

CONSIDERATIONS OF CUBA IN RELATION TO THE INCLUSION OF NEW DISCIPLINES
IN THE MULTILATERAL INVESTMENT AGREEMENT (MIA)
UNDER NEGOTIATION IN OECD

Communication from Cuba

The following communication, dated 2 October 1997 and addressed to the Director-General, has been received from the Permanent Mission of the Republic of Cuba with the request that it be circulated to Members.

I. INTRODUCTION

In the last few months, the US Administration has been negotiating with the European Union, seeking to include new disciplines in the Multilateral Investment Agreement currently in preparation at the OECD.

Within the context of those negotiations, some of the measures being considered may affect Cuba because of the interpretation that US negotiators are trying to give to the nationalization of US property undertaken at the end of the fifties and the beginning of the sixties.

One of the objectives of this document is to avoid the distortion of the historical process and the conditions under which such nationalization took place. A secondary objective would be to warn the rest of the nations about the implications that the aforementioned scheme may entail.

What is at stake with the Helms-Burton Act goes well beyond the bilateral conflict between Cuba and the United States, showing how this powerful country views the reordering of the international relations with its own allies, the developing countries and the multilateral institutions.

By brewing up confusion and resorting to deceit, a plot against Cuba is being concocted, which can be used against other nations in the near future.

II. BACKGROUND

After six months of futile warnings to have the Helms-Burton Act repealed, last 3 October 1996, the European Union asked the World Trade Organization (WTO) to appoint an Expert Panel to examine and adopt decisions about the infringements of the regulations of that organization resulting from the Helms-Burton Act. Canada, Mexico, Japan, Malaysia and Thailand escorted the European Union as Third Parties to the request.

The US Administration threatened to come up with National Security reasons in order to impose the extraterritorial measures contained in that Act, which would seriously and irresponsibly undermine WTO in its organizing functions concerning international trade and world economy.

On 11 April of this year, the United States and the European Union reached an "Understanding," and it was reported that the US Administration undertook to continue suspending the lawsuits under Title III of Helms-Burton and negotiate with the US Congress the possibility of amending the Act in question to waive Title IV. Besides, commitments were made to work towards an agreement concerning the Iran and Libya Sanctions Act (ILSA).

The European Union, pursuing the common objective of not weakening WTO, temporarily suspended the proceedings before WTO's Panel.

Based on this "Understanding", the negotiation process relating to the Helms-Burton Act was referred from WTO to the OECD, the organization where, since 1995, a Multilateral Investment Agreement is being prepared.

Two years ago, the Ministerial Meeting of the OECD adopted the following guideline when it set up the Negotiation Group which would draft the Multilateral Investment Agreement:

"The MIA should provide a wide multilateral structure for international investments, with high standards for the liberalization of investment regimes and investment protection, and containing effective procedures for the settlement of lawsuits."

In its two years of work, the Negotiation Group has only taken up the issue of nationalization of foreign property in terms of exceptional cases which could appear in the future. At no stage in the preparation of the MIA was any reference made to previous nationalization. That is recorded in the Informative Note of the OECD dated March 1997 concerning the development of the MIA:

"Rapid progress has been made in drafting the MIA provisions on investment protection. This can be attributed to the wide experience acquired by OECD countries in negotiating Bilateral Investment Protection Treaties (BITs). The MIA provisions are largely based on the principles enshrined in these Agreements."

Explicitly, that same Note explained how the issue of nationalization would be dealt with:

"ii) Expropriation

Expropriation, or any other measure having similar effect, whether directly or indirectly, would be permitted only if it is in the public interest, on a non-discriminatory basis, against payment of prompt, adequate and effective compensation, and in accordance with due process of law."

