

CAN HELMS-BURTON BE CHALLENGED UNDER WTO?

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In the midst of all their outrage over the enactment of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the Helms-Burton Act),¹ one concept seemed clear to every foreign government. That concept was that the United States government “had to be” violating some international obligation by enacting such a law.² While it might be unclear what international obligation was

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1. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.A. §§ 6021–6091 (West Supp. 1997) [hereinafter Helms-Burton Act]. The Helms-Burton Act has inspired numerous articles debating its legitimacy under international law and treaties. See, e.g., Brice M. Clagett, *The Controversy over Title III of Helms-Burton: Who Is Breaking International Law — The United States, or the States that Have Made Themselves Co-Conspirators with Cuba in Its Unlawful Confiscations*, 30 GEO. WASH. J. INT'L L. & ECON. 271 (1996–97); Brice M. Clagett, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Continued, A Reply to Professor Lowenfeld*, 90 AM. J. INT'L L. 641 (1996) [hereinafter *Agora*]; Lucien J. Dhooze, *Fiddling with Fidel: An Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996*, 14 ARIZ. J. INT'L & COMP. L. 575 (1997); William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INT'L & COMP. L. REV. 713 (1997); David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from Within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297 (1997); Andreas F. Lowenfeld, *Congress & Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996); Ralph G. Steinhardt, *Helms-Burton and the Virtues of a Good Course in Pathology*, 30 GEO. WASH. J. INT'L L. & ECON. 201 (1996–97); Jeannette M.E. Trammel, *Helms-Burton Invites a Closer Look at Counter-Measures*, 30 GEO. WASH. J. INT'L L. & ECON. 317 (1996–97); John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747 (1997); W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289 (1997); Christian Franken, Note, *The Helms-Burton Act: Force or Folly of the World's Leader?*, 7 MINN. J. GLOBAL TRADE 157 (1998); Jonathan R. Ratchik, Note, *Cuban Liberty and Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343 (1996); Anthony M. Solis, Comment, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L.J. 709 (1997); Brian J. Welke, Comment, *GATT & NAFTA v. The Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361 (1997).

2. See, e.g., Debra Beachy, *Sanctions on Cuba Rile Mexico, Europe/But U.S. Trade too Important to Lose*, HOUS. CHRON., May 31, 1996, at 1; *U.S.-E.U. Trade Relations: Phoney War*, ECONOMIST, Oct. 18, 1997, at 29.

being violated, this type of state conduct, which unilaterally sought to inhibit investment by one country in another, could not possibly be proper. In other words — “There outta be a law.” But which law was relevant?

The European Union (E.U.) decided that the Agreement Establishing the World Trade Organization (WTO Agreement)³ was the relevant law, and more particularly that Helms-Burton violates the United States obligation under the General Agreement on Tariffs and Trade (GATT).⁴ The E.U. has alleged that Helms-Burton violates GATT Articles I, III, V, XI and XII.⁵ The British Government has also declared that Helms-Burton violates GATT Article XI. The E.U. has sought formation of a panel under the WTO Dispute Settlement Understanding (DSU)⁶ concerning these alleged violations of GATT, but has suspended further proceedings pending additional negotiations.⁷ The E.U.'s actions caused political consternation in the United States, especially since the most egregious features of Helms-Burton had been suspended.⁸

For its part, the United States has indicated that, if it must defend Helms-Burton before a WTO panel, it will defend on the basis of the “national defense” exception contained in GATT Article XXI.⁹ That indication, in turn, has caused great consternation among both governments and international scholars. Most scholars worried that, if this assertion of the national security defense succeeded, that defense would have no limits on it, and it could be used

3. Agreement Establishing the Multilateral Trade Organization (World Trade Organization), Dec. 15, 1993, General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round), 33 I.L.M. 13 (1994) [hereinafter after WTO Agreement].

4. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

5. Request for the Establishment of a Panel by the European Communities, WTO Doc. WT/DS38/2/Corr.1 (Oct. 14, 1996) [hereinafter E.U. Complaint].

6. *See id.*; Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round), 33 I.L.M. 112, 118 (1994) [hereinafter DSU].

7. The panel was suspended in accordance with article 12.12 of the DSU on April 25, 1997. *See* WTO Doc. WT/DS38/5.

8. *See United States: Statement by the President on Suspending Title III of the Helms-Burton Act*, Jan. 3, 1997, reprinted in 36 I.L.M. 216 (1997); *Clinton Extends His Suspension of Title III of Cuba Law*, 14 Int'l Trade Rep. (BNA), No. 2, at 42 (Jan. 8, 1997).

9. *See U.S. to Use All Available Means to Defend Helms-Burton, Envoy Says*, 13 Int'l Trade Rep. (BNA), No. 47, at 1824 (Nov. 27, 1996).

by any nation at any time to defend any trade barrier.¹⁰ Thus, they prophesied that the carefully worked out dispute resolution processes under DSU would collapse under future aberrant assertions of national defense.¹¹

Most discussion, therefore, has tended to assert that an over-reaching United States statute has been challenged by the E.U. complaint to the WTO under the DSU. In turn, the E.U. complaint has supposedly been met by the assertion of a defense that could significantly weaken the enforcement processes of the whole world trade regime.

The purpose of this Article is to examine the issues which arise out of this E.U. action. Does the E.U. have a valid complaint against the United States under the WTO Agreement and GATT, and if so, under what GATT provisions? There are different Titles of Helms-Burton, and they each have a different impact on the obligations of the United States under the WTO Agreement. Thus, this Article will examine separately the likelihood of a GATT violation under Title I of Helms-Burton,¹² and the likelihood of a GATT violation under Titles III and IV of Helms-Burton.¹³ Then, the Article will examine the validity of the United States defenses under GATT, both the one asserted by the United States and others it could have asserted. Finally, it will examine whether GATT is the best forum for settling this dispute, or whether there is another, more relevant, potential agreement and forum for this dispute.

This Author must state at the outset that the conduct of almost all parties seems baffling. It is as though the entire trade-related diplomatic corps has decided to take a trip “through the looking-glass.”¹⁴ Is there an explanation for their conduct?

In attempting to explain the conduct of the parties, there are four basic points to this Article. First, the E.U. may have a valid complaint under GATT and WTO against Title I of Helms-Burton, but this United States conduct is not a major source of their complaint, nor does relief from Title I seem to be a significant issue to

10. See John H. Jackson & Andreas F. Lowenfeld, *Helms-Burton, the U.S., & The WTO*, ASIL INSIGHT (Mar. 1997) <<http://www.asil.org/insight7.htm>>.

11. See *id.*

12. Helms-Burton Act, 22 U.S.C.A. §§ 6021–6046.

13. *Id.* §§ 6081–6091.

14. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS: AND WHAT ALICE FOUND THERE* (1872).

them.¹⁵ Instead, they seek relief from Titles III and IV of Helms-Burton, where there seems to be no valid complaint. Although these titles may create more political pain, it is difficult to find a technical, legal case for claiming any violation of any GATT provisions by these titles. This dichotomy was certainly understood by the E.U. attorneys who sought the WTO panel review. Why did they ignore the most likely arguments, and select the less likely arguments, to form the basis of their complaint? This article will discuss the relative standing of the different titles and conclude that it is unlikely that Titles III or IV of Helms-Burton violate GATT, but that Title I does.

