

## ACADEMIC ARTICLES

# UNDERSTANDING THE HELMS-BURTON ACT

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## Abstract

In this article we study the Helms-Burton Act in the intersections of foreign policy, American law, and international law. We provide an explanation of the making of the law through the lenses of policymaking, and the core variables that drove the process, as we consider that it was an act of foreign policy, and that foreign policy is a particular form of public policy. We discuss the legality of the statute within American law, and point out its inconsistencies and open contradictions with the constitutional framework of the United States, as it violates some of its core principles and provisions. We examine

the legality of the Helms-Burton according to international law, and determine that it violates several fundamental principles included in the Charter of the United Nations and other major international treaties and charters of international organisations, of which the United States is a signatory.

**Keywords:** Helms-Burton Act, United States, Cuba, international law, constitutionality

## Introduction

Relations between the United States and Cuba constitute a complex reality that has evolved over several centuries, deeply interwoven in the power dynamics of the Western Hemisphere and the modern world system. The incompatibility of both countries' national projects and the geographical location of Cuba at the centre of the geopolitical pivot of the Americas created conditions that have shaped the structural *longue durée* of their interactions.

The Cuban revolution of 1959 was a watershed moment in the country's and the region's history, and as such it marked a qualitative change in the relations across the Florida Straits. Most notably, it upset Washington's domination over the island nation and fractured its regional power structure. Hence, the reaction by American elites and government to the revolution was hostile from the beginning.

Economic sanctions<sup>1</sup> were used by the US to deal with the new reality as the preferred means to undermine the support for the new Cuban government (Mallory 1960). The first measures introduced in 1959 set the stage for an ever-increasing system of coercive policies beyond what could have been thought when John F. Kennedy signed the Presidential Proclamation 3447 in February 1962, formally establishing what is called embargo in the US and blockade in Cuba.<sup>2</sup>

One of the key components of the system of coercive measures, and one of the most significant in terms of its qualitative nature and its potential and actual implications, is the Cuban Democratic Freedom and Solidarity Act, signed into law by President William J. Clinton on the 12 March 1996 (United States Congress 1996), better known as Helms-Burton Act. It was the climatic point of

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1 These were presented and labeled as sanctions, and justified on the base of alleged violations incurred by the new Cuban government. Hence the use of the term. However, their legality under the international law, and even under the American law is at least questionable, as it is the classification of Cuba, the Cuban government and individuals and entities in Cuba as wrongdoers. In fact, they are but means to coerce Cuba into complying with US political goals.

2 It is worth noticing that this proclamation was signed over eight months before the Cuban Missile Crisis of October 1962.

a process of reinforcing coercive mechanisms against Cuba via statutory law with extraterritorial scope (Arboleya Cervera 2019).

The act consists of four titles, which in general terms extend administrative sanctions to financial entities that give loans to Cuba, and to foreigners who invest in the country. Title I: *Strengthening international sanctions against the Castro government*, created aggressive political guidelines such as a call to establish a mandatory international blockade, blocked any path for Cuba to join international financial institutions, and established the obligation of the US government to materially and financially support the Cuban political opposition (Pino Canales and Diaz Perez 2020). This title formally prevents presidents from lifting the blockade via executive action.

Title II: *To help a free and independent Cuba*, provides a scheme for the – intended – future political, economic, and social organisation to be implemented in Cuba, so that it can be considered a “democratically elected government”. It creates the office of Cuba Transition Coordinator, which is meant to oversee and Control the transitional period that would encompass the change of political regime in Cuba. The Coordinator is in charge of guaranteeing compliance with US law during that transition and of shaping the new government (United States Congress 1996). This section amounts to a formal denial of Cuba’s sovereignty.

Title III: *Protection of property rights of United States nationals*, allows US nationals to initiate judicial proceedings in US courts, against any foreign person or entity that traffics with American property nationalised by the Cuban Revolution after 1 January 1959. An important part is that it effectively recognises as US nationals those who were Cuban citizens when their properties were nationalised, even if they emigrated afterwards.

Title IV: *Exclusion of certain foreigners*. It denies visas to or excludes from the territory of the United States those who traffic with confiscated American property, as well as their family members. It has been implemented selectively, to pressure companies from various countries and intimidate them, with the aim of forcing them to leave Cuba or withdraw their investment or business proposals in the country (Dávalos 2019).

Since its inception, Title III was suspended by executive action. It was the section within the statute most likely to generate friction with Washington’s allies. Subsequent administrations continued to suspend it, until the Trump administration changed course. On 17 April 2019<sup>3</sup> Mike Pompeo, then Secretary of State, announced the full application of Title III. This ended 23 years of executive policy and opened the door for a flurry of lawsuits and renewed contradictions, thus bringing the statute to the forefront yet again.

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3 The date coincided with the 58th anniversary of beginning of the invasion of Bay of Pigs.

The making of this law was completed with the implementation of Title III. involved the judicial branch directly in the bilateral conflict, while shrugging away an array of legal and political questions. As such, it requires an in-depth study, both in its formulation and its implementation, given its potential to shape the political, economic and legal landscape in the US, Cuba and beyond.

The aim of this article is to study the Helms-Burton Act in the intersection between US law, international law, foreign policy and domestic politics. We have three specific objectives: first, to explain its making as part of US policy towards Cuba; second, to evaluate the legality of the act within the American law; third, to evaluate the legality of the act within the framework of international law.

