REVUE BELGE DE DROIT INTERNATIONAL
1998/1 — Éditions BRUYLANT, Bruxelles

THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996. SOME ASPECTS FROM THE PERSPECTIVE OF INTERNATIONAL ECONOMIC LAW

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SUMMARY

(*) The authors would like to express their gratitude to Prof. Dr. Y. Devuyst, Prof. Dr. E. Franckx, Prof. Dr. T. Joris, Drs. M. Najjar, Dr. A. Pauwels, Dr. A. Rosas, Mr. E. White and Prof. G. Wilner for their help and continuing encouragement. Comments are welcome via email : Stefaan.Smis@vub.ac.be or Kim.Van.der.Borght@vub.ac.be.

I. — Introduction

On 12 March 1996, the U.S. President William Jefferson Clinton signed the Cuban Liberty and Democratic Solidarity (Libertad) Act. This act is better known as the Helms-Burton Act (1), referring to the name of its two principal sponsors : the republican Senator of North Carolina Jesse Helms and the republican Congressman of Indiana Dan Burton. A week earlier, on 5 March 1996, the bill was approved by the Senate with a majority of 74 to 22 with 4 abstentions. One day later, the House of Representatives gave its approval by a vote of 336 to 86 with 11 abstentions. Being the outcome of an almost four decades long isolationist policy of the U.S. towards Cuba, it is to the date, the most far reaching and controversial exercise of the American legislative competence, in the words of the Act itself, to

(1) Pub. L. No. 104-114 (12 March 1996) reprinted in 35 *I.L.M.* 357 (1996) [hereinafter the Act, the Helms-Burton Act or Helms-Burton].

« strengthen international sanctions against the Castro government. » To this end, it uses the U.S.' position as the world most important economic market to force foreign companies not to invest or trade with Cuba for fear of losing their trade relations with the U.S.

World-wide, the Act has been criticised for its extraterritoriality. The purpose of this comment, however, is not to discuss the position of the world community towards the Act but rather to examine it from the angle of economic international law. In doing this, we will, in a first phase, recall the background of the Cuban-American relations which led to the enactment of the Helms-Burton Act, to be followed, in a second phase, by an explanation of the contents of the Act. Thereafter, we will focus on certain legal doctrines and international legal principles susceptible to being affected by the Act. We will successively discuss the national security exception, the extraterritorial jurisdiction, the act of State doctrine, economic coercion and sovereign equality and non-intervention in the external and internal relations of other States.

II. — The Political Background Leading to the Enactment of the Helms-Burton Act

Ever since the Spanish-American War of 1898 which brought to an end the almost four centuries old Spanish colonial rule over Cuba by a military intervention of the U.S., the relationship between Havana and Washington might qualify as a turbulent one. The Spaniards ousted from their hemisphere, the U.S. protected their own growing economic interest on the Island by reserving the right to intervene in economic as well as in political matters. Earl Smidt, a former American Ambassador to Cuba even declared that prior to Castro's military overthrow, the U.S. possessed such influence in Cuba that the American Ambassador was the second most important person in Cuba even sometimes more important than the Cuban President himself (2). With the revolution of 1959 (3), the Island which had grown for the Americans as a tourist's heaven and a foreign investor's paradise due to its limited government regulations and taxes on businesses (4), quickly resolved into claiming sovereignty over its natural resources. Consequently, its policy shifted towards one of regaining control over its mostly foreign

(2) See Eduardo Galeano, *Las venas abiertas de America Latina* 112 (1990).

(3) See generally Robert E. Quirk, *Fidel Castro : the full story of his rise to power, his regime, his allies, and his adversaries* (1993).

(4) See Richard Falk, « Introduction », *in United States Economic measures against Cuba : Proceedings in the United Nations and International Law issues* 5 (Michael Krinsky & David Golove eds., 1993).

owned economy (5). This policy shift primarily hit the trade relations with the U.S (6). Almost forty years later, tensions between the two countries are still influenced by this revolution which not only brought the American sponsored Batista regime to resign and flee the country but also transformed the attractive investment atmosphere into an increasingly hostile one.

2.1. — *The Nationalisation of Properties following the Cuban Revolution of 1959*

As mentioned above, from the outset of the Revolution, the Cuban government initiated economic reforms to restructure its economy in line with the philosophy known in the decade of decolonisation as sovereignty over its natural resources. To this end, the newly formed government began implementing a policy of expropriating key industries and foreign-owned properties (7). Based on the newly enacted Fundamental Law of the Republic (8), the government initiated its process of expropriation by the enactment of the first Agrarian Reform Law of 17 May 1959 which organised the redistribution of land ownership providing compensation for the expropriated land owners (9). Although compensation was provided, the U.S. reacted to its form (10). The same year, the Cuban government enacted the Mineral Law, requiring the re-registration of mining claims and imposing a 25 percent tax on exports (11), followed by the Petroleum Law,

(5) See e.g. the Platt Amendment imposed on Cuba at the beginning of the 20th century. It stated that « in transferring the control of Cuba to the government established under the new constitution, the United States reserves and retains a right of intervention for the preservation of Cuban independence and the maintenance of a stable government. » Moreover, it gave the U.S. the power to establish a naval base in Cuba and to submit for approval any treaty and engagement between Cuba and any foreign power affecting Cuba's independence. Based on this amendment, the U.S. intervened military on three occasions before the Platt Amendment was formally abrogated in 1934. In practice, however, the U.S. kept its influence on Cuban politics.

(6) Before the economic embargo instituted against Cuba, the U.S. was the most important trading partner of Cuba importing sixty-seven percent of Cuba's export and supplying seventy percent of Cuba's import. See Rupinder HANS, « The United States' Economic Embargo of Cuba : International Implications of the Cuban Liberty and Democratic Solidarity Act of 1995 », 5 *J. Int'l L. Prac.* 329 (1996).

(7) Dean BUCCI, « The Cuban Liberty and Democratic Solidarity Act of 1996-Implications for NAFTA », 26 *Ga. J. Int'l Comp. L.* 412 (1997).

(8) *Ley Fundamental de la Republica*, 5-123 of 7 February 1959, *Gazeta Oficial* (7 February 1959). See Michael W. GORDON, *The Cuban Nationalizations : The Demise of Foreign Private Property* 71 (1976) ; Susan J. LONG, « A Challenge to the Legality of Title III of Libertad and an International Response », 7 *Ind. Int'l & Comp. L. Rev.* 470 (1997) ; Anthony M. SOLIS, « The Long Arm of U.S. Law : The Helms-Burton Act », 19 *Loy. L.A. Int'l & Comp. L.J.* 712 (1997).

(9) *Ley de Reforma Agraria of 17 May 1959*, Decreto No. 1426, *Gazeta Oficial* (17 May 1959).

(10) In a diplomatic note of 12 June 1959 addressed to the Government of Cuba, the U.S. recognised that according to international law, a State may expropriate property for public interest in absence of contractual or other agreement to the contrary. Yet, according to the U.S., to this right a corresponding obligation is attached to pay prompt, adequate and effective compensation. See Olga Miranda BRAVO, *Cuba/USA. Nacionalizaciones y bloqueo* 30 (1996).

(11) *Ley 617 of 27 October 1959, Gazeta Oficial* (30 October 1959).

levying a 60 percent royalty on all oil production (12). Relations between the U.S. and Cuba further worsened when the U.S. demonstrated a willingness to reduce Cuba's sugar quota (13) and Cuba's growing interest in developing greater economic and political ties with the Soviet Union. After Cuba had signed oil agreements with the Soviet Union (14), American and British owned oil refineries refused to process that imported crude oil. The Cuban government first threatened and later effectively nationalised the refineries. Moreover, additional legislation was enacted in order to expropriate the remaining foreign owned property (15). In reaction to the above mentioned Cuban threat to nationalise American property, the U.S. Congress amended the Sugar Act of 1948 by authorising the U.S. President to establish the Cuban sugar quota (16). The Act was for the first time implemented by President Eisenhower. He decided to significantly reduce the Cuban sugar quota (17) and later to suspend the Cuban sugar quota altogether (18). Loosing the exports to the U.S. of cane sugar, Cuba's most important hard currency earner, moved Castro and his followers to seek support from the U.S.' rivals and to nationalise properties owned by nationals of the U.S (19). The socialist bloc, in turn, responded by purchas-

(12) *Ley 635 of 20 November 1959, Gazeta Oficial* (23 November 1959).

(13) HANS, *supra*, note 6, at 327 ; Richard D. POROTSKY, « Economic Coercion and the General Assembly : A Post Cold War Assessment of the Legality and Utility of the Thirty-Five Year Old Embargo Against Cuba », 28 *Vand. J. Transnat'l L.* 901, 933 (1995) and Jane FRANKLIN, *The Cuban Revolution and the United States : A Chronological History* 26-30 (1992).

(14) Cuba signed the oil agreement with the Soviet Union on the occasion of the Soviet Deputy Prime Minister Mikoyan's visit to Cuba in February 1960.

(15) See *Leyes No. 890 and 891 of 13 October 1960, Gazeta Oficial* (13 October 1960).

(16) 7 *U.S.C.* § 1158 (1960), 74 Stat. 330 (1961).

(17) Proclamation No. 3355, 3 *C.F.R.* 80 (1959-1963), reprinted in « President Reduces Cuban Sugar Quota for Balance of 1960 », 43 *Department of State Bulletin* 140 (1960).

(18) Proclamation No. 3383, 3 *C.F.R.* 100 (1959-1963), reprinted in « President Sets Cuban Sugar Quota at Zero for First Quarter of 1961 », 44 *Department of State Bulletin* 18 (1961).

(19) *Resolucion No. 1 del Poder Ejecutivo de la Republica de Cuba of 6 August 1960, Gazeta Oficial* (6 August 1960) implementing *Ley No. 851 of 7 July 1960, Gazeta Oficial* (7 July 1960) which empowered the President and the Prime Minister by way of resolutions to nationalise property in Cuba belonging to U.S. nationals. See also « U.S. Protests Seizure of American Oil Refineries », 43 *Department of State Bulletin* 141 (1960). Executive Power Resolution No. 1 in part proclaimed the following :

WHEREAS, the Chief Executive of the Government of the United States of North America, making use of said exceptional powers, and assuming an obvious attitude of economic and political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process.

WHEREAS, this action constitutes a reiteration of the continued conduct of the government of the United States of North America, intended to prevent the exercise of its sovereignty and its integral development by our people thereby serving the base interests of the North American trusts, which have hindered the growth of our economy and the consolidation of our political freedom.

WHEREAS, in the face of such developments the undersigned, being fully conscious of their great historical responsibility and in legitimate defense of the national economy are duty bound to adopt the measures deemed necessary to counteract the harm done by the aggression inflicted upon our nation. [...]

WHEREAS, it is the duty of the peoples of Latin America to strive for the recovery of their native wealth by wrestling it from the hands of the foreign monopolies and interests which pre-

ing the refused sugar. The trade war, reached its climax when the U.S. broke up the diplomatic relations with Cuba on 3 January 1961, supported the failed Bay of Pigs invasion in April, and lobbied within the OAS (« Organisation of American States ») to expel Cuba from the organisation (20). Later that year, Congress passed the Foreign Assistance Act which authorised the President to impose an economic embargo against Cuba (21). In February 1962, President Kennedy proclaimed the embargo on all trade with Cuba basing his action on this Foreign Assistance Act (22). Cuba's economy nearly collapsed. By 1962, however, Cuba had by-passed the threat of economic collapse ; 80 percent of Cuba's trade was

vent their development, promote political interference, and impair the sovereignty of the underdeveloped countries of America.

WHEREAS, the Cuban Revolution will not stop until it shall have totally and definitely liberated its fatherland.

WHEREAS, Cuba must be a luminous and stimulating example for the sister nations of America and all the underdeveloped countries of the world to follow in their struggle to free themselves from the brutal claws of Imperialism.

NOW, THEREFORE : In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby,

RESOLVE :

FIRST. To order the nationalisation, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest, [...]

(20) Cuba was finally prevented from participating in the Organisation of American States in January 1962 when the foreign ministers of the OAS gathered at Punta del Este (Uruguay) decided to exclude Cuba « from participating in the Inter-American system » because of the Castro's regime's adherence to communism. Thereafter all Latin American countries except Mexico broke their diplomatic relations with Cuba.

