Kaleidoscope

Widening the US Embargo Against Cuba Extraterritorially:

A Few Public International Law Comments on the 'Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996'.

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I. Introduction

On 12 March 1996 President Clinton signed into law the latest anti-Cuba sanctions bill, the 'Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996',[1] also widely known after its sponsors in Congress, Senator Jesse A. Helms (Republican-North Carolina) and Representative Dan Burton (Republican-Indiana), as the Helms-Burton Act (the 'Act'). Predictably, this immediately caused an uproar in the Western hemisphere. It led America's closest allies to condemn in diplomatic notes the legislation as a violation of international law, and to threaten to invoke dispute settlement procedures under NAFTA and WTO provisions.[2]

The Act raises a number of interesting 'conflict of laws' and 'jurisdiction of courts' questions which cannot be addressed in an exhaustive fashion in this short comment. What should be addressed in a more detailed manner, however, is the intriguing aspect, inherent in this latest piece of extraterritorial US legislation, of the broader 'public order' considerations lying behind such unilateral international law

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1 Public Law 104-114, H.R. 927; reprinted in 35 ILM (1996) 357-378.

2 European Union: Démarches Protesting the Cuban Liberty and Democratic Solidarity Act, reprinted in 35 ILM (1996) 397. As of June 1996, requests for consultations concerning the Act have been brought forward by Canada and Mexico under NAFTA Chapter 20 and the EU and its Member States under the WTO dispute settlement procedure. Within the OAS the Inter-American Juridical Committee has been seized of the matter.

enforcement attempts and the limits imposed on such action by the same international law.

In some respects the ado about the Act appears to revolve around the pitting of substantive against formal rules of international law. While the US maintains that it is defending property rights of its citizens that had been infringed in violation of an international 'treatment of aliens' standard, Europeans and America's NAFTA trade partners regard the US action as a violation of the international rules of 'jurisdiction to prescribe', which delimit each sovereign's legislative sphere.

It is very likely that the two sides will not enter into a meaningful dialogue, but rather misunderstand each other fundamentally, because their lines of argument will probably fall back on these two completely different levels of discourse. This comment will undertake to avoid this almost pre-ordained misunderstanding and try to address the two competing claims along with their proper counter-arguments. In other words, it will ask whether the protection of private property as an intended goal of the legislation could prove acceptable for the purpose of exercising jurisdiction to prescribe as a matter of international law, and on the other hand, whether the perceived unlawfulness of extraterritorial legislation is indeed as rigorous as is claimed by America's trading partners.

Before entering the debate about the lawfulness of the Helms-Burton Act under international law, a brief summary of the operative provisions of the legislation seems appropriate.

II. The Content of the Helms-Burton Act

The Act is divided into four titles aiming at: 'I. Strengthening international sanctions against the Castro government'; 'II. Assistance to a free and independent Cuba'; 'III. Protection of property rights of United States nationals'; and 'IV. Exclusion of certain aliens'.[3] The legislation contains a host of provisions clearly problematic under both public international law and international trade law. Among them would be 'Prohibition against indirect financing of Cuba';[4] 'United States opposition to Cuban membership in international financial institutions' implying a potential 'Reduction in United States Payments to International Financial Institutions';[5] 'Impor-

3 Headlines of the respective titles. Unless otherwise stated references to specific sections relate to sections of the Act.

4 Sec. 103(a) states that '[n]otwithstanding any other provision of law, no loan, credit, or other financing may be extended knowingly by a United States national, a permanent resident alien, or a United States agency to any person for the purpose of financing transactions involving any confiscated property the claim to which is owned by a United States national as of the date of the enactment of this act, except for financing by the United States national owning such claim for a transaction permitted under United States law.' This might have extraterritorial scope.

