

HELMS-BURTON: AN OVERSTATED THREAT

BY SUSAN KAUFMAN PURCELL

Canadian officials have strongly criticized the new Helms-Burton law [the *Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*], which tightens the American embargo against Cuba for allegedly violating Canadian sovereignty by attempting to limit Canada's trade with Cuba. They have also charged that the law violates the NAFTA and the rules of the World Trade Organization (WTO), and have threatened to take up the issue with both bodies. The objections give the impression that Helms-Burton targets all Canadian companies or individuals doing business with Cuba, which is not the case.

The scope of Helms-Burton is considerably more limited. One of its most criticized — and admittedly broad — provisions bars entry into the United States to corporate officers, principals of partnerships, or controlling shareholders of foreign companies who traffic in expropriated American property. This provision, however, will probably be extremely difficult to enforce, except in certain very clear-cut cases, the number of which is small.

The other provision of the law that most concerns Canadian and other foreign investors gives United States nationals the right to bring suits in American courts against foreign governments, companies, and individuals who knowingly and intentionally traffic in property expropriated from American citizens. Plaintiffs can sue only the American subsidiary of the company operating in Cuba. The law is mainly relevant to

claims against commercial property in Cuba worth US\$50,000 or more at the time of expropriation. The president of the United States can suspend application of this provision for six months at a time if he believes that suspension is in the American national interest and is necessary for encouraging democracy in Cuba.

Not only is the scope of Helms-Burton more limited than most Canadians believe, but charges of the law's illegality under the NAFTA and the WTO are questionable as well.

The fact that the embargo will not be lifted any time soon because of the Helms-Burton law is, therefore, a big economic blow to most foreign investors on the island.

Both Canada and Mexico agreed that nothing in the NAFTA would operate to override the Cuban sanctions program of the United States. Furthermore, Article 1110 of the NAFTA forbids nationalization or expropriation without just and adequate compensation. Although Cuba is not a party to the NAFTA, this provision could be seen as an implicit endorsement of the American position regarding the illegality of Cuba's expropriation of American property without due compensation.

With regard to the compatibility of Helms-Burton and the *World Trade Agreement*, American officials argue that Article 21 allows WTO members to take unilateral actions involving trade in order to protect their "essential security interests." A trade dispute panel asked to render a judgment on Helms-Burton would probably not consider itself competent to make a judgment concerning American security needs. If it were to accept the case and rule that Washington's definition of its national security interests was misguided or wrong, WTO opponents in both the United States and other countries would immediately press for their country's withdrawal from the organization, thereby calling into question the future of the WTO.

CUBAN EMBARGO TO STAY

Although much of the criticism of Helms-Burton has focused on the visa and claims provisions of the law, they are of less importance to Canadian and other foreign economic interests than the provision which takes the power to lift the embargo from the president of the United States and gives it instead to the United States Congress. As a result of this change, it is now highly improbable that the embargo will be lifted any time soon.

Most of the foreign investment that has entered Cuba during the past few years has done so in the expectation that President Clinton would be re-elected in November 1996 and would shortly thereafter lift the American embargo. Foreign investors based their assumption on the fact that key people in the Clinton administration were known or assumed to favour such a policy change. Foreigners were not alone in this assumption. Many United States Con-

gressmen and Senators shared this belief, which accounts, in part, for their support of Helms-Burton.

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Before Helms-Burton, the existence of the American embargo gave Canadians and other foreigners a triple incentive to invest in Cuba. First, they could do so without having to concern themselves with competition from American companies. Second, the Castro Government was desperate for hard currency in the aftermath of the disappearance of the Soviet subsidy to Cuba, which equaled US\$3-6 billion annually. Knowing this, investors could drive a hard bargain with the Cuban Government and invest on very favourable terms. Third, once the embargo were lifted, the value of their Cuban investments would skyrocket. They could then either sell out to American investors, or take advantage of Cuba's sudden access to the lucrative American market.

The fact that the embargo will not be lifted any time soon because of the Helms-Burton law is, therefore, a big economic blow to most foreign investors on the island. What happens next partially depends on what they decide to do.