(21) Foreign Relations and Intercourse Act of 1961, 22 *U.S.C.* § 2151 & 2370 (1994). Section 2151 holds that : « [t]he individual liberties, economic property, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms and which work together to use wisely the world's limited resources in an equitable international economic system. »

With this aim in mind, section 2370 states that : « (1) No assistance shall be furnished under this chapter to the present government of Cuba [...]. The President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba. (2) Except as may be deemed necessary by the President in the interest of the United States, no assistance shall be furnished under this chapter to any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation of Cuban sugar into the United States or to receive any other benefit under any other law of the United States [...]. »

(22) Proclamation No. 3447, 27 Fed. Reg. 1,085 (1962), reprinted in 22 *U.S.C.* § 2370 (1994). In President Kennedy's proclamation we are able to read the following :

WHEREAS the United States, in accordance with its international obligations, is prepared to take all necessary actions to promote national and hemispheric security by isolating the present Government of Cuba and thereby reducing the threat posed by its alignment with communist powers :

NOW, THEREFORE, I, John F. Kennedy, President of the United States of America, acting under the authority of section 620(a) of the Foreign Assistance Act of 1961 (75 Stat. 445), as amended [subsection (a) of this section,] do

1. Hereby proclaim an embargo upon trade between the United States and Cuba in accordance with paragraphs 2 and 3 of this proclamation.

then being conducted with the socialist countries (23). The U.S.-Cuban relations, however, did not improve. On the contrary, issues such as Cuba's intervention in Africa to support the Angolan government against the UNITA-rebellion during the 1970s and 1980s or the refugee crisis in the 1990s, deteriorated the relations with the U.S. even further.

2.2. — *The End of the Cold War*

With the end of the Cold War and the subsequent collapse of the Soviet Union, Cuba not only lost its principal trading partners but also its principal foreign financial contributor (24). But even before being confronted with this problem, the Cuban government, initiated political and economic reforms to attract foreign investments in order to adapt itself to new realities and make the Castro Revolution survive the eminent collapse of the Eastern Bloc. In 1982, the Cuban government enacted the Cuban Joint Venture Law allowing foreign investors an up to 49 percent stake in business ventures and a tax free profit repatriation (25). The darkest period, however, was the so-called « special period in time of peace » at the begining of the 1990s when food, fuel and electricity had to be rationalised (26). The Cuban government reacted with « dolarising » the economy, allowing Cubans to engage in self-employment (*cuenta propria*), accepting to break up State owned lands and transforming them into agricultural cooperatives (*Unidades Basicas de Produccion Agricula*), reforming the banking sector by allowing some foreign banks to open representative offices

2. Hereby prohibit [...] the importation into the United States of all goods of Cuban origin and all goods imported from or through Cuba ; and I hereby authorize and direct the Secretary of the Treasury to carry out such prohibition, to make such exceptions thereto, by license or otherwise, as he determines to be consistent with the effective operation of the embargo hereby proclaimed, and to promulgate such rules and regulations as may be necessary to perform such functions.

3. AND FURTHER, I hereby direct the Secretary of Commerce, under the provisions of the Export Control Act of 1949, as amended (50 *U.S.C.* App. §§ 2021-2032) [...], to continue to carry out the prohibition of all exports from the United States to Cuba, and I hereby authorize him, under that Act, to continue, make, modify or revoke exceptions from such prohibition.

(23) POROTSKY, *supra* note 13, at 910 citing Donald L. LOSMAN, *International Economic Sanctions : The Cases of Cuba, Israël, and Rhodesia* 25 (1979).

(24) Antoni KAPCIA, « Cuba After The Crisis : Revolutionising the Revolution », in *Research Institute for the Study of Conflict and Terrorism* (April 1996) writes the following on this subject : « That [the disintegration of the Eastern Bloc], together with the tightening of the United States' embargo in 1992, forced the Cuban economy into a nightmarish decline : by 1991, trade with the former CMEA [Comecon] countries had fallen by 90 per cent and imports by 60 per cent, oil deliveries from the Soviet Union fell from 13 million tonnes (mt) annually to 2mt in 1992, and sugar, the emblematic mainstay of the traditional economy, began a decline that weakened Cuba's capacity to import, finance or feed. Growth (4.2 per cent between 1959 and 1989, reaching 8 per cent in 1984), ended and the economy plummeted by 38 per cent between 1989 and 1994, resulting in a demoralising return to basic rationing, shortages, lay-offs, a debilitating lack of public transport and seemingly a return to the hardships of the 'siege' of the 1960s. »

(25) *Declaracion Legislativo No. 50 de Asociacion Economica Entre Partidos Cubano y Extranjero, Gazeta Oficial* 15 February 1982, reprinted in English version in 21 *I.L.M.* 1106 (1982).

(26) HANS, *supra* note 6, at 333 ; KAPCIA, *supra* note 24, at 6.

and transforming the *Banco Nacional de Cuba* into a modern central bank, leaving the commercial and investment activities to other banks. Finally, income taxes were introduced and the government enacted a new investment law (27). In 1992, the 1979 Constitution was amended to allow private and corporate ownership and to eliminate the State monopoly over foreign trade (28).

Despite these radical changes in terms of economic policy, and considering the view that Cuba no longer remains a threat to the national security of the U.S., the latter opted for a strict isolationist policy toward Cuba by keeping the embargo, even further strengthening it with the Cuban Democracy Act of 23 October 1992 (« CDA »). The U.S. hoped that the radical changes in the Soviet Union and Eastern Europe would open an « unprecedented opportunity » for the U.S. « to promote a peaceful transition to democracy in Cuba » (29). The Act has widely been criticised for its extraterritorial jurisdiction since it imposes severe penalties on U.S. subsidiaries which are located in foreign countries and trade with Cuba as well as prohibits any merchant ships trading with Cuba from docking in U.S. ports for a period of six months following the raising of anchor in Cuba (30).

This Act signed by President Bush, presumably to secure the Cuban-American votes in the coming presidential elections, would probably have remained the most controversial legislation concerning Cuba if it were not for the two aircraft's purportedly entering Cuba's airspace. The aircraft's belonged to the Cuban-American organisation of Brothers to the Rescue (*Hermanos al Rescate*) and were shot down by the Cuban Air Force on 24 February 1996. In fact, before this incident President Clinton had made it clear that he would veto the Helms-Burton bill if it were to be approved

(27) *Ley No. 77 of 6 September 1995, Gazeta Oficial*, 6 September 1995 ; See generally Ron FIRST, « Cuba's Changing Foreign Investment Climate : Castro's Attempt to Lure Foreign Investors », 9 *Transnat'l Law*, 295-330 (1996). See also KAPCIA, *supra*, note 24, at 7-10.

(28) See respectively new Articles 14 and 15 and Articles 18 and 23 Constitution.

(29) « Cuban Democracy Act of 1992 », *Pub. L.* No. 102-484, 106 Stat. 2575 reprinted in 22 *U.S.C.* §§ 6001-6010 (Supp. V 1988).

(30) See generally « The Committee on Inter-American Affairs », *The Legality of the Extraterritorial Reach of the Cuban Democracy Act of 1992* ; Laura A. DONNER, « The Cuban Democracy Act of 1992 : Using Foreign Subsidiaries as Tools of Foreign Economic Policy », 7 *Emory Int'l L. Rev.* 259-267 (1993) ; Arnold M. ZIPPER, « Toward the Termination of Licensed U.S. Foreign Subsidiary Trade with Cuba : The Legal and Political Obstacles », *Law & Pol'y Int'l Bus.* 1045-1062 (1992) ; Kam S. WONG, « The Cuban Democracy Act of 1992 : The Extraterritorial Scope of Section 1706(a) », 14 *U. Pa. J. Int'l Bus. L.* 651-681 (1994) ; Michael A. NOVO, « Cuba si, Castro no ! The Cuban Democracy Act of 1992 and its Impact on the United States' Foreign Policy Initiatives Towards Establishing a Free and Democratic Cuba », 3 *J. Transnat'l L. & Pol'y* 265-282 (1994) ; Harold G. MAIER, « Extraterritorial Jurisdiction and the Cuban Democracy Act », 8 *Fla. J. Int'l L.* 391-400 (1993) ; Gabriel M. WILNER, « International Reaction to the Cuban Democracy Act », 8 *Fla. J. Int'l L.* 401-410 (1993).

by Congress (31). Within a week following the incident, however, the President made a *volte face* and announced that he would sign the bill (32). President Clinton then signed the bill on 12 March 1996 after compromising with Congress that he would be authorised to suspend Title III of the Act for periods of six months, on the condition to report to Congress that the suspension « [i] is necessary to the national interests of the United States and [ii] will expedite a transition to democracy in Cuba » (33). President Clinton has systematically used its authority to suspend Title III of the Helms-Burton Act. Meanwhile the relevance of the 36 years old embargo against Cuba is more and more questioned, even in the U.S. Pressured by « Americans for Humanitarian Trade with Cuba, » a bill has been submitted in Congress to ease the embargo following the publication of a report of the American Association for World Health in March 1997 holding that the embargo has considerably damaged the physical well-being of many children, women and elderly people (34).

III. — The content of the Helms-Burton Act

The Helms-Burton Act has a triple purpose : to strengthen international sanctions against the Castro regime in order to force it to transform into a democratic State and to return and protect against trafficking, property which has belonged to U.S. nationals prior to the nationalisation in the beginning of the 1960s. To this end, the Act has been subdivided in four titles of which only the last two contain real innovations, the two first being a kind of restatement of the present policy against the Cuban government.

3.1. — *Title I : Strengthening International Sanctions against the Castro Government*

In 16 sections (35), Title I of the Helms-Burton Act restates and amends existing legislation aimed at transforming the Castro regime as well as urges the U.S. government to take certain measures to reinforce the economic embargo against Cuba. As such, it instructs the President, among other things to advocate for the adoption of a UN Security Council Resolu-

(31) See Brice M. Clagett, « Agora : The Cuban Liberty and Democratic Solidarity (Libertad) Act. Congress and Cuba : The Helms-Burton Act », 90 *Am. J. Int'l L.* 419 (1996), referring to the letter of 20 September 1995 from Secretary of State Christopher addressed to the Speaker Newt Gingrich stating that he was « deeply concerned » about the Act, and that he would recommend that the President veto the bill if passed by Congress.

(32) *Id.*

(33) Section 306 (b) (1) of the Helms-Burton Act.

(34) *Id.*

(35) Section 101 to 116 of the Helms-Burton Act.

tion pursuant to Chapter VII of the UN Charter in order to impose a mandatory international embargo against the Cuban Government (36). To justify this, the Act refers to what it calls « massive, systematic, and extraordinary violations of human rights » leading to mass migration and considered as a threat to international peace and security. Moreover, the President should respond to the construction of the Juragua Nuclear Plant threatening the national security as well as new mass migrations as acts of aggression. In addition, to enforce the economic embargo against Cuba, the Act amends and reaffirms existing legislation (37) including the Cuban Democracy Act of 1992 which, among other things, gave the President the power to impose sanctions against any country trading with or assisting Cuba (38). Moreover, the U.S. will oppose Cuba's membership in international financial institutions such as the International Monetary Fund, the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guaranty Agency, and the International Development Bank (39). If such institutions would approve a loan or other assistance to the Cuban Government without the agreement of the U.S., the latter will withhold from its financial contribution to such institution an amount equal to the amount of the loan or the assistance given to the Cuban government. Similarly, the U.S. will oppose the lifting of the suspension of the Cuban Government from participating in the OAS (40). The Act contains several measures to constrain individuals and States, including the States of the former Soviet Union (41), to trade with Cuba (42). On the other hand, measures which could contribute to changing the system from within are supported (43).

3.2. — *Title II : Assistance to a Free and Independent Cuba*

Title II defines both the conditions to be met prior to the lifting of the economic embargo as well as the political and economic system to be adopted by the Cuban Government to qualify as a so-called « democratically elected government. » As such, it gives a detailed description of the political

(36) Section 101.

(37) It includes besides the Cuban Democracy Act of 1992 also the Trading with the Enemy Act, the Foreign Assistance Act and the Cuban Assets Control Regulations.

(38) Section 102.

(39) Section 104.

(40) Section 105.

(41) The Soviet Union was Cuba's most important trading partner before the collapse of the Eastern Block.

(42) Sections 103, 106, 108, 110 and 111.

(43) See e.g. Section 107 on television broadcasting to Cuba, Section 114 on the establishment of news bureaus in Cuba or Section 109 authorising the support for individuals and independent non-governmental organisations to support democracy building efforts for Cuba.

system the U.S. wishes to impose on Cuba since several measures relating to the economic embargo contained in Title I as well as the initiation of negotiations leading to the return of the Guantanamo Naval Base to Cuba, are subject to the transformation of the Cuban government into a democratically elected government. The delineated scenario to attain this goal passes through a transition government which would organise free and fair elections supervised by internationally recognised observers. In this process, the Cuban government must prove to have attained certain objectives transforming the present Cuban State and society into a mirror of the U.S. society (44). To this end, the Cuban government must not only legalise all political activity and release all political prisoners but also make progress in the establishment of an independent judiciary, respect human rights and fundamental freedoms and allow the establishment of trade unions and independent social, economic and political associations. The desired government may neither include Fidel nor his brother Raul Castro. It must also dissolve certain Cuban institutions (45), and has to reject communism in favour of a market-oriented economic system. In addition, Cuban-born citizens of other States must be permitted to regain their original citizenship and finally, all property or entities which were at 50 percent or more owned, at the moment of the nationalisation, by present U.S. citizens must be returned or fully compensated according to U.S. standards.

