The Choice of a Switch: The European Reaction to the Helms-Burton Act

Edwin Vermulst & Bart Driessen[*]

Keywords: dispute settlement; Helms-Burton Act; United States; World Trade Organization.

Abstract: The dispute between the United States and the European Community on American extraterritorially operating trade legislation is far from resolved. The European Community has adopted a two-pronged approach to the matter: on the one hand WTO dispute settlement proceedings were initiated which, however, were subsequently suspended. On the other hand, the Community adopted quite unique anti-extraterritoriality legislation. This contribution reviews developments relating to the Community's double response in the last year, and provides some comments on possible developments in the future.

> Redress (noun): Reparation without satisfaction. Among the Anglo-Saxons a subject conceiving himself wronged by the king was permitted, on proving his injury, to beat a brazen image of the royal offender with a switch that was afterward applied to his own naked back. The latter rite was performed by the public hangman, and it assured moderation in the plaintiff's choice of a switch.[1]

1. INTRODUCTION

Shortly after the downing of two small American planes by Cuba on 24 February 1996, the US Congress adopted the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, better known as the Helms-Burton Act.[2] Title III of this legislation, *inter alia,* provides for liability for damages of foreign investors trafficking in Cuba in property confiscated from US citizens. Moreover, Section 401 of the Helms-Burton Act foresees the "exclusion from the United States of aliens who have confiscated property of United States nationals or who traffic in such property".[3] The US government is obliged to refuse a visa to and exclude any person who, after entry into force of the Helms-Burton Act, trafficked in or owns confiscated prop-

+ Vermulst & Waer Advocaten, Brussels, Belgium.

1. A. Bierce, The Devil's Dictionary (1911).
2. US Public Law 104-114 of 12 March 1996, 110 Stat. 785 enacted HR 927, 104th Cong., 2n Sess. (1996), reproduced *in* 35 ILM 357 (1996).
3. *Id.*

11 Leiden Journal of International Law 81-90 (1998)

erty, a claim to which is owned by a United States national. The exclusion also covers the family and agent of such person. Last, the Helms-Burton Act considerably sharpened the American economic boycott against Cuba.

Although President Clinton suspended application of Title III under Section 306 thereof, the European Community was outraged over the extraterritorial character of the legislation.[4] Moreover, the mandatory refusal of visa under Section 401 cannot be suspended and the US authorities have applied this part of the legislation against EC and other citizens.

Indeed, the United States started in the middle of 1996 to send letters to executives of Canadian, Mexican, Italian, and other foreign companies, warning them that they had to divest within 45 days from property seized from Americans by the Cuban government or face visa denials.[5]

This legislation and similar legislation aimed at Iran and Libya commonly known as the D'Amato Act or ILSA[6] provoked a multiple response from the European Community. Firstly, the Community challenged the Act before a WTO panel. Secondly, the unprecedented step of anti-extraterritoriality legislation was taken through the adoption of Council Regulation (EC) No. 2271/96 of 22 November 1996 Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom (hereinafter: Regulation 2271/96).[7] This note discusses the practical consequences of the conflict and some of the legal issues involved.

2. WTO PROCEEDING

The European Community reacted harshly against the Helms-Burton legislation[8] for several reasons. The least prosaic is that the EC Member States, and especially Spain and Italy, have considerable interests in trade with Cuba. US operators face few problems, since trading with Cuba has been prohibited in the United States long since. Similarly, the United States was

4. On 2 December 1996 the Council adopted the Common Position Defined by the Council on the Basis of Art. J.2 of the Treaty on European Union on Cuba, OJEC 1996, L 322/1. This stressed the Community's willingness to co-operate with Cuba in order to bring changes there. This text had a certain provocative value *vis-à-vis* the US.
5. *US Threatens to Deny Visas to More Firms With Cuba Ties*, CNN, 13 July 1996.
6. Iran and Libya Sanctions Act of 1996, Code of Federal Regulations. For the details we refer to R. Lefeber, *Frontiers of International Law: Counteracting the Exercise of Extraterritorial Jurisdiction*, 10 LJIL 1 (1997); and K.J. Kuilwijk, *Castro's Cuba and the US Helms-Burton Act – An Interpretation of the GATT Security Exemption*, 31 Journal of World Trade 49-61 (1997).
7. OJEC 1996, L 309/1. The original Commission proposal can be found in OJEC 1996, C 296/10.
8. The Community effectively requested consultations on a package of American legislative measures. These are summed up in United States – The Cuban Liberty and Democratic Solidarity Act, WTO Doc. WT/DS38/1 (1996).

traditionally never really dependent on Iranian and Libyan oil. That situation is quite different in the European Community.

