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## Implementation:

# Rock and a Hard Place: Helms-Burton Summary and Responses

*Roland P. Wiederaenders, III*<sup>1</sup>

## I. Introduction.

The latest sortie in the ongoing diplomatic stalemate between the United States and Cuba is in the form of legislation passed by the United States Congress and signed into law by President Clinton on March 12, 1996. This legislation is the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996<sup>2</sup>, also known as the Helms-Burton Act, after its two authors, Senator Jessie Helms (R - N. Carolina) and Representative Dan Burton (R - Indiana).

The purpose of this article is to highlight provisions of Helms-Burton that affect United States trade relations with other countries. Also considered in this article are responses to the Act from Canada and Mexico and other states who are potential accessors to NAFTA.

## II. Helms-Burton.

Under the Findings section of the Act, Congress has stated that changes in world politics and in particular the end of large-scale economic subsidization by the former Soviet Union of Cuba's economy has led to a decline in Cuba's economy of at least sixty percent over the last 5 years.<sup>3</sup> Congress recognized that systematic human rights abuses occur in Cuba. These abuses include Cuba's ban on free democratic elections, its active participation in illegal international narcotics trade, Cuba's harboring of fugitives from justice in the United States, the country's utilization of torture, as well as execution, exile, confiscation, political imprisonment and other forms of terror and repression.<sup>4</sup>

Congress further recognizes that the United Nations has passed several resolutions condemning Cuba's human rights violations.<sup>5</sup> The United Nations has imposed sanctions on other countries found guilty of human rights violations and in the case of Haiti, the U.N. authorized the use of "all necessary means" to restore the "democratically elected government of Haiti."<sup>6</sup>

1. J.D. Candidate, Southern Methodist University Class of 1988. Staff Editor, International Law Review Association of SMU.
2. Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 U.S.C.A. § 6021-6091 (1996) [hereinafter Helms-Burton].
3. *Id.* § 6021(1).
4. *Id.* § 6021(4), (13) & (15).
5. *Id.* § 6021(22).
6. *Id.* § 6021(26) (citing S.C. Res. 940, U.N. SCOR, 3413th Mtg., U.N. Doc. S/RES/940 (1994)).

Pursuant to these findings, the Cuban Democracy Act of 1992,<sup>7</sup> amendments to the Foreign Assistance Act of 1961 made by the Freedom Support Act<sup>8</sup> and the United States' commitment to the protection of human rights and fundamental freedoms as expressed in the Charter of the United Nations and in the Universal Declaration of Human Rights,<sup>9</sup> the United States Congress states that the purposes of Helms-Burton are:

- (1) to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere;
- (2) to strengthen international sanctions against the Castro government;
- (3) 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 the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States;
- (4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers;
- (5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and
- (6) to protect United States nationals against confiscatory taking and the wrongful trafficking in property confiscated by the Castro regime.<sup>10</sup>

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7. *Id.* § 6001-6009 (1996).

8. Freedom for Russian and Emerging Eurasian Democracies and Open Markets Support Act of 1992, 22 U.S.C.A. § 5801 and following (1996).

9. Helms-Burton, *supra* note 1, § 6021(9), (11) & (12). "The Cuban Democracy Act of 1992 calls upon the President to encourage the governments of countries that conduct trade with Cuba to restrict their trade and credit relations with Cuba in a manner consistent with the purposes of that Act." The amendments to the Foreign Assistance Act of 1961 require that "the President, in providing economic assistance to Russia and the emerging Eurasian democracies, take into account the extent to which they are acting to terminate support for the communist regime in Cuba including removal of troops, closing military facilities, and ceasing trade subsidies and economic, nuclear, and other assistance." *Id.*

10. *Id.* § 6022(1)-(6).

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## A. TITLE I.

Title 1 of the Act begins with the Act's Statement of Policy. The first subsection reiterates the language of Article 39 of Chapter VII of the United Nations Charter, stating that violations of human rights by Castro's government are a "threat to international peace."<sup>11</sup> This policy statement calls for the President to instruct United States Permanent Representative to the United Nations to seek within the Security Council a "mandatory international embargo against the totalitarian Cuban Government pursuant to chapter VII of the Charter of the United Nations, employing efforts similar to consultations conducted by United States representatives with respect to Haiti."<sup>12</sup>