Second, the United States seems to have a reasonable and understandable technical defense against assertions that Titles III and IV of Helms-Burton violate GATT, but it ignores those defenses. Instead it uses a “bogeyman” defense of national security under GATT Article XXI that few people find convincing. Further, the national security defense may not be as powerful a technical legal argument as the United States believes it to be, or as the defenses which the United States ignores. This article, in discussing the various defenses available to the United States, will conclude that the national security defense may be available, but would have to be carefully argued; and it might not succeed if the United States fails to appear and argue it carefully. Moreover, there are other defenses, based on the inapplicability of GATT to these Helms-Burton provisions, which are probably more powerful arguments for the United States position.

Third, if the United States does use the national security defense under GATT Article XXI, it is both inappropriate and dangerous. The successful use of this defense could provide a defense for all other respondent parties in all other trade disputes, leaving the WTO's dispute resolution process as flawed and unusable as the dispute resolution process had been under GATT 1947,¹⁶ about which the United States complained vociferously.¹⁷ The United States negotiators at the Uruguay Round worked very hard to create

15. See, e.g., *E.U./U.S.: E.U. Clears the Air with U.S. over Cuba Dispute*, EUR. REP., Dec. 18, 1996.

16. See generally JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990).

17. See Judith H. Bello & Alan F. Holmer, *U.S. Trade Law Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095, 1097 (1994).

a useful and useable dispute resolution process under the WTO,¹⁸ using the DSU, so it seems very strange that they seem so willing to scuttle it completely to defend the first difficult case. This article will examine the impact of this apparently inappropriate threat to use the national security defense. It concludes that there may be a United States belief that the E.U. complaint to the WTO is an inappropriate use of that body — and that an inappropriate defense is an appropriate response to an inappropriate complaint. The proper forum for disputes involving the types of provisions in Titles III and IV of Helms-Burton is not the WTO. Neither the complaint nor the defense should be before a body which regulates trade in goods. This article will examine why there may be differences between the United States and the E.U. over the proper functions of the DSU.

Fourth, there is a forum which is appropriate for this dispute. The measures in Titles III and IV of Helms-Burton involve regulation of international investments, not international trade in goods. Thus, a more appropriate forum for resolving dispute over these measures is the current OECD negotiation for a Multilateral Agreement on Investment (MAI).¹⁹ This article will examine why the MAI may be a better forum than the WTO in which to resolve the disputes over Helms-Burton.

There are several political leitmotifs which must be examined in this analysis, because the problem is political, as well as legal. One leitmotif, which runs through all the presentations in this symposium, is that there is too much use of unilateral economic measures by the United States. Each presenter has been bothered by that fact, and the political process that induces the United States Congress to use economic boycotts and other like measures as a “weapon of first

18. See, e.g., *General Agreement on Tariffs and Trade: The Benefits of the Uruguay Round Before the Senate Commerce Committee on June 16, 1994* (testimony of Ambassador Michael Kantor, United States Trade Representative), reprinted in Federal Document Clearing House [hereinafter Testimony of Michael Kantor].

19. The Multilateral Agreement on Investment (MAI) is currently under negotiations within the OECD. Most recently, the U.S. has refused to endorse a draft agreement because it is “unbalanced.” It is unclear what course the future negotiations will take if the U.S. does not change its position by the April 28 deadline. Many do not believe an agreement can be reached without a solution to the Helms-Burton dispute. See, e.g., Nancy Dunne, *U.S. Shies away from Accord on Investment*, FIN. TIMES, Feb. 14, 1998, at 3; *OECD Investment Accord Impossible Without U.S.-E.U. Helms-Burton Agreement*, AGENCE FR.- PRESSE, Jan. 16, 1998, available in 1998 WL 2202127.

resort.” A second leitmotif is that there is no international mechanism which is politically effective to limit our use of unilateral measures. Further, the WTO will be a doubtful forum for creating such limits. It may not have enough political stature in the United States Congress to bear the burden of initiating such limits, because the economic benefits to the United States from the WTO are not perceived to be sufficient. It is perceived as having created economic benefits and costs in almost equal measure, and the concept of the “growing global economic pie” has not overcome the perceived benefit-cost balance. However, the MAI should have greater political clout with the United States Congress, because the benefits to United States investors should clearly outweigh any perceived costs. Thus, MAI may provide a more viable political forum for including such unappealing concepts as limiting the use of unilateral measures.

I. IS THERE A CAUSE FOR COMPLAINT UNDER WTO?

Any discussion of Helms-Burton must recognize that the different titles of that act raise separate problems which must be discussed separately. Title I deals with trade in goods, in the usual sense of goods imported into the United States, and strengthens the provisions of the prior economic boycott against Cuba.²⁰ Titles III and IV, on the other hand, do not deal directly with goods imported into the United States. Instead, they deal with sanctions against persons who use property, wherever located, that United States nationals assert has been confiscated from them.²¹ Importation of that property into the United States is not necessary to trigger these titles, so that “trade in goods” (in the sense usually associated with GATT) is not involved.²² Use of goods, real property or intellectual property is involved, and that implies an investment transaction, which is not regulated by GATT, and almost not regulated by WTO.²³

Thus, the analysis of a complaint against Helms-Burton under

20. See Helms-Burton Act, 22 U.S.C.A. §§ 6021–6046.

21. See *id.* §§ 6081–6091.

22. See the definition of “trafficking” under the Helms-Burton Act, 22 U.S.C.A. § 6091(b)(2)(A).

23. The WTO has addressed investment transactions. See Patricia Isela Hansen, *The Impact of the WTO and NAFTA on U.S. Law*, 46 J. LEGAL EDUC. 569, 575 (1996).

its Title I is quite different from the analysis of a complaint under its Titles III and IV. They will be discussed separately.

A. Title I of Helms-Burton

The complaints against Title I of Helms-Burton could be based on GATT Articles I (and allied article XIII), III, V, and XI.²⁴ Each will be discussed in turn. There is also a difference between prohibiting the entry of Cuban sugar and prohibiting the entry of Belgian chocolate made with Cuban sugar. Thus, these two transactions will also be discussed separately.

Article I establishes the most-favored-nation principle of “non-discrimination” between the contracting parties — that goods imported from one contracting party must be treated as well as goods from any other contracting party.²⁵ Article XIII extends that concept to require that the treatment given to goods from contracting parties also be equal to that given to goods imported from any non-member states.²⁶ Thus, sugar or rum imported as a product of the E.U. must be treated by the United States no worse than sugar or rum from any other contracting party — and it is. But, the E.U. is not complaining that its own sugar or rum is being discriminated against. It is sugar or rum from Cuba, which is not a member of the WTO, that may not enter the United States market under Helms-Burton.²⁷ Further, that Cuban sugar or rum may not enter the United States market, even though it has been transshipped through the E.U. on its way to the United States.²⁸ Such transshipment does not make the sugar or rum into a product of the E.U., and does not subject the goods to the WTO disciplines.²⁹

Under Helms-Burton, if Cuban sugar comes from Cuba it may not enter the United States market.³⁰ If Cuban sugar comes from the E.U., or from Canada, or from North Korea, a non-member of

24. GATT, *supra* note 4, arts. I, III, V, XI, XIII.

25. *See id.* art. I.

26. *See id.* art. XIII:1.

27. *See id.* art. XIII:1.

28. *See id.* art. I.

29. Agreement on Rules of Origin, Art. II, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS — THE LEGAL TEXT 241, 242–44 (1994) [hereinafter Rules of Origin].

