

Fordham International Law Journal

Volume 20, Issue 3

1996

Article 6

The Helms-Burton Blocking Statute of the European Union

Jürgen Huber LL.M.*

*

Copyright ©1996 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Helms-Burton Blocking Statute of the European Union

Jürgen Huber LL.M.

Abstract

According to European Community ("EC") law, the initiative for legislation lies with the Commission of the European Communities ("Commission"). Therefore, on July 31, 1996, the Commission submitted to the Council of the European Union a "proposal for a Council regulation protecting against the effects of the application of certain legislation of certain third countries, and actions based thereon or resulting therefrom." After long and intensive discussions by the Committee of Permanent Representatives of the Member States ("COREPER") and at the ministerial level, which proved to be difficult due to political and legal reasons, the Council, during its October 28, 1996 session, arrived at a political agreement in Council Regulation 2771/96 ("Regulation"). The Regulation aimed to "protect[] against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom." The Council based this Regulation on Articles 73c, 113, and 235 of the Treaty Establishing the European Community ("EC Treaty"). The Council believed that this piece of Community legislation did not cover all areas of activities that needed protection, and, therefore, the Council also adopted a Joint Action based on Articles J.3 and K.3 of the Treaty on European Union ("TEU"). The official adoption of this Regulation and of this Joint Action by the Council took place on November 25, 1996 after legal linguistic experts had finalized the legal texts. Part I of this Essay sets out the content of these European Union acts. Part II analyzes the legal problems which occurred during the Council deliberations in relation to Community and EU law.

THE HELMS-BURTON BLOCKING STATUTE OF THE EUROPEAN UNION

*Dr. Jürgen Huber, LL.M.**

INTRODUCTION

After the U.S. Congress passed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act¹ ("Helms-Burton Act") in March of 1996, the Council of the European Union ("Council"), during its July 15, 1996 session, identified a range of measures that the European Union could deploy in response to the damage EU companies incurred from the implementation of the Helms-Burton Act. The Council identified the introduction of legislation by the European Union with the objective of neutralizing the extra-territorial effects of the U.S. legislation.

According to EC law, the initiative for legislation lies with the Commission of the European Communities ("Commission").² Therefore, on July 31, 1996, the Commission submitted to the Council a "proposal for a Council regulation protecting against the effects of the application of certain legislation of certain third countries, and actions based thereon or resulting therefrom."³ After long and intensive discussions by the Committee of Permanent Representatives of the Member States ("COREPER")⁴ and at the ministerial level, which proved to be

* The author is a member of the Legal Service of the Council of the European Union. He expresses purely personal views which do not necessarily reflect those of the Council.

1. Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021 et. seq. (1996)) [hereinafter Helms-Burton Act].

2. Under Title V, Provisions on a Common Foreign and Security Policy, and Title VI, Provisions on Co-operation in the Fields of Justice and Home Affairs of the Treaty on European Union, individual Member States may take the initiative for Joint Actions (art. J.3 and J.8 (3)), programs implemented to further the objectives of the common foreign and security policy of the European Community which are passed in areas of common interest to and binding on the Member States. Treaty on European Union, Feb. 7, 1992, art. J.3, K.3, O.J. C 224/1, 94-95, 97-98 (1992), [1992] 1 C.M.L.R. 719, 730-31, 736, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)).

3. O.J. C 296/10 (1996).

4. The "Committee of Permanent Representatives of the Member States

difficult due to political and legal reasons, the Council, during its October 28, 1996 session, arrived at a political agreement in Council Regulation 2771/96⁵ ("Regulation"). The Regulation aimed to "protect[] against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom."⁶ The Council based this Regulation on Articles 73c, 113, and 235 of the Treaty Establishing the European Community ("EC Treaty").⁷ The Council believed that this piece of Community legislation did not cover all areas of activities that needed protection, and, therefore, the Council also adopted a Joint Action⁸ based on Articles J.3 and K.3 of the Treaty on European Union ("TEU").⁹

The official adoption of this Regulation and of this Joint Action by the Council took place on November 25, 1996 after legal linguistic experts had finalized the legal texts.¹⁰ Part I of this Essay sets out the content of these EU acts. Part II analyzes

("COREPER") prepares and carries out the tasks assigned to it by the Council, acting as a link between the Council and the Commission." Treaty Establishing the European Community, Feb. 7, 1992, art. 151 (1), [1992] 1 C.M.L.R. 573, 681 [hereinafter EC Treaty], *incorporating changes made by TEU, supra* note 2.

5. Council Regulation No. 2271/96, O.J. L 309/1 (1996).

6. *Id.*

7. EC Treaty, *supra* note 4, art. 73c., [1992] 1 C.M.L.R. at 621. Article 73c of the EC Treaty provides:

Whilst endeavouring to achieve the objective of free movement of capital between member-States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment (including investment in real estate), establishment, the provision of financial services, or the admission of securities to capital markets.