Additionally the Statement of Policy states that the United States will give no further aid to any independent state of the former Soviet Union if any such state continues assisting Cuba in the creation of nuclear facilities, or continues intelligence activities targeted at the United States. Section 106 requires the President to submit to Congress a report concerning the progress of the withdrawal of "personnel of any independent state of the former Soviet Union, including advisers, technicians, and military personnel, from the Cienfuegos nuclear facility in Cuba."<sup>13</sup> Either completion of nuclear facilities in Cuba or further threats on the part of the Castro government to "unleash [on the United States] another wave of Cuban refugees fleeing from Castro's oppression" will be considered acts of aggression and will be "met with an appropriate response in order to maintain the security of the national borders of the United States."<sup>14</sup> Concerning Russia in particular, Title I expresses Congress' "strong disapproval" of the "extension by Russia of credits equivalent to \$200,000,000 in support of the intelligence facility at Lourdes, Cuba, in November 1994."<sup>15</sup>

Title I reaffirms section 1704(a) and (b)(1) of the Cuban Democracy Act of 1992; this Act, *inter alia*, expresses the United States' disfavor toward other nations for their ongoing economic dealings with Cuba.<sup>16</sup> Title I amends the Trading With the Enemy Act, making the provisions of that Act applicable to persons in violation of the provisions of Helms-Burton.<sup>17</sup> The Title I amendment also removes the section of the Trading with the Enemy Act that in the past has precluded the imposition of penalties for — (A) news gathering, research, or the export or import of, or transmission of, information or informational materials; or (B) clearly defined educational or religious activities, or activities of recognized human rights organizations, that are reasonably limited in frequency, duration, and number of participants.<sup>18</sup>

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11. *Id.* § 6031.

12. *Id.* § 6031(2).

13. *Id.* § 6036(a).

14. *Id.* § 6031(4)(A) & (B).

15. *Id.* § 6036(d)(1).

16. *Id.* § 6032(a)(1).

17. *Id.* § 6032(d)(1) (amending Trading with the Enemy Act, 50 App. U.S.C.A. §16 (1996)).

18. 50 App. U.S.C.A. § 16 (1995).

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These acts are now prohibited.

Title I includes debt-for-equity swaps among those activities prohibited by the Cuban Democracy Act.<sup>19</sup> Also prohibited is investment by a United States person<sup>20</sup> in Cuba's telecommunications infrastructure and the prohibited investment "includes the contribution (including the donation) of funds or anything of value to or for, and the making of loans to or for, such network."<sup>21</sup>

Another important aspect of Title I is its codification of the economic embargo of Cuba previously promulgated under part 515 of title 31 of the Code of Federal Regulations.<sup>22</sup>

Section 104 states that the United States will oppose admission of Cuba into any international financial institution,<sup>23</sup> both by the United States' voice and vote and also by means of its withdrawal of economic support for such institution should loans or other assistance be extended to Cuba by that institution.<sup>24</sup> This section considers the potential for a democratically elected government in Cuba and provides for support the United States would extend to such a government through loan programs from international financial institutions of which the United States is a member.<sup>25</sup>

Section 105 states that the President should instruct "the United States Permanent Representative to the Organization of American States to oppose and vote against any termination of the suspension of the Cuban Government from participation in the Organization until the President determines . . . that a democratically elected government in Cuba is in power."<sup>26</sup>

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19. Helms-Burton, *supra* note 1, § 6032(f)(3)(B) (amending Cuban Democracy Act of 1992, 22 U.S.C.A. § 6003(b)(2) (1996)).
  20. The term 'person' means any person or entity, including agency or instrumentality of a foreign state." *Id.* § 6023(11).
  21. *Id.* § 6032(g)(5) (amending Cuban Democracy Act of 1992, 22 U.S.C.A. § 6004(e) (1996)).
  22. [S]ection 515.024 of title 31, Code of Federal Regulations, prohibits the entry of, and dealings outside the United States in, merchandise that— (1) is of Cuban origin; (2) is or has been located in or transported from or through Cuba; or (3) is made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba. *Id.* § 6040(a)(1)-(3).
  23. This section names the financial institutions that its provisions are applicable to: International Monetary Fund, the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guaranty Agency, and the Inter-American Development Bank. *Id.* § 6034(c).
  24. *Id.* § 6034(a) & (b).
  25. *Id.* § 6034(a)(2).
  26. *Id.* § 6035.
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Several sections of Title I provide for amendments to the Foreign Assistance Act of 1961 primarily as that Act defines the qualifications the independent states of the former Soviet Union must meet before receiving economic assistance from the United States. Section 106 prohibits the United States from providing assistance to any "independent state that . . . [in turn] is providing assistance for, or engaging in nonmarket based trade" with Cuba.<sup>27</sup> This section adds to the Foreign Assistance Act the definition of nonmarket based trade as exports, imports, exchanges, or other arrangements that are provided for goods and services (including oil and other petroleum products) on terms more favorable than those generally available in applicable markets or for comparable commodities.<sup>28</sup> Any amount of economic assistance extended to Cuba by one of the independent states will be reduced by "an amount equal to the sum of assistance and credits . . . provided . . . by such state in support of intelligence facilities in Cuba, including . . . Lourdes."<sup>29</sup> The requirements imposed on the independent states for the receipt of economic assistance can be waived by the President if "such assistance [to be provided to the states] is important to the national security of the United States . . . [and, in the case of Russia] the Russian Government has assured the United States Government that the Russian Government is not sharing intelligence data collected at the Lourdes facility with officials or agents of the Cuban Government."<sup>30</sup> These requirements do not apply to humanitarian aid, and, democratic political reform or rule of law activities; . . . technical assistance for safety upgrades of civilian nuclear power plants; . . . the creation of private sector or nongovernmental organizations that are independent of government control; . . . the development of a free market economic system; . . . assistance under the secondary school exchange program administered by the United States Information Agency; or . . . assistance for the purposes described in the Cooperative Threat Reduction Act of 1993.<sup>31</sup>

