THE HELMS-BURTON LAW AND ITS ANTIDOTES:

A CLASSIC STANDOFF?

by

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by

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A. INTRODUCTION

In the three years since its enactment, the Helms-Burton Act[3] has generated a plethora of analyses and commentaries at professional meetings and symposia and in law review articles.[4] At the heart of this voluminous – and growing – literature are differences among analysts on whether certain provisions of the Act violate treaties to which the United States is a party and international law principles.[5]

Outside the United States, opposition to the Act has been virtually unanimous. In addition to declarations by international organizations condemning the policies embodied in the Act and legal challenges through dispute settlement provisions in international trade agreements, several nations have sought to counter the Helms-Burton Act by enacting legislation that in some way allows or requires the country's citizens to take actions that would defeat the purposes of the Act. These legislative initiatives are commonly known as

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[3] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," Pub. L. No. 104-114, 110 Stat. 785, *codified as 22 U.S.C. Chapter 69A,* also known as the "Helms-Burton Law" (hereinafter "the Helms-Burton Act" or "the Act").

[4] The legal literature alone is vast and growing rapidly. The *Index to Legal Periodicals and Books* for the period August 1996 through January 1999 lists more than 30 articles in law reviews and professional legal publications dealing with various aspects of the Act.

[5] *Compare, e.g.,* Brice M. Clagett*, Title III of the Helms-Burton Act is Consistent with International Law,* 90 Am J. Int'l L. 434, 434-435 (1996) *with* Robert L. Muse, *A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996),* 1998 G.W. J. Int'l L. & Econ. 1.

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“antidotes”[6] to the Helms-Burton Act. Countermeasures have been put in place by Canada (October 1996), Mexico (October 1996), the European Union (November 1996), and Argentina (September 1997). Cuba also enacted antidote legislation in December 1996 and February 1999.

The purpose of this paper is to describe the Helms-Burton Act and the above-mentioned antidotes and document, where possible, their implementation to date. The article expressly takes no position on the appropriateness, validity under international or U.S. domestic law, or political merit of the Act.

The first section of the article presents an overview of the Helms-Burton Act. The second section summarizes the main criticisms leveled against the Act by key U.S. trading partners and by international organizations. The third section describes the antidote laws including, where available, their legislative history. The fourth section addresses the experience to date with the implementation of the Act and the antidote measures. The article closes with some general observations on the implementation status of the Act and the antidote legislation.

B. ESSENTIALS OF THE HELMS-BURTON ACT

The stated purpose of the Act is “to seek international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes.” The law is composed of a preamble containing sections on findings, purposes, definitions and severability, and four substantive titles of dissimilar content and focus: 1) Title I: Strengthening International Sanctions Against the Castro Government; 2) Title II: Assistance to a Free and Independent Cuba; 3) Title III: Protection of Property Rights of United States Nationals; and 4) Title IV: Exclusion of Certain Aliens.

1. Preamble

[6] *The American Heritage Dictionary of the English Language* (Boston: Houghton Mifflin, 1981) defines “antidote” as “a remedy or other agent to counteract the effects of a poison.”

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a) Findings

The "Findings" section of the Preamble to the Helms-Burton Act contains twenty-eight Congressional "findings" relating to the current situation in Cuba, including the dire economic conditions on the island, the refusal of the Castro government to permit free and fair elections and undertake political reforms, and the record of violations of human rights on the island.[7] For the purposes of this article, three findings are particularly relevant:

- "the consistent policy of the United States towards Cuba since the beginning of the Castro regime, carried out by both Democratic and Republican Administrations, has sought to keep faith the people of Cuba, and has been effective in sanctioning the totalitarian Castro regime";[8]
- "the Congress has historically and consistently manifested its solidarity and the solidarity of the American people with the democratic aspirations of the Cuban people";[9] and
- "the Cuban Democracy Act of 1992[10] calls upon the President to encourage the governments of countries that engage in trade with Cuba to restrict their trade and credit relations with Cuba in a manner consistent with the purposes of that Act."[11]

b) Purposes

The "Purposes" section of the Preamble to the Helms-Burton Act sets forth six "purposes" of the legislation.[12] Among the stated purposes of the Helms-Burton Act most relevant to this article are: 1) "to strengthen international sanctions against the Castro

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7 Section 2 of the Act, 22 U.S.C. § 6021.

8 *Id.*, finding number 6.

9 *Id.*, finding number 10.

10 Cuban Democracy Act of 1992, P.L. 102-484, 22 U.S.C. §§ 6001-6010 (hereinafter "Cuban Democracy Act").

11 22 U.S.C. § 6021, finding number 11.

12 Section 3 of the Act, 22 U.S.C. § 6022.

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government";[13] and 2) "to protect United States nationals against confiscatory taking and the wrongful trafficking in property confiscated by the Castro regime."[14]

c) Definitions

The "Definitions" section of the Preamble of the Helms-Burton Act contains fifteen definitions of terms used throughout the Act.[15] Among other terms, Section 4(4) of the Act defines "confiscated" to include "the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of the property, on or after January 1, 1959 -- (i) without the property having been returned or adequate and effective compensation provided; or (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure." [16] Section 4(12) defines property to include "any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." A United States national, according to Section 4(15), is "any United States citizen," or "any other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has its principal place of business in the United States."[17]

Section 4(13) of the Act states that a person "traffics" in confiscated property if "that person knowingly and intentionally --

> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefiting

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13 *Id.*, purpose number 2.

14 *Id.*, purpose number 6.

15 Section 4 of the Act, 22 U.S.C. § 6023.

16 *Id.*, definition number 4.

17 *Id.*, definition number 12.

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from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,

without the authorization of any United States national who holds a claim to the property."[18]

It is interesting to note that, because of the breadth of the definition of "trafficking," any conduct deemed to constitute "trafficking" by a company could bring the effects of the statute to bear upon its subsidiaries or affiliated companies, therefore potentially depriving third-country enterprises of the ability of shielding themselves from liability under the Act by doing business in Cuba through subsidiaries.[19]

d) Severability

Section 5 of the Act provides that if any of its provisions or its application to any person or circumstance is held to be invalid, the remainder of the Act or its application to other persons not similarly situated or to other circumstances will not be affected by such invalidation.[20]

2. Title I: Strengthening International Sanctions Against the Castro Government

Among the provisions intended to strengthen international sanctions against the Castro Government in Title I of the Act[21] are:

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18 *Id.,* definition number 13(A).

19 *Id.* However, the term "traffics" does not include: 1) the delivery of international telecommunications signals to Cuba; 2) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated individual; 3) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or 4) transactions and uses of property by a person who is not an official of the Cuban Government or the ruling political party in Cuba. *Id.*, definition number 13(B).

20 Section 5 of the Act, 22 U.S.C. § 6024

21 22 U.S.C. §§ 6031-6046.

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- Section 102,[22] which reaffirms Section 1704(a) of the Cuban Democracy Act stating that the President should encourage foreign countries to restrict trade and credit with Cuba and urges the President to take steps to apply sanctions described by such Act against countries assisting Cuba; requires the President to instruct the Secretary of the Treasury and the Attorney General to enforce the Cuban Assets Control Regulations; expresses the sense of the Congress that the President should instruct the Secretary of State and the Attorney General to enforce existing regulations that deny visas to Cuban Government employees or Cuban members of the Communist Party of Cuba; amends the Cuban Democracy Act with respect to sanctions against a country that provides assistance to Cuba, to include as such assistance any exchange, reduction, or forgiveness of a Cuban debt owed to a country in return for a grant of an equity interest in a property, investment or operation of the Cuban Government or a Cuban national (i.e., debt-for-equity swaps); prohibits investment by any United States person in the domestic telecommunications network within Cuba; and codifies the economic embargo of Cuba in effect as of March 1, 1996.

- Section 103,[23] which prohibits any U.S. national, permanent resident alien, or U.S. agency from knowingly extending any loan or other financing to any person in order to finance transactions involving property confiscated by the Cuban Government, the claims to which is owned by a U.S. national.

- Section 104,[24] which directs the Secretary of the Treasury to instruct the United States Executive Director of the international financial institutions to oppose the admission of Cuba as a member of such institutions until the President determines that a democratically-elected government is in power in Cuba, and withholds U.S. payments to international financial institutions to the extent of any loans or other assistance given by those institutions to Cuba.

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[22] 22 U.S.C. § 6032.

[23] 22 U.S.C. § 6033.

[24] 22 U.S.C. § 6034.

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- Section 105,[25] which urges the President to instruct the U.S. Permanent Representative to the Organization of American States to oppose and vote against any termination of the suspension of Cuba from that organization until the President determines that a democratically-elected government is in power there.

- Section 106,[26] which directs the President to report to the Congress on progress toward the withdrawal of personnel of any independent state of the former Soviet Union from the Cienfuegos nuclear facility; amends the Foreign Assistance Act of 1961 to make ineligible for assistance any independent state that is providing assistance for, or engaging in non-market based trade with Cuba; and directs the President to withhold from assistance provided for an independent state of the former Soviet Union an amount equal to the assistance and credits provided by such state in support of intelligence facilities in Cuba, including the facility at Lourdes.

- Section 108,[27] which directs the President to report annually to the appropriate Congressional committees on commerce with, and assistance to, Cuba from other foreign countries. The reports are to contain: 1) a description of all bilateral assistance provided by foreign countries to Cuba, including humanitarian assistance; 2) a description of Cuba's commerce with foreign countries, including the identification of Cuba's trading partners and the extent of such trade; 3) a description of the joint ventures completed, or under consideration, by foreign nationals and business firms involving facilities in Cuba, including an identification of the location of the facilities involved and a description of the terms of agreement of the joint ventures and the names of the parties involved; 4) a determination as to whether any of the facilities described above is the subject of a claim against Cuba by a United States national; 5) a determination of the amount of debt of the Cuban government that is owed to each foreign country; 6) a description of the steps taken to assure that raw materials and semi-finished or finished goods produced by facilities in Cuba involving foreign nationals do not enter the United States market,

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25 22 U.S.C. § 6035.

26 22 U.S.C. § 6036.

27 22 U.S.C. § 6038.

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either directly or through third countries or parties; and 7) an identification of countries that purchase, or have purchased, arms or military supplies from Cuba or that otherwise have entered into agreements with Cuba that have a military application.

- Section 109,[28] which authorizes the President to furnish assistance and other support for individuals and independent nongovernmental organizations to support democracy-building efforts for Cuba and directs the President to take the necessary steps to encourage the Organization of American States to create a special emergency fund for the purpose of deploying human rights observers, election support, and election observation in Cuba.

- Section 111(b),[29] which directs the President to withhold the allocation of assistance, with specified exceptions, for any country in an amount equal to the sum of assistance and credits, if any, provided by such country in support of the completion of the Cuban nuclear facility at Juraguá, near Cienfuegos, Cuba.

3. <u>Title II: Assistance to a Free and Independent Cuba</u>

Title II of the Helms-Burton Act[30] sets out a general framework for relations with, and assistance to, a free and independent Cuba. Among the provisions of this Title relevant to our analysis are:

- Section 201,[31] which establishes a general policy for the United States toward a transition government and a democratically elected government in Cuba, including assistance to: 1) to a transition government in Cuba; 2) to facilitate the rapid movement from such a transition government to a democratically elected government in Cuba that results from an expression of the self-determination of the

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28 22 U.S.C. § 6039.

29 22 U.S.C. § 6041(b).

30 23 U.S.C. §§ 6061-6067.

31 22 U.S.C. § 6061.

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Cuban people; and 3) to support such a democratically elected government.[32] It is also U.S. policy "to encourage other countries and multilateral organizations to provide similar assistance and to work cooperatively with such countries and organizations to coordinate such assistance."[33]

- Section 202,[34] which requires the President to develop a plan for providing economic assistance to Cuba at such time that a transition government or democratically-elected government is in power and to seek agreement from other countries, international financial institutions, and multilateral organizations to provide comparable assistance to Cuba.

- Section 204,[35] which authorizes the President to take steps to: 1) suspend the U.S. economic embargo and applications of certain other actions against Cuba – including the right of action created under Title III of the Act – upon transmitting to the appropriate Congressional committees a determination that a transition government is in power in Cuba; and 2) terminate the embargo when a democratically-elected government is installed.

- Sections 205[36] and 206[37] which establish, respectively, the requirements for a government in Cuba to be deemed to be a "transition government" and a "democratically elected government."

- Section 207,[38] which directs the Secretary of State to report to the appropriate Congressional committees an assessment with respect to settlement of outstanding

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[32] *Id.*, item 5.

[33] *Id.*, item 8.

[34] 22 U.S.C. § 6062.

[35] 22 U.S.C. § 6064.

[36] 22 U.S.C. § 6065.

[37] 22 U.S.C. § 6066.

[38] 22 U.S.C. § 6067.

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U.S. claims to confiscated property in Cuba, and expresses the sense of the Congress that "the satisfactory resolution of the property claims by a Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba."

4. Title III: Protection of Property Rights of United States Nationals

In Section 301 of Title III of the Helms-Burton Act,[39] Congress finds that "it is in the interest of the Cuban people that the Cuban Government respect equally the property rights of Cuban nationals and nationals of other countries."[40] The Congress also makes the following additional findings in Section 301 of the Act:

- "the Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals;"[41]

- "this 'trafficking' in confiscated property provides badly needed financial benefit, including hard currency, oil and productive investment and expertise to the current Cuban Government and thus undermines the foreign policy of the United States;"[42]

- "the international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property;"[43]

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[39] 22 U.S.C. §§ 6081-6085.

[40] 22 U.S.C. § 6081, finding number 5.

[41] *Id.*, finding number 6.

[42] *Id.*, finding number 7.

[43] *Id.*, finding number 8.

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- "international law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory;" [44]

- "the United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies;" [45] and

- "to deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures."[46]

Based on the above findings, the Act sets out the following provisions:

- Section 302, which makes any person that traffics in property confiscated by the Cuban Government on or after January 1, 1959, liable for money damages to any U.S. national who owns the claims to such property and grants U.S. district courts jurisdiction over such actions where the amount in controversy exceeds $50,000.[47]

- Section 303,[48] which requires district courts to accept as conclusive proof of ownership a certification of a claim to ownership that has been made pursuant to the International Claims Settlement Act of 1949.[49] It also amends the International

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44 *Id.*, finding number 9.

45 *Id.*, finding number 10.

46 *Id.*, finding number 11.

47 22 U.S.C. § 6082.

48 22 U.S.C. § 6083.

49 Under a procedure established by U.S. law, U. S. nationals who were the former owners of properties confiscated by the Cuban government were able to file claims with the Foreign Claims Settlement Commission ("FCSC") of the United States for the expropriation of their properties in Cuba and had the validity and amount of their claims certified by the FCSC. See Title V of the International Claims Settlement Act of 1949, 22 U.S.C. § 1643 *et seq.* A total of

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Claims Settlement Act of 1949 to authorize district courts, for fact-finding purposes, to refer to the FCSC questions of the amount and ownership of a claim by a U.S. national resulting from the confiscation of property by Cuba, whether or not the U.S. national qualified for claim certification by the FCSC as the time of confiscation.

- Subsection (a)(2) of Section 303 bars certain ineligible U.S. nationals (including eligible nationals who failed to file timely claims), and Cuban nationals, from having a claim to or participating in the compensation proceeds or nonmonetary compensation paid or allocated to a U.S. national by virtue of a claim certified by the FCSC.[50]

- Section 305,[51] which sets a two-year statute of limitations for bringing an action related to trafficking.

Once a suit is instituted under Section 302, a claimant whose expropriation claim was certified by the FCSC can recover from the defendant three times the greater of (1) the amount certified to the claimant by the FCSC plus interest, or (2) the fair market value of the property (calculated as either the current value of the property, or the value of the property when confiscated, plus interest).[52] The claimant can also recover "court costs and reasonable attorneys fees."[53] There is a presumption in favor of the amount certified by the FCSC as the value of the property for purposes of recovery; such a presumption can be

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5,911 such claims were certified. *See generally,* Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuba Nationals' Expropriation Claims Against Cuba,* 16 U. PA. J. INT'L BUS. L. 217 (1995) and Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba,* 17 U. PA. J. INT'L ECON L.659 (1996).

[50] 22 U.S.C. § 6083(a)(2).

[51] 22 U.S.C. § 6084.

[52] Section 302(a)(1)(A)(i), 22 U.S.C. § 6082(a)(1)(A)(i). As set forth in Section 302(a)(1)(B), 22 U.S.C. § 6082(a)(1)(B), interest under Title III is to be computed under the provisions of 28 U.S.C. § 1961, which sets a rate of interest equal to the coupon issue yield equivalent of the average accepted auction price of the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. In this case, the period in which interest accumulates (and compounds annually) goes from the date of the confiscation of the property to the date in which the action is brought.

[53] Section 302(a)(1)(A)(ii), 22 U.S.C. § 6082(a)(1)(A)(ii).