Id. Additionally, Article 113 states, "the Commission shall submit proposals to the Council for implementing the common commercial policy." *Id.* art. 113, [1992] 1 C.M.L.R. at 656. Furthermore, Article 235 asserts:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Id. art. 235, [1992] 1 C.M.L.R. at 716.

8. Joint Action of 22 November 1996, O.J. L 309/7 (1996) [hereinafter Joint Action].

9. TEU, *supra* note 2, art. J.3, K.3, O.J. C 224/1, at 94-95, 97-98 (1992), [1992] 1 C.M.L.R. at 730-31, 736; Joint Action, *supra* note 8, pmb., O.J. L 309/7, at 7 (1996).

10. Council Regulation No. 2271/96, *supra* note 5, O.J. L 309/1 (1996).

the legal problems which occurred during the Council deliberations in relation to Community and EU law.

I. THE CONTENT OF THE EU REGIME

A. Objectives of the Regulation

The EU Regulation and Joint Action are mainly concerned with removing the adverse effects of Title III and Title IV of the Helms-Burton Act.¹¹ Under Title III of the Helms-Burton Act, legal proceedings may be brought in the United States against EU citizens or companies involved in the trafficking¹² of property formerly owned by U.S. citizens and confiscated by the Cuban Government.¹³ In addition, Title III provides that such proceedings may lead to judgments against EU citizens to pay multiple compensation to a U.S. party.¹⁴ Title IV provides for the refusal of entry into the United States of persons involved in the trafficking of confiscated property, including the spouses, minor children, and agents thereof.¹⁵

The preamble of EC Regulation No. 2271/96 sets out the reasons for its adoption.¹⁶ It recalls that the objectives of the European Community include contributing to the harmonious development of world trade, progressively abolishing restrictions on international trade, and achieving, to the greatest extent possible, the free movements of capital.¹⁷ These two stated reasons are linked directly to the scope of the Regulation, and they indicate clearly that Articles 113 and 73c of the EC Treaty constitute, together with Article 235, the legal basis of this act.¹⁸ The preamble then sets out, "a third country has enacted certain laws which purport to regulate activities of persons under the jurisdiction of the Member States,"¹⁹ and, "by their extra-territorial application such laws . . . violate international law and impede the

11. Helms-Burton Act, 22 U.S.C.A. §§ 6081-85 (1996).

12. *See id.* § 6023 (13)(A)(i) (1996) (defining trafficking as use, sale, transfer, control, management, and other activities that benefit persons).

13. *Id.* §§ 6081-85 (1996).

14. *Id.*

15. *Id.* § 6091 (1996).

16. Council Regulation No. 2271/96, *supra* note 5, pmbl., O.J. L 309/1, at 1 (1996).

17. *Id.*

18. *Id.*

19. *Id.*

attainment of the aforementioned objectives.”²⁰ The preamble further states that these laws “affect or are likely to affect the established legal order and have adverse effect on the interests of natural and legal persons exercising rights under the [EC Treaty].”²¹

The preamble then proceeds to state:

Under these exceptional circumstances, it is necessary to take action at the Community level to protect the established legal order, the interests of the Community and the interests of the said natural and legal persons, in particular by removing, neutralizing, blocking or otherwise countering the effects of the foreign legislation concerned.²²

Finally, the preamble makes a cross reference to the Joint Action the Council adopted on the same day and indicates that the purpose of the Joint Action is to ensure that Member States take measures to protect those persons whose interests the foreign legislation affects insofar as this Regulation does not protect those interests.

B. Scope of the Regulation

Articles 1 and 11 of the Regulation determine its scope. According to Article 1, the Regulation provides protection against the extra-territorial application of the laws specified in the annex.²³ The Regulation provides protection where such application affects the interests of persons, referred to in Article 11,²⁴ who engage in international trade or the movement of capital and related commercial activities between the European Community and third countries.²⁵

Article 11 provides for wide coverage of the Regulation. Paragraph one covers all nationals of Member States who are residents in the European Community, whether they are found

20. Council Regulation No. 2271/96, *supra* note 5, pmbl., O.J. L 309/1, at 1 (1996).

21. *Id.*

22. *Id.*

23. These are the Helms-Burton Act, 22 U.S.C.A. §§ 6021 et seq. (1996), and the D'Amato Act (“Iran and Libya Sanctions Act of 1996”), Pub. L. No. 104-172, 110 Stat. 1541 (1995) (codified at 50 U.S.C. § 1701 (1996)).