Section 107 of Title I converts television broadcasting to Cuba under the Television Marti Service to ultra high frequency (UHF) broadcasting.<sup>32</sup> This section also repeals the Television Broadcasting to Cuba Act and the Radio Broadcasting to Cuba Act.<sup>33</sup>

Foreshadowing the provisions of Title III, Section 108 of Title I requires a report from the President detailing all assistance third-party countries provide to Cuba, Cuba's trade with other countries and past and present or future planned joint ventures by foreign business firms regardless of whether these ventures involve facilities that are the subject of a claim against Cuba by a United States national.<sup>34</sup> Also required in this report is

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27. *Id.* § 6036(c)(1)(C).

28. *Id.* § 6036(c)(3). Examples of such non-market based trade include "(A) exports to the Cuban Government on terms that involve a grant, concessional price, guaranty, insurance, or subsidy; (B) imports from the Cuban Government at preferential tariff rates; (C) exchange arrangements that include advance delivery of commodities, arrangements in which the Cuban Government is not held accountable for unfulfilled exchange contracts, and arrangements under which Cuba does not pay appropriate . . . costs" and debt-for-equity agreements. *Id.* § 6036(c)(3)(A)-(D).

29. *Id.* § 6036(d)(1) (amending Foreign Assistance Act of 1961, 22 U.S.C.A. § 2295a(d) (1996)).

30. *Id.* § 6036(d)(2).

31. *Id.* § 6036(d)(3)(A)-(G).

32. *Id.* § 6037(a).

33. *Id.* § 6037(c) (repealing 22 U.S.C.A. § 1465aa and following and 22 U.S.C. § 1465 and following).

34. See generally *id.* § 6038(b)(1)-(7).

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information regarding outstanding or forgiven debt Cuba has with foreign countries, steps being taken by the United States to ensure that no Cuban produced products enter the United States and information concerning foreign countries with whom Cuba has arms dealings.<sup>35</sup>

Section 111 requires the President to reduce the amount of economic assistance provided by the United States to any country in an amount equal to what that country provides to Cuba in support of the Cuban nuclear facility project at Juragua, near Cienfuegos, Cuba.<sup>36</sup>

## B. NAFTA.

In Section 110, Congress remarks that NAFTA "does not modify or alter the United States sanctions against Cuba"<sup>37</sup> and cites the NAFTA Implementation Act as authority for this conclusion.<sup>38</sup> The Implementation Act states that NAFTA's Article 309(3) "permits the United States to ensure that Cuban products or goods made from Cuban materials are not imported into the United States from Mexico or Canada and that U.S. products are not exported to Cuba through those countries."<sup>39</sup> This Statement also cites NAFTA Article 2102 for authority that nothing in NAFTA shall prevent any Party to the agreement from taking steps necessary "for the protection of [the Party's] security interest taken in time of war or other emergency in international relations."<sup>40</sup> During NAFTA negotiations, the United States made it clear that this article would be used specifically as it related to sanctions imposed by the United States against Cuba.<sup>41</sup> Helms-Burton does encompass the embargo but goes far beyond it, especially in the Act's Title III provisions.

