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The Helms-Burton law and its consequences for Cuba, the United States and Europe

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Introduction

That it once was aimed at a political change in Cuba has almost been forgotten: The ”Helms-Burton”[1] law did not lead neither to the overthrow of Fidel Castro’s government nor to any political opening on the socialist Island 90 miles south of the United States. Instead, its extraterritorial extension of United States sanctions against Cuba has provoked worldwide protest from other countries’ governments and has led to a prolongued dispute between the United States and Europe. Because of this, it has become popular to say that the Helms-Burton law did not isolate Cuba, but the United States. This, however, overlooks that in spite of its almost universal rejection the Helms-Burton law in did in fact prove to be a quite functional instrument in the political logic of the U.S. reaffirming its claim to political leadership in the world, and, any more so, in its ”backyard”.

It were precisely the threats against third country business and trade with Cuba that caused the most international troubles but that at the same time served most efficiently as a mechanism of pressure and intimidation with the European countries. It is argued in this paper, that the Helms-Burton law has been helpful for the United States in bringing about a significant approachment of the European Union’s policy on Cuba to the positions held by Washington. The Understanding of May 18, 1998, with which the European Union and the U.S. put an end (for now) of their dispute over the Helms-Burton law, has indeed confirmed this.

In the international debate the Helms-Burton law has often been qualified as ”anachronistic” or as the expression of a supposed ”irrationalism” of U.S. policy towards Cuba. Many times it has been argued, too, that putting the property claims of pre-revolutionary Cuba at the center of U.S. policy towards the Island, the law is simply the result of very particular interests and pressures of the Cuban exile community in the U.S..

These arguments certainly have some truth to them; however reducing the analysis to them falls short. Besides all irrational aspects and particular interests involved in the case, there is -

[1] So named for its sponsors, the Senator (R) Jesse Helms and the Representative (D) Dan Burton. Its official name is *Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996.* The full text of the law as well as related official documents and declarations of the U.S. government can be found in the internet: www.usia.gov/topical/econ/libertad/libertad.htm

as shall be argued here - a political logic and functionality to the Helms-Burton law for the United States as a superpower with hegemonic aspirations.

For this, the present text will first look at the political dynamics that led to the tightening of the U.S. embargo measures against Cuba in the form of the Helms-Burton law in March 1996. Then the legal dispositions of the ley and its repercussions in the international juridicial and commercial system will be examined. Also we will discuss its - generally underestimated or neglected - consequences and implications for the future political development in Cuba itself and for the long-term relations between the U.S. and the Island.

On this background it will be shown how the European protest against the extraterritoriality of the sanctions has gone hand in hand with a gradual approachment of the EU's Cuba policy to positions held by Washington. For Cuba, the Helms-Burton law has reduced drastically the space for any process of political opening in dignity "from within" or "from the Revolution"; perhaps it has turned this option completely impossible in the foreseeable future.

The political dynamics behind Helms-Burton becoming law

The Helms-Burton law has not been, as quite a number of press articles have tended to suggest, some sort of "accident" of the United States' foreign policy. To the contrary, it is the most recent step in a three and a half decade old effort of the United States to bring the Castro government down by exerting economic pressure. Since 1960 the U.S. embargo prohibits U.S. companies trade and commerce with Cuba. And also before the Helms-Burton law this embargo had affected business interests of third countries, for instance with the prohibition to import products to the U.S. that contain Cuban nickel.[2]

Many expected that with the downfall of the socialist countries in Eastern Europe in 1989/90, Cuba would be the next domino to fall almost automatically. But as time went by and this did not take place the United States Congress in 1992 passed the so-

2 Before the Revolution, the United States had been Cuba's by far most important trading partner. As long as the Cold War lasted, Cuba found a solution to the United States' embargo and trade pressures in its integration in the international economic system of the socialist countries. It is with the breakdown of these relations since 1989/90 that the U.S. embargo against Cuba is being felt with all its weight in the Cuban economy. Although it's a permanent phrase for Castro's government propaganda, there certainly is very little doubt that the U.S. embargo is a most severe restriction to any proyect of economic recuperation in Cuba. (For a discussion of the economic costs of the embargo see Zimbalist 1994.)

called ”Torricelli law”[3]. Already this law establishes explicitly what years later with the Helms-Burton law was to become the principal point of dispute between the United States and Europe (and practically the rest of the world): the extraterritorial application of United States law.

With the Torricelli law the U.S. embargo was carried beyond the countries boundaries by formulating sanctions against subsidiaries of U. S. companies in third countries, meaning that no Coca Cola factory in Mexico or General Motors owned car plant in Great Britain could have commercial relations with Cuba. This led to an unanimous disapproval by the potentially affected third countries. However, the conflict remained at a rather low level. Washington did not really enforce the measure consistently, with the effect that the European and other governments did not feel a sufficiently strong need to raise a major conflict on the issue.

The Torricelli law not only augmented Cuba`s costs for commerce and transport of goods, but on a wider base it complicated the reinsertion of Cuba into the capitalist world economy, a strategy which the Cuban government, forced by circumstances, adopted since the early 1990s (see Carranza et al. 1995; Hoffmann 1995). If the goal of the law was, as stated by its official name, the ”Cuban Democracy” (in the sense the United States understands ”democracy”), then without doubt the Torricelli law has been unsuccessful. However, Cuba policy in the United States continued to be dominated by those political forces that argued that this failure was not due to the Torricelli Act’s strategy of economic strangulation, but as still having too little of it.