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rebutted by "clear and convincing evidence" that the fair market value is the appropriate amount of liability.[54]

Thus, subject to certain limitations,[55] the Act imposes strict liability on third parties held to be trafficking in confiscated properties in Cuba against which a U.S. national holds a certified claim. Assuming jurisdiction can be asserted over the defendant under the rules of United States courts, all that the plaintiff needs to establish to prove liability is that the defendant was "trafficking" in the properties at issue after plaintiff's right of action accrued under the statute, and that the last act of trafficking occurred two years or less before the initiation of the action.[56]

There is, however, a significant restraint in this right of action. The President of the United States has authority to suspend the effective date of Title III for discrete six-month periods if the President "determines and reports in writing to the appropriate congressional committees at least 15 days before such effective date that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."[57] This suspension may be applied for consecutive periods before Title III goes into effect.[58] After Title III becomes effective, the President can suspend the right to bring an action under Title III for discrete periods of six months by determining and reporting in writing to the appropriate congressional committees that such suspension is necessary to the national interests of the United States and will expedite a transition to democracy in

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[54] Section 302(a)(2), 22 U.S.C. § 6082(a)(2).

[55] Suits by certified claimants against third parties are subject to a $50,000 floor on the amount in controversy; that floor is computed on the principal value of the claim "exclusive of interest, costs, and attorneys' fees." Section 302(b), 22 U.S.C. § 6082(b). Another limitation on the ability of certified claimants to sue is the above-mentioned two-year statute of limitations.

[56] Interestingly, the Helms-Burton Act allows the claimant and the defendant to settle the lawsuit without obtaining licenses from any U.S. government agency, thereby bypassing the licensing procedure by the U.S. Department of Treasury that would otherwise apply under the terms of 31 C.F.R. Part 515. Section 302(a)(7), 22 U.S.C. § 6082(a)(7). This provision could be utilized by claimants and potential defendants to settle the claims via court-approved settlements that would permit the defendants to continue their activities in Cuba without further hindrance from the former owners.

[57] Section 306(b)(1), 22 U.S.C. § 6085(b)(1).

[58] Section 306(b)(2), 22 U.S.C. § 6085(b)(2).

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Cuba.[59] The President can also, at any time, rescind any suspension of the applicability of Title III by "reporting to the appropriate committees that doing so will expedite a transition to democracy in Cuba."[60]

As will be further discussed below, President Clinton has allowed Title III of the Act to go into effect, but has repeatedly invoked his authority to maintain in suspense the ability of U.S. claimants to bring action against foreign nationals based on Title III.[61] While there are no guarantees that he will continue to do so, there is good reason to believe that barring unforeseen events the President will keep the Title III suits in suspense until the end of his term in January 2001.[62] However, a foreign party who may be subject to suits by certified U.S. claimants cannot rely on the suspension because it can be revoked without notice at any time.

5. Title IV: Exclusion of Certain Aliens

Title IV of the Helms-Burton Act[63] directs the Secretary of State to deny a visa to, and the Attorney General to exclude from the United States, aliens (including their spouses, minor children, or agents) involved in the confiscation of property, directly or indirectly, or the trafficking[64] in confiscated property, owned by a U.S. national. The Act also provides a

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59 Sections 306(c)(1)(B), and 306(c)(2), 22 U.S.C. §§ 6085(c)(1)(B), 6085(c)(2).

60 Section 306(d), 22 U.S.C. § 6085(d).

61 The most recent exercise of this authority was on January 14, 1999. Letter to Congressional Leaders on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, January 14, 1999, *Weekly Compilation of Presidential Documents* 35:3 (January 25, 1999) (waiver for 6 months beyond February 1, 1999).

62 The President has repeatedly indicated his intention to continue to keep Title III in suspense as long as he remains in office. For example, in his January 1998 declaration suspending the start of judicial proceedings under Title III, the President stated: "I said last January and reaffirmed last July that I expected to continue suspending this provision of the LIBERTAD Act so long as our friends and allies continue their stepped-up efforts to promote a democratic transition in Cuba." "Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," January 16, 1998, *Weekly Compilation of Presidential Documents* 34:3 (January 19, 1998), pp. 81-82 and "Letter to Congressional Leaders on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," January 16, 1998, *Weekly Compilation of Presidential Documents* 34:3 (January 16, 1998), p. 82. He made the same commitment in the May 18, 1998 agreement, further discussed below, with the E.U. that settled the U.S.-E.U. dispute over the Helms-Burton Act.

63 22 U.S.C. § 6091.

64 For purposes of Title IV, "trafficking" does not include the delivery of international communications signals to Cuba; (2) the trading or holding of securities publicly traded or

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case-by-case waiver of this exclusion for medical reasons or for purposes of litigation of a claim under Title III.

The immigration exclusions in Section 401 of the Act are very broad in the categories of people to which they apply, the timing of the sanctions, and the conduct that brings about the exclusion. The exclusions in Title IV are triggered by proscribed conduct taking place "after the date of enactment of the Act." The conduct includes confiscating, directing or overseeing the confiscation of, or converting for personal use, property subject to a claim by a U.S. national; trafficking in confiscated property," a claim to which is owned by a United States national;" being a corporate officer, principal, or shareholder with a controlling interest in an entity that has been involved in trafficking in confiscated properties; or being a spouse, minor child, or agent of an excludable person under Title IV.[65]

Trafficking occurs, for purposes of Title IV, if a person "knowingly and intentionally" transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property; purchases, receives, obtains control of, or otherwise acquires confiscated property; improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after the date of enactment of the Act to manage, lease, possess, use or hold an interest in confiscated property; enters into a commercial arrangement using or otherwise benefiting from confiscated property; or causes, directs, participates in, or profits from, trafficking by another person, or otherwise engages in trafficking through another person, without the authorization of the U.S. national who holds a claim to the property.[66]

Unlike Title III, Title IV does not allow the President to waive its requirements in the

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held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national; (3) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; and (4) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban government or the ruling political party in Cuba.

65 Sections 401(a), 22 U.S.C. § 6091(a).

66 The definition of trafficking is worded somewhat differently for Title IV than for the rest of the Act, and is said in the Conference Report issued by Congress to accompany the Act to be slightly narrower than that for Titles I and III. Conference Report at 66. However, a careful reading of the definition in Section 401(b)(2) reveals no material differences between that definition and the one in Section 4(13).

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national interest. In addition, there is no provision to remove the bar against entry into the United States once an individual has been declared excludable. Nonetheless, in a recent instance, the U.S. Department of State chose to lift the immigration prohibitions it had imposed against high officials of a company (Grupo Domos, a Mexican telecommunications company) that had invested in confiscated property in Cuba after the company terminated its investment in the island.[67]

C. FOREIGN CRITICISMS OF THE HELMS-BURTON ACT

1. By Individual Countries and Trading Blocs

The crux of the foreign objections to the Helms-Burton Act have been articulated succinctly by a U.S. trade policy expert as follows:

> This legislation seeks to force foreign businesses to participate in the United States economic embargo of Cuba; however, it directly contradicts international law and undermines the long-term goals of United States international economic policy. … Helms-Burton empowers the State Department to deny entry visas to the top officials and representatives of companies that use or benefit from property in Cuba that was confiscated from Americans after the 1959 revolution. This would effectively exclude these firms from exporting to, or doing business in, the United States even if their products and activities have nothing to do with Cuba.[68]

The Helms-Burton Act was signed into law on March 12, 1996. However, the legislative proposals by Representative Dan Burton (R-IN) and Senator Jesse Helms (R-NC) that constitute the backbone of the law were formally introduced in Congress in February 1995; some of the provisions of the Helms-Burton proposal were in fact mostly re-introductions in one omnibus package of proposals that had been introduced in the previous session of Congress.[69] Thus, the thrust of the legislation was well known to both supporters and opponents long before it was enacted.

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[67] Statement of Michael Ranneberger before Subcommittee on International Economic Policy and Trade, House International Relations Committee, March 12, 1998.

[68] Peter Morici, "The United States, World Trade, and the Helms-Burton Act," *Current History* (February 1997), p. 87.

[69] Robert E. Freer, Jr., "Helms-Burton Myths & Realities," *Cuba in Transition—Volume 5* (Washington: Association for the Study of the Cuban Economy, 1995), p. 429.

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On March 5, 1996, after the tragic incident of February 24, 1996 in which Cuban MiGs shot down two civilian airplanes piloted by Cuban-Americans which created a groundswell of support for the legislation, the European Union lodged a demarche with the Department of State restating "its opposition as a matter of law and policy, to extraterritorial applications of US jurisdiction which would also restrict EU trade in goods and services with Cuba, as already stated in various diplomatic demarches made in Washington last year, including a letter from Sir Leon Brittan to Secretary of State Warren Christopher. Although the EU is fully supportive of a peaceful transition in Cuba, it cannot accept that the US unilaterally determine and restrict EU economic and commercial relations with third countries."[70]

The European Union requested consultations with the United States under the dispute settlement provisions of the World Trade Organization (WTO) on the Act as well as three pre-existing provisions of U.S. Cuban sanctions legislation, regarding their consistency with the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).[71] Consultations took place on June 4 and July 6, 1996.[72]

On October 16, 1996, the European Union formally requested that the Dispute Settlement Body (DSB) of the WTO establish a panel to rule on the "extra-territorial means" used by the Helms-Burton Act to achieve its objectives and the adverse effect they have on

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70 Demarche by the European Union, Delegation of the European Commission, Washington, March 5, 1996, at 35 I.L.M. 398-399 (1996). The referenced letter from Sir Leon Brittan to Secretary of State Warren Christopher, dated March 15, 1995, states that should the proposal by Helms and Burton be enacted, "it would revive our long-standing differences about the unilateral and extraterritorial aspects of various statutes implementing US policy vis-á-vis Cuba. Indeed, we have consistently expressed our opposition to the extraterritorial reach of the Food Security Act of 1985, the Cuban Assets Control Regulations or the Cuban Democracy Act of 1992 that the proposal in questions seeks to tighten up." 35 I.L.M. 399 (1996).

71 "Estados Unidos: Ley para la Libertad y Solidaridad Democrática Cubana. Solicitud de celebración de consultas presentada por las Comunidades Europeas," Organización Mundial del Comercio, WT/DS38/1 (May 13, 1996). See also Evelyn F. Cohn and Alan D. Berlin, "European Community Reacts to Helms-Burton," *The New York Law Journal* (August 4, 1997).

72 United States Trade Representative, *1998 Trade Policy Agenda and 1997 Annual Report of the President of the United States on the Trade Agreements Program* (Washington: U.S. Government Printing Office, 1998, p. 66.

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European Union trade in goods and services.[73] Subsequently, the Government of Canada supported the EU panel request and jointed the proceedings as a third party, with the right to make written and oral submissions to the panel and have the proceedings reflect its submissions.[74] The DSB established the panel requested by the European Union on November 20, 1996.[75] On February 3, 1997, the European Union asked the Director-General of the WTO to appoint panelists; this was done on February 20, 1997.[76]

In addition to supporting the European Union's request for a WTO panel on the Helms-Burton Act, Canada has also held consultations with the United States under the North American Free Trade Agreement (NAFTA) and has pursued the issue in international organizations such as the United Nations, the Organization of American States and the Organization for Economic Cooperation and Development.[77]

Meanwhile, Mexico has "expressed its most vigorous rejection (of the Helms-Burton Act) since, in addition to violating international law by adopting coercive measures against the Cuban state, it also pretends to sanction physical and moral persons of Mexican nationality because of their financial and commercial dealings with Cuba, contravening, among other legal instruments, the Charter of the World Trade Organization, and the North

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73 "Request for a Panel on the Helms-Burton Bill," Statement by the Representative of the European Communities and their Member States at the Dispute Settlement Body of the WTO (October 16, 1996).

74 "Canada Supports European Union Request for WTO Panel on Helms-Burton," Canada Department of Foreign Affairs and International Trade, Press Release No. 214 (November 21, 1996).

75 United States Trade Representative, *1998 Trade Policy Agenda and 1997 Annual Report of the President of the United States on the Trade Agreements Program* (Washington: U.S. Government Printing Office, 1998, p. 66.

76 United States Trade Representative, *1998 Trade Policy Agenda and 1997 Annual Report of the President of the United States on the Trade Agreements Program* (Washington: U.S. Government Printing Office, 1998, p. 66. The panelists appointed by the WTO Director-General were Arthur Dunkel, chair (Switzerland), Tommy Koh (Singapore) and Edward Woodfield (New Zealand). *Id.* The European Union had agreed to a one-week postponement of the nomination of the panel, while bilateral negotiations with the United States seeking a solution to the dispute were taking place. See "Decision on Creation of Helms-Burton Panel Deferred," European Union, Delegation of the European Commission to the United States, Press Release No. 6/97 (February 12, 1997). The eventual suspension of the WTO panel deliberations is discussed below.

77 "Canada Supports European Union Request for WTO Panel on Helms-Burton," Canada Department of Foreign Affairs and International Trade, Press Release No. 214 (November 21, 1996).

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American Free Trade Agreement. The legislation contains specific provisions regarding extraterritorial application that ignore the fundamental principle of the sovereign equality of the States and therefore are clearly incompatible with the international law."[78] Mexico worked closely with Canada to develop a joint strategy to challenge the Act under the NAFTA.[79]

2. By the United Nations

Since 1992, the United Sessions General Assembly has adopted annually at its fall session a resolution on the U.S. embargo of Cuba. Although they vary slightly in formulation, the resolutions adopted during 1992-95: [80]

- reaffirmed, among others, the principles of the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of trade and international navigation;

- expressed concern about the promulgation and application by Member States of laws and regulations whose extraterritorial effects affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction, and the freedom of trade and navigation;

- noted the recent adoption (by the United States) of measures to extend or strengthen the economic, commercial and financial embargo of Cuba; and

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78 "Posición de México sobre la 'Ley Helms-Burton' y la Cuestión de Cuba," Mexico Secretaría de Relaciones Exteriores, Press Release (August 28, 1996).

79 Pedro Castro, "La Ley Helms-Burton y la extraterritorialidad de las leyes internas: Elementos para su explicación," *Revista Mexicana de Política Exterior*, no. 53 (February 1998), pp. 48-49.

80 "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba," Resolution 47/19, 47th Session of the UN General Assembly, A/RES/47/19 (November 24, 1992). See also "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba," Resolution 48/16, 48th Session of the UN General Assembly, A/RES/48/16 (November 3, 1993); "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba," Resolution 49/9, 48th Session of the UN General Assembly, A/RES/48/9 (November 8, 1994); and "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba," Resolution 50/10, 50th Session of the UN General Assembly, A/RES/50/10 (November 15, 1995). The text of these General Assembly resolutions have been posted online by the United Nations Department of Economic and Social Affairs, www.un.org.

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- called on States to refrain from promulgating and applying laws and regulations that violate UN principles and urged States that had such measures to take the necessary steps to repeal or invalidate them as soon as possible in accordance with their legal regime.

The findings of the resolution adopted in 1996 added: "Concerned about the continued promulgation and application by Member States of laws and regulations, such as the one promulgated on March 12, 1996 known as the "Helms-Burton Act", the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation."[81] Resolutions adopted in 1997 and 1998 have repeated the reference to the Act.[82]

3. By the Organization of American States (OAS)

A resolution of the OAS General Assembly adopted in June 1996 directed the organization's Inter-American Juridical Committee "to examine and decide upon the validity under international law of the Helms-Burton Act … as a matter of priority, and to present its findings to the Permanent Council."[83] On August 23, 1996, the Inter-American Juridical Committee issued an opinion[84] structured in two parts:

- The "Protection of the Property Rights of Nationals" section reaffirmed the "Hull Doctrine" requiring that expropriation be nondiscriminatory, for a public purpose, and accompanied by prompt, adequate and effective compensation. Moreover, the

81 "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba," Resolution 51/17, 51th Session of the UN General Assembly, A/RES/51/17 (November 21, 1996).

82 "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba," Resolution 52/10, 52nd Session of the UN General Assembly, A/RES/52/10 (November 12, 1997) and "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba," Resolution 53/4, 53rd Session of the UN General Assembly, A/RES/53/4 (October 22, 1998).

83 OAS Resolution on Free Trade and Investment in the Hemisphere, approved by the General Assembly on June 4, 1996, OAS Doc. OEA/SER.P AG/doc.3375/96.

84 Opinion of the Inter-American Juridical Committee in Response to Resolution AG/doc.3375/96 of the General Assembly of the Organization Entitled "Freedom of Trade and Investment in the Hemisphere," CSI/SO/II/doc.67/96 rev. 5 (23 August 1996), at 35 I.L.M. 1329 (1996).

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opinion recognized sponsorship by a State of unsatisfied claims against its citizens. Finally, the opinion endorsed, as a requirement of international law, a fair judicial or administrative review.[85]

- The "Extraterritoriality and the Limits Imposed by International Law on the Exercise of Jurisdiction" section, however, stated that "the exercise of jurisdiction by a State over acts of 'trafficking' by aliens abroad, under circumstances whereby neither the alien nor the conduct in question has any connection with its territory and there is no apparent connection between such acts and the protection of its essential sovereign interests, does not conform with international law."[86]

The Committee concluded that "in significant areas … the bases and potential application of the legislation which is the subject of this Opinion are not in conformity with international law."[87]

4. By the Latin American Economic System (Sistema Económico Latinoamericano, or "SELA")

SELA is an intergovernmental regional organization of Latin American and Caribbean countries created in 1975[88] and headquartered in Caracas, Venezuela. Twenty-

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85 Seymour J. Rubin, "Introductory Note" to Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Act, 35 I.L.M. 1323 (1996).

