranted when extraordinary events, such as a revolution or a civil war, distort the traditional rules governing the nationality and citizenship of individuals under international law.¹²²

The extraordinary-events exception, based upon the unique circumstances surrounding the Castro revolution, requires the retroactive application of the principle of diplomatic protection in this case. To do otherwise would produce the absurd result of creating a group of "stateless" individuals for indemnization purposes. Naturalized U.S. citizens who were Cuban nationals at the time of the expropriations cannot realistically seek compensation from the same dictator who nationalized their property, forced these individuals to flee the island in 1959, and stripped these individuals of their Cuban citizenship under his new political regime. The denial of U.S. diplomatic protection in this case would be tantamount to determining that former Cuban nationals who are now U.S. citizens were "persons without a country" during the period of the nationalizations. Customary international law frowns upon such a harsh result.¹²³

119. *Id.* at 1107-08, 1116-26 (publishing relevant pages of cited judicial decisions); Vienna Convention on Diplomatic Relations of April 18, 1961, art. 3., *entered into force*, April 24, 1964, 500 U.N.T.S. 95, 23 U.S.T. 3,227. The United States became a signatory to the Vienna Convention on Diplomatic Relations on December 13, 1972. SWEENEY ET AL., *supra* note 51, DOCUMENTARY SUPPLEMENT, at 223.

120. See SWEENEY ET AL., *supra* note 51, at 1122.

121. *Id.* at 509-10 (publishing the Nottebohm Case (*Liechtenstein v. Guatemala*), Int'l Ct. Just., ICJ R. 4 (1955)).

122. *Id.*

123. *Id.*

In addition, and consistent with well-established civil law doctrine, Cuban law in force at the time when Castro overthrew the Batista government required the payment of compensation to Cuban citizens in cases involving expropriations for a public purpose and nationalizations.¹²⁴ As a result, Castro's wholesale taking of property from former Cuban nationals, legitimately acquired under the previous legal system in Cuba, constituted the retroactive confiscation of vested property rights. In enacting *Helms-Burton*, the U.S. Congress sought to obtain compensation in accordance with international law on behalf of former Cuban nationals, now naturalized U.S. citizens, because Fidel Castro has refused to obey the controlling domestic rule of law in this case. This analysis shows that *Helms-Burton* has correctly recognized a universal wrong and has fashioned an appropriate remedy to address the deprivation of vested property rights. Both civil law and common law countenance the "favorable" retroactive application of legal principles whenever necessary to correct patent injustices and to achieve equitable results.¹²⁵

Hence, our comparative legal analysis demonstrates that the invocation of the principle of diplomatic protection, in combination with the substantially detrimental or negative effects that Castro's illegal activities have produced in the United States, authorizes the enactment and enforcement of *Helms-Burton* within the national territory of the United States in accordance with international law. If, after this analysis, detractors still maintain that the Cuban Liberty and Democratic Solidarity Act constitutes the extraterritorial application of U.S. law, they must necessarily acknowledge that such "extraterritoriality" is not only permissible but also warranted under international law. Neither a common law nor a civil law lawyer who objectively analyzes the extraterritoriality issue can dispute this conclusion.

V. "Prompt, Adequate, and Effective" Compensation in Cases Involving Foreign Government Expropriations or Nationalizations of Private Investments

A. BACKGROUND

During the late 1930s, the Government of Mexico expropriated and nationalized petroleum interests and land owned by American citizens and other foreigners in Mexico.¹²⁶ The U.S. Government did not challenge these nondiscriminatory actions, because the right of a State to expropriate or nationalize foreign-owned property for a public purpose is an unquestionable principle of customary interna-

124. See H.R. 104-202, at 42.

125. See H.R. art. 14 (Mex.) (authorizing "favorable" retroactive application of new statutes); CIVIL CODE OF THE FEDERAL DISTRICT OF THE UNITED MEXICAN STATES art. 5 (articulating same principle); CONST. art. I, § 9 (U.S.) (interpreted by courts to sanction the "favorable" retroactive application of legal principles).

126. See Daly, *supra* note 115, at 1166.

tional law.¹²⁷ Unlike the current situation with the Castro expropriations, however, the Government of Mexico eventually paid compensation of over \$360 million to the U.S. claimants.¹²⁸

The fundamental legal question in any expropriation or nationalization case is whether indemnization is required in accordance with a so-called international minimum standard, which demands "prompt, adequate and effective" compensation.¹²⁹ Two schools of thought exist on the subject. The common law jurisdictions of Canada, England, and the United States, as well as the civil law nations of the European continent, have universally supported the legal standard of "prompt, adequate and effective" compensation.¹³⁰ Moreover, the PCIJ in *The Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)* (1939), the *Oscar Chinn Case* (1934), and the *Chorzow Factory Case* (1928) has consistently endorsed this view.¹³¹

By contrast, the civil law nations of Latin America have historically rejected the existence of an international minimum standard.¹³² Rather, they have embraced the tenets of the 1868 Calvo doctrine that prohibits foreign investors from seeking diplomatic protection before their home-country governments and rejects the automatic compensation standard in cases involving expropriations or nationaliza-

127. *Id.* BLACK'S LAW DICTIONARY defines the term "expropriation" to mean a "taking, as under eminent domain," and the term "nationalization" to include the "acquisition and control of privately owned business by government." BLACK'S LAW DICTIONARY 470, 522, 924 (5th. ed. 1979). Thus, an expropriation generally refers to the government's taking of private property to achieve some kind of legitimate public purpose (e.g., taking private land to construct a public highway), while a "nationalization" usually refers to the government's taking of privately owned assets that constitute a business (e.g., bank, factory, hotel). *Id.* In a nationalization, the government first wrests control of the enterprise from the private sector through seizure proceedings and then places the ownership, management, and administration of the business in the hands of the public sector. See Decision No. 81-132 DC, *Conseil Constitutionnel* (France) (Jan. 16, 1982) (explaining French legal principles governing Socialist government nationalization of private banks). The theoretical distinction between an "expropriation" and a "nationalization" often becomes blurred in practice, for even BLACK'S LAW DICTIONARY refers to an "expropriation" as a "foreign government taking of an American industry located in a foreign country." BLACK'S at 522. In 1980, the Republic of Chile eliminated this theoretical distinction in the text of its current Constitution by providing that the term "expropriation" refers to either a government expropriation for a public purpose or the wholesale nationalization of a privately owned business. See CONST. art. 19(24) (Chile); Interview with Prof. Fernandois, *supra* note 71. The constitutional mandate with respect to "prompt, adequate, and effective" compensation applies in both cases. *Id.*

128. *Id.* at 1170.

129. See SWEENEY ET AL., *supra* note 51, at 389-92, 415-16, 547-56, 1103, 1108, 1179 (discussing "international minimum standard" in context of "nationalized" foreign investments); Daly, *supra* note 115, at 1171-74 (explaining "prompt, adequate and effective" compensation for expropriated foreign investments).

130. See SWEENEY ET AL., *supra* note 51, at 389-92, 415-16, 547-56, 1103, 1108, 1179; Daly, *supra* note 115, at 1171-74.

131. See SWEENEY ET AL., *supra* note 51, at 1106-1108 (reprinting in part cited cases); Daly, *supra* note 115, at 1167, n.110, 111 (analyzing cited cases); *Sabbatino*, 376 U.S. at 398, n.27 (citing the *Oscar Chinn Case* at P.C.I.J., ser. A/B, No. 63 at 87 (1934)).