5 Sec. 104(b) states that '[i]f any international financial institution approves a loan or other assistance to the Cuban Government over the opposition of the United States, then the Secretary of the Treasury shall withhold from payment to such institution an amount equal to the amount of the loan or other assistance, with respect to either of the following types of payment:

tation safeguard against certain Cuban products';[6] and the 'Exclusion from the United States of aliens who have confiscated property of United States nationals or who traffic in such property'.[7]

This comment, however, will focus on the Act's most prominent feature, its purported protection of property rights of US citizens. Giving US nationals whose properties in Cuba have been expropriated a claim for damages against 'traffickers' in such property enforceable in US courts is the most controversial and at the same time the most 'innovative' part of the legislation.[8] This right to sue, granted in Title III of the Act, serves the stated purpose[9] of deterring foreign investment in Cuba, perceived by the US as a major reason for Cuba's continuing economic survival after the collapse of the Soviet Union and the ensuing end of financial support from the former Eastern Bloc.

A. Title III of the Helms-Burton Act

Sec. 302(a)(1) states that 'any person that [...] traffics in property which was confiscated by the Cuban government on or after January 1, 1959, shall be liable to any United States national who owns the claims to such property for money damages

(1) The paid-in portion of the increase in capital stock of the institution.
(2) The callable portion of the increase in capital stock of the institution.'
This might hamper the independent functioning of affected international organizations, such as the IMF, IBRD, IDA, etc.

6 Sec. 110(c) requires 'the President not to allocate any of the sugar import quota to a country that is a net importer of sugar unless appropriate officials of that country verify to the President that the country does not import for reexport to the United States any sugar produced in Cuba.' This might contravene American GATT obligations.

7 Sec. 401(a) provides that '[t]he Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after the date of the enactment of this Act–
(1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national;
(2) traffics in confiscated property, a claim to which is owned by a United States national;
(3) is a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national; or
(4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).'
This provision has been criticized as 'particularly absurd' by a U.K. member of parliament. Cf. 'Britain May Retaliate For Helms-Burton Act', *The Washington Post*, May 3, 1996, A25.

8 The Clinton administration's initial opposition to the Act resulted in a remarkable compromise: according to Sec. 306, Title III will enter into force only on August 1, 1996 but the President has the authority to suspend this effective date for additional six month periods if he determines that a suspension is 'necessary to the national interests of the United States'.

9 Cf. the Congressional 'Findings' in Sec. 301(5): 'The Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals.' and (11): 'To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures.'

[...]'. The deterrent effect is increased by providing that liability is not limited to actual damages[10] but regularly encompasses the recovery of 'court costs and reasonable attorneys' fees'[11] – something which is unusual under US civil procedure law – in addition to the award of treble damages under certain conditions.[12]

The extraterritorial aspect of the legislation becomes pertinent at the stage of defining the potential defendants in such a damage action. While the scope of potential claimants is limited to US citizens and US corporate entities,[13] 'any person' – which means 'any person or entity, including any agency or instrumentality of a foreign state'[14] – who 'traffics' in Cuban expropriated property formerly held by Americans can be sued under the Act. According to the wide definition of 'trafficking', a person 'traffics' in confiscated property if he 'knowingly and intentionally', even only indirectly, profits from a commercial use of such property without the former owner's consent.[15]

10 Under the Act the amount of damages is to be determined as 'an amount equal to the sum of –
(i) the amount which is the greater of –
(I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest;
(II) the amount determined under section 303 (a) (2), plus interest;
(III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; . . .'
Sec. 302(a)(1)(A).
Sec. 303(a)(2) envisages the determination of uncertified claims by a court-appointed 'special master'.

11 Sec. 302(a)(1)(A)(ii).

12 Sec. 302(a)(3)(C). The exposure to treble damages applies if the US owner's claim had been previously certified by the Foreign Claims Settlement Commission or if a potential defendant under the Act continues trafficking after having received notice of a potential claimant.