As explication for this continued hold of the hardliner on Wahington’s Cuba policy a frequent argument points at the influence of the right-wing Cuban exiles that seemingly can dominate U.S. policy towards Cuba at will, accompanied with the argument that it is ”irrational” that such a small minority shall dictate the policy of the world’s leading power. Again, this thesis certainly has truth to it. The community of Cubans that emigrated to the U.S. since 1959 is in its majority certainly profoundly ”anti-castrista”, and the Cuban community in the U.S. certainly commands proportionally much more economic and financial ressources than any other immigrant group from Latin America. Also, with the Cuban-American National Foundation the right-wing exiles have succeeded in establishing an organization that has shown great efficiency in lobbying in Washington’s political arena.

Still, in this proportions tend to get lost. It is a myth that the Cuban-Americans can dictate U.S. policy at will; they can do

[3] So named for the Representative (D) Robert Torricelli; official name: Cuban Democracy Act.

so only in the measure in which their specific interests can be based on a general hard-line anti-Castro-attitude in important parts of the non-Cuban political establishment of the U.S.. In other cases - for instance as the cuestion of Cuban immigration - this is not the case, in spite of all economic power, electoral weight or political lobbying.

As a result, the tightening of the U.S. sanctions against Cuba usually is implemented in moments, when a political crisis stirs not only the emotions of the Cuban exile community, but of the general U.S. public as well. An example of this was the ″balseros″ (″rafters″) refugee crisis in summer of 1994, when the Cuban government declared its borders open and more than 30.000 Cubans abandoned the Island on improvised boats or rafts heading for Florida. As a measure of ″retaliation″ the Clinton government announced a drastic cut on the dollar remittances allowed for Cubans in the U.S. to send to their relatives on the Island - a kind of ″family solidarity″ that since the legalization of the U.S.-dollar in Cuba in 1993 has become by many estimates the single most important hard-currency income for the economy of socialist Cuba[4].

In spite of the sanctions, in the end the crisis was ended by an agreement between Washington and Havanna, where the United States accepted a substantial change in its immigration policy towards Cuba, agreeing to send ″illegal refugees″ back to the Island. The pressure groups of the Cuban exile community simply were neither invited nor informed until after the accord was signed. Their spokespeople strongly denounced this agreement, calling it ″treason″ and ″a pact with the devil″, but they at no time had any real posibility to challenge it politically.

This defeat led the hardliner in the Cuban exile to concentrate more than ever on another project: the Helms-Burton law, presented to Congress in february 1995 by Senator (R) Helms and Representative (D) Burton. For a long time the fate of this initiative seemed uncertain. In fact, it was approved by the House of Representatives, but in the Senate only a modified version passed. Moreover, President Clinton had repeatedly declared he would veto the Helms-Burton law in its present form.

Once again a political crisis cleared the way, that had strong repercussions in the broad U.S. public, not only in the Cuban

[4] For 1994 the Banco Nacional de Cuba showed in Cuba’s balance of payments an amount of U.S.-$ 574,8 millons under the title ″current transfers″, which, as is expressly explained, is attributably ″primarily to donations and remittances″ (Banco Nacional de Cuba 1995, p. 20-21) - a figure hihger than that year’s net income through Cuba’s main export product, sugar. Since then, this tendency has increased. For 1997 this item is estimated at around U.S.-$ 800 million (IRELA 1997, p. 4).

community: The shooting of two unarmed Cessna planes by the Cuban airforce in February 1996, killing the four crew-members, all of them U.S. citizens of Cuban origin.

The planes belonged to the Cuban exile organization ”Hermanos al Rescate” (Brothers to the Rescue), originally founded to save Cuban ”boat people”. Since the immigration accord between Washington and Havanna had left the ”Hermanos” pilotes much without that task the organization decided to launch a strategy of calculated provocations by violating Cuban air space. The details of the shooting of the two planes are still subject to debate (especially the question if it took place over international waters or within Cuba’s national air space). What is certain, however, is that the strategy of provocation did succeed in provoking: the fatal shooting produced an outrage of protest in the U.S.. The proponents of the Helms-Burton law had no difficulty in using the general indignation against the Castro government to have the law passed within only ten days, approved by an overwhelming majority in both chambers of Congress.

It is an open debate if the Helms-Burton project would have become law without having occurred this incident.
In international conferences organized by the Institute for European-Latin American Relations (IRELA, Madrid) and the Center for International Policy (CIP, Washington D.C.) in Sitges (8-10 july 1996) and in Washington D.C. (9-11 february 1997), the opinions were divided. Dan Restrepo, then a Democratic Professional Staff Member on the House International Relations Committee and closely involved in the issue, argued that by february 24 - the day of the shootdown of the planes - the proponents of the law already had secured a majority vote for Helms-Burton (v. Restrepo 1996). The lawyer Robert Muse, equally closely involved in the issue, and Wayne Smith, former head of the U.S. Interest Section in Havanna, had good arguments to consider the race not yet decided by that date. However, what is beyond doubt is that the shooting of the planes accelerated enormously the aprobation of the Helms-Burton law; moreover, the outraged public opinion made possible, that in the few days between the incident and the passing of the law a number of passages were introduced or changed, radicalizing it even beyond the initial project, without encountering protest or even public discussion (see Whitehead 1996, pp. 5 and 8; Pérez-Stable 1996).