## C. TITLE II.

Title II is entitled "Assistance to a Free and Independent Cuba" and provides for the assistance that the United States will extend to Cuba "at such time as the President determines that a transition government or a democratically elected government in Cuba . . . is in power."<sup>42</sup> At that time, the President is authorized to lift the United States' economic embargo of Cuba and to "suspend the right of action created in section 302 with respect to actions thereafter filed against the Cuban Government, to the extent that such steps contribute to a stable foundation for a democratically elected government in Cuba."<sup>43</sup>

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35. *Id.*

36. *Id.* § 6041(b)(1).

37. *Id.* § 6040(b).

38. *Id.* § 6040(b)(1) & (2).

39. NAFTA Implementation Act, Sept. 13, 1993, 1993 WL 561138.

40. *Id.*

41. *Id.*

42. *Helms-Burton*, *supra* note 1, § 6062(a)(1).

43. *Id.* § 6064(a).

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Pursuant to Section 207, the Secretary of State is ordered to provide a report detailing extant claims of United States nationals against Cuba, what relation the prompt resolution of these claims bears on "the revitalization of the Cuban economy" and what role the United States will play in assisting the transition government or the democratically elected government in Cuba "establish mechanisms to resolve property questions."<sup>44</sup>

#### D. TITLE III.

The most controversial portion of Helms-Burton is Title III, which provides United States nationals with a cause of action against persons found trafficking in property illegally confiscated by Castro. Section 302 provides that "any person [who] . . . traffics<sup>45</sup> in property . . . confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages."<sup>46</sup> The money damages are computed by taking the greater of: "the amount . . . certified to the claimant by the Foreign Claims Settlement Commission, . . . plus interest;" "the amount determined under section 303(a)(2), plus interest;" or "the fair market value of that property . . . plus interest."<sup>47</sup> Court costs and attorney's fees are also recoverable.<sup>48</sup> Subparagraph (a)(2) creates a presumption regarding the liability quantum: if damages are determined through the certification of the Foreign Claims Settlement Commission pursuant to subparagraph (a)(1)(i)(I), that amount is presumed to be the correct damages amount.<sup>49</sup> This presumption can be rebutted by clear and convincing evidence that the correct quantum is the amount determined under either (a)(1)(i)(II) or (III).<sup>50</sup>

The quantum value of (a)(1)(i) is trebled in two instances. The first is when the claim for such trafficking is certified by the Foreign Claims Settlement Commission pursuant to title V of the International Claims Settlement Act of 1949.<sup>51</sup> The second is when a claimant ("other than a United States national to whom subparagraph (A) applies") provides notice to defendant in the action at least 30 days before initiating the action or joining such person as defendant, and that person after the end of the 30-day period beginning on the date the notice is provided traffics in the confiscated property that is the subject of the action.<sup>52</sup>

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44. *Id.* § 6067 (a).

45. "[A] person traffics in confiscated property if that person knowingly and intentionally—transfers, distributes, dispenses, brokers, or otherwise disposes of . . . purchases, receives, obtains control of, or otherwise acquires . . . or improves . . . invests in, . . . or begins . . . to manage, lease, possess, use or hold an interest in, . . . enters into a commercial arrangement using or otherwise benefitting from . . . , or causes, directs, participates in, or profits from trafficking . . . through another person [in]" such confiscated property "without the authorization of any United States national who holds a claim to the property. *Id.* § 6091(b)(2)(A)(I)-(III).

46. *Id.* § 6082(a)(1).

47. *Id.* § 6082(a)(1)(i)(I), (II) & (III).

48. *Id.* § 6082(a)(1)(ii).

49. *Id.* § 6082(a)(2).

50. *Id.* § 6082(a)(2).

51. *Id.* § 6082(a)(3)(A) & (C)(i) & (ii).

52. *Id.* § 6082(a)(3)(B).

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A United States national must acquire ownership to a claim for confiscated property under this provision before the date of the enactment of Helms-Burton.<sup>53</sup> No federal court can decline adjudication under the Act of State Doctrine of an action brought pursuant to subparagraph (1).<sup>54</sup> Any judgment under this section against "an agency or instrumentality of the Cuban Government shall not be enforceable against an agency or instrumentality of either a transition government . . . or a democratically elected government in Cuba."<sup>55</sup>

For an action brought under this provision, Section 303 provides that proof of ownership "of an interest in property" is established either by certification of the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act<sup>56</sup> or by a special master ("including the Foreign Claims Settlement Commission") appointed by the court if the claimant's interest in the property has not been previously certified.<sup>57</sup> If "administrative agencies or courts of foreign countries or international organizations" either assign value to or invalidate the claim, the federal court "shall not accept as conclusive evidence" such determinations, "unless the declaration of value or invalidation was found pursuant to binding international arbitration to which the United States or the claimant submitted the claim."<sup>58</sup>