132. See SWEENEY ET AL., *supra* note 51, at 555, 1112; Daly, *supra* note 115, at 1150-51, 1162-64.

tions.¹³³ Furthermore, the anti-foreign intervention doctrine requires aggrieved foreign nationals to consider themselves to be nationals of the host country, to seek redress exclusively before the national courts of that country, and to forgo recourse to international arbitral tribunals in disputes involving nationalizations.¹³⁴ The Calvo doctrine entitles a foreign investor to national treatment and no more.

In 1974, the United Nations General Assembly ratified article 2 of the Charter on Economic Rights and Duties of States (CERDS).¹³⁵ Article 2 of CERDS contains a provision similar to the Calvo doctrine, yet specifically requires the expropriating or nationalizing country to pay "appropriate compensation" to the adversely affected foreign investor.¹³⁶

B. GOVERNING INTERNATIONAL LEGAL STANDARD: COMMON LAW ANALYSIS

What is the international legal standard today, based upon traditional sources of international law, that governs foreign government expropriations and nationalizations? In approaching this legal problem, the ICJ, a WTO panel, or a NAFTA arbitration tribunal employing common law reasoning probably would not turn the clock back to 1868 when Dr. Carlos Calvo unveiled his xenophobic legal doctrine in Argentina. Nor would an international arbitral tribunal, acting consistently with this flexible approach, go back in time to 1959 when Fidel Castro confiscated the property at issue, or even to 1974 when the United Nations General Assembly ratified CERDS. Unlike today, these were all hostile eras characterized by anti-foreign investment policies in Latin America. To determine what the international legal standard is today, an international tribunal embracing the U.S. common law approach probably would examine the compensation issue in light of the full development of current free trade and investment policies that are sweeping the Western Hemisphere through the NAFTA, the South American Common Market (MERCOSUR), the new GATT of 1994, the new WTO Agreements, and countless bilateral trade and investment agreements in the region, including the Mexico-Chile Free Trade Agreement (FTA) and the Canada-Chile FTA.¹³⁷

133. See SWEENEY ET AL., *supra* note 51, at 555, 1112; Daly, *supra* note 115, at 1150-51, 1162-64.

134. See SWEENEY ET AL., *supra* note 51, at 555, 1112; Daly, *supra* note 115, at 1150-51, 1162-64.

135. See SWEENEY ET AL., *supra* note 51, at 1126-27; United Nations Charter on Economic Rights and Duties of States of December 12, 1974, art. 2(2)(c), GA Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, A/9631, at 50.

136. G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, A/9631, at 50.

137. Compare *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 74 S. Ct. 686 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment [to the United States Constitution] was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."). *Id.* at 492-93, 74 S. Ct. at 691.

This common law focus on contemporary trade and investment policies shows that Chapter 11 of the NAFTA breaks new ground by expressly establishing an international minimum standard to govern foreign government expropriations and nationalizations.¹³⁸ Articles 1105 and 1110 mandate that no Party to the NAFTA shall expropriate or nationalize an investment of an investor of another Party unless the expropriation or nationalization is undertaken for a nondiscriminatory public purpose and is in accordance with due process of law.¹³⁹ More important, Article 1110 expressly requires the expropriating or nationalizing country to "compensate" the adversely affected investor "without delay."¹⁴⁰ Such compensation must be "freely . . . convertible into a G7 currency" and must reflect the "fair market value of the expropriated investment" plus interest.¹⁴¹

A variant of this NAFTA Chapter 11 language and, hence, the same legal standard (*i.e.*, automatic compensation in cases involving expropriations or nationalizations), is enshrined in other traditional sources of international law relevant to the current analysis. For instance, the pending Foreign Investment Treaty Between the Republic of Chile and the Federal Republic of Germany, two civil law jurisdictions, expressly provides that "[i]nvestments of nationals or corporations of a Contracting Party may not, in the territory of the host Party, be expropriated, nationalized, or subjected to measures having similar effects to expropriations or nationalizations, unless undertaken for a public purpose, with compensation required in such cases."¹⁴² Numerous Bilateral Investment Treaties (BITs) and Treaties of Friendship, Commerce, and Navigation (FCN) executed between the United States and both common law and civil law nations also contain the automatic compensation standard.¹⁴³ Even the recent bilateral trade

138. See NAFTA, ch. 11, subsection B, arts. 1105, 1110, *reprinted in* 32 I.L.M. 605. Significantly, Mexico, historically a vociferous champion of the Calvo doctrine, broke with tradition when it signed, ratified, and codified the NAFTA, together with the international minimum standard, into its "Supreme Law of the Land" pursuant to Article 133 of its Constitution. See Craig R. Giesze, *Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, as Well as Practical Business Risks and Realities, for American Exporters to Mexico in the Era of the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 885, 959, n.293 (1994), *reprinted in* NORTH AMERICAN FREE TRADE AGREEMENTS, Commentary I (1994). Although article 27 of the Mexican Constitution still recognizes the Calvo doctrine under Mexican law, Mexico must comply with the NAFTA international minimum standard vis-à-vis the United States and Canada as a matter of international law. In fact, article 26 (*pacta sunt servanda*) and article 27 (international obligations prevail over inconsistent domestic legislation) of the Vienna Convention on the Law of Treaties, a congressionally ratified treaty and "Supreme Law of the Land" in Mexico, mandate this result. See Harry B. Endsley, Steve Baker, *A Practical Guide to Customs, Tariffs & Rules of Origin under NAFTA*, NORTH AMERICAN FREE TRADE AGREEMENTS, Commentary I, 1, 18, n.61 (1994) (explaining that Mexico is a signatory to the Vienna Convention on the Law of Treaties).

139. NAFTA, ch. 11, § B, arts. 1105, 1110.

140. NAFTA, ch. 11, § B, art. 1110, para. 3.

141. *Id.*

142. Foreign Investment Treaty Between the Republic of Chile and the Federal Republic of Germany (currently pending before the Chilean National Congress).

143. See Daly, *supra* note 115, at 1183-84.

agreements negotiated in the Western Hemisphere, including the 1997 Canada-Chile FTA, embrace the long-standing international minimum standard.¹⁴⁴

In a similar vein, Chapter 11 of the NAFTA departs from the Calvo requirement that foreign nationals seek redress only before national authorities and the Calvo prohibition against diplomatic protection in cases involving expropriations or nationalizations. In this regard, the NAFTA, similar to the pending Chile-Germany Foreign Investment Treaty,¹⁴⁵ the current Chile-Mexico FTA,¹⁴⁶ and the recently negotiated Canada-Chile FTA,¹⁴⁷ offers resort to international arbitral tribunals to resolve disputes involving direct foreign investment.¹⁴⁸ Furthermore, Chapters 11 and 20 of the NAFTA,¹⁴⁹ as well as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated March 18, 1965 (ICSID Convention),¹⁵⁰ authorize recourse to an indirect form of diplomatic protection when the expropriating or nationalizing country fails to comply with an arbitral award of "prompt, adequate, and effective" compensation.¹⁵¹ As a practical matter, the Calvo doctrine is a dead letter in the overwhelming majority of Latin American countries.¹⁵²

Accordingly, Chapter 11 of the NAFTA, in conjunction with numerous Latin American trade and investment treaties, contemporary U.S. BITs and FCNs, and a consistent line of international judicial decisions, removes any doubt concerning the current international legal standard governing the expropriation or nationalization of foreign-owned investments in a host country by stating: No country shall expropriate or nationalize any foreign investment unless it provides "prompt, adequate, and effective" compensation. Therefore, consistent with Ambassador Wilkey's analysis, *Helms-Burton* simply creates a procedural rem-

144. See Canada-Chile FTA, art. G-10 (requiring expropriating or nationalizing country to pay prompt, adequate, and effective compensation).