24. Council Regulation No. 2271/96, *supra* note 5, art. 11, O.J. L 309/1, at 3 (1996).

25. *Id.* art. 1, O.J. L 309/1, at 2 (1996).

inside or outside the European Community.²⁶ Paragraph four includes any natural person who is a citizen of a third country and a resident in the European Community, wherever that person is found, unless that person is in the country of which he is a national.²⁷ Paragraph five embraces any other natural person present in the European Community, who is not a resident of the European Community, if that person acts in a professional capacity.²⁸ Paragraph five would cover such person if he is on a business trip in the European Community, but not if he stays in the European Community as a tourist.²⁹ Paragraph two encompasses any legal person incorporated within the European Community.³⁰ Finally, paragraph three covers any natural or legal person referred to in Article 1(2) of Regulation (EEC) No. 4055/86, an EC Regulation on maritime transport.³¹ It follows from the above that all five paragraphs establish a clear link between the persons the Regulation covers and the European Community, either through nationality,³² residency,³³ physical presence,³⁴ incorporation,³⁵ or control.³⁶ It must, however, be stressed that the Regulation only protects these persons if they are engaging in one of the activities referred to in Article 1.

26. *Id.* art. 11.1, O.J. L 309/1, at 3 (1996).

27. *Id.* art. 11.4, O.J. L 309/1, at 4 (1996).

28. Council Regulation No. 2271/96, *supra* note 5, art. 11.5, O.J. L 309/1, at 4 (1996).

29. *Id.*

30. *Id.* art. 11.2, O.J. L 309/1, at 4 (1996).

31. *Id.* art. 11.3, O.J. L 309/1, at 4 (1996); Council Regulation No. 4055/86, O.J. L 378/1, at 1 (1986) (stating "applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries"). Article 1(2) of Council Regulation 4055/86 stipulates the following:

The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

Council Regulation 4055/86, *supra*, art. 1(2), O.J. L 378/1, at 2 (1986).

32. Council Regulation No. 2271/96, *supra* note 5, art. 11.1, O.J. L 309/1, at 4 (1996).

33. *Id.* art. 11.1, 11.4, O.J. L 309/1, at 3-4 (1996).

34. *Id.* art. 11.5, O.J. L 309/1, at 4 (1996).

35. *Id.* art. 11.2, O.J. L 309/1, at 4 (1996).

36. Council Regulation No. 2271/96, *supra* note 5, art. 11.3, O.J. L 309/1, at 4 (1996).

C. The Substantive Rights and Obligations Created by the Regulation

Article 2 imposes upon any person referred to in Article 11 whose economic or financial interests the foreign legislation affects, the obligation to inform the Commission accordingly within thirty days.³⁷ If a legal person is affected, this obligation applies to directors and persons with management responsibilities.³⁸ This information is of essential importance to the Commission in order to enable it to assess the impact of the Helms-Burton Act on EU based companies.

According to Article 3, all information supplied may only be used for the purposes for which it was provided.³⁹ The Commission may, therefore, not disclose confidential information without the express permission of the person providing the information. This provision aims to counterbalance the obligation to inform the Commission under Article 2 by creating a clear obligation for the Commission to respect the principle of confidentiality.

The most important substantive provisions are contained in Articles 4,⁴⁰ 5,⁴¹ and 6.⁴² Article 4 prohibits, in categorical terms, the recognition and enforcement of any judgment of a court as well as any decision of an administrative authority located outside of the European Community giving effect to the Helms-Burton Act or the D'Amato Act or to actions based thereon or resulting therefrom.⁴³ Article 4 clearly aims at preventing the enforceability in the European Community of judgments of U.S. courts based on Title III of the Helms-Burton Act and providing for compensation against EU companies or natural persons. Moreover, because Article 4 addresses decisions of administrative authorities as well, it is also expected to apply to decisions based on the D'Amato Act.

Article 5 provides for an obligation of non-compliance with any requirement or prohibition, including requests of foreign

37. *Id.* art. 2, O.J. L 309/1, at 2 (1996).

38. *Id.*

39. *Id.* art. 3, O.J. L 309/1, at 2 (1996).

40. Council Regulation No. 2271/96, *supra* note 5, art. 4, O.J. L 309/1, at 2 (1996).

41. *Id.* art. 5, O.J. L 309/1, at 2 (1996).

42. *Id.* art. 6, O.J. L 309/1, at 2 (1996).

43. *Id.* art. 4, O.J. L 309/1, at 2 (1996).

courts, based on the Helms-Burton Act and the D'Amato Act.⁴⁴ Under certain circumstances, however, non-compliance might result in disproportionate damage to the person or company concerned, and, thus, Article 5(2) provides for the possibility of obtaining an authorization to comply to the extent that non-compliance would seriously damage the interests of the person concerned or those of the European Community.⁴⁵ The Commission may grant such authorization according to the procedure set out in Article 8.⁴⁶ Article 8 provides for a "comitology decision"⁴⁷ in accordance with Procedure III variant (a) of the Council Decision of July 13, 1987⁴⁸ laying down the procedures for the exercise of implementing powers conferred on the Commission.⁴⁹

Article 6 represents the cornerstone of the whole Regulation. It contains the so-called "claw-back" clause which enables the persons referred to in Article 11 who are engaging in activities set out in Article 1 to recover any damages, including legal costs, caused to that person by the application of the Helms-Burton Act.⁵⁰ The claimant may recover from the natural or legal person, a person acting on its behalf or as an intermediary, or

44. Council Regulation No. 2271/96, *supra* note 5, art. 5, O.J. L 309/1, at 2 (1996). Article 5 provides:

No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.

