Hastings International and Comparative Law Review

Volume 20
Number 4 *Fall 1997*

Article 5

1-1-1997

Helms-Burton: The Canadian View

Kim Campbell

Helms-Burton: The Canadian View

By KIM CAMPBELL*

I. Introduction

I am delighted to be able to participate in this symposium on the Helms-Burton Act. This is a piece of legislation that resonates - however jarringly - with several hats I have worn over the years: as a student of international relations, as a practitioner of public policy, as a lawyer and former Attorney General of Canada - because Helms-Burton is about more than a set of legal issues, important as they are. It is also about the rule of law itself, about trade and investment policy, the conduct of great states towards others, not least its closest friends and allies, and it is about alternate approaches to foreign policy.

As I lead up to delivering the burden of my remarks, I will not prolong the suspense. I can tell you here and now - Canada is against the Helms-Burton Act and hopes to see it repealed. The recent suspension by the President of the right to sue is helpful, but does not solve the problem, because liability continues to accrue, the sword continues to dangle above our heads, and the other noxious provisions continue to apply.

We think this is bad law - and bad policy - which violates international law and agreements in numerous ways. The irony is that many in this country in politics, government, media and business agree with us. Rarely does an American action galvanize such universal opprobrium among its closest friends, neighbours and trading partners. It says something about how much a flashpoint Cuba remains in American policy - perhaps in the American psyche - after all these years, even after the collapse of the Soviet empire and the curtailment of Cuban adventurism abroad. It is hard not to observe that in Vietnam, for example, with all the American treasure expended on its soil, the United States. has moved

* The Right Honourable Kim Campbell is Counsel General of Canada. She was Canada's nineteenth prime minister. This address was given on January 25, 1997, at the Hastings International & Comparative Law Review's 15th Annual Symposium on International Legal Practice, "The Helms-Burton Act: Domestic Initiatives & Foreign Responses."

on to new relationships without abdicating core values. With Cuba, however, the reflex remains isolation and punishment.

We simply have a different approach to Cuba. The visit to Cuba this January by our foreign minister, Lloyd Axworthy, demonstrated the importance we attach to engagement. I will say more later about our Cuban policy. I would just add that as can be seen from the Declaration adopted at the end of Mr. Axworthy's visit, human rights and democratic development are among our central concerns. At this juncture in international, regional and Cuban affairs, we believe engagement is the way forward, and that it yields fruit.

With all the disagreement engendered by the Helms-Burton controversy, it is all the more important to situate this dispute in the context of the broader relationship Canada and the United States enjoy with one another. Understanding the depth and breadth of our partnership in so many fields helps to illuminate the basis for our chagrin, the depth of our conviction, and the essential need not to allow such tensions to erode the confidence and mutual respect which underpin the common purpose we project in the world.

II. The Canada-United States Relationship

Canada's economy and its population are about one-tenth of that of the United States. Despite this, Canada is by far the United States' most important trading partner. You sell more goods to us than to the European Union or to Japan. In fact, more American goods are sold to Ontario than to Japan. Canada-United States trade flows are the largest in the world, amounting to about $1 billion a day. Canadians purchase about $4300 worth of American goods per capita, while Americans buy $560 a head from Canada.

We sell more of our total output to you than any other country ships to any other in the world. Eighty-five percent of our exports come to the United States. We also invest heavily in each other's economy, $70 billion from you to us, $56 billion from us to you. It is safe to say that millions of jobs on both sides of the border depend in some way on the Canada-United States relationship. Our almost $10 billion in imports from California represents about 190 thousand jobs, on the basis of U.S. Department of Commerce estimates of the employment effects of exports.

So it is no wonder that Canada and the U.S. concluded the Free Trade Agreement (now transmuted into NAFTA) in 1988. We had to have law to ensure the stability and predictability in this relationship. It had become too important and too complex for its management to be left to conventional, i.e., ad hoc, and politically susceptible techniques.

We are linked in a myriad of ways beyond economic relations, much of this covered in some 239 bilateral agreements. We share a continent. We share the environmental responsibility for that continent in a uniquely harmonious way, with our standards nudging each other.

We share a neighbourhood. We share a social agenda that we are each managing in our own way.