13 Sec. 4(15) defines 'US nationals' who may bring a claim under Title III as '(A) any United States citizen; or (B) any other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has its principal place of business in the United States.' Interestingly, in the case of physical persons, there is apparently no requirement that potential claimants under Title III were US citizens already at the time of the expropriation. That the Act would thus provide a remedy also to 'Cuban-Americans' is understandable as a matter of US domestic politics. However, it appears to weaken the US attempt the portray the Act as a method to 'espouse' the claims of former property owners. Under general rules of international law requiring a 'continuity of claims', the (regular, i.e. in the context of diplomatic protection) espousal of claims of persons who were not nationals of the protecting State at the time of the expropriation is considered legally inadmissible. Cf. Seidl-Hohenveldern in Neuhold, Hummer, and Schreuer, *Österreichisches Handbuch des Völkerrechts* (2nd ed., 1991) 136.

14 Sec. 4(11).

15 Sec. 4(13)(A): 'As used in title III, and except as provided in subparagraph (B), a person "traffics" in confiscated property if that person knowingly and intentionally–
(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.' Exceptions relate to telecommunication signals delivery, certain securities trading, property uses incidental to traveling, and activities of certain Cuban nationals (Sec. 4(13)(B)).

The operation of two seemingly innocuous provisions of the Act might prove crucial to the success of claimants under Title III: To remove a potential legal obstacle the Helms-Burton Act declares that '[n]o court of the United States shall decline, based upon the act of State doctrine, to make a determination on the merits in an action brought under paragraph (1).'[16] On a practical level, in order to gain knowledge important to potential claimants, the Act obliges the President to submit to Congress 'Reports on commerce with, and assistance to, Cuba from other foreign countries' which must contain, *inter alia*, detailed descriptions of investments and identifications of the parties involved.[17]

III. The Extraterritorial Scope of the Helms-Burton Act (Re-)Assessed

The thrust of the criticism of America's trading partners and allies is directed against the 'extraterritoriality' of the Act's provisions and in particular of Title III. For instance, the European Union vehemently opposes 'extraterritorial applications of US jurisdiction' and with regard to the Helms-Burton Act formally objected 'as a matter of principle, to those provisions that seek to assert extraterritorial jurisdiction of US federal courts over disputes between the US and foreign companies regarding expropriated property located overseas.'[18]

The extraterritoriality of the Act, however, is less obvious than in previous transatlantic jurisdictional disputes. These controversies involved, *inter alia*, attempts to apply a State's public law (jurisdiction to prescribe) extraterritorially or to subject foreign parties to a State's courts (jurisdiction to adjudicate).[19] The two best known instances were, on the one hand, the Pipeline dispute of the early 1980s, where the US sought to make its re-export prohibitions on certain allegedly 'American' tech-

16 Sec. 302(8). When asked to invalidate the effect of Cuban expropriations, the US Supreme Court held that '[..] the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government [...] even if the complaint alleges that the taking violates customary international law.' *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The *Second Hickenlooper Amendment*, (Sec. 620(e)(2) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. Sec. 2370(e)(2)), passed in 1964 to 'reform' the effect of the *Sabbatino* decision, excluded the applicability of the act of State doctrine in cases where claims are based on the assertion that a foreign State confiscated the property in violation of international law. However, since the Amendment is limited to cases involving 'a claim of title or other right to property', it would probably not remove the act of State barrier to liability claims under Title III of the Act. Cf. *Restatement (Third) of the Foreign Relations Law of the United States* (1990), Sec. 444, Comment e. See also *Hunt v. Coastal States Gas Producing Co.*, Supreme Court of Texas, 583 S.W.2d 322 (1979) where the Texan Supreme Court held that Hunt's 'contractual rights' to search for and extract oil under a Concession Agreement with Libya were not 'claims of title or other rights to property' rendering the *Second Hickenlooper Amendment* inapplicable.