Id.

45. *Id.* art. 5, ¶ 2, O.J. L 309/1, at 2 (1996).

46. *Id.* art. 8, O.J. L 309/1, at 3 (1996).

47. *Id.* Without going into specific details of this complicated "comitology", under a type III variant (a) the Commission first submits to the committee a draft of the measure it will likely take. Council Decision of 13 July 1987, O.J. L 197/33, 34 (1987). For example, in the present case a draft to grant the authorization of compliance is submitted. Next, the Committee delivers its opinion by qualified majority. *Id.*; see EC Treaty, *supra* note 4, art. 148(2), [1992] 1 C.M.L.R. at 680. If the measure envisaged corresponds to the opinion of the Committee, the Commission adopts the measure. Council Decision of 13 July 1987, O.J. L 197/33, at 34. If the Commission's draft measure is not in accordance with the opinion of the Committee or if the Committee delivers no opinion, the Commission must submit to the Council a proposal relating to that measure. *Id.* If the Council has not acted by qualified majority within two weeks, the Commission adopts the proposed measures. *Id.*

48. Council Decision of 13 July 1987, O.J. L 197/33, 34 (1987).

49. *Id.*

50. Council Regulation 2271/96, *supra* note 5, art. 6, O.J. L 309/1, at 2-3 (1996).

any other entity causing the damages.⁵¹ It is important to note that this provision does not allow recovery from a company incorporated within the European Community in accordance with the laws of a Member State, if a U.S. based company of which the EU company is a subsidiary caused the damage.⁵² Indeed, under Community law such a subsidiary is an EU based company and legally to be distinguished from the U.S. based company.

Article 6(3) creates a new special jurisdiction not foreseen in the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters⁵³ insofar as it allows for judicial proceedings to be brought in the courts of any Member State where the defendant holds assets.⁵⁴ According to Article 6(4), without prejudice to other means available, the recovery may take the form of seizure and sale of defendant's assets within the European Community, including shares held in a legal person incorporated within the European Community.⁵⁵ It follows from these provisions that, for example, any damage General Motors causes to an EU based company could not be recovered from Opel, Germany, as that company is a separate legal person incorporated in the European Union, but any shares held by General Motors in the Opel company could be seized if held within the European Community.

In order to make sure that the provisions of the Regulation will be effective, the Council believed it was indispensable to provide for sanctions in case of a breach of "any relevant provision" of the Regulation. While it would have been legally possible to specify such sanctions directly in the Regulation, Article 9 imposes on a Member State the task of determining those sanctions.⁵⁶ The Regulation provides, however, that the sanctions must be effective, proportional, and dissuasive.⁵⁷

Because the Regulation does not cover all persons and areas of activities which the Commission had proposed and which

51. *Id.*

52. *Id.*

53. Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, J.O. L 299/32 (1972), *amended by* O.J. L 304/77 (1978), *amended by* O.J. L 388/1 (1982), *amended by* O.J. L 285/1 (1989).

54. Council Regulation 2271/96, *supra* note 5, art. 6, ¶ 3, O.J. L 309/1, at 3 (1996).

55. *Id.* art. 6, ¶ 4, O.J. L 309/1, at 3 (1996).

56. *Id.* art. 9, O.J. L 309/1, at 3 (1996).

57. *Id.*

Council and Member States wanted to protect, it alone would not have been an adequate response to the Helms-Burton Act and the D'Amato Act. Therefore, the Council, on the same day it adopted the Regulation, adopted a Joint Action⁵⁸ based on Articles J.3 and K.3 of the TEU.⁵⁹ The Joint Action provides that each Member State shall take the measures it deems necessary to protect the interests of any person referred to in Article 11 of the Regulation that the Helms-Burton Act or the D'Amato Act affects, insofar as the Regulation does not protect these interests.⁶⁰

The preamble of that Joint Action states that it and the Regulation "constitute together an integrated system involving the Community and the Member States each in accordance with its own powers."⁶¹ In order to fully understand the construction of this integrated system and the legal relation between the Regulation and the Joint Action, it is necessary to proceed with a legal analysis of these two pieces of legislation paying particular attention to their legal basis under the EC Treaty and the TEU.

II. LEGAL ISSUES

The proposal which the Commission submitted to the Council on July 31, 1996⁶² for the adoption of a "Helms-Burton blocking statute" was based on Articles 113 and 235 EC Treaty.⁶³ Article 1 of the proposal provided for protection against the extra-territorial effects of the Helms-Burton Act⁶⁴ and the Commission intended the Regulation to be applicable to any natural or legal person resident or incorporated within the European Community. The Commission suggested no Joint Action because it believed that the Regulation would cover all persons and activities which had to be protected. This proposal immediately raised legal problems within the Council. The main issues facing the Council were whether the Community was competent to adopt the measures proposed and, if yes, what scope could the Regulation have under Community law.