We share the challenges of managing migration flows that are changing the nature of our societies.

We share the challenges of managing criminality in a fragmenting world. We share the challenge of adjusting the way that central government relates to the subnational level - the states and provinces.

We have fought shoulder to shoulder in the great European conflicts of the twentieth century where universal values were at stake. We were allies in the "40 Years War" against communism, and we stand together today, each seeking in our own way to define the armature that would provide stability and peace in a bipolar world.

What we are, then, are partners in a peculiar relationship. We have relations that bring us together as sovereign states acting, usually in concert, on the international stage and conducting affairs between our jurisdictions in respect and equality. We also have a relationship of literally extraordinary intimacy in our North American household.

Canada and the United States are, in effect, two societies that share an integrated economy. With the flow of information largely south-north, Americans know much less about Canada than Canadians do about the United States. We really are a different society, not merely a smaller, colder, gentler version of yourselves.

Canadians, for example, do not share the visceral dislike of government often found in the United States and even among political conservatives, there is a strong sense of collective social responsibility.

We look at culture differently. Canadians are enormous consumers of American cultural product - books, magazines, music, television and cinema. Nevertheless it remains vital to our future as an independent

democracy for Canadians to be able to hear the echo of our own experience in our own voice. In the United States, culture is a business; for us, it is that to be sure, but also a key feature of our national defense.

As a relatively small country, we see our role in the world differently, although we both seek to bring freedom, order and democracy in the world. As a relatively small country heavily dependent on international trade for our own prosperity, we are deeply conscious of being a piece of a global mosaic. This is one of the reasons we work so hard to be linked multilaterally - to wield greater influence by working with others, as well as to shape rules that should govern international conduct. In the United States, awareness of being a superpower may make Americans more likely to see themselves as being at the center.

As a country deeply committed to a rules-based international system, Canada is not surprisingly opposed to the Helms-Burton legislation. We believe it is the wrong instrument as it not only targets Cuba but threatens trading partners and friends, and disrupts international trade and investment. Helms-Burton has transformed a United States-Cuba problem into a much broader trade and investment issue that undermines what the United States and its major trading partners have been trying to achieve in the last few years - a freer trade environment.

III. What Is Wrong with the Law

Within the United States itself, criticism has been levied at all aspects of the law. For example, the provisions which codify American economic sanctions and set out conditions for future assistance have been attacked for constraining the President's ability to shape United States-Cuba policy in response to new developments. However, it is Titles III and IV that elicit the gravest condemnation from the international community.

We are, of course, particularly outraged by the claims provisions and restrictions on temporary entry. As you are aware, the claims provisions known as Title III permit American citizens to sue foreign nationals in U.S. courts over property expropriated by the Cuban government. These measures contravene accepted international legal practices, and introduce uncertainty about the security of investments in the United States and third countries. The restrictions on temporary entry into the United States known as Title IV will target executives of companies in-

vesting or doing business in Cuba. They even bar the families of these executives. Who could seriously believe that a five-year-old child is a security threat?

The extraterritorial reach of Title III is particularly egregious. The transparent purpose of this measure is to compel a chill in economic and trading relations with Cuba by non-U.S. firms. To this we say that the United States is free not to have economic ties with Cuba. It is equally free to try to persuade others to adopt similar policies. What Canada or any other self-respecting sovereign state will not accept—and will never accept—is the unilateral imposition on it of another country's policy. Even legislators who voted for the bill expressed deep discomfort with this aspect. One of those, Senator Phil Gramm, hit the nail on the head when he said: "My primary concern with Title III is its extraterritorial reach. I have concerns with laws which attempt to impose our own laws and standards on other countries . . . This kind of U.S. attempt to infringe on the sovereignty of other nations should concern us."

I should add that this is not the first time Canada has had to deal with this problem. We have periodically had to take action against unacceptable attempts by the United States to impose its laws extraterritorially. In 1984 Canada passed the Foreign Extraterritorial Measures Act (FEMA), which allows the Government to respond to unacceptable claims of extraterritorial jurisdiction by foreign governments and courts.

