Inter-American Law

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The peso devaluation of December 20, 1994, and the ensuing weak peso, high interest rates, and unemployment depressed domestic consumption and investment in Mexico. Those same factors, however, made exports the single most important ingredient in Mexico's overall growth. Mexico's trade surplus with the United States is running at about $600 million per month. The 1995 year-end total export figure for Mexico was $79.8 billion, up from $60.9 billion in 1994.[1] As of July 1996, the year-to-date export figure for Mexico was $44.5 billion, a gain of 22.8% from a year earlier.[2]

Moreover, as a result of the North America Free Trade Agreement (NAFTA), U.S. exports to Mexico rose by 11% over the 1993-95 period and they fell by only 9% in 1995 (following the devaluation), from the level reached in 1994.[3]

Overall, Latin America enjoyed a 12.1% increase in exports to the United States in 1996, raising the shipment value to $743.5 billion as of July 1996 from $663.3 billion in 1995.[4] Latin American exports to the United States are booming, and the region is overtaking China as a supplier to the United States. In 1995, multinational corporations invested a total of $325 billion in mergers and acquisitions, of which $97 billion were invested in developing nations, including Latin America.[5]

The MERCOSUR customs union that came into effect in January 1995 between Argentina, Brazil, Paraguay, and Uruguay has been a significant factor in Latin American's resurgence as a trading region. Trade among MERCOSUR nations rose to $15 billion in 1995 from just $3 billion in 1989. MERCOSUR already boasts a combined annual gross domestic product (GDP) of about $880 billion and a population of some 200 million.[6]

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1. Ricardo J. Cata, *Emerging Markets Liability in Latin America*, 27 U. MIAMI INTER-AM. L. REV. 509 (1996).
2. Craig Torres and Joel Millman, *Exports from Mexico Continue to Rise*, WALL ST. J., Aug. 22, 1996, at A8.
3. Ricardo J. Cata, *The Resurgence of Mexico and South America*, MERCADO ASEGURADOR, Aug. 1996, at 64.
4. *Id.*
5. Brazil $4.9 billion; Mexico $4.1 billion. J. COM., Mar. 18, 1996, at 1A.
6. Cata, *supra* note 3; William R. Fadul, *Latin America: The Impact of Free Trade*, GLOBAL REINSURANCE, March-May 1996, at 63.

In 1996, an agreement was reached to add Chile to MERCOSUR, though as an associate, not a full member. The treaty took effect on July 1, 1996. MERCOSUR also signed a free trade process with the European Union in December 15, 1995. Finally, MERCOSUR is considering linking up with the Andean Pact, which is a customs union between Bolivia, Colombia, Ecuador, Peru, and Venezuela. The ultimate goal of the MERCOSUR countries is to create a South American Free Trade Area (SAFTA) within ten years. This, if realized, will create a market of 500 million consumers and a GDP in excess of $1 trillion.[7]

I. The Helms-Burton Act

A. Background and Scope

The Helms-Burton "LIBERTAD" Act (Act), was approved by the U.S. Congress and signed into law by President Clinton on March 12, 1996. The Act, when fully implemented, will allow U.S. citizens who have certified claims against Cuba to sue in U.S. District Courts foreign companies who "traffic" in property seized by the Castro government. The Act will also deny executives of those companies, and their immediate families, the right to enter the United States.[8]

According to a senior government official, between 100 and 200 companies can be said to be trafficking in confiscated U.S. property in Cuba, as that term is defined by the Act.[9] The law allows the original 5,911 claimants of property confiscated by the Castro government, and an undetermined number of naturalized Cuban Americans, to file lawsuits in federal courts. It is estimated that about $6 million in property is involved.[10] Of the 5,911 certified claims, about 800 are above the $50,000 threshold for federal court jurisdiction.[11] As a result, some foreign firms are divesting themselves of their Cuban assets, such as Cemex, the Mexican cement producer; Occidental Hotels, the Spanish hotel company; and ING Group, the Dutch banking and insurance company which announced it would not renew a $30 million credit to the Cuban sugar industry.[12]

On July 16, 1996, President Clinton granted U.S. citizens the right to sue foreign companies under Title III of the Act, and immediately suspended those suits until February 1, 1997.[13]

7. Fadul, *supra* note 6; Thomas Andrew O'Keefe, *The New EU-MERCOSUR Agreement: Negotiations with Bolivia and Chile*, LATIN AM. L. & BUS. REP., May 31, 1996, at 30; Meredith Persily, *MERCOSUR to Shape Regional Telecom Landscape*, LATIN AM. L. & BUS. REP., June 30, 1996, at 24.