58. Joint Action, *supra* note 8, O.J. L 309/7, at 7 (1996).

59. *Id.*

60. *Id.* art. 1, O.J. L 309/7, at 7 (1996).

61. *Id.* pmbl, O.J. L 309/7, at 7 (1996).

62. O.J. C. 296/10 (1996).

63. *See* EC Treaty, *supra* note 4, art. 113, 235, [1992] 1 C.M.L.R. at 656, 716.

64. Helms-Burton Act, 22 U.S.C.A. §§ 6021 et seq. (1996).

It was clear from the outset that the measures proposed went far beyond the common commercial policy. Measures adopted under Article 113 of the EC Treaty must deal specifically with international trade and the proposed measures did not.⁶⁵ The proposal was supposed to protect all persons the Helms-Burton Act affected and not only those engaging in international trade. It provided for remedies, especially in Articles 4, 5, and 6, which are not available under Article 113. It would also have covered persons engaging in activities which fall under Member State competence.

The addition of Article 235⁶⁶ as a legal basis could not remedy this situation. According to well-established jurisprudence of the Court of Justice, Article 235 cannot serve as a basis for widening the scope of the EC Treaty.⁶⁷ Action may be based on Article 235 only where it falls within EC competence and where the EC Treaty does not provide any specific power for that purpose. Nor does Article 235 permit the use of all remedies indiscriminately. The European Community remains bound by the other rules the EC Treaty set, in particular, the principles of legality, subsidiarity, and proportionality.

The first question to be addressed is whether the EC Treaty provides any specific power elsewhere which would have allowed the adoption of the Commission's original proposal. One might, in this context, think of Article 228a of the EC Treaty.⁶⁸

65. EC Treaty, *supra* note 4, art. 113, [1992] 1 C.M.L.R. at 656. Article 113 deals with the common commercial policy of the European Community and asserts:

[t]he common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

Id.; see Opinion 1/94, [1994] E.C.R. I-5267, 5405, ¶ 57.

66. EC Treaty, *supra* note 4, art. 235, [1992] 1 C.M.L.R. at 716.

67. See *Re the Accession of the Community to the European Human Rights Commission* (Opinion 2/94), [1996] E.C.R. I-1759, [1996] 2 C.M.L.R. 265.

68. EC Treaty, *supra* note 4, art. 228a, [1992] 1 C.M.L.R. at 715. Article 228a stipulates:

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission

Id.

That provision, however, had not been conceived to create new powers of the European Community every time a common position or joint action under the Common Foreign and Security Policy ("CFSP") provides for an action to interrupt or reduce economic relations with a third country. Article 228a provides for an action by the European Community.⁶⁹ Therefore, the existence of an EC competence, which must exist outside of Article 228a, is a precondition for the application of Article 228a. In addition, the Commission's proposal was in no way aimed at reducing or interrupting the economic relations with the United States, which would be a condition for the application of Article 228a. This provision, therefore, clearly could not constitute the correct legal basis for the Regulation as the Commission proposed.

The Council was then confronted with a choice between several options. The first option would have been to restrict the scope of the Regulation to the objective of the common commercial policy which is an exclusive EC competence under Article 113 of the EC Treaty and, thus, limit the protection to persons engaging in international trade. Under this approach, it would still have been necessary to add Article 235 as a legal basis because the remedies foreseen in Articles 4, 5, and 6 of the Regulation could only be adopted under that provision.⁷⁰ This approach was considered much too narrow for an adequate response of the European Community to the Helms-Burton Act. Indeed, it would then have fallen to the individual Member States to cover all the other persons that the law affected and all person engaging in activities other than international trade.

A second option for the European Community would have been to not limit its action to the objectives for which it has exclusive competence, namely Article 113, but include other objectives to be found elsewhere in the EC Treaty where the European Community has potential competence. The areas one could think of in this context were, for example, Article 57 (right of establishment),⁷¹ Article 59 (provision of services other

69. *Id.*

70. *Id.* art. 235, [1992] 1 C.M.L.R. at 716.

71. See EC Treaty, *supra* note 4, art. 52, 57, [1992] 1 C.M.L.R. at 613, 616. The right of establishment governs self-employed persons such as doctors, lawyers, and architects and allows them to pursue economic activities and establish practices in other Member States. ERIC STEIN ET AL., EUROPEAN COMMUNITY LAW & INSTITUTIONS IN PER-

than cross-border services which are covered by Article 113),⁷² Articles 73b and 73c (free movement of capital),⁷³ Article 73 (transport),⁷⁴ as well as Article 100a (approximation of legislation for the establishment or functioning of the internal market).⁷⁵