Next to Realpolitik, there is a genuine conviction in the European Community that a functioning and effective World Trade Organization (WTO) is in the best long-term interest of Europe. Maybe such multilateralism has been somewhat dampened by the defeat of the Community in some important recent panel proceedings (e.g. the non-adopted *Audio Tapes in Cassettes* panel report which was handed down under the GATT 1947,[9] and the recent WTO panel reports in the *Bananas*[10] and *Hormones*[11] cases). The European Commission appears, nevertheless, strongly convinced that the Community stands more to gain from the WTO than it can loose.

This attitude towards the WTO has always been more ambiguous in the United States. US Congress has been dominated for a long time by Republicans, many of whom are critical of anything threatening their legislative sovereignty. The institution in the US of the WTO Dispute Settlement Review Commission (better known as the Dole Commission) as a condition to the adoption of the WTO Agreement in 1994[12] provides ample illustration of Congress' wary attitude *vis-à-vis* the WTO.

Soon after the proposal for the Helms-Burton Act was adopted, the Commission started to consult with the United States.[13] Formal consultations were requested by the EC on 3 May 1996.[14] Three rounds of consultations were held, but these did not lead to a compromise.

On 16 October 1996 the representative of the European Commission at the WTO's Dispute Settlement Body made a statement with which the Community and its member states officially requested the establishment of a panel.[15] The representative objected, *inter alia*, to

9. General Agreement on Tariffs and Trade, 55 UNTS 194 (1948).
10. Panel Report European Communities – Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/R/USA (complaint by the USA), WT/DS27/R/ECU (complaint by Ecuador), WT/DS27/R/GTM and WT/DS27/R/HND (complaint by Guatemala and Honduras), and WT/DS27/R/MEX (complaint by Mexico), all adopted 22 May 1997; and Appellate Report, adopted 9 September 1997, WT/DS27/AB/R.
11. Panel Report European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R/USA (complaint by the United States), and WT/DS48/R/CAN (complaint by Canada), both adopted 18 August 1997.
12. Marrakesh Agreement Establishing the World Trade Organization, 33 ILM 13 (1994). *See* E. Vermulst & B. Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship With the Uruguay Round Agreements: Nice on paper but too Much Stress for the System?*, 2 Journal of World Trade 131, at 153 (1995).
13. *See* written question E-1071/95 by L. Gonzalez Alvarez, C. Carnero Gonzalez & W. Kreissl-Dorfler, MEPs to the Commission, OJEC 1995, C 209/41.
14. *See* note 8, *supra*.
15. The request for the establishment of a panel can be found in United States – The Cuban Liberty and Democratic Solidarity Act, WTO Doc. WT/DS38/2 (1996).

> the US trying to force other countries to follow their own foreign policy objectives through the threat and actual imposition of trade sanctions. The principle that countries should refrain from trying to force their own policies on other WTO Members through measures that are incompatible with WTO rules, is well-established in WTO jurisprudence, notably the second tuna/dolphin panel. The Community also objects to the US exerting jurisdiction over companies registered in the European Communities and controlled by US individuals or companies in such a way as to force such companies to follow US foreign policy objectives.[16]

In the view of the European Community, the US had acted inconsistently with GATT and GATS.[17] The Community enumerated a long list of objections in its request for a panel.[18] In the view of the Community, the legislation is inconsistent with Articles V, XI, XIII of GATT 1994, Articles II, III, VI, XI, XVI, and XVII of GATS, and Paragraphs 3 and 4 of the GATS Annex on the Movement of Natural Persons.[19] Moreover, the Community considered that the American actions, whether or not legal, nullified or impaired benefits accruing to the EC under GATT and to the EC and its member states under GATS (a so-called non-violation impairment complaint). Last, the Community considered that the Helms-Burton Act impedes "the attainment of an objective of GATT 1994". The objectives which are being impeded are notably the expansion of production and trade, the overall balance of rights and obligations between WTO Members (a so-called 'situation complaint').[20]