Section 306 provides that this title and all its provisions take effect August 1, 1996 provided that the President does not suspend the effective date pursuant to paragraph (b).<sup>59</sup> The President may suspend the effective date for no longer than an initial six month period, and thereafter for subsequent six month periods,<sup>60</sup> if he determines that "suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."<sup>61</sup>

#### E. TITLE IV.

The Secretary of State and the Attorney General, pursuant to Title IV, have the power to exclude from entrance into the United States any person whose confiscated property is subject to a claim created by Title III, traffics in such confiscated property, is a "corporate officer, principal, or shareholder with a controlling interest of an entity" which has either confiscated or trafficked in such property, or such person's spouse, minor child, or their agent.<sup>62</sup>

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53. *Id.* § 6082(a)(4)(b).

54. "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

55. Helms-Burton, *supra* note 1, § 6082(d).

56. International Claims Settlement Act of 1949, 22 U.S.C. § 1643 and following (1996).

57. Helms-Burton, *supra* note 1, § 6083(a)(2).

58. *Id.* § 6083(a)(3).

59. *Id.* § 6085(a) & (b)(1).

60. *Id.* § 6085(b)(2).

61. *Id.* § 6085(b)(1).

62. *Id.* § 6091(a)(1), (2), (3) & (4).

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### III. Responses to Helms-Burton.

On July 16, 1996, President Clinton announced the implementation of Title III of Helms-Burton; at the same time, he postponed the effective date of this portion of the Act for six months, pursuant to Title III's Section 306.<sup>63</sup> This six-month period will be up in January, and significantly, after the November presidential election.

Currently two-hundred-and-twelve foreign companies from fifty different countries do business in Cuba and four-hundred-and-fifty foreign firms have established offices there.<sup>64</sup> Considering the level of involvement in Cuba by foreign countries, responses to Helms-Burton have been resoundingly negative. European Union countries prepared to enact legislative counter-measures to Helms-Burton before Clinton announced the postponement of the Act's effective date in July, and even after this announcement, several countries may proceed to enact such legislation.<sup>65</sup>

Great Britain already has such legislation in place. Britain's Protection of Trading Interests Act of 1980 currently requires British companies to not cooperate with foreign courts, either by refusing to provide documents or to send witnesses.<sup>66</sup>

The following section details reactions to Helms-Burton by likely accessor states to NAFTA as well reactions to the Act from Mexico and Canada.

#### A. ARGENTINA.

Argentina's ambassador to the United States Raul Granillo Ocampo said July 5, 1996 that Helms-Burton could damage relations between Argentina and the United States.<sup>67</sup> Argentina was once a consistent critic of Castro's government but recently has made overtures to Cuba in an attempt to expand its economic involvement into Cuba's market.<sup>68</sup> The Rio Group of Latin countries has its secretariat in Argentina and on March 8th voiced its "most energetic rejection" of Helms-Burton, which, it claimed, breaks both international law and the United Nations charter.<sup>69</sup>

#### B. CHILE.

Most likely, the next accessor state to NAFTA will be Chile.<sup>70</sup> In the spring of 1996, United States Secretary of State Warren Christopher visited Chile and was greeted with

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63. *U.S. digs in on Helms Burton*, UPI, July 30, 1996, available in LEXIS, Nexis Library, UPI File.
  64. *Scores of countries making deals with Cuba*: CEPAL, AGENCE FRANCE PRESSE, Aug. 29, 1996, available in LEXIS, Nexis Library, Allnews File.
  65. *EU welcomes Cuba lawsuit delay but vows to keep fighting broader law*, AGENCE FRANCE PRESSE, July 16, 1996, available in LEXIS, Nexis Library, Allnews File.
  66. *Id.*
  67. *US Helms-Burton law could create "conflict" with Argentina: ambassador*, AGENCE FRANCE-PRESSE, July 6, 1996, available in LEXIS, Nexis Library, Allnews File.
  68. Juan Forero, *Cuba: Living in the Past, facing the future*, THE (NEWARK, N.J.) STAR-LEDGER, Apr. 28, 1996, 1996 WL 7930283.
  69. *The Americas: falling out with Uncle Sam*, THE ECONOMIST, Mar. 16, 1996, at 47, 1996 WL 8671269.
  70. See James E. Etri, *The Road to Free Trade: Chilean Accession to the NAFTA*, *infra* at 170.
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Chile's condemnation of Cuba's shooting down of the Brothers to the Rescue Cessnas.<sup>71</sup> However, Chile officially rejected the possibility of imposing any bilateral sanctions in retaliation for Cuba's actions.<sup>72</sup> On March 15, 1996, Chilean Foreign Minister Jose Miguel Insulza also stated that Chile will not accept Helms-Burton.<sup>73</sup> Before a meeting last spring with visiting Cuban Vice Foreign Minister Jorge Bolanos, Insulza said the Chilean Government will not accept laws made by other countries that will affect "the interests of Chilean entrepreneurs or common citizens."<sup>74</sup> Chile and Cuba have moved toward political and economic cooperation since the normalization of their relations in April, 1995 and Chile has about 50 million dollars (US) invested in Cuba.<sup>75</sup>