Under this approach, the legal basis would have been a whole range of articles together with Article 235. This approach was inconvenient because it would have had important procedural implications which would have delayed the adoption of the Regulation by months. Indeed, the inclusion of Articles 57, 59, and 100a would have meant that the co-decision procedure⁷⁶ with the EC Parliament would have had to be applied, while the inclusion of Article 75 would have required the cooperation procedure with the Parliament.⁷⁷ Furthermore, if all these articles had been included, the wording of the definition of the scope of the Regulation in Article 1 would have been extremely complicated and might have blurred the exact delineation between the Regulation and the Joint Action. A third option for the Council would have been to base the proposed Regulation on Article 228a of the EC Treaty.⁷⁸ This option had to be ruled out because of the legal grounds set out above.⁷⁹

In the end, the Council chose an intermediate solution. Rather than limit its action to the objectives covered by the exclusive EC competence under the common commercial policy,⁸⁰ the Council added the objective of Article 73c, concerning the free movement of capital between Member States and third countries. The preamble and especially Article 1, which defines the scope of protection of the Regulation, clearly illustrate the Council's choice. Indeed, Article 1 limits the application of the

SPECTIVE 489 (1967); P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 76 (Laurence Gormley ed., 2d ed. 1989).

72. *Id.* art. 59, [1992] 1 C.M.L.R. at 616.

73. *Id.* art. 73b, 73c, [1992] 1 C.M.L.R. at 621.

74. *Id.* art. 75, [1992] 1 C.M.L.R. at 623-24.

75. EC Treaty, *supra* note 4, art. 100a, [1992] 1 C.M.L.R. at 633-34.

76. *See id.* art. 189b, [1992] 1 C.M.L.R. at 694 (outlining co-decision procedure between Commission, Council, and Parliament).

77. *See id.* art. 189c, [1992] 1 C.M.L.R. at 696 (detailing cooperation procedure with Parliament).

78. *Id.* art. 228a, [1992] 1 C.M.L.R. at 715.

79. *See supra* notes 68-69 and accompanying text (discussing Article 228a and legal grounds for not utilizing it).

80. EC Treaty, *supra* note 4, art. 113, [1992] 1 C.M.L.R. at 656.

Regulation to persons "engaging in international trade and/or the movement of capital and related commercial activities between the Community and third countries."⁸¹ The Member States, in accordance with the Joint Action, would have to protect any other person affected by the Helms-Burton Act or the D'Amato Act.

As neither Article 113 nor Article 73c provides for the remedies envisaged in Articles 4, 5, and 6 of the Regulation, the question became whether the addition of Article 235 as a legal basis would allow the European Community to adopt these remedies in an EC Act. Three conditions must be met in order to use Article 235 as a basis for specific action. The action must aim to achieve an EC objective, relate to the operation of the common market, and be necessary.⁸²

Regarding the Community objective, it follows clearly from the wording of the text, particularly Article 1 and the preamble recitals, that the Regulation does indeed aim to achieve Community objectives covered by Articles 113 and 73c and is confined to those objectives. The first recital expressly refers to the harmonious development of world trade and to the abolition of restrictions on international trade.⁸³ The second recital states that the Community endeavors to achieve to the greatest extent possible the objective of free movement of capital between Member States and third countries.⁸⁴ Article 1, for its part, provides protection for persons engaging in international trade or the movement of capital to and from third countries and related commercial activities.⁸⁵

The operation of the common market is clearly at issue in the areas the Regulation covers. If some nationals of Member States engaging in investments or trade connected with Cuba were to be subject to U.S. sanctions, whereas others investing in other countries were not, the rights conferred by the EC Treaty upon the first category of persons would be seriously impaired.

81. Council Regulation 2271/96, *supra* note 5, art. 1, O.J. L 309/1, at 2 (1996).

82. EC Treaty, *supra* note 4, art. 235, [1992] 1 C.M.L.R. at 716.

83. *See* EC Treaty, *supra* note 4, art. 110, [1992] 1 C.M.L.R. at 655 (stating "Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade . . .").

84. *See id.* art. 73c(2), [1992] 1 C.M.L.R. at 621 (stating EC Treaty objective as "endeavoring to achieve the objective of free movement of capital between Member States and third countries . . .").

85. Council Regulation 2271/96, *supra* note 4, art. 1, O.J. L 309/1, at 2 (1996).

The Member States would be required to take national measures individually in the areas the Regulation covers, thereby disturbing the operation of the common market.

Assessing whether action is necessary is partly a legal and partly a political matter. As to the legal aspects of the assessment, the action must be necessary in order to enable the common market to continue to operate properly and must comply with the principles of EC law, particularly subsidiarity and proportionality. These conditions have been met. In the absence of measures taken on a uniform basis by the European Community, if Member States were to adopt unilateral measures in the areas the Regulation covers, the common market would be disturbed. Moreover, action of a more limited scope or intensity than that provided for by the Regulation would not appear to ensure implementation of the EC Treaty, particularly ensuring that the common market and the common commercial policy continue to operate. The action envisaged, including Articles 4, 5, and 6, would seem to be the minimum needed to achieve those objectives and to react effectively to the challenge facing the EC common market and the operation of that market.