3.3. — *Title III : Protection of Property Rights of U.S. Nationals*

Title III of the Helms-Burton Act's primary aim is to put pressure on anyone « trafficking » (46) with « confiscated U.S. properties » (47) in Cuba. To prevent such trafficking, any U.S. national who claims that his property

(44) See Sections 205 to 207.

(45) These institutions are the Department of State Security in the Cuban Ministry of Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades.

(46) According to the Act, « a person traffics in confiscated property if that person knowingly and intentionally (i) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property, purchases, receives, obtains control of, or otherwise acquires confiscated property, or 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 the enactment of this Act to manage, lease, possess, use, or hold an interest in confiscated property ; (ii) enters into a commercial arrangement using or otherwise benefiting from confiscated property ; or (iii) causes, directs, participates in, or profits from, trafficking [...] without the authorisation of any United States national who holds a claim to the property. »

(47) According to the Act, confiscation refers to « (1) the nationalisation, expropriation, or other seizure by the Cuban Government of ownership or control of property

(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 ; and

has been confiscated by the Cuban government since 1 January 1959 may bring an action in a U.S. court against a person trafficking in such property. With the Helms-Burton Act, all U.S. nationals, even the present U.S. nationals who were Cuban nationals at the time of the nationalisation, have the right to initiate a law suit on the above mentioned basis. Prior to the Helms-Burton Act, only citizens who were U.S. citizens at the time of the nationalisation could benefit from this action (48). The Act, however, distinguishes between those who have obtained certified claims before the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949 and those who have not. The latter are generally exiled Cubans who have opted for the U.S. nationality after the nationalisation. While the first category may initiate its action at any time after 1 August 1996 (49), the second group may not bring an action before the end of a 2-year period beginning on the date of the enactment of the Act (50). The liability for damages of persons trafficking in these goods may amount to 3 times the amount of the fair market value of that property (51).

Contrary to the other titles of the Act, the President has the authority to suspend the effective date for consecutive periods of 6 months, on the condition to report to Congress that the suspension is necessary for the national interest of the U.S. and will expedite a transition to democracy in Cuba (52). President Clinton has since the enactment of the Helms-Burton Act systematically used his prerogative to suspend this title.

3.4. — *Title IV : Exclusion of Certain Aliens*

Title IV is another measure to prevent aliens from trafficking in confiscated property « belonging » to U.S. nationals. Though being the same

(2) the repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay

(i) a debt of any enterprise which has been nationalised, expropriated, or otherwise taken by the Cuban Government ;

(ii) a debt which is a charge on property nationalised, expropriated, or otherwise taken by the Cuban Government ; or

(iii) a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim. »

(48) See « Cuban Claims Act », 22 *U.S.C.* § 1643 (1996).

(49) Section 306 (a).

(50) Section 302 (5) (C).

(51) There are three methods to establish the value to the confiscated property : « (i) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest ; (ii) if the claim has not been certified by the Foreign Claims Settlement Commission, the court may appoint a special master, including the Foreign Settlement Commission, to make determinations regarding the amount of the claim ; (iii) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater ».

(52) Section 306 (b).

offence and without explaining it, the definition of a person who « trafficks » in confiscated property under Title IV diverges from the definition used in Title III (53). Title IV is aimed at excluding foreigners trafficking in such property from entry into the U.S. To this end, the Secretary of State and the Attorney General must deny visa or exclude above mentioned aliens from the U.S. territory. This includes spouse, minor child or agent of an alien who traffics in such properties (54).

IV. — Helms-Burton and International Trade Law

4.1. — *Economic Coercion by States*

4.1.1. *General Prohibition of Economic Coercion*

While the threat or use of armed force has been prohibited by general international law, rules on economic coercion are still vague and remain in the grey zone between *lege ferenda* and *lege lata*. The position at the beginning of the century was unproblematic. In the words of de Vattel :

> [i]t is clear that it is for each Nation to decide whether it will carry on commerce with another or not. If it wishes to allow commerce with a certain Nation, it has the right to impose such conditions as it thinks fit ; for in permitting another Nation to trade, it grants the other a right, and everyone is

(53) Title IV defines the offence of trafficking as follows : « (a) Except as provided in subparagraph (b), a person 'traffics' in confiscated property if that person knowingly and intentionally :

(i) (I) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property,

(II) purchases, receives, obtains control of, or otherwise acquires confiscated property, or

(III) 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 the enactment of this to manage, lease, possess, use, or hold an interest in confiscated property,

(ii) enters into a commercial arrangement using or otherwise benefiting 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.

(*b*) The term 'traffics' does not include :

(i) the delivery of international telecommunication signals to Cuba ;

(ii) 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 national ;

(iii) 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

(iv) 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. »

For the definition of « traffics » under Title III, see *supra*, note 47.

(54) Section 401 (a).

at liberty to attach such conditions as he places to his voluntary concessions (55).

During the first half of the century, a consensus seems to have formed in doctrinal thought that economic coercion is to be rejected as illegal (56). However, no such consensus exists on the basis of the illegality. One of the arguments that have been advanced to support the illegality of economically coercive measures, is Article 2(4) of the UN Charter. During the drafting process of this article, the delegate from Brazil proposed to link economic force to armed force by including a prohibition against « the threat or use of economic measures in any manner inconsistent with the purposes of the U.N. ». The amendment was, however, rejected by an overwhelming majority (57). Similarly, the attempt by Third World Countries to substitute the word « force » by the words « military or economic force » in the 1969 Vienna Conference on the Law of Treaties failed because of the resistance of the Western countries (58).

4.1.2. *Specific Grounds of Illegality of Economic Coercion*

Although the application of economic force as such is not illegal, the illegality of economic force can be based on other established grounds. Bowett distinguishes three possible grounds of illegality : (1) violations of specific treaty commitments, (2) violations of general principles of international law and (3) violations of the principle of non-intervention (59). The first ground, and the easiest to prove, is that some of these economically coercive measures violate specific treaty commitments such as the provisions of the General Agreement on Tariffs and Trade (« GATT »), the General Agreement on Trade in Services (« GATS »), the North American Free Trade Agreement (« NAFTA »), and International Monetary Fund (« IMF »). Provisions from all these treaties as well as of the provisions of the charters of these organisations or agreements concluded by the organisations or their members are probably violated by the Helms-Burton Act. This will be looked at *infra* (60).

(55) Emmerich DE VATTEL, *The Law of Nations* 41 (C. Fenwick trans., 1916) quoted by POROTSKY, *supra* note 13, at 918.

(56) D. C. DICKE, « Economic Coercion », in 8 *Encyclopedia of Public International Law* 147 (R. BERNHARDT ed., 1983).

(57) See Antonio CASSESE, *International Law in a divided World* 137 (1986). See also Ignaz SEIDL-HOHENVELDERN, « International Economic Law », 198 *Receuil des Cours de l'Académie de Droit International* 200-201 (1986) ; Yoram DINSTEIN, *War, Agression & Self-Defence* 84-85 (1988) ; Derek BOWETT, *Self-Defence in International Law* 186 (1958) ; Tom J. FARER, « Political and Economic Coercion in Contemporary International Law », 79(2) *Am. J. Int'l L.* 407-410 (1985).

(58) See SEIDL-HOHENVELDERN, *supra* note 57, at 200.

(59) See Derek BOWETT, « Economic Coercion », 13(1) *Va. J. Int'l L.* 2-3 (1972).

(60) See *infra* parts VI, VII, VIII.

Secondly, the use of economic coercive measures can be illegal because they violate established general principles of international law. General principles are recognised as a source of international law in Article 38 of the Statute of the International Court of Justice (61). The Helms-Burton Act most likely violates several general principles of international law. The most remarkable part of the Act in this respect, is Title IV concerning the admission and expulsion of aliens (62). Admittedly, the admission and expulsion of aliens is a right, inherent in the sovereignty of States (63). This right can, however, not be used arbitrarily. The discretion given to States in the application of this right is derived from the principle of self-preservation and has been curtailed by *dicti* of international courts and arbitral tribunals. According to these *dicti*, the right « can only be rightfully exercised in proper defence from some danger anticipated or actual » (64). True as it may be that the State itself is best placed to determine the existence of this danger and the need and methods best used to meet this danger, the international courts and tribunals require the State to prove the existence of a danger, *in casu*, the threat to the national security (the standard defence of the U.S. in this case). Moreover, the international courts can intervene in case of abuse of the discretion (65). However, as it is based on the principle of self-preservation, the discretion is wide and normally any reason of a serious nature will suffice (66). Nevertheless, as any right, the right of admission and expulsion of aliens must be exercised following general principles of law. The principles applicable to this right have been determined in international judgements to be good faith, without arbitrariness and in the absence of unnecessary indignity or hardship (67).

(61) See H. MOSLER, « General Principles of Law », in 7 *Encyclopedia of Public International Law* 93 (R. BERNHARDT ed., 1984). However, general principles of law as an independent source of law is not uncontentious. See Géza HERCZEGH, *General Principles of Law and the International Legal Order* 126 (1969) ; Clive PARRY, *The Sources and Evidences of International Law* 83-91 (1965).

(62) See *supra* part 3.4 ; Expulsion exists where an individual is given an order by the State to leave its territory within a fixed and usually short period of time. See K. DOEHRING, « Aliens, Expulsion and Deportation », in 3 *Encyclopedia of Public International Law* 14-15 (R. BERNHARDT ed., 1982).

(63) See R. ARNOLD, « Aliens », in 3 *Encyclopedia of Public International Law* 6-11 (R. BERNHARDT ed., 1982) ; R. DOEHRING, « Aliens, Admission », in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 11-13 (R. BERNHARDT ed., 1982).

(64) See « The Maal Case » (1906) as quoted by Bin CHENG, *General Principles of Law as applied by International Courts and Tribunals* 32-33 (1987).

(65) See CHENG, *supra* note 64, at 68 and at 132-133. Cheng notes that : « Any legal system is founded on definite rules which are always ready to reappear as the constant element of the construction, whenever the field of action of discretionary principles, adopted in exceptional circumstances, is overstepped. This is a long established principle, and has served during centuries, to limit the scope of the principle of '*qui suo jure utitur neminem laedit*' ». CHENG, *supra*, note 64, at 133, note 32.

(66) See SEIDL-HOHENVELDERN, *supra* note 57, at 137-139.

(67) See CHENG, *supra* note 64, at 133 ; Also see ARNOLD, *supra* note 63, at 6-11 ; DOEHRING, *supra* note 63, at 11-13.

Good faith. Good faith is used here as a general principle applicable to the general performance of a State's obligation under international law (68). The principle requires States to deal honestly and fairly with each other (69). Hence, the right of admission and expulsion as used in Title IV of the Helms-Burton Act to coerce States and their nationals into complying with U.S. foreign policy goals by threatening these nationals or by actually inflicting economic or psychological injuries, seems incompatible with the exigencies of good faith (70). It constitutes a malicious use of a right and is, as such, an *abus de droit*. Moreover, it can be argued that when a right is used maliciously, the State can no longer rely on that right (71). It is one of the foundations of international law that a right does not stand alone. It is corollary to a legitimate interest. The *legitimate* interest on which the Helms-Burton Act is based is far from clear and could not be determined by the authors. In these circumstances the U.S. cannot rely on its right to admit or expel aliens : *Malitiis non est indulgendum* (72). In addition, the right as an attribute of sovereignty is installed to protect the security, independence and existence of the State. The Helms-Burton Act does not respect the sovereign equality of Cuba and is a tool to further a foreign policy goal rather than protect the U.S. independence. The right is thus evaded from its just purpose. Evasion of law, another form of *abus de droit*, contravenes the principle of good faith (73).

Not arbitrary. Title IV introduces an arbitrary element in the expulsion of aliens, in that not only persons who actually traffic are punished but also the spouse, minor child or agent (74). These persons, having no direct involvement in the actions, are earmarked by the Act. They are not the actual traffickers and the extension to these categories of persons is not based on objective reasoning but merely serves to enhance the efficiency of the imposed measures.

Without unnecessary hardship or indignity. The right of entry or expulsion may not be accompanied by unnecessary indignity or hardship (75). The hardship aspect refers *e.g.* to economic hardship. For example, expropria-

(68) See Antonio D'AMATO, « Good Faith », in 7 *Encyclopedia of Public International Law* 107-109 (R. BERNHARDT ed., 1984) ; « Border and Transborder Armed Actions (Nicaragua/Honduras), Jurisdiction and Admissibility, Judgment », *I.C.J. Reports* (1988), at 69 ; « Nuclear Tests », *I.C.J. Reports* (1974), at 268, and 473.

(69) D'AMATO, *supra* note 68, at 107-109.

(70) *Id.* ; Examples of economic damage could be the impossibility of trading or not being able to set up joint-ventures. An example of psychological injury is the indignity to the person and his/her feelings. See CHENG, *supra* note 64, at 36, note 15.