145. Foreign Investment Treaty Between the Republic of Chile and the Federal Republic of Germany, arts. 9-10 (currently pending before the Chilean National Congress).

146. Chile-Mexico Free Trade Agreement, art. 33, *entered into force*, Jan. 1, 1992.

147. See Canada-Chile FTA, arts. G-16-39.

148. NAFTA, *supra* note 138, arts. 1115-38.

149. See *id.* arts. 1136, paras. 5, 2008.

150. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, art. 27, para. 1, 575 U.N.T.S. 159 (1966) [hereinafter ICSID Convention].

151. See Daly, *supra* note 115, at 1186. In the event that the aggrieved private party does not receive effective relief from the expropriating government pursuant to Chapter 11 of the NAFTA, the claimant may petition his or her national government to invoke the dispute-resolution-mechanism procedures of Chapter 20 of the NAFTA, which include bilateral consultations with the recalcitrant government and arbitration panel review as well. *Id.* ("For example, if a U.S. investor is given an award under Chapter Eleven of the NAFTA as a result of an expropriation by the Mexican government, and Mexico does not comply with the award, an insured investor can appeal to the U.S. government to assert a claim by alleging the noncompliance with the award is a breach of a NAFTA obligation. Violation of a Chapter Eleven award automatically triggers Chapter Twenty dispute settlement procedures.").

152. See, e.g., CONST. art. 19(24) (Chile) (mandating that compensation or indemnization be paid "in cash" before the government can take possession of any expropriated property or investments previously owned by Chilean or foreign nationals).

edy to obligate someone—the Castro government or the would-be purchasers of the wrongfully confiscated property—to provide aggrieved Americans with compensation in accordance with the international minimum standard.¹⁵³

This analysis demonstrates that in enacting *Helms-Burton* the U.S. Congress correctly identified the existence of a substantive international legal right as well as the breach of that right. This analysis further shows that *Helms-Burton* properly takes the required extra step under international law and fashions an effective procedural remedy to enforce that substantive right to fill a void in the international legal system. As accurately pointed out by the American Congress in the enactment of the U.S. law, the “international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property.”¹⁵⁴ Instead of violating international law, *Helms-Burton* gives procedural teeth to the substantive international minimum standard of “prompt, adequate, and effective” compensation.

C. CONTROLLING INTERNATIONAL LEGAL STANDARD: CIVIL LAW ANALYSIS

A civil law analysis of the compensation issue demands the same legal conclusion, albeit for different reasons. In contrast to a U.S. common law lawyer, a civil law jurist from Latin America would probably turn the clock back in time, first to 1868 when the Calvo doctrine became part of Latin American law, and then to 1959 when the Castro government carried out the contested expropriations. In accordance with a rigid temporal requirement under civil law doctrine, lawyers must examine the governing international legal standard at the precise time when Castro perpetrated the legal wrong in question.¹⁵⁵

However, the international community has never accepted, but rather has flatly rejected, the Calvo doctrine and its teachings ever since 1868. The PCIJ's decisions in the *Chorzow Factory Case* (1928), the *Oscar Chinn Case* (1934), and *The Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)* (1939) reinforce this view.¹⁵⁶ In addition, French civil law, the pillar underlying the initial foundation and subsequent development of both the current international legal system and Latin American civil law, has been adamant in this regard by providing that a foreign government expropriation or nationalization, absent compensation, is a legal nullity.¹⁵⁷

153. See Wilkey, *supra* note 1, at 4.

154. H.R. 927, Tit. III, § 301(8), 104 P.L. 114; 110 Stat. 785.

155. Interview with Prof. Llanos, *supra* note 3.

156. See SWEENEY ET AL., *supra* note 51, at 1104-08 (reprinting in part cited cases); Daly, *supra* note 115, at 1167, nn.110-11 (analyzing cited cases); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923 (1964) (citing the *Oscar Chinn Case* at P.C.I.J., ser. A/B, No. 63 at 87 (1934)).

157. See French Declaration of the Rights of Man and of the Citizen, of August 26, 1789 (“Property is a sacred and inviolable right. No one shall be deprived of any property unless for a public purpose, legally justified and under the condition of just and prior compensation”). In accordance with French

Similarly, in 1953, consistent with the prevailing majority view, the Supreme Court of the British protectorate of Aden held in *Anglo-Iranian Oil Company Ltd. v. Jaffrate (The Rose Mary)* that the Government of Iran's failure to compensate a British oil company, which it had nationalized in 1951, *per se* violated international law.¹⁵⁸ Specifically, the court ruled that the illegal nationalizations did not divest title held by the English company to Iranian oil produced after the government expropriations and later sold to *bona fide* purchasers in international commerce.¹⁵⁹ As a result, the court proceeded to invalidate the purported title held by the Government of Iran and returned the expropriated oil to the British company.¹⁶⁰ Although an Italian civil law court declined to follow suit based upon the same facts—intimating that the English company in question had not fully exhausted its judicial remedies in Iran¹⁶¹—*The Rose Mary* spawned before other civil law courts numerous successful “hot product” litigation involving additional petroleum products, sugar, tobacco, and, as analyzed below, Chilean copper.¹⁶²

One year before the Castro expropriations, Lauterpacht, an eminent international legal scholar in Europe, wrote a treatise analyzing the judicial decisions rendered by the Permanent Court of International Justice and the International Court of Justice in cases involving foreign government expropriations and nationalizations.¹⁶³ In examining the governing international legal standard employed by these international tribunals, Lauterpacht dismissed the Calvo doctrine as contrary to international law:

In the sphere of State responsibility the jurisprudence of the Court has assisted—indirectly, but emphatically—in discouraging a view closely connected with an extreme assertion of sovereignty, namely, that a State incurs no international responsibility if, with regard to measures adopted by it, it treats aliens and nationals alike. The Court has repeatedly laid down that the so-called plea of nondiscrimination is not a valid defence against a charge of violation of international law. This the Court has done in numerous cases . . . in which it affirmed the principle that equality of treatment must be an equality of both fact and law, and that a State cannot avoid its obligations by the device of framing its law in general terms equally applicable to all. . . . The plea of non-discrimination as a defence against a charge of violation of international law amounts, upon analysis, to a claim of the sovereign State to

law, just compensation is required in cases involving both nationalizations and expropriations for a public purpose. See Decision No. 81-132 DC, *Conseil Constitutionnel* (France) (Jan. 16, 1982) (ruling on the French government nationalization of private banks); Decision No. 89-256 DC, *Conseil Constitutionnel* (France) (July 25, 1989) (explaining compensation requirement in context of an expropriation for a public purpose). See also SWEENEY ET AL., *supra* note 51, at 419.

158. *Id.* at 415-16 (reprinting in relevant part *Anglo-Iranian Oil Company Ltd. v. Jaffrate* (“*The Rose Mary*”), Aden, Supreme Court (1953), 20 Int'l.Rep. 316 (1957)).

159. *Id.*

160. *Id.*

161. *Id.* at 416 (reprinting in relevant part *Anglo-Iranian Oil Company Ltd. v. S.U.P.O.R. Co.*, Italy, Court of Venice (1953), 22 Int'l.Rep. 19 (1958)).

162. *Id.* at 1179.