17 Sec. 108.

18 European Union: Démarches Protesting the Cuban Liberty and Democratic Solidarity Act, *supra* note 2, 398.

19 For the different jurisdictional concepts cf. *Restatement*, *supra* note 16, Sec. 401 et seq.

nology applicable to European firms exporting from Europe to the Soviet Union,[20] and, on the other hand, the *Laker Airways* litigation, where American and British courts not only asserted jurisdiction over the same dispute, but went on to issue mutual antisuit injunctions aimed at preventing the other forum's exercise of adjudicative jurisdiction.[21]

In Title III of the Helms-Burton Act, the US has not technically exercised its jurisdiction to prescribe, in the sense that it would have formally prohibited 'trafficking' in Cuban/former US property. The only thing it did was to create a private law liability claim enforceable in US courts. The US may thus claim that it has only 'provided a private remedy' for its nationals to go after persons engaged in an activity that is already prohibited as 'receiving stolen property'.[22]

However, in substance the provisions of Title III are an exercise of extraterritorial jurisdiction to prescribe. The choice of a private law tool (with the threat of treble damages) should be regarded as an alternative to a 'public law' prohibition to invest in Cuba, if not an effective 'disguised' prohibition. It is a commonly acknowledged feature of tort law – and in particular of US tort law – that it can also serve a strong 'public' order purpose. The concept of punitive damages and of individual plaintiffs serving as 'private attorney generals' enforcing the public policy of a State underlines this idea.[23]

In the context of the Helms-Burton Act, the potential exposure to substantial dollar amounts of damages is clearly a tool to regulate private behaviour, i.e. more the suppression of 'trafficking' and less a means to reallocate the financial burdens of the Cuban expropriations. This primarily deterrent effect and intent of the Act – which make it more akin to a 'public law' prohibition than a 'private law' tort rule – is made explicit in many ways: Trafficking is seen as a way of contributing to the viability of the Cuban economy contrary to US foreign policy.[24] Very indicative are also the substantive limitations to recovery: Sec. 302(a)(1) enacts only a prospective deterrent against 'trafficking' occurring after a three months period following the entry into effect of Title III. This clearly leaves those US citizens without a remedy whose confiscated property had earlier become the object of 'trafficking'. That fact might cause doubts whether the private recovery goal was really an equally impor-

20 Cf. on the Pipeline controversy Carter and Trimble, *International Law* (2nd ed., 1995) 766 et seq.

21 Contrast *British Airways Board v. Laker Airways, Ltd.*, [1983] 3 W.L.R. 544 (C.A.) with *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

22 Cf. the congressional finding in Sec. 301(10) that 'The United States Government has an obligation to its citizens to provide protection against wrongful confiscation's by foreign nations and their citizens, including the provision of private remedies' and in Sec. 301(11), according to which US nationals 'should be endowed with a judicial remedy in the courts of the United States'. See also *infra* text at note 24 as to the half-hearted approach of the Act concerning the previous existence of a prohibition of 'receiving stolen property' or 'conversion' of confiscated property.

23 Cf. *Prosser and Keeton on Torts* (5th ed., 1984) 9 et seq.

24 Sec. 301(6) contains the congressional finding that '[t]his 'trafficking' in confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban Government and thus undermines the foreign policy of the United States'.

tant purpose for the legislation as the investment deterrence objective. To introduce such an exclusion of retroactivity also underlines the 'public' law and quasi-criminal character of the legislation. If 'receiving stolen property' was already forbidden in the particular situation envisaged by the Act, there would have been no need for this limitation. Its inclusion indicates the awareness that, in effect, the legislation enacts a hitherto non-existent prohibition to 'traffic in former US property' to be enforced by quasi-penal sanctions for which both US constitutional law – prohibiting *ex post facto* laws – and the international human rights rule of *nullum crimen sine lege* require non-retroactivity.[25]

On the other hand, the EU's allegation that the US is seeking 'to assert extraterritorial jurisdiction of US federal courts over disputes between the US and foreign companies regarding expropriated property located overseas'[26] has to be taken *cum grano salis* as well. The wording of the Act does not indicate that US jurisdiction to adjudicate has been enlarged. On the contrary, the normal procedural requirements to obtain jurisdiction over potential defendants seem to remain applicable.[27] Federal courts will thus still have to gain *in personam* jurisdiction over 'traffickers' when sued by US nationals.[28] Despite certain 'long-arm' aspects of US procedural law, the exercise of this adjudicative jurisdiction is limited by constitutional considerations based on the *International Shoe* test[29] and further developed in subsequent court decisions.[30]

Nevertheless, the legality of the extraterritorial prohibition to 'traffic' in confiscated US property remains to be scrutinized.