An order under the Act was issued in 1992 to block the effect of the U.S. Cuban Democracy Act, or Torricelli Bill, by forbidding any Canadian company from complying with instructions not to trade in goods with Cuba. The 1992 order was amended in January of this year to cover trading in services with Cuba and to deal with other U.S. extraterritorial measures.

In response to the Helms-Burton Act, we have just enacted further changes to the FEMA. The amended FEMA will ensure that judgments under Helms-Burton will not be enforced in Canada. It will also provide for "clawback," that is, a right to sue in Canadian courts to recover an amount equivalent to any damages awarded in U.S. courts under Title III of Helms-Burton, plus the costs of defending the suit in the United States and those of seeking recovery in Canada.

In setting up "federal courts as tools in the pursuit of U.S. foreign policy in Cuba" - to quote Senator Nancy Kassebaum - the Helms-Burton

law ignores established international legal practices for settling disputes between states concerning claims by foreign nationals who have had their property expropriated. The foreign claims settlement process is the right way to pursue property claims for American citizens. If a foreign national does not receive adequate compensation, the widely accepted international practice is for the home State to adopt the claim as its own and to pursue a resolution through government-to-government negotiations. States have a number of options for resolving the state-to-state dispute. They could reach a settlement through diplomatic negotiations or they could negotiate a treaty to cover a large number of claims. Canada and many other nations took this route in settling the claims of their nationals against Cuba. The United States is the only country not to have reached a settlement. Occasionally, states may agree to have the dispute settled by an international tribunal such as the International Court of Justice. Sometimes, states may agree to submit claims for resolution by a special tribunal. In fact, the United States has been doing exactly that in resolving outstanding claims with Iran. The real difficulties in reaching agreement in the political climate which has characterized United States-Cuban relations is no justification for adopting an illegal alternate process.

Last June, 33 out of 34 members of the OAS agreed that the issue of whether Helms-Burton is consistent with international law should be put to the Inter-American Juridical Committee, the legal arm of the OAS. It found that the Act violates a number of important principles of international law. I mention a few:

- Claims against a State for expropriation of the property of foreign nationals cannot be enforced against the property of private persons except where such property is itself the expropriated asset and within the jurisdiction of the claimant State.

- The domestic court of a claimant State are not the appropriate forum for the resolution of State-to-State claims.

- The claimant State does not have the right to espouse claims by persons who were not its nationals at the time of injury. (Helms-Burton confers the right to sue on people who were Cuban citizens at the time of expropriation. Senator Gramm goes so far as to suggest that the bill was designed to help these now Cuban-Americans get benefits other Americans who had claims are entitled to.)

- The claimant State does not have the right to attribute liability to nationals of third States for a claim against a foreign State.

- The claimant State does not have the right to attribute liability to nationals of third States for the use of expropriated property located in the territory of the expropriating State where such use conforms to the laws of this latter State, nor for the use in the territory of third States of intangible property or products that do not constitute the actual asset expropriated.

- The claimant State does not have the right to impose liability on third parties not involved in a nationalization through the creation of liability not linked to the nationalization or otherwise unrecognized by the international law on this subject, thus modifying the juridical bases for liability.

- The claimant State does not have the right to impose compensation in any amount greater than the effective damage, including interest, that results from the alleged wrongful act of the expropriating State. (Helms-Burton accords up to treble damages.)

- All States are subject to international law in their relations. No State may take measures that are not in conformity with international law without incurring responsibility.

- Except where a norm of international law permits, the State may not exercise its power in any form in the territory of another State. The basic premise under international law for establishing legislative and judicial jurisdiction is rooted in the principle of territoriality.

This kind of action undermines the rule of law. The whole premise of the development of the international trading system, of the GATT and the WTO is the notion of agreeing to and abiding by a set of rules. No country has gained more from the opening of the world economy that has been enabled by an ever-deepening set of rules than the United States. The logic of Helms-Burton, applied in other contexts by other countries, creates an impossible environment for the conduct of international business. Not only will businesses need to know the laws of their own countries and those of the countries they do business in, they will need to know American - and who knows who else's - laws as well. Representative Tom Campbell pointed to the danger: will the United States or oth-

ers at a later date raise the trafficking issue in connection with investment in former communist states in Eastern Europe or Vietnam?