163. *Id.* at 1104-06.

disregard international law and to erect its own law as the sole standard of the legitimacy of its action so long as such action is of general application. That claim the Court has declined to countenance. . . .

[In the *Chorzow Factory Case*], [t]he Court laid down in detail the principle governing compensation in these cases: "Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear. . . ." ¹⁶⁴

In 1970, in an attempt to lay to rest the misguided view that international law may not require compensation in every case involving an expropriation, the illustrious ICJ Judge Jessup issued the following legal opinion in *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*: "In place of what used to be denounced as illegal expropriations, the issues now turn largely on the measure of compensation, since even the famous [United Nations] General Assembly Resolution on Permanent Sovereignty Over Natural Resources [of 1962], provides that compensation is due." ¹⁶⁵

In keeping with the Jessup opinion, as well as with a consistent line of PCIJ and ICJ precedent, many European civil law courts refused to recognize the Allende government's claim to copper that it had nationalized and expropriated from the Kennecott Copper Corporation in Chile during the early 1970s. ¹⁶⁶ The Allende government's initial failure to compensate Kennecott for the nationalized copper provided European courts with sufficient legal grounds to invalidate the purported title held by the Chilean government. ¹⁶⁷ As explained by Ambassador Wilkey, a former General Counsel of the Kennecott Copper Corporation, "[t]he result was that the lawful title of the Allende Government to any copper exported from Chile was so questioned that European purchasers refused to continue buying. The [Chilean] Government then negotiated a settlement involving a substantial sum of money, after which Kennecott stopped its legal actions." ¹⁶⁸ The Calvo doctrine was not useful to Chile.

Therefore, a civil law analysis demonstrates that the substantive legal right to compensation for expropriated or nationalized foreign investments existed under international law even in 1959 when Castro carried out the challenged nationalizations. It follows that the Castro regime's continued failure to indemnify the legitimate American owners of the confiscated property constitutes an illegal act under international law. Consequently, the ICJ, a WTO panel, or a NAFTA arbitration tribunal should uphold the *Helms-Burton* procedural enforcement remedy in the

164. *Id.*

165. *Id.* at 1116, 1119 (*reprinting* in relevant part *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Int'l Ct. Just. (1970), I.C.J.Rep. 3 (1970)).

166. Wilkey, *supra* note 1, at 4; SAMUEL LIRA OVALLE, DERECHO MINERO 32-33, 40-41 (Editorial Jurídica de Chile 1992) (discussing Law No. 17,450, enacted on July 16, 1971, which not only amended the 1925 Chilean Constitution, but also expropriated and nationalized the property rights that, *inter alia*, the Kennecott Copper Corporation had in copper mines located in Chile). See also CONST. transitional art. III (Chile) (codifying the 1971 nationalizations into the 1980 Chilean Constitution).

167. Wilkey, *supra* note 1, at 4.

168. *Id.*

event of a formal legal challenge, regardless of whether the international judges, panelists, or arbitrators were from common law or civil law countries. The views of Ambassador Wilkey, a former U.S. common law judge, a NAFTA extraordinary-challenge panelist, and an international arbitrator support this conclusion: "The [substantive] right to be paid for the confiscated property has always existed under international law. The United States has simply created a procedure to enforce those [international] rights."¹⁶⁹

VI. New GATT of 1994, WTO Agreements, and NAFTA Provisions

Many Latin American and European civil law jurists—in particular, the European Union in its legal arguments under the framework of the WTO dispute-resolution mechanism—and even some common law lawyers from the United States, Canada, and England are convinced that *Helms-Burton* violates specific provisions of the new GATT of 1994, the WTO Agreements, and the NAFTA.¹⁷⁰ They contend that the U.S. law violates such principles as most-favored-nation (MFN) treatment, prohibitions against trade embargoes and quotas, rules guarding against the "nullification and impairment" of trade benefits, and provisions regulating the temporary entry of foreign businesspeople.¹⁷¹ These contentions do not withstand careful scrutiny.

WTO and NAFTA panels must resolve international commercial disputes in accordance with the express treaty terms, the objectives of the governing international agreement, and the applicable rules of international law, which as shown above, require automatic compensation in cases involving expropriations and nationalizations.¹⁷² The objectives of the new GATT, the WTO Agreements, and the NAFTA relevant to the present legal analysis include: (1) facilitating the legitimate movement of goods, services, and capital; (2) encouraging fair competition; and (3) eliminating unfair international trade practices in global and regional markets.¹⁷³

Helms-Burton antagonists conveniently ignore certain treaty terms that authorize the wholesale departure from the prohibition against trade embargoes and the sacrosanct principle of MFN treatment. In particular, Article 309(3) of the NAFTA authorizes the U.S. embargo imposed against Cuba.¹⁷⁴ More important, both the new GATT/WTO and the NAFTA contain a national security exception to the MFN principle: "[N]othing in this Agreement shall be construed . . . to

169. *Id.* at 17.

170. Interview with Professor Roberto Guerrero, Director, LL.M. Program in Chilean Corporate Law, Catholic University of Chile (Oct. 10, 1996) [hereinafter Interview with Guerrero]; Snyder & Agostini, *supra* note 7, at 41-43; Interview with Villarosa, *supra* note 9.

171. *Id.*

172. See WTO Agreement, Preamble; WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3(2); NAFTA, ch. 1, art. 102.

173. See *id.*

174. See NAFTA, ch. 3, art. 309(3).

prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.¹⁷⁵ The national security exception extends to the international provisions covering the temporary entry of foreign business persons as well.¹⁷⁶

The new GATT of 1994, the WTO Agreements, and the NAFTA all pay great deference to individual countries to define their own national security interests.¹⁷⁷ Accordingly, a WTO or NAFTA panel should be hard-pressed to substitute its own judgment for that of the U.S. Government and conclude that the United States, as a sovereign nation, had erroneously defined its national security interests with respect to Cuba, a country located only ninety miles off the coast of Florida. A contrary result would create an ill-advised precedent for WTO or NAFTA panels to second-guess national security decisions of sovereign nations.¹⁷⁸

Furthermore, the principle of MFN treatment, the protection against "nullification and impairment" of trade benefits, and the international rules covering the temporary entry of foreign businesspeople do not apply to illegal, illicit, or unfair commercial activity or conduct.¹⁷⁹ As demonstrated in the previous section of this article, the expropriation or nationalization of a foreign investment (without affording any compensation) constitutes outright confiscation and violates international law. In this regard, the *Kennecott* expropriation case and *The Rose Mary* provide ample support for the proposition that, absent compensation, an expropriating country cannot transfer a legally valid title to third-party purchasers.¹⁸⁰

In pithy fashion, Ambassador Wilkey explains the sound economic policy rationale underlying this long-standing legal precept by tracing its history back to the English common law:

It has been the law in Anglo-Saxon jurisdictions since before 1700 that neither the thief nor his successor in possession can ever pass good title to property, even to an innocent purchaser. In the case of *Armory vs. Delamare* (1722), it was held that even the innocent finder of a lost jewel could not assert good title against the original owner.

175. GATT 1994, art. XXI(c); NAFTA, ch. 21, art. 2102(1)(c).

176. See GATT 1994, art. XXI(c); NAFTA, ch. 16, arts. 1603(1), 1607, Annex 1603, Section A(1), (3), (B)(3), ch. 21, art. 2102(1)(c).