Hence, the text is structured in three sections, each one addressing one of the specific objectives. The results of this work will contribute to the understanding of this critical component of the policy towards Cuba, and will create the conditions for further inquiries into the most recent practical application of this piece of legislation.

## **1. Law, Politics and Policymaking**

The first question is how did the Helms-Burton Act come to be. The key to answering it lies in considering it an act of foreign policy. In our view, foreign policy is a form of public policy; thus, it responds to the same mechanisms and is made in an essentially similar manner to any other public policy. Its specificities stem from the behaviour of variables, like concrete imperatives and interests, and the characteristics of the actors that participate in one way or another. Hence, it is critical to look at it through the lens of policymaking.

To that effect, we followed the model proposed by Dominguez Lopez and Barrera Rodriguez (2020: 174–181). They developed a synthetic model articulated around a core cycle, with boundaries for acceptable policies set by the current State policy, and concrete policies made under the influence of non-governmental actors and other governmental actors not formally involved in the decision-making on the given issue. Dominguez Lopez and Rodriguez Rodriguez (2022) applied this model while studying the making of the US's Cuba policy at large. They built an analytical framework based on the behaviour of a system formed by three sets of variables: structural variables, contextual variables and domestic variables. An examination of those sets will allow for a more comprehensive explanation of the Helms-Burton Act.

The structural variables have a high degree of stability, such that within certain time frames they act as parameters. For the case we are studying, two of the component variables have remained fundamentally unchanged for over a

century: The American project of being a regional and global power, and Cuba's project of being a sovereign nation (Dominguez Lopez and Rodriguez Rodriguez 2022: 313–315).

The third major component, the geopolitical relevance of Cuba, remained strong, with some variations. The basic geography was largely invariant, with the island sitting at the centre of a network of critical shipping routes, crossed by three international flight corridors, near the Panama Canal, at the entrance of the Gulf of Mexico, near the mouth of the Mississippi river, encased between major petroleum basins, surrounded by a dense network of submarine cables, near some key ports and facilities for US's trade, space programme and military capabilities. The Cuban Revolution of 1959 breached the regional power structure, a fundamental pillar in Washington's international stance, thus weakening it to some degree. Finally, close relations between the post-1959 Cuba and left and left-leaning political forces and processes in Latin America and the Caribbean add an extra layer to this factor, particularly in the context of the so-called post-Cold War (Feinberg 2020).

This means that the key factors driving the US's State policy towards Cuba remained active, hence its end goal remained steady. The explanation for the making of the specific policy should be found in the behaviour of contextual and domestic variables.

The 1989–1991 period was the time frame for one of the most intense geopolitical earthquakes in history: the collapse of the Eastern European socialist block and the dissolution of the Soviet Union. The US government had to adapt its foreign policy to a deeply transformed international system that had lost one of its major components.

The successive administrations led by George H. W. Bush and William J. Clinton spent years addressing this problem. Actions like the invasion of Panama (1989), the first Gulf War (1990–1991), the intervention in Somalia – ended in failure in 1993 – and the interventions in the wars and the eventual NATO attack in former Yugoslavia (1992–1999) were milestones in that process (Dobson and Marsh 2006). The main goal was to claim victory in the Cold War and reshape the system, with the basic assumption that the US was the sole world major power. Hence, Washington's foreign policy was aimed at asserting its hegemony, subordinating other international actors through diverse means, providing new goals and legitimacy to existing structures and organisations, and rebuilding regional components of the global power structure.

This massive shift in the world order included the survival of a few members of the socialist camp. Two of them, China and Vietnam, were the object of a change of policy by Washington, with the eventual lifting of economic sanctions (Wei 2014; Manyin 2005). With Cuba the US went in the opposite direction, as

it introduced harsher policies, epitomised by the Torricelli Act of 1992 and the Helms-Burton Act in 1996. The latter was passed after the lifting of the sanctions against the Asian socialist countries. The distinct geopolitical value and geographical proximity of the Caribbean country to the United States provided policymakers with a particular lens when assessing their interests, resources and imperatives, and therefore their options regarding Cuba.

There were other particularly relevant factors driving the making of the Helms-Burton Act. The first, also a contextual variable, derives from the perception of the situation in Cuba. The global geopolitical transformation of 1989–1991 represented for the Caribbean country not only the loss of political allies, but the loss of 85% of its foreign markets and most sources of credit and technology, in the conditions of economic sanctions and external pressure coming from the US. This triggered a deep economic crisis (Diaz Vazquez 2010), connected to a social crisis that crystallised in the migratory crisis of 1994 – also stimulated by Washington’s policies on the matter (Dominguez Lopez, Machado Cajide, and Gonzalez Delgado 2016) – and political unrest – with the riots of the 5 August 1994 as its peak – apparently signalling the demise of the post-1959 political regime.

By 1995–1996, however, Cuba had overcome the worst of the crisis. The economy was starting to recover, partly due to important reforms inclusive of opening to foreign investment, distributing land to workers’ organisations and decentralising the management of State-owned enterprises (Diaz Vazquez 2010). The government had held and was rebuilding its legitimacy through increasingly participatory processes. Hence, the country was entering a positive dynamic, albeit still fragile. The chosen pathway for US policy was to increase the pressure, aimed at preventing the recovery and finally causing the collapse of the Cuban government.