The President of Chile, Eduardo Frei, also stated that NAFTA is still important to Chile because it gives his country access to a very large market.<sup>76</sup> However, apart from NAFTA, Chile already has a bilateral trade agreement with Mexico, signed in 1990, that allows Chile to sell 90% of its products to Mexico duty-free.<sup>77</sup> Frei stated that Chile is also planning to sign a similar bilateral agreement with Canada in October of 1996.<sup>78</sup> Frei said that Chile is "totally against . . . Helms-Burton" for solving the Cuba problem, and thought that "it has been totally ineffective."<sup>79</sup> According to Chile's Chamber of Trade, as of 1995 Cuba received only 0.7 percent of Chilean investments, worth some US\$63 million.<sup>80</sup>

### C. BRAZIL.

Brazil had a trade exchange worth US\$78.4 million with Cuba last year and more than two-hundred-and-sixteen Brazilian companies have dealings with Havana.<sup>81</sup> In response to Helms-Burton, only the tobacco company Souza Cruz, a subsidiary of a British company, has publicly admitted making investments in Cuba.<sup>82</sup> Souza Cruz executives said that they have had no warnings from Washington regarding their involvement in Cuba but admitted that they were afraid of sanctions and did not want their U.S. visa applications to be turned down, pursuant to Helms-Burton's Title IV.<sup>83</sup> Brazil's condemnation of the provisions of Helms-Burton has been restricted to diplomatic announcements.<sup>84</sup>

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71. *Id.*

72. *Id.*

73. *Chile Rejects U.S. Helms-Burton Law*, XINHUA ENGLISH NEWSWIRE, Mar. 15, 1996, 1996 WL 5573704.

74. *Id.*

75. *Cuban Offensive Cast New Pall on US' faltering LA Agenda*, LAGNIAPPE LETTER, Mar. 1, 1996, 1996 WL 8394601.

76. *Chile's Economic Vision Q&A/ Eduardo Frei*, INT'L HERALD TRIBUNE, June 24, 1996, 1996 WL 4091613.

77. *Id.*

78. *Id.*

79. *Id.*

80. Diego Cevallos, *Trade-Cuba: Latin America Generally Ignores Helms-Burton Threat*, INTER PRESS SERVICE, July 29, 1996, 1996 WL 10768436.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

#### D. COLOMBIA.

Leader of the Non-Aligned Movement of Latin American States and president of Colombia, Ernesto Samper, criticized unilateral measures taken against developing countries as "flagrant violations of the U.N. Charter and the rules of the World Trade Organization."<sup>85</sup> The NAM Committee meeting began May 14, 1996 with the participation of foreign ministers, deputy ministers, ambassadors and experts from the thirty-seven member countries.<sup>86</sup> Samper was speaking at the opening of NAM's Methodology Committee and while his statements were not explicitly directed at Helms-Burton, they were an obvious reference to the Act.<sup>87</sup> His statements also referred to the United States disqualification of Colombia as a privileged trading partner after the United States determined that the nation had made insufficient efforts in the war on drugs during 1995.<sup>88</sup>

In May of 1996, the United States revoked the visa of Colombia's Comptroller General David Turbay pursuant to Title IV and in April, Colombia's Attorney General Orlando Vasquez's visa was revoked for the same reason.<sup>89</sup>

In a speech in June of 1996, OAS Secretary-General Cesar Gaviria of Colombia referred indirectly to Helms-Burton when he called for judicial procedures to help solve conflicts among members.<sup>90</sup> Colombia is one of fourteen countries who have signed bilateral, commercial accords with Cuba. Apart from their agreement, twenty-five other countries are planning such bilateral pacts with Cuba.<sup>91</sup>