8. *U.S. Embargo Against Cuba: The Canadian Response*, in 4 LATIN AM. LEGAL DEV. BULL., No. 3, July 1996, at 5.

9. Carla Ann Robbins and Jose de Cordoba, *Sherill Officials to Be Barred from U.S.*, WALL ST. J., July 11, 1996, at A11.

10. Ralph Galliano, *Cuba a Clinton Dilemma: Anger Florida or U.S. Allies*, J. COM., July 15, 1996, at 7B.

11. Robbins, *supra* note 9.

12. Carla Anne Robbins and Jose de Cordoba, *Clinton Puts Cuba Lawsuits on Hold*, WALL ST. J., July 17, 1996, at A10; Pablo Alfonso, *Cadena Hotelera Española Cancela Acuerdo Con la Isla* [Spanish Hotel Chain Cancels Accord with the Island], EL NUEVO HERALD, June 13, 1996, at 1B.

13. David E. Sanger, *Clinton Grants, Then Suspends, Right to Sue Foreigners on Cuba*, N.Y. TIMES, July 17, 1996, at 2. Following his reelection to a second term, it is possible that President Clinton may once again waive the provisions of Title III of the Act. Steven Lee Myers, *A European Call for Rights in Cuba Lets U.S. Off Hook*, N.Y. TIMES, Dec. 4, 1996, at A14. The December 1996 resolution from the European Union calling for human rights and political freedoms in Cuba will likely help President Clinton to again waive such provisions. *Id.*

The Clinton administration is, however, enforcing the provisions of Title IV of the Act, which denies entry to the United States to anyone who "traffics" in expropriated property.[14]

B. The Mexican Response

Initially, the six-month suspension of Title III was welcomed in Mexico, since the Mexican government, still trying to get Mexico back on its economic feet, did not need the extra burden of fighting the United States on the international scale.[15] However, soon thereafter, Mexico joined Canada to lead the charge against the United States in this hemisphere in a formal trade complaint under the terms of NAFTA and announced that it would use a nonbinding opinion from a legal committee of the Organization of American States (OAS), that the Act violates the sovereign rights of nations, to mount a broad international, legal challenge to the Act.[16]

In October 1996, Mexico enacted legislation that would allow lawsuits in Mexico to recover damages assessed under Helms-Burton.[17] The Mexican Chamber of Deputies enacted an "antidote" law, previously approved by the Mexican Senate, labelled "Law for the Protection of Commerce and Foreign Investments," which prohibits Mexican companies from furnishing information to foreign authorities concerning their activities, and establishes sanctions against companies that do so.[18] Article 4 of the Mexican law prohibits Mexican tribunals from recognizing judgments or processes from foreign tribunals that are based on extraterritorial measures which affect the business of Mexican companies abroad.[19] Article 5 allows affected companies to file lawsuits in Mexico to recover damages assessed against Mexican citizens or companies under Helms-Burton.[20]

C. The Latin American Response

The twenty-seven member countries of the Latin American Economic System [Sistema Economico Latino Americano (SELA)] wound up their XXI Congress in Montevideo, Uruguay, with a strong criticism of the Helms-Burton Law, based on "the fundamental principles of sovereignty," and because the Act "constitutes a flagrant violation of international law and of the principles and norms that control international commerce."[21] The SELA members also

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14. Jose de Cordoba, *Mexico's Domos Catches U.S.-Cuba Heat*, Wall St. J., Aug. 19, 1996, at A9. Title III of the Act defines "trafficking" broadly. Anyone who knowingly and intentionally sells, transfers, manages, brokers, purchases, leases, obtains control of, uses, holds an interest in, or engages in commercial activity using property confiscated by the Cuban government is a "trafficker" for lawsuit purposes.

