



## The Helms-Burton Law and U. S. Interests in the World Trade Organization

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**Testimony before the House Committee on International Relations**

**Subcommittee on International Economic Policy and Trade**

**March 19, 1997**

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Madam Chair, it is a pleasure to appear before this subcommittee and to present my views on the Helms-Burton Law as it relates to the World Trade Organization (WTO) and trade policy more broadly.

My overall assessment is that the Helms-Burton Law is having substantial adverse impact on U. S. interests in the WTO and on U. S. trade policy objectives more broadly. The law applies, for foreign policy reasons, economic sanctions on an extraterritorial basis to certain companies in other countries who trade with or invest in Cuba. Such actions conflict with the principles underlying the WTO multilateral trading system, possibly violate some specific U. S. commitments in the WTO, create a bad precedent for future actions by other countries, and undermine respect and support for U.S. leadership in international economic relationships. Let me elaborate each of these four concerns in turn and

then conclude with some suggestions for the U. S. policy course ahead given the current circumstances.

1. **Conflict with WTO principles.** The WTO is a rules-based trading system wherein member nations undertake mutual commitments to open their markets to each others' trade and, to a limited extent, investment. The system now includes a prompt and hopefully reliable dispute settlement mechanism which the United States urged on other nations for 25 years and finally achieved in the concluding phase of the Uruguay Round negotiations. The initial experience with the WTO dispute settlement mechanism indicates that the United States has much more to gain from others who do not live up to their commitments than to give in terms of adjustments on our part. These trade policy commitments cannot, however, be waived unilaterally for foreign policy reasons because many, if not most, trade policy actions have or could be claimed to have a foreign policy dimension. The United States is currently challenging in the WTO the European Union (EU) banana import policy which adversely affects U. S. commercial interests in Central America, and the EU could rightly claim that their banana import restrictions are motivated by foreign policy considerations. Likewise, China, once a WTO member, could apply a secondary boycott on countries trading with Taiwan for foreign policy reasons and the Arab countries could do likewise with respect to Israel. A wide range of regional trading arrangements, subject to WTO disciplines, are mostly based on foreign policy considerations.

There is a WTO provision for a security exception, of which more below, but for the United States to state categorically that the Helms-Burton Law is not applicable to WTO commitments because it is motivated principally by foreign policy objectives runs contrary to the underlying principles of the WTO trading system, and is rejected on this basis by all other member nations and the preponderant majority of U. S. experts and practitioners of trade policy. For the United States to threaten to boycott the WTO dispute settlement procedure on this basis constitutes a mockery of the rules- and commitments-based trading system the United States has promoted for half a century as in its interest.

2. **Possible U. S. violations of WTO commitments.** It is not yet clear whether the Helms-Burton Law, as applied by the President, is in violation of U. S. commitments in the WTO, as claimed by the EU in its presentation to the WTO dispute panel. To some extent, the legislation was drafted to avoid such violations, and the specific charges are complex in legal content. Initial reactions by WTO/GATT legal experts are that some of the EU claims are more likely to

prevail with the panel than are others. For purposes of considering next steps by the United States, however, I believe we should assume that at least some of the EU claims may be supported by the dispute panel.

This leaves the option open to the United States to claim the security exception as provided for in GATT Article XXI, which states that a member government can take any action "which it considers necessary for the protection of its essential security interests...taken in time of war or other emergency in international relations." If the United States claims this security exemption, the legal precedents are not clear as to whether the WTO dispute panel would have the authority to assess the U. S. claim for exception, although it is probable that the panel would in any event yield wide discretion to the U. S. Government for justifying its essential security interest.

3. **A bad precedent.** The new WTO dispute settlement procedure has not yet firmly established its credibility, and the outcome of initial panel proceedings, particularly involving the major trading nations, will determine how effective the procedure will be over time. Several important panel procedures are currently in process and their outcome over the coming year or two will be especially important for establishing the usefulness of the WTO dispute procedure. If the United States boycotts the proceedings and/or rejects an adverse panel finding for reasons that have no legal standing in the WTO and no political sympathy with any other members, the future ability of the WTO multilateral trading system to maintain open markets could suffer substantially.
4. **Loss of respect and support for U. S. leadership.** The United States has emerged from the Cold War as the sole global power, but U. S. leadership in the new circumstances, absent the overriding Soviet national security threat, is poorly perceived by friends and allies around the world. Many are coming to view U. S. foreign policy as erratic, increasingly unilateral, and driven largely by domestic political interests--not to mention foreign financial contributions. In this context, it is difficult to overstate the virtual unanimous scorn and disrespect which the Helms-Burton economic sanctions elicit abroad, with a corresponding decline in the ability of the United States to exercise a leadership role, particularly in the economic field. The Castro regime was a national security threat during the Cold War, with Soviet military facilities in Cuba and Cuban political subversion throughout the Caribbean region and elsewhere. Today, in contrast, there is no convincing justification that the crumbling Castro regime is a threat to the "essential security interest" of the United States and that the U. S.-Cuba relationship constitutes an "emergency in international relations," which U. S. officials would have to explain if a Helms-Burton exception under GATT Article

XXI were to be pursued. We may well succeed in claiming such an exception or we could boycott the entire WTO dispute process, but it would be at a cost to U. S. leadership capacity for future trade and other economic objectives.

These are the actual and potential adverse consequences of the Helms-Burton Law with respect to U.S. interests in the WTO. The next steps by the United States will be important for the outcome, and I would suggest the following:

1. The preferred resolution of the dispute would be on the basis of agreements reached outside the formal WTO dispute panel. This would presumably mean further commitments by the EU, and perhaps others, to work together more forcefully toward an early and peaceful democratic transition in Cuba. The United States, in turn, would also likely have to take some further actions, which might require adjustments in the Helms-Burton Law.
2. If such a bilateral agreement is not forthcoming, the United States should not boycott the WTO dispute panel procedure, but make its best legal case against the EU charges. The United States should not, however, claim the security exception since the current U. S.-Cuba foreign policy relationship does not substantiate the criteria for such an exception. Rather, the individual charges should be countered, each on its individual merits and demerits.
3. When and if the final report, including a possible appeals procedure, is completed, the United States would have an opportunity to reassess next steps. If the U. S. response to the EU charges prevails, the case would be closed. If the United States is found in violation of WTO commitments in some instances, possible remedial action to comply with the panel findings should be considered seriously by the President in close consultation with the Congress. In any event, such a point will not be reached for a considerable time, and in the interim progress toward achieving a democratic transition in Cuba should be reevaluated with a view toward policy adjustments where the current course is producing less than optimum results, not only for Cuba policy, but for overall U. S. foreign policy interests, including in the trade policy field.