Second, in the domestic dimension, the 1990s witnessed important changes in the US’s political landscape. The long-term effects of the collapse of the liberal consensus and the conservative revolution continued to shift the centre of US politics and policy to the right, as President Clinton – in office since January 1993 and considered a representative of the Third Way (Romano 2006) – had to deal with conservative factions in both major parties, and experienced a number of setbacks in his legislative agenda. In 1994 the Republican Party captured both chambers of Congress for the first time in decades, led by the New Right and the neoconservatives (Green 2022).

This right-wing block was deeply intertwined with the political elites of the Cuban-American community. The Cuban American National Foundation (CANF) contributed important sums to Republican campaigns and the influential Cuban-American lobby – staunchly anti-Cuban in its policies – gained

priority access to key legislators. Also, some Cuban-American figures already had or acquired positions in Congress and the executive and increased their influence (Castro Mariño 2003).

The new chairman of the Senate Committee on Foreign Relations, Jesse Helms, introduced an agenda aimed at changing Clinton's foreign policy, inclusive of the hardening of its Cuba policy by expanding and strengthening the Torricelli Act (Roy 1997). Helms' assistant, Dan Fisk, was appointed to lead a team that included Cuban-American Republican congresspersons from Florida Lincoln Diaz Balart and Ileana Ros-Lehtinen, and Democratic Congresspersons from New Jersey Bob Menendez – also Cuban-American – and Robert Torricelli, to work on a legislative proposal, based on previous bills seeking to toughen the Cuba policy. They were joined by Dan Burton, a Republican representative from Indiana, at the time chairman of the House Sub-Committee on the Western Hemisphere of the Committee on International Relations, and staff member and diplomat Roger Noriega (Alarcon 2019).

Fisk showed an initial draft of the bill to Jorge Mas Canosa, Executive Director of CANF, who later met with Helms and offered some suggestions (Kiger 1998). A number of companies related to or owned by former members of the Cuban oligarchy or their descendants, who had lost their dominant position and properties on the island, lobbied in favour of the bill. The most prominent was Bacardi, an active part of the process since its early stages (Arbolea 2019).

At the time, one of Bacardi's competitors, French Pernod Ricard, had entered into an agreement with Cuba's Cuba Ron to distribute Havana Club, an iconic Cuban brand – never owned by Bacardi – that now had access to global markets. What came to be the Helms-Burton Act and in particular its Title III, represented a tool for Bacardi and other companies to harm their competitors and rig the competition in their favour (Kiger 1998). In some political circles, the statute was known as the Bacardi Act (Alarcon 2019)

There was also a direct line between their evaluation of the US's China policy and the proposed Cuba policy. A few months later, Burton said during a hearing that

I have had businessmen come up to me and suggest that we normalize relations with Cuba and let's work with Fidel Castro to change things from within. Well, we haven't done it in China, and I'm not going to do it in Cuba. (Kiger 1998: 49)

The Clinton administration initially opposed the initiative (Dunning 1998), a position that was officially conveyed by Peter Tarnoff, the undersecretary of State, to Ricardo Alarcon, then president of the National Assembly of People's Power of Cuba (Kiger 1998). So did the Joint Committee of Claims against

Cuba, made up of American companies that had properties nationalised in 1960, including giants like Chase Manhattan Bank, Coca Cola and ITT (Arboleya 2019), and some Democratic legislators, prominently Charles Rangel (Dunning 1998). Third-country-based companies, primarily Canadian mining company Sherritt and Mexican telecommunications company Grupo Domos, which would be harmed by the statute, lobbied against the bill (Kiger 1998). However, they were unsuccessful in their attempt to sway Congress away from the proposed bill.

The last opposition was swept away after an incident occurred on 24 February 1996, when Cuba's air force shot down two small aircraft flown by the Miami-based anti-Cuban government organisation *Hermanos al Rescate*, when they violated Cuban sovereign airspace after repeated warnings at the effect. This served as justification to increase the pressure, and Clinton finally signed the bill into law in March 1996 (Castro Mariño 2003).

Hence, the approval of the Helms-Burton Act resulted from a combination of factors: A strong rightwards swing in the composition of Congress; the influence of politicians and groups ideologically opposed to the Cuban revolution that prioritised the use of hard power tools; the need to adjust US foreign policy to a much transformed international system; a negative evaluation of the policy towards China and Vietnam by those groups; the increased influence of the Cuba American elites; the perceived need of increasing the pressure on Cuba to cause the collapse of its government, as the Cuban economy began to recover; and the influence of companies and other interest groups that, albeit less powerful in general than others that preferred a different approach, had this type of policy and this issue as a priority, unlike their counterparts. All these operated within the framework of a State policy whose main goal was shared by most, if not all of the actors, including those who did not support the bill.

## 2. Helms-Burton Act and American Law

Questions regarding the constitutionality of the Helms-Burton Act were raised since the discussion of the bill began. In academia, there is widespread criticism of the text, largely based on the fact that its drafters prioritised political objectives over legal or commercial ones (Roy 1998). Robert Muse (2020) went as far as to call it a legal monstrosity.

Despite these criticisms and a number of problems, which we discuss below, the constitutionality of the statute has not been formally challenged, neither by the executive, nor by individuals and companies sued under its provisions, although some defendants have alluded to constitutional issues in their allegations.