IV. The Lawfulness of Title III of the Helms-Burton Act under International Rules of Jurisdiction

The lawfulness of Title III of the Helms-Burton Act under international law largely depends upon the answer to the question of whether a justification for this exercise of extraterritorial jurisdiction can be found.

25 See only Article I, Sec. 9, para. 3 *U.S. Constitution* and Article 15 para. 1 *International Covenant on Civil and Political Rights*, 999 UNTS 171.

26 European Union: Démarches Protesting the Cuban Liberty and Democratic Solidarity Act, *supra* note 2, 398.

27 Sec. 302(c)(1) provides that the federal rules on the judiciary and judicial procedure as codified in Title 28 U.S.C.A. apply to actions under section 302.

28 In particular, fears that the Act might provide a direct jurisdictional basis for US plaintiffs against foreign defendants analogous to Art. 14 of the French Civil Code seem to be unfounded. This provision – according to which an alien may be brought before French courts for obligations contracted by him in a foreign country towards French persons – has been sharply criticized as an example of 'exorbitant' jurisdiction. See Steiner, Vagts and Koh, *Transnational Legal Problems* (4th ed., 1994) 707.

29 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

30 Cf. *Restatement, supra* note 16, Sec. 421, Reporters' note 2.

This comment is not the place to enter in depth into the scholarly debate stemming from the controversy of interpreting the *Lotus* decision by the Permanent Court of International Justice[31] of whether, in the absence of specific prohibitive norms, States in their sovereign activities are generally free to act extraterritorially, or whether their jurisdiction is in principle limited to acting within their territorial scope, subject to extension under certain justifying circumstances.[32] Suffice it to say that there appears to be a growing consensus that any assertion of extraterritorial jurisdiction requires a sufficiently 'close connection' between the State exercising jurisdiction and the facts or persons affected.[33]

One of the generally recognized 'links' for the exercise of extraterritorial jurisdiction, the effects doctrine, also called 'objective territoriality principle', seems to be particularly well suited to justify the recent US legislation. Indeed, the 'Congressional Findings' of the Act broadly paraphrase the well-known formulation of the effects principle in the American *Restatement (Third) of Foreign Relations Law* holding that '[i]nternational law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.'[34] There are some significant nuances in this reference, however, that one should not fail to note. First, – like in the *Restatement* – the unspecified reference to prescriptive jurisdiction which does not discuss the highly controversial issue of whether this kind of 'effects jurisdiction' is valid only for certain economic regulations, such as 'antitrust' or 'competition' law, or whether it could be seen acceptable under international law in general. Second, the Act's formulation omits the qualifying limitation of the *Restatement's* rule which makes the exercise of such jurisdiction subject to a test of 'reasonableness'.[35]

As far as the first point is concerned, there seems to be a growing consensus, at least in State practice, to use 'effects' as a link to exercise prescriptive jurisdiction over anti-competitive behaviour. Nevertheless, even in those circumstances it is not wholly accepted.[36] In areas such as export controls the legality of exercising extraterritorial jurisdiction under international law appears even more doubtful.[37] What is particularly troubling is that it seems questionable whether under the Act's own modest standards, unlimited by an express 'reasonableness requirement', 'substantial effect', which is still necessary to confer jurisdiction, can be established. The

31 *The Case of the S.S. Lotus* (France v. Turkey), PCIJ Reports Ser. A, No. 10 (1927).
32 Cf. Bianchi, *L'applicazione extraterritoriale dei controlli all'esportazione* (1995) 41 et seq.
33 Seidl-Hohenveldern, *supra* note 13, 141.
34 Sec. 301(9) cf. with *Restatement*, *supra* note 16, Sec. 402(1)(c).
35 Sec. 402 of the *Restatement* provides that States have jurisdiction to prescribe 'subject to Sec. 403' which in turn makes every exercise of prescriptive jurisdiction subject to its 'reasonableness'.
36 Cf. the ECJ's reluctance to affirm the *de facto* extraterritorial application of EC competition law as extraterritorial jurisdiction. In the *Wood Pulp* case, instead, the Court seeks to rely on a territorial principle, finding that anti-competitive agreements entered into abroad were in fact 'implemented' 'within the common market'. See Cases 89, 104, 114, 116-117, 125-129/85, *Ahlström Osakeyhtiö v. Commission* [1988] ECR 5193.
37 Bianchi, *supra* note 32; Reinisch, *US Exportkontrollrecht in Österreich* (1991).

