

Sultan
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On September 18, 1996, President Clinton signed the "Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996," generally known by the names of its principal sponsors as the Helms-Burton Act. (HB) The Act is a mixture of codification of existing economic sanctions previously imposed pursuant to executive orders; inducements and promises related to restoration of democracy in Cuba; threats against persons from third countries that do business with Cuba; a new, unprecedented remedy for expropriation; and restrictions on entry into the United States by persons who "traffic in confiscated property" or who are affiliated with such persons by ownership, employment or by direct family ties. The President had indicated that he would veto the bill if it reached his desk, and quite possibly it would never have done so, but for the events in the Florida Strait on Saturday, February 24, 1996. On that day, at about 3:15 in the afternoon, two Cessna 337 light planes flown by a Cuban-American organization based in Florida were blown up by missiles launched by MIG-23 and MIG-29 planes of the Cuban Air Force, apparently on standing orders of President Fidel Castro. President Clinton immediately condemned the attack, and by the following Wednesday, he announced that he now would sign HB--two weeks before the November, 1996 elections.

In the instrument of transmittal of HB to the White House, the Congress included the following statement that President Clinton quoted with approval at the public ceremony when he signed HB--one week before the election:

The United States has a legitimate interest in trafficking by third-country nationals with Cuba.

In addition, the United States has a strong interest in facilitating the rapid economic development of post-Castro Cuba without the rancor, litigation and clouds on title that Castro's foreign-investment strategy will inevitably cause when he is gone.

"The U.S. department of State has repeatedly recognized these interests. For example, in September 1993, in a message entitled "Buyer Beware: Cuba May Be Selling American Property," Secretary of State Christopher instructed our missions abroad to tell their host governments:

[we] hope that the government of Cuba will ultimately decide to return expropriated properties to their original owners. If the properties are purchased by foreign investors before this occurs, restitution of property will prove far more difficult.... Care should be taken by prospective investors to ensure that property the Cuban government attempts to sell or otherwise dispose of is not the subject of a claim by a U.S. national.

"Still further, because of the proximity of Cuba to the United States and the history of relations between the two countries, Cuba's persistence in suppressing democracy, violating human rights and refusing to satisfy international law claims against it effects the United States in a variety of ways, including the recurring crises caused by the flight of refugees. The United States has legitimate interests in crises caused by the flight of refugees. The United States has legitimate interests in bringing these problems to an end. It

has reasonably concluded that discouraging foreign investment in tainted Cuban property is an appropriate and proportionate means toward that goal."

Foreign reaction to HB and the above statement was swift and pervasive, especially in Canada, Mexico, the European Economic Community and Japan. For example, in Canada:

I. The Canadian Parliament promulgated an extensive statute designed to defend Canadian interests against attempts by foreign governments or courts to apply unreasonable laws or rulings in Canada. The law gives the Attorney General of Canada, in agreement with the Minister of Foreign Affairs, the authority to forbid compliance in Canada with any official foreign activity that, in the Attorney General's view, infringe Canadian sovereignty. In addition, there is authority to restrict provision of documents to foreign courts if such an action infringes Canadian sovereignty.

The Canadian Act also allows Canada to respond to changing circumstances, such as recent attempts by the United States to attack legitimate Canadian business interests under HB. It permits the Attorney General of Canada to block any attempt by a foreign claimant to enforce a judgment under a law such as HB in Canada. Also Canadian companies have recourse in Canadian courts -the so called "clawback" provisions - if awards are made against them in U. S. Courts under HB, since the act provides a right to claim damages in Canada for an equivalent amount against the American claimant.

Here is how one of these "clawback" changes might apply in a hypothetical example:

A U.S. National might win a suit against a Canadian in a U.S. court under HB. If the Canadian had no assets in the United States, the U.S. National would have to ask a Canadian court to enforce the judgment. The Attorney General of Canada could issue an order blocking this process.

If the Canadian has paid damages in the United States to an American, he or she could then sue the American in Canadian Courts to recoup the full amount of the award. This amount plus court costs in both countries would be applied against any of the American's assets in Canada.

The "clawback" provisions would also allow a Canadian, forced to fight an HB court action in the U.S., to try to recover anticipated court costs and attorney fees from the American party in Canadian courts even before the case is over in the U.S.

The penalties for violation of HB are up to one million U.S. dollars; the penalties for violation of the responding Canadian act are up to one and one-half million Canadian dollars and five years imprisonment.