The drafters of the Constitution of the United States based their political model on the concept of separation of powers. Its manifestation is the so-called model of checks-and-balances. This has been equivocated with democracy, although some empirical studies have questioned the democratic nature and/or the typology of democracy applicable to the US political regime (Gilens and Page 2014)

In spite of the constitutional design, there is a long history of friction around the prerogatives of each branch of government. This translates into a number of famous judicial precedents. For example, the cases of *Immigration and Naturalization Service vs. Chadha* in 1983, and *Clinton vs. City of New York* in 1998 (Vile 2010). In both, the Supreme Court intervened to clarify the constitutionality of certain acts, based on its interpretation of the separation of powers. Nevertheless, there is evidence that supports a historical trend to the reinforcement of the executive branch at the expense of the judicial and the legislative (Howell 2003).

The Helms-Burton Act violates the tri-partition of powers in two fundamental ways. First, it limits the ability of the president to formulate and conduct foreign policy, which is a presidential prerogative, according to Article 1 of the Constitution of the United States (The National Archives 2021). It is important to point out that the Constitution does not establish the independence of the executive in matters of foreign policy, as Congress retains a number of tools to exercise influence in that arena, primarily through budget and appropriations laws, and the Senate's role in ratifying treaties and ambassadors. Rather, it establishes a high degree of autonomy in the making of foreign policy.

Aside from codifying the sanctions into law, the Helms-Burton Act conditioned the recognition of the legitimacy of a foreign government and limited the ability of the executive to lift the sanctions. Congressional approval in the form of a public law would be required to completely eliminate the blockade against Cuba (Roy 1997).<sup>4</sup> The provisions allowed the executive to retain some prerogatives. For example, issuing licences for economic activities, and suspending the possibility of suing in US courts under Title III (Roy 1998). But these imply some flexibility in the application of the law, not the full range of constitutional autonomy of the President regarding foreign policy. The implementation of the Helms-Burton Act narrowed the range of possible policies towards the island.

The Helms-Burton Act also interferes with the autonomy of the courts, thus putting unconstitutional restrictions on the judicial branch. Particularly, it negates the right of the courts to calculate damages incurred in case of ruling in

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4 It is technically possible for a president to end the blockade via executive action, for any potential plaintiff would have serious difficulties in demonstrating standing in front of the Supreme Court. The political cost of such action is a different matter.

favour of a claimant under Title III. In common law, the power to determine the amount of damages and calculate compensation derived from sentences falls under the jurisdiction of the judges. The law may determine general guidelines, but not establish in detail how the calculation is made for a specific case.

The Helms-Burton Act does exactly that, by using as fixed referent the results of an earlier inquiry by the Department of Justice (DoJ). After the nationalisations, the Foreign Claims Settlement Commission (FCSC), an entity subordinated to the DoJ, evaluated 8,819 claims filed by individuals and corporations from the United States through its Cuba programme, and certified 5,911 of them. The value of the certified claims was assessed at 1,851,057,358.00 USD (Re 1996). This figure was likely an overstatement, since few official documents were considered and many were based on the allegations of those affected (Pumariega Perez 2021).

The statute established that, in the case of claims certified by the FCSC, to calculate the damage, judges should use the certified amount plus the annual interest accrued from the moment of nationalisation. In the case of uncertified claims, the greater amount is chosen between the current market value of the property or its value at the time of nationalisation. In all cases, the procedural costs are added, that is, the expenses incurred by the court and the plaintiff's attorneys during the process.

Even more significant, if the plaintiffs meet the requirement of notifying the future defendant 30 days before filing the case, and in that notification they warn that the defendant is trafficking in property "confiscated" by the Cuban government, then the value of the total damage would be tripled (Quin Emanuel Trial Lawyers 2022). Some authors qualify this as draconian (Freire, Domb and Augusto 2022).

This valuation system it is structured so it would inflict the greatest possible damage on the defendants, and far exceeds normal valuation in the US system. This way of calculating damage in a civil case is unprecedented.

Another aspect of the statute is that it limits the application of the doctrine of the Act of State in cases arising from the application of Title III. In this way, it eliminates the ability of the courts to, when reasoning about a case, determine whether nationalisations are covered by the doctrine, and therefore if they should be dismissed on those bases (Quin Emanuel Trial Lawyers 2022).

The doctrine of the Act of State is a jurisprudential rule applied to those cases that imply or question the legality of a foreign government rule or act, carried out in its own territory. From its origins to the present, its analysis has varied as it is related to issues of expropriation and nationalisation, but also to other areas such as monopolies or human rights. Judicial precedent is recognised and set in the jurisprudence of the Supreme Court of the United States (SCOTUS) with the opinion of Justice Marshall in the 1812 case *The Exchange v. McFaddon* (John 2005).

In fact, SCOTUS recognised the legitimacy of Cuban nationalisations in the ruling of *Sabbatino vs. National Bank of Cuba* in 1964 (Miranda 1996). In that case, the court recognised that, based on the doctrine of the Act of State, Cuba had every right to nationalise properties in accordance with public international law. The court ruled that, whatever impact the nationalisations in Cuba could have in the US, the interests of the US and the progress of international law would be best served by keeping the doctrine of the Act of State intact, hence the recognition of Cuba’s right to expropriate the contested properties (Canardo 2020).

Despite the importance of this ruling, in practice it was ignored. In 1962, Congress had passed the Hickenlooper Amendment to the Foreign Assistant Act of 1961, which restricted the use of the doctrine, declaring that it is not applicable when it would affect the expropriation of assets abroad owned by American citizens (Canardo 2020). The lawmakers opted for Hickenlooper’s view instead of the SCOTUS ruling, thus establishing an important precedent for further extraterritorial legislation.