15. Kevin G. Hall, *Mexico Has No Plans to Raise Tariffs on Goods*, J. Com., June 7, 1996, at 5A; Robbins, *supra* note 12.

16. Julia Preston, *Clinton Envoy Finds Mexico Adamant on Cuba*, N.Y. Times, Aug. 29, 1996, at A5; Kevin Hall, *Official Warns Cuba Law May Sour Trade Relations*, J. Com., Aug. 30, 1996, at 3A; *Mexico Luchara contra Ley Helms, Dice Zedillo* [Mexico Will Fight Against the Helms Law, States Zedillo], El Nuevo Herald, Aug. 27, 1996, at 1B; *Gov't Condemns U.S. "Threat,"* The News [Mexico], Aug. 21, 1996, at 1.

17. *Law for the Protection of Commerce and Investment from Foreign Laws Which Violate International Law*, Diario Oficial de La Federacion [Federal Official Gazette], Oct. 23, 1996; John Maggs, *U.S. Warns EU: Cuba Showdown Could Hurt WTO*, J. Com., Oct. 3, 1996, at 3A.

18. *Law for the Protection of Commerce and Investment from Foreign Laws Which Violate International Law*, *supra* note 17; Pablo Alfonso, *Crece Rechazo a La Ley Helms-Burton* [Opposition Grows to the Helms-Burton Law], El Nuevo Herald, Oct. 3, 1996, at 1A.

19. *Law for the Protection of Commerce and Investment from Foreign Laws Which Violate International Law*, *supra* note 17.

20. *Id.*; Maggs, *supra* note 17; Steven Lee Myers, *Clinton Troubleshooter Discovers Big Trouble from Allies on Cuba*, N.Y. Times, Oct. 23, 1996, at A1.

21. *Organismo Exige Se Le Ponga Fin Al Embargo a Cuba* [Organization Demands an End to the Cuban Embargo], El Nuevo Herald, Oct. 26, 1996, at 1B.

decided to exchange information concerning the enactment and application of "antidote" or "mirror" legislation against Helms-Burton among their members.[22]

Moreover, at the VI IberoAmerican Summit which was held in Viña del Mar, Chile, in November 1996, the Helms-Burton Act was specifically rejected in the Final Declaration of the Summit. The Declaration stated that the Act ignored fundamental principles of sovereignty of States, and that its implementation constitutes an external application of national (U.S.) laws, which threatens the principles of international relations. The Declaration endorsed the OAS's nonbinding legal opinion referred to above.[23] Therefore, it is likely that Latin American countries such as Argentina, Brazil, and Chile may soon follow the example of Canada and Mexico, and enact "antidote" legislation to the Helms-Burton Act.

II. Brazil—The Opening of the Reinsurance Market

The Brazilian Reinsurance Institute (Instituto de Resseguros de Brazil)—IRB—created in May 1939, is the official reinsurance agency in Brazil. Under current Brazilian law, insurance and reinsurance abroad are to be placed exclusively through the IRB and are limited to risks that have no coverage in Brazil, or that are not in accordance with the national interest.[24] However, a proposed constitutional amendment was approved by the Brazilian House of Representatives in two rounds and was then voted on again and approved by the Senate in June 1996.[25] This present amendment, which will end the IRB monopoly on reinsurance, must be signed by the president, and then will require further implementation by appropriate legislation.[26]

On June 10, 1996, moreover, the Official Gazette of the Federal Executive published Opinion No. GQ-104/96, issued by the Federal Attorney-General's office. That opinion declares illegal the provisions of Resolution 14 of the Brazilian Private Insurance Counsel (CNSP) which discriminates against foreign capital.[27] The opinion also stated that Article 52 of the Temporary Provisions of the Brazilian Constitution (TPBC) will not apply to insurance companies in Brazil. This Article established that the increase in the percentage participation of individuals and legal entities resident or domiciled abroad in the capital of financial institutions headquartered in Brazil would be prohibited.[28]