30. Helms-Burton Act, 22 U.S.C.A. § 6040.

WTO, it still may not enter the United States market. Under Helms-Burton, there is “non-discrimination” concerning E.U. or Canadian sugar, as the GATT requires. There is discrimination only against sugar from Cuba, which is not a contracting party, and that policy does not contravene the most-favored-nation policies of either Article I or Article XIII of GATT 1994.

Thus, there does not seem to be a serious complaint under GATT Articles I or XIII concerning Cuban goods shipped from Cuba by an E.U. owner and seller, or transshipped through the E.U. to the United States. The goods are not the product of a contracting party, and are treated equally regardless of the point of shipment. They are all barred from entry into the United States. If the Cuban goods are *processed* in the E.U., however, the analysis is different, and this issue will be discussed later.³¹

Article III, the “national treatment” provision, prohibits the United States from discriminating against imported goods in favor of domestically produced goods, so as to “afford protection to domestic production.”³² Under Article III, products of a contracting party must be accorded treatment equal to that given to domestically produced goods. But Helms-Burton does not seem to contravene these concepts. Sugar and rum from Cuba are barred, but products of the E.U. are not. Further, domestic products incorporating Cuban property are just as subject to Helms-Burton sanctions as E.U. products incorporating the same Cuban property.³³ Whatever its faults may be, the purpose of Helms-Burton is not to afford protection to the United States domestic sugar industry, or any other domestic industry.³⁴ Thus, Article III does not appear to be violated by Helms-Burton.

Article V,³⁵ on freedom of transit, presents more difficult problems. It requires the United States to permit goods to transit

31. See *infra* notes 48–49 and accompanying text.

32. GATT, *supra* note 4, art. III:1.

33. See Helms-Burton Act, *supra* note 1, § 6040.

34. Helms-Burton Act, Pub. L. No. 104-114, 110 Stat. 788 *supra* note 1, § 3. In congressional debates, domestic protection was not argued as a justification or benefit of the Helms-Burton Act. Most seemed to view the Helms-Burton Act as more likely to cause economic harm and were choosing between the potential economic harm to the U.S. and the effect of the Act on promoting democracy in Cuba. See, e.g., 142 CONG. REC. S1479 (daily ed. Mar. 5, 1996) (containing the Senate debate considering the conference report of the Helms-Burton Act).

35. See GATT, *supra* note 4, art. V.

through United States territory, to or from the territory of other contracting parties, without regard to the place of origin of the goods, or other place of departure.³⁶ Freedom of transit must also be given, regardless of ownership of the goods or the means of transport, or "the flag of vessels."³⁷ United States regulations prohibit entry of goods of Cuban origin, and also of goods that have been transported from or through Cuba.³⁸ A vessel carrying Cuban goods may be prohibited from entering a United States port or offloading other goods for shipment across the United States to Canada or Mexico. This restriction would violate GATT Article V, but whether it causes sufficient trade loss to require significant compensation or allow significant retaliation is open to question. It is technically a violation of our obligations under the WTO, even though it may not be the stuff of which trade wars are made.

Article XI³⁹ prohibits either the creation or maintenance of prohibitions or restrictions on the importation of the products of contracting parties, other than monetary import duties. Helms-Burton obviously provides a restriction on the importation of Cuban sugar or rum, but those are not products of a contracting party.⁴⁰ It has been suggested that Helms-Burton creates a secondary boycott of Cuba, and that such a boycott violates both customary international law and GATT. There is another article in this symposium which undertakes a serious analysis of whether such a boycott violates customary international law, and that discussion will not be duplicated here.⁴¹

Whether Helms-Burton violates GATT by creating a secondary boycott depends upon two separate issues: (1) whether Helms-Burton creates a secondary boycott, and (2) whether a secondary boycott violates GATT Article XI. Some argue that Helms-Burton is not a secondary boycott because it does not prohibit trade with countries that trade with Cuba, but only creates a right of action if disputed property is involved in the transaction.⁴² Others argue that the po-

36. *See id.*

37. *Id.*

38. *See* Helms-Burton Act, *supra* note 1, § 6040.

39. GATT, *supra* note 4, art. XI.

40. For further discussion of this point, see *infra* text at notes 43–50.

41. *See* Paul B. Stephan, *Creative Destruction-Idiosyncratic Claims of International Law and the Helms-Burton Legislation*, 27 STETSON L. REV. 1341 (1998).

42. *See Implementations of the Cuban Sanctions: Testimony Before the Western*

tential exposure to litigation, with possible treble damages calculated by the value of the property not the goods at issue, has the effect and the intent to deter trade with Cuba and is therefore a secondary boycott.⁴³

Even if Helms-Burton creates a secondary boycott, does such a boycott violate Article XI? Precedent is scarce. Neither GATT nor the WTO panels have been asked to make a decision based on this issue.⁴⁴ However, there are other sources of precedent, if international law is created by what nations do, as well as what they say.⁴⁵ One available precedential action arises out of the accession of the United Arab Republic (U.A.R.) to GATT.⁴⁶ During the accession negotiations, some contracting parties raised concerns that the U.A.R. was participating in the Arab League boycott of Israel. All agreed that this was a secondary boycott. The U.A.R. did not renounce the boycott, and would continue to observe it. Members of

Hemisphere Subcomm. of the Senate Foreign Relations Comm., 104th CONG. 23 (July 30, 1996) (statement of Monroe Leigh) *reprinted in* Federal Document Clearing House, *available in* 1996 WL 437738 (F.D.C.H.); *Agora*, *supra* note 1, at 641-44.

Those who believe Helms-Burton is not a secondary boycott argue that it is not such a boycott because it does not prohibit trade with other countries who trade with Cuba. Helms-Burton does not provide for any trade restrictions against any third party nation who trades and permits its nationals to trade with Cuba. They argue that Helms-Burton's intent is not to deter *all* trade with Cuba, but only that which is based on "trafficking" in expropriated property.

43. See Fidler, *supra* note 1, at 309-11; Lowenfeld, *supra* note 1, at 429; Joseph V. Walker, *The Legality of the Secondary Boycotts Contained in the Helms-Burton Act*, 3 DEPAUL DIG. INT'L L. 1, 1-12 (1997).

Those who argue that Helms-Burton is, in intent and effect, a secondary boycott believe that, although Helms-Burton is not a prohibition on trade with Cuba, the potential exposure to litigation with possible treble damages under Title III and exclusion from the U.S. under Title IV has the same effect as prohibition. Helms-Burton attempts to coerce and change conduct occurring wholly outside the United States. They further argue as a secondary boycott, Helms-Burton violates both stated United States policy and customary international law.

44. This Author has not discovered any cases before GATT/WTO that establish that a secondary boycott violates Article XI.

45. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4 (4th ed. 1990).

46. Participation of the U.A.R. in the Arab League boycott against Israel constituted a classical boycott and secondary boycott. They were not denied admission into GATT even though the boycott was still in existence because the boycott was justified as a reasonable measure considering the "state of war" of the U.A.R. and the political character boycott. *Working Party Report: Accession of the United Arab Republic*, GATT doc. L/3362, adopted on Feb. 27, 1970, 17S/33, 39, para. 22 [hereinafter U.A.R. Report]; see GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 602-03 (6th ed. 1995) [hereinafter GATT Index].

the working party supported the concept that such a boycott did not preclude accession, as long as it was for political purposes and not a disguised trade protection measure. This action by GATT would suggest that violations of GATT depend more upon the underlying purpose of the boycott — whether political or trade-related — rather than its scope — whether primary, secondary or tertiary. There also seems to be general recognition that the purpose of Helms-Burton is political, not trade-related, regardless of whether it is considered a primary or a secondary boycott. Thus, however its scope is categorized, Helms-Burton does not seem to create the kind of trade-related boycott which concern the GATT disciplines.