In an amazing move, the US Administration is trying to transform its position, going from the Defendant's seat it occupied at WTO to setting down new measures on International Law within the framework of the OECD, by means of which it attempts to define in the MIA as "illegal and against International Law the nationalization of property undertaken" from the end of the fifties. One of the goals of this scheme would be to deem illegal the nationalization of US property undertaken by Cuba. In practice, it intends to internationalize Titles III and IV of the Helms-Burton Act, under the umbrella of a multilateral treaty issued by the OECD. Another goal would be to apply these measures to other nations, in accordance with the convenience of the US Administration and Congress.

After the Understanding in April, the United States managed, in its negotiations with the EU, to isolate the 13 other member countries of the OECD.

It is obvious that in a partially secret environment and with compartmentalization of information at the political levels of the OECD member countries, US negotiators will try to take advantage of those conditions to achieve their objectives. In the United States proper some voices are requesting information about the decisions made in the negotiations of the MIA because there have been vast information gaps in this respect.

The US endeavours to reorder an International Agreement with the sole purpose of serving its foreign policy. The United States is actually taking advantage of its long-standing economic war against Cuba to use it as its test lab for future action with the rest of the world.

The US violated all rules by enacting the Helms-Burton Act, climbing above the recognized regulations of International Law. But it refuses to be held accountable for such action. It is dangerous to allow it not only to break rules with impunity but to impose its power once again, taking concessions away from other nations. This will poise a threat to the future; a step further in the accumulation of unilateral acts done by Washington lately, such as self-defining a reduction in its financial obligations to the UN; pre-defining the reforms to be undertaken by that institution; and setting itself up as the supreme attorney which “certifies” the good or bad behaviour of other countries in the international struggle against drug trafficking, human rights and other issues.

III. THE DANGERS AND CONTRADICTIONS RESULTING FROM THE SCHEME CONCOCTED BY THE UNITED STATES

In the last four years, the US enacted 61 executive laws and decisions to apply unilateral trade sanctions against 35 nations, which account for 40% of the world population.

The inconsistency of the US policy goes to such extremes that the President’s Export Council issued a report advising him to restrict the use of unilateral sanctions, eliminating extraterritorial sanctions and secondary boycotts. This report exemplifies this inadequate policy through the Helms-Burton and the D’Amato-Kennedy Acts, and the complications brought about in the international and trade fields.

It is interesting to note that the Executive Director of the President’s Export Council is the Under Secretary of State Stuart Eizenstat, who in one instance advises to restrict the use of unilateral and extraterritorial sanctions and, on the other, spearheads the task force set up to turn the Helms-Burton Act into an international affair.

Alan Larson, US Assistance Undersecretary of State and Vice-chairman of the Negotiation Group in charge of the MIA since its inception, is the second man in command in this negotiations with the European Union.

The US is trying to impose disciplinary measures which “prohibit” investments in property nationalized or expropriated by any country without compensation and envisages sanctions for those violating its rules. It attempts to apply such retrospective measures to the acts of expropriation carried out at the end of the fifties. The predefinition of the period from which it plans to consider the nationalization is similar to an Identikit picture of Cuba.

After the end of World War II, several tendencies and movements became stronger in order to decolonize many African, Asian and Caribbean nations. In Latin America, those forces with some sense of nationalism grew at a fast rate. Several were interested in retrieving and preserving its resources

and wealth, and others, like Cuba, tried to build a more righteous system, getting rid of the hegemony of its powerful neighbour.

All those forces undertook a nationalization process spanning a quarter of a century, from 1950 to 1976. Those years were witness to the intervention of the Suez Canal; the Chinese, Vietnamese and Cuban acts of expropriation; the Arab and Peruvian nationalization of oil industries during the first half of the seventies; the nationalization process in Africa in the sixties and seventies, in addition to the nationalization that took place in Portugal in the early seventies. The year 1976, when Venezuela nationalized its oil companies, was the last of the era of major acts of nationalization. The new privatization wave that has swept the world in the last 15 years, has included many enterprises which were previously nationalized. It is likely that these new measures the US Administration is trying to include in the MIA will bring about unforeseen complications with other countries and enterprises, which has not been considered by those in Washington hatching up this plan. These complications will not have anything to do with Cuba.