Cuban official representatives energically reject any interpretation that on these grounds give the Cuban government some share of responsbility for the smooth passing of the Helms-Burton law. However, directly after the incident, Fidel Castro justified the shooting of the planes in an interview with ”Time”, saying that it had been an inevitable step to take, although the

Cuban government had been aware that it would be politically exploited in the U.S..

> Castro: ”We reported each and every violation [of Cuban airspace - B.H.] to the United States in a diplomatic protest. We warned U.S. officials time and again. We had been patient, but there are limits.”
> Time: ”Nevertheless, the Helms-Burton bill was dormant. The wisdom of the embargo was being openly debated.”
> Castro: ”We realized the incident would be exploited as an issue between Cuba and the U.S. and would become an issue in the American presidential election. But, in addition to these flights, there was also interference by the U.S. Interests Section in our internal affairs. What these people were doing was intolerable. They were giving money and paying the bills of dissidents. They were visiting the provinces and promoting opposition to the government under the pretext of checking on rafters returned from the U.S. And all the time we were just watching. It was intolerable. And then there were flights.” (Time, 11.3.1996, S. 22)

It is remarkable that Fidel Castro himself expressly links the shooting of the airplanes with the internal opposition in Cuba. Indeed, the shootdown took place on precisely the day for which the dissident umbrella organization ”Concilio Cubano” had convened its first nation-wide meeting. It is to assume that a strong intimidating effect of the Cuban air force’s action certainly was part of the calculation when giving the order to shoot. Since the Cuban government has always attacked internal opposition groups as being at the service of the Cuban exile or the U.S., now the internal conflict could once again be interpreted as part of the external aggressions against Cuba.

Under the pressure of events, President Clinton did not veto the Helms-Burton law, but instead signed it in a solemn ceremony in the presence of family members of the four killed pilots. His only condition was a waiver to suspend for six months the application of the law’s internationally most controversial Title III. But before going into further detail on this, the dispositions of Title I and Title II shall be examined, which received much less attention, but which have far-reaching political consequences that should not be underestimated.

A straight-jacket for Washington’s Cuba policy (Title I)

The first of the four titles, in which the Helms-Burton law is divided, lists a long catalogue of U.S. sanctions and threats against Cuba, that in many cases reaffirm or extend already existing measures[5]. However, of particular importance is the fact

[5] This includes, among others, the following issues:
- in all international financial institutions such as the IMF, the World

that to all these measures and sanctions taken by the U.S. executive Helms-Burton now attributes the status of law. Thus, in legal terms it is now only the legislative body - that is the U.S. Congress - and not the President who can lift these sanctions, this, of course, being a politically much more difficult process.

By this, the U.S. embargo policy against Cuba has been solidly frozen and immunized against change. If in the political system of the U.S., foreign policy is a domain of the President, Title I of the Helms-Burton law marks an enormous transfer of political competence away from the Executive and to the Congress, reducing strongly the possibilities for any President to change the course of U.S. policy towards Cuba.

About this ”straight-jacket” for the U.S. policy on Cuba established by Title I of the Helms-Burton law, William Leogrande (1997, p. 214) writes: ”Although the trafficking provisions of Helms-Burton [Title III and IV - B. H.] have received the most press attention because of their potential for diplomatic mischief, the bill’s most important title is the one that writes the U.S. economic embargo into law. Apart from his ability to suspend the trafficking provisions of Helms-Burton, Clinton is left with almost no discretion in formulating U.S. policy towards Cuba.”

The long shadow of the Platt Amendment (Title II)

While the sanctions of Title I are directed against the current Cuban government, in Title II the guidelines of U.S. policy towards the hoped-for future Cuban governments are sketched out (”Assistance to a Free and Independent Cuba”). However, here,

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Bank, etc., the U.S. has to oppose any form of loan or financial aid to Cuba. If a loan or aid is given over the United States’ opposition, the U.S. shall withhold from payment to such institution an amount equal to that loan or aid (§ 104);
- a reinforcement of the prohibition to import merchandise from third countries that contains Cuban products (such as nickel or sugar) (§§ 108, 110);
- U.S. financial assistance to the succesor states of the Soviet Union shall be reduced by the same amount in which these assist or engage in nonmarket based trade with Cuba (§ 106);
- U.S. financial assistance to Russia shall be reduced by the same amount that Russia is paying for the utilization of the intelligence faculties in Lourdes, Cuba (§ 106 d);
- withholding of U.S. assistance from countries that engage in the construction or financing of the Cuban nuclear power plant at Juraguá (§ 111);
- moreover the law establishs that the ”completion and operation of any nuclear power facility or any further political manipulation of the desire of Cubans to escape that results in mass migration to the United States will be considered an act of aggression which will meet with an appropriate response” (§ 101, 4A).

where the hard-liners wanted to put the carrot of assistance from the U.S. in contrast to the stick of the present day sanctions, the Helms-Burton law confirms the worst expectations.