Thus, so far as sugar or rum from Cuba is concerned, Helms-Burton may violate GATT Article V, but it does not seem to violate the other provisions concerned. Further, almost all of the provisions discussed so far have been part of United States law for 36 years and have not been subjected to challenge under GATT.⁴⁷ Why should analysis change now? There are two new concerns, caused by changes in GATT.

Section 110(a) of Helms-Burton prohibits the entry into the United States, not only of Cuban sugar or rum, but also of goods of other countries which are made in part of Cuban sugar or rum.⁴⁸ Thus, if Cuban sugar is used to produce Belgian chocolate, Helms-Burton prohibits entry of the Belgian chocolate into the United States market. The analysis of this problem is quite different from all of the prior analyses of the prohibitions of entry of Cuban sugar. The E.U. will consider the Belgian chocolate to be a product of the E.U., against which the United States may not discriminate under GATT Articles I or XIII, and perhaps Article XI.⁴⁹ The United States response, that the Belgian chocolate itself is free to enter, as long as the Cuban sugar remains offshore, is inherently unsatisfactory.

However, it should be noted that this prohibition was not created by Helms-Burton, but is a long-standing part of United States

47. President Kennedy first imposed a trade embargo on Cuba in February 1962 under the authority of the Foreign Assistance Act of 1961. He later reinforced the embargo under the authority of the Trading with the Enemy Act. The regulations are still substantially in effect and now codified in the Helms-Burton Act, 22 U.S.C.A. § 102(h). Cuban Assets Control Regulations, 31 C.F.R. § 515.101 (1998).

48. Helms-Burton Act, *supra* note 1, § 6040.

49. GATT, *supra* note 4, arts. I, XI, XIII.

law.⁵⁰ If it violates GATT Article I, why has it not been challenged before? There are three possible reasons that come to mind. First, the obtaining and enforcement of panel decisions under GATT 1947 was an uncertain proposition, especially for disputes with a high political content; and all contracting parties understood the political dimensions of the Cuban embargo. That reason is no longer an obstacle under WTO's Dispute Settlement Understanding and its use of procedures involving "inverted consensus."⁵¹

Second, there were few challenges of traditional practices under GATT 1947, an attitude fostered by GATT's Protocol of Provisional Application.⁵² Although the Protocol did not specifically apply to the 1963 Cuban Assets Control Regulations, those regulations had an established history by the time they became controversial within GATT. That reason is also no longer an obstacle, since the Protocol of Provisional Application has been deleted from GATT 1994, and the "grandfathering" of traditional practices under GATT 1947 has been terminated.⁵³

Third, and most importantly, WTO includes a multilateral Agreement on Rules of Origin.⁵⁴ Although the E.U. would object to the United States' exclusion of Belgian chocolate made with Cuban sugar as the exclusion of a product of the E.U., the United States analysis under GATT 1947 would have been different. Helms-Burton, and the prior regulations, is phrased to regard Cuban sugar as a product of Cuba regardless of its incorporation into other goods through manufacturing processes.⁵⁵ As such, it could be regarded as a peculiar United States "rule of origin" concerning Cuban products, and GATT 1947 had no specific effective international constraints on such domestic rules of origin.

That analysis is now subject to the disciplines of the WTO Agreement on Rules of Origin.⁵⁶ That agreement establishes a process to create harmonized rules of origin, which is not yet com-

50. The ban on imports dates to 1962. *See* Cuban Import Regulations, 22 U.S.C.A. § 2370(a)(1) (West Supp. 1997).

51. *See* DSU, *supra* note 6.

52. *See* 1947 Protocol of Provisional Application, 55 UNTS 308; 30 Oct. 1947, 61 Stat. pts. 5, 6 T.I.A.S. No. 1700.

53. *See* WTO Agreement, *supra* note 3, art. 1(a).

54. *See* Rules of Origin, *supra* note 29.

55. Helms-Burton Act, *supra* note 1, § 6040(a)(3).

56. *See* Rules of Origin, *supra* note 29, art. 2.

plete.⁵⁷ When completed, it will require that all goods be considered the product of a single country, the country “where the last substantial transformation has been carried out.”⁵⁸ Thus, Belgian chocolate could not be considered to have two countries of origin, one for the chocolate and a different one for the sugar in it. The new WTO rules will also create a harmonized definition of “substantial transformation.” Even before the harmonization process is completed, however, domestic rules of origin are subject to some WTO discipline, in that they may not create “restrictive, distorting or disruptive effects on international trade.”⁵⁹ A United States rule of origin which prohibits a Belgian chocolate manufacturer from purchasing any particular sugar available in the market is both trade-distorting and, in extreme cases, trade-disruptive.

Thus, the E.U. has available an argument that Title I of Helms-Burton violates the WTO to the extent that it prohibits entry into the United States of Belgian chocolate containing Cuban sugar. Under WTO rules, Belgian chocolate is only a product of the E.U., because the Cuban sugar component has been “substantially transformed,” when it was processed with other ingredients into candy.⁶⁰ The result would be the same under normative U.S. law on “substantial transformation.”⁶¹ Prohibiting entry of an E.U. product with a transformed Cuban component while permitting entry of a like Canadian product having no Cuban component would violate GATT Article I and be subject to a complaint under DSB.⁶² Under GATT analysis, we would be discriminating between E.U. and Canadian products, because the source of the component parts would be irrelevant.⁶³ And Article I does not permit discrimination between products of different contracting parties.

B. Titles III and IV of Helms-Burton

57. *See id.* art. 9.

58. *Id.* art. 3(b).

59. *Id.* art. 2(c).

60. *See id.* art. 3(b).

61. *See* Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556, 562 (1908); Superior Wire v. United States, 669 F. Supp. 472, 478 (Ct. Int'l Trade 1987).

62. *See* Rules of Origin, *supra* note 29, art. 8.

63. *See supra* note 25 and accompanying text.

The E.U.'s technical argument concerning violations by Title I of Helms-Burton is not really the subject of the United States — E.U. dispute before the WTO. Instead, the dispute centers on E.U. claims that Titles III and IV of Helms-Burton violate GATT.⁶⁴ There is very little authority for such a case.

Titles III and IV of Helms-Burton do not seem to concern “trade in goods,” in the GATT sense of those goods being imported into one country from another. No such importation is required to trigger Titles III and IV of Helms-Burton. First, a person may “traffic” in “confiscated property” while it remains in Cuba and is used or managed there without transportation.⁶⁵ Second, the term “confiscated property” is not limited to goods, but also includes real property and intellectual property.⁶⁶

Titles III and IV also do not apply to “trade in services” in the General Agreement on Trade-in Services (GATS) sense of providing services from the territory of one member into the territory of another member.⁶⁷ Neither title requires transborder provision of any service to trigger its provisions. It was suggested during this symposium's discussion period that commitments under GATS were violated by Title IV, because the individuals that a service provider wished to use might not be allowed to travel to the United States under certain circumstances. Such denial of travel documents could prevent the service provider from operating in the United States, thus denying benefits under GATS.