Hence, Congress limited the powers of the courts in at least two major ways from very early on. The Helms-Burton Act entered the stage as a continuation and expansion of those early actions. This implies another violation of the separation of powers enshrined in the Constitution.

One technical criticism of the act stems from the breadth with which the term “trafficking” is defined. Title III states that US nationals can file lawsuits before US courts against anyone who traffics with US property that was “confiscated” in Cuba in the 1960s. Likewise, Title IV establishes that it may deny visas or exclude from the territory of the United States those who “traffic” in “stolen” American property, and their families. The statute states that trafficking can mean: selling, transferring, distributing, dispensing, dealing, managing, or otherwise disposing of confiscated property, or purchasing, leasing, receiving, possessing, obtaining control of, managing, using, or otherwise acquiring or maintaining an interest in confiscated property (United States Congress 1996). As written, practically any action concerning a nationalised property can be included in the term trafficking. In addition, it will largely depend on the court’s interpretation of the specific case.

Hence, civil liability may result from almost any action carried out by a person or entity, whether directly or indirectly. This situation raises the question of how direct the link between the properties and the interested party must be in order to demonstrate “trafficking” (Roy 1998).

This is linked to another issue with the constitutionality of the Helms-Burton Act: the violation of the due-process clauses. In particular, with one of its elements: personal jurisdiction. In American law, it refers to the power that a court

has to make a decision regarding the defendant in a given case. Due process is one of the few that is regulated by two different amendments in the US Constitution: the Fifth Amendment, which states that no one shall be “deprived of life, liberty, or property without due process of the law”, and the Fourteenth Amendment, which basically describes the same legal obligation, but for the states. The Fifth was only aimed at protecting citizens against the power of the federal government (Cornel Law School 2022). The Fourteenth, after the Civil War, permitted Congress to adopt a series of measures to protect individual rights from State interference. This provided a guarantee that all levels of the US government must operate within the law and provide fair procedures (Chapman and Yoshino 2022).

Due process is divided into two forms: procedural, referring to the procedures that the government must follow before depriving an individual of life, liberty or property; and substantive, derived from the idea that certain freedoms are so important that they cannot be infringed without a compelling reason. The Supreme Court has defined on several occasions that the limit on the jurisdiction of the courts over individuals and companies is contained in the due-process amendments. In the case of *Pennoyer vs. Neff*, in 1878, the Supreme Court enunciated two principles of jurisdiction with respect to the states in a federal system. First, every State has exclusive jurisdiction and sovereignty over persons and property within its territory, and second, no State can exercise direct jurisdiction and authority over persons or property that are not in its territory (Justia US Law 2022).

However, this last idea has evolved as the dynamics of contemporary society and the new ways in which commerce is practised have led to this principle being attenuated. The Court has established more modern standards for personal jurisdiction based on the nature and quality of contacts that individuals and corporations have with a state. This test allows State courts to gain power over out-of-State defendants (Weiss, Rifkind, Wharton, and Garrison 2022).

This last point is relevant for foreign companies and individuals. The Supreme Court ruled in *Daimler vs. Bauman* (2014) that for a court to have jurisdiction over a foreign company it must be “at home”, that is, based in the United States. However, in exceptional cases, even if the company is not domiciled in the United States, if it has a continuous and systematic presence, and if its operations in the territory are substantial, jurisdiction over the corporation may also exist (*Columbia National Helicopters vs. Hall* 1984).

This entire debate is relevant to our analysis. The legislation allows people and corporations from third countries to be sued for events that occurred outside of US territory, and by people who were not US citizens at the time of nationalisation. Therefore, it does not consider the question of due process.

This is a key point when evaluating the applicability of the statute, when lawsuits are brought forward, and is one of the key defences available for a defendant.

This topic relates to the question of citizenship. The Helms-Burton Act contemplates a new and controversial approach to citizenship, which allows Cubans naturalised in the United States to enjoy the State's protection from the consequences of events that took place before they became American citizens. This situation contradicts the broad American judicial practice, in which one can only enjoy legal protection for events that occurred when one enjoyed American citizenship (Roy 1998).

Without a doubt, one of the aspects that has the most implications in the Title III processes is the standing. Article III of the US Constitution provides that federal courts have jurisdiction over cases and disputes arising under federal law. When interpreting these terms, the US Supreme Court has held that a plaintiff must establish standing, that is, the lawsuit must be based on an alleged actual or imminent injury that is concrete and individual (Cornell Law School. Legal Information Institute, s.f.). Although Congress has the power to enact laws that create new legal rights, and that allow people to sue when those rights are violated, the Third Amendment limits the power of federal courts to decide cases (Freire, Domb, and Augusto 2022).

Historically, the Supreme Court has been inconsistent in its interpretation of the Third Amendment, expanding or limiting the requirements for determining whether a plaintiff has standing. In recent years, the existence of an irreducible minimum has been argued to demonstrate legitimation. In this doctrine, there are three requirements: the plaintiff must have personally suffered some real harm or threat; the damage or threat can be fairly attributed to the defendant's contested action; the damage suffered can be effectively repaired through a judicial decision (Epic Org s.f.).

In the event that a lawsuit filed in federal court has multiple parties, for each relief requested there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff or co-plaintiff (Cornel Law School 2022). Additionally, two more recent Supreme Court decisions, *Spokeo, Inc. vs. Robins* (2016) and *TransUnion LLC vs. Ramirez* (2021), have cast significant doubt on the power of Congress to create rights that are actionable in federal court. The Court announced a new rule: proof of concrete damage, not simply legal damage, and added that it must be traceable. The Supreme Court has held that simply alleging that a particular claim arises from a federal congressional statute is not sufficient to have standing. The injury must exist regardless of what is established by any statute. As a result, federal courts are increasingly questioning Congress' judgment and dismissing lawsuits.