Title II establishs that the U.S. President may take whatever steps towards a lifting of the embargo only after he has demonstrated to Congress that in Cuba a ”transition government” is in power (Sec. 204a). In continuation a long list of conditions defines via U.S. law what may be considered a ”transition government” in Cuba. It must have ”legalized all political activities” (Sec. 205a, 1), ”released all political prisoners” (Sec. 205a, 1) and ”dissolved the present Department of State Security in the Cuban Minstry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades” (Sec. 205a, 3). It must also have made ”public commitments to organizing free and fair elections (...) to be conducted under the supervision of internationally recognized observers” (Sec. 205a, 4), as well as establishing an independent judiciary (Sec. 205a, 6 A) and allowing the establishment of independent trade unions (Sec. 205a, 6 C). It must be making ”demonstrable progress” in ”granting permits to privately owned media and telecommunications companies to operate in Cuba” (Sec. 205b, 2 A), in assuring the right to private property (Sec. 205b, 2 C) and in ”taking appropriate steps to return to United States citizens (...) property taken by the Cuban government (...) after January 1, 1959, or to provide equitable compensation” (Sec. 205b, 2 D).

And whereas the law initially declares that the U.S. government will ”not provide favorable treatment or influence on behalf of any individual or entity in the selection by the Cuban people of their future government” (Sec. 201, 10), a few parragraphs later Washington's requirements extend explicitly into personnel policies: "For the purposes of this Act, a transition government in Cuba is a government that (...) does not include either Fidel Castro or Raúl Castro" (Sec. 205a7).

From the point of view of Cuban functionaries, no matter how reform-oriented they might be, this catalogue of conditions describes less a transition government than an already carried out and nearly complete change of power. And all this note bene defined by U.S. law.

But the Helms-Burton law does not even promise an end to the embargo in return to a Cuban government fulfilling all the above requirements. Instead, the construction of the law itself implies that an only gradual lifting of sanctions will be used as a mecanism to influence and control the Cuban government for quite some time even after the demise of Fidel Castro and the one-party-state - just like the government of Violeta Chamorro in

Nicaragua was confronted with economic pressures from the U.S. still years after the electoral defeat of the Sandinistas (see Leogrande 1997, p. 215).

Moreover the Helms-Burton Law also stipulates further conditions and requirements for what the U.S. would recognize not only as a ”transition government” but finally as a full-fledged "democratically elected government", giving the U.S. ample field of action to pursue their interests. Sec. 206 clearly states that a "democratically elected government" by no means simply means, as one might think, a government that has been elected democratically. Instead it must be ”substantially moving toward a market-oriented economic system based on the right to own and enjoy property” (Sec. 206, 3) as well as having made ”demonstrable progress in returning to United States citizens (...) property taken by the Cuban Government (...) or providing full compensation” (Sec. 206, 6).

With this the law aims to dictate the cornerstones of Cuban politics far beyond the end of the Castro era. It thus in fact enters into the heritage of the notorious Platt Amendment, anchored into the Cuban constitution in 1901, which ceded to the U.S. the right of intervention and became the symbol for the half-colonial dependence of the new Cuban Republic.

This is unpalatable even for many Cubans who are resolute Castro opponents. "Under Helms-Burton, Cuba would pass from the dictatorship of Fidel Castro to the tutelage of the U.S. Congress," objected Alfredo Durán (1995: 3), a former participant in the Bay of Pigs invasion and currently one of the leaders of the moderate forces within the Cuban exile community, in a U.S. Senate hearing: "The specifications in the proposed Act (...) establish parameters for democracy in Cuba that are unequivocally the prerogative of the Cuban people."

Thus, Title II presents far-reaching and disastrous political perspectives for Cuba. If actually in Cuba a political change as desired by the anti-Castro hardliners should come about, then the Helms-Burton law will be the congenital defect of the new political order, just like the ”Platt Amendment” was for Cuba’s first republic. But as for now the Helms-Burton law has only one immediate effect: it strengthens the most rigid tendencies within the present Cuban system. For anyone among Cuba's political leadership or functionaries who might have the courage to set out for some form of political opening, the Helms-Burton law shows only a deep abism and no space for a reform process, in dignity and from within and with viable perspectives for ”the day after”.

The extraterritoriality of U.S. sanctions (Title III and IV)

The international debate about the Helms-Burton law was, however, limited only exclusively to its titles III and IV. The extraterritorial outreach of U.S. sanctions policy is aimed at deterring trading partners and investors from doing business with Cuba and thus isolating the Cuban economy. Title III gives United States citizens and companies, whose properties had been confiscated after the Revolution, the right to file a claim against third country companies, who benefit from the use of this confiscated property. Complementary, Title IV calls for the denial of U.S. entry visas to managers, owners or majority shareholders (including their family members) of foreign companies that are subject to claims under Title III (Sec. 401).

This provision results especially explosive since the Helms-Burton law extends the right to file suits *as U.S. citizens* to all Cuban exiles who were Cuban citizens at the time of expropriation and who only later, after having emigrated to the U.S., acquired U.S. citizenship. This clause modifies in decisive form the impact: whereas from owners who were U.S. citizens at the time of expropriation only about 800 claims are expected, from the Cuban exiles living in the U.S. and having acquired U.S. citizenship after emigration, an avalanche of some 300.000 to 430.000 can possibly be expected (Muse 1996).