(71) See CHENG, *supra* note 64, at 36, note 15.

(72) See *Id.*, at 122.

(73) Comp. Jean-Marie HENCKAERTS, *Mass Expulsion in Modern International Law and Practice* 17 (1995).

(74) See *supra* part 3.4.

(75) The notion is comparable to the degrading treatment in the human rights conventions. See e.g. HENCKAERTS, *supra* note 73, at 40-45.

tion without compensation can lead to economic hardship, as can treble damages. The indignity aspect, on the other hand, has been clarified to mean that a State, in the exercise of the right to control the entry or expulsion of aliens, should refrain from inflicting the suffering of indignity to the person or his/her feelings (76). Exemplary of the unnecessary indignity inflicted, is the refusal to grant entry or the expulsion of people extraneous to the actual conduct being envisaged, namely trafficking. One may take for example, one of the versions of the by now almost classic example of the student returning to the U.S. from Canada after the school break and being denied entry because one of his parents is blacklisted on the « role of shame » (77). Apart from general principles of international law concerning the entry and expulsion of aliens, the U.S. misused the treaties instituting the international financial institutions to which it was signatory (78). Evasions of these treaty obligations and fictitious exercise of rights are forms of abuse of rights (79).

According to Bowett, a third basis to establish the illegality of economically coercive measures, next to violations of specific treaty commitments and violations of general principles of international law, is violations of the principle of non-intervention.

As one of the foundations upon which the modern international community is construed, the principles of sovereign equality of States and non-intervention in the internal or external affairs of other States are two faces of the same coin. In fact, the first proclaims that, regardless of their strength or size, States are juridically equal and must by consequence be treated on the same footing. Moreover, as a sovereign entity, every State has a large number of powers over the territory under its jurisdiction (80). The second, though having the same status under international law, might be qualified as an instrument to realise the purpose of sovereign equality. It requires that each State respects the sovereignty of other States (81). In the *Nicaragua case*, the International Court of Justice invoked the principle of non-interference in the following terms :

> in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.

(76) See the « Maal Case » as quoted by CHENG, *supra* note 64, at 36, note 15.

(77) See e.g. Jens VAN DEN BRINK, « Helms-Burton : Extending the limits of US Jurisdiction », XLIV(2) *Netherlands J. Int'l L.* 144-145 (1997).

(78) See *infra*, part VII.

(79) See CHENG, *supra* note 64, at 122-123.

(80) CASSESE, *supra* note 57, at 130.

(81) *Id*, at 143.

> Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones (82).

For Cassese, the principle of non-intervention is composed of three distinct rules of customary law. The first one prohibits States from encroaching upon the internal affairs of other States by putting pressure on the institutions of other States or interfering in the relations between the institutions and their own nationals. The second one is aimed at safeguarding domestic affairs from foreign intrusion. With this aim, a State must prevent the organisation on its territory of activities which are prejudicial to foreign countries. Finally, the third one requires that States refrain from assisting insurgencies in case of civil strife (83).

When Title II of the Helms-Burton Act makes a detailed description of the political system into which Cuba must transform before the U.S. may lift the economic embargo and initiate negotiations leading to the return of the Guantanamo Naval Base to Cuba, it violates the principle of non-interference and thus the principle of sovereign equality. Helms-Burton motivates this interference by referring to the massive violation of human rights including the right to self-determination. As several States have done, one can criticise the human rights record of Cuba (84). But though contemporary international law accepts that the issue of human rights is one going beyond the limits of the national sovereignty of a State, taking the Helms-Burton Act as a whole, the only human rights that are really defended are the economic rights of the Americans. In fact, the Helms-Burton Act intends to protect the former owners who were expropriated without prompt, adequate and effective compensation and Americans who want to broadcast TV programs to Cuba. Similarly, for self-determination, Helms-Burton intends to impose a favourable political and economic system on Cuba while self-determination requires that the inhabitants themselves choose the political and economic system under which they are living.

4.1.3. *Economic Coercion accepted under International Law*

Where Bowett acknowledges three types of measures (85) under which coercion is illegal under international law, he also establishes three excep-

(82) *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, *I.C.J. Reports* (1986), at 108.

(83) See CASSESE, *supra* note 57, at 144-145.

(84) See e.g. the common position on Cuba adopted by the Council of Ministers on 2 December 1996 (O.J. (L 322) 1 (2 December 1996)), stating that the EU's objective in its relations with Cuba was aimed at encouraging « a process of transition to pluralist democracy and respect for human rights and fundamental freedoms. » But contrary to the U.S., the Council of Ministers believes that « [a] transition would most likely be peaceful if the present regime were itself to initiate or permit such a process. It is not European Union policy to try to bring about change by coercive measures with the effect of increasing the economic hardship of the Cuban people. »

(85) As stated, these are : (1) violations of specific treaty commitments ; (2) violations of established principles of law ; and (3) violation of the principle of non-intervention.

tions. These are circumstances in which illegal coercion can be justified : (1) economic sanctions authorised by a competent organ of the international community, (2) economic measures of self-defence and (3) economic measures of reprisal.

Authorisation by a competent organ. Article 41 of the UN Charter gives a mandate to the Security Council to decide what measures, except the use of force, may be employed to give effect to its decisions. These measures can include complete or partial interruptions of economic relations. Although Helms-Burton requested the American President to bring the Security Council to adopt a mandatory economic embargo against Cuba, the Security Council has not implemented such measures against Cuba.

While the authority of the Security Council to decide on the interruption of economic relations is well-established, the authority of the General Assembly to authorise or order economic measures is far from clear (86). Even if States could pursue economic coercive measures under the authority of the General Assembly, this would be of no avail in the present case as the General Assembly has spoken out against the U.S. economic measures against Cuba. With an ever increasing majority, the General Assembly has, since the early 1990s condemned the U.S. trade embargo against Cuba, emphasising the extraterritorial application of U.S. law.

Two events made the international community focus on Cuba. The first related to the dissolution of the Soviet Union as a result of which the designation of Cuba as a security threat to the U.S. has lost its meaning. The second related to the enactment of the CDA (87) creating such a sense of indignation in the rest of the world that it moved some of the U.S. closest allies to vote against the U.S. interest (88). Thus in a first instance, without naming the U.S. measures, General Assembly Resolution 47/19 (89) reaffirmed « the sovereign equality of States, non-intervention and non-interference in their internal affairs », but then called upon « all States to refrain from promulgating and applying laws and measures » not « in conformity with their obligations under the Charter » which are « aimed at strengthening and extending the economic, commercial and financial embargo against Cuba ». It further urged all States « to take the necessary steps to repeal or invalidate [already enacted measures] as soon as possible. » One year later, as Resolution 47/19 had not been implemented, the General Assembly specified *expressis verbis* to which measures Resolu-

(86) In principle coercive measures must be taken by the Security Council not by the General Assembly, however, the General Assembly has assumed this power in the 1950 Uniting for Peace. See General Assembly Res. 377(V) of 3 November 1950.

(87) Cuban Democratic Act of 1992, Pub. L. No. 102-484, 22 *U.S.C.A.* 6001-6010 [hereinafter CDA].

(88) POROTSKY, *supra* note 13, at 938-939.

(89) General Assembly Res. 47/19 of 24 November 1992, adopted with a vote of 55 in favour, 3 against (Israel, Romania, and the United States of America) and 71 abstentions.

tion 47/19 was addressed by naming the U.S. embargo. In response to the CDA, it condemned « the promulgation and application by Member States of laws and regulations whose extrajudicial effects affect the sovereignty of other States » and re-emphasised the necessity to « refrain from applying such measures in conformity with their obligations under the U.N. Charter » (90). From then on, and every subsequent year, the General Assembly has reaffirmed « the necessity of ending the economic, commercial and financial embargo imposed by the U.S. of America against Cuba ». With the years, the number of member States voting for the lifting of the trade embargo grew to a level of leaving the U.S. criticised by almost the entire world (91).

One should pose the question, however, whether it is the trade embargo itself or the extraterritoriality which is rejected by the community of States. There are reasons to believe that it is the latter. In fact, and as mentioned above, before the enactment of the CDA, the trade embargo was not considered by the international community as a violation of the U.S. legal obligations towards Cuba. The member States voting for the above mentioned resolutions rejected primarily the extraterritorial application of U.S. law (92). The third world countries, however, considered the embargo as a unlawful measures of economic coercion. We could conclude with the words of the UN Secretary-General who, on the basis of a study made by an international panel of experts, came to the conclusion that « there is no clear consensus in international law as to when coercive measures are improper, despite relevant treaties, declarations, and resolutions adopted in international organisations which try to develop norms limiting the use of such measures » (93).

The OAS, however, as a regional organisation in the area, has, in the past, authorised coercive economic measures (94). Although one might

(90) General Assembly Res. 48/16 of 3 November 1993, adopted with a vote of 88 in favour, 4 against (Albania, Israel, Paraguay, and the United States) and 57 abstentions.

(91) General Assembly Res. 49/9 of 26 October 1994, adopted with a vote of 101 in favour, 2 against (Israel and the United States of America) and 48 abstentions ; General Assembly Res. 50/10 of 2 November 1995, adopted with a vote of 117 in favour, 3 against (Israel, United States of America and Uzbekistan) and 38 abstentions ; General Assembly Res. 51/17 of 2 November 1996, adopted with a vote of 137 in favour, 3 against (Israel, United States of America and Uzbekistan) and 25 abstentions ; General Assembly Res. 52/10 of 5 November 1997, adopted with a vote of 143 in favour, 3 against (Israel, United States of America and Uzbekistan) and 17 abstentions ; General Assembly Res. 53/4 of 14 November 1998, adopted with a vote of 157 in favour, and 2 against (Israel and United States of America).

(92) See e.g. 45th Plenary Meeting, Wednesday 26 October 1994, at 10 a.m., New York, U.N. GAOR, 49th Sess., at 11-12, U.N. Doc., A/49/PV. 45 (1993). See also POROTSKY, *supra*, note 13, at 931-950 who on the ground of the analysis of the member States in the voting of the resolutions adopted between 1991-1994 comes to the same conclusion.

(93) Economic Measures as a Means of Political and Economic Coercion Against Developing Countries. Note by the Secretary-General, U.N. GAOR, 48th Sess., Agenda Item 91(a), at 1, U.N. Doc. A/48/535 (1993).

(94) Against the Dominican Republic (1961) and twice against Cuba (1962 & 1964).

question the competence of a regional organisation to authorise such measures, the OAS condemned the U.S. actions. Thus for the present case, the competence issue is irrelevant.

Self-defence. Self-defence in inter-State relations is the lawful use of force (principally counter-force), under conditions prescribed by international law, and in response to the previous unlawful use of force (or, at least, the threat of force) (95). The conditions for the use of self-defence are that there is an immediate danger to the security or independence of the State concerned. The reaction must be both necessary (no other, less injurious means are open to the State) and proportionate (there is some correlation between the harm inflicted (or threatened) and the (counter-) action taken) (96). We do not see how the independence and the security of the U.S. are threatened by Cuba.

Reprisals. Reprisals have been aptly described as « counter-measures that would be illegal if not for the prior illegal act of the State against which they are directed » (97). The use of reprisals presupposes the existence of an international wrong or an international delict (98). The term international wrongful act or international delict has been described by the International Law Commission as « an act of State which constitutes a breach of an international obligation. » The subject matter of the obligation is irrelevant (99). The U.S. consider the expropriation of U.S. assets by the Cuban government in the 1960s to be an international delict that justifies the current measures imposed by the Helms-Burton Act. International law could not provide a clear answer whether the expropriations were conducted in violation of it. Even if the expropriations are accepted as an international delict, the reprisal measure still has to comply with general principles of good faith, proportionality and necessity.

a. Good faith. The principle of good faith applies both for obligations and rights arising from treaties as for other rights and obligations in interna-

(95) See Article 51 of the UN Charter.

(96) See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) I.C.J. Reports* (1986), at 94, where the Court stated that « there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law ». See also « Advisory Opinion on the Legality of the threat or Use of Nuclear Weapons », Advisory Opinion, 8 July 1996, at 18. 35 *I.L.M.* 822 (1996).

(97) Oscar SCHACHTER, « International Law in Theory and Practice », 178(9) Receuil des Cours de l'Académie de Droit International 168 (1982).

(98) See Hans KELSEN, *International Order* 13 (1935); Hans KELSEN, *Law and Peace* 33 (1948).