Considering all this, it is very difficult for a plaintiff to demonstrate that the nationalisations carried out in Cuba in the years after 1959 caused concrete

damage. Furthermore, assuming that damage is proven, it is difficult in the extreme to prove it is attributable to a company or person sued for doing business on property that was expropriated and is now the property of another owner. Even if specific harm is demonstrated and it is attributable to the defendant, it is very unlikely that the court will be able to effectively repair the harm beyond monetary compensation. The court cannot restore the property to the original owner nor can it impute guilt to the defendant.

Another doctrine that has been under debate in relation to the law and especially with the claims of Title III, is what is known in American legal theory as *scienter*. Although much less addressed, this could also represent a challenge for the plaintiffs. It refers to the state of mind that someone must have before they can be legally responsible for their actions. *Scienter* requirements vary across statutes, and may even differ between elements of a single statutory provision (Bellinger and Mirski 2020).

Title III establishes that a person traffics in confiscated property if that person knowingly and intentionally engages in certain actions defined in the law as trafficking. Knowingly is defined elsewhere in the act as knowingly or having reason to know. This is a controversial element, since it is difficult for a person or entity to look for records as far back as 1959 while engaging in business deals. It may be complex to prove in some cases that the defendant knew that the property had been nationalised. However, this point has seldom been studied and addressed in relation to Title III.

Hence, the Helms-Burton Act is, to say the least, a controversial piece of legislation, as it contradicts a wide array of constitutional and doctrinal principles, fundamental to US judicial and political systems. The doubts about the legality of the statute have yet another important level: apparent contradictions with international law.

### **3. The Helms-Burton Act and International Law**

International law is a controversial topic in itself, given the absence of a fully legitimate supranational political body with the capacity to produce binding legislation. It is largely the result of the combination of inter-governmental agreements and traditions. The UN system is a network of inter-governmental organisations, with very limited capacity to produce significant binding rules. Yet, there is a degree of consensus around an array of principles and referential documents that constitute the general framework of international law.

One of the first problems is the question of territoriality. This is an issue with several dimensions related to, among others, procedural law and theoretical debates about the law in space. A State has sovereignty and public political

power solely over its territory; therefore, it can only create rules and regulations for the space where it exercises its sovereignty.

The Helms-Burton Act is built on the condemnation of the nationalisation process that occurred in Cuba and, in addition, sanctions third parties who conduct business in Cuba. It intends to regulate and sanction beyond the limits of US sovereignty. Therefore, it violates the principle of territoriality: it is extraterritorial.

Another important issue that connects the principles of international law to US constitutional and doctrinal frameworks is related to the fundamental justification of the law. The US Congress decreed that the Cuban nationalisations were illegal, based on a report from the Foreign Relations Committee of the House, under the number 104-202 (United States House of Representatives 1995). The document generalised the use of the term confiscation when considering that any seizure of property by the Cuban government after January 1959, and which had not been compensated or resolved under an international agreement on claims settlement, would be equal to confiscation.

This criterion does not differentiate the types of processes that unfolded in Cuba after the triumph of the Revolution. The confiscation of property constitutes an accessory sanction that was imposed on individuals convicted of a number of serious crimes. It was legalised by Article 24 of the *Ley Fundamental de la República* (Gobierno Provisional 1959a) and regulated in Law 664 (Gobierno Provisional 1959b). This process derives from a criminal trial and it does not entail compensation.

Confiscation was imposed primarily on assets owned by Fulgencio Batista and his collaborators, and also on assets owned by individuals and entities that had committed crimes against the Cuban population, the national economy or the public treasury, and those who would enrich or had enriched themselves illegally through the abuse of public power (Gobierno Provisional 1959a). This is a historical institution in criminal law, which existed in Cuba long before 1959. It was applied to individuals who emptied the coffers of the State while fleeing Cuba. In other cases, it was applied to individuals who killed and tortured political opponents during Batista's dictatorship.

Forced expropriation, the method applied for the nationalisations in Cuba, is an institution of an administrative nature that seeks to transfer assets from private to public ownership, for reasons of public benefit or social interest. In this case, the owner must be compensated (Valido 2015). The nationalisation was conducted in accordance with international law and with Article 24 of the 1940 Constitution. The latter was the core of the *Ley Fundamental* of 1959 (Gobierno Provisional 1959a).

As part of the process, Law 851 of 1960 established the procedures to compensate for nationalised properties. In addition, ten specific resolutions were

adopted for the nationalisation of US assets. The United States government refused to accept or even discuss the compensation terms proposed by the Cuban government (Miranda 1996).

Modern international law accepts and regulates the right of the States to nationalisation, as long as it is for reasons of public benefit, the corresponding compensation is stipulated, and there are no discriminatory reasons. All these criteria were followed by the Cuban nationalisation process (Fernández Pérez 1998). In fact, the Cuban government resolved the issue of compensation with all countries, except the United States, due to Washington's refusal, and compensated former owners who remained in Cuba as well. This refutes the conclusion of report 104-202, and thus invalidates the basic assumption of the Helms-Burton Act.