The Commission began actively building its WTO case by seeking information from economic operators experiencing difficulties. To this effect a notice was published in the Official Journal.[21] However, the Commission's initiative ran into difficulties because it required the input of individual EC companies who have been targeted by the legislation. The number of affected companies was reported as going into the dozens. The EC executive appears to have been confronted with a relatively lukewarm response from EC companies to co-operate.[22]

---

16. *Id.*
17. GATT 1994 is part of Annex 1A, the Multilateral Agreement on Trade in Goods of the WTO Agreement, 33 ILM 13 (1994). The General Agreement on Trade in Services is contained in Annex 1B.
18. *See* note 15, *supra*.
19. *Id.*
20. Such a situation complaint under Art. XXIII(1.c) of GATT has until now never been successful.
21. Appeal for Information Concerning the Effects on Community Enterprises of the Cuban Liberty and Democratic Solidarity Act 1996 of the United States of America (USA) and of Other Measures Taken by the USA Affecting Trade With Cuba, OJEC 1996, C 307/4.
22. *See* B. Coleman, *European Companies Are Questioned by EU Panel on Activities in Cuba*, Wall Street Journal (European edition), 27 February 1997, at 2.

This may have been due to those companies' perception that cooperation with the Commission's request for information might show compliance with the Helms-Burton Act which is prohibited under EC law (see *infra*).

3. ANTI-TERRITORIALITY ACTION

The legal structure of Regulation 2271/96[23] has been discussed before in this Journal and it is not necessary to repeat in detail what has been said there.[24] Its crucial provision, Article 5, provides that

> [n]o person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.
>
> Persons may be authorized, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community. The criteria for the application of this provision shall be established in accordance with the procedure set out in Article 8. When there is sufficient evidence that non-compliance would cause serious damage to a natural or legal person, the Commission shall expeditiously submit to the committee referred to in Article 8 a draft of the appropriate measures to be taken under the terms of the Regulation.[25]

Article 5 was complemented by the 'Joint Action' adopted on 22 November 1996 in which the Council of the European Union mandated each EC member state to

> [t]ake the measures it deems necessary to protect the interests of any person referred to in Article 11 of Regulation (EC) No 2271/96 and affected by the extra-territorial application of laws including regulations and other legislative instruments referred to in Annex to Regulation (EC) No 2271/96, and actions based thereon or resulting therefrom, insofar as these interests are not protected under that Regulation.[26]

It seems to be the Commission's view that in principle the Member States are the prime authorities responsible for the implementation of the Regulation and the Joint Action, although it is *prima facie* difficult to see how this

23. *See* note 7, *supra*.
24. *See* Lefeber, *supra* note 6.
25. *See* note 7, *supra*.
26. Joint Action of 22 November 1996 Adopted by the Council on the Basis of Articles J.3 and K.3 of the Treaty on European Union Concerning Measures Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, OJEC 1996, L 309/7.

https://doi.org/10.1017/S0922156598000065 Published online by Cambridge University Press

combines in practice with the exemption procedure in Article 5, where the prime responsibility lies with the Commission.

The Commission followed the Regulation up by publishing a notice requesting relevant information on the names of US citizens and companies filing Title III actions.[27] Although Title III has remained suspended, the Commission still has the machinery in place and collects information on potential problem cases.

Although this legal armoury is impressive enough, the European Commission and the member states have been prudent in using it against EC companies respecting the Helms-Burton Act. Little implementing legislation has been adopted by the member states. There are good reasons for this attitude: probably the EC authorities recognise that the companies concerned are caught between an American hammer and a European anvil and have limited freedom of movement. Moreover, in practice it would seem difficult to obtain evidence that a company divested itself from Cuban property as a direct consequence of the American legislation or for some other reason. Thirdly, some of the most important provisions of the Helms-Burton Act, namely its provisions for establishing liability for damages under Title III, have until now continuously been suspended. Instead of prosecuting companies, the Commission has put more emphasis on supporting operators which have defied the Helms-Burton and D'Amato Acts, as was shown e.g. during the recent announcement by Total of a major oil contract with Iran.[28]

4. THE APRIL 1997 UNDERSTANDING BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

In April 1997, after protracted negotiations, the United States and the European Community finally reached an understanding on the Helms-Burton Act (the Understanding).[29] Firstly, both parties seemed to implicitly agree that the matter ought to be resolved in the context of the Multilateral Agreement on Investment (MAI) that is currently being negotiated under OECD auspices. The US and the Community agreed that