As a response to Helms-Burton, the Colombian airline Aerorepublica has pulled out its operations from Cuba.<sup>92</sup>

#### E. MEXICO AND CANADA.

Mexico and Canada have both responded negatively to Helms-Burton and are considering legal challenges to Helms-Burton before a trilateral commission, pursuant to NAFTA's Chapter 20 dispute resolution mechanism.<sup>93</sup> As punishment for violations of NAFTA, such a commission could impose trade sanctions against the United States.<sup>94</sup>

85. *Colombia: NAM Knocks Northern nations' Unilateral Measures*, INTER PRESS SERVICE, May 16, 1996, 1996 WL 10242793.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Countries Oppose Cuba Law*, (FT. LAUDERDALE, FL.) SUN-SENTINEL, May 17, 1996, at 18A, 1996 WL 4188345.

90. *OAS takes up fight against land mines*, MONTREAL GAZETTE, June 4 1996, at B1, 1996 WL 4188345.

91. *Cuba Government Assesses the Economic Impact of Helms-Burton Law*, CHRON. LATIN AM. ECON. AFF., Apr. 4, 1996, 1996 WL 7980194.

92. Cevallos, *Trade-Cuba: Latin America Generally Ignores*, *supra* note 79.

93. Philip True, *U.S. diplomat hopes to ease opposition to Helms-Burton - Mexican official doesn't give mission much of a chance*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 1996, available in LEXIS, Nexis Library, Allnews File.

94. *Id.*

### 1. *Mexico.*

Acting Assistant Secretary of State for Inter-American Affairs Jeffrey Davidow told a Senate subcommittee in July that the United States government has notified several foreign companies who may face liability under Helms-Burton: "as a result a significant number of companies with possible involvement in confiscated U.S.-claimed properties have informed the State Department that they are disengaging from those activities," said Davidow.<sup>95</sup> One of these companies, the Mexican cement company, Cemex, has forgone future investment plans in Cuba to avoid any negative effects on trade it currently conducts with the United States.<sup>96</sup>

Mexico has taken steps in its national legislature to enact an "antidote" law to Helms-Burton. On September 23, 1996, the Mexican Senate approved the Law on Protection of Trade and Investments from Foreign Norms Contravening International Law.<sup>97</sup> This law would provide for the imposition of sanctions on Mexican companies that obey foreign laws implemented with extraterritorial objectives in mind and establishes a foundation to assist Mexicans whose assets are affected to countersue and demand indemnification.<sup>98</sup> Mexican leftist opposition leader Senator Felix Salgado said "[w]e will never permit the meddling of a foreign nation in our internal affairs . . . much less become an accomplice to an attack on a country like Cuba, with which we have such friendly ties."<sup>99</sup>

On August 19, 1996, the State department barred executives of Mexico's telecommunications firm, Grupo Domos, which does extensive business with Cuba.<sup>100</sup>

### 2. *Canada.*

Canadian mining interest, Sherritt, was the first foreign company to feel Helms-Burton's effects: since July, Sherritt executives have been denied entrance into the United States pursuant to the Act's Title IV.<sup>101</sup> Sherritt held a routine board meeting in Havana, Cuba on September 13, 1996, in an obvious act of defiance of Helms-Burton.<sup>102</sup> Sherritt has over US\$200 million invested in Cuba in mining, oil exploration, agriculture and tourism activities<sup>103</sup> and operates a nickel mine in Cuba once owned by New Orleans-based Freeport-McMoran, Inc.<sup>104</sup>

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95. *Id.*

96. Colin McMahon, *Mexico acts to shield firms facing U.S. penalties over Cuba; Helms-Burton law causing rifts with trading partners*, CHI. TRIB., Sept. 12, 1996, available in LEXIS, Nexis Library, Allnews File.

97. *Senate approves "antidote" law to offset effects of US Helms-Burton Act*, NOTIMEX NEWS AGENCY, Sept. 24, 1996, available in LEXIS, Nexis Library, Topnews File.

98. *Id.*

99. True, *U.S. diplomat hopes to ease*, *supra* note 92.

100. *Id.*

101. Helms-Burton, *supra* note 1, § 6091(a).

102. *Helms-Burton target company to hold board meeting in Cuba*, AGENCE FRANCE PRESSE, Sept. 12, 1996, available in LEXIS, Nexis Library, UPI File.

103. *Id.*

104. *Mexican executives to be barred from U.S.*, UPI, Aug. 19, 1996, available in LEXIS, Nexis Library, UPI File.