Title III of the Helms-Burton law retroactively extends the jurisdiction of U.S. courts to the claims of persons, who were expropriated in Cuba, as Cuban citizens, by a Cuban government and in accordance with Cuban laws. This is in open contradiction with the principles of international law as well as with prevailing U.S. legal practice. The U.S. Foreign Claims Settlement Commission itself some 30 years ago had stated categorically: ”The principle of international law that eligibility for compensation requires American nationality *at the time of loss* is so widely understood and universally accepted that citation of authority is scarcely necessary.”[6] As Muse concludes: ”It is simply unlawful under established international jurisprudence for the U.S., pursuant to Title III of the Helms-Burton law, to lend support and assistance to the claims of Cuban Americans with respect to properties taken from them while they were Cuban cititzens” (Muse 1996, p. 7).

And the Cuban journalist Luis Manuel García (1996 p. 34), now residing in Spain, points to the following: ”Even if the Helms-Burton law stipulates that the President of the United States may remove it once the Island has been democratized, the claims made up to that date will have to be satisfied”. And, García adds, it

6 Claim No. IT-10, 252, Dec. No It-62, cited by Muse 1996, p. 6

is clear that it will not be the Castro government who will pay the price of restitutions determined by U.S. law courts, ”so that we get the following paradox: a law directed against Castro will only affect the ‘transition government’ or the ‘democratically elected government’ which - at least in the theory of this law - will succeed him” (García 1996 p. 34).

Although an extended review of the legal discussion brought about by the Helms-Burton law cannot be presented here (cf. Irela 1996b), it is inevitable to just briefly draw the attention to a second, very central aspect: the extraterritorial caracter of the law. In her analysis of the problem of the so-called ”secondary sanctions” Jean Anderson (1997, p. 2), an economic and legal advisor to U.S. government institutions for many years, writes: ”(...) the two most recent sanction bills enacted by the United States, which target Cuba, Iran and Lybia, go beyond previous sanctions by imposing sanctions not only on U.S. interests investing and trading with these countries, but also on firms or individuals located in other countries that trade with the sanctioned country. This shift to ‘secondary’ sanctions or ‘secondary boycotts’ is significant. Previously, the United States had firmly opposed secondary sanctions as extraterritorial measures that impermissibly infringe on the sovereignty of third countries. In fact, compliance with the Arab boycott of firms that trade with Israel has long been a violation of U.S. law. The United States now has come a full circle from the 1970’s and 1980’s, when it universally decried secondary boycotts, by erecting secondary sanctions of its own.” It comes as no surprise that the countries now affected by Washington’s secondary sanctions oppose them as much as the United States traditionally have opposed this kind of measures.

United States and Europe: Conflict and Cooperation

For most European countries the volume of trade and investment with Cuba is a rather small figure in their foreign trade balance. However, the extraterritoriality of the Helms-Burton law sets a precedent for the fundamental rules of economic relations in the post-war world.

Parallel to the protest on the political and diplomatic level, in many countries an explicit ”anti-Helms-Burton”-legislation was adopted or previously existing ”blocking legislation” extended or modified[7]. At the level of the European Union binding regulations

7 In Great Britain the ”Protection of Trade Interests Act” (PITA) of 1980 was reactivated. In Canada a similar legislation - the ”Foreign Extraterritorial Measures Act” (FEMA) of 1985 - had already been activated in 1992 to counteract the Torricelli Law and was again extended in response to the Helms-Burton law. In Germany article 4 of the Regulation on Foreign Trade prohibits that any German company

were passed that prohibit European companies to comply with the Helms-Burton law; and even more, European companies sued in the United States under the provisions of Title III are given the right to file a counter-claim in European courts (Irela 1996b, p. 5; Anderson 1997, pp. 12-15). In addition, the European Union called upon the World Trade Organization to settle the dispute, meaning: to condemn the extraterritorial provisions of the Helms-Burton law.

Given the almost universal international protest against the Helms-Burton law it has often been said, that Helms-Burton has not so much isolated Cuba as it has isolated the U.S.. In legal discussions and in reference to the extraterritorial aspects of the law, this might indeed be the case. However, at a political level - and this is often generously overlooked - it is not quite so: On the one hand the European Union has vocally protested against the extraterritorial provisions of Title III and IV; parallel to this, however, a notable stiffening of the EU's position on Cuba and a relative approachment to the U.S. positions has taken place.

This change of policy has found its prominent expression in the European Union's so-called "Common Position" on Cuba approved in december 1996 as a binding foreign policy document (published in: Encuentro de la Cultura Cubana No 3, Madrid, 1997, pp. 134; cf. also Irela 1996b). In this document the extension of economic aid to Cuba is explicitly linked to progress in the human rights record and the guarantee of political liberties. Also an amnesty for political prisoners and a revision of Cuba's penal code are given high priority; in its efforts for a dialogueue with Cuba the EU is called upon to include more strongly non-government organizations on the Island.