> [t]he standard of protection governing expropriation and nationalization embodied in international law and envisioned in the MAI should be respected by all

27. Notice Concerning the Publication of a List of Citizens and Companies of the United States of America (USA), Filing Actions Under Title III of the Cuban Liberty and Democratic Solidarity Act (Libertad), OJEC 1996, C 276/7.
28. *US Sanctions Threat Over Total's $2bn Iran Gas Deal*, Financial Times, 30 September 1997, at 1.
29. 1997 Memorandum of Understanding Concerning the United States Helms-Burton Act and the United States Iran and Libya Sanctions Act, reproduced *in* 36 ILM 529 (1997).

> States, these disciplines should inhibit and deter the future acquisition of investments from any State which has expropriated or nationalized such investments in contravention of international law, and subsequent dealings in covered investments.[30]

The US promised continued suspension of Title III during the remainder of President Clinton's term "so long as the EU and other allies continue their stepped up efforts to promote democracy in Cuba".[31] The US Administration committed itself to consulting Congress on obtaining a waiver for Section 401 of the Helms-Burton Act (the visa clause) from the moment an agreement has been reached.

The two trade powers further agreed to attempt to solve the issue of 'conflicting jurisdictions' by continuing negotiations. These should have been concluded by October 1997; however, by that time no satisfactory solution had yet been reached[32] and at the time of writing they are still ongoing.

In the meantime, the American side agreed to exercise "rigorous standards to all evidence submitted to the Department of State" in determining whether business executives should be denied entry to the US. In practice this means that Section 401 is not actively enforced by the US Administration, so as not to jeopardize the negotiations with the European Community.

On the issue of Iran and Libya, the two sides agreed to work towards some resolution of differences over the D'Amato Act. The text of the Understanding in this respect is, to say the least, vague:

> [t]aking into account the measures taken by the EU, in particular those recently announced with respect to Iran,[33] the U.S. will continue to work with the EU toward the objectives of meeting the terms 1) for granting EU Member States with a waiver under Section 4.C. of the Act with regard to Iran, and 2) for granting companies from the EU waivers under Section 9.C. of the Act with regard to Libya.[34]

No wonder that disagreement on the precise meaning was fast to arise: according to the EC ambassador to Washington, Mr Hugo Paemen, the agreement "aims at working together [...] in such a way that the president would

30. *Id.*, at 529.
31. The EC interpreted this as a firm commitment that President Clinton would renew the waiver every six months. *EU States Juggle Response to Cuba Deal*, Reuters news report, 15 April 1997.
32. *See* the Conclusions adopted by COREPER, reproduced *in* Agence Europe, 18 October 1997, at 14.
33. The European Community withdrew its ambassadors from Teheran after a German court found Iranian officials implicated in a bombing in Berlin.
34. Memorandum of Understanding, *supra* note 29, at 530.

be able to apply a multilateral waiver to the European Union".[35] The EC Council Conclusions adopted on 18 April 1997 explicitly stated that

> [i]f action is taken against EU companies or individuals under the Libertad Act or under the Iran and Libya Sanctions Act (ILSA), or waivers as described in the Understanding are not granted, or are withdrawn, the Commission will request the WTO to restart, or to re-establish, the panel, which will then follow its natural course.[36]

Moreover, the French Government attached a declaration to the Council decision adopting the Understanding to the effect that

> [l]es autorités françaises ont pris connaissance des résultats des conversations entre la Commission et les Etats Unis sur les lois extraterritoriales américaines.
>
> Elles constatent que tant que la menace des sanctions unilatérales n'aura pas été complètement éliminée, les effets dissuasifs de ces législations continueront de jouer et pénaliseront les entreprises européennes.
>
> Elles appellent la Commission à faire preuve de la plus grande vigilance dans les mois à venir pour assurer la défense des intérêts européens et veiller à ce que les Etats-Unis prennent des engagements de nature à garantir un résultat équilibré.[37]

This interpretation that a waiver will almost automatically be granted is, however, contested by the American side.[38]

Last, and most important, the Community agreed to suspend the WTO panel proceeding. However,

> [t]he EU reserves all rights to resume the panel procedure, or begin new proceedings, if action is taken against EU companies or individuals under Title III or Title IV of the Libertad Act or if the waivers under ILSA referred to above are not granted or are withdrawn.[39]