There are several other problems. Non-retroactivity is a general principle of law (Silva García and Villeda Ayala 2017). It means that new legislation should not be applied to events or situations prior to the date of implementation of said legal norm. The fundamental argument for the defence of this principle is legal certainty. However, it has exceptions, fundamentally in criminal law, where a rule can be applied retroactively, as long as it benefits the offender or alleged offender.

Claims under Title III of the Helms-Burton Act can be brought by US persons and companies, who were US citizens or subject to the jurisdiction of the United States at the time their property was seized. As mentioned above, these claims may or may not have been certified by the Foreign Claims Settlement Commission of the US Department of Justice. However, the so-called uncertified claims, that is, those that were not presented to the FCSC, can be introduced by natural and legal persons who were Cuban at the time of nationalisation, and who subsequently became naturalised American citizens or domiciled in the United States.

If a person or company that was not subject to US jurisdiction at the time the nationalisations occurred can file a claim under the aforementioned Title III, then it is being retroactively considered that they were US nationals. Therefore, this violates the principle of non-retroactivity. It does not qualify as an acceptable exception, as it damages the alleged offender, Cuba in this case. The statute also has a discriminatory nature, since it does not grant equal protection to citizens of other countries or from other origins.

Likewise, authors like Dunning (1998) point to the principle of the nationality of claims in international law. Under this principle, eligibility for compensation requires US nationality at the time of loss. Therefore, confiscations and expropriations by the Cuban government of property owned at the time by Cuban citizens should not be actionable in the courts of the United States.

From the point of view of Public International Law, there are studies that show serious violations of several other guiding principles. One of the most

widely addressed is the principle of non-intervention, which aims at protecting the right of a State to its sovereignty and independence. This implies that the State has freedom of action within the limits of its jurisdiction, but without violating the rights of other States. The application of coercive measures on third countries and Cuba, justified on the base of the nationalisations and other events within Cuba, violates this principle (Pino Canales and Diaz Perez 2020). It is a means to internationalise the US blockade by interrupting investment flows and commercial relations between third countries and Cuba, and thus limit the sovereignty of those States –and Cuba.

The Helms-Burton Act also violates other norms and principles of international law recognised in the Charter of the United Nations Organization (1945). We can mention the principle of self-determination, freedom of trade, sovereign equality and non-interference in the internal affairs of States. Furthermore, it transgresses the principle of peaceful coexistence and the prohibition of the use of force between nations, as well as national sovereignty over natural resources and the right to nationalise. It is also in conflict with other instruments of international law, like UN Resolution 1514 on the granting of independence to colonial countries and people (United Nations Organization 1960), which expresses that all peoples have an inalienable right to absolute freedom, to the exercise of their sovereignty and to the integrity of their national territory.

Similarly, it contradicts Resolution 2625 (XXV) of the General Assembly (1970), on the Declaration of the Principles of International Law relating to friendly relations and cooperation among States in accordance with the Charter of the United Nations. This resolution states that by virtue of the principle of equal rights and free determination, all peoples have the right to freely determine, without external interference, their political condition; they must be free to continue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

From the moment that the debates on the bill began, a number of specialists and some of Washington's commercial and political allies pointed to violations of international regulations on trade, like the agreements of the World Trade Organization or regional treaties such as the North American Free Trade Agreement (NAFTA). Specifically, in terms of international trade, the law in its Title III violates the regulations that govern the freedom of investment and financing, and violates the regulations established by institutions such as the World Trade Organisation, the World Bank and the International Monetary Fund (Pino Canales and Diaz Perez 2020).

The Helms-Burton Act has been rejected in numerous multilateral fora. The United Nations Organisation, the Community of Latin American and Caribbean States, the Association of Caribbean States, and the African Union, all have

published statements condemning the extraterritorial nature of the statute (Dirección General de Estados Unidos 2019). The European Union declared that it violates the United States' obligations under the General Agreement on Tariffs and Trade (World Trade Organisation 1994), in particular Articles I, III, V, XI, and XII. As a consequence of these considerations, the European Union sought the formation of a World Trade Organisation Dispute Settlement Understanding panel (Spanogle 1998). However, proceedings in the panel were suspended when the European Commission withdrew its lawsuit, as the US government suspended the application of Title III and stopped applying Title IV. This agreement meant the end of the legal dispute between Brussels and Washington (Roy 1998).

Mexico and Canada, signatories of NAFTA along with the United States, not only rejected the law publicly, but also developed and approved antidote mechanisms to protect their businesses from the effects of the Helms-Burton. On 1 October 1996, Mexico implemented the Law for the Protection of Trade and Investment from Foreign Regulations that Contravene International Law. In the case of Canada, regulations that had already been introduced to protect themselves from other coercive measures against Cuba were modified and strengthened (Castro Martínez 1997).

The European Union approved, on 22 November 1996, Council Regulation (EC) 2271/96, on the protection against the effects of the extraterritorial application of legislation adopted by a third country, and against actions based on or derived from it. It contemplates the obligation to report within a period of 30 days the possible impact of a coercive measure on a national of the European Union, and also contemplates reactive actions such as seeking compensation in court for damages (Castro Martínez 1997).

Within the framework of other regional organisations, the discussions resulted in the rejection of the legislation. Of particular interest is the position of the Organization of American States (OAS), which has been tied to the US agenda for decades. However, in the regular period of sessions held in Panama on 3 June 1996, the OAS approved a resolution that ordered the Inter-American Juridical Committee to present an opinion to the Permanent Council on the validity of the Helms-Burton Act and its conformity with international law (Dávalos 2019: 164).