177. See Snyder & Agostini, *supra* note 7, at 43, n.40.

178. Wilkey, *supra* note 1, at 18.

179. See GATT 1994, art. VI (authorizing a departure from MFN treatment and the principle against the "nullification and impairment" of trade concessions under article XXIII of the GATT 1994 in cases in which foreign governments engage in, *inter alia*, "prohibited" subsidy practices or when private firms participate in unfair dumping practices); GATT 1994 Subsidy Agreement (sanctioning the imposition of countervailing duties to offset injurious effects of foreign government subsidy practices); Agreement on Implementation of Article VI of the GATT 1994 (countenancing the imposition of antidumping duties to counteract the adverse effects produced by international price discrimination or dumping practices); NAFTA, ch. 16, arts. 1603(2) (authorizing the denial of visas for foreign workers in cases in which entry will adversely affect the settlement of a national labor dispute).

180. Wilkey, *supra* note 1, at 1, 4; SWEENEY ET AL., *supra* note 51, at 415-16 (*reprinting* in relevant part *Anglo-Iranian Oil Company Ltd. v. Jaffrate* ("The Rose Mary"), Aden, Supreme Court (1953), 20 Int'l.Rep. 316 (1957)).

This rule is probably the law, in one form or another, in every country in the world with a legal system worthy of respect.

Logically, there can never be a secure right to private property if a thief can pass good title. Grant a government the power to pass good title [under such circumstances] and you have destroyed any enforceable right to private property.¹⁸¹

More important, foreign purchasers of the Cuban property expropriated from current American nationals cannot now argue in good faith—in accordance with civil law doctrine—that they are somehow immune from any legal liability, because they “may have acted under advice of legal counsel that any title obtained from the Cuban government was a valid title.”¹⁸² As stressed by Ambassador Wilkey, in the case of the Castro nationalizations, “it was worldwide knowledge that the regime was confiscating private property without compensation.”¹⁸³ Thus, third-party purchasers of the nationalized property sold by Castro, “knowing that the property was confiscated without payment to the rightful owner,”¹⁸⁴ are trafficking in stolen goods (*i.e.*, contraband) and are engaging in illicit commercial activity even under mainstream civil law analysis.¹⁸⁵

The NAFTA specifically carves out an exception to its general rules governing the temporary entry of foreign businesspersons under such circumstances. In particular, the NAFTA authorizes the United States to deny such foreign purchasers from Mexico or Canada entry into its national territory based upon the perfor-

181. *Id.* (“Take the case of an automobile confiscated with no compensation whatsoever from a private owner in Cuba. The former owner then leaves for the United States, where he registers the motor and chassis serial numbers as stolen. A Mexican citizen comes to Cuba, buys the car, transports it to Mexico, and subsequently drives it across the Rio Grande. A routine computer check reveals the car is stolen. The former owner identifies his automobile and produces title papers. Any court in the United States would give him the car.”) *Id.* The legally enforceable right to private property is the cornerstone of the free-market system. It enables individuals to create economic value and wealth by fostering the efficient consummation of private-party transactions in a secure environment. A corollary to this well-established proposition is that the absence of a stable right to private property prevents any nation from achieving its most efficient allocation of resources and its most productive maximization of wealth. Contemporary empirical evidence amply supports this conclusion. Therefore, the provision of “prompt, adequate, and effective” compensation constitutes the only viable mechanism that can preserve the “sacred and inviolable right” to private property in the face of a government seizure of such property. See French Declaration of the Rights of Man and of the Citizen art. 17 (1789).

182. *Id.* at 4.

183. *Id.*

184. *Id.*

185. See H.R. 927, § 4(13), Tit. IV, § 401(b)(2), 104 P.L. 114; 110 Stat. 785 (defining “trafficking”). Foreign purchasers of the property confiscated by the Castro government cannot even argue that they are not required to pay any compensation, inasmuch as they are the current owners of the property at issue in accordance with the civil law version of adverse possession. See CIVIL CODE OF THE REPUBLIC OF CHILE, arts. 2492, 2498, 2506 (setting forth generally Chile’s equivalent to adverse possession). As explained in footnote 14, the original U.S. and Cuban-American owners of the property nationalized in Cuba filed legal claims for compensation with the U.S. Foreign Claims Settlement Commission during the period subsequent to the Castro expropriations. See *supra* note 14. The filing of such legal claims automatically “interrupts” or tolls the statutory period that must be satisfied to trigger the application of the civil law equivalent of the adverse possession doctrine. See CIVIL CODE OF THE REPUBLIC OF CHILE, art. 2503.

mance of acts of "moral turpitude" under the U.S. immigration law.¹⁸⁶ The new GATT of 1994, the WTO Agreements, and the NAFTA also authorize a departure from the MFN principle and other trade requirements under such circumstances as well.¹⁸⁷

Finally, the Castro regime's recent sale of confiscated U.S. property to Asian, European, and Latin American entrepreneurs, at prices that do not include any compensation paid to the rightful owners of such property, constitutes an unfair international trade practice. Assume, for instance, that a Cuban cement factory seized from a U.S. owner in 1959 has a current market value of \$5 million. Assume, further, that the Castro government decides to indemnify the original American owner, in accordance with international law, by virtue of a lump-sum payment of \$5 million. The Cuban government's acquisition cost for the Cuban cement plant under this scenario, as a result of the lump-sum payment as compensation, is \$5 million. To make any kind of a reasonable profit under these circumstances, the Castro regime must sell the cement plant to a would-be purchaser at a price in excess of its acquisition cost.

Now assume, consistent with reality, that the Castro government refuses to compensate the original U.S. owner of the Cuban cement factory in violation of international law. The Cuban government's new acquisition cost to obtain the Cuban cement plant, as a direct consequence of an outright confiscation, is zero. This new acquisition cost is well below the fair-market and book value of the cement factory. Under these circumstances, Fidel Castro can easily entice such foreign investors as CEMEX, Mexico's leading cement producer, to purchase the cement plant at a below-fair-market-value price of only \$3 million.¹⁸⁸ The Castro regime still makes a profit, while CEMEX enjoys the fruits of a Cuban cement plant, worth \$5 million, at a discounted purchase price of only \$3 million. The only loser under these circumstances is the

186. See NAFTA, ch. 16, arts. 1603(1), 1607, Annex 1603, Section A(1), (3), (B)(3), ch. 21, art. 2102(1)(c); Snyder & Agostini, *supra* note 7, at 43, n.37.

187. See GATT 1994, art. XXI(c); NAFTA, ch. 16, arts. 1603, 1607, Section A(1), (B)(3), ch. 21, art. 2102(1)(c); cf. GATT 1994, art. VI (authorizing suspension of MFN treatment in cases involving the bestowal of "prohibited" foreign government subsidies); GATT 1994 Subsidy Agreement (articulating same legal principle); Agreement on Implementation of Article VI of the GATT 1994 (countenancing the imposition of antidumping duties to counteract the adverse effects produced by international price discrimination or dumping practices).