86 Opinion of the Inter-American Juridical Committee, at para. 9.

87 Opinion of the Inter-American Juridical Committee, at para. 10. For a rebuttal of the Committee's findings see Juan Azel, "What's All the Commotion About? International Attacks on the Validity of the Cuban Liberty and Democratic Solidarity Act," *University of Miami Inter-American Law Review* 28:3 (Spring-Summer 1997).

88 The charter of the organization is the "Convenio de Panamá Constitutivo del Sistema Económico Latinoamericano (SELA)," adopted on October 17, 1975, which can be found at www.lanic.utexas.edu/project/sela/docs.

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eight Latin American and Caribbean countries are members of SELA;[89] neither the United States nor Canada are members of the organization.[90]

SELA's highest-level body, the Latin American Council, has issued several "Decisions" in opposition to the Act at meetings held in 1996-98:

- At its XXII meeting in Montevideo, Uruguay, in October 1996, the Council rejected "the Helms-Burton Act of the Congress of the United States for overlooking the fundamental principle of respecting sovereignty; contravening the rules governing the harmonious relations among States; imposing extraterritorial unilateral sanctions and flagrantly violating international law and the principles and rules governing international trade." The Council also called for promoting "among the Member States the official exchange of information and experiences in creating and applying the so-called 'antidote laws or mirror laws' to the so-called 'Helms-Burton Act.'"[91]

- At its XXIII meeting in Port of Spain, Trinidad and Tobago, in October 1997, the Council recalled its 1996 Decision on Helms-Burton and reaffirmed its rejection of the law and the call for exchanges of information and experiences among the Member States in creating and applying "antidote" laws.[92]

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89 SELA members as of early 1999 are Argentina, Barbados, Belize, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad y Tobago, Uruguay, and Venezuela.

90 Article 6 of the "Convenio de Panamá Constitutivo del Sistema Económico Latinoamericano" states that membership in the organization is open to "sovereign Latin American states."

91 "Decision No. 377: Need to put an end to the economic, trade and financial embargo imposed by the Government of the United States of America against Cuba," XXII Regular Session of the Latin American Council of SELA, Montevideo, 22-25 October 1996. The legal and economic analysis of the Act underlying the Decision is contained in the SELA technical document "Implicaciones jurídicas y económicas de la Ley Helms-Burton," SP/CL/XXII.O/DT no. 9 (1996).

92 "Decision No. 390: Need to put an end to the economic, trade and financial blockage imposed by the Government of the United States of America against Cuba," XXIII Regular Session of the Latin American Council of SELA, Port of Spain, October 1997. See also the SELA technical document "Follow-up report on the application of the Helms-Burton Act," SP/CL/XXIII.O/Di no.1 (1997).

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- At its XXIV meeting in La Habana, Cuba, in November-December 1998, the Council restated its "energetic" rejection of the Helms-Burton Act for the reasons given in earlier Decisions. Interestingly, the 1998 Council Decision no longer called for exchanges of information and experiences among the Member States in creating and applying "antidotes" to the Act.[93]

5. By Other Organizations

A number of other international organizations have also criticized the Helms-Burton Act. They include the Movement of Non-Aligned Countries[94], the Rio Group (consisting of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay, Venezuela, Costa Rica representing the Central American States and Trinidad and Tobago representing the Caribbean States),[95] and the Ibero-American Conference of Heads of State and Government.[96] In addition, another regional group, the 25-member

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93 "Decisión No. 401: Necesidad de poner fin al bloqueo económico, comercial y financiero impuesto por el Gobierno de los Estados Unidos de América contra Cuba," XXIV Reunión Ordinaria del Consejo Latinoamerico del SELA, La Habana, November-December 1998. See also the SELA technical document "Informe de seguimiento de la aplicación de la Ley Helms-Burton y análisis del proceso de expropiación e indemnizaciones en Cuba," SP/CL/XXIV.O/Di no.2 (1998).

94 *See, e.g.,* "Comunicado de los Ministros de Asuntos Exteriores y Jefes de Delegación del Movimiento de Países No Alineados con Ocasión de la Reunión del Comité Ministerial sobre Metodología," Cartagena de Indias (May 15-16, 1996) and "Communique of the Meeting of Ministers of Foreign Affairs and Heads of Delegation of the Movement of Non-Aligned Countries to the Fifty-First Session of the General Assembly," held in New York on September 25, 1996, submitted to the 51st Session of the United Nations General Assembly, A/51/473, S/1996/839 (October 10, 1996).

95 See, e.g., "Declaration of the Tenth Summit of Heads of State and Government of the Rio Group," held in Cochabamba, Bolivia, on 3-4 September 1996, submitted to the 51st Session of the United Nations General Assembly, A/51/375 (September 19, 1996).

96 See, e.g., the Bariloche Declaration, issued in October 1995, in which the 21 Ibero-American countries (Latin America plus Spain and Portugal) "reject all unilateral coercive measures that affect the well-being of the peoples of Ibero-America, impede free trade and universally recognized transparent trade practices, and violate the principles of regional coexistence and the sovereignty of States," submitted to the 50th Session of the United Nations General Assembly, A/50/673 (October 24, 1995), and the Declaration of Viña del Mar, issued in November 1996, in which the participants again criticized "unilateral measures, particularly coercive ones, that are contrary to free trade" and "expressed our energetic rejection to the approval by the United States of America of the Helms-Burton Act, which violates international law principles and norms and the United Nations Charter, contravenes those of the World Trade Organization, and runs contrary to the spirit of cooperation and friendship that should characterize the relations of all members of the international community," and which can be found at http://www.soc.qc.edu/procuba/vicumbre.html.

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Association of Caribbean States, has in its recent summit expressed its "categorical rejection" of "any unilateral coercive measure as well as the extraterritorial application of national laws," and called on the United States to "put an end to the Helms-Burton law, in accordance with international resolutions approved by the United Nations General Assembly."[97]

D. HELMS-BURTON ANTIDOTES

1. Introduction

Five so-called antidote laws to the Helms-Burton Act have been enacted to date. Canada, Mexico, the European Union and Argentina have all enacted "blocking statutes"[98] intended to counteract not only the Helms-Burton Act but, more broadly, other foreign legislation perceived to have extraterritorial reach. [99] Spain reportedly considered enacting a Helms-Burton antidote in the summer and fall of 1996 but did not follow through in view of

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97 Patrick Mosser, *Caribbean Leaders: End Cuba Embargo,* France-Presse, April 17, 1999.

98 Vaughan Lowe, "Helms-Burton and EC Regulation 2271/96," *The Cambridge Law Journal* 56:2 (July 1997), p. 248.

99 On August 5, 1996, less than 5 months after the enacted of the Helms-Burton Act, the President signed into law the Iran and Libya Sanctions Act of 1996, P.L. 104-172 (known as the D'Amato Act). The objective of that Act is "to impose sanctions on persons making certain investments directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop its petroleum resources, and on persons exporting certain items that enhance Libya's weapons or aviation capabilities or enhance Libya's ability to develop its petroleum resources, and for other purposes." This action infuriated U.S. trading partners, particularly certain European countries, for whom the Iranian and Libyan oil and gas industry is probably more significant than the Cuban market. On the importance of economic relations with Iran and Libya to U.S. European trading partners see, Michael A. Asaro, "The Iran & Libya Sanctions Act of 1996: A Thorn on the Side of the World Trading System," *Brooklyn Journal of International Law* 33:2 (1997), especially pp. 508-510. The European Union derives nearly 20 percent of its energy needs from Libya and Iran; it has significant investment in both countries and continues to maintain ties with these countries. In particular, Turkey has a $23 billion contract to buy Iranian natural gas and is building a pipeline between Turkey and Iran for the purpose of transporting natural gas; energy companies from France and Italy are considering multi-billion dollar projects in Iran and Libya. See Jean Anderson, "U.S. Economic Sanctions on Cuba, Iran & Libya: Helms-Burton and the Iran and Libya Sanctions Act," *Revue de Droit des Affaires Internationales*, no. 8 (1996), pp. 1027-1028. The strong European reaction may have been a shot across the bow, to put the United States on notice that the trend toward legislation that Europeans deemed to be extraterritorial in application had to stop.

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the anticipated joint action by the European Union.[100] As will become apparent from the discussion below, these antidotes have many features in common.

That Canada, Mexico and the European Union adopted Helms-Burton antidotes is not surprising given the blossoming of their trade and investment relationships with Cuba since 1989-90, when Cuba's preferential economic relations with the former Soviet bloc countries came to a halt.[101] Over the period 1992-97, the member states of the European Union[102] as a group were Cuba's most important trading partner. In 1997, the European Union took about 30 percent of Cuba's exports and supplied about the same percent of Cuba's imports. Cuba's imports of European goods in that year amounted to over $1 billion, while exports to Europe were about half of that amount, for a European positive bilateral trade balance of about $500 million. Within the European Union, commercial relations with Cuba were particularly significant for the Netherlands, Spain and France. Mexico and Canada were also significant markets for Cuban goods and important suppliers of merchandise to the island. Merchandise trade between Cuba and Argentina has been relatively small, but Cuban imports of Argentinean goods have been significant in certain years (e.g., 1996).[103]

Statistics on foreign direct investment in Cuba are very unreliable, in part because of concerns about sanctions by the United States against investors pursuant to the Act.

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100 "España amenaza con acciones contra la Ley Helms," *El Nuevo Herald* (September 20, 1996), p. 2B. See also Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European-US Relations," *Journal of Interamerican Studies & World Affairs* 39:3 (Fall 1997), especially pp. 90-91. According to Roy, the package of measures being considered by the Spanish Government in May 1996 included regulations on confidentiality of data on investments in Cuba, a concept known as "Obligatory Diplomatic Protection" designed to make the Spanish Administration a co-defendant of law suits arising from the Act, and some European-wide countermeasures, such as the denial of visas to potential litigants against European interests and proscription of investments in Europe from these same sources.

101 On this relationship and its shift in 1989-90 see, e.g., Jorge F. Pérez-López, "Cuba's Foreign Economic Relationships," in *Cuba: The International Dimension*, Georges Fauriol and Eva Loser, editors, pp. 311-352 (New Brunswick: Transaction Publishers, 1990) and "The Cuban Economic Crisis of the 1990s and the External Sector," *Cuba in Transition—Volume 8* (Washington: Association for the Study of the Cuban Economy, 1998), pp. 386-413.

102 The fifteen members of the European Union are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

103 U.S. Central Intelligence Agency, *Cuba: A Handbook of Trade Statistics, 1998*, APLA 98-10008 (Washington, December 1998).

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Available statistics suggest that member states of the European Union, Canada and Mexico are important sources of investment in Cuba, however. According to Cuban statistics, there were 212 foreign investments (joint ventures) in Cuba at the end of 1995, of which 47 (22 percent) were with Spanish investors, 26 (12 percent) with Canadian investors, 17 (8 percent) with Italian investors, 13 (6 percent) with Mexican and with French investors, and 9 (4 percent) with Dutch investors.[104] Statistics on delivered foreign investment in Cuba since 1990 and through March 20, 1999 compiled by the U.S.-Cuba Trade and Economic Council show overall investment at slightly under $1.8 billion, of which $600 million has originated from Canada, $450 million from Mexico, $387 million from Italy, $100 million from Spain and $50 million each from France and the United Kingdom.[105] To date, Argentina does not seem to have been a source of foreign investment in Cuba.

These statistics suggest that the nations enacting antidote legislation have a strong economic interest in protecting the ability of their citizens to invest in Cuba.

Cuba has also enacted a very specific statute to counter the Helms-Burton Act. The Cuban statute, and complementary legislation enacted in February 1999, differ significantly from the other antidotes, as their thrust is to withhold information regarding investments and create opaqueness in the foreign investment process primarily through punitive measures against Cuban citizens deemed to be assisting in the implementation of the Act.[106]

2. Canada's Antidote Law

a) General Description

The Canadian Parliament first adopted legislation "to defend Canadian interests against attempts by foreign governments or courts to apply unreasonable laws or rulings in Canada,"[107] was the Foreign Extraterritorial Measures Act (FEMA),[108] effective in February

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104 Consultores Asociados, S.A., *Cuba: Inversiones y Negocios, 1995-1996* (La Habana, 1995), p. 18.

105 U.S.-Cuba Trade and Economic Council, "Foreign Investment in Cuba," as of March 20, 1999, http://www.cubatrade.org.

106 On the oddity that laws ostensibly aimed at countering foreign laws concentrate on punishment against Cuban citizens see Ricardo R. Sardiña, "Es más que mordaza la Ley Mordaza," *Diario las Américas* (March 30, 1999), p. 8A.

107 "Government Introduces Legislation to Counter U.S. Helms-Burton Act," Canadian Department of Foreign Affairs and International Trade, Press Release No. 163 (September 16, 1996).

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1985. FEMA was enacted as a response to U.S. antitrust legislation aimed at preventing monopolies among companies, including Canadian companies, most notably in the uranium industry, where the existence of a worldwide cartel was alleged in the 1970s.[109] The main purpose of FEMA was to prohibit Canadian corporations, which were subsidiaries of U.S. corporations, from obeying the orders and directives of their U.S. parents insofar as the antitrust legislation was concerned.[110] Prior to the enactment of FEMA, Canada had blunted some of the extraterritorial effects of foreign legislation through provincial measures, e.g., the blocking laws of Quebec and Ontario at the provincial level, but wished to give such blocking laws a sounder legislative footing though the enactment of federal legislation.[111]

Like the European Union, the Government of Canada expressed opposition to the proposed Helms-Burton Act, and attempted to dissuade the United States from enacting it. In late February 1996, Canadian Foreign Minister Lloyd Axworthy and Trade Minister Art Eggleton indicated they would take up the issue directly with United States authorities.[112] When the Helms-Burton Act became law, a member of the Canadian Parliament drafted legislation in May 1996 that would give Canadian citizens adversely affected by lawsuits pursuant to the Act the right to countersue in Canadian courts and attach any property that those who originated the suits may have in Canada.[113] In June, the Government of Canada

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108 The text of the Foreign Extraterritorial Measures Act, including the 1996 amendments contained in Bill C-54 (hereinafter "Canadian antidote"), appears at 36 I.L.M. 117 (1997).

109 Andrew C. Dekany, "Canada's Foreign Extraterritorial Measures Act: Using Canadian Criminal Sanctions to Block U.S. Anti-Cuban Legislation," *Canadian Business Law Journal* 28 (1997), p. 211. Douglas H. Forsythe, "Introductory Note to Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act," 36 I.L.M. 111 (1997), traces the origin of FEMA also to disputes during the 1970s and early 1980s over U.S. extraterritorial assertion of jurisdiction that Canada found objectionable, for example in the Bank of Nova Scotia subpoenas case and the Siberian pipeline. For analysis of challenges to U.S. extraterritorial regulations in the Soviet pipeline dispute in the 1980s and in the *Fruehauf* case in the mid-1960s see William S. Dodge, "The Helms-Burton Act and Transnational Legal Process," *Hastings International Law and Comparative Law Review* 20:4 (Summer 1997), especially pp. 720-722.

110 Dekany, "Canada's Foreign Extraterritorial Measures Act," p. 211.

111 Forsythe, "Introductory Note to Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act," 36 I.L.M. 111 (1997).

112 Anne Swardson, "Sanctions Legislation in U.S. Angers Cuba-Friendly Canada," *The Washington Post* (March 1, 1996), p. A10.

113 Aviva Freudmann, "Canada considering new way to fight Helms-Burton Act," *The Journal of Commerce* (May 24, 1996), p. 3A.

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announced the intention to introduce legislation amending the FEMA "to help Canadian companies against foreign measures such as the U.S. Helms-Burton Act."[114]

The Canadian legislative response to the Helms-Burton Act -- in the form of a bill (Bill C-54, an Act to Amend the Foreign Extraterritorial Measures Act) amending the FEMA -- was presented by the Canadian Executive to the House of Commons on September 16, 1996. Foreign Affairs Minister Lloyd Axworthy described the government's proposal as follows: "this package of amendments is a key element of Canada's leadership role in the international campaign against Helms-Burton."[115] Meanwhile, Minister of International Trade Eggleton said that the legislation was "a regrettable measure. I hope that it never has to be implemented. It is 'antidote legislation.'"[116] The bill was passed by the House of Commons on 9 October 1996 and received the approval of the Senate on 7 November 1996; the Act received Royal Assent on 28 November 1996 and came into force on January 1, 1997.[117]

Because Canada already had legislation in place to address the domestic effects of foreign measures, particularly those arising from antitrust proceedings, the Canadian Helms-Burton antidote did not take the form of a new statute (as was the case with the other antidotes—see below) but rather of amendments to an existing statute. The amendments generally broadened the FEMA to address foreign judgements in general, rather than those contained in antitrust proceedings, as had been the emphasis of the original Act. The following paragraphs briefly describe the general mechanisms to

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[114] "Government Announces Measures to Oppose U.S. Helms-Burton Act," Canadian Department of Foreign Affairs and International Trade, Press Release No. 115 (June 17, 1996). See also Clyde H. Farnsworth, "Canada Warns U.S. Over Law Penalizing Trade with Cuba," *The New York Times News Service* (June 17, 1996).