Following this instruction, on 23 August 1996, the Inter-American Juridical Committee issued an opinion, in which it concluded that the legislation was not in accordance with international law in several aspects. It added that Articles 10 and 34 of the OAS Charter point out that every American State has the duty to respect the rights enjoyed by other States in accordance with international law, making clear the concern about the promulgation and application by Member States of laws and regulatory provisions whose extraterritorial effects affect the sovereignty

of other States, legitimate interests of entities and persons under their jurisdiction, as well as freedom of trade and investment. The opinion of the Inter-American Juridical Committee, in compliance with the General Assembly Resolution (AG/DOC.3375/96), was adopted unanimously in an ordinary session held on the same day in Rio de Janeiro (Inter-American Juridical Committee 1996).

Hence, the array of contradictions with commonly accepted principles of international law compounds the problems with the legality of the Helms-Burton Act. The stance of international organisations and the vast majority of members of the United Nations on the topic coincide in this regard.

## Conclusions

The Helms-Burton Act created a stable legal core for the continuous pressure on Cuba, and as such it anchors multiple specific actions, intended to crush the Cuban economy and force the country into accepting US plans. The latter, in turn, is meant to contribute to the reconstruction of the regional power structure, partially damaged by the Cuban revolution, by the long-term survival of the political regime it created, and by Cuba's strive for sovereignty.

Thus, the statute cannot be interpreted as a specific event, a result solely of the actions of some specific groups in a given set of circumstances. It must be placed within the framework of US State policy towards Cuba, which derives from a combination of long-running consensuses around the role of the United States in the region and the world, and the geopolitical value and conditions of the island nation. It is, then, the offspring of the State policy, that shares the end goals of other variants – whether more or less aggressive, it matters not in this sense – and represents a path chosen in those conditions to attempt to achieve those goals.

Against that backdrop, the making of the act responded to a combination of multiple factors. Several of them were particularly important: the process of adjusting American foreign policy to the “post-Cold War” conditions and the interest in reshaping the international system; the perception of the conditions in Cuba; the shifting landscape in American politics; the increased influence of certain interest groups; contrasting hierarchies of priorities between sectors of the elites, positioned in favour or against the bill, that shaped their willingness to spend political capital in the issue.

Hence, it was the result of the balance of forces between domestic political actors and the resulting control on the making of public policy in a given context, that determined the path chosen for the advancement of the common strategic goals defined by the State policy. It derived from the interplay of interests and power that shaped American politics and policies in a period in which

the US government and power elites were scrambling to reorganise the world in an order better suited for its project as a global power, while consolidating its domestic version of the Washington Consensus.

The examination of the text shows a wide array of issues regarding the legality of the statute in different levels. From the point of view of American law, the act violates two core constitutional principles: the tri-partition of powers, by mutilating the functions of the president in matters of foreign policy and by interfering with the powers granted to the judiciary; and the due-process clauses included in Fifth and Fourteenth Amendments, particularly in relation to the jurisdiction of the courts and the requirements for standing. These two violations of the constitutional framework, which have been pointed out by a number of scholars, render the Helms-Burton Act effectively unconstitutional.

The act violates other principles and doctrines. One of them is that it was, clearly, a political action, aimed at political goals, rather than a legislative action aimed at regulating matters of legal relevance. However, this principle is, in itself, flawed, as the law, its makers and its enforcers are as many components of the political system. Hence, any piece of legislation will entail political goals and its making will be driven by political concerns, regardless of its presentation.

More importantly, the Helms-Burton followed a decades-old trend to ignore the Doctrine of Act of State, which has been upheld by the Supreme Court of the United States, even when concerning Cuba and the nationalisations that served as justification for the bill in the first place. This has two important implications: on the one hand, it is a further demonstration of the violation of constitutional principles, as it basically neglects the rulings of the Supreme Court and oversteps the formal boundaries of legislative power; on the other, it demonstrates a clear double standard, as it negates the doctrine for a foreign country, not for the US, while setting a precedent that can eventually cause issues for the North American country itself.

Additionally, the Helms-Burton Act contradicts an array of principles of international law. This is particularly the case of the principles of sovereign equality of States, and self-determination. These are included in the Charter of the United Nations, of which the United States is a signatory and co-founder, and other documents. There are well-established principles, and bedrock of the international order.

These are complemented by the necessary territoriality of any national legislation, as it should apply only to territories and persons under the sovereignty of the State. The statute is clearly extraterritorial, and far exceeds the legal limits of US sovereignty. In many ways its implications are global in scope. Furthermore, violations extend to other international agreements, like freedom of trade, as

asserted by the World Trade Organisation, of which the US is a founder and also one of its builders, first as the General Agreement on Trade and Tariffs and later as the WTO proper.

This is an area in which contradictions with international law meet unconstitutional actions. According to the US Constitution, Article II, Section 2, international treaties signed by the US have the strength of law of the land. That is, they become part of the institutional and constitutional framework of the United States. Certainly, the courts have often made efforts to interpret congressional actions in manners that attempt to gloss over contradictions of this sort (Kirgis 1997). But the fact remains that the Helms-Burton Act contradicts fundamental principles of major international agreements of which the US is a signatory.

Hence, the Helms-Burton Act is clearly unconstitutional and violates the international law. It was a product of political processes in very fluid conditions, shaped by a State policy. Yet, it became law of the land, or more precisely, law of many lands, regardless of illegality and illegitimacy.

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