It should be noted that this declaration leaves quite some room for interpretation and the policy toward Cuba. And it also must be added, that this step has not only been brought about by the Helms-Burton law but that other factors have been important, too: First, the open failure of the EU-Cuba talks on a cooperation agreement started in september 1993; second, the change of government in Spain in May 1996 where the socialdemocratic government of Felipe González, for years the driving force in European contacts to La Habana, had to cede to the conservative Partido Popular with José María Aznar at its head. Already in his election campaign, Aznar had promised a turnaround of Spain's Cuba policy, and after taking office he rapidly followed up on this. Precisely on the occasion of a visit of U.S. Vice-president Al Gore to Madrid, Aznar anounced an end to Spain's economic

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complies openly to an embargo legislation against a third country (see Richter 1996, p. 6) - a clause originally introduced as a response to the Arab boycott against Israel.

assistance to Cuba, thus presenting the Spanish change of policy explicitly as closing files with the U.S. government.

It must be noted that Spain's Aznar government, too, has protested against the extraterritoriality of the U.S. sanctions under Helms-Burton. However, it obviously bets on a combined strategy of protest on one hand and a noted alignment with the general U.S. Cuba policy toward Cuba on the other, hoping that by this combination Spain will be spared from the full weight of possible sanctions.

The policy of the European Union in general tends in the same direction, although in less drastic forms, but with the same logic. At the above mentioned Helms-Burton-conference in Washington D.C. in 1997 an interesting situation arose when the U.S. government's special representative for the Helms-Burton law, Stuart Eizenstat, and the ambassador of the European Union in Washington, Hugo Paeman, were to discuss their positions on a panel. As a result of his mission to Europe, Eizenstat could declare: ”The response of our allies has been extremely positive!”, so that the President of the United States would continue to use his waiver every six months to suspend Title III of the Helms-Burton law ”as long as Europe continues to step up its efforts on democratization in Cuba”. The inverted lecture of this argument is, of course, an open threat: Washington could apply the sanctions fully at any time, if Europe does not stay in line with what the U.S. sees as the right ”stepping up of efforts on democratization in Cuba”.

Right from the start, Eizenstat and Paeman refused to call their panel a ”dispute”, but insisted instead on the term ”dialogue”. Effectively Ambassador Paeman limited himself to criticize the extension of U.S. sanctions to third countries, only to give proof time and time again that the EU shares the general postulates and goals of the U.S. Cuba policy: ”We are on the U.S. side in this issue”, ”as far as the ultimate goal there is no diference at all”, etc. arguing that there is no need that the U.S. apply unfriendly measures against such a good ally.

Seen in this perspective the Helms-Burton law does not seem quite that ”irrational”. Instead, a person like Dan Fisk, an aide to Senator Jesse Helms, explained the political calculation of using the threat of the sanctions to intimidate the Europeans as trading partners and as foreign policy actors in the Cuban case: ”Although the European uproar over the LIBERTAD Act continues, as does the rhetoric about ‘secondary boycotts’, ‘extra-territoriality’ and ‘international law’, the subject of Cuba as something other than a place to sit on the beach has begun to enter into their policy calculations. Since the enactment of the LIBERTAD Act, there have been unprecedented political and

diplomatic initiatives taken by the international community on Cuba. The most notable achievement is the adoption of a 'Common Position' by the 15-member European Union (...) This position clearly conditions future European relations with Cuba on specific and concrete progress towards democracy (...) The fact ist that the EU policy was codified, in effect, in a legally-binding document after the enactment and as a result of the LIBERTAD Act." (Fisk 1997, S. 5). Not in his manuscript but in the freely spoken part of his presentation Dan Fisk found this enchanting metaphor to illustrate the effect of the Helms-Burton-threat on the European Union: "It improves a man's concentration wonderfully if he knows that he will be hanged in a fortnight."

The Understanding between the United States and the European Union

The full application of Title III would lead to some kind of trade war with law suits and counter-law suits that certainly is not in the interest neither of the EU nor of the U.S.. In this situation the suspension of Title III by the Presidential waiver every six months results not as much a "defect" of the law as much rather its condition of success in terms of a big-stick diplomacy: the sword of Damocles is only effective as a deterrent as long as it is suspended over the heads. The U.S. scholar Susan Kaufman Purcell found with satisfaction that in spite of such a "messy" law as is the Helms-Burton it places the U.S. currently in "the best of all worlds: keeping the menace of the Title III sanctions, but not applying them"[8].

In this context, in April 1997 the United States and the European Union reached an agreement to postpone their conflict in the World Trade Organization. The EU suspended its suit against the U.S. and made (although unspecified) promises to discourage European companies from investing in illegally confiscated properties not only in Cuba but anywhere in the world; for its part the Clinton government formulated a non-binding declaration of intention to suspend Title III for the rest of its mandate (see El País, 12/4/97 y 17/4/97). "The deal relies heavily on promises by President Bill Clinton's administration of efforts - rather than firm guarantees of action - to limit the application of Helms-Burton", comments the Financial Times (14/4/97) and sees the European Union as the loser in the conflict: "The EU has blinked"[9].