(99) (1976) *ILC Yearbook*, Vol. ii, Part II, p. 117. (Any international wrongful act that is not an international crime is an international delict). See Christine GRAY, *Judicial Remedies in International Law* 217 (1987); Hans KELSEN, *Law and Peace* 23-26 (1948).

tional law (100). Good faith in the exercise of a right prohibits the malicious use of this right (*abus de droit*) (101). One exponent of this rule is also known as *ex re sed non ex nomine*, or, in other words, look at the facts not at the legal terminology given to these actions (102). Applied to reprisals, good faith means that the reprisal is used to restore the situation to what it was before the international law violation occurred (*restitutio in integrum*) or to obtain satisfactory compensation. If the « aim and the demands go beyond the violation to include a different objective », the reprisal would become unlawful (103). The Helms-Burton Act purports to protect the property right of American citizens, a right guaranteed by the U.S. Constitution. However, looking at the aims of the Act (Title I & II) and the demands (Title III & IV) it reveals that these extend further than restoration of ownership or compensation. The Act also strives to change Cuba into a free market democracy, American style and to this end employs means to coerce even nationals of third States to refrain from trading with or investing in Cuba.

b. Proportionality. The principle of proportionality in the context of reprisals means that there must be some correspondence between the harm done (the international wrong or international delict) and the reprisal measure. In other words, a due relation between the reprisal and the delict (104). In the law of reprisals, proportionality was not thought to be applicable to well into the 20th century (thls in contrast with the law of self-defence). Proportionality does not mean that there has to be an exact correlation between the delict and the harm inflicted by the reprisal, the latter can even inflict greater harm. It is, however, clear that proportionality does put some constraints on the use of reprisals to justify a *prima facie* unlawful act (105). In other words, the countermeasure, to be lawful, may not be out of all proportionality to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State (106). If the measures of the Act are out of proportion to the gravity of the internationally wrongful act committed by Cuba, they would constitute

(100) See « Border and Transborder Armed Actions (Nicaragua/Honduras), Jurisdiction and Admissibility Judgment », *I.C.J. Reports* (1988), at 69 ; « Nuclear Tests », *I.C.J. Reports* (1974), at 268 and 473.

(101) See *supra*, part 4.1.1.

(102) *Chorzow Factory Case (Merits) P.C.I.J.*, Ser. A. No. 17 (1928) ; See CHENG, *supra* note 64, at 121-123.

(103) SCHACHTER, *supra* note 97, at 170.

(104) See J. DELBRÜCK, « Proportionality », in 7 *Encyclopedia of Public International Law* (R. BERNHARDT ed., 1984).

(105) See Michael J. HAHN, « Vital Interests and the Law of GATT : An Analysis of GATT's Security Exception », 10 *Mich. J. Int'l L.* 60-62 (1991) ; Kees J. KUILWIJK, « Castro's Cuba and the U.S. Helms-Burton Act — An Interpretation of the GATT Security Excemption », 31(3) *J. World Trade* 55 (1997).

(106) See Articles 48 and 49 of the ILC Draft Article on State Responsibility (UN Doc. A/CN.4/L.528/Add.2/1996).

excessive measures and would be unlawful as a prohibited act of intervention into the internal affairs of the State addressed by the measure (107). The International Court of Justice in the *case concerning the diplomatic and consular staff in Tehran* impliedly endorsed the measures considering the gravity of the situation and the serious nature of the violations of international law and the legal principles involved (108). In this case, the U.S. froze the assets of Iran in U.S. banks and in foreign branches and subsidiaries of U.S. banks (to ensure possible compensation of hostages, hostage families or other U.S. claimants), denied access to Iran nationals to the U.S. and other economic sanctions. The comparison of the circumstances of the *Tehran hostage case* and the reasons given by the U.S. for the Helms-Burton Act reveals a distinctive discrepancy between the magnitude of the violations of international law used to support the harsher measures of the present Act.

c. Necessity. In the law of reprisals, the necessity requirement for unilateral reprisals is controversial. It is true that many authors contend that necessity is required in the employment of reprisals (109). They are followed in their line of reasoning by authoritative organisations such as the International Law Commission and the Institut de Droit International (110). Moreover, these authors and organisations declare that there is no necessity to employ reprisals if either peaceful means of conflict resolution are open (extensive interpretation) or if a treaty obligation between the parties provides for peaceful settlement of disputes (restrictive interpretation) (111). Applying these criteria to the Helms-Burton Act, leads to the conclusion that no necessity existed for these measures as peaceful alternatives were still available to the U.S. In addition, the U.S. have negotiated lump-sum agreements over expropriations with other countries and they have been invited by Cuba to conclude similar agreements. The U.S., however, refused the offer. The sincerity of Cuba concerning this offer of negotiations is shown by the fact that Cuba has concluded similar agreements on expropriations with other countries. However, as clarified by Oscar Schachter, these views on the necessity requirement are not followed in recent practice. Reprisals are a peaceful method of conflict resolution within the meaning of Articles 2(3) and 33 of the UN Charter. They merely serve as an additional incentive to use other peaceful methods of conflict resolution, such as negotiations (112). In this

(107) See CHENG, *supra* note 64, at 98 ; DELBRÜCK, *supra* note 104, at 399.

(108) See United States Diplomatic and Consular Staff in Tehran, Judgment, *I.C.J. Reports* (1980), at 120, paras. 30, 31 and 36. *Contra Dissenting Opinion of Judge Tarazi*, at 63-64.

(109) See BOWETT, *supra* note 59, at 1.

(110) Report of the International Law Commission, 31st Sess. 1979, 34 UN GAOR, Supp., at 319 ; *Annuaire, Institut de Droit International*, 1934, Vol. 38, at 709

(111) See SCHACHTER, *supra* note 97, at 172.

(112) *Id*, at 172-175.

view, the Helms-Burton Act could be seen as an Act to bring about a speedier resolution of the U.S.-Cuba conflict.

4.2. — *Helms-Burton as a Secondary Boycott*

An economic boycott in international law consists of the interruption of commercial and financial relations with another State and its nationals as a measure of economic coercion or hostility both in peace-time and during war (113). However, in our world of globalisation with an increasingly interdependent economy, the efficiency of a primary boycott becomes limited. To become more effective, it is sometimes extended extraterritorially, either to impose restrictions on foreign subsidiaries of businesses of the boycotting country or even to limit the freedom to trade of foreign businesses. This constitutes a secondary boycott. Thus a secondary boycott forces businesses of a neutral country to choose between trading with the boycotting country or with the boycotted country, even though trading with the boycotted country is perfectly legal under the legislation of the neutral country (114). Title III and Title IV of the Helms-Burton Act introduce aspects of a secondary boycott in the U.S. relation with Cuba. This while the U.S. in other cases has been opposed to secondary boycotts. Indeed, the U.S. spoke out against the Arab League (secondary) boycott against Israel because they asserted it was a measure that violated international law. As such measures *prima facie* do. Moreover, the U.S. have a declared policy of being opposed to secondary boycotts (115). The U.S. will not accept secondary boycotts because they would force the U.S. to comply with or endorse the foreign State's policy they may not agree with. The one case where the U.S. might employ a secondary boycott, according to their own policy statement, is where other States had an obligation or duty toward the U.S. to co-operate in enforcing some foreign policy and they failed to do so (116). Canada, the European Union and Mexico had no such duty or obligation to comply with the U.S. measures against Cuba. In sum, the secondary boycott installed by the Helms-Burton Act flaunts U.S. policy on the subject as well as presumably

(113) See H.G. KAUSCH, « Boycott », in 3 *Encyclopedia of Public International Law* 74 (R. BERNHARDT ed., 1982). The term boycott is derived from the name of the English landowner, Captain Boycott, who was socially and economically isolated because of his treatment of his tenants in Ireland in the 1870's.

(114) See Andreas F. LOWENFELD, « Congress and Cuba : The Helms-Burton Act », 90(3) *Am. J. Int'l L.* 422-430 (1997). Also see Peter L. FITZGERALD, « Pierre goes online : Blacklisting and Secondary Boycotts », 31(1) *Vanderbilt J. Transnat'l L.* 1-96 (1998) ; Craig R. AUBE, « Title IV of the Helms-Burton Act : A Questionable Secondary Boycot », 28(2) *L. & Poly. Int'l Bus.* 575-591 (1997).

(115) See Antonella TROIA, « The Helms-Burton Controversy : An Examination of Arguments that the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 Violates U.S. Obligations under NAFTA », 23 *Brook. J. Int'l L.* 647 (1997).

(116) *Id.*

being in violation of international law as an excessive or even unjustified measure (117).

V. — The World Trade Organisation

The World Trade Organisation (« WTO ») was signed into existence in Marrakesh, Morocco, in April 1994 (118). The establishment of this new organisation was the crowning moment of the Uruguay Round negotiations. It meant the eventual institutionalisation of the GATT and the enlargement of the subject matter in international economic law being regulated by an international organisation, encompassing services (GATS), and intellectual rights (Agreement on Trade Related Aspects of Intellectual Property Rights — « TRIPS »). The essential functions of the WTO are : (1) administrating and implementing the multilateral and plurilateral agreements which together make up the WTO, (2) acting as a forum for multilateral trade negotiations, (3) seeking to resolve trade disputes, (4) overseeing national trade policies, and (5) co-operating with other international institutions involved in global economic policy-making (119).

5.1. — *Violations of GATT and GATS provisions*

During the consultations phase (120), the European Community (« EC ») was ready to argue the non-conformity of the Act, especially of section 302 (liability for trafficking), with Article I GATT (the general most-favoured-nation clause), Article III GATT (the principle of national treatment on international taxation and regulation), Article V (freedom of transit), Article XI (general elimination of quantitative restrictions) and Article XII (non-discriminatory administration of quantitative restrictions). In addition, according to the European Community, the following articles of GATS would also have been violated : Article I (scope and definition, presumably the undertaking by GATS Members to take reasonable measures to ensure the observance of the GATS provisions), Article III (transparency),

(117) Lowenfeld believes that a secondary boycott against Cuba in peacetime is contrary to international law. See R. Jennings & A. Watts, *Oppenheim's International Law* (Vol. I) 430 (9th ed. 1992). Moreover, the recent negotiating text (14/2/1998) of the OECD concerning the Multilateral Agreement on Investment contains a draft article on secondary investment boycotts. The draft article reads as follows : « No Contracting party may take measures that :

i) either impose or may be used to impose liability on investors or investments of investors of another Contracting Party ;

ii) or prohibit, or impose sanctions for, dealing with investors or investment of investors of another Contracting Party. »

(118) See WTO Agreement, 33 *I.L.M.* 13 (1994) ; Paul Demaret, « The Metamorphoses of the GATT : From the Havana Charter to the World Trade Organization », 34(1) *Colum. J. Transnat'l L.* 123-171 (1995).

(119) World Trade Organization, *Trading into the Future* 4 (1995).

(120) See *infra* 5.2.

Article VI (domestic regulation), Article XVI (market access), and Article XVII (national treatment) (121).

Whereas in general public international law liability for injurious consequences arising out of acts or omissions not prohibited by international law is still very controversial, in international trade law, it has long been established. In GATT they are known as non-violation cases whereby no specific violation has to be shown (122). What has to be shown, however, is a nullification or an impairment of an advantage under the agreement or the hindrance of the attainment of an objective under the agreement (123). The rather cryptic provision is intended to deal with the frustration of legitimate expectations of contracting parties under the GATT (124). This provision was also invoked by the EC as the Helms-Burton neither promotes the reduction of barriers to trade (see Section 302 Helms-Burton) nor works towards the elimination of discriminatory treatment in international commerce (see Section 401 Helms-Burton) (125).

The actual complaint in the EC request for the establishment of a panel consisted of six elements in the CDA of 1992 and the Libertad Act of 1996 that were claimed to be violative of GATT and GATS law (126). (1) The extraterritorial application of the U.S. trade embargo against Cuba in so far as it restricts trade between the EC and Cuba or between the EC and the U.S. (Articles 102 and 110 Helms-Burton Act). This would violate the GATT prohibition on quantitative restrictions (Article XI GATT). (2) The denial of access to the U.S. quota for sugar to a country that is a net importer of sugar unless that country certifies that it does not import Cuban sugar that could indirectly find its way to the U.S. (Article 110 (c)

(121) See United States — The Cuban Liberty and Democratic Solidarity Act : Request for Consultations by the European Communities, WTO Doc. WT/DS38/1 ; Press Release of the European Commission, 3 May 1996 (IP/96/387) ; Henry LESGUILLONS, « Les Lois Helms-Burton et D'Amato : Réactions de l'Union Européenne », *Revue de Droit des Affaires Internationales 97-99* (1997).

(122) Ernst Ulrich PETERSMANN, *The GATT/WTO Dispute Settlement System* 135-176 (1997). See Report of the International Law Commission on the work of its 47th Sess., 1995, UN 1995.

(123) See Article XXIII GATT : « If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective is being impeded as the result of

(a) the failure of another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting partyor parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it. »

(124) John H. JACKSON, *World Trade and the Law of GATT* 173-187 (1969).

(125) *Id.* ; Preamble to the General Agreement on Tariffs and Trade.

(126) See United States — *The Cuban Liberty and Democratic Solidarity Act : Request for the Establishment of a Panel by the European Communities*, WTO Doc. WT/DS38/2.