conduct sought to be regulated, or rather discouraged, is 'trafficking' in confiscated property – in other words, investing in Cuba. Its potential effect within the US is hard to ascertain. The US legislators may have relied on the concept that the commercial use of the expropriated property by foreigners could diminish the potential for compensation to the former owners.[38] However, the circumstance that 'traffickers' might derive benefits from such property does not affect Cuba's international law obligation to compensate for its original unlawful taking. Thus, it would be difficult to argue that the current foreign investment activities have a harmful effect within the US. Also the 'national security threat' amply invoked by the US legislation[39] appears to be a far-fetched consequence of such activities, if at all. It seems to be a result of the Cuban government's comportment rather than of the foreign investors' commercial contacts.[40]

Thus, under a traditional concept of territoriality as well as the 'objective territoriality' principle, an effects-based justification for the exercise of jurisdiction in Title III of the Act is likely to fail. If one looks, however, at more flexible approaches to the problem of regulating economic facts and situations, a different conclusion is at least conceivable. Such an alternative view requires reliance less on formal jurisdictional principles – that could then be applied *more geometrico* to the situations in question – but rather more on an analysis of the substantive interests involved and in particular on their link to rules of international law. Such an interests balancing approach would certainly fit into the 'American' *Restatement* rules of reasonableness by taking into account political, human rights, and other concerns.[41]

It is a matter of scholarly debate whether the 'reasonableness rule' of the *Restatement* which it portrays as a requirement of international law[42] is indeed part of international law.[43] Some of the *Restatement's* critics maintain that it is rather a domestic rule of restraint developed by the US judiciary in cases like *Timberlane*[44]and *Mannington Mills.*[45] In any event, even if the rule is not an unequivocal

38 The fact that the congressional findings list the deterrent purpose of the judicial remedy 'that would deny traffickers any profits from economically exploiting Castro's wrongful seizures' in Sec. 301(11), immediately after the invocation of the effects principle in Sec. 301(9) (See *supra* text at note 34) might give some weight to this speculation.

39 According to Sec. 3(3), the purposes of the Act are, *inter alia*, 'to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government ...'.

40 Nevertheless, it is and remains hard to believe for an outside observer that '[f]or the past 36 years, the Cuban Government has posed and continues to pose a national security threat to the United States.' Sec. 2(28).

41 The *Restatement, supra* note 16, Sec. 403(2)(e) and (f) lists among the factors to be taken into account in determining the 'reasonableness' of exercising jurisdiction, *inter alia*, 'the importance of the regulation to the international political, legal, or economic system' and 'the extent to which the regulation is consistent with the traditions of the international system'.

42 *Restatement, supra* note 16, Sec. 403, Comment a, asserts that the reasonableness principle is 'established in United States law, and has emerged as a principle of international law as well.'

43 Maier, Extraterritorial Jurisdiction at a Crossroads: an Intersection Between Public and Private International Law, 76 *AJIL* (1982) 280 et seq.

44 *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976).

45 *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3rd Cir. 1979).

expression of the international *lex lata*, it appears to be a useful and sensible limitation of an otherwise potentially over-reaching extraterritorial jurisdiction, and for the sake of argument one should consider the validity of the US claim to jurisdiction in the given circumstances of the Helms-Burton Act under such a broad and flexible jurisdictional concept.[46]

In addition, one could also contemplate whether the 'close link' requirement between the conduct to be regulated and the State wanting to assert jurisdiction cannot be replaced by a general interest under international law that is regulated 'vicariously' by a single State. An interesting example where this thought seems accepted is the principle of universal jurisdiction in international humanitarian law. Under this principle, the gravity and seriousness of the offense justifies the exercise of criminal jurisdiction over acts committed in a place different from the forum State.[47] In such cases, the interest of the international community in protecting core values of international law serves as a substitute for a State's otherwise lacking jurisdictional link.