After all there had been little doubt that the WTO would have had to decide in favor of the European Union. The problem was, however, that even before any such ruling the Washington

8 At the mentioned CIP/Irela Washington conference 9-11 Feb 1997

9 For a contrary evaluation see the interview with the head of the EU delegation, Leon Brittan, in his interview in El País, 27/4/1998.

government had prophilactically declared that it would simply ignore it, declaring the Helms-Burton law and all its parts a matter of ”national security” and thus challenging the competence of the World Trade Organization. As Stern (1997) arguments, a not necesarily unintended side-effect of the Helms-Burton law has been to demonstrate the dominant world power’s capacity to define the ”rules of the game” after the end of the Cold War and to show its power to raise itself above the international norms and institutions, if necessary.

In addition the U.S. government had ”warned” that any WTO sentence against the U.S. would be fresh ammunition for ”the strong anti-WTO current in Congress and in the U.S.”, as Eizenstat on the mentioned Washington conference underscored. These might question the whole setup of international regulatory institutions and demand the withdrawal of the U.S. from them. In its result this constellation functions as a tacit division of labor: the Executive presents itself as the moderate force and the only one that can prevent more radical forces to prevail; thus the Europeans, in their own good, should support the U.S. President even on measures they don’t like, but that they should learn to see as the lesser of two evils.

On May 18, 1998 the United States and the European Union reached an agreement that goes much further than the accord of 1997 and that (for now) has put an end to the dispute. This ”Understanding about Expropriated Property” places the Cuban case in a generalized context. But in the end, this agreement has meant that the European Union, which never has pronounced itself in relevant form on the first two titles of the Helms-Burton legislation, now also de facto accepts much of the postulates of title III and IV. Actually, the Understanding does not revoke or modify the extraterritorial character of the law itself but simply excludes one region of the world - the European Union - from its full application. The extraterritoriality of the U.S. law, so strongly attacked by European governments as ”a matter of principle”, stays in place for all the rest of the world.

Since any change in legislation corresponds to the U.S. Congress, the Executive cannot promise changes in the Helms-Burton law or give guarantees in this sense. In the Understanding the U.S. government has thus merely committed itself not make use of Title IV against European businessmen and to try to *persuade* Congress to accept the non-application of the full potential of the sanctions to the European Union.

In exchange for this the EU has accepted that it will not give any institutional assistance to business operations in which property is involved that in the U.S. is being claimed as ”illegally expropriated”. And even though the Understanding is

not a legally binding treaty, as European governments have hurried to clarify, in it they have effectively given approval to the U.S. thesis that the confiscations in revolutionary Cuba violated international law. This actually creates a strange contradiction with their own way of dealing with the issue, since the European states affected by expropriations have resolved the issue years ago through compensation deals negotiated with the Castro government.

With the Understanding of May 18 the European Community also de facto accepts one of Helms-Burton's clearest violations of international legal practice, the retroactive extension of U.S. citizenship to all those Cuban-Americans who at the time of loss were Cuban citizens. The Understanding includes the establishment of a registry of claims that is to be the base on which the European countries are to withhold any assistance or official cooperation for business operations with Cuba. And this register is not only open to all Cubans who later adopted U.S. citizenship but it does not even establish any serious process of verification of the claims, as Wayne Smith (1998) points out in his critique of the agreement. Subsecretary Eizenstat himself declared: "The Registry of Claims will be established to warn investors. (...) It will be open to any claimant who alleges that his or her property was expropriated in contravention of international law. If basic information is provided by the claimant, the claim will be included. There will be no screening out of claims" (cited in: Smith 1998, p. 10). Evidently, this is a legally more than weak, if not absurd base on which the European governments supposedly are to build their policy towards commerce with Cuba.

US sanctions under domestic pressure

A general revokal of the Helms-Burton law seems for the moment only a very remote possibility as long as no major change in the overall political coordinates in Havanna or in Washington occurs. The Helms-Burton law had been implemented in a short-term political crisis situation but it aims at long duration; precisely this, the legal codification of U.S. policy to Cuba had been, as shown, one of its goals.

However, in a mid-term perspective opposition to this policy from the U.S. business community could become an increasingly strong factor. In Washington, commercial sanctions have become an ever more frequent instrument of foreign policy. Only between 1993 and 1996 Congress passed no less than 60 laws that in one way or the other establish economic sanctions against a total of 35 countries. And this tendency is still going up: in 1996 alone no less than 125 law initiatives demanding sanctions were introduced in Congress. This "sanctionitis" as a complementary foreign

policy has become indeed a serious obstacle for the export interests of U.S. companies. In this general problem, the embargo against Cuba is only one case out of many, but certainly the most far-reaching and prominent one.

The U.S. Chamber of Commerce as well as the National Association of Manufacturers have spoken out strongly against this tendency to respond to foreign policy crises by unilateral trade sanctions, not only hurting the other countries' economy but the United States' own economic interests, too. To end this policy, in the beginning of 1997 a lobby organization called "USA Engage" was founded. Since at present it is much easier to establish sanctions than to lift them, one of its objectives is a reversal of the "proof of guilt", establishing that by general rule all trade sanctions can only be established for a limited time (e.g. one year) and after this time they would have to be re-introduced, being it their proponents who have to argue why they still must be in place and not, as now, the opponents of sanctions having to argue why they should be lifted.

It is quite possible that positions like these will gain influence in coming years. If once the phrase "What is good for General Motors is good for the USA" had become a sort of rule of thumb for U.S. policy, it may not indefinitely subordinate now the country's long-term commercial interests to the foreign policy ambitions of Congress, frequently guided by very short-term political motives.