The commercial implications of this opening to foreign insurers are significant, since the Brazilian insurance market already generates $15 billion in annual premiums with 35% of the above consisting of automobile insurance. There is still plenty of room for growth in the insurance market since, for example, only 25% of the vehicles in Brazil are insured.[29]

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22. *Id.*

23. *Declaracion de Viña del Mar, Tercera Parte—Asuntos de Especial Interes* [Declarations of Viña del Mar, Third Part, Matters of Special Interest], IV IBERO AMERICAN SUMMIT, Viña del Mar, Chile, November 9-11, 1996, at 28; Pablo Alfonso, *Auguran Condena a Ley Helms en Cubre de Chile* [Condemnation of the Helms Law Is Foreseen in the Chile Summit], EL NUEVO HERALD, Nov. 7, 1996, at 1B.

24. Ricardo E. Vieira Coelho and Barbara Dvorsak, *The Opening Up of the Reinsurance Market*, LATIN AM. L. & BUS. REP., Sept. 30, 1996, at 6.

25. *Id.*

26. *Id.*

27. *Id.*; Resolution 14 of the CNSP, issued in 1986, limited the direct or indirect participation of foreign capital in insurance companies and insurance brokerage companies in Brazil to fifty percent of the total shares of capital; and to one-third of the voting capital of such companies. *Id.*

28. *Id.*

29. Roberto Castro, *Brasil, Ante La Apertura* [Brazil, Before the Opening], MERCADO ASEGURADOR, Oct. 1996, at 60; Robert O'Connor, *Latin America Opens Up*, REVIEW WORLDWIDE REINSURANCE, Oct. 1996, at XV.

III. Brazil—New Industrial Property Law

On May 14, 1996, a new Brazilian industrial property law was enacted by President Fernando Henrique Cardoso. Law No. 9,279/96 will go into effect one year after its publication and will replace current Law No. 5,772/71.[30] Some provisions of the new law, though, have already gone into effect, such as protection for chemicals, pharmaceutical products, and food products.[31] The major changes under the new law will be:

- Chemicals, pharmaceuticals, and food products will be patentable (they are not presently protected.)[32]
- Patents will remain in force for 20 years, in the case of inventions, and 15 years in the case of utility models, both counted from the date of *filing*. However, the law provides that the validity of the patent shall not be less than 10 years for inventions, and 7 years for utility models, counted from the date of *granting*.[33]
- Industrial designs are no longer protected as patents. They will be subject to registration that will be in force for a period of 10 years, counted from the date of filing and renewable for 3 subsequent periods of 5 years each. Novelty must be present, however, to secure registration.[34]
- Pipeline protection will be provided, but only if the product has not been marketed anywhere and if no serious and effective preparations for exploitation of the corresponding product have been carried out by third parties in Brazil.[35]
- In order to obtain pipeline protection, the application must be filed in Brazil within 1 year from the enactment of the new Industrial Property Law.[36] A patent granted under pipeline protection shall be valid for the remaining term of validity in its home country, but counting from the filing date in Brazil.[37]
- With respect to parallel imports, the owner of a patent or trademark will have the right to prevent third parties from importing the subject matter of the patent or assisting others to do so. Such exclusive right will not apply to products which have been introduced in the Brazilian market directly by the patent (or trademark) owner or with its consent.[38]
- Any visually perceptive distinctive sign may be registered as a trademark; therefore, registration of three-dimensional trademarks will be allowed. The registration of a trademark will be valid for a period of 10 years and may be renewed indefinitely.[39] Protection of trade dress will be available, not only under registration but also as industrial design registration.[40]

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30. Marilete Tang, *Brazil: New Industrial Property Legislation*, 4 LATIN AM. LEGAL DEV. BULL., July 1996, at 2.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*

- Under the new law, as opposed to the earlier statute where the great majority of patent or trademark license agreements had to be royalty free, the parties will now be free to contract for the royalties to be paid under such agreements.[41]
- The violation of industrial property rights (patents, industrial designs, and trademarks) is defined as a crime under the new law, as they were under the earlier statute. Moreover, the violation of a trade secret is treated as a crime of "unfair competition." The meaning of unfair competition has been greatly enlarged under the new law.[42]