These remedies, the use of which is, of course, limited to the objective of the Regulation as determined by Articles 73c and 113 of the EC Treaty and by Article 1 of the Regulation itself, are remedies legally available to the European Community. The Council has already used similar remedies in a number of earlier cases involving Iraq,⁸⁶ Libya,⁸⁷ Haiti,⁸⁸ and the former Yugoslavia.⁸⁹ Article 1(2)(c) and (e) of these four regulations contains provisions that roughly match Articles 4 and 5 of the Regulation.⁹⁰ Article 6 of the Regulation does not appear word for word in the precedents, but is a logical consequence of Articles 4 and 5 and adds nothing in relation to the Community legislator's power to act. The four previous regulations were all

86. Council Regulation No. 3541/92, O.J. L 361/1 (1992).

87. Council Regulation No. 3275/93, O.J. L 295/4 (1993).

88. Council Regulation No. 1264/94, O.J. L 139/4 (1994).

89. Council Regulation No. 1733/94, O.J. L 182/1 (1994).

90. Compare Council Regulation No. 2271/96, *supra* note 5, art. 4, 5, O.J. L 309/1, at 2 (1996) with Council Regulation No. 3541/92, *supra* note 86, art. 1 (2)(c), (e), O.J. L 361/1, at 1-2 (1992); Council Regulation No. 3275/93, *supra* note 87, art. 1 (2)(c), (e), O.J. L 295/4, at 4 (1993); Council Regulation No. 1264/94, *supra* note 88, art. 1 (2)(c), (e), O.J. L 139/4, at 4 (1994); Council Regulation No. 1733/94, *supra* note 89, art. 1 (2)(c), (e), O.J. L 182/1, at 1 (1994).

adopted unanimously without any disagreement on EC competence to adopt them.

These precedents may not be disregarded on the grounds that the principal aim of the regulations was to prohibit trade and that the provisions which correspond to Articles 4 and 5 were simply a means to that end. As stated above, the objective of the measures provided for in the Regulation is a Community objective within the meaning of Article 235, in that it directly concerns the operation of the common market in the areas covered by Articles 73c and 113 of the EC Treaty.⁹¹ Therefore, the question of the subsidiary nature of these measures does not arise, because they are the objective of the Regulation. By their nature, those measures also constituted one of the principal objectives of the above precedents. Likewise, it is the operation of the common market which is at issue now. The objective is no doubt even clearer in legal terms than at the time of these precedents.

That the Council further adopted the previous regulations following U.N. Security Council resolutions⁹² obviously does not affect this legal analysis. The provisions of the EC Treaty determine EC power to act and external factors such as the existence of a U.N. Security Council resolution do not condition this power. A U.N. decision could not have the legal effect of modifying the EC Treaty to give the European Community competence that the EC Treaty does not confer upon it. EC competence, therefore, already existed legally, independent of whether the United Nations adopted a resolution. Finally, the legal argument that it would be possible to take action on the basis of Title VI of the TEU and that this action would rule out Community actions is patently quite erroneous. Article M of the TEU clearly establishes that Titles V and VI of the TEU cannot "affect" Community competence, much less call it into question.⁹³

That leaves us with the question of where the exact borderline has to be drawn between the Regulation and the Joint Action which Member States must implement. This question is mainly relevant as concerns the provision of services. In its

91. See *supra* notes 82-91 and accompanying text (explaining how Regulation relates to operation of common market and is necessary under Article 235 of EC Treaty).

92. See *supra* notes 86-89 and accompanying text (discussing EC use of Council Regulations to remedy situations involving Iraq, Libya, Haiti, and former Yugoslavia).

93. TEU, *supra* note 2, art. M, O.J. C 224/1, at 99, [1992] 1 C.M.L.R. at 738-39.

Opinion 1/94,⁹⁴ the Court of Justice of the European Communities ruled that the cross-border provision of services is covered by the common commercial policy and is, thus, an area of exclusive EC competence of Article 113.⁹⁵ Therefore, the Regulation covers persons engaging in this kind of activity in the same way as persons engaging in trade of goods. The Regulation covers other modes of the provision of services only to the extent that they can be considered as "related commercial activities" in relation to international trade or the movement of capital as set out in Article 1 of the Regulation. In order to understand what "related commercial activities" means, one has to take into account that the legal basis of the Regulation, namely Articles 73c and 113, limit the scope of the Regulation to the objectives of those two articles.⁹⁶ Thus, the essential objective of the Regulation is to protect persons engaging in international trade or in the movement of capital.