[115] "Government Introduces Legislation to Counter U.S. Helms-Burton Act," Canadian Department of Foreign Affairs and International Trade, Press Release No. 163 (September 16, 1996); "Ottawa introduces bill to defend companies doing business in Cuba," CP Ottawa (September 16, 1996).

[116] "Canadá espera aprobar medida contra Helms-Burton," *El Nuevo Herald* (September 21, 1996), p. 1B. See also Beverly L. Campbell, "Helms-Burton: Checkmate or Challenge for Canadian Firms Doing Business in Cuba?," *Cuba in Transition—Volume 6* (Washington: Association for the Study of the Cuban Economy, 1996), p. 498.

[117] Dekany, "Canada's Foreign Extraterritorial Measures Act," p. 212.

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counteract foreign measures contained in FEMA[118] and the modifications introduced by the 1996 amendments.

The stated purpose of FEMA is "to authorize the making of orders relating to the production of records and the giving of information for the purposes of proceedings in foreign tribunals, relating to measures of foreign states or foreign tribunals affecting international trade or commerce and in respect of the recognition and enforcement in Canada of certain foreign judgements obtained in antitrust proceedings." The 1996 Amendments deleted the clause "obtained in antitrust proceedings," broadening the statute to cover judgements other than those related to antitrust matters. Similarly, the 1996 Amendments expanded the definitions (called "Interpretations") in Section 2 of FEMA to add "foreign trade law"[119] alongside "antitrust law." This addition prepared the ground for the legislation to counteract adverse foreign trade law actions.

An innovation of the 1996 amendments is that they created a schedule within FEMA into which the Attorney General, with the concurrence of the Minister of Foreign Affairs, may add the name of "foreign trade laws or a reference to any provision of a foreign trade law if the Attorney General of Canada is of the opinion that that law or provision is contrary to international law or international comity."[120] The "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996" is the only foreign law thus far listed in the schedule.[121]

b) Cooperation in the Implementation of Foreign Laws

Section 3 of FEMA authorizes the Attorney General of Canada, by order, to prohibit or restrict the production of information or disclosure of records[122] that are in Canada or

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118 The description of FEMA is based on Forsythe, "Introductory Note to Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act," and Dekany, "Canada's Foreign Extraterritorial Measures Act."

119 Section 2 states: "'foreign trade law' means a law of foreign jurisdiction that directly or indirectly affects or is likely to affect trade or commerce between (a) Canada, a province, a Canadian citizen or a resident of Canada, a corporation incorporated by or under a law of Canada or a province or a person carrying on business in Canada; and (b) any person or foreign state."

120 Section 2.1.

121 Schedule to Section 2.1, at 36 I.L.M. 124 (1997).

122 According to Section 2, "record" includes "any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy or portion thereof."

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under the control of a Canadian citizen or a person resident in Canada, to a foreign tribunal if the Attorney General decides that the foreign tribunal has exercised, is exercising or plans to exercise jurisdiction or powers that is likely "to adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe on Canadian sovereignty." The 1996 amendments expanded the behavior by foreign tribunals that may be subject to prohibition of disclosure of information and records to include "jurisdiction of power that is or are related to the enforcement of a foreign trade law or a provision of a foreign trade law set out in the schedule." Where a superior court is satisfied that Section 3 may not be complied with, the Attorney General may seize records for safe-keeping and to prevent their production (Section 4).

Section 7 sets out a schedule of penalties for violation of Section 3, ranging from up to C$5,000 or up to two years or prison or both for indictable offenses to up to C$10,000 or up to five years in prison or both for offenses punishable on summary conviction. The 1996 amendments raise the penalties for violations of Section 3 to up to C$1.5 million for corporations and up to C$150,000 and up to five years in prison or both for individuals upon conviction on indictment and up to C$150,000 for corporations and up to C$15,000 and up to two years in prison or both for individuals on summary conviction.

c) Validity of Foreign Decisions

The Attorney General, with the concurrence of the Minister of Foreign Affairs, is authorized to make orders to block compliance in Canada with an extraterritorial measure of a foreign state, provided the extraterritorial measures in question adversely affect significant Canadian trading interests or infringe Canadian sovereignty (Section 5). A new Section 7.1, added by the 1996 amendments, is very direct: "any judgment given under the law of the United States entitled Cuban Liberty and Solidarity (LIBERTAD) Helms-Burton Act of 1996 shall not be recognized or enforced in any manner in Canada."

d) Counterclaims

Pursuant to Section 8, the Attorney General is permitted to issue orders forbidding enforcement of foreign competition law (referred to as "antitrust") judgments in Canadian courts (Section 8), subject to the requirement that the foreign judgment affects significant Canadian trading interests or infringes Canadian sovereignty. If a judgment is blocked by Section 8, the Canadian defendant (a Canadian citizen, a resident of Canada, a corporation

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incorporated by or under a law of Canada or a province, or a person carrying business in Canada) has the right to sue in a Canadian court to recover an equivalent amount in damages against the person who took action in the foreign tribunal (Section 9).[123]

Under the 1996 amendments, the Attorney General is permitted to issue orders forbidding enforcement in Canada of foreign trade law or a provision of a foreign trade law listed in the schedule that the Attorney General deems has adversely affected or is likely to adversely affect significant interests in Canada (Section 8(1.1)). A new Section (Section 8.1) allows the Attorney General to issue a recovery order compensating Canadian citizens, residents, corporations incorporated by or under Canadian federal or provincial law or persons doing business in Canada for judgments assessed by foreign jurisdictions under the Act plus expenses and damages.

Section 9 provided that if a judgment is blocked by a Section 8 order, the Canadian defendant had the right to sue in a Canadian court to recover an equivalent amount in damages against the person who took the action in the foreign tribunal. The 1996 amendments modified this Section to allow persons in Canada to recover expenses incurred in defending against foreign legislation singled out by the statute (i.e., the Helms-Burton Act), including expenses incurred in the proceedings in the foreign jurisdiction and in the recovery proceedings in Canada and any consequential loss or damage suffered by reason of the enforcement of the foreign judgment.

3. Mexico's Antidote Law

a) General Description

During the summer of 1996, Mexican legislators, in collaboration with the Secretariat of Foreign Relations (Secretaría de Relaciones Exteriores, SRE), drafted a bill to counteract extraterritorial actions taken by a foreign country, particularly the Helms-Burton Act.[124] The bill (at that time called Act to Protect Trade and Investment) was submitted to the Senate by President Zedillo and a group of senators on September 5; it was referred to the Senate's United Commissions of Foreign Affairs, Commerce, Industrial Development and Legislative

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[123] Forsythe refers to this recovery of damages provision as a "clawback."

[124] Irma Pilar Ortiz, "Incautación de bienes en México para contrarrestar embargos por la Helms-Burton," *Excelsior* (June 26, 1996).

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Studies for its consideration.[125] In a statement accompanying the bill, President Zedillo wrote:

> The formulation of legislation, by a foreign country, purporting to restrict the acts of trade taking place outside its territory and which are not executed by its own nationals, constitutes a clear example of a claim of extraterritoriality which is contrary to our legal tradition, which has always been respectful of the fundamental principles of international law. … Our country … rejects in an energetic manner the pretension of any country to apply, outside its territory, legal provisions that affect third countries. This is the case of laws such as the Helms-Burton [Act] and the D'Amato-Kennedy [Act] which in an arbitrary manner purport to place under their jurisdiction individuals, corporations and even officials of sovereign countries, in flagrant violation of international law and (which constitute an) intolerable aggression to the sovereignty of nations.[126]

With minor changes, including changing the title to Act to Protect Trade and Investment from Foreign Statutes that Contravene International Law, ("the Mexican Antidote Law") the legislation was approved unanimously by the Senate on September 19 and referred to the Chamber of Deputies.[127] The legislation was approved by the Chamber of Deputies and went into effect on October 24, 1996.[128] According to legal scholar Vargas, the Mexican Antidote law represents the first instance in which Mexico expressly formulated a statute to counteract the extraterritorial effects of a foreign piece of legislation.[129]

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125 "Excerpts from Legislative History: The Bill Sent by the President of Mexico to the Senate," 36 I.L.M. 148 (1997).

126 36 I.L.M. 152-153 (1997).

127 "Senado mexicano da sí a 'antídoto' a Helms-Burton," *El Nuevo Herald* (September 20, 1996), p. 2B.

128 The text of "Ley de Protección al Comercio y la Inversión de Normas Extranjeras que contravengan el Derecho Internacional," *Diario Oficial de la Federación* (October 23, 1996). An English language translation appears at 36 I.L.M. 145 (1997). The law states in its transitory provision that it becomes effective the day following publication in the *Diario Oficial de la Federación*. According to press reports, the legislation was approved by Mexico's Chamber of Deputies by a margin of 317-1, with the lone dissenting Deputy explaining that he voted against the law because it was "lukewarm and timid" and he demanded the enactment of a stronger response. See Pablo Alfonso, "Crece rechazo a la Ley Helms," *El Nuevo Herald* (October 3, 1996), pp. 1A, 14A.

129 Jorge A. Vargas, "Introductory Note to Mexico: Act to Protect Trade and Investment from Foreign Norms that Contravene International Law," 36 I.L.M. 139 (1997).

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b) Cooperation in the Implementation of Foreign Laws

Article 1 of the Mexican Antidote Law forbids Mexican nationals or corporations from engaging in conduct that affects Mexico's trade or investment whenever such conduct is guided by extraterritorial effects of foreign laws. The article defines "foreign law with extraterritorial reach that affects Mexican trade or investment" to include measures imposing economic sanctions intended to limit trade or investment in order to provoke a change in a country's form of government; allowing claims against resulting from nationalizations carried out by the country targeted by the sanctions; or restricting entry into the country issuing the law as a means to achieve political change.

Article 2 forbids Mexican nationals or corporations from providing any information required by foreign tribunals or authorities in order to implement foreign laws with extraterritorial reach that affect Mexican trade or investment, as defined in Article 1.

Article 3 directs Mexican nationals or corporations whose interests might be adversely affected by foreign laws with extraterritorial reach or who might receive formal requests or summons based on such foreign laws, to notify the Secretariat of Foreign Relations and the Secretariat of Commerce and Industrial Development.

Article 9 sets out a schedule of administrative sanctions that the Secretariat of Foreign Relations might impose on those who violate Articles 1-3, independent of civil, penal or other liability. Repeated violations would be penalized by up to twice the corresponding maximum penalty.

c) Validity of Foreign Decisions

Article 4 sets out that Mexican tribunals will deny recognition and will not enforce any judgements, judicial resolutions or arbitral awards issued on the basis of foreign laws with extraterritorial reach.

d) Counterclaims

Article 5 allows Mexican nationals or corporations who might have been subjected to payment of indemnification by foreign laws with extraterritorial reach to sue in federal tribunals to recover the value of the indemnification (damages) plus other damages, expenses and legal costs.

Article 7 directs the Secretariat of Foreign Relations and the Secretariat of Commerce and Industrial Development to advise Mexican nationals or corporations who may be affected by foreign laws with extraterritorial reach. Article 8 empowers these same

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government entities to issue general criteria regarding interpretation of the Mexican Antidote Law in their respective areas of jurisdiction.

4. European Union Antidote Law

a) General Discussion

As noted earlier, the European Union (EU) raised objections to the proposed U.S. legislation shortly after Senator Helms introduced his bill in 1995. The European Union intensified its objections in 1996 after it became evident that President Clinton intended to sign the Helms-Burton Act and, once the Act became law, used the dispute settlement mechanism of the WTO to challenge its conformity with U.S. international obligations.

In parallel with efforts by individual member states and by the European Union as an entity to overturn the Act, the EU also developed "antidote" legislation to counteract the Helms-Burton Act.[130] In late October, the EU Foreign Ministers agreed to an approach that would "make it illegal for Europeans to obey Washington's anti-Cuban Helms-Burton Act."[131] On November 22, "in a surprisingly robust display of unity,"[132] the Council of the European Union enacted Council Regulation No. 2271/96, a regulation aimed at "protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom."[133] At the same time, the Council also enacted Joint Action 96/668/CFSP, "concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based

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[130] An important precedent for European reactions to the Helms-Burton Act was the United Kingdom's Protection of Trading Interests Act, enacted by the British Parliament in 1980, in response to the threat of treble damages being imposed on a major U.K. minerals company as a result of a private suit filed under U.S. antitrust law alleging participation in an international uranium cartel. See Nicholas Davidson, "U.S. Secondary Sanctions: The U.K. and EU Response," *Stetson Law Review* 27:4 (Spring 1998), especially pp. 1425-1429.

[131] "EU Counters Helms-Burton Act," Reuters, October 28, 1996. According to this report, the most contentious issue in the development of the legislation was Danish concern that it handed national powers to the EU and therefore limited Danish sovereignty of action.

[132] Vaughan Lowe, "Helms-Burton and EC Regulation 2271/96," *The Cambridge Law Journal* 56:2 (July 1997), p. 250. European unity against the Helms-Burton Act is significant since the EU was not able to muster the unanimity necessary to counter legislatively the effects of the Cuban Democracy Act. See Muriel van den Berg, "The Cuban Liberty and Democratic Solidarity Act: Violations of International Law and the Response of Key American Trading Partners," *Maryland Journal of International Law and Trade* 21:2 (Fall 1997), p. 300.

[133] Council Regulation (EC) No. 2271/96, *Official Journal*, No. L.309 (November 29, 1996), reproduced at 36 I.L.M. 127 (1997).

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thereon or resulting therefrom,"[134] to ensure that all areas of activity requiring protection were addressed.[135]

The preface of Regulation No. 2271/96 states that passage by a third country of certain laws, regulations and other legislative instruments with extraterritorial reach violate international law and impede the attainment of the objective of harmonious development of world trade and of the progressive abolition of restrictions on international trade. Under these exceptional circumstances, "it is necessary to take action at Community level to protect the established legal order, the interests of the Community and the interests of … natural and legal persons [under the jurisdiction of the Member States], in particular by removing, neutralising, blocking and otherwise countering the effects of the foreign legislation concerned." The Regulation further states that Member States may impose their own information requirements in addition to those at the Community-wide level. Moreover, the objective of the Joint Action was "to ensure that Member States take the necessary measures to protect those natural and legal persons whose interests are affected by … [third-party laws with extraterritorial reach and actions based thereon], insofar as those interests are not protected by this Regulation."

Like its Canadian counterpart, the EU Antidote Law is structured so it can counteract a broader set of foreign laws than the Helms-Burton Act. Article 1 "provides protection against and counteracts the effects of the extra-territorial application of the laws specified in the Annex …, including regulations and other legislative instruments, and of actions based thereon or resulting therefrom, where such application affects the interests of persons … [defined in Article 11] engaged in international trade and/or the movement of capital and related commercial activities between the Community and third countries." The Annex in question contains only laws, regulations and other legislative instruments of the United States of America, namely: the Cuban Democracy Act, the Helms-Burton Act, the D'Amato Act, and the Foreign Assets Control Regulations implementing the U.S. economic embargo

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[134] Joint Action 96/668/CFSP, *Official Journal*, No. L.309 (29 November 1996), reproduced at 36 I.L.M. 132 (1997). The above-cited Council Regulation and Joint Action will be jointly referred to in this article as "the EU Antidote Law."

[135] See Jurgen Herber, "The Helms-Burton Blocking Statute of the European Union," *Fordham International Law Journal* 20:3 (March 1997) for a discussion of the legal issues behind the adoption of the EU Antidote Law.

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of Cuba.[136] Pursuant to Article 11, the EU Antidote Law applies to EU nationals and residents and to corporations incorporated within the EU.

b) Obligation to Report

Whenever the economic and/or financial interests of any person covered by the Regulation (as defined in Article 11) are affected directly or indirectly by the laws and regulations listed in the Annex, that person must inform the Commission within 30 days (Article 2). If the information is conveyed to the Commission, the latter will inform the competent authorities of the Member State in which the person who gave the information is resident or incorporated. The information will be used only for the purpose for which it is provided; confidential information will be thusly treated (Article 3). The Commission and Member States will inform each other of measures taken under the Regulation and other pertinent information (Article 10).

Article 9 authorizes each Member State to determine the sanctions that it will impose in the event of breach of any provision of the Regulation, stating that such sanctions "must be effective, proportional and dissuasive."

c) Validity of Foreign Decisions

Article 4 sets out that no judgment of a court or tribunal and no decision of an administrative authority located outside the Community given effect, directly or indirectly, to the laws and regulations in the Annex to the regulation or to actions based thereon or resulting therefrom, shall not be recognized or be enforceable in any manner.

d) Cooperation in the Implementation of Foreign Laws

Article 5 directs persons covered by the Regulation not to comply, directly or through a subsidiary or intermediary, actively or through deliberate omission, with any requirement or prohibition, including requests of foreign courts, arising from the laws and regulations in the Annex. Compliance may be authorized if non-compliance would seriously damage their interests or those of the Community; such cooperation would be subject to procedures set up under the Regulation (Articles 7 and 8).