II. Historically, the U.S. and Canada have long been, and continue to be, by far, the largest international trading partners in the world! This mutual prosperity has been strongly assisted by a three thousand mile unpatrolled boundary and a common set of political values. Yet, Canada has rallied international opposition to HB at the world's major economic and political fora:

1. At a meeting of the World Trade Organization's (WTO) general council, Canada made its opposition

to the Act clear, in concert with the European Union (EU), Mexico and Japan.

2. As part of talks on a Multilateral Agreement on Investment in June, Canada asked members of the Organization for Economic Co-operation and Development (OECD) (the economic "big seven") to ban boycotts of firms that invest in third countries. There was almost unanimous support for the proposal, the only dissenter being the United States.

3. Canada is also pursuing this issue through the North American Free Trade Agreement (NAFTA), which has rules governing investment and temporary entry.

4. NAFTA consultations will be held with the United States in late April and again in May. Mexico will participate in both sessions and has already announced that it shares Canada's concerns with HB and will join Canada in protesting HB at the consultations.

5. Canada and the U.S. recently held a meeting of the North American Free Trade Agreement Commission. Given that meeting, Canada is now in a position to request a formal dispute settlement panel under the NAFTA should it feel this move is warranted.

6. The Canadian International Trade Minister, Art Eggleton, raised the issue in person with then U.S. Trade Representative Mickey Kantor and with EU ambassadors.

7. Canadian Foreign Affairs Minister, Lloyd Axworthy, has stated his concerns directly to U.S. Secretary of State Warren Christopher.

Canada's opposition to HB led the Organization of American States (OAS) to refer the law to its Inter-American Juridical Committee to investigate whether HB is consistent with international law.

The EU is drafting legislation similar to Canada's, and other nations are considering such a move. Mexico has already introduced legislation into its Senate.

In April, 1996, the Canadian Government entered a joint venture with the Cuban Government involving the production and marketing of sugar for sale world-wide. The agreement embraces use of both land in Cuba and refineries in both countries. Some of the sugar cane fields and refineries in Cuba had been owned by U.S. nationals; others were confiscated by the Cuban government from "boat people" who fled to Florida and have since become American citizens, or such ownership continues under U.S. law in their American descendants.

Under the joint venture each country designates an official who jointly oversee the project. The Canadian official who presently holds this responsibility is the Vice-Minister of Foreign Affairs for Economic Activity, Jim Jones (JJ). His 19 year old daughter, Mary, is a student at Smith College in Northampton, Mass.

As we have seen, HB allows the U.S. government to deny entry to senior executives of companies that the U.S. State Department determines have been "trafficking", after March 12, 1996, in property subject to a claim in the U.S. This provision also applies to agents, spouses and unmarried children of these executives.

The American government sent letters to some Canadians immediately after the HB signing ceremony informing them

that they would be banned from entering the United States. J. J. received such a letter on November 15, 1996. On December 1, 1996 Mary returned to college following the U.S. Thanksgiving holiday. Two days later she received a phone call from the U.S. Department of State telling her that she would have to leave the U.S. within one weeks time. After J. J. was informed of the phone call he immediately travelled to Smith College, using his drivers license as a personal ID, as is the general practice for all American and Canadian nationals crossing the border. The next day, December 5th, he is arrested by U.S. Marshals for illegal entry into the U. S. After posting bond, he and his daughter return to their home in Ottawa, Canada's capital city.

I.

A recent graduate of the University of Dayton Law School, you are employed by a firm with a reputation in the practice of international law in Boston, where the trial of U S v. Jim Jones will be held. The Canadian government has engaged your firm as defense counsel in that case. The senior attorney in charge of the case requests that you prepare a memo listing all of the international legal issues, in order of their priority, presented by the case, how they will probably be resolved, and why you feel that they would be so resolved.

II.

A Canadian national, you attended the University of Dayton Law School and are presently a member of the legal staff of the Canadian Ministry of Foreign Affairs in Ottawa. Your supervisor informs you that the Canadian Cabinet has unanimously agreed that the "J.J. incident" constitutes a challenge to Canadian sovereignty and honor, and has decided to seek redress, if at all possible, from the International Court of Justice (ICJ) in the Hague. He requests that you

prepare a memo on the possibility of such action, indicating the issues and/or problems involved, their probable resolution, and why they will be so resolved.

(You may incorporate by reference any of your response to question I, and thereby avoid having to rewrite the same material a second time.)