The related commercial activities which Article 1 of the Regulation also covers may, therefore, only be activities which are linked inextricably to international trade or the movement of capital and which, therefore, may be regarded as ancillary in respect to the activities covered by Articles 73c and 113 of the EC Treaty. In other terms, the provision of services under modes 2, 3, and 4 of Article 1 of the General Agreement on Trade in Services⁹⁷ ("GATS") normally would be covered only by the Regulation if they were closely linked to an investment or other movement of capital or to an activity in international trade. On the other hand, the Regulation would not protect persons engaging in other activities which may not be linked to an activity that Articles 73c or 113 of the EC Treaty cover.⁹⁸ This would be the case, for example, where there is purely a provision of services

94. Opinion 1/94, [1994] E.C.R. at I-5267, 5401, ¶ 44, [1995] 1 C.M.L.R. 205, 316.

95. *Id.* at I-5401, ¶ 44, [1995] 1 C.M.L.R. at 316.

96. The objectives of these articles are goods and cross-border provision of services (art. 113) as well as the free movement of capital between Member States and third countries (art. 73c). See EC Treaty, *supra* note 4, art. 73c, 113, [1992] 1 C.M.L.R. at 621, 656. See also *supra* notes 80-88 and accompanying text (stating that Article 235 has been added to Regulation in order to cover remedies provided for in Articles 4, 5, and 6 of the Regulation and not falling within the limits of Articles 73c and 113).

97. General Agreement on Trade in Services, art. 1, 33 I.L.M. 44, 48 (1994).

98. Unless a Community competence can be based on the principles resulting from the "AETR" jurisprudence. See EC Commission v. EC Council, Case 22/70, [1971] E.C.R. 263, [1991] C.M.L.R. 335 [hereinafter AETR Case].

through the presence of the service provider in Cuba, including as a consultant, architect, or manager of a hotel. In the same way, the Regulation only covers transport services to the extent that they are linked to international trade or to a movement of capital.

Member States, in accordance with the Joint Action, would have to protect any other persons the Helms-Burton Act or the D'Amato Act affected. The Joint Action does not specify which measures the Member States may or must take to protect these persons. They may clearly adopt measures which are similar to those provided for in the Regulation. They are not limited, however, to such measures. Each Member State has to take the measures it deems necessary. This leaves a large margin of appreciation to each Member State. Because of the wide range of measures available to the Member States under the Joint Action, it was necessary to base it not only on Article J.3 of the TEU⁹⁹ but also on Article K.3(2)(b).¹⁰⁰ Indeed, some Member States might want to take protective measures which consist of rules governing the crossing by persons of its external borders. Article K.1(2) covers such measures¹⁰¹ and, therefore, the Joint Action had to be based on Article K.3 as well. Furthermore, if Member States want to adopt measures outside the scope of the Regulation which correspond to Article 6 of the Regulation, such measures would be subject to judicial cooperation in civil matters as covered by Article K.1 point 6.¹⁰² For these reasons, the Council has correctly based the Joint Action on Articles J.3 and K.3 of the TEU.

99. See TEU, *supra* note 2, art. J.3, O.J. C 224/1 at 94-95, [1992] 1 C.M.L.R. at 730-31 (laying out EC "procedure for adopting joint action in matters covered by the foreign and security policy . . .").

100. See *id.* art. K.3(2)(b), O.J. C 224/1 at 98, [1992] 1 C.M.L.R. at 736 (stating that Council may "adopt joint actions insofar as the objectives of the Union can be attained better by joint action than by Member States acting individually on account of the scale or effects of the action envisaged . . .").

101. See *id.* art. K.1(2), O.J. C 224/1, at 97, [1992] 1 C.M.L.R. at 735 (maintaining that "rules governing the crossing by persons of the external borders of the Member States" is area of common interest and as such, subject to cooperation).

102. See *id.* art. K.1, O.J. C 224/1 at 97, [1992] 1 C.M.L.R. at 735 (stating that "[f]or the purposes of achieving the objectives of the Union," Member States shall consider judicial cooperation as matter of common interest).

CONCLUSION

It follows from the above analysis that the integrated system set up by the Council in adopting the Regulation together with a Joint Action should, in theory, protect all those persons whose interests are adversely affected by the application of the Helms-Burton Act and the D'Amato Act. It is clear from the above analysis that the Regulation focuses mainly on neutralizing and removing the adverse effects of the Helms-Burton Act, particularly Title III of that act. The Regulation's provisions seem to be less operational when it comes to countering the effects of the D'Amato Act. For that reason, the Council and the Commission committed themselves when they adopted the Regulation to take the necessary action in the event that the Regulation and the Joint Action will not provide sufficient remedies against the effects of the extra-territorial application of the laws specified in the Annex of the Regulation. Only the future can tell whether the system set up will be effective in practice. It is far too early to evaluate what impact these pieces of EU legislation will actually have on the protection of EU nationals and companies. It should not be forgotten that Member States have to take measures themselves by legislating or otherwise in order to implement the Joint Action and to determine the sanctions to be imposed in the event of a breach of the provisions of the Regulation. Moreover, it is too early to assess how the provision on authorizations for compliance will operate, how many persons will ask for such authorization, and how many authorizations will be granted.