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[136] Specifically, the Annex contains the following U.S. Acts and Regulations: 1) the National Defense Authorization Act for Fiscal Year 1993, Title XVII, Cuban Democracy Act 1992, Sections 1704 and 1706; 2) the Cuban Liberty and Democratic Solidarity Act of 1996, Titles I, III and IV; 3) the Iran and Libya Sanctions Act of 1996 (the D'Amato Act); and 4) Cuban Assets Control Regulations, 31 CFR , Chapter V, Part 515, subpart B (Prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties).

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e) Counterclaims

Article 6 entitles any person covered by the Regulation engaging in international trade and/or the movement of capital and related commercial activities who are affected by the application of foreign laws listed in the Annex, to recover any damages, including legal costs, caused to that person by the application of the laws. Such recovery may be obtained from the natural or legal person or entity causing the damage or from any person acting on its behalf or intermediary. The recovery could take the form of seizure and sale of assets held by those persons, entities, persons acting on their behalf or intermediaries within the Community, including shares held in a legal person incorporated within the Community.

Article 1 of Joint Action 96/668/CFSP states that each Member State will take the necessary steps to protect the interests of any person covered by Regulation 2271/96 affected by the extra-territorial application of laws listed in the Regulation's Annex, insofar as these interests are not protected under the Regulation.

5. Argentina's Antidote Law

a) Introduction

The Argentinean Senate approved on December 11, 1996 a proposal by Senator Menem to counteract the domestic effects of foreign legislation; the proposal was approved by the Chamber of Deputies on August 20, 1997. Law 24,871, "Foreign Legislation—Regulatory Framework Related to Its Reach within the National Territory," was enacted on September 5, 1997.[137] The Argentinean Antidote Law is more subtle than the others – neither the Helms-Burton Act nor the United States is mentioned in the law – but there is no doubt that counteracting Helms-Burton is one of the aims of the legislation.

b) Validity of Foreign Laws

Article 1 deems not applicable within the national territory any foreign law with the objective, directly or indirectly, of restricting or impeding free trade and the free flow of capital, goods or persons to the detriment of a country or group of countries, or that in some way allow claims for payments or indemnizations of any nature as a result of expropriations

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137 "Ley 24.871: Legislación extranjera—Marco regulatorio referido a los alcances en el territorio nacional," *Boletín Oficial* (September 10, 1997), as reproduced in *Anales de Legislación Argentina 1997*, vol. LVII-D (Buenos Aires: La Ley S.A.E. e I, 1997), pp. 4257-4258 ("Argentinean Antidote Law.")

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that took place in a third country. Also not applicable and devoid of legal authority are foreign laws intended to generate extraterritorial effects through economic sanctions, limits to investment in a given country, or restrictions on the free flow of goods, services or capital with the intention of bringing about systemic change in a country. Article 2 states that no natural or juridical person can invoke rights based on, or be compelled to obey, laws, measures or directives arising from foreign laws with extraterritorial reach. Article 5 directs judges not to recognize or implement sentences, claims or arbitral decisions based on foreign legislation with extraterritorial reach.

c) Obligation to Report

Natural or legal persons who may directly or indirectly be affected by foreign laws with extraterritorial reach must report it to the Ministry of Foreign Relations, International Commerce and Worship, through the Secretariat of International Economic Relations. The Secretariat of International Economic Relations will provide advice to the affected person. The Ministry of Foreign Relations, International Commerce and Worship will keep a confidential record of complaints filed and will periodically inform the Attorney General and the Public Defender about them, in order of these officials to take the necessary judicial or administrative steps for the effective implementation of the current law (Article 4).

d) Cooperation with Foreign Authorities

Legal, judicial and public authorities are directed not to provide information that may be requested by foreign legal or administrative authorities related to foreign laws that have extraterritorial reach (Article 3).

e) Counterclaims

Persons sanctioned by a foreign tribunal to a fine, the payment of indemnization or some other penalty as a result of the implementation of foreign laws with extraterritorial reach may sue the plaintiff of the foreign trial in federal court for the amount of the sanction plus damages, interest, expenses and costs (Article 6).

6. Cuba's Antidote Laws

a) Enactment of Law No. 80

On 24 December 1996, Cuba's National Assembly (Asamblea Nacional del Poder Popular, ANPP) approved Law No. 80, the Reaffirmation of Cuban Dignity and Sovereignty

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Act.[138] According to a journalist, Ricardo Alarcón, President of the National Assembly, introduced the bill and attempted to gain its approval without discussion; concerns by one of the deputies about a portion of the bill led to a discussion and to a long intervention by President Fidel Castro just before the law was approved unanimously.[139]

b) Rejection of the Helms-Burton Act

The Preamble of Law No. 80 makes it abundantly clear that its objective is to counteract the Helms-Burton Act. The law refers to the Helms-Burton Act as "having as its objective the colonial reabsorption of Cuba" by the United States. The law states that "the National Assembly of People's Power, as the representative of the people, repudiates the Helms-Burton Act and declares its uncompromising decision to adopt all available legal measures as a response to this anti-Cuba legislation, and to demand the compensation to which the State and people of Cuba have a right."

Article 1 of Law No. 80 declares the Helms Burton Act "illegal, inapplicable and without value or legal effect. Consequently, all claims by persons or corporations, regardless of citizenship or nationality, on the basis of the Helms-Burton Act shall be considered null and void." Article 13 directs the National Assembly and the Government of Cuba to work with other legislative bodies, government and international organizations to promote actions deemed necessary to thwart the implementation of the Helms-Burton Act. Article 14 calls on the people of Cuba to continue the profound and systematic examination of the "anexionist and colonial plan of the United States contained in the Helms-Burton Act to ensure that in every geographic area, community, workplace, educational institution and military unit there is full knowledge of the specific consequences that the execution of such plan would entail for each and every citizen and to guarantee the active and conscientious participation of all in the implementation of the measures needed to defeat it."

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138 "Ley Número 80: Ley de Reafirmación de la Dignidad y Sobreranía Cubanas," *Gaceta Oficial* (December 24, 1996, Extraordinary Edition). An English language translation appears at 36 I.L.M. 472 (1997). See also Juan O. Tamayo, "Antídoto' contra la Ley Helms intenta socavar presión de EU," *El Nuevo Herald* (January 2, 1997), pp. 1B, 2B.

139 Juan Sánchez, "Sucesos habaneros," *El Nuevo Herald* (January 15, 1997), p. 8A. The doubting deputy is identified by the journalist as singer-composer Silvio Rodríguez, who was concerned about the provisions of the bill imposing sanctions on Cuban citizens who cooperate with the foreign media, pointing out that he frequently travels abroad and is interviewed by foreign journalists. See also, "Asamblea cubana da el sí a su antídoto contra la Ley Helms," *El Nuevo Herald* (December 26, 1996), p. 1B.

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c) Compensation for Nationalizations

Article 2 reaffirms the willingness on the part of the Government of Cuba to pay adequate and just compensation for the expropriation thirty-five years ago of property and corporations "that had United States citizenship or nationality at that time." This is an important distinction, since the Helms-Burton Act allows claims by "United States Nationals" – this is a much larger population than alluded to in Law No. 80, since it includes Cuban-origin persons who were not U.S. citizens at the time of the property nationalizations by the Cuban Government but may have subsequently attained such citizenship.

The Preamble of Law No. 80 recalls that the nationalizations of the 1960s were carried by the revolutionary Government on behalf of the Cuban people in accordance with the Constitution, existing laws and international law, without discrimination, with the objective of public benefit, and making available adequate compensation, as agreed through bilateral negotiations with all of the Governments involved except with the Government of the United States. It declares that compensation of U.S. citizens and corporations pursuant to Article 2 "may form part of a negotiating process between the Governments of the United States of America and the Government of the Republic of Cuba on the basis of equality and mutual respect." However, the article also states that such compensation claims would have to be considered together with the compensation to which the Cuban State and people have a right as a result of the U.S. Government economic "blockade" and all forms of aggression for which the United States Government is responsible. Finally, Article 4 states that any U.S. person or corporation that uses the mechanisms of the Act to assert a claim will be excluded from possible future compensation negotiations pursuant to Articles 2 and 3.

d) Protection of Foreign Investors

Article 5 directs the Cuban Government to adopt provisions, measures and additional arrangements that might be necessary to protect current and future foreign investments in Cuba and the legitimate interests of investors in the face of actions derived from the Helms-Burton Act. Article 6 authorizes the Cuban Government to take such measures as are required to protect foreign investment against the effects of the Act, including the transfer of the interests of foreign investors to fiduciary companies, financial entities or investment funds. Article 7 empowers the appropriate state bodies to make available to foreign investors who request it with information and documentation necessary

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to defend their interests against the Act or to pursue legal actions in their own countries pursuant to countermeasures.

e) Remittances

Article 10 of Law No. 80 reaffirms that remittances sent by persons of Cuban origin residing abroad to their families in Cuba will not be taxed and, moreover, that the Government of Cuba will take steps to facilitate such remittances. Persons of Cuban origin residing abroad will be permitted to hold accounts in Cuban banks denominated either in pesos or in convertible currency and interest earned will not be taxable. Finally, persons of Cuban origin residing abroad will be permitted to take out insurance policies naming permanent residents of Cuba as beneficiaries; beneficiaries will be allowed to collect the proceeds free of taxes.

f) Counterclaims Against the United States

Article 11 of Law No. 80 asserts that the Cuban Government will maintain up-to-date statistics on the compensation owed by the Government of the United States arising from the economic, commercial and financial "blockade" and its aggression against the country, and will add to such claims those associated with the damages and losses caused by "thieves, embezzlers, corrupt politicians and mafiosos as well as by torturers and murderers associated with Batista's dictatorship, for whose actions the United States has taken up responsibility by enacting the Helms-Burton Act."

Article 12 authorizes individuals who themselves or their families have been the victims of personal injury or material damage as a result of actions sponsored or supported by the Government of the United States -- including death, injury or economic losses caused by the torturers and murderers associated with Batista's dictatorship as well as actions by saboteurs and other criminals in the service of United States imperialism against the Cuban nation since January 1, 1959 – to file claims for compensation before a Claims Commission that will be created by the Ministry of Justice. The Commission will have the power to determine the validity of the claims, their value and the responsibility of the Government of the United States. The Ministry of Justice is empowered to issue regulations for the orderly processing of the claim applications.

g) Proscription of Collaboration with Helms-Burton

Articles 8 and 9 of Law No. 80 are peculiar in an instrument ostensibly aimed at counteracting actions by a foreign power because they deal with behavior by Cuban

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citizens. Article 8 declares unlawful any "collaboration," direct or indirect, with the implementation of the Helms-Burton Act. "Collaboration" is defined, among other acts, as:

- Seeking information for or supplying information to a representative of the Government of the United States of America or any other individual for the purpose of using it directly or indirectly in the possible application of the Act, or aiding another person in seeking or supplying such information.

- Requesting, receiving, accepting or facilitating the distribution of or benefiting in any way from financial, material or other forms of resources provided by the Government of the United States of America or channeled by it through its representatives or through any other means, to promote the implementation of the Helms-Burton Act.

- Distributing, disseminating or aiding in the distribution of information, publications, documents or promotional materials from the Government of the United States of America, its agencies or dependencies or any other source, for the purpose of promoting the implementation of the Act.

- Collaborating in any way with radio or television stations or other media or public information sources for the purpose of facilitating the implementation of the Act.

Article 9 directs the Government of Cuba to present to the National Assembly or to the Council of State draft legislation "to impose sanctions on all actions which in one way or another involve collaboration with the objectives of the Helms-Burton Act."

h) Issuance of Law No. 88

In February 1999, the National Assembly, meeting in special session, unanimously adopted Law No. 88, the Law for the Protection of Cuba's National Independence and Economy.[140] National Assembly President Ricardo Alarcón described the new law as "a response to the systematic aggressions to which our Republic has been subjected. These actions began in the spring of 1959 with undercover operations, which were revealed many years later as the aggression took more open character and began to take the form of laws

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[140] "Ley No. 88: Ley de Protección de la Independencia Nacional y la Economía de Cuba," *Trabajadores* (March 8, 1999), as translated by FBIS. The text of the law has also been published in *Diario las Américas* (Miami) (March 23, 1999), p. 8A.

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and presidential proclamations, culminating last January [1999] with the announcement of measures reaffirming the blockade and seeking private entities and American citizens to join in the implementation of such policy."[141]

Law No. 88, dubbed by opponents of the Castro regime as *ley mordaza* (gag law),[142] states that its objective is "to define and to punish actions aimed at supporting, facilitating or collaborating with the objectives of the Helms-Burton Act, the blockade and the economic war against our people, which are intended to disrupt the peace, destabilize the country, and destroy the Socialist state and independence of Cuba" (Article 1). The following actions are deemed to be punishable:

- Providing, directly or indirectly, to the Government of the United States, its agencies, departments, representatives or officials, information intended to facilitate the objectives of the Helms-Burton Act – 7 to 15 years of imprisonment (Article 4.1). The penalty increases to 8 to 20 years if the action is carried out in complicity with 2 or more persons; if profit or personal gain is involved; if the perpetrator has come to know or possess the information surreptitiously or using illegal means; if the information came to be known or possessed in the course of official duties; if the information provided results in serious damage to the national economy; or if as a result of the action, the United States Government carries out reprisals against Cuban or foreign industrial, commercial, or financial enterprises or against their managers or families (Article 4.2).

- Seeking "classified" information to be used to achieve the objectives of the Helms-Burton Act – 3 to 8 years imprisonment and/or fine of 3,000 to 5,000 units[143] (Article

[141] Julia Mayoral, "Respondemos con severidad, conciencia e inteligencia," *Granma* (February 18, 1999). See also Roger Ricardo Luis, "Dos leyes para defender la soberanía y la libertad," *Granma* (February 17, 1999). The U.S. measures adopted in January 1999 are discussed later on in this article.

[142] E.g., "Condena el exilio mordaza a la prensa independiente," *El Nuevo Herald* (February 17, 1999), p. 17A; Pablo Alfonso, "Alarma en La Habana por la nueva ley castrista," *El Nuevo Herald* (February 18, 1999), p. 4A; and Andrés Oppenheimer, "Nueva ley cubana: hay que leer para creer," *El Nuevo Herald* (March 18, 1999), p. 1B.

[143] The Cuban Penal Code assigns monetary fines in terms of *cuotas* (units or payments). *Cuotas* are units of a fine that have variable value. Thus, one person may be assessed a fine of 1,000 *cuotas* at one peso each while another may be subject to the same fine but at a rate of two pesos per *cuota*. Under this system, while Courts do not have discretion on the nominal amount of the fines, they can define the value of the *cuotas*, and thereby retain discretion over the overall penalty assessed.

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5.1). The penalty increases to 5 to 12 years imprisonment if the perpetrator came to know or possess the information surreptitiously or through illegal means or in complicity with 2 or more persons (Article 5.2) or to 7 to 15 years if results in serious damage to the national economy (Article 5.3).

- Gathering, reproducing or disseminating "subversive" material from the Government of the United States, its agencies, departments, representatives or officials, or from any foreign entity, supporting the objectives of the Helms-Burton Act – 3 to 8 years imprisonment and/or fine of 3,000 to 5,000 units (Article 6.1). The same penalty applies to individuals who bring such materials into the country (Article 6.2). The penalty increases to 4 to 10 years imprisonment if the action is taken in complicity with 2 or more persons or for profit or personal gain (Article 6.3) and to 7 to 15 years if it results in serious damage to the national economy (Article 6.4).

- Collaborating with any foreign radio or television stations, newspapers, magazines or other media in support of the objectives of the Act – 2 to 5 years imprisonment and/or fine of 1,000 to 3,000 units (Article 7.1). The penalty increases to 3 to 8 years imprisonment and/or fine of 3,000 to 5,000 units if the action is taken for profit or personal gain (Article 7.3). The law clarifies that criminal charges under this section would be filed against those who use the foreign media, and not against foreign journalists legally accredited in the island.[144]

- Disturbing the peace for the purpose of cooperating with the objectives of the Helms-Burton Act – 2 to 5 years imprisonment and/or fine of 1,000 to 3,000 units (Article 8.1). The penalty increases to 3 to 8 years imprisonment and/or fine of 3,000 to 5,000 units for promoting, organizing or inciting such disturbances (Article 8.2).

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[144] In a press conference held shortly after the adoption of Law No. 88, National Assembly President Ricardo Alarcón had stated that "foreigners must abide by the laws of the countries where they live," meaning that foreign journalists accredited in the island would be bound by the same rules as Cuban journalists. See Pablo Alfonso, "Alarma en La Habana por la nueva ley castrista," *El Nuevo Herald* (February 18, 1999), p. 4A. Either National Assembly Ricardo Alarcón was not aware that foreign journalists would not be covered by the sanctions imposed by the law – although their sources would be – or the law was modified as a result of the negative reaction it generated among the foreign media. See Pablo Alfonso, "Rectifican al propio líder del Parlamento," *El Nuevo Herald* (March 10, 1999).