5. FUTURE DEVELOPMENTS?

The April 1997 Understanding did something to temporarily take the fuse out of the matter. That by no means implies that Helms-Burton or D'Amato are off the agenda. The indictment in April 1997 of a Spanish citizen for trading between the United States and Cuba, although not strictly a consequence of the Helms-Burton Act, conveys a flavour of the seriousness

35. P. Blustein & Th.W. Lippman, *Trade Clash on Cuba is Averted – US-Europe Pact Seeks to Ease Helms-Burton*, Washington Post, 12 April 1997, at A1.
36. Council Conclusions Adopted in Brussels on 18 April 1997 by written procedure.
37. *Id.*
38. *See* Blustein & Lippman, *supra* note 35.
39. Memorandum of Understanding, *supra* note 29, at 530.

https://doi.org/10.1017/S0922156598000065 Published online by Cambridge University Press

with which the American authorities look at commerce with Cuba.[40] Similarly, the transatlantic tension pursuant to the Total deal with Iran in October 1997 is a sign that the matter is very much alive and sensitive. An active lobby in Congress works to the tightening of the D'Amato package.[41] The European Commission continues to scrutinize the matter closely.

Consequently, the WTO panel proceeding is still very much a possibility. The European Community merely suspended it. Moreover, the United States indicated in the Understanding that the suspension of Title III not only depends on the behaviour of the EC, but also on that of 'other allies'. That may prove to be the joker in the pack: Mexico, Canada, Israel, and other countries are obviously not bound by any bilateral agreement between the European Community and the United States.[42] Indeed, in September 1997 the Israeli BM Group announced the development of a trade centre in Cuba worth 200 million US dollars notwithstanding a warning from the US government that the group was involved in property seized from Americans.[43] It would seem that the US would have great difficulties both under American law and WTO law to grant a waiver of Title III to only the Community, but not to third countries. Already for this reason the American efforts to multi-lateralise the negotiations and to contact Canada and Mexico are understandable.[44]

The Understanding failed to resolve the underlying legal issue: is the United States entitled to adopt extraterritorial legislation if it considers this to be its vital security interest? The EC still strongly thinks that such legislation is unacceptable.[45] This note is not the place to discuss this matter in detail; let it suffice that previous GATT panel practice suggests the US may have a difficult legal position.

There is, of course, a more geo-political concern to this dispute. The United States had already indicated that it considers the Helms-Burton Act a matter of national security and that it was not prepared to cooperate with a WTO panel in this matter. While it would theoretically be possible for a WTO panel to proceed without the cooperation of the United States, this scenario would be a test for the young trade organization nobody really looks forward to. Moreover, a WTO panel report finding against the US

40. *Spaniard Indicted for Shipping US Goods to Cuba*, Reuters news report, 10 April 1997.
41. *US Renews Threat Against Investors in Iran*, Financial Times, 31 October 1997.
42. Other countries, such as for instance Canada, have signalled they also want to reach an understanding with the US government (see e.g. G. Gedda, *EU, US Reach Deal on Cuba Trade*, Associated Press news report of 12 April 1997).
43. P. Fletcher, *Israelis Press Ahead With Cuba Venture*, Financial Times, 22 September 1997.
44. American Undersecretary Stuart Eizenstat stated in April 1997 that the US strives for a global agreement to enhance protection of property rights in Cuba and other countries. H. Dunphy, *US Wants to Settle EU-Cuba Dispute*, Associated Press news report, 17 April 1997.
45. J. Gaunt, *EU, With Warning, Backs Helms-Burton Peace Plan*, Reuter news report, 17 April 1997.

would have led to serious questioning in Congress of the United States' membership of the WTO.

The US Congress has played a pivotal part in the success of many important international organizations, but also in the wrecking of others. After World War I the League of Nations became a lame duck partially because Congress refused to let the United States participate. The non-ratification by Congress of the treaty establishing the International Trade Organization meant that this organization never became operational. After 40 years of GATT practice, the WTO has finally taken to executing the work the ITO was intended to do. Whether the WTO can effectively do this, will to a large extent depend on Congress' ability to properly weigh the importance of an orderly multilateral trading system against a bilateral dispute with a small island state.

https://doi.org/10.1017/S0922156598000065 Published online by Cambridge University Press