188. See generally Giesze, *supra* note 138, at 885, 911, n.96 (1994) (citing to Craig R. Giesze, *Los Desafíos Jurídicos de México, Canadá y Los Estados Unidos bajo el nuevo sistema de Solución de Controversias, en Materia de Antidumping y Cuotas Compensatorias, del Capítulo XIX del Tratado de Libre Comercio de América del Norte*, in PRÁCTICAS DESLEALES DE COMERCIO INTERNACIONAL, INSTITUTO DE INVESTIGACIONES JURÍDICAS (UNAM 1st ed. 1995) (alluding to U.S. countervailing duty investigations addressing the privatization of state-owned steel companies in Europe in which certain foreign governments sold the state-run enterprises in question to private individuals at prices below the fair market value of the government asset)).

legitimate U.S. owner of the Cuban cement plant confiscated in violation of international law.¹⁸⁹

The sale of goods, services, or property by a foreign government at prices below their fair market value constitutes a foreign government subsidy, an unfair international trade practice condemned by the GATT 1994 Subsidy Agreement.¹⁹⁰ Even though Castro's sale of the previously U.S.-owned property at potentially subsidized prices affects competing American producers in third-country markets

189. Compare Wilkey, *supra* note 1, at 4. ("Take the case of a small ranch or pharmaceutical plant in Cuba, owned by an American company, that is confiscated and sold to a foreigner. The American company's moral and legal rights in regard to its stolen property are the same as those of the owner of the car, but because the ranch and the plant are not movable, it has a very difficult time finding a way to procedurally assert those rights. . . . Enter the Helms-Burton law. Title III gives, under certain circumstances, a right of action to the deprived owner of property against a foreigner who came to Cuba, acquired the property from the Cuban government, and then enjoyed the use of it.") Ambassador Wilkey's analysis forcefully demonstrates that Titles III and IV of *Helms-Burton* are also consistent with the instructive Coase Theorem in an international context. See Ronald H. Coase, *The Problem of Social Costs*, Vol. 3 J.L. & ECON. 1 (1960) (author awarded the Nobel Peace Prize for law-review article). The Coase Theorem provides that potential litigants in a dispute involving conflicting property rights can negotiate the most economically advantageous and efficient solution by themselves—and, thereby, bypass altogether the legal and judicial apparatus—provided that two conditions exist: (1) that the transaction costs associated with private-party negotiations are zero; and (2) that the legal rights and obligations of the parties are clearly established. See MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12, 23-26 (1985). In other words, the free forces of the marketplace (*i.e.*, Adam Smith's "invisible hand"), rather than the courts, will lead the parties to the economically efficient solution irrespective of the rule of law in place, provided that the two conditions outlined above are satisfied. *Id.* Alternatively, the *normative* application of the Coase Theorem provides that where, as here, the transaction costs are high or prohibitive (*i.e.*, Castro's refusal to negotiate), or where property rights have not been adequately delineated, the legislature can step in to "lubricate" the negotiating process by enacting a legal provision that either reduces the relevant transaction costs or clearly spells out and clarifies existing legal rights and obligations. The net result of such legislative intervention fosters private-party negotiations that eventually lead to out-of-court settlements. See, *e.g.*, Rule 23, F.R.C.P. (1993) (creating class action suits, which lower the transaction costs associated with private-party negotiations in cases involving multiple plaintiffs or defendants, making out-of-court settlements feasible). Accordingly, consistent with the *normative* application of the Coase Theorem, Title III of *Helms-Burton*, in combination with Title IV, creates a procedural enforcement device that obligates either the Castro government or the foreign purchasers of the confiscated property to indemnify the legitimate American owners in accordance with international law. In so doing, *Helms-Burton* has lowered the transaction costs discussed above and, at the same time, has clearly demarcated existing legal rights and obligations under international law. Hence, *Helms-Burton*, similar to Rule 23 of the Federal Rules of Civil Procedure, makes feasible private-party negotiations and settlements between the legitimate owners of the expropriated property and the foreign purchasers thereof, with a view towards achieving the economically efficient result of obtaining just compensation for seized private property. See *supra* note 181. The recent settlement between STET, a major Italian telecommunications firm, and the International Telephone and Telegraph Corporation ("IT&T"), a U.S.-based company, illustrates the economic soundness of *Helms-Burton* in light of the Coase Theorem. See <http://www.CNNenEspañol.com> (Jan. 16, 1998). STET compensated IT&T, the previous U.S. owner of certain property seized by the Castro government in Cuba and later sold to STET, because *Helms-Burton* contains an effective enforcement device (*i.e.*, actual implementation of Title IV and potential application of Title III) that clearly spells out the controlling legal standard under international law. *Id.*

190. See GATT 1994 Subsidies Agreement, arts. 1.1(a)(1)(iii), (b), 2.

outside the United States and Cuba, the new GATT 1994 Subsidy Agreement contemplates an MFN departure to counteract foreign government subsidies that produce injurious effects in such markets.¹⁹¹

Accordingly, a careful examination of the relevant international treaties, including the new GATT of 1994, the WTO Agreements, and the NAFTA, reinforces the conclusion that the United States should prevail before a WTO or a NAFTA panel in the event of a formal legal challenge. Nothing in either the common law or the civil law legal traditions—namely, different rules of treaty construction, divergent reasoning methodologies, or conflicting legal doctrines—alters our interpretation of the express provisions of the controlling international agreements.

Although both the common law and the civil law methods of analysis lead to the same conclusion in this case, the opposite result is usually the day-to-day scenario that adversely affects and disrupts contemporary international relations and business transactions in the Western Hemisphere and in other parts of the globe. Indeed, the inherent differences that divide the two major legal philosophies of the world are often a chief source of misunderstanding, tension, and conflict among international organizations, sovereign nations, and private individuals in cases subject to international law.¹⁹²

191. See GATT 1994 Subsidies Agreement, arts. 4, 5, 6, 7, 27 (codifying third-country subsidy rules).

192. See, e.g., In the Matter of the Mexican Antidumping Investigation into Imports of Cut-to-Length Plate Products from the United States, MEX-94-1904-02, slip op. 1, 32 (August 30, 1995) (publishing first binational panel decision issued pursuant to Chapter 19 of the NAFTA that reviewed a Mexican antidumping administrative determination) ("Plate Products"). Chapter 19 required the U.S.-Mexico binational panel to determine whether the contested Mexican administrative determination was consistent with the applicable Mexican antidumping law. See NAFTA, art. 1904, para. 2. Chapter 19 further required the panelists to apply the relevant Mexican standard of judicial review, as well as general principles of Mexican law, to reach their final decision. See NAFTA, art. 1904, para. 3. Article 1904(8) then specifically limited the panel's powers by authorizing one of two courses of action at the conclusion of the panel review: (1) affirm the administrative determination if consistent with the applicable Mexican law; or (2) remand the administrative ruling to the Mexican agency if inconsistent with the governing law. NAFTA, art. 1904, para. 8. That which complicated the analysis was that the definition of the term Mexican "antidumping statute," as drafted in Chapter 19 of the NAFTA, was not coterminous with its counterpart under Mexican law. Compare NAFTA, art. 1911 (Definitions), Annex 1911 with CONST. art. 133 (Mex.). The inconsistency at issue stemmed from an ambiguity or gap contained in Chapter 19 of the NAFTA, a source of international law. Compare NAFTA, art. 1904, para. 2, art. 1911 (Definitions), Annex 1911 with CONST. art. 133 (Mex.). Nevertheless, the U.S. common law panelists writing for the majority surprisingly ignored the international rules governing treaty construction codified in Article 102(2) of the NAFTA and Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties to fill in the gap. See *Plate Products* at 1-121; but see *Treaties and Other International Agreements: The Role of the United States Senate*, 103d Cong., 1st Sess., S. PRT. 103-53, at 20 (1993) (Comm. Print) (emphasizing that the Vienna Convention is an "authoritative guide to current treaty law and practice."). Rather, the majority invoked Mexican *national legislation* to resolve an ambiguity under *international law* and, thereby, interpreted the operative NAFTA term "antidumping statute" extremely broadly to embrace Mexican legal provisions not at all contemplated by the express language of the NAFTA. Compare *id.* at 20-27, 29-34 with NAFTA, art. 1911 (Definitions), Annex 1911. In handing down a decision adverse to the competing Mexican domestic industry, the common law panelists may

Consequently, it behooves the international legal community—especially in light of the recent escalation in FTAs negotiated between common law and civil law nations—to harmonize the inconsistent aspects of the two legal cultures and to develop a uniform system of legal reasoning, analysis, and interpretation under international law. In this manner, the United Nations, the ICJ, and the WTO, among other international organizations, can take the lead in attempting to ferret out those unnecessary international disputes that are merely the result of formalistic differences that separate the common law heritage from its civil law counterpart. As a positive result, the international legal community can focus its energies more efficiently on those truly substantive international legal conflicts that require, at a minimum, the correct interpretation and the proper application of the governing international legal principles to the facts of a particular controversy to ensure successful dispute resolution under any set of circumstances.