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- Carrying out any act to impede or harm economic activity of domestic or foreign industrial, commercial or financial enterprises in support of the objectives of the Helms-Burton Act -- 7 to 15 years imprisonment and/or fine of 3,000 to 5,000 units (Article 9.1). The penalty increases to 8 to 20 years imprisonment if the action is accompanied by violence, intimidation, blackmail or other illicit means; is carried out for profit or personal gain; or if as a result of the action, the United States Government adopts measures against Cuban or foreign industrial, commercial, or financial enterprises or against their managers or families (Article 9.2).

- Proposing to others, or inciting, through any means, commission of any of the actions covered by the Helms-Burton Act, or collaborating with others in carrying out such actions – 2 to 5 years imprisonment and/or fine of 1,000 to 3,000 units (Article 10).

- Receiving, distributing or participating, directly or indirectly, in the distribution of financial, material or other resources from the Government of the United States, its agencies, departments, representatives or officials, or from private entities, supporting the objectives of the Helms-Burton Act – 3 to 5 years imprisonment and/or fine of 1,000 to 3,000 units (Article 11).

Finally, Article 12 states that the penalties set out in Law No. 88 apply to any actions taken in collaboration with a third country that supports the objectives of the United States Government.

E. IMPLEMENTATION OF THE HELMS-BURTON ACT AND ITS ANTIDOTES

1. Introduction

The Helms-Burton Act recently celebrated its third anniversary, and four of the five antidotes to the Act were enacted in the second half of 1996 and therefore have been in place for over two years. This section explores what the experience has been with the implementation of these conflicting laws, and to what extent have the antidotes actually resulted in countermeasures against the United States. As will be seen, the gloomy

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scenarios of trade and investment wars associated with the enactment of the Helms-Burton Act and its antidotes have so far failed to materialize.

2. U.S. Implementation of the Helms-Burton Act

a) Overall Approach

In implementing the Helms-Burton Act, the Clinton Administration has sought to avoid open confrontation with U.S. trading partners, while seeking to use the provisions of the Act to achieve the objective of bringing democracy to Cuba. The President signaled this approach in August 1996 when he appointed then-Under Secretary of Commerce for International Trade, Stuart E. Eizenstat, to serve as Special Representative of the President and Secretary of State for the Promotion of Democracy in Cuba.[145] The elements of the Administration's approach are described below.

b) Support for Democratic Transition

On January 28, 1997, President Clinton sent to Congressional leaders a report ("the Title II Report") titled *Support for a Democratic Transition in Cuba*, required by Section 202(g) of the Act.[146] In the preface to the report, the President wrote:

> The document outlines the assistance that a democratizing Cuba is likely to seek during its transition, and the ways in which the United States and the international community will try to help. It draws from the experiences of other countries that have embarked upon similar transitions and highlights some of the lessons learned in those processes. It is my sincere hope that it will contribute to a better understanding of the international community's potential role in a transition to democracy and underscore the strong commitment of the American people to support the Cuban people when they embark upon that process of change.[147]

The Title II Report identified a number of key issues related to a political and economic transition in Cuba. Among the political issues are: 1) human rights; 2) efficient,

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145 "Statement on Efforts to Bring Democracy to Cuba," August 16, 1996, *Weekly Compilation of Presidential Papers* 32:33 (August 19, 1996), pp. 1455-1456.

146 "Letter to Congressional Leaders Transmitting the Report Entitled 'Support for a Democratic Transition in Cuba,'" January 28, 1997, *Weekly Compilation of Presidential Papers* 33:112 (January 28, 1997).

147 *Id.*, pp. 111-112. The full report was widely distributed by the U.S. Government, including in Spanish. It was prepared by the U.S. Agency for International Development and available at the website of that organization, http://www.info.usaid.gov.

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democratic and accountable government; and 3) the rule of law. The economic issues include: 1) private enterprise and independent labor; 2) the legal and institutional framework for a market economy; 3) management of the transition to achieve growth and equity; 4) developing human resources for a successful democracy and market economy; 5) rebuilding infrastructure; and 6) integration into the global economy. The Title II Report concludes that when Cuba undertakes a transition to democracy, "Cubans from all walks of life, … can count on the United States and the international community to help them forge a peaceful future, free from repression and economic misery. Cuba will then take its rightful place in the democratic community of nations, befitting its long struggle for freedom."[148]

An Annex to the Title II Report set out indicative resource flows – from multilateral organizations, individual countries, private sources – that might be available to support Cuba's transition and economic recovery. It also identified remittances from the Cuban community abroad and private foreign direct investment as important sources of financing for economic recovery in Cuba. In the short term, however, the Title II report saw a need for foreign assistance:

> At this time, no country or international institution is in a position to make a specific funding commitment to support Cuba's transition. Nonetheless, it is reasonable to project that, during a six year period following the establishment of a transition government, Cuba would received from $4 billion to $8 billion in private assistance and loans, grants and guarantees from the international financial institutions, multilateral organizations, and individual countries. After this period, the economic transition should be well advanced, and private and commercial flows into Cuba ought to be sufficient to make the economy self-sustaining without significant further external official assistance.[149]

c) Suspension of Title III Lawsuits

As discussed earlier, the President has repeatedly exercised his authority under Section 306(c) of the Act to keep in suspense the ability of U.S. citizens to initiate suits against third country nationals.

The President's actions come as no surprise. In several public statements during 1996, some on the occasion of visits to Washington of leaders of trading partners that had

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148 Title II Report, Section IV.

149 Title II Report, Annex, Section I.

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expressed concern about the Act,[150] the President sought to defend his position in support of the legislation by highlighting the implementation flexibility associated with the waiver provision. For example, in a press conference on April 2 with Italian President Scalfaro, the President stated that "the Helms-Burton Act provides the President with a waiver authority which I believe makes it possible for me to implement that bill in a way that does not violate the commercial rules and regulations governing nations and that will not undermine our strong, broad-based, and consistent commitment to open trade among nations, and I will do my best to do that."[151] And in a 13 June press conference with Irish President Robinson, he stated that "there are provisions in the Helms-Burton law which give the President some flexibility, … I am reviewing what the facts are and trying to determine what the best and most proper way to implement the law is."[152] Finally, in a June 15 television interview, in response to a question on whether he would enforce Title III of the Act, the President stated that he had several options under consideration and would make a decision very soon: "The criteria is that I must do what I think is in the national interest of the United States and what is most likely to bring democracy to Cuba. And in general, we believe that putting more pressure on does that."[153]

Indeed, on July 16, 1996, the President announced that he would allow Title III of the Act to come into force on 1 August as scheduled so that "all companies doing business in Cuba are hereby on notice that by trafficking in expropriated American property, they face

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150 In addition to the specific statements cited below, see "The President's News Conference with Chancellor Helmut Kohl of Germany in Milwaukee, Wisconsin," May 23, 1996, *Weekly Compilation of Presidential Documents* 32:21 (May 27, 1996), p. 931; "The President's News Conference with European Union Leaders," 12 June 1996, *Weekly Compilation of Presidential Documents* 32:24 (June 17, 1996), p. 1044 (press conference with Italian Prime Minister Prodi and European Commission President Santer).

151 "The President's News Conference with President Scalfaro," *Weekly Compilation of Presidential Documents* 32:14 (April 8, 1996), p. 597; and "The President's News Conference with European Union Leaders," December 16, 1996, *Weekly Compilation of Presidential Documents* 32:51 (December 23, 1996), pp. 2518-2519 (press conference with Irish Prime Minister Bruton and European Commission President Santer).

151 "The President's News Conference with President Scalfaro," *Weekly Compilation of Presidential Documents* 32:14 (April 8, 1996), p. 597.

152 "The President's News Conference with President Robinson," *Weekly Compilation of Presidential Documents* 32:24 (June 17, 1996), p. 1053.

153 "Interview with Tom Brokaw of MSNBC's 'InterNight,'" 15 July 1996, *Weekly Compilation of Presidential Documents* 32:29 (July 22, 1996), p. 1253.

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the prospect of lawsuits and substantial liability in the United States. This will serve as a deterrent to such trafficking, one of the central goals of the LIBERTAD Act."[154] In the same statement, the President also said:

> At the same time, I am suspending the right to file suit for 6 months. During that period, my administration will work to build support from the international community on a series of steps to promote democracy in Cuba. … At the end of that period, I will determine whether to end the suspension, in whole or in part, based upon whether others have joined us in promoting democracy in Cuba. Our allies and friends will have a strong incentive to make real progress because, with Title III in effect, liability will be established irreversibly during the suspension period and suits could be brought immediately when the suspension is lifted. And for that very same reason, foreign companies will have a strong incentive to immediately cease trafficking in expropriated property, the only sure way to avoid future lawsuits.[155]

Consistent with the above statement, the President has repeatedly cited as the rationale for the repeated suspension of the right to sue provisions[156] the actions being taken by other nations in bringing pressure to bear on Cuba.[157]

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154 "Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995 (sic)," *Weekly Compilation of Presidential Documents* 32:29 (July 22, 1996), p. 1265.

155 *Id.*

156 "Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," January 3, 1997, *Weekly Compilation of Presidential Documents* 33:1 (January 1997), pp. 3-4 and "Letter to Congressional Leaders on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," January 3, 1997, *Weekly Compilation of Presidential Documents* 33:1 (January 1997), p. 4 (waiver for 6 months beyond February 1, 1997); "Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," July 16, 1997, *Weekly Compilation of Presidential Documents* 33:29 (21 July 1997), pp. 1078-1079" and "Letter to Congressional Leaders on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," July 16, 1997, *Weekly Compilation of Presidential Documents* 33:29 (July 21, 1997), p. 1079 (waiver for 6 months beyond August 1, 1997); "Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," January 16, 1998, *Weekly Compilation of Presidential Documents* 34:3 (January 19, 1998), pp. 81-82 and "Letter to Congressional Leaders on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," 16 January 1998, *Weekly Compilation of Presidential Documents* 34:3 (January 19, 1998), p. 82 (waiver for 6 months beyond February 1, 1998); "Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," July 16, 1998, *Weekly Compilation of Presidential Documents* 34:29 (July 16, 1998), pp. 1397-1398 and "Letter to Congressional Leaders on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," July 16, 1998, *Weekly Compilation of Presidential Documents* 34:29 (July 16, 1998), p. 1398 (waiver for 6 months beyond August 1, 1998); "Letter to Congressional Leaders on Title III of the Cuban Liberty and Democratic Solidarity

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Meanwhile, in at least one case a third country investor has availed itself of the claims settlement option provided by Section 302(a)(7) of the Act. In July 1997, the U.S. Department of State announced that it had reviewed a private agreement reached between U.S. corporation ITT and the Italian telecommunications company STET regarding STET International's use of ITT's confiscated property in Cuba (specifically the assets of the Cuban Telephone Company) to determine whether the agreement complied with Title IV of the Act.[158] In return for a one-time payment[159] to ITT, the agreement authorized STET

(LIBERTAD) Act of 1996," January 14, 1999, *Weekly Compilation of Presidential Documents* 35:3 (January 25, 1999) (waiver for 6 months beyond February 1, 1999).

157 For example, in his July 16, 1998 statement announcing the suspension for six additional months of the right to sue provisions in Title III of the Helms-Burton Act, the President stated as follows:

> In January 1997, I said that I expected to continue suspending this provision of the Act so long as our friends and allies continue their stepped-up efforts to promote a democratic transition in Cuba. I made this decision to take advantage of the growing realization throughout the world, in Europe and Latin America especially, that Cuba must change. We and our allies agree on the importance of promoting democracy, human rights, and fundamental freedoms in Cuba, and over the past 2 years we have worked together to support concrete measures that promote peaceful change.
>
> Events in the past 6 months reaffirm that international cooperation for Cuban democracy is increasing. The January visit of His Holiness John Paul II inspired the Cuban people and gave encouragement to the Cuban Catholic Church and Cuban advocates for democratic change. The Pope gave hope to the Cuban people when he called for greater freedom and respect for individual rights.
>
> Building on the Pope's important visit, European Union (EU) member states have reiterated their commitment to democratic transition in Cuba and, in June, as a group reaffirmed their Common Position on Cuba, committing them to take concrete steps toward that end. The EU has continued to urge Cuba to release imprisoned dissidents and stop harassing people who seek peaceful democratic change. The EU Working Group on Human Rights, formed last year among embassies in Havana, has met with Cuban dissidents. These are positive steps, and we encourage the EU to be even more active in their efforts.

"Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," July 16, 1998, *Weekly Compilation of Presidential Documents* 34:29 (July 16, 1998), pp. 1397-1398.

158 U.S. Department of State, Office of the Spokesman, "Implementation of Title IV of the Cuban Liberty and Democratic Solidarity Act of 1996," Press Statement (July 23, 1997).

159 According to press reports, the payment was approximately $25 million. See Christopher Marquis, "ITT paid for confiscated Cuban properties," *The Miami Herald* (July 24, 1997), pp. 1C, 3C.

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International and its affiliates to "take any action … with respect to the Cuban Telephone System" for a period of 10 years from July 17, 1997. The State Department

> concluded that the agreement constitutes "authorization of (a) United States national who holds a claim to the property" consistent with Title IV." The Department has determined that this authorization eliminates, though the period covered by this agreement, any question about whether the activities of STET International with respect to this property constitute "trafficking" within the meaning of Title IV of the Act, provided the agreement is implemented in accordance with its terms. The Department has, therefore, terminated without adverse action the investigation which had been ongoing related to STET International's and its affiliates' use of ITT's confiscated property in Cuba.[160]

This type of settlement removes the risk of eventual litigation by U.S. claimants against foreign investors and avoids the potential application of Title IV sanctions by the U.S. Government against the investor's officers, shareholders and other potentially affected persons. On the other hand, it legitimizes foreign investment in the island, which appears contrary to the purposes of the Act.

d) Implementation of Title IV

Unlike Title III, Title IV of the Helms-Burton Act does not have waiver procedures. The statute states that Title IV "applies to aliens seeking to enter the United States on or after the date of enactment of the Helms-Burton Act,"[161] i.e., March 12, 1996. However, the statute allows the Secretary of State, on a case by case basis, to exempt excludable aliens if entry into the United States is necessary for medical reasons or for purposes of litigation of an action under Title III.[162]

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160 U.S. Department of State, Office of the Spokesman, "Implementation of Title IV of the Cuban Liberty and Democratic Solidarity Act of 1996," Press Statement (July 23, 1997). Congressman Burton requested the U.S. General Accounting Office to examine whether the telecommunications agreement between ITT and STET International was consistent with U.S. law. The U.S. General Accounting Office concluded that "the agreement (is) consistent with the language and intention of titles III and IV of Helms-Burton. The agreement would appear to preclude STET from being considered a trafficker in ITT's confiscated property, at least for the 10-year period covered by the agreement." U.S. General Accounting Office, *Cuban Embargo: Selected Issues Relating to Travel, Exports, and Telecommunications*, GAO/NSIAD-99-10 (Washington, 1998), p. 8.

161 Section 401(d)(1) of the Act, 22 U.S.C. § 6091(d)(1).

162 Section 401(c) of the Act, 22 U.S.C. § 6091(c).

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Pursuant to Title IV, in the summer of 1996, the U.S. Department of State prepared a standard letter to be sent to corporate officers or principals of companies believed to be trafficking in confiscated U.S.-claimed properties in Cuba, as defined in the Act.[163] The letter informs such corporate officers or principals that there is sufficient information to determine that their company "knowingly and intentionally" has engaged in trafficking in confiscated U.S.-claimed foreign property.[164] For each foreign company, the letter cites specific instances of joint ventures between the company and a Cuban entity which actively made investments and improvements to a property confiscated by the Cuban Government from a U.S. national for which a loss was certified by the U.S. Foreign Claims Settlement Commission. Therefore, the letter warns, the names of the corporate officers or principals, as well as those of their spouses and minor children and agents, if applicable, "will be entered in the appropriate visa lookout system and port of entry exclusion system, and any visa or entry application will be denied … effective 45 days from the date of this letter. Divesting from the business arrangements described above would avert the exclusion."[165] Finally, the letter invites the subject corporate officer or principal to provide any information that would lead the Department of State to "reasonable conclude" that the company has not, or is no longer, engaged in trafficking or meets one of the exemptions in the statute.

Reportedly, the Department of State sent determination letters regarding Title IV to Sherritt International of Canada in July 1996 and to Grupo Domos of Mexico in August 1996.[166] Subsequently, the Department of State reportedly issued similar letters to Mexico's CEMEX, Israeli firm Grupo BM and to a Panamanian firm selling automobiles in Cuba.[167]

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163 "United States: Department of State Standard Language Title IV Determination Letter on Denying Visas Under the Helms-Burton Act," 36 I.L.M. 1667 (1997).