However, GATS does not guarantee that a service provider can offer a service through any particular individual. Drug lords and pedophiles do not automatically get travel documents because a service provider wants them. NAFTA has affirmative provisions on these issues, and they occupy a whole Chapter and are quite complicated.⁶⁸ The WTO and GATS, on the other hand, chose to ignore

64. See, e.g., Paul Blustein, *Ruling Sought on U.S. Trade Law*, WASH. POST, Feb. 5, 1997, at D10.

65. See Helms-Burton Act, *supra* note 1, § 6082(a).

66. See *id.* § 6023(12)(A).

67. See General Agreement on Trade-in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. I, reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS — THE LEGAL TEXT 325 (1994) [hereinafter GATS].

68. See North American Free Trade Agreement, ch. 16, Dec. 17, 1992, U.S.-Mex.-Can., entered into force Jan. 1, 1994, reprinted in 32 I.L.M. 289 & 32 I.L.M. 605 (1993) [hereinafter NAFTA].

the issues and are silent on them. Thus, the E.U. must argue that the WTO Agreements conferred upon all enterprises of all the WTO members a simplistic right of entry for any designated individual by silence and implication, even after the complexity of the NAFTA negotiations were known to the negotiators. This interpretation seems untenable. Thus, neither GATT nor GATS seem necessarily to be involved with the provisions of these titles, even though both have Most Favored Nation (MFN) and national treatment provisions.

The Agreement on Trade-Related Investment Measures (TRIMS)⁶⁹ might have created applicable WTO disciplines, because it could appropriately cover the transborder use and management of property claimed by others. However, TRIMS is, at this time, a non-functioning agreement, and is likely to remain so.⁷⁰ Thus, it is not available for the E.U. to use as a foundation for a complaint.

It would still be possible for the E.U. to claim relief under GATT Article XXIII for a non-violation nullification and impairment of its benefits under GATT.⁷¹ A full analysis of that topic would be the proper subject of a complete law review article in and of itself. There are, however, three impressions derived from the cases which indicate that a successful claim under Article XXIII is unlikely. First, the cases are numerous and not usually successful.⁷² Second, analysis of such a claim would be linked to a panel analysis of the “rea-

69. Agreement on Trade Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS — THE LEGAL TEXT* 163 (1994) [hereinafter TRIMS].

70. “[T]he TRIM’s Agreement improves upon prior GATT jurisprudence in the area . . . the Agreement does not prohibit all TRIM’s outright — it merely states that certain TRIM’s violate Articles III and XI of the GATT, and are therefore prohibited.” Robert H. Edward, Jr. & Simon N. Lester, *Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures*, 33 *STAN. J. INT’L L.* 169, 171 (1997).

71. See GATT, *supra* note 4, art. XXIII:1(b); See generally, Ernst-Ulrich Petersmann, *Violation-Complaints and Non-Violation Complaints in Public International Trade Law*, 34 *GERMAN Y.B. INT’L L.* 175 (1991).

72. There have been approximately 20 nonviolation “nullification and impairment” cases but only three have been successful. See Working Party Report, Australia-Subsidy on Ammonium Sulphate, adopted Apr. 3, 1950, BISD II/188; Panel Report, Germany-Imports of Sardines, adopted Oct. 31, 1952, BISD IS/53; Panel Report, Germany- Import Duties on Starch and Potato Flour, noted Feb. 16, 1955, BISD 3S/77; Panel Report, European Communities- Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted Jan. 25, 1990, BISD 37S/86.

sonable expectations” of the parties. This doctrine has been used in the past mainly to protect the balance of tariff concessions,” not non-tariff barriers; so it is less likely to be available outside those issues which concern “trade in goods.”⁷³ Third, under Article XXIII, it will

73. Although the “non-violation” remedy under Article XIII:l(b) seems broad on its face, very few cases have succeeded. To prevail, the E.U. must prove that a reasonably expected benefit, accruing to it directly or indirectly, has been nullified or impaired by unforeseen trade measures not inconsistent with GATT.

What constitutes a legitimate benefit for Article XIII:l(b) purposes is not clear. In the past, the benefits most successfully recognized in a “non-violation” case were market access related benefits expected from negotiated tariff concessions that were nullified or impaired by unforeseen non-tariff barriers. The Panels are mostly concerned with the balance of competitive relationships created through the negotiation of the various trade agreements.

The E.U. will have difficulty establishing what benefit Title III of the Helms-Burton Act is affecting. The best E.U. argument is that Title III acts as a secondary boycott forcing a choice between trade with Cuba and trade with the U.S. E.U. firms will not risk potential treble damages by possibly creating liability under Title III by doing business in Cuba and creating personal jurisdiction or access to assets by doing business in the U.S. Title III affects their freedom of choice by not adhering to rules of origin allowing MFN benefits and burdening any business with Cuba, regardless of where the products produced are both sourced and shipped. The U.S. response is that there is no prohibition on trade with Cuba under Helms-Burton. Title III only affects businesses that further the uncompensated expropriation of property. Furthermore, there is no reasonable expectation in the protection of one's ability to profit from illegally acquired property.

Title IV does not impair any benefit since standards for granting or denying visas have not been negotiated either under WTO or directly between the United States and E.U.. The U.S. has always retained unfettered discretion to determine whom it will allow to cross its borders and the E.U. can have no reasonable expectations regarding grants of visas by the U.S.

The E.U. must establish a prima facie showing of nullification or impairment by arguing with specificity. However, past panels did not require statistical evidence showing a reduction in trade. In practice, the burden of proof applied has been more of a burden of going forward rather than a burden of persuasion. If the E.U. can establish a legitimate benefit, this is not likely to be a difficult hurdle.

Establishing non-foreseeability may be the most difficult problem. The U.S. action under Helms-Burton, which is alleged to have upset the competitive balance, must not have been reasonably anticipated at the time the specific benefit was created. This is the reasonable expectations test. It acts as a check on the expectation of benefits. The U.S. can argue that while the E.U. may have expected a benefit, the claimed expectation was not reasonable. The Panel is asked to examine the legitimacy of the expectation when considering all the facts and circumstances surrounding the creation of the benefit and provisions of the General Agreement. It is also at this point, that the U.S. will argue that it was foreseeable that the U.S. could enact measures to protect its national security that adversely effect previously expected benefits.

See Petersmann, *supra* note 71, at 200–28; Thomas Cottier & Krista Nadakavukaren Schefer, *Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present, and Future*, International Trade Law and the GATT/WTO Dispute Settlement System 145 (E.U. Petersmann ed., 1997); ROBERT E. HUDEC, THE GATT LEGAL

be very difficult to determine that the motivations of the United States, which are said to arise out of national security concerns, arise instead out of trade-distorting motivations. Those motivations are more likely to be considered political than economic.⁷⁴

In sum, although Title I of Helms-Burton probably violates GATT, this is not the center of the dispute. The E.U.-United States dispute over Helms-Burton centers upon Titles III and IV of that act. However, the analysis above shows that it is difficult to understand how a persuasive case can be made for the existence of a violation of any of the specific provisions of the WTO Agreements.

II. WHAT DEFENSES ARE AVAILABLE TO THE UNITED STATES?

Section I indicates that there are many sound defenses available to the United States in response to the E.U.'s challenge to Helms-Burton. These defenses center around the fact that GATT seems inapplicable to most of the provisions of Helms-Burton, and especially to all the provisions of its Titles III and IV. These provisions do not deal with "trade in goods" in the traditional GATT sense, or with "trade in services" as that term is defined in GATS.