Not only does Helms-Burton brush aside accepted international legal practice, it flies in the face of NAFTA. Canada, the United States and Mexico negotiated NAFTA to ensure that trade within North America is conducted under a predictable system of rules. We broke new ground in negotiating rules on investment and movement of business persons. Helms-Burton violates a number of those provisions.

For this reason, in deciding where to press our grievance we turned first to the NAFTA process. Two rounds of formal consultations have been held, and the NAFTA Commission met in June. Mexico shares Canada's concerns and also participated in the discussions.

Canada has taken every opportunity internationally to muster opposition to Helms-Burton. It has not been difficult. We have discussed the issue with like-minded trading partners, gathering broad support. We have raised it at the World Trade Organization and the Organization for Economic Co-operation and Development. We are seeking binding instruments in the current OECD negotiations on the Multilateral Agreement on Investment to protect investments against such measures as Helms-Burton. We will not let up.

IV. Cuba Policy

This dispute on Helms-Burton is not about differences in our goals in Cuba. We share a commitment to democratic change and to the protection of human rights. In the broadest sense, I believe we share many of the same goals as the United States. Our aim is a peaceful transition in Cuba to a genuinely representative government that fully respects internationally agreed human rights standards. And we look forward to Cuba becoming an open economy.

However, we differ from the United States on how to reach these objectives. We have chosen the path of engagement and dialogue; the United States has picked isolation. I am proud of our Cuba policy. It has strong support from all political parties and from interested Canadians. It is also quite similar to that of most other countries in Latin America and Europe.

Canada and Cuba have enjoyed unbroken official relations since 1945, and unofficial contacts between our two countries go back to the

nineteenth century. Canadians and Cubans have a number of common interests, such as trade, fisheries, an interest in strong social programmes, and academic and scientific exchanges. As with any bilateral relationship, we have differences of view in some areas, but we discuss our differences frankly and openly. Our dialogue on issues of human rights and governance goes back many years. We do so in the context of dialogue and engagement. This is more productive than isolation or formal conditionality.

We think this approach is effective. The Declaration Minister Axworthy and his Cuban counterpart released in January 1997 sets out initiatives in several areas of our relationship, including human rights and governance, support for economic reform and the cultural sphere. These are all areas that we have agreed to work on jointly. These are works in progress rather than dramatic breakthroughs. Taken together over time they help to foster the capacity of individuals and institutions to participate in public life, to strengthen mechanisms that safeguard human rights, and help economy shift toward a market orientation.

Frankly we disagree with your policy. With the democratization of Latin America, the rapid expansion of trade, the Miami Summit and the expansion of free trade in our hemisphere, this is the time to foster integration, not isolation. The policy the United States is pursuing in China and Vietnam, for example, in no way derogates from American commitment to democracy and human rights in those countries. This is the time to help the Cuban people get ready for change rather than to try to worsen their economic and social conditions.

We actively pursue issues with the Cuban government where we do not agree. On human rights, we have urged the Cuban government to abide by international standards and obligations, particularly on civil and political rights. We were among the first to express concern at the severe sentence handed down in April 1995 against Francisco Calvin, a human rights activist. We responded very strongly to the harassment in February and March this year of the Consilio Cuban, an emerging coalition of human rights activists. Moreover, human rights was a major item on the agenda when the Cuban Foreign Minister visited Canada last year.

The constant dialogue that Cuba has had with Canada and other countries has helped lead to reforms. Cuba is moving ahead with economic policy changes. There are changes, too, in human rights areas.

For example, Cuba ratified the United Nations Convention against Torture in May, and it received visits from the UN High Commissioner for Human Rights and several international human rights organizations.

V. Conclusion

There is no denying that feelings run high on the Helms-Burton issue in many parts of the world. There is dismay that the United States is deploying its great power in a way that harms its friends more than its target. This fosters doubt about the capacity of the United States for constructive leadership at a time when the world requires it.

The bilateral relationship remains bound by unbreakable partnerships. It will require the discipline of mutual respect to overcome this tempest, but I remain confident that by choice and chance, our ties and friendships will only continue to deepen.