164 Id, at 1668.

165 Id, at 1668.

166 Id, at 1667, footnote.

167 María C. Werlau, "Update on Foreign Investment in Cuba, 1996-97," *Cuba in Transition—Volume 7* (Washington: Association for the Study of the Cuban Economy, 1997), p. 90. The Panamanian firm that received a warning letter in January 1997 has been identified in the press as Motores Internacionales del Caribe, S.A. (MICSA); it reportedly sold Mitsubishi and other vehicles in La Habana. See Frances Kerry, "Cuba Admits Helms-Burton Hurts, But Not Fatal," Reuters, La Habana (March 11, 1997). Notice of the determination letter under Title IV sent on 13 November 1997 to Grupo B.M, or B.M. Group, an Israeli-owned citrus company, is available at U.S. Department of State, Office of the Spokesman, "Implementation of Title IV of the Cuban Liberty and Democratic Solidarity Act of 1996," Press Statement (November 17, 1997).

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However, a U.S. State Department official reported in March 1999 that only three determinations of "trafficking" under Title IV had been made and fifteen executives and family members had been denied entry into the United States.[168]

3. Canada's Implementation of its Antidote Law

The Canadian antidote law has yet to be applied, since the right to sue provisions in Title III of the Helms-Burton Act have not been implemented. However, the Canadian Government has given indication that it intends to implement FEMA in appropriate cases. Thus, in March 1997, the Canadian Government began an investigation of Canadian Wal-Mart Stores to determine whether they were complying with the prohibition placed by the Cuban Democracy Act against foreign subsidiaries of U.S. companies doing business with Cuba.[169] The parent company, Wal-Mart Stores, Inc., of Bentonville, Arkansas, reportedly issued a directive to its Canadian subsidiary to remove from sale in its 136 stores, because they violated U.S. laws, cotton pajamas made in Cuba. Canadian Wal-Mart Stores initially removed the offending goods from their shelves, but reversed their decision under pressure from the Canadian Government and the threat of action under FEMA. The decision by Canadian Wal-Mart Stores to resume sale of the Cuban-origin pajamas rendered moot the enforcement issue under FEMA.

4. The European Union's Implementation of its Antidote Law

On December 2, 1996, the Council of the European Union issued its Common Position on Cuba.[170] The Common Position states that the objective of the European Union in its relations with Cuba is "to encourage a process of transition to pluralistic democracy and respect for human rights and fundamental freedoms, as well as a sustainable recovery

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[168] See "Advancing Human Rights and Property Rights in Cuba: The Role of Multilateral Coalitions," remarks by Alan P. Larson, Assistant Secretary of State for Economic and Business Affairs, to the U.S.-Cuba Business Council Conference, Coral Gables, March 9, 1999, at http://www.usia.gov.

[169] Brenda Swick-Martin and Katherine Evans, "Canadian Practitioners' Perspective on Sanctions and Trade Controls," *Stetson Law Review* 27:4 (Spring 1998), p. 1401; "Gobierno de Canadá investiga si empresa cumplió Ley Helms-Burton," Montreal, EFE (March 4, 1997); and Howard Schneider, "Canada, U.S. Wager Diplomatic Capital in a High-Stakes Pajama Game," *The Washington Post* (March 14, 1997), p. A29.

[170] "Common Position of 2 December 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union, on Cuba," *Official Journal of the European Communities*, No. L 322 (December 12, 1996), at 36 I.L.M. 213 (1997).

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and improvement in the living standards of the Cuban people. … It is not European Union policy to bring about change by coercive measures with the effect of increasing the economic hardship of the Cuban people."

In April 1997, the United States and the European Union signed a memorandum of understanding (MOU) regarding the Helms-Burton Act and the D'Amato Act[171] consisting of the following elements relating to Cuba:

- the two sides confirmed their commitment to continue their efforts to promote democracy in Cuba; on the side of the European Union those efforts were set out in the December 2, 1996 Common Position.

- the United States reiterated its presumption of continued suspension of Title III of the Act for the duration of the President's term (i.e., through January 2001) provided the European Union and other allies continued their stepped up efforts to promote democracy in Cuba.

- the United States and the European Union agreed to step up efforts to develop agreed "disciplines" and principles for the strengthening of investment protection, bilaterally and multilaterally, including disciplines that would inhibit and deter the future acquisitions of investments from any State which has expropriated or nationalized investments in contravention of international law and subsequent dealings in covered investments.

- the United States Administration committed to consult with Congress with a view to obtaining an amendment providing the President with the authority to waive Title IV of the Act once it is demonstrated that the European Union has adhered to the agreed disciplines and principles; in the meantime, the United States would continue to enforce Title IV through a "deliberate process" that included discussions with all affected parties and consideration of all relevant information.

171 "European Union-United States Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act," 36 I.L.M. 529 (1997).

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- the European Union agreed to suspend the proceedings of the WTO panel, reserving the right to resume the panel procedure, or being new proceedings, if action was taken against European Union companies or individuals under Title III or IV of the Act.

A statement by European Union Commissioner Sir Leon Brittan at the time of the issuance of the MOU made it clear that European objections to the Helms-Burton Act and D'Amato Act remained as strong as ever: "Despite the success of our talks, both Helms-Burton and D'Amato (Acts) are still on the US statute book. This is why we can only suspend the WTO Panel, and fully reserve our right, under the terms set out in the understanding with the US to reinstate if European interests are adversely affected by the implementation of either of the Acts. We continue to oppose the principle of extraterritorial laws, and believe that the WTO is an appropriate forum through which to defend our legitimate interests against them if necessary." [172] On April 18, the Council of the European Union accepted the European Commission's recommendation to suspend the WTO case pursuant to the terms of the MOU.[173] Interestingly, on May 15, the European Parliament issued a Resolution criticizing the European Commission for not consulting with it on the decision to suspend the WTO proceeding, calling for the Commission to inform the Parliament on the implementation of the MOU, and urging the Commission "to reintroduce its case at the WTO against extraterritorial policies such as the Helms Burton and D'Amato Kennedy Acts of the United States unless Parliament receives a satisfactory answer in keeping with its declared policy."[174]

The negotiations between the United States and the European Union to develop agreed disciplines and principles for the strengthening investment protection pursuant to the 1997 MOU extended into 1998. On May 18, 1998, during the U.S.-EU Summit in London, President Clinton and UK Prime Minister Tony Blair (on behalf of the EU) announced an Understanding with Respect to Disciplines for Strengthening of Investment Protection that defused, at least for the time being, the transatlantic dispute over the implementation of

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[172] "Helms-Burton Negotiations Reach a Proposed Settlement," European Union, Delegation of the European Commission to the United States, Press Release No. 20/97 (April 11, 1997).

[173] "Helms-Burton and D'Amato: Council Conclusions," April 18, 1997. European Union legislative data base, http://www.eurunion.org/legislation.

[174] "European Parliament Resolution on the suspension of the WTO dispute settlement procedure as regards the Helms Burton Act," B4-0393/97, May 15, 1997. European Union legislative data base, http://www.eurunion.org/legislation.

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Title III of the Helms-Burton Act.[175] The description of the understanding released by the White House states:

> The United States and the European Union have reached an Understanding that will inhibit and deter investments in illegally expropriated property. The Understanding will strengthen the protection of property rights around the world. It contains special measures to deal with countries that have "an established record of repeated expropriation in contravention of international law," of which Cuba is a notable example. The Understanding was developed as a result of negotiations following enactment of the Libertad (Helms-Burton) Act.[176]

Disciplines are to be applied to discourage business relationships giving rise to an ownership interest or control -- including purchases, management contracts and leases -- and some forms of portfolio investment in expropriated property. The disciplines include no loans, grants, subsidies, fiscal advantages, guarantees, political risk insurance, and equity participation; the two sides also agree to deny other forms of government support, including commercial and diplomatic advocacy, to publish information about expropriated properties and make public statements discouraging investment in such properties, and to make joint or coordinated diplomatic representations to the expropriating state.

Special provisions of the Understanding apply to Cuba, where the United States holds the view that there has been "an established record of repeated expropriation in contravention of international law." The Understanding states that the EU has examined some of the 5,911 claims against Cuba certified by the U.S. Foreign Claims Settlement Commission and has identified a number of cases where, "having regard to the discriminatory provisions of Cuban Law 851, it appears that the expropriations were contrary to international law." Specifically, the EU agreed to take action to discourage investments in illegally expropriated properties, among them:

- the establishment of an international claims registry;

- public statements discouraging investments in illegally expropriated property;

175 See, e.g., Christopher Marquis and Jodi Enda, "Clinton y Europa pactan sobre Ley Helms," *El Nuevo Herald* (May 19, 1998).

176 "Disciplines for Strengthening Investment Protection," White House Fact Sheet, U.S.-EU Summit (May 18, 1998).

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- the denial of government financial assistance; and

- the withholding of commercial advocacy or diplomatic support for such investments.[177]

The EU agreed to implement the Understanding upon receipt of a waiver from the provisions of Title IV of the Helms-Burton Act, and the U.S. Administration to seek early action on legislation to authorize the President to waive the provisions of Title IV with regard to countries implementing the disciplines.[178] The two parties also agreed to make a joint proposal embodying the elements of the Understanding in the Multilateral Agreement on Investment, an agreement that was being negotiated at the time under the auspices of the Organization for Economic Cooperation and Development.[179]

5. Mexico's Implementation of its Antidote Law

To date, Mexico has not come into open confrontation with the United States over the Act, as potential conflicts on two investment projects were resolved. These were important cases because the investments involved properties on which there were outstanding claims by U.S. corporations certified by the U.S. Foreign Claims Settlement Commission. Thus, the Mexican companies involved were vulnerable to Title IV actions by

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177 "Remarks on the President's Title III Decision by Stuart E. Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs," U.S. Department of State (July 16, 1998).

178 At the time of this writing, the Understanding has not become operative because Congress has not given the President authority to waive the provisions of Title IV of the Helms-Burton Act. On March 9, 1999, U.S. Assistant Secretary of State for Economic and Business Affairs Alan Larson called for the United States and the EU to put the Understanding into operation, stating that "we are working closely with the Congress to seek action on legislation that will authorize the President to waive, on a provisional basis, application of Title IV with respect to countries implementing the disciplines." See "Advancing Human Rights and Property Rights in Cuba: The Role of Multilateral Coalitions," remarks by Alan P. Larson to the U.S.-Cuba Business Council Conference, Coral Gables, March 9, 1999, at http://www.usia.gov.

179 On the day following the announcement of the Understanding, President Castro spoke at a special session of the WTO commemorating the 50th Anniversary of the Multilateral Trading System in Geneva. A visibly angry Castro attacked U.S. foreign economic policy, singling out the extraterritoriality of the embargo against Cuba and of the Helms-Burton Act, which he said illustrate the U.S. "economic war against Cuba." Speech of His Excellency Dr. Fidel Castro Ruz, President of the Republic of Cuba at the Special Session Commemorating the 50th Anniversary of the Establishment of the Multilateral Trade System, Palais des Nations, Geneva, Switzerland (May 19, 1998), mimeographed; *see also,* Pablo Alfonso, "Un Castro irritado ataca otra vez a EU en foro de Ginebra," *El Nuevo Herald* (May 20, 1998).

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the U.S. Government as well as to lawsuits by certified claimants, if Title III was fully implemented.

First, Grupo Domos, a relatively little known Mexican company based in Monterrey, announced in June 1994 that it had purchased a 49 percent stake in the Empresa Telefónica de Cuba (EMTEL), the state-owned telephone monopoly, forming a joint venture, the Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA). Reportedly, Domos' investment would amount to $1.5 billion over a multi-year period, with the initial investment estimated at about $200 million.[180] In 1995, Domos announced that it had sold 25 percent of its share in ETECSA to STET International Netherlands, N.V., a wholly owned subsidiary of the Italian State Telecommunications Company, for $291.2 million and was seeking additional buyers to reduce its share of ETECSA.[181] Domos apparently ran into difficulties in obtaining financing for its share of ETECSA and was forced by the Cuban government to divest of its equity in ETECSA, which was subsequently sold by the Cuban government to STET.[182] By early 1997, Domos was no longer an investor in ETECSA.[183] Therefore, as discussed earlier, the Title IV notification to Grupo Domos issued in September 1996 was rescinded by the U.S. Department of State.

Second, in 1994, Mexican cement giant CEMEX reportedly made a $40 million investment to purchase a one-half interest in Cuba's largest cement manufacturing plant, located at Mariel.[184] The Mariel plant was established in 1918 by Lone Star Steel

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180 See, e.g., Craig Torres, "Mexican Company May Pay $1.5 Billion to Buy 49% of a Cuban Phone System," *The Wall Street Journal* (June 13, 1994), p. A12; Ted Bardacke, "Mexicans to Buy 49% of Cuban Phone System," *The Washington Post* (June 14, 1994), p. A10; La Sociedad Económica (London), "An Index of Foreign Investment in Cuba," (1994), p. 7; and Enrique Llaca, "Compañía mexicana invertirá $1.5 millones en Cuba adquiriendo el 49% de la compañía de teléfonos," *Diario las Américas* (June 19, 1994), p. 10A.

181 Larry Press, "Cuban Telecommunication Infrastructure and Investment," *Cuba in Transition—Volume 6* (Washington: Association for the Study of the Cuban Economy, 1996), p. 151.

182 María C. Werlau, "Update on Foreign Investment in Cuba: 1996-97," *Cuba in Transition—Volume 7* (Washington: Association for the Study of the Cuban Economy, 1997), p. 87.

183 María C. Werlau, "Update on Foreign Investment in Cuba, 1997-98, and Focus on the Energy Sector," *Cuba in Transition—Volume 8* (Washington: Association for the Study of the Cuban Economy, 1998), p. 211.

184 Homero Campa, "México cobra a Cuba parte de su deuda de 310 millones de dólares mediante 'swaps,'" *Proceso*, no. 310 (April 11, 1994), pp. 55-59 and Andrés Oppenheimer, "Salinas considera visitar a Cuba para impulsar negocios," *El Nuevo Herald* (April 21, 1994), p. 4A.

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Corporation and nationalized by the Cuban Government on October 24, 1960; in the 1970s and 1980s it underwent expansion and extensive modernization so that it was an attractive target for foreign investment in the 1990s.[185] According to press reports, shortly after the enactment of the Helms-Burton Act, CEMEX officers were informed by the U.S. Department of State that they would be subject to Title IV visa restrictions and the company terminated its investment in Cuba.[186]

There are other potential disputes with Mexico on the horizon, however, as Mexican investors have stated that they intend to maintain their investments in the island.[187] For example, the president of the Mexico's DSC Group, investor in the Tuxpan Hotel in Varadero and also owner of investments in the United States, stated that in June 1996 that his company did not intend to leave Cuba and would challenge the Act if anyone filed a suit or took legal action against DSC.[188]

6. Cuba's Implementation of its Antidote Laws

Cuba has provided no information on how it goes about implementing its antidote laws. It is, for example, unknown whether the Cuban authorities have carried out the provisions in Article 6 of Law No. 80 on measures to protect foreign investors by transferring the interests of investors to fiduciary companies, financial entities or investment funds. Nor is it known whether people have actually been prosecuted under Article 8 of that law, which prohibits any form of "collaboration" with the implementation of the Helms-Burton Act. On the other hand, Cuba has moved aggressively since the Act went into effect to quell internal dissent, even among those who focus their disagreement with the government on economic issues.

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185 Teo A. Babún, Jr., "Cuba's Cement Industry," *Cuba in Transition—Volume 7* (Washington: Association for the Study of the Cuban Economy, 1997), pp. 375-376.

186 Jorge G. Castañeda, "The Absurd Tragicomedy of Helms-Burton," (June 1996), at http://www.epn.org/castaneda/cubaen.html; Lucia Newman, "U.S. anti-Cuba law meets widespread defiance," CNN report from Mexico City, June 7, 1996, at http://www.cnn.com/world/9606/07; and José Carreño Figueras, "Convoca a intensificar presiones sobre Cuba," *El Universal* (Mexico) (January 4, 1997).

187 José Luis Ruiz and Ana María Rosas, "Mantendrán mexicanos sus proyectos en la isla," *El Universal* (Mexico) (January 4, 1997).

188 Lucia Newman, "U.S. anti-Cuba law meets widespread defiance," CNN report from Mexico City, June 7, 1996, at http://www.cnn.com/world/9606/07.

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In a well publicized case, on June 27, 1997 four Cuban citizens organized as the Internal Dissidence Working Group held a press conference in Havana and issued a public document titled *The Nation Belongs to All*,[189] in which they questioned the ability of Cuba socialist system to overcome the current economic crisis.[190] The four critics were jailed on July 16, 1997, allegedly because "they were engaged in intensive activities to subvert the legal order and Constitution of the Republic," and in so doing were in contact with "the leadership of terrorist organizations located within the territory of the United States."[191] It was not until late February 1999, 19 months after they were imprisoned, that the four were tried under the charge of inciting sedition and condemned to jail sentences of between 5 and 3 and one-half years.[192]

International reaction to the trial and its conduct (the government rounded up dissidents who might comment on the trial or seek to attend it and the proceedings were closed to the public and the international press), compounded by the enactment in mid-February of Law No. 88, evoked negative reactions from the international community, including from Cuba's trading partners such as Canada, the European Union and Spain, who had up to that time steadfastly stood with Cuba against the Act.[193]

In addition to enacting its antidote laws, Cuba has sought to counteract U.S. strategy towards implementing the Helms-Burton Act. Thus, when the White House issued in January 1997 its Title II Report, which contained illustrative resource flows that might be available to support Cuba's transition to democracy, President Castro retorted in a speech

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189 Grupo de Trabajo de la Disidencia Interna, *La Patria es de Todos* (La Habana, June 27, 1997). The authors of the document are Félix Antonio Bonne Carcassés, René Gómez Manzano, Vladimiro Roca and Martha Beatriz Roque Cabello. The document has been circulated widely abroad in its Spanish original and English. It is available, e.g., at http://www.cubanet.org.