However, the United States chose not to use any of those defenses. Instead, it has chosen to defend on the basis of national security under GATT Article XXI.⁷⁵ Further, the United States asserts that this defense is entirely self-judged, and that a panel may not attempt to look behind such an assertion to consider its validity.⁷⁶

SYSTEM AND WORLD TRADE DIPLOMACY 159-67 (2d ed. 1990) (discussing the Australian Subsidy case).

74. This difficult balance was articulated by the U.S. representative when discussing the Panel Report on "United States — Trade Measures affecting Nicaragua" before the council. See GATT Index, *supra* note 46, at 659. The representative stated that nullification or impairment when no GATT violation had been found was a delicate issue, linked to the concept of "reasonable expectations". . . . Applying the concept of "reasonable expectations" to a case of trade sanctions motivated by national security considerations would be particularly perilous, since at a broader level those security considerations would nevertheless enter into expectations."

Id. at 706 (quoting GATT Doc. C/M/204).

75. See GATT, *supra* note 4, art. XXI; see also sources cited *supra* note 8.

76. "Every country must be the judge in the last resort on questions relating to its own security." GATT Index, *supra* note 46, at 600 (quoting Statement During the Decision of Czechoslovakia at the Third Session in 1949, GATT Doc. CP.3/SR.22, Corr. 1). It was suggested by the Chairman of Commission A that the only guarantee against abuses

From this assertion, the United States has decided that it need not argue the case, but can win a default judgment by chanting the magic words "national security,"⁷⁷ even though newspaper reports indicate that the Department of Defense has decided that Cuba is no longer a threat to our national security defense.⁷⁸

Is the national security defense that strong? There are some analytical problems with the United States position. There are, of course, many pronouncements in treatises and other writings that any assertion of a national security defense is so important to sovereign nations, that it must be accepted at face value without question. But there are very few actual precedents available, as will be discussed below.

One precedent involves Nicaragua's complaint against the United States embargo, and the GATT panel decision concerning that complaint.⁷⁹ After the panel was formed, the United States defended its embargo on national security grounds, and stated that GATT Article XXI allowed each contracting party to determine what actions were necessary to protect its own security. In its decision, the panel concluded that it could not find the United States to be in compliance with its obligations under GATT, nor could it find the United States to be failing to comply.⁸⁰ Since the panel decision did not find a violation, the United States interpretation is that the panel adopted all of its assertions concerning the national security defense.

of the national security exception was the "spirit in which Members of the Organization would interpret these provisions." GATT Index, *supra* note 46, at 600 (citing GATT Doc. EPCTA/A/PV/33, p. 20-21).

77. See, e.g., Riyaz Dattu & John Boscaroli, *GATT Article XXI, Helms Burton, and the Continuing Abuse of the National Security Exception*, 28 CAN. BUS. L.J. 198 (1997); Richard Lawrence, *U.S. Will Snub WTO Panel on Anti-Cuba Law*, J. COM., Feb 21, 1997, at 1A.

78. Several newspapers have reported that the U.S. Defense Department has found that Cuba is no longer a military threat to the U.S. See, e.g., Dana Priest, *U.S. Report Delayed on Lack of Cuban Military*, WASH. POST, Mar. 31, 1998, at A13. The report was reported to be ready for release to Congress on March 31, 1998. See *id.* However, before release, it was withdrawn for further review by political appointees. See *id.* Even if its conclusions are changed the original of this report will be embarrassing to U.S. trade litigators, and will be subject to discovery by any DSB panel. See *id.*

79. See Unadopted GATT Panel Report, *U.S.-Trade Measures Affecting Nicaragua*, Oct. 13, 1986, GATT Doc. L/6053, available in 1986 WL 363154 [hereinafter Nicaragua Report].

80. See *id.* ¶¶ 5.1-5.3.

There are, however, some difficulties with this interpretation. One difficulty is that the panel's terms of reference precluded it from considering the very issue for which it is now cited.⁸¹ When the panel was formed, the most contentious issue was removed from its jurisdiction, and its terms of reference precluded it from examining the validity of the United States assertion of national security as a defense. The panel decision, therefore states the views of each contending party, and then states that it is not permitted to decide the issue.⁸² As weak as the panel report is, it was never adopted by GATT. Thus, the Nicaragua Report is a non-adopted report stating that the panel is not permitted to consider or decide the validity of the assertion of a national security defense. That is not necessarily a decision holding that all assertions of a national security defense are automatically valid just because a contracting party makes the assertion.

The limitations on the panel's terms of reference may be understood only in relation to how weak the dispute settlement process was under GATT 1947. Under GATT 1947, a panel would not be formed if any one contracting party objected, giving each member a virtual veto. Within such a system, permitting limits on terms of reference was one way of ensuring that a panel would, in fact, be formed.

There is no equivalent difficulty in forming a panel now, however, under WTO and DSU.⁸³ Under "inverted consensus" rules, panels will be formed even if some, but not all, contracting parties object. That makes it much more likely that panels will be formed without limits on their terms of reference. It will no longer be necessary to exercise care in creating terms of reference so as to avoid parties' objections. When the WTO panels are formed without such limitations on their terms of reference, they may not regard the Nicaragua Report as a useful precedent. At the least, they may not consider that panel decision to uphold the concept that the validity of the assertion of a national security defense is determined by the asserter alone.

A more interesting precedent is Sweden's use in 1975 of a na-

81. See GATT Index, *supra* note 46, at 601 (citing GATT Doc. C/M/196) [hereinafter Nicaragua Terms].

82. See Nicaragua Report, *supra* note 79, ¶¶ 5.1–5.3.

83. See DSU, *supra* note 6, at 118 ¶¶ 6.1.

tional defense rationale to justify an import quota system on footwear.⁸⁴ The Swedes asserted that their army would need domestically produced footwear in case of war. The quota was needed to protect the domestic footwear industry, whose production had decreased. When the Swedish measure was discussed in the GATT Council, many contracting parties expressed reservations and doubts as to whether the Swedish measure could be so justified. Sweden hastily made an offer of consultations on the matter, and removed the quota system within two years. If interpretation of GATT is determined by what sovereigns *do*, as well as what they say, this is a precedent.⁸⁵

Thus, the precedents on the use of the national security defense may be more mixed than the United States would like. The Swedish footwear quota system shows how the national security defense can be abused, and that other contracting parties do react — although in 1975 the reactions were informal and diplomatic.

The discussions concerning the U.A.R. accession to GATT while adhering to the Arab League boycott of Israel follow a path similar to that of the Swedish footwear quota, but illustrating the other side of the coin. The boycott of Israel was considered a political decision and not trade-related. Because it was a political decision, the boycott, even a secondary boycott, was not considered to contravene the U.A.R.'s obligations under GATT.⁸⁶ The contracting parties are able to make distinctions based on motivation, despite confusing labels. They can recognize a political decision with economic consequences (U.A.R.), or an economic decision cloaked in political terms (Sweden). The former is not considered to violate GATT obligations, while the latter raised doubts, required consultations and was withdrawn.

The lesson for the United States is that claims based on national security under Article XXI may not provide the simple, automatic

84. Sweden introduced the quota system in November 1975. See GATT Index, *supra* note 46, at 603 (citing discussion of measure in the GATT Council, GATT Doc. L/4250 at 3). They justified the measure under GATT Article XXI. See *id.* Following objections by other member states, who did not believe the measure was necessary to protect national security, Sweden removed the quota in July 1977. See *id.*

85. See Rene E. Browne, *Revisiting "National Security" in an Interdependent World: The Article XXI Defense After Helms-Burton*, 86 GEO. L.J. 405 (1997); Jackson & Lowenfeld, *supra* note 10; *WTO Powers Are Put to the Test*, WASH. POST, Feb. 22, 1997, at D1.