It would not be a surprise to find US multinationals that have acquired privatized enterprises which were previously nationalized without compensation and were formerly owned by British, French, Dutch, Belgian, Italian or other countries companies. Could cases like those come up in Algeria, Indonesia, Congo, Peru, Venezuela and even the Middle East?

A boomerang effect would not hurt US planners for the first time: by trying to act against a given country, they unleash unforeseen situations which then backfire. It happened like that when from 1959 the Central Intelligence Agency encouraged the hijacking of Cuban planes. The CIA did not consider that most planes were American, and that practice they abetted against Cuba soon spread to their own airlines.

Cuba would like to recall that:

I- The willingness of the Cuban Government to negotiate mutual claims has always existed, including the compensation process. In December of 1996, upon enactment of Law No. 80 (Cuba's clawback law against Helms-Burton), it sets down:

Article 2

"The disposition of the Government of the Republic of Cuba, implemented in the nationalization laws implemented more than 35 years ago, in relation to adequate and just compensation for the expropriated assets of persons and corporations which had US citizenship or nationality at that time, is hereby reaffirmed."

II- The UN General Assembly in its 47th Session approved its Resolution 47/19 titled:

"Need to put an end to the economic, trade and financial blockade imposed on Cuba by the United States of America,"

according to which, all the members of that organization should abstain from enacting and applying laws and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under its jurisdiction, as well as free trade and navigation.

In conformity with that same resolution, the countries applying that kind of action should take all necessary measures to eliminate or annul the effect of those laws.

From 1992 to date, the UN General Assembly has approved five resolutions requesting the US to abstain from implementing extraterritorial laws. In its last Session, 137 States reiterated that request.

It is Cuba's duty to warn and insist about the following:

- All the Cuban nationalization laws contained provisions relating to adequate compensation, both to nationals and foreigners. Thus, under international practice, Cuba negotiated and signed several Global Compensation Agreements, paying all agreed-upon amounts, except the one owed to Spain (currently in implementation because its validity period is 20 years: 1988-2008). The Governments which submitted claims in favour of their citizens were served and, accordingly, some compensation agreements were signed with them (France, Switzerland, the United Kingdom, Canada and Spain). Several small claims were also paid off to Italy through the Exchange of Notes.
- On many occasions, the Cuban Government has suggested that the US Government sit down with it to discuss the compensation issue along with other matters, the request being rejected all the time.
- Throughout almost four decades, the US Administrations have not been interested in receiving compensation for nationalized property. This is the confusion the US is trying to spread among those working on the MIA and the OECD member nations. The US Government is only intent on overthrowing and wiping out the Cuban Revolution.
- The Helms-Burton Act is totally unacceptable in all its Titles, for it attempts, from the United States of America, to determine the political, economic and institutional order of a sovereign, independent state, an objective which is not in line with the UN Charter and violates principles of sovereignty and non-interference in the internal affairs of other states.
- The recent action taken by the US Congress shows that, regardless of the final form adopted by the Foreign Service Reform Act, it will always be at cross purposes with the understanding reached with the EU in April. Besides keeping Title IV of the Helms-Burton Act, the notion is to spread it to the rest of the world, which will poise a constant threat to all investors, including those unrelated to Cuba. The lack of answers by the Legislative Power clearly shows that there is no intention to honour the obligations entered into with the European partners.
- Ongoing negotiations are not about a trade dispute between the EU and the US, but about a political issue affecting the sovereignty of the EU member nations, which could go beyond the scope of action of the Commission.
- Any arrangement or understanding agreed upon with prejudice to Cuba within the global framework of the MIA may become a perilous legal precedent likely to be applied to any country in the future. Cuba has endured almost four decades of blockade and acts of aggression. Other countries could now fall prey to such action.