190 Pablo Alfonso, "Disidentes critican documento comunista," *El Nuevo Herald* (June 28, 1997), p. 6A.

191 Cynthia Corzo, "Castro debate que hacer con activistas presos," *El Nuevo Herald* (August 10, 1997), pp. 1A, 6A.

192 "Quienes son los disidentes y los presos de conciencia en Cuba," *Granma* (March 4, 1999) and "Sancionados los acusados de la Causa No. 4 de 1998," *Granma* (March 16, 1999).

193 Pablo Alfonso, "Indignación internacional por la condena a los disidentes cubanos," *El Nuevo Herald* (March 16, 1999). Cuba's actions also brought it condemnation by the U.N. Human Rights Commission, U.N. Panel Criticizes Cuba, *Associated Press*, April 23, 1999, and placed in jeopardy a scheduled visit to Cuba by the King and Queen of Spain. Alberto Miguez, Reyes de España no van a Cuba, *Diario Las Americas*, April 22, 1999.

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given the same day the report was issued: “it is contemptible that anyone could believe that freedom and dignity could be bought; it is contemptible that anyone could believe that we would be willing to be slaves again.”[194] In another speech given a few days later, in which he described the U.S. blueprint for democracy as “shameless, full of lies, deceitful and manipulative,” Castro gave his views on transition to democracy in Cuba: “No, Mr. Clinton, there will not be a transition government in Cuba!”[195] In February 1997, National Assembly President Ricardo Alarcón announced a national campaign to inform the public about the “Yankee re-colonization plan” contained in the Title II Report through assemblies in workplaces, classrooms and neighborhoods.[196] In a television appearance to launch the campaign, Alarcón set out the Cuban government’s message to the Cuban people: “This so well advertised plan contains President Clinton’s ideas on how to dislodge families from their homes and farmers from their land, how to take away our factories, and how to privatize schools and hospitals.”[197]

In June 1997, the Cuban Government began an offensive against the Helms-Burton Act and against then ongoing initiatives in the U.S. Congress to further strengthen the Act. High-level Cuban officials, among them Vice President Carlos Lage, President of the National Assembly Ricardo Alarcón, Foreign Affairs Minister Roberto Robaina and Foreign Affairs Vice Ministers Jorge Bolaños and Isabel Allende, traveled to more than 20 countries in Latin America and Europe to make Cuba’s case against the Helms-Burton Act and the overall U.S. policy towards Cuba. The Cuban envoys reportedly carried a letter from President Castro denouncing U.S. policies and rallying international support to confront such policies.[198] Cuba’s public relations campaign against the Act has continued to this day.[199]

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194 Juan O. Tamayo, “El ‘cordero’ ruge: Oferta de EU indigna a Castro,” *El Nuevo Herald* (January 30, 1997), pp. 1A, 8A.

195 “Castro fustiga plan de EU y llama ‘bobo’ a Clinton,” *El Nuevo Herald* (February 9, 1997), p. 1B.

196 Pablo Alfonso, “Cuba organiza campaña contra plan de Clinton,” *El Nuevo Herald* (February 5, 1997), p. 1B.

197 *Id.*

198 “Anuncian acciones contra enmiendas a la Helms,” *El Nuevo Herald* (June 18, 1997), p. 6A. Reportedly, Vice President Lage traveled to Uruguay, Argentina, Chile and Brazil; National Assembly President Alarcón to Colombia and Venezuela; Foreign Affairs Minister Robaina to El Salvador, Mexico, Honduras, Guatemala, Costa Rica, Panama, the Dominican Republic and Nicaragua; and Foreign Affairs Vice Ministers Bolaños and Allende to Canada, the

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F. ASSESSMENT AND CONCLUDING REMARKS

The enactment of the Helms-Burton Act and its antidotes have created a very complex web of sanctions and counter-sanctions by sovereign nations to protect their national interests. However, the high-caliber weapons created by the Act and its antidotes, although in place and ready to engage in battle, remain so far silent, held at bay by the use of discretion by the Executive branch of the U.S. Government and diplomatic maneuvering by all countries involved.

Indeed, on the U.S. side, the tightening of sanctions against Cuba that is one of the objectives of the Helms-Burton Act has given way to a series of Executive measures which provide limited relief against the trade embargo's strictures. On March 20, 1998, U.S. Secretary of State Madeleine Albright announced four actions President Clinton had decided to take "to reach out to the people of Cuba to make their lives more tolerable."[200] The four actions were:

- develop bipartisan legislation to meet humanitarian food needs on the island;
- streamline and expedite the issuance of licenses for the sale of medical supplies to Cuba;
- resume licensing direct humanitarian charter flights to Cuba; and
- restore the arrangement to permit Cuban-American families to send remittances to their relatives on the island.[201]

Vatican, the Netherlands, and the headquarters of the European Union in Brussels and of the World Trade Organization in Geneva.

[199] For example, on March 9, 1999, shortly after Law No. 88 went into effect, Ricardo Alarcon (the President of Cuba's National Assembly) wrote to parliamentarians around the world defending the new law and insisting that Cuba had no choice but to defend itself against the economic aggression embodied in the Helms-Burton Act and other hostile U.S. policies. Andrew Cawthorne, *Cuba Defends Anti-U.S. Law to Foreign Parliaments,* Reuters, March 10, 1999.

[200] Secretary of State Madeleine K. Albright, "Opening Remarks on Cuba at Press Briefing Followed by Question and Answer Session by Other Administration Officials," Washington (March 20, 1998).

[201] *Id.*

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In May 1998, the U.S. Department of State announced that the Departments of the Treasury and Commerce had completed the procedures to implement three of the measures[202] and would continue to work with the Congress, on a bipartisan basis, to develop ways to increase support for the Cuban people by facilitating the transfer of food and humanitarian assistance.[203]

On January 5, 1999, the President announced a further series of steps to assist the Cuban people:

- expansion of remittances by allowing any U.S. resident – not only those with families in Cuba – to send limited funds to individual Cuban families as well as to organizations independent of the government;

- expansion of people-to-people contact through two-way exchanges among academics, athletes, scientists, and others, including streamlining the approval process for such visits;

- authorization for the sale of food and agricultural inputs to independent nongovernmental entities, including religious groups and Cuba's emerging private sector, such as family restaurants and private farmers;

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202 The procedures would: 1) restore direct humanitarian cargo flights in order to provide U.S. NGOs with a more cost-effective way to send assistance to the Cuban people; 2) restore direct passenger charter flights to facilitate licensed travel to Cuba, which directly benefits the Cuban people; 3) restore the authority for family remittances to Cuba in the amount of $300 per quarter; and 4) simplify and expedite the licensing of exports of commercial sales and donations of medicines and medical supplies, consistent with the existing law. See U.S. Department of State, Office of the Spokesman, "Press Statement by James P. Rubin" (May 13, 1998). Additional information on each of these steps is given in a series of Fact Sheets prepared by the Office of the Coordinator for Cuban Affairs, Bureau of Inter-American Affairs, "Implementing Procedures for Direct Humanitarian Cargo Flights," "Implementing Procedures for Direct Passenger Charter Flights," "Implementing Procedures for Family Remittances to Cuba," and "Implementing Procedures for Facilitating the Licensing of the Export of Commercially Sold and Donated Medicines, Medical Supplies and Equipment to Cuba" (May 13, 1998).

203 U.S. Department of State, Office of the Spokesman, "Press Statement by James P. Rubin" (May 13, 1998).

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- authorization of charter passenger flights to cities in Cuba other than Havana and from cities in the United States other than Miami in order to facilitate family reunification for persons living outside those cities; and

- an effort to establish direct mail service to Cuba, as provided by the Cuban Democracy Act.[204]

The President also announced steps to increase the flow of information to the Cuban people and others around the world by strengthening Radio Martí and TV Martí, the two U.S.-funded stations that broadcast to Cuba, and launching a new public diplomacy program in Latin America and Europe to keep international attention focused on the need for change in Cuba.[205]

Predictably, Cuba reacted negatively to the measures announced by the Clinton Administration in March 1998 and January 1999. National Assembly President Alarcón dismissed the March 1998 initiatives, arguing that the actions to resume licensing of humanitarian flights to Cuba and to restore the arrangement to permit the sending of remittances to relatives in the island were essentially a return to the policy before February 1996, while the other two purportedly aimed at "flexibilizing" the embargo by developing legislation to meet humanitarian needs in the island and streamlining the issuance of licenses to export of medical supplies to Cuba were not implemented.[206] Minister of the Economy José Luis Rodríguez described the January 1999 measures, particularly the authorization for the sale of food and agricultural inputs to independent nongovernmental entities, as "crumbs," far short of the abrogation of the overall U.S. embargo sought by Cuba.[207] National Assembly President Alarcón called the measures to allow transfers of funds to organizations in Cuba and the sale of food and agricultural inputs directly to

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204 "Statement on United States Policy Toward Cuba," January 5, 1999, *Weekly Compilation of Presidential Documents* 35:1 (January 11, 1999), p. 7.

205 Id. These new initiatives have been implemented by regulations issued by the Departments of Commerce and Treasury in May 1999. 64 Fed.Reg. 25807 (May 13, 1999).

206 "Comparecencia del compañero Ricardo Alarcón de Quesada sobre la política del gobierno norteamericano contra Cuba, el 8 de enero de 1999," *Granma* (January 12, 1999).

207 Pablo Alfonso, "Medidas de EU son 'migajas,' dice Cuba," *El Nuevo Herald* (January 9,1999).

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independent entities as "subversive and counterrevolutionary," warning that the transfers of funds to other than relatives "is a way to create traitors."[208]

In addition to taking limited measures to ease the effects of the embargo on Cuba's population, the United States has thus far held off on implementation of Title III of the Helms-Burton Act, the provisions of the law that are most objectionable to foreign nations and would most likely trigger the countermeasures contained in the antidotes, preferring to negotiate agreements with trading partners that commit them to take steps to advance democracy in Cuba. The agreement reached with the European Union, which brought a temporary halt to the complaint filed by the EU with the WTO over the Helms-Burton Act, is the best example of this approach.[209]

Has the U.S. approach to implementing the Act being successful? Cuba has sent mixed signals on the impact of the Helms-Burton Act of the nation's economy. On the one hand, Vice Minister of Tourism Eduardo Rodríguez de la Vega told a visiting group of Catalonian tourism writers in late June 1996 that "surprisingly, the Helms-Burton law benefits the marketing and ranking of Cuban tourism because it stirs interest in the island in places where it was not known before."[210] At about the same time, Minister of Foreign Investment and Economic Cooperation Ferradaz described the reaction of foreign investors to the Act as follows:

> The 230 investors from 50 countries present in Cuba knew beforehand what could happen. I do not doubt that some partners will be frightened off and will delay their plans. Some have announced this even though we have not yet received official notification. We do not reproach the victims of an unjust law but rather those who have promulgated this law. The bast majority of companies have opted to stay and are seeking with us and their countries of origin, legal formulas to defend themselves and thus reduce the risk.[211]

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[208] Pablo Alfonso, "Propuesta de EU es subversiva, dice Cuba," *El Nuevo Herald* (January 9, 1999) and Alfonso, "Cuba no aceptará las medidas de EU," *El Nuevo Herald* (January 10, 1999), p. 11A.

[209] As noted earlier, the agreement reached between the United States and the EU in 1998 requires approval by the U.S. Congress. So far Congress has failed to act on the agreement, which may cause the agreement to eventually collapse.

[210] "Helms-Burton Law Said to Benefit Tourist Trade," Havana Prensa Latina (June 24, 1996), *FBIS-LAT-96-126* (June 28, 1996), p. 4.

[211] "Foreign Investment Minister on Helms-Burton Law," *El País* (Madrid) (June 15, 1996), *FBIS-LAT-96-119* (June 19, 1996), pp. 2-3.

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On the other hand, Vice President Carlos Lage told journalists in Havana in late July 1996 that the Act had "negative effects" on the Cuban economy: "The effects (of the Act) are negative not because of the practical application of the law itself, but because of its objective of intimidation and the concerns that it raises with a significant number of investors."[212]

According to Minister of Foreign Investment and Economic Cooperation Ferradaz, at the end of 1998 Cuba had 340 joint ventures with foreign investors, 57 of which were approved in 1998.[213] Citing slightly different figures, Vice President Lage stated that 58 joint ventures with foreign investors were approved in 1998, for a total of 345 joint ventures approved in the ten-year period since the opening to foreign investment and "more than half of them after the enactment of the Helms-Burton Act."[214] Vice President Lage further stated that 63 percent of the joint ventures are with investors from Spain (70), Canada (66), Italy (52), the United Kingdom (15) and France (14).[215] Moreover, 18 new joint ventures were approved in the first two months of 1999, and 100 were under negotiation.[216] Lage also reported that Cuba recently signed bilateral investment promotion and protection agreements with 6 more countries, bringing the total through March 1999 to 37, 19 of them since the enactment of the Helms-Burton Act, and negotiations were ongoing on 10 others.[217] Cuban officials see these bilateral investment promotion and protection

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212 Pablo Alfonso, "Lage: Ley tiene 'efectos negativos' en Cuba," *El Nuevo Herald* (July 24, 1996), pp. 1B, 2B.

213 "Se acelera en 1999 la inversión extranjera," *El Nuevo Herald* (March 28, 1999).

214 Susana Lee, "Amplio análisis para mejorar y controlar el proceso de la inversión extranjera," *Granma* (March 16, 1999).

215 *Id.*

216 *Id.*

217 *Id.* Lage indicated that Cuba signed investment promotion and protection agreements with Belize, Belgium-Luxembourg, Portugal and Bulgaria in 1998, and with Suriname and Panama in early 1999. Other countries with which Cuba has signed such agreements, and year in which the agreement was concluded, include: Italy and Russia (1993); Spain and Colombia (1994); United Kingdom, China, Ukraine, Bolivia, Vietnam, Lebanon, Argentina and South Africa (1995); Chile, Romania, Barbados, Germany, Switzerland, Greece and Venezuela (1996); and Hungary, Holland, France, Laos, Ecuador, Cape Verde, Jamaica, Brazil, Namibia, Indonesia, Malaysia and Turkey (1997). See *Economic Eye on Cuba* (August 17-23, 1998).

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agreements as "an indication of the level of independence of the countries involved and the willingness to do business with Cuba."[218]

Official statistics on foreign investment in Cuba are sparse and of questionable reliability. One reason for their sparseness is the Cuban antidote legislation, which seeks to limit the amount of information made available in order to thwart the Act. Another reason is the desire on the part of the Cuban government to give the impression that foreign investment is high and therefore affect positively the investment climate. Those data that are available refer only to overall investment and raise a host of questions, for example whether they are commitments or disbursements, whether they are actual investments or potential investments based on the performance of joint ventures, whether they constitute fresh money or debt-equity swaps, and so on.[219] Official Cuban government statistics put cumulative foreign direct investment since 1990 at $2.1 billion by May 1995[220] and $2.2 billion by August 1998.[221] These statistics suggest that foreign investment has been essentially stagnant since the bill that became the Helms-Burton Act was introduced in Congress. While it is impossible to separate the potential discouraging effect of the Act from many other factors that may have kept investors away, it is safe to conclude that the Act, even with Title III in suspension, has had a detrimental impact on foreign investment in the island.

The antidote laws enacted by other nations may have also had an effect on U.S. foreign policy, making the Clinton Administration more amenable to reach a compromise that minimizes the risk of multiple, inconsistent court adjudications and administrative actions. Because of the mutual forbearance exhibited by the United States and its trading partners, international confrontation has thus far been avoided.

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218 Joaquín Oramas, "Greater efficiency in the search for partners," *Granma International Electronic Edition* (February 5, 1998).

219 On these issues see, e.g., Jorge F. Pérez-López, "Foreign Investment in Socialist Cuba: Significance and Prospects," *Studies in Comparative International Development* 31:4 (Winter 1996/97), especially pp. 7-12.

220 "Support for Economic Changes," Havana Radio Habana Cuba (July 12, 1995), as reproduced in *FBIS-LAT-95-137* (July 18, 1995), pp. 6-7.

221 Carmelo Mesa-Lago, "The Cuban Economy in 1997-98: Performance and Policies," *Cuba in Transition – Volume 8* (Washington: Association for the Study of the Cuban Economy, p.4. On the other hand, the U.S. Department of State estimates that only $1.7 billion have been invested by foreigners in Cuba since 1990. Remarks by Michael Rannenberger to Equity International, March 15, 1999.

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The lesson in this precarious state of affairs is perhaps that sanction laws such as the Helms-Burton Act and its antidotes are most effective when not in use: their value lies mainly in the political arena, and the threat of invoking them is more likely to achieve the legislature's intent than their actual implementation.

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