VII. The Chilean Political Perspective

If, as demonstrated in previous sections of this article, the United States truly has international law on its side in this case, then why are America's trading partners vehemently opposed to *Helms-Burton*? The answer to this question actually constitutes the heart of the international debate and demonstrates that legal analysis alone is not sufficient to settle the current conflict. In fact, the *Helms-Burton* experience illustrates that political considerations can often play a much more important role in the resolution of disputes arising under international law than the strict application of the governing legal principles.

Some of the civil law students at the Catholic University of Chile believe that, although the U.S. Government may win the substantive legal battle in this case, it may eventually lose the diplomatic war by antagonizing its trading partners. In their estimation, the United States will find it extremely difficult to legitimize *Helms-Burton* vis-à-vis Latin America in light of its unilateral genesis. Such a state of affairs could complicate Chile's future accession to the NAFTA, as well as the proposed creation of the Free Trade Area of the Americas by the year 2005. Even though the U.S. House of Representatives is currently giving hemispheric free trade low marks on its list of priorities, Chile's future international

have also misapplied the Mexican standard of judicial review and may have exceeded their powers, authority, and jurisdiction. Compare *Plate Products* at 120 (ordering revocation of antidumping order) with NAFTA, art. 1904, para. 8 (empowering binational panels only to affirm or remand administration determinations to the agency). In short, the common law panelists did not fully appreciate the important, albeit subtle, distinction between the binational panel task of "reviewing" a Mexican administrative determination in light of the applicable Mexican law and the unrelated "judicial powers" enjoyed *exclusively by Mexican courts* to revoke a legally deficient agency decision. Compare NAFTA, art. 1904, para. 2, with Mexican Federal Tax Code, arts. 237, 238, and 239 (1995). In hostile response to this unfavorable decision, the Mexican Congress amended the Mexican standard of judicial review to curb the overreaching influence of common law reasoning in a strict constructionist, civil law environment. See Mexican Federal Tax Code, as amended, art. 238 (1996).

lawyers believe that such a short-sighted foreign policy strategy may actually backfire. In the global marketplace of economic interdependence, the United States needs hemispheric free trade just as much as Latin America.

What offends many Chileans is that, after decades of apparent disinterest, the United States has now decided to dabble in Latin American trade issues. Always seeming to take advantage of its self-proclaimed role as the "hemispheric police authority," the United States invariably gives the impression that it will shirk its diplomatic obligations in the hemisphere. One such obligation is to refrain from undertaking unilateral action in favor of fostering multilateral accords. In this regard, the United States seems to forget that the new GATT of 1994, the new WTO Agreements, and the NAFTA all mandate that a country wishing to undertake action must first consult with its trading partners, either on a bilateral or multilateral basis, before proceeding with the measure in question.¹⁹³

The civil law students at the Catholic University of Chile are not so naive as to suggest that the President of the United States should call a summit of the Organization of American States (OAS) every time the United States wishes to make an important foreign policy decision affecting the Western Hemisphere. Nonetheless, tomorrow's international legal practitioners stress that the United States must develop a coherent, multilateral strategy to include its Latin American partners in the diplomatic process when implementing policies that have repercussions far outside the U.S. border. For example, it is worthy to note that neither Canada nor Mexico has ever publicly objected to Article 309(3) of the NAFTA, which sanctions the U.S. trade embargo against Cuba, because both of these countries actively participated in the process of negotiating and drafting the controversial article.

In the eyes of some Chileans, *Helms-Burton* suggests that the United States may have lost sight of a valuable lesson supposedly learned from the past. In 1930, President Herbert Hoover, falling prey to strong congressional pressure at that time, signed into law the Tariff Act of 1930, better known as *Smoot-Hawley*.¹⁹⁴ *Smoot-Hawley*, the most protectionist trade legislation in the history of the United States, strained international relations to such a degree that America's leading trading partners retaliated with their own protectionist statutes.¹⁹⁵ The net result plunged both the U.S. and world economy further into the Great Depression.¹⁹⁶

The unilateral enactment of *Helms-Burton* has resurrected the ghosts of *Smoot-Hawley*. Indeed, the anti-Castro statute finds itself in an atmosphere somewhat reminiscent of that confronted by the 71st Congress in 1930. Canada, France, Great Britain, and Mexico, among others, already have codified or are in the

193. See WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 4; NAFTA, ch. 20, art. 2006.

194. See Craig R. Giesze, Martin J. Lewin, *The MultiFiber Arrangement: "Temporary" Protection Run Amuck*, 19 LAW & POL'Y INT'L BUS. 51, 169-70 (1987).

195. *Id.*

196. *Id.*

process of codifying retaliatory laws in direct response to *Helms-Burton*.¹⁹⁷ Meanwhile, the U.S. Executive Branch has declined to commit to participate in any aspect of the WTO dispute-resolution process invoked by European diplomats, signaling that the United States may not honor its international commitments in the possible event of an adverse WTO ruling. Finally, the U.S. House of Representatives has repeatedly refused to grant the President fast-track negotiating authority that is necessary to promote free trade alliances and U.S. exports in the Western Hemisphere.¹⁹⁸ Thus, the danger exists that in the current emotionally supercharged environment caused by the unilateral passage of *Helms-Burton*, the United States' failure to commit to participate in any aspect of the WTO dispute-resolution process, and the congressional rejection of fast-track, relentless appeals to "prompt, adequate, and effective" compensation may lead to results of a self-destructive nature.

It is critical that the U.S. Congress and the President recognize this danger and avoid the mistake of assuming that the American cultural approach to address economic, legal, and political problems, especially with respect to Cuba in particular and Latin America in general, is the only approach. The Congress and the Administration must be alert in the sensitive area of Latin American sovereignty. The national and international interest of healthy relations in the hemisphere demands that the United States overcome its unilateral tendencies with respect to Cuba and the region. Such an approach is essential to ensure that the U.S. Government does not repeat the mistakes of some sixty years ago.

VIII. Policy Options

Ironically, *Helms-Burton* could turn into a golden opportunity to bring the nations of the Western Hemisphere closer together. It could even be the stepping stone to ensure the passage of the moribund fast-track negotiating authority by the American Congress—jump starting the NAFTA talks with Chile and resuscitating the Free Trade Area of the Americas. Nonetheless, to achieve these goals and to resolve the *Helms-Burton* conflict, the United States must carefully weigh international political considerations in the region, rather than rely exclusively upon the strict application of international law. Failure to do so could result in a serious setback for the continued growth of free trade in the Western Hemisphere.