86. See U.A.R. Report, *supra* note 46.

“win” that is hoped for. A national security claimed defense which is actually politically motivated will probably be successful, but a claimed national security defense which is considered a disguised trade protection measure probably will not. Since Helms-Burton is politically motivated, the United States claim of a national security defense would probably be successful if carefully argued before a WTO panel. However, the national defense claim does have vulnerabilities, and a United States failure to appear and present its case could lead to a rejection of the defense. As many attorneys have learned the hard way, the easiest way to lose the “unlosable case” is by default.⁸⁷

III. WHAT IS THE EFFECT OF ASSERTING THE NATIONAL SECURITY DEFENSE?

To most academic observers, the United States assertion of the Article XXI national security defense is both ridiculous and dangerous. It seems like the functional equivalent of a person who, while having a discussion with a group of other people, suddenly brings a hand grenade out of their pocket, pulls the pin and states: “Let us continue the discussion, but if you do not agree with me, I will drop the hand grenade and kill the entire group.”

If the United States could claim with a straight face exemption from GATT disciplines because of a threat to our national security from Cuba, then any other contracting party could, with an equally straight face, claim exemption from all GATT disciplines in regard to trade with any other nation.⁸⁸ If the United States claim was successful on a self-judging basis, then claims by any other contracting party would also be successful on a self-judging basis. Thus, any contracting party who is the subject of a complaint under DSU could

87. This Author's favorite example of losing the unlosable case is *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982) (finding jurisdiction and entering a default judgment in favor of plaintiffs). The plaintiffs owned Chinese railroad bonds that had matured 40 years before suit was brought. *See id.* at 872. However, the statute of limitations is an affirmative defense that must be pleaded and proven, and the Chinese government refused to appear and argue that defense — and it lost. *See id.* at 873–74. Subsequently, through enormous effort, that decision was overturned in an unpublished order setting aside the default judgement. *See Jackson v. People's Republic of China*, 596 F. Supp. 386, 387 (N.D. Ala. 1984) (finding lack of jurisdiction and dismissing the case), *aff'd*, 794 F.2d 1490 (11th Cir. 1986).

88. *See Browne, supra* note 85; *Jackson & Lowenfeld, supra* note 10.

merely respond “national security defense” and avoid responsibility, destroying any ability that the DSU has to decide issues and enforce decisions.

That is a strange result for the United States to seek. The United States worked very hard to create a workable dispute settlement mechanism within the WTO, a mechanism that could bring enforcement to its decisions.⁸⁹ And we succeeded in creating such a mechanism. Now, in the first difficult case in which we are the respondent, we seem willing to engage in conduct which would weaken, or even overthrow, that mechanism. For example, Sweden could renew its footwear quota and avoid the WTO disciplines.⁹⁰ The logical result under the WTO would be a dispute resolution mechanism which is more fundamentally flawed than was the previous mechanism under GATT 1947.

This result would be an unfortunate unintended consequence. It would be even more unfortunate because, as was indicated in Part I of this article, there are other valid defenses available, based on the inapplicability of the WTO to most Helms-Burton provisions. Why has the United States reacted in this seemingly inappropriate and destructive manner?

It is possible that the United States provided this response because it considered the original E.U. complaint equally inappropriate and destructive; an attempt to bring an overtly political dispute before a trade-related body. Further, a complaint that had, as we have seen in Part I.B. of this article,⁹¹ to have almost no foundation in any of the specific provisions of the WTO Agreements. An inappropriate response to an inappropriate complaint may seem to be rational conduct; but to the rest of us, it looks like two kids playing “chicken” with the world trading system.

Mr. Davidson believes that Titles III and IV of Helms-Burton are jurisdictionally inappropriate,⁹² but the United States government could believe that the E.U. complaint to the WTO is equally jurisdictionally inappropriate. The dispute which centers on Titles III and IV of Helms-Burton does not involve “trade in goods”, but

89. See, e.g., Testimony of Michael Kantor, *supra* note 18.

90. See *supra* note 69.

91. See *supra* Part I.B.

92. See Nicholas Davidson, *Secondary Sanctions: The U.K. and E.U. Response*, 27 STETSON L. REV. 1425 (1998).

does involve investment policies, so GATT does not appear to have jurisdiction. As an investment dispute, since TRIMS is non-functional,⁹³ there would seem to be to this writer no WTO jurisdiction through any of the other multilateral agreements.

If the problems of the applicability of the WTO Agreements are relatively clear, why would the E.U. bring its complaint to the WTO? The answer to this question lies in the fact that the United States and the E.U. have two very different conceptions of what the dispute settlement process under WTO is all about. The former regards it as an international trade court with enforcement powers; the other considers it to be an enhanced form of diplomacy and international negotiations.

The United States and most developing countries view the DSB as a court system for trade disputes involving sovereigns.⁹⁴ They seek a rule-oriented approach to such disputes, with system-decided remedies for "compensation," or system-sanctioned self-help remedies for "retaliation." The comparison to a sheriff with a court order is loose, at best, but the similarities are recognizable. The proponents of this view believe that this use of DSB will provide a quick resolution of trade disputes, so that the parties can put the disputes behind them and proceed to enhance their trade relationships. It is comparable to the attitude that most merchants, who are in long-term relationships, have toward contract disputes. It is a useful attitude when the dispute is purely economic and not a political one.

The European approach is quite different. They traditionally viewed GATT as a forum for diplomatic negotiations over trade disputes, and view the DSB as a continuation and enhancement of this power-oriented diplomacy, even when filing a complaint.⁹⁵ The complaint, therefore, is not regarded as the start of a formal court-oriented process, but instead as a method of obtaining the other party's attention and signaling a desire for serious negotiations to begin. The proponents of this view wish to use DSB to create complex, mutually satisfactory negotiated solutions to problems seen as involving a combination of economic and political problems which are

93. See *supra* note 70 and accompanying text.

94. See Judith H. Bello & Alan F. Homer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 *Int'l. Law.* 1095, 1102-03 (1994).

95. See, e.g., E.U. Complaint, *supra* note 5.

inextricably intertwined. But the complainant seeks these negotiations through the threat of the possibility of an adverse ruling from the DSB.

It was this type of negotiations which the E.U. sought by initiating the DSB process against Helms-Burton. The United States reacted as a defendant which had been served with a complaint that was, at best, frivolous and, at worst, an abuse of process. Was this the best way to get the United States to the bargaining table? More importantly, was this the appropriate bargaining table to use?

IV. HOW SHOULD THIS DISPUTE BE RESOLVED PROCEDURALLY?

If DSB is an inappropriate forum, what is an appropriate forum? There are two leitmotifs to this symposium. One is that the United States uses unilateral measures to affect international problems too early and too often.⁹⁶ The second is that there is no multilateral mechanism to restrain that use. To have such a multilateral mechanism, nations need a multilateral agreement which covers the disputed conduct. WTO is not such an agreement without a functional TRIMS because such a WTO does not cover investment issues, and Titles III and IV of Helms-Burton primarily concern investment issues.