Toronto based Redpath Sugars, which used to buy as much as 100,000 tons of Cuban sugar annually, is turning instead to Colombia and Brazil for its needs.<sup>105</sup> While the company is not affected directly by Helms-Burton, it claims to have canceled its Cuban contracts because of the "logistical nightmare" required to keep Cuban sugar separate from its other inventory, which is frequently shipped to the United States.<sup>106</sup> The Canadian justice department says it is looking into Redpath's decision to cancel its contract.<sup>107</sup> B.C. Sugar Refinery Ltd. said it will continue to import Cuban sugar while managing to keep Cuban sugar separate from other inventory.<sup>108</sup>

Vancouver-based mining interest Northern Orion Explorations Ltd. has recently become Cuba's first commercial-quantity gold producer and was planning on spending US\$60 million this past summer to produce over 80,000 ounces of gold and 440 million pounds of copper.<sup>109</sup> Northern Orion has been careful, however, to ensure that none of its dealings in Cuba involve any of the subject property of Title III claims.<sup>110</sup> Vancouver-based Wilton Properties Ltd. announced on July 4, 1996 that it will invest C\$200 million in a ten-year partnership with the state-owned hotel firm Gran Caribe.<sup>111</sup> The vacation property deal will involve eleven hotels with over 4,200 rooms.<sup>112</sup>

Canada also has pending antidote legislation to Helms-Burton. This legislation, introduced in the Canadian legislature on September 16, 1996, would allow Canadians to countersue in Canadian courts to recover damages awarded by U.S. courts.<sup>113</sup>

#### IV. Conclusion.

On August 16, 1996, President Clinton named Undersecretary of Commerce Stuart Eizenstadt special representative for the promotion of democracy in Cuba.<sup>114</sup> Clinton said that Eizenstadt was appointed "to build international support for increasing pressure on Cuba to open up politically and economically."<sup>115</sup> After visiting Mexico, Canada and the European Community, Eizenstadt made little progress in achieving his goal.

The current level of condemnation of Helms-Burton by foreign countries is likely slight compared to the certain outcry the activation of the Act's Title III in January will illicit. Currently, the effects of Helms-Burton have been limited to the mere threat of lawsuits pursuant to this section of the Act, the banning of foreign officials and businessmen from entering the United States, public condemnation of the Act both in the United

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105. *Canadian Companies Take Steps to Minimize Impact of Helms-Burton*, U.S. MEX. FREE TRADE REP., July 31, 1996, 1996 WL 10175556.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Canada joins EU in countering U.S. Cuba law*, REUTERS NORTH AMERICAN WIRE, Sept. 16, 1996, available in LEXIS, Nexis Library, Topnews File.

114. True, *U.S. diplomat hopes to ease*, *supra* note 92.

115. *Id.*

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States and abroad and antidote legislation to Helms-Burton pending in the legislatures of foreign countries.

According to the Clinton administration, 5,911 Americans hold the rights for business interests seized in Cuba after the revolution there in 1959.<sup>116</sup> The monetary amount of the top one-hundred-and-thirty-one expropriation claims total over US\$1.6 billion.<sup>117</sup> When faced with the possibility of complaints of this financial scope brought by nearly 6,000 Americans in United States federal courts, foreign companies will face several alternatives. The first option for these foreign companies is to redetermine the value of doing business with Cuba as weighed against the cost Helms-Burton will impose on such involvement. Some foreign firms have decided to eliminate their involvement in Cuba's economy because the cost of doing business with Cuba would adversely affect their simultaneous business interests in the United States.

Another option for foreign firms doing business in Cuba will be to pursue the legal counter-measures to Helms-Burton enacted by their respective countries' legislatures. Considering the legislative response by Canada and Mexico and provisions of their antidote legislation, companies from these countries may be caught between a rock and a hard place. Mexican and Canadian firms can either remain in Cuba and deal with the consequences of Helms-Burton or face the provisions of their own countries' antidote laws which are aimed at penalizing compliance with the "illegal" and "extraterritorial" United States legislation.

Mexico and Canada could bring challenges to Helms-Burton pursuant to NAFTA and other international trade agreements. While the NAFTA negotiations may have considered and accepted the United States trade embargo of Cuba, it did not consider legislation such as Helms-Burton. Accordingly, Helms-Burton may violate the NAFTA. This is the most likely and realistic course of action.

A final option for foreign countries and their business interests is to await November elections and expect either a Clinton victory and another six-month extension of Title III in January or Democrat reclamation of Congress and an outright repeal.

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116. *Mexican executives to be barred from U.S.*, *supra* note 103.

117. Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. National Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659 (1996).

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