In January of 1998, President Clinton took the necessary first step by suspending the implementation of Title III of *Helms-Burton*, which authorizes the filing of U.S. lawsuits to obtain compensation for the Castro expropriations, for another six months.¹⁹⁹ The President should continue to invoke his suspension

197. See <http://www.CNN.com> (June 6, 1996).

198. *Id.*

199. Giesze, *supra* note 18, at 23; <http://www.CNNenEspanol.com> (Jan. 16, 1998).

authority judiciously pursuant to the statute, provided that he simultaneously engages his Latin American counterparts in a series of multilateral negotiations during his proposed visit to Chile to attend the Second Summit of the Americas. Meanwhile, the Administration must actively participate in any WTO dispute-resolution proceeding triggered by the European Union that challenges *Helms-Burton*.

One specific consideration for the President and the U.S. Congress ultimately entails offering U.S. congressional approval of fast-track in exchange for the vigorous enforcement of *Helms-Burton*, including the implementation of Title III of the law. In other words, the United States would offer its Latin American trading partners greater regional free trade and investment opportunities in the Americas in exchange for the further isolation of Fidel Castro through the aggressive enforcement of *Helms-Burton*. In so doing, the United States would be able to obtain compensation in accordance with international law for those current U.S. nationals stripped of their vested property rights by the Castro government in 1959 while, at the same time, fostering free trade in the region.

A more ambitious policy option for the President and the U.S. Congress would be to propose the creation of an international compensation fund for those current U.S. persons and entities deprived of their property interests by Fidel Castro. All of the countries whose entrepreneurs have purchased previously U.S.-owned property from the Castro government would make a contribution to the fund. The individual contribution would be in direct proportion to the percentage of previously U.S.-owned assets purchased by the foreign nationals of these countries. An international oversight body, established under the aegis of the United Nations or the OAS, could administer this fund and distribute the proceeds directly to the original U.S. owners of the expropriated property. Such an approach would satisfy the international minimum standard under international law and, thereby, would obviate in large part the underlying purpose of *Helms-Burton*. In return, the U.S. Congress could contemplate repealing *Helms-Burton* in whole or in part.

A third approach incorporates a variant of the first two policy prescriptions. The U.S. President would offer our Latin American trading partners, as well as Republican lawmakers in the U.S. House of Representatives, the aggressive enforcement of Title III of *Helms Burton* in exchange for additional fast-track votes. Alternatively, the President would still seek to establish the international compensation fund described above—with the cooperation of America's trading partners—as a viable substitute for Title III of the law. Finally, the Administration might even simultaneously consider proposing the partial relaxation of Title I of *Helms Burton* (i.e., trade embargo), perhaps starting in a narrow area like baseball, which is generally exempt from U.S. antitrust regulation.²⁰⁰ This political

200. See *Federal Baseball Club of Baltimore, Inc. v. National League of Prof. Baseball Clubs*, 259 U.S. 200 (1922) (upholding U.S. antitrust exemption for baseball); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (maintaining antitrust exemption); *Flood v. Kuhn*, 407 U.S. 258 (1972) (adhering to exemption for historical reasons).

tactic could prove to be a possible, albeit attenuated, attempt to garner fast-track votes from Democrat representatives who prefer a change in America's policy stance with respect to Cuba. Indeed, the free market-driven influx of more Cuban baseball players like Livan Hernandez into the United States could do more to dismantle the authoritarian Castro regime than the four-decade U.S. foreign policy that has produced questionable results.²⁰¹

Under all of these policy scenarios, the countries comprising the Western Hemisphere, including the United States, would settle the *Helms-Burton* controversy on a multilateral basis and in accordance with international law. The consultative diplomatic process espoused by this article would enable the nations involved to share in the benefits and the costs of expanded free trade in the Americas on a multilateral basis as well. Moreover, such an approach could be the key policy prescription to resurrect the moribund fast-track negotiating authority just before the Second Summit of the Americas to be held in Santiago de Chile in April of 1998.

IX. Conclusion

An unbiased and objective analysis of the governing international legal principles from both a common law and a civil law perspective demonstrates that *Helms-Burton* is consistent with international law. The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 passes muster with respect to: (1) the relevant international treaties, agreements, and conventions, including the Vienna Convention on the Law of Treaties, the new GATT of 1994, the WTO Agreements, and the NAFTA; (2) customary international law, including customs and usage among nations; (3) international judicial decisions rendered by the PCIJ and the ICJ; (4) general principles of national law espoused by the civilized nations of the world; and (5) the writings of eminent international legal scholars, jurists, and commentators, including the illustrious ICJ Judge Jessup. Specifically, *Helms-Burton* does not constitute the "extraterritorial" application of a U.S. law, but rather creates, in the words of Ambassador Wilkey, "an unusual but perfectly legal . . . procedural enforcement device" to obtain compensation for current American citizens in accordance with the international minimum standard.²⁰²

Therefore, the inherent differences between the common law and the civil law traditions do not adequately explain the diametrically opposed legal conclusions drawn by Ambassador Wilkey and the majority of the civil law jurists in Latin America and Europe in this case. Rather, international political and diplomatic considerations—namely, the United States' failure to consult with its Latin Ameri-

201. See THE CLEVELAND PLAIN DEALER A-1 (Oct. 28, 1997) (reporting that Cuban exile Livan Hernandez, starting pitcher for the world champion Florida Marlins, was named Most Valuable Player of the 1997 World Series).

202. Wilkey, *supra* note 1, at 17.

can and European trading partners and its unilateral enactment of the controversial law—constitute the heart of the debate. Thus, as legal analysis alone is not sufficient to settle the *Helms-Burton* conflict, the United States should consider such diplomatic solutions as the passage of fast-track negotiating authority in exchange for the vigorous enforcement of the statute, the establishment of an international compensation fund, and even the partial relaxation of the current trade embargo to resolve the international dispute.

Although many of the United States' trading partners in the region will not easily forget the unilateral genesis of *Helms-Burton*—as well as the lack of complete U.S. congressional support for fast-track—the positive state of affairs resulting from the policy options proposed in this article would actually increase the likelihood of Chile's future accession to the NAFTA, as well as the creation of the Free Trade Area of the Americas by the year 2005. Every country involved in this multilateral process, including the United States, would be better off economically through enhanced regional trade and investment in the Western Hemisphere. To echo again the shibboleth of Chile's future international lawyers at the Catholic University of Chile: *In the global marketplace of economic interdependence, the United States needs hemispheric free trade just as much as Latin America.* In addition, effective economic cooperation in the hemisphere could lead to a multilateral response designed to address China and Iraq, the two major commercial and political challenges facing the Americas at the dawn of the twenty-first century.

The moment for multilateral diplomacy with respect to Cuba and the Western Hemisphere could not be any more auspicious. In response to an historic political confrontation between Fidel Castro and José María Aznar, the President of Spain, just days after the Summit on Democracy held in November of 1996 in Santiago, Chile, the European Union has adopted a new foreign policy strategy vis-à-vis Cuba.²⁰³ The purpose of the European plan is to address human-rights abuses and, consistent with Title II of *Helms-Burton*, to foster the transition to a democratically elected government in the Caribbean island.²⁰⁴ Harmonious with this plan, Pope John Paul II made an unprecedented visit to Cuba during the early part of 1998 as a favorable prelude to the Second Summit of the Americas. As the international legal system approaches the crossroads in its continued development, the door to multilateral diplomacy is wide open. The only question now is whether the U.S. President and the Congress will make the correct policy choice.

203. *Documento Oficial: UE Endurece su Política Hacia Cuba*, EL MERCURIO A1, A19 (Nov. 29, 1996).

204. *Id.*