If this is a dispute over investment issues, there is an appropriate forum, which is designed to negotiate a resolution of investment issues between developed countries. After the failure of TRIMS, the Organization for Economic Cooperation and Development (OECD) began the work of negotiating the Multilateral Agreement on Investment (MAI).⁹⁷ Those negotiations are well underway, but like the Uruguay Round they will require lengthy negotiations to achieve agreement.

Helms-Burton is already a subject of negotiations within the MAI, but the E.U. complains that the United States is not sufficiently flexible in the MAI.⁹⁸ Therefore, it chose to pursue these issues

96. See Richard N. Haass, *Sanctioning Madness*, FOREIGN AFF., Nov./Dec. 1997, at 74.

97. See, e.g., Dunne, *supra* note 19, at 3. The Multilateral Agreement on Investment (MAI) is currently under negotiations within the OECD. Most recently, the U.S. has refused to endorse a draft agreement because it is "unbalanced." See *id.*

98. Many do not believe an agreement can be reached without a solution to the

within the WTO, perhaps to leverage its bargaining power and create more flexibility in the United States position. From a legal analytical perspective, as this article endeavors to establish, this was inappropriate. But there is also a political dimension to this dispute over Titles III and IV of Helms-Burton, and it is also inappropriate to resolve this dispute under the WTO from a political perspective.

There are several advantages to resolving this dispute within a multilateral investment agreement. One is that the negotiators would not be limited to the traditional language and ambiguous concepts of GATT Article XXI.⁹⁹ The new language could distinguish between political and disguised trade protection measures, and not rely upon interpretations of a seemingly open-ended national security defense. This is how the contracting parties seem to have acted in previous disputes under GATT.¹⁰⁰ Further distinctions between permissible political measures and impermissible political measures could then be negotiated directly without constantly raising dubious national security issues. The resulting agreement might then be able to place agreed-upon, specific, but limited, restrictions on the use of unilateral actions or controls by any contracting party.

If the resulting agreement places any limitations on the use of unilateral actions or controls by the contracting parties, it will then face the domestic political hazards of gaining adherence by the individual contracting parties. That will be an especially sensitive subject within the United States, and MAI is much more likely to provide a successful vehicle than the WTO. The WTO is *perceived* within many parts of the United States as either economically harmful to the United States or as having economic costs and benefits about in balance. If the political cost of abandoning the use of unilateral controls were added to the current mix, it would be perceived by many as unbalanced and unsustainable.

On the other hand, MAI, as an investment agreement, is perceived as bringing greater benefits and lesser costs, because the United States market is believed to be already open to investment. Thus, there is likely to be more political flexibility, a greater ability to negotiate a compromise restriction on the use of unilateral con-

Helms-Burton dispute reached. See *OECD Investment Accord Impossible Without U.S.-E.U. Helms-Burton Agreement*, AGENCE FR.- PRESSE, Jan. 16, 1998.

99. See *supra* text accompanying notes 62-73 and 75-77.

100. See *supra* text accompanying notes 71-73.

trols by the United States and others, when the vehicle is an investment agreement. On the political front, MAI is a more appropriate forum for resolving disputes concerning Helms-Burton than is the WTO.

CONCLUSION

The E.U. has presented a complaint that the Helms-Burton Act violates the United States obligations under the WTO and has requested formation of a DSB panel to consider its complaint. This article examined two sets of issues arising from that E.U. action. First, it examined whether the Helms-Burton Act violates the United States obligations under the WTO Agreements and, if so, what defenses might be available to the United States under those agreements. Second, it examined the appropriateness of the E.U. complaint and of the United States assertion of the national security defense under GATT Article XXI, and the appropriateness of the WTO as a forum to resolve this dispute.

The examination of Helms-Burton was divided into analyses of Title I and of Titles III and IV of that act. Title I, which concerns trade in goods, does violate the United States' obligations under GATT, but the violations are few and esoteric. The provisions concerning entry of goods which have been transported from or through Cuba violate GATT Article V, although whether these United States provisions create significant trade loss is open to question. The provisions which prevent entry of Cuban products after they have been incorporated into other, non-Cuban products violate GATT Articles I and XIII. These provisions have not previously been challenged, but the new WTO Agreement on Rules of Origin make them more vulnerable.

Despite these limited violations through Title I of Helms-Burton, the E.U.'s primary concern has been with Titles III and IV of that act, which provide damage remedies against persons who "traffick" in "confiscated property" and bar the entry of those who participate in trafficking. Since they concern *use* of property (real, personal and intellectual), they do not seem to violate the "trade in goods" provisions of GATT or the "trade in services" provisions of GATS. They might constitute a "non-violation nullification or impairment of benefits" under GATT Article XXIII, but that would depend on the E.U. being able to prove that United States motivations were to

distort trade, or that “reasonable expectations” of the WTO members related to trade concessions were violated. The E.U. cannot prove the first, and proof of the second seems unlikely.

The United States has ignored the obvious defenses that Titles III and IV of Helms-Burton are not covered by the WTO Agreements and therefore cannot be violated. Instead, it has asserted the national security defense under GATT Article XXI, that the defense is wholly self-judging and automatic, and that the United States will not appear before a DSB panel to argue the matter, but will only enter its claim of the defense. Although precedent is scarce, the defense may not be as automatic as the United States asserts. It may not be available for disguised trade-related measures, but it does seem available for politically motivated measures. Since Helms-Burton is generally accepted to be a politically-motivated measure, the national security defense should be successful; but it should be argued carefully, not merely claimed.

If the United States is successful in using the national security defense in this case, especially using the broad claims that it is self-judging and automatic, its action could undermine the DSB process. If the United States can make such a claim, then every other respondent in every other dispute can make a similar claim. WTO contracting parties with valid complaints would receive no relief through the DSB process, and the WTO process would be no more effective than that under GATT 1947. Since the United States worked very hard to create an effective dispute resolution process under the WTO, its current conduct seems baffling.

One possible explanation is that the United States has given an inappropriate response to what it considered to be an inappropriate complaint — or, at least, a complaint which was lodged before an inappropriate forum. The E.U. regards the DSB as an extension of diplomacy, and a vehicle for forcing trading partners to negotiate. From that perspective, forcing negotiations on a problem not precisely related to the WTO, but involving commercial matters, may be appropriate. The United States regards the DSB as a rule-oriented system with many similarities to a court system. From that perspective, the E.U. sought to bring it before a body that did not have subject-matter jurisdiction, through a complaint that was either frivolous or an abuse of process.

If the WTO is an inappropriate forum for this dispute, because the WTO Agreements are inapplicable, there is a better forum. This

is essentially a dispute over investment measures. The OECD is currently negotiating an agreement on investment measures (MAI), and Helms-Burton and other such measures are being debated there. While the E.U. may be dissatisfied with the pace of these negotiations, MAI is the appropriate place for them to occur. The MAI negotiations are not channeled by the language of GATT Article XXI, and can create distinctions between trade-related and politically-motivated measures. Because MAI involves only investment measures, it can also create appropriate limitations on the latter, and still present a total package that is politically acceptable.¹⁰¹

101. As this manuscript goes to press, there are reports that the E.U. will let the WTO panel lapse, but will continue negotiating with the U.S. concerning Helms-Burton. See *E.U. Members Signal Acceptance of Move to Let Helms-Burton Panel Expire*, 16 INSIDE U.S. TRADE, Apr. 17, 1998, at 1. The forum for those continuing negotiations is not clear from the report. See *id.*