It is quite obvious that criminal jurisdiction principles are something genuinely different from the civil liability legislation contained in the Helms-Burton Act, but one should ask – at least hypothetically – whether the rationale for the legislation – i.e. the protection of private property rights – might be (or at least could replace) a close enough link to the US, justifying its extraterritorial jurisdiction.

V. The Helms-Burton Act as Decentralized Protection of Private Property Rights?

Apart from the strict technical jurisdictional issues involved, the recent US legislation could be seen as another quite innovative attempt at redressing foreign expropriations. Throughout this century the US has proven a vigilant protector of private property rights, especially of those of US citizens vis-à-vis foreign States.[48] While it has formally rejected European gunboat diplomacy[49] – largely on the ground of Monroe Doctrine resistance against European intervention in American affairs – it has – frequently justified by variations of the same doctrine – put pressure on foreign governments to respect US property interests. Frequently the exercise of US diplomatic protection led to the establishment of bi- or unilateral Claims Commissions adjudicating claims of US citizens against foreign governments.[50] Where the

46 See the discussion *infra* text at note 63 et seq.

47 Brownlie, *Principles of Public International Law* (4th ed., 1990) 305. Although universal jurisdiction is generally referred to as an example of adjudicative or enforcement jurisdiction, it also presupposes that the courts trying persons who have committed acts abroad apply their own law extraterritorially. Since, in the case of 'war crimes' and 'piracy', the domestic law is regularly incorporated international law and thus identical with international law, the extraterritoriality aspect becomes less obvious.

48 See Carter and Trimble, *supra* note 20, 859 et seq.

49 Cf. Benedek, Drago-Porter Convention (1907), 8 *EPIL* (1985) 141.

50 Steiner, Vagts and Koh, *supra* note 28, 472 et seq.

political and economic leverage was not sufficient to force such judicial settlements, the US resorted to alternative methods of exerting pressure such as the imposition of economic embargoes that frequently progressed from targeting specific goods towards an all encompassing disruption of economic relations,[51] including the blocking of foreign aid to countries that resisted US demands for making reparations for expropriations.[52]

In this light, the Act could be viewed as a final chapter in a rather desperate endeavor to bring down the Castro regime, which, despite all its economic troubles, has so far turned out to be remarkably immune to US economic pressure. The Act attempts to force nationals of other States indirectly to refrain from doing business in Cuba. In this respect it has a similar trait with the traditional blacklisting of foreign firms under the US export control regime.[53] Although the Act is technically limited to 'traffickers' in expropriated property, the legal uncertainty about what kind of property might actually be affected will probably deter many foreign investors from doing business in Cuba at all.[54] Given the legislation's political background, it seems plausible to suspect that the political punishment motive weighed more heavily than the American intent to grant relief to expropriated US citizens.[55]

VI. Enforcing International Law through Domestic Courts?

Under the Helms-Burton Act the technique of redressing the alleged wrongdoing of 'confiscation' lies in entrusting it to the private parties aggrieved, expropriated US citizens, and depends upon their use of US courts. This is an interesting feature of a current trend to enforce international law through domestic courts.

The US has a long record of inventing legal techniques in order to protect private interests, not only against its own governmental actions, but also against the official acts of foreign authorities. A good example is the dramatic rediscovery of an 'an-

51 A good example in point is the American embargo legislation against Cuba. See the documentation by Krinski and Golove, *United States Economic Measures Against Cuba. Proceedings in the United Nations and International Law Issues* (1993).

52 See the so-called first Hickenlooper Amendment to the Foreign Assistance Act of 1961, Section 620 of the Act, 75 Stat. 444 (1961), as amended, 22 U.S.C.A. Sec. 2370(e)(1), directing the President to suspend foreign aid to countries that have expropriated property of US citizens and failed to make compensation.