Only a few months after founding "USA Engage", however, a new package of trade sanctions was imposed on Birma, in spite of the opposition of U.S. business. And if this is the case with Birma, a country which does not stirr American emotions half as much as Fidel Castro's Cuba, it may take quite some time for this business-led opposition to result in an effective change in U.S. Cuba policy.

Conclusions

The Helms-Burton law has in no way been an "accident" in the U.S. policy, but one more step in the three and a half decade long effort of the U.S. governmnet to mount economic pressure against Cuba through trade sanctions. It is true that the law passed Congress in a moment of an acute foreign policy crisis and under specific conditions; but it is "made to last" and to dominate U.S. policy for a long time to come.

Secondly, the Helms-Burton law is not merely the expression of particular interests by conservative Cuban exile groups, but for Washington's foreign policy it has proven to be a conflictful,

but in the end functional instrument of intimidation against third countries, namely the European Union.

For Cuba the economic costs of the Helms-Burton law are difficult to calculate. On the one hand the Cuban government claims that so far no foreign company has withdrawn from Cuba as a consequence of Helms-Burton; on the other hand it is evident that the threat of U.S. sanctions augments the uncertainties for foreign enterprises investing in Cuba which in many cases may lead to a more prudent business attitude. For Cuba’s current economic strategy this is highly problematic. The rising deficit in the balance of payments (U.S.$ 970 millions in 1994, U.S.$ 1.800 millions in 1996), the urgent need to modernize the economy and the critical debt situation (combined with great problems in obtaining external financing) makes joint-ventures or foreign capital investments a question of survival for the Cuban economy.

Perhaps even more disastrous, however, are the consequences of Helms-Burton for the political future of Cuba. The Castro government has used the renewed external aggression the law represents for a vigorous call to close files around the present leadership and system. An infamous ”Report of the Politburo”, read out in March 1996 by Fidel’s brother and army commander Raúl Castro (1996), not only attacked dissidents but deviant lines of thought within the party and academic establishment reducing greatly the possibilities of a meaningful reform debate within the political system. In the center of the Politburo`s frontal attack were the academic institutions in Havanna which had developed an incipient but extremely relevant discussion about reform steps from within and under socialist auspices (e. g., Carranza et al.; for a panorama of this ”renaissance” of Cuba’s social sciences cf. Hoffmann 1996).

In addition, after the ”Report del Politburo” all members of Cuba’s Armed Forces (including retired officers) were asked for public declarations of loyalty. As the Helms-Burton law explicitly excludes Fidel and Raúl Castro from any ”transition government”, this so-called ”Declaration of the Mambises of the XXth century” resulted its negative image, demanding loyalty not only to the Fatherland, Revolution and Socialism, but explicitly calling for ”unconditional loyalty” to Fidel and Raúl, ”our uncuestionable ‘jefes’ and leaders” (Granma Internacional, 26/3/97, p. 6).

The ideological roll-back also affected the slow-moving reform process reform of Cuba’s domestic economy. The ”Report of the Poitburo” denounced self-employment as a potential ”breeding-ground” for subversive activities of the enemy (Raúl Castro 1996, p. 4). In consequence a policy of disincentives was pursued, combining taxes and ”inspections” lowering the number of

(legally) self-employed Cubans from 210.000 at the end of 1995 to 150.000 at the middle of 1996.

If Washington's policy of confrontation is a decisive element of legitimacy for the Castro government, the Helms-Burton law renewed it, contributing thus to a tightening and stabilization of the political status quo, not to its opening up. At the same time the Title II of the Helms-Burton law dramatically cut the possibilities of a reform from within, with dignity and national independence.

Nevertheless, it may be an error to qualify the Helms-Burton law simply as a ″mistake″ or being ″counterproductive″. Maybe it just pursues other aims. Putting the pre-1959 property claims in the center of U.S. Cuba policy it seems not to have in mind a process of gradual reform that may present a viable option for the present-day elite, but rather the ″unconditional surrender″ of the Revolution as such. For this purpose, the Helms-Burton law is indeed ″productive″. In this logic, the Cuban people seems taken hostage in the historic power struggle between Cuba and the USA. As Luis Manuel Garc#ia (1996, p. 35) writes, the ″Socialism or Death″ pronounced by Fidel Castro finds its equivalent in a kind of ″Insurrection or Death″ policy from the U.S. government. In this logic, atightening of the internal political situation in Cuba does not lack a rationale: it polarizes the extreme options and eliminates intermediate alternatives of gradual and controlled reform.

The European Union would be well advised not to react only defensively in protection of their specific business interests from the extraterritorial sanctions of the Helms-Burton law. Doing this it has come to increasingly accept large parts of the legal tricks and policy postulates of the law. Instead, the European countries should insist on their own, different policy approach to Cuba and that the current U.S. policy of tightening the embargo and aggravating the social and economic conditions in Cuba is politically dangerous and morally intolerable; they should formulate their clear opposition not only against titles III and IV of the law but also against its titles I and II, declaring that such a political tutelage of another country's affairs is profoundly anti-democratic (even if it is tutelage in the name of democracy) and unacceptable for the international community. And they should make as clear as possible that such a policy cannot count on neither the support nor the tacit permission of the European Union.

Fin

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