Helms-Burton Act). It is claimed this is a discriminatory application of a quantitative restriction, a practice banned by Article XII GATT. (3) The denial of transit by EC goods and vessels of Member States of the EC through ports in the U.S. (Article 6005 (b) Cuban Democracy Act 1992). This provision would purportedly violate Article V GATT that grants freedom of transit. (4) The prohibition of the provision of « any loan, credit or other financing » (which includes such matters as provision of performance guarantees, insurance and some payments) by U.S. persons to any person for the purpose of transactions involving any confiscated property the claim to which is owned by a U.S. national (Article 103 Helms-Burton). However, this seems in contradiction with the provisions of Article XI GATS (no restrictions on payments and transfers). (5) The creation of a right to sue EC persons and companies in U.S. courts for « trafficking » in « confiscated property ». (6) The denial of visas and exclusion from the U.S. (or the threat thereof) of persons involved in confiscating or « trafficking » in confiscated property a claim to which is owned by a U.S. national and persons with a controlling interest of an entity which has been involved in « trafficking » in such property. Spouses, minor children and agents of such persons are also denied visas and excluded from the U.S. under this provision.

Moreover, the measures described under points (5) and (6) above are said to be in conflict with Articles II (most-favoured nation treatment), III (transparency), VI (domestic regulation), XVI (market access) and XVII (national treatment). The measure described under (6) supposedly is also in violation of Articles 3 and 4 of the Annex on Movement of Natural Persons Supplying Services under the Agreement. Moreover it is claimed that these measures could nullify or impair benefits (namely unrestricted export of Community goods to Cuba and to the U.S. without such exports giving rise to or being subject to or providing an opportunity for unwarranted legal action and exclusion of persons from the U.S.) the EC could expect to have accrued to it directly or indirectly under GATT 1994. The measures allegedly also impede the attainment of GATT objectives, most notably the expansion of production and trade, the overall balance of rights and obligations between WTO Members, in particular the right of access to markets, and the principle, recognised in GATT jurisprudence, that WTO Members should not try to force other WTO Members to change their sovereign policies through trade sanctions (127). Similarly, for points (4), (5) and (6), a nullification and impairment violation is claimed by the EC under GATS. The benefits mentioned there are : trade in services between the EC and Cuba and the EC and the U.S. unhindered by the interruption of financial services, the threat of seizure of assets for the purposes of satisfying compensation claims in respect of « trafficking » and by the harassment of its

(127) *Id.*

citizens through the denial of visas and exclusion from the U.S. (or the threat thereof) (128).

5.2. — *Deciding on Proceeding to Dispute Settlement*

The WTO dispute settlement procedure consists of two parts. Whereas the first is a purely diplomatic stage, the second is the panel procedure (129). In the first stage, consultations are held at the request of a party (130). The consultations are a mandatory first step in the dispute settlement procedure. If all parties so agree, they can opt for good offices, conciliation or mediation as a second step (131). If the parties do not agree upon such methods and the consultations reach no satisfactory result, either party can proceed with the request for the formation of a panel. In this, the co-operation of the other party is not required (132). If there is no willingness to co-operate with the formation of a panel, then the Understanding on Dispute Settlement prescribes standard terms of reference and a panel composed by the Director-General (133).

As for the Helms-Burton dispute within the framework of the WTO, the consultations were held in June and July 1996 but failed to reach any result (134). It was then the EC who had to decide whether to proceed with a request for the formation of a panel or seek alternative solutions. At first sight, the EC had a strong case. Some Member States, however, were unsure of the wisdom of opting for litigation in the WTO. One argument against panel proceedings was that there was no certainty of victory. More importantly, there were serious risks involved for the EC and for the future of the WTO. The U.S. had been adamant that they would not co-operate because they took the position that the Helms-Burton Act is part of their foreign policy and constitutes a national security issue (135). Further elaborating on this line of reasoning, the U.S. advocated that the Helms-Burton Act was

(128) *Id.*

(129) See PETERSMANN, *supra* note 122, 141.

(130) See Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organisation. [hereinafter DSU]. See also Article XXII :1 GATT and Article XXIII :1 GATS.

(131) See Article 5 DSU.

(132) In the negotiations resulting in the new procedure, this was referred to as « the right to a panel ».

(133) See Article 7 DSU and Article 8 DSU ; See also PETERSMANN, *supra* note 122, at 182-185.

(134) A formal request for consultations, in accordance with Article XXIII :1 GATT and Article XXIII :1 GATS, was made by the European Community and its Member States in a letter addressed to the U.S. Permanent Representative in Geneva on 3 May 1996. See Press Release, *EU requests consultations with the U.S. on the Helms-Burton legislation*, 3 May 1996 (IP/96/387).

(135) See e.g. Under Secretary Eizenstat, Speech and Questions & Answers on Helms-Burton, USA Text, 20 November 1996 ; Background Briefing on the EU's WTO Challenge to the Libertad Act, USA Text, 20 February 1996.

not a trade issue that could be dealt with by the WTO but a political question that was outside the WTO's jurisdiction (136). The EC, in an official statement, made clear that it would nevertheless proceed with a panel to « protect legitimate European trade interests which [had] been damaged by U.S. extraterritorial jurisdiction » (137). On the use of the national security exception, the statement declared that « it was not credible to suggest that protection of U.S. national security requires interference with the legitimate trade of the European companies with Cuba » (138). The EC refused to accept that the issue was too sensitive for the WTO to handle (139). The U.S. reply was prompt : « Our position has always been in this and similar cases that no WTO or GATT panel is competent to judge the foreign policy and national security interests of the United States and that continues to be our legal position » (140). No room for doubt was left in the threat directed at the EC : « Pursuing this matter in the WTO will only provide aid and comfort and sustain and support those elements in the United States who are already opposed to the WTO » (141). Thus, the final assessment concerning the opportunity and feasibility of a WTO panel had to take into consideration not only possible failure of the legal arguments, but also the risk of undermining the WTO if the U.S. kept to its position by refusing to take part in the panel proceedings (142). One effect of success in the panel proceedings was also discussed in the EC. Success would mean that the Helms-Burton Act would be declared illegal under WTO rules and could not rely on a wide, self-judging and unreviewable security exception. This would involve a clear confirmation by the panel of the limits of this exception. The wide interpretation had, however, served the EC well in the past. Some EC Member States were therefore eager to hang on to the wide interpretation (especially Belgium, Finland, Germany and the Netherlands).

5.3. — *The Essential Security Interest, the Vital National Interest and the National Security Exception*

As stated above, the Cuban Liberty and Democratic Solidarity (Libertad) Act most likely contravenes GATT and GATS provisions. It certainly

(136) R. EVANS, *Helms-Burton ; Résistance des USA*, Telexpress, 2 February 1997, Ed.3. (visited 2 February, 1997) <http://www.cc.cec/D1/28--10htm>.

(137) Statement by Sir Leon Brittan, Helms-Burton and US National Security, 12 February 1997 (IP/97/120).

(138) *Id.*

(139) *Id.*

(140) See Background Briefing, *supra* note 135. It has to be noted here that this is not exactly a true account of the American position. The US view during the initial negotiations for the Havana charter was exactly the opposite.

(141) See Under Secretary Eizenstat, *supra* note 135.

(142) See Kinka GERKE, « The Transatlantic Rift over Cuba. The Damage is Done », 32(2) *Int'l Spectator* 41 (1997).

goes against the basic philosophy of the liberalisation of world trade. However, the GATT allows for the suspension of obligations in certain circumstances. One of the possibilities to suspend these obligations is to use the national security exception. The idea of allowing States an escape route when their national security or national interest is involved, is not a novel idea (143). It is rooted in the foundations of international law. It is a subject that keeps stirring philosophical and political debates on the nature of international law and international relations. As we shall see, the arguments are similar irrespective of whether the discussion takes place before the International Court of Justice (« ICJ »), the WTO or the NAFTA (144).

5.3.1. *The Background and the ICJ Experience*

The national security exception of GATT is linked to the concept of self-defence referred to in Article 51 of the UN Charter (145). In fact, the GATT contracting parties have expressly stated that « this provision should be interpreted in the light of the basic principles of international law and in harmony with the decisions of the UN and of the ICJ and should therefore be regarded as merely providing contracting parties subjected to an aggression with the right of self-defence » (146). More often, however, contracting parties merely echo the wording of Article 51 UN Charter, more in particular the « inherent right » phraseology. The « inherent right » notion of Article 51 UN Charter has two interpretations that both go against international law and are both, unfortunately, still popular. The first is based on a traditional naturalist doctrine (147). The inherent right (*droit*

(143) The article provides as follows : « Nothing in this agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests ; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(iii) relating to fissionable materials or materials from which they are derived ;

(iv) relating to traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for supplying a military establishment ;

(v) taken in time of war or other emergency in international relations.

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. »

For an excellent overview of the national security exception under GATT, see Hahn, *supra* note 105. Similar provisions are found in Article XIVbis GATS and Article 73 TRIPS.

(144) For a discussion of the NAFTA issues involved see *infra*, part VI.

(145) Article 51 UN Charter : « Nothing in the present Charter shall impair the inherent right of individual or collective self-defence [...]. »

(146) As declared by Nicaragua C/M/196, at 7 (report not adopted). Also see WTO, Guide to GATT Law and Practice (Vol. 1) 601 (1995).

(147) See Yoram DINSTEIN, *supra* note 57, at 169-172. Also see Oscar SCHACHTER, « Self-Defense and the Rule of Law », 83 *Am. J. Int'l L.* 259-260 (1989).

naturel) (148) in this theory, negates the idea of subjection to international law and consequently leaves the State free to do what it judges necessary when grave threats are made to its existence as State or its way of life (149). This naturalist conception of the right of self-defence based on Hugo Grotius, accepts no limits on the right of self-defence. Whereas this first interpretation still strongly influences political rhetoric, a second strain of « inherent right » thinking has become dominant. It is the interpretation of the political realists (150), made (in)famous by the remark of the U.S. Secretary of State, Dean Acheson : « [...] law simply does not deal with such questions of ultimate power — power that comes close to the sources of sovereignty [...]. The survival of a State is not a matter of law » (151). In general, limitations on the use of force are accepted but, according to the political realists, ultimate power wins from law. The decision on the ultimate use of power is made by the State and is not open to legal scrutiny (152). The ICJ apparently chose to anchor the inherent right in international law by stating that *inherent* right means a right that is vested in all States (153). It is a legal concept, based on international law and limited by it (154). In general, States cannot be the sole judges of the applicability of the concept (155).

(148) The equally authoritative French version. Or, in Spanish « *el derecho inmanente* ». The Russian expression is « *imprescriptible right* ». See CHENG, *supra* note 64, at 93.

(149) See SCHACHTER, *supra* note 97, at 260 ; CHENG, *supra* note 64, at 29-98.

(150) Hearn describes this group as political realists. See W.H. HEARN, « The International Legal Regime Regulating Nuclear Deterrence and Warfare », 61 *Brit. Y.B. Int'l L.* 200-202 (1991).

(151) *Proc. Am. Soc'y Int'l L.* 13-14 (1963).

(152) Werner LEVY, « The Vital National Interest and International Law », LXXV *Revue de Droit International de Sciences Diplomatiques et Politiques* 88 (1997). Also see DINSTEIN, *supra* note 58, at 69-72 & 165-172 (1988) ; Robert W. TUCKER, *The Just War* 118 (1960).

(153) See Albrecht RANDELZHOFER, « Article 51 », in *The Charter of the United Nations, A Commentary* 666 (B. SIMMA ed., 1995). But see David K. LINNAN, « Self-Defence, Necessity and U.N. Collective Security : United States and Other Views », 1 *Duke J. Comp. & Int'l L.* 57-84 (1991). (Discussing the controversy whether the Charter limited the customary right to self-defence at the time of drafting and if so, whether this is still the case. The argument is made that State practice might have effectively rejected the most restrictive doctrinal views of the Charter and that it might be preferable to admit that the restricted functional customary law rules never lost their force. The author suggests this could reconcile the international law's systematic problems with self-help and self-preservation interests.).

(154) This is also the view of numerous legal scholars. See e.g. Hersch LAUTERPACHT, *The Function of Law in the International Community* 180 (1933). « There is not the slightest relation between the content of the right to self-defense and the claim that it is above the law and not amenable to evaluation by right, and as, at the same time, it dissociates itself from regulation and evaluation by the law. Like any other dispute involving important issues, so also the question of the right of recourse to war in self-defense is in itself capable of judicial decision [...]. » This statement was quoted by Judge Schwebel in the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, at 9. 35 *I.L.M.* 818 (1996).

(155) See LINNAN, *supra* note 153, at 85-124.