Fidel Castro has no choice now but to implement additional economic reforms in order to increase the productivity of the Cuban economy and attract additional foreign

capital to Cuba. He correctly views such reforms as potentially threatening to his continued control over the Cuban people: Cubans with increased access to property and money will be less dependent on the state and more able to resist state control. This explains the recent increase in political repression in Cuba. The Cuban Government is attempting to reinforce its control over the Cuban people prior to embarking on the next wave of needed, and politically threatening, economic reforms.

If Canadians and other foreigners truly favour a peaceful transition to a democratic regime in Cuba that respects human rights, they should begin pressing the Castro Government to reform not only economically, but politically as well. Canada, which has had close relations with the Castro regime for several decades, is ideally positioned to take the lead in this regard. Top priority should be given to holding free and fair elections in the presence of international observers.

An elected civilian regime in Cuba would produce both popular and congressional support in the United States for lifting the embargo. It would also restore the value of the investments that Canadians and others have made on the island. Most important, it would finally allow the Cuban people to speak for themselves regarding how and by whom they wish to be governed. 🍁

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acquisition, and transmission rights, another (FTA 2005.2) puts culture right back in by giving the Americans the right to retaliate against Canada for "actions" the United States deems "inconsistent" with it. Yet another provision (FTA 2011.2) permits the United States to circumvent the dispute settlement procedure when it retaliates. Other sections of the agreement, particularly those dealing with Investment, Competition Policy, and Monopolies also infringe on the right of Canadians to protect their cultural policy.

This means that the United States has the legal right to unilaterally decide if a Canadian cultural measure is "inconsistent" with NAFTA, to retaliate against Canada, and to select the nature and severity of the retaliation. The United States is the accuser, the umpire, and the enforcer. The late Peter Murphy, chief American FTA negotiator, explained to journalist Marci McDonald how Canadians just did not "get it": "Because [of] the way the agreement is written, if there's a problem, the US will take action — and it doesn't have to show any injury. The retaliatory possibilities are huge."

Canada has no legal rights whatsoever. It cannot even request a panel to judge whether American accusations are justified and, if so, to ensure American retaliation is commensurate with the offence. Further, in signing the NAFTA, Canada surrendered important GATT cultural protections which included the freedom to act to sustain its cultural industry by virtually any measure that did not impair tariff concessions, the establishment of screen quotas that "require the exhibition of

cinematographic film by national origin," and the right to a panel to judge American complaints on the basis of GATT law and not in accordance with the vested interests of the American broadcasting, publishing, film, and recording industries.

It is time to admit that Canada is never going to get the fair trade rules we were promised and to understand that we do not have "free trade" even in theory.

Both the Mulroney Conservatives and the Chrétien Liberals have continued to assert the claim that NAFTA protects Canadian culture while giving in, time and again, to American demands on key Canadian cultural issues such as film distribution and book publishing. Complying with American demands has the advantage of avoiding retaliation and enabling politicians to continue to sell the illusion that the agreement protects Canadian culture.

TARGETTING CANADA

The Chrétien government has finally taken several mild measures to protect Canadian culture — one on split-run editions of *Sports Illustrated* and the other on the big-six book retailer Borders. But the American industry has threatened retaliation and the Secretary of Commerce has stated that the tax on *Sports Illustrated* directly conflicts with NAFTA.

United States Trade Representative Mickey Kantor had Canadian cultural disputes specifically in mind when he recently announced the creation of a "hit squad" to apply American trade law to "unfair" trade practices around the world, and named Canada as one of the targets. The smoke-and-mirrors "cultural exemption" will not protect Canadian culture against these threats any more than the non-existent disputes code protected Canadian lumber.

It is time to admit that Canada is never going to get the fair trade rules we were promised and to understand that we do not have "free trade" even in theory. Stelco's President, Frederick Telmer, says that American trade laws are sacrosanct and their preservation was a precondition for the United States to sign the NAFTA: "We do not have free trade with the United States. Anybody who thinks otherwise is living in a dream world."

Therefore, it is also time to admit what these arguments were really about — to impose an American-style free market model on Canada complete with weakened government, low corporate tax rates, privatized social programs, a deregulated environmental regime, a contingency work force, and class warfare. It is time to reopen this debate. 🍁

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