IV. Argentina—New Workers' Compensation Law

On May 31, 1996, Law 585/96 was decreed by the Executive Branch of the Government of Argentina, enacting Law No. 24.557, the new workers' compensation law which went into effect on July 1, 1996.[43] Under the new law, Argentina is now covered by specialist, monoline companies known as compensation insurers or ARTs (reflecting the Spanish-language initials of *Aseguradoras de Riesgos del Trabajo*), or by multiline companies that insured workers' compensation under the previous law. Under the new law, however, the multiline companies must now separate their workers' compensation business from the rest of their portfolios and, insofar as workers' compensation business is concerned, they must now function in the same manner as ARTs.[44]

Under the new legislative regime, ARTs must make loss prevention recommendations; cover the cost of medical care, including medication; and pay compensation for total or partial disabilities caused by work-related accidents.[45] The new law has changed all aspects of workers' compensation. One of the most important changes lies in assigning ARTs a key role in loss prevention.[46] On July 1, 1996, the ARTs from which employers purchase workers' compensation became responsible for making loss prevention recommendations. As such, responsibility for loss prevention is no longer spread among 480,000 companies in the private sector, but is concentrated in some 40 ARTs.[47]

An important change under the new law is that an injured worker may not use the courts to claim greater benefits than those prescribed by the new law. Argentina's former system was mired in litigation with workers suing in civil courts. The new law allows the use of the courts by an employee only in the case of "dolo" (fraud/deceit).[48]

It is estimated that the new law will cause the annual workers' compensation premium volume to reach $1.5 billion. As a result, several foreign firms specializing in this insurance product have established local operations in Argentina, since multinational companies have a

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41. *Id.*

42. *Id.*; Luiz Lonardos, *Trademark Aspects of the New Industrial Property Law*, LATIN AM. L. & BUS. REP., June 30, 1996, at 16.

43. *ART: Texto del Decreto 585/96 Sobre Autoseguros* [ART: Text of Decree 585/96 Concerning Self-Insurance], MERCADO ASEGURADOR, June 1996, at 56; Cata, *supra* note 3.

44. Carlos Kaplan and Carlos Trovarelli, *New W.C. Loss Prevention*, MERCADO ASEGURADOR [Argentina], Aug. 1996, at 70.

45. *Id.*

46. *Id.*

47. *Id.*

48. Ley de Riesgos del Trabajo [Law Concerning Workers' Risks], No. 24.557, Article 39(1). Article 39(4) allows a suit by the employee against a third-party tortfeasor; *see also* Roberto Ceniceros, *Workers Comp Conversion in Argentina*, BUS. INSURANCE, June 10, 1996, at 18; Daniel G. Marcú, *Se Producirá Una Fuente Caida del Costo Laboral de la Empresa* [A Strong Decline Expected in Employers' Labor Costs], AMBIENTE FINANCIERO, Mar. 1, 1996, at XIII.

significant presence in Argentina, and there are 4,700 local companies, all of which will require ARTs.[49]

V. Argentina—New Patent Law

In March 1996, the Executive Branch of the Argentinean Government issued Decree No. 260/96, which regulates the new Patent and Utility Models Law No. 24,481, which was approved by the Argentinean Congress on March 30, 1995, and modified under Law No. 24,572 of October 18, 1995. The March 1996 Decree also replaces the previous Regulatory Decree No. 590/95, which had been replaced by Congress under Law No. 24,603 of December 7, 1995.[50] The more important provisions of the new Law are:

- All physical or legal entities, national or foreign, are entitled to obtain patents and/or utility model certificates.[51]
- "Invention" is defined as any human creation that transforms matter or energy to the advantage of man.[52] Inventions of products or processes shall be patentable if they are novel, if they involve an inventive activity, and if they are capable of industrial application.[53] The exhibition of the invention at a national or international exhibition within one year prior to the patent application date or the priority date will not affect the novelty requirement.[54]
- Pharmaceutical products are not excluded from protection. Patents for pharmaceutical products will be granted from October 2000, but applications may be filed before then.[55]
- Exclusive rights granted to the owner of a patent consist in excluding third parties from the manufacture, use, offer to sell, sale, and import of the subject matter of the patent.[56]
- The Law provides for the protection and ownership of an invention made while working for an employer. Such invention will belong to the employer if the purpose of such employment involves partially or totally inventive activities.[57]
- The duration of a patent is 20 years from the filing date of the application.[58] Patents and utility models may be transferable and licensed totally or partially. The transfer of the patent shall become enforceable against third parties only after it has been registered with the National Institute of Industrial Property.[59]
- The Law includes criminal sanctions, fines, and imprisonment for anyone who infringes upon a patent or abuses the character of a patentee. Civil and criminal actions are also provided to prosecute infringers, as well as remedies to have the infringement stop, such as "seizure, inventory and attachment of the falsified objects."[60]

49. Keith Shroyer, *Reinsurance in Latin America*, GLOBAL REINSURANCE, March-May 1996, at 66; Ceniceros, *supra* note 48.
50. Bernard Malone, *Argentina: New Patent Legislation*, 4 LATIN AM. LEGAL DEV. BULL., July 1996, at 1.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

VI. Mexican *Maquiladoras* and NAFTA—New Regulations on the Horizon

Mexico *maquiladoras*[61] continue to benefit from the waiver of Mexican import duties on imported materials, parts, and components for use in the manufacture of finished products for export, while also benefiting from preferential rates of duty upon importation of their finished products into the United States and Canada, provided they meet the NAFTA rules of origin.[62] As of January 1, 2001, however, there will be restrictions on the duty relief available on non-NAFTA original materials used by *maquiladoras* in the assembly or manufacture of finished products for export to the United States and Canada.[63]

The most important provision of NAFTA directly affecting *maquiladoras* is Article 303, which deals with restrictions on drawback and duty deferral programs. "Duty deferral program" is defined in Article 318 as including "measures such as those governing foreign trade zones, temporary importations under bond, bonded warehouse, *maquiladoras* and inward processing programs."[64] Article 303 addresses the concern, particularly of the United States, that drawback and duty deferral programs represent an unfair advantage for foreign exporters, since domestic manufacturers receive no drawback or waiver of import duties on materials imported to produce goods for sale into the domestic market.[65]

Currently, *maquiladoras* are permitted to import materials used in the production of finished products for exports without the payment of Mexican import duties. As of January 1, 2001, however, if the finished products are exported to the United States or Canada, duty relief will only be available on the non-NAFTA original materials imported into Mexico, if the finished product is subject to import duties upon importation into the United States or Canada.[66] In that case, the amount of Mexican import duties which may be waived will be equal to: (i) the Mexican import duties payable on the non-NAFTA original materials used in the manufacture of the finished product, and (ii) the U.S. or Canadian import duties paid on the finished goods, *whichever amount is lower*.[67]

As such, as of 2001, the *maquiladoras* will be required to pay the difference between the Mexican import duties normally payable on the non-NAFTA original materials and the U.S. or Canadian import duties payable on the finished product. Therefore, the waiver of Mexican import duties on materials will not be eliminated entirely as of January 1, 2001, but will be restricted. Moreover, no Mexican import duties, if any, will have to be paid at the time the materials are imported into Mexico, but only at the time the finished products are exported to the United States or Canada.[68]

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61. *Maquiladoras* are primarily foreign-owned manufacturing and assembly plants located along the U.S. border that take U.S. and other foreign components or materials, assemble them with completed goods, and return them to the United States for resale. Between 1995 and 1996, some 160 *maquiladora* plants were expected to be added to the Mexican border. This expansion will bring the number of *maquiladoras* to a record high of 2,250. Cata, *supra* note 1, at 24.

62. Carlos Angulo-Parra, Edmundo Elias-Fernandez, and Carlos S. Osmond, *Mexico-Maquiladoras and NAFTA Beyond Year 2000*, 4 LATIN AM. LEGAL DEV. BULL., July 1996, at 15.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*