5.3.2. *The World Trade Organisation*

The position of what should have been the International Trade Organisation (« ITO ») at the Havana Conference was clear from the outset. The prospective members of the ITO took a pragmatic stance. If the ITO (later GATT) (156) was going to have a significant number of members, it should respect the basic tenements of sovereignty. In cases of war or other emergency in international relations, States needed the possibility to suspend their GATT-obligations for national security reasons (157). The dilemma remained between making the exception very strict, risking to exclude measures needed purely for security reasons, or, creating a wide exception thus opening a serious risk of abuse (158). The option made in the Havana Charter was to have a very broad exception but it was clear that since this exception was open to abuse, it was made subject to consultation, review and the dispute settlement provisions (159). The attitudes of contracting parties in applying this exception soon showed a linkage with the old ideas also employed to interpret the inherent rights of Article 51 of the UN Charter.

The EC referred to Article XXI GATT as a reflection of the inherent right. In the EC's view, the States were the only judges of these rights (160). Contrary to their initial position in the negotiations leading to the Havana Charter, the U.S. also advanced the proposition that « a panel cannot examine or judge the validity or motivation of Article XXI (b) (iii) by the United States » (161). Similarly, Canada took the position that it was a political question and that GATT had neither the competence nor the responsibility to deal with this political issue (162). However these are

(156) The International Trade Organisation never came into existence after loosing the support of the U.S. The results of the Havana conference were partly gathered under the GATT. The GATT agreement in practice functioned like an international organisation but remained a mere agreement. Only with the establishment of the WTO was a real international organisation created. See JACKSON, *supra* note 124, at 178.

(157) See WORLD TRADE ORGANIZATION, *Guide to GATT Law and Practice* 600 (1997). [hereinafter Analytical Index].

(158) *Id.*

(159) See HAHN, *supra* note 105, at 568 ; KUILWIJK, *supra* note 107, at 58-60 ; Rutsel MARTHA, « Presumptions and Burden of Proof in World Trade Law », 14 *J. Int'l Arb.* 95 (1997), David T. SHAPIRO, « Be Careful what you wish : U.S. Politics and the Future of the National Security Exception to the GATT », 31(1) *Geo. Wash. J. Int'l L. & Econ.* 97-118 (1997). It is interesting to note that the Suggested Charter for an International Trade Organization (the U.S. draft that served as the discussion text for the U.S. Havana Conference) explicitly names the security exception as justiciable. See U.S. Department of State, Suggested Charter for an International Trade Organization of the United Nations, September 1945 (Commercial Policy Series 93 ; Publication 2598, reprint).

(160) See Analytical Index, at 600 and 603.

(161) Position of the United States in United States — Trade Measures affecting Nicaragua. See Analytical Index 61.

(162) See Analytical Index, at 600 (contains other examples of States sharing a similar view, e.g. Australia). Even the ICJ has rejected this argument for self-defence. The ICJ holds the view that any question that can be framed in terms of law and to which an answer in legal terms

mere views of the GATT contracting parties (the States), not the view of the CONTRACTING PARTIES (the General Assembly of GATT Members). In the Decision concerning Article XXI of the General Agreement, the extreme views of the GATT contracting parties were rejected and the preamble of the Decision makes an indirect reference to the dispute settlement rules by echoing the wording of Article XIII (163). This Decision is comparable with the stance of the ICJ on the self-judging nature of self-defence. In principle self-defence is not self-judging but in extreme circumstances no clear answer can be given.

Accepting the Article XXI GATT exception as self-judging would potentially undermine the WTO system as much as a self-judging self-defence notion undermines international law. Admittedly, a primary deliberation on the necessity of taking reprisal measures is to be taken by the « injured State ». The wording of the article still leaves a wide discretion on the measures it can invoke (*any action it considers necessary*). But ultimately the security exception is a justiciable issue (164). Article XXI is an exception in the legal sense of the word and not an exemption. In other words, if a State decides to use the Article XXI GATT exception, it will in first instance infringe international law and basic GATT rules, however this action can be justified under the exception (165). The WTO or the State

is possible is a legal question. The fact that is has political aspects is irrelevant and, in international relations, inevitable. The Court believes it to be « in the nature of things » that there are political aspects. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, at 9. 35 *I.L.M.* 818 (1996).

(163) See HAHN, *supra* note 105, at 575, note 83 ; Decision concerning Article XXI of the General Agreement, 30 November 1982 (L/5426), *BISD*, 29th Supp, 1981-82 (38th Session), at 23-24.

(164) The ICJ, in an *obiter statement*, declared that the GATT security exception is self-judging. However, this remark in passing leaves many questions unanswered, such as, is the exception as a whole self-judging or only the first sentence ([...] any action it considers necessary [...]) and what is the legal reasoning for their conclusion. See *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports* (1986), at 116.

(165) In the view of absolute sovereignty, this would not be necessary as the States would simply set the Treaty aside to protect their national security. The Treaty however provides the opportunity to suspend treaty obligations in these circumstances. Or, in the words of Ivan Head : « Sovereignty, at this bridge in time between millennia, is the product of rules adherence ; rules which in the international community are called international law. When any member of that community fails to adhere to rules previously agreed upon, or refuses to respect principles and practices broadly recognized and accepted, it declines in stature and prestige. It will find itself subject to international criticism, as Cuba has in the past, or will be the object of directed dissatisfaction and retaliation, as is the United States in the wake of the Helms-Burton Law. No State, on reflection, wishes or encourages international criticism of its acts any more than any State is capable of living in isolation. Isolation is self-destructive in this era ; it matters not whether it stems from military might or from philosophical ideology. Interdependence is the successor of the Westphalian system. A mutuality of vulnerability, as well as of opportunity, is the essence of the new international structure. » I. HEAD, as quoted by KUILWIJK, *supra* note 107, at 1. See contra J. YOO, « Federal Courts as Weapons of Foreign Policy : The Case of the Helms-Burton Act », 20 *Hastings Int'l & Comp. L. Rev.* 760-761 (1997). Prof. Yoo does not agree with our analysis of the security exception as an exception. He qualifies the article as an « invoker-interprets »-rule that exempts from GATT (and NAFTA) requirements. In his view, any State

against which the reprisals are taken can still use the WTO provisions to defend itself if the reprisals are unjustified since the State relying on the exception has not put itself outside the system (166). The exception is merely a possibility of suspending GATT obligation, but the suspension itself has to be in accordance with the rules of GATT. This conclusion is in line with the overall system of the GATT Treaty (167). All escape clauses in GATT are limited by a set of factual circumstances that need to be present to invoke the escape clause (168). If these circumstances are present, a WTO member can unilaterally decide to depart from its obligation. However, the dispute settlement regulations apply and the WTO member concerned may have to prove the existence of these circumstances (169). The only other way of getting out from under GATT obligations involving direct control from the other WTO members, is to request a waiver (170). In the case of waivers both the exceptional circumstances have to be shown in advance as well as the acceptance by two thirds of the WTO members.

5.3.3. *The Conditions of Article XXI (b) (iii)*

Once established that Article XXI (b) (iii) cannot be solely judged by the WTO member invoking it, we have to look at the constraints under the same article (171). First, the notion « other emergency in international relations » of Article XXI (b) (iii) needs clarification. It has then to be applied to the current situation. Second, the actions of the U.S. supposedly covered by the exception have to be investigated to establish their conformity with the general principles of international law applicable in these circumstances, such as good faith and proportionality. The meaning of « other emergency » depends on how firm one links it to the preceding « war » in Article XXI (b) (iii). If these two notions are taken as a whole, the « other emergency » would constitute any armed conflict short of full-blown war. On the other end of the scale, any « problem » between States more serious than strained relations could be seen as an emergency in international rela-

could arbitrarily invoke national security at will, interpret the notion as it likes and still remain within the boundaries of international law (as no international law would cover these actions presumably). The fact that the notion has been abused in the past can hardly create a precedent (Prof. Yoo advances the Nicaragua case as a precedent) as the use made of the exception was made in bad faith and deceitful : *Fraus omnia corrumpit*. Prof. Yoo concludes his section on GATT/NAFTA with the remark that if the Helms-Burton is to encounter restraints, they must originate from the American domestic legal system.

(166) See HAHN, *supra* note 105, at 60.

(167) See MARTHA, *supra* note 159, at 96.

(168) Except for Article XXI(a) ; See HAHN, *supra* note 105, at 591-592 ; MARTHA, *supra* note 159, at 96.

(169) See Olivia SWAAK-GOLDMAN, « Who Defines Members' Security Interest in the WTO ? », 9 *Leiden J. Int'l L.* 365-368 (1996).

(170) Article XXV(5) GATT.

(171) Article XXI(b)(iii) concerns actions taken in time of war *or other emergency in international law*. (our emphasis).

tions (172). If « other emergency » is seen as having a meaning of its own and is not a mere extension of war, it like war, depends on general international law for its interpretation (173).

On the question what « other emergency » could mean in general international law, several interpretations exist. It has been suggested that the UN Security Council could establish a state of emergency in international relations. This thesis has to be rejected for several reasons : the Security Council is too political, there is a problem with the veto in the Security Council, and finally two members of the Security Council are not members of the WTO (174). Even if we were to support this line of reasoning, it would not support the Helms-Burton Act. In fact, the Security Council has not adopted a resolution against Cuba. The General Assembly even spoke out against the U.S. embargo (175). A linkage with the law of reprisals, as suggested by Hahn, seems more apt (176). According to this view, « other emergency » refers to situations where an international delict has been committed which gives States the right to take reprisal measures such as economic sanctions. This shifts the problem from defining « other emergency » to defining the notion of international delict. As stated, the term international delict has been described by the International Law Commission as « an act of State which constitutes a breach of an international obligation. » The subject matter of the obligation is irrelevant (177). We have already pointed to the fact that the Cuban expropriation was not an international delict that justifies the current reprisal measures (178). If, for the sake of argument, we do accept the expropriation to be an international delict for which reprisal measures could be taken, the reprisals have to comply with the exigencies of the principles of good faith and proportionality (179).

VI. — North American Free Trade Agreement

NAFTA entered into force 1 January 1994. It establishes a free trade zone between the U.S., Canada and Mexico (180). The NAFTA objectives

(172) See Hahn, *supra* note 105, at 593 ; Also see Kuilwijk, *supra* note 105, at 52-53.

(173) This approach gives « other emergency » a meaning of its own, rather than making its existence superfluous. An interpretation that makes words superfluous, contravenes basic rules of interpretation. See Hahn, *supra* note 106, at 593-594 ; Kuilwijk, *supra* note 105, at 52-53.

(174) See Kuilwijk, *supra* note 105, at 53-54.

(175) UN General Assembly Res. 47/19 of November 1992 concerning « the need to put an end to the economic, commercial and financial embargo against Cuba by the United States ». See Kuilwijk, *supra* note 107, at 54 ; Brigitte Stern, « Lois Helms-Burton et D'Amato-Kennedy », 100 *Revue Générale de Droit International Public* 99 (1996).

(176) See Hahn, *supra* note 105, at 593 ; Kuilwijk, *supra* note 105, at 53-55.

(177) See *supra*, note 99.

(178) See *supra* part IV.

(179) See *supra*, part 5.1.1.

(180) Canada — Mexico — United States : North American Free Agreement (Done at Washington on 8 and 17 December 1992, at Ottawa on 11 and 17 December 1992 and at Mexico

include the liberalisation of trade in goods and services, the protection and promotion of investment, the protection of intellectual property rights, and the creation of effective NAFTA implementation (including dispute settlement). The basic principles of NAFTA are, as usual in free trade agreements, the principle of national treatment, the most-favoured-nation clause and transparency (181).

6.1. — *Violations of NAFTA Provisions*

6.1.1. *Free Trade*

The provisions of the Helms-Burton Act seem to be in conflict with the objectives listed in Article 102 NAFTA. These include the most basic principles of the free trade agreement, such as the elimination of trade barriers and the facilitation of cross-border movement of goods and services between the territories of the parties (182). Particularly, Section 302 (liability for trafficking in confiscated property claimed by U.S. nationals) and Section 401 (exclusion of aliens who own or traffic in confiscated property) hinder the free movement of goods and services as certain service providers may be denied access to the U.S. and because the property of traders is liable to seizure when they are found to be traffickers (as defined by the Act). NAFTA was created to establish a framework for further trilateral, regional and multilateral co-operation and to expand and enhance the benefits of free trade as promoted by this agreement (183). Helms-Burton in no way promotes these objectives. Greater co-operation has not been reached by this agreement. In fact, Mexico and Canada voiced clear protests against the Act by diplomatic means, through the appropriate NAFTA channels and by creating blocking legislation. Helms-Burton is the cause of strained relations rather than the promoter of greater co-operation (184).

6.1.2. *Investment Protection*

The security of investment, a right not expressly protected under GATT, is clearly mentioned in Article 1105 (1) of NAFTA. The Agreement grants

City on 14 and 17 December 1992), 32 *I.L.M.* 289 (1983). [hereinafter NAFTA]. The NAFTA is part of the shift in U.S. policy of opening markets to U.S. business through bilateral agreements (e.g. the U.S.-Israel Free Trade Agreement, 22 April 1985. 24 *I.L.M.* 653 (1984) & U.S.-Canada Free Trade Agreement, 27 *I.L.M.* 281 (1987)) rather than trough multilateral agreements such as GATT.

(181) See Article 102 NAFTA ; See also J. HOLBEIN & D. MUSCH, *The Practitioner' Deskbook Series : NAFTA* 14 (1994).

(182) See *supra* part III.

(183) See Article 102(1)(f) NAFTA.

(184) See HOLBEIN & MUSCH, *supra* note 181, at 628-630.

protection to investments in furtherance of its investment promotion policy. Article 1105 (1) reads as follows : « Each party shall accord to investors of another party treatment in accordance with general principles, including fair and equitable treatment and full protection and security. » Article 1105 (1) NAFTA accords this protection to investors of NAFTA signatories irrespective of where they are located and irrespective of the situation of the investment. The protection against direct and indirect nationalisation or expropriation would also extent to *e.g.* a Canadian investment in Cuba (185). Nationalisation or expropriation is possible, both under general international law and under NAFTA. NAFTA, however, requires very strict conditions (186). These conditions are not met when the assets in the U.S. are seized to fulfil claims under Title III of the Helms-Burton Act (187). Articles 1102 and 1104 accord Most Favoured Nation (« MFN ») treatment or better treatment. If a NAFTA signatory accords better than MFN treatment in a bilateral treaty to a non-NAFTA signatory, the advantages will be open to all NAFTA signatories. The Helms-Burton reneges on this part of the agreement for NAFTA signatories who invest in Cuba. Admittedly, the same rules apply to U.S. nationals of other NAFTA countries. However, the question then becomes whether the investments in a non-NAFTA State can make a group of investors distinguishable. If so, the Helms-Burton Act does not violate Articles 1102 and 1104. If the MFN or better treatment has to be accorded because they are NAFTA investors, irrespective of their investments in other non-NAFTA countries, then the Helms-Burton violates Articles 1102 and 1104 (188).

6.1.3. *Expulsion of Aliens*

Apart from the total lack of respect for the basic principles of NAFTA and for the investment protection provisions of NAFTA, a third complaint was made by Mexico and Canada. This complaint concerned the NAFTA-illegality of Title II of the Helms-Burton Act allowing the U.S. to deny entry into the U.S. to any U.S. alien who traffics in confiscated property (189). This is in clear violation of Chapter 16 of NAFTA that is intended to facilitate temporary entry for business persons, on a reciprocal

(185) See Brian J. WELKE, « GATT and NAFTA v. The Helms-Burton Act : Has the United States violated Multilateral Agreements ? », 4 *Tulsa J. Comp. & Int'l L.* 372 (1997).

(186) Article 1110 NAFTA requires that no nationalisations or expropriations take place unless for a public purpose, on a non-discriminatory basis, in accordance with the due process of law and Article 1105(1) and on payment of compensation. The compensation has to be the equivalent of the fair market price and payment is to be made in a G7 currency.

(187) These seizures have been labelled a « privatized form of expropriation ». See *Proceedings XXV Annual Conference of the Canadian Council on International Law : Fostering Compliance in International Law*, 17-19 October 1996, Ottowa, Ontario, at 173.

(188) See TROIA, *supra* note 115, at 620-621.

(189) See *supra* part 3.2.

basis (190). Article 1603 (1) NAFTA is clear : « Each party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this chapter, [...]. » Specific reasons to withhold permission to enter the country are provided in Article 1603 (2) NAFTA. They are concerned with labour disputes. The counter-argument put forward that the exclusion is not absolute and ceases to exist when the trafficking stops is unconvincing in our opinion (191). It has to be noted here that as far as entry into the U.S. is concerned, NAFTA only accords rights to business persons, whereas the sanction for trafficking extends to the spouse, minor child or agent of the trafficker. These will have to rely on general international law to fight the unreasonable refusal to grant entry. This is not an easy thing, as it is part of the sovereignty of the State to decide on granting entry to aliens, however the theory of *abus de droit* might prove a solution (192). Troia points out that the exclusion of spouses and minor children is violative of the new U.S. immigration laws put in place to promote Chapter 16 of NAFTA (193).

6.2. — *Exceptions under NAFTA*

6.2.1. *Exception under the Investment Protection Heading*

According to Article 1113, a NAFTA party may deny the benefits of the investment protection and promotion provision of Chapter 11 to an investor of another NAFTA party that is an enterprise of such a NAFTA party and to investments of such investor if investors of a non-party own or control the enterprise and the denying (NAFTA) party : (a) does not maintain diplomatic relations with the non-party ; or (b) adopts or maintains measures with respect to the non-party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of Chapter 11 were accorded to the enterprise or its investment.

This provision would allow the U.S. to withhold the benefits of Chapter 11 to investors and enterprises of Canada and Mexico, if they are owned or controlled by Cuban investors if one of two conditions are met. First, the denying party (U.S.) maintains no diplomatic relations with the non-party (Cuba), which is the case. Second, the embargo under Helms-Burton is a measure that prohibits transactions with the non-party and the Helms-Burton Act would be circumvented if the protection of Chapter 11 were

(190) Article 1601 NAFTA. See L. GIERBOLINI, « The Helms-Burton Act : Inconsistency with International Law and Irrationality at their Maximum », 6 *J. Transnat'l L. & Poly.* 316, note 2 (1997) ; SOLIS, *supra* note 8, at 733.

(191) See WELKE, *supra* note 185, at 373-374.

(192) See CHENG, *supra* note 64, at 132.

(193) See TROIA, *supra* note 115, at 627.

accorded. The operative phrase on which the argument hinges is « owned or controlled » by the investors of the non-party. If « own » or « control » is interpreted broadly to encompass all investments in Cuba owned jointly with a Cuban investor, or even wider, all investments in Cuba because they are under general governmental control, then this would prove a strong argument for the U.S. We believe that « own » or « control » in this context means that another Cuban investor needs to have a majority stake in the investment or a controlling interest in the investment to comply with Article 1113 (194).

6.2.2. *The National Security Exception*

Although some rights may well be protected under NAFTA's provisions, it may be to no avail. The Clinton government at first maintained that the Helms-Burton Act was fully consistent with NAFTA but it soon had to resort to a new tactic as this position was untenable. They made clear that if the Helms-Burton Act came under attack for its possible NAFTA inconsistencies, the U.S. would rely on the security exception of NAFTA (195). The NAFTA security exception is very similar to the security exception under GATT (196). NAFTA's Article 2102 is said to be self-judging in nature, although each government would expect the provision to be applied in good faith as exposed in the U.S. implementation legislation (197). This stance does not contradict our reasoning for Article XXI GATT in that the primary deliberations are made by the State. In that respect the exception is self-judging. But the exception can only be used for the purpose for which it was created. Any evasive or fictitious use is an abuse of law and contravenes the principle of good faith. The application of the exception in bad faith gives NAFTA signatories the right to a claim under general inter-

(194) See TROIA, *supra* note 115, at 632-634.

(195) See SOLIS, *supra* note 8, at 733.

(196) The NAFTA security exception can be found in Article 2102 : « [...], nothing in this Agreement shall be construed :

(a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests ;

(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests

(i) relating to traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices ; or

(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. »

(197) North American Free Trade Agreement Implementation Act, NAFTA Statement of Administrative Action (1993), reprinted in *H.R. Doc.* No. 103-159, at 666.

national law (198). Note that the security exception is listed *nominatim* in Chapter 16, Article 1603 NAFTA (expulsion of aliens).

VII. — The Financial Institutions

Section 104 of the Act deals with the furtherance of the U.S. foreign policy goals toward Cuba in the international financial institutions (199). The actions described in the Act are twofold. The first action is the continued opposition of the U.S. to Cuban membership in these institutions until the conditions under Section 203 (c) (3) are met (200). As provided for in Section 203 (c) (3), once a democratically elected (transition) government is in place, the U.S. will provide assistance to this government, *in casu* support Cuban application for membership of international financial institutions or when the Cuban government requests a loan or other assistance to contribute to the stable foundations for a democratic government in Cuba. However, if the financial institution grants a loan or assistance to Cuba before the fulfilment of the requirements of Section 203 (c) (3) and over the opposition of the U.S., it would then withhold an amount equal to the loan or the value of the assistance from the institution (201). Clearly, using an international financial institution to support the foreign policy goals of one member is in contradiction with the essence and the *raison d'être* of these institutions. Withholding contributions because the majority in the institution decides to follow a course that is not in line with the foreign policy goals of the U.S. conflicts with the Charter of these institutions (202).

VIII. — Conclusions

When the U.S. Congress passed the Helms-Burton Act in 1996 its main objective was to further U.S. foreign policy towards the Cuban regime by continuing the isolation of targeted country by imposing severe penalties upon persons and companies investing in Cuba. From an international law perspective, several arguments have been advanced to criticise the Act for being extraterritorial, imposing an secondary boycott, violating the principle of sovereignty and non-intervention in domestic matters, and infringing rules of international economic organisations such as the NAFTA and the WTO, as well as several charters of international financial institutions.

(198) See e.g. Troia, *supra* note 115, at 636-638. See *contra* Welke, *supra* note 185, at 376.

(199) See *supra* text accompanying note 39.

(200) The election of a democratic transition government.

(201) See section 104(b). Also see S. Lucio II, « The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 : A Critical Analysis », 27 *Inter-Am. L. Rev.* 340 note 2 (1995-96).

(202) See Stern, *supra* note 175, at 1001 n.4 (1996) ; Gierbolini, *supra* note 190, at 318.

The EU reacted to the Helms-Burton Act by first using diplomatic means, followed by blocking legislation. Finally, the EU was prepared to fight the battle on legal grounds within the WTO dispute settlement procedures. In the WTO dispute settlement procedures, one of the key issues was how the panel would interpret the « national security exception ». However, the dispute never reached the establishment of a panel since during the WTO dispute settlement procedure the parties opted for a political settlement. Under pressure of the U.S. that threatened to bring the whole WTO system into jeopardy, the EU, on 17 April 1997, agreed to freeze the case on the condition that the U.S. would limit the effects of the Act on both the European companies and persons affected by the U.S. legislation. As such, the U.S. Administration committed itself to suspend Title III of the Helms-Burton Act, relating to « trafficking » in expropriated U.S. property during the remainder of President Clinton's second term and to consult with Congress in order to obtain an amendment to Title IV of the Helms-Burton Act with a view to giving the President the authority to waive this title. The EU in turn, agreed to join the U.S. in stepping up their efforts « to develop agreed disciplines and principles for the strengthening of investment protection, both bilaterally and in the context of the Multilateral Agreement on Investment (MAI) or other appropriate fora » (203). One year later, on 18 May 1998, the commitments were further concretised in a compromise to limit the effects of the Helms-Burton Act in return for the development of agreed disciplines and principles for the strengthening of investment protection primarily in the context of the ongoing MAI-negotiations. The new agreement created the Transatlantic Partnership on Political Cooperation and was accompanied by two Understandings (204) and unilateral statements of both parties (205).

These agreements support the U.S. Act that has been criticised as incompatible with international law. It only served to end the negative consequences of the Act for the EU but leaves the situation for other States unaltered. This situation likely violates U.S. obligations under interna-

(203) European Union-United States : Memorandum of Understanding concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act (11 April 1997), 36 *I.L.M.* 529 (1997). See Kinka GERKE, « The Transatlantic Rift over Cuba. The Damage is done », 22(2) *Int'l Spectator* 51-52 (1997). For an explanation of the 1997 Understanding from an U.S. point of view, see e.g. Undersecretary for Economic, Agricultural and Business Affairs, Stuart E. Eizenstat, *Remarks before the North American Committee of the National Policy Association* (Washington D.C., 7 January 1998) <http ://www.state.gov.www.policy—remarks> and for a European perspective, see Statement by Sir Leon Brittan (11 April 1997) <http ://www.eurunion.org/news/press/>.

(204) Understanding with Respect to Disciplines for the Strengthening of Investment Protection and Understanding on Conflicting Requirements.

(205) The text of the 1998 Agreement can be found in Delegation of the European Commission to the United States, Guide to the EU-U.S. Summit (London, 18 May 1998) <http/// www.eurunion.org/news/uksummit.htm>. See generally Stefaan SMIS & Kim VAN DER BORGHT, « The E.U.-U.S. Compromise on the Helms-Burton & D'Amato Acts », 93(1) *Am. j. Int'l L. 227-236 (1999).*

tional economic law including several GATT and GATS objectives. Moreover, if every time the foreign policy of a State would be seen as falling under a broadly interpreted national security exception and consequently WTO members could negotiate separate agreements infringing both the letter and the spirit of the WTO system and thus prejudice the rights of WTO Members, it would probably limit considerably the effectiveness of the world trading system. It can not be that parties are claiming that they are willing to settle trade issues by judicial means and use the system only when minor interests are involved. They should fully commit themselves to the world trading system even if at times important foreign policy matters are at stake.