53 Under US export controls, violations might be sanctioned by a denial or suspension of 'export privileges'. See Berman and Garson, 'United States Export Controls – Past, Present, and Future', 67 *Columbia Law Review* (1967) 791.

54 The EU is quite outspoken in its criticism, finding that these rules 'risk leading to legal chaos.' European Union: Démarches Protesting the Cuban Liberty and Democratic Solidarity Act, *supra* note 16, 398.

55 See also *supra* text at note 24. In addition, one should not underestimate the concerns of the American business community that all the investments go to the Europeans while they are still prevented from acting in the Cuban market under domestic law.

cient' US statute, the so-called Alien Tort Statute of 1789,[56] not invoked for almost two hundred years, which gained prominence in such recent human rights *causes celèbres* as *Filartiga*[57] and *Forti*[58]. It provides that US 'circuit courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'[59] and has led American courts to uphold their jurisdiction in civil damage cases brought by the parents of a Paraguayan citizen who died as a result of being tortured in Paraguay by a Paraguayan official[60] and by Argentine citizens against a former Argentine general for acts of torture, murder and arbitrary detention in Argentina.[61]

While it is certainly legitimate, if not required under international law, to provide for domestic means of redress against acts of domestic organs, it seems more questionable whether the protection against foreign acts can be made subject to the domestic procedures of another State. In these situations, States have traditionally opted for international, as opposed to (extraterritorial) foreign national, supervision, such as the Inter-American or the European Human Rights Courts, etc. The lack of such external methods, as in the case of Cuba (which has not ratified the 1966 International Covenant on Civil and Political Rights or the 1969 American Convention on Human Rights and rejects any form of international control of its internal acts as an intervention into its domestic affairs)[62] might make the quest for alternatives understandable, and such alternatives might even have some moral persuasiveness. However, it does not in itself justify the solutions found.

A. Wrong Right?

The potential legitimacy of action to remedy cases of gross violations of human rights forms part of the current international law debate where the discussion centers on the lawfulness of humanitarian intervention, etc.[63] However, while there seems to be a growing consensus that collective action might even use forceful means to reach humanitarian ends, it is still highly controversial whether the same could be held true for unilateral actions. Against this background, one could at least argue whether 'weaker' forms of unilateral redress, such as judicial remedies offered against individual human rights violators, can be viewed as lawful under international law. It is important, however, to remember that this justification probably only

56 Judiciary Act of 1789, ch. 20, Sec. 9(b), 1 Stat. 73, 77 (1989), *codified at* 28 U.S.C.A. Sec. 1350.
57 *Filartiga v. Pena-Irala*, United States Court of Appeals, Second Circuit, 1980, 630 F.2d 876.
58 *Forti v. Suarez-Mason*, United States District Court, Northern District of California 1987, 672 F.Supp. 1531.
59 28 U.S.C.A. Sec. 1350.
60 *Filartiga v. Pena-Irala*, *supra* note 57.
61 *Forti v. Suarez-Mason*, *supra* note 58.
62 Cf. the Cuban refusal to cooperate with the UN Special Rapporteur on Cuba, Report of the Special Rapporteur on Cuba, UN Doc.E/CN.4/1993/39.
63 Lillich, 'Humanitarian Intervention Through the United Nations: Towards the Development of Criteria', 53 *ZaöRV* (1993) 557.

applies to a core of human rights provisions falling within the – albeit difficult to delimit – sphere of *jus cogens* rights. Based on the assumption that a violation of such rights has an *erga omnes* effect, i.e. is a violation of obligations vis-à-vis all other States, each of the other States arguably has an individual right to respond.[64]

Recourse to national courts to adjudicate violations of international law is not totally revolutionary. The traditional acceptance of the exercise of jurisdiction over war criminals and other offenders against the law of nations (e.g. in cases of piracy or slave trade), even in the absence of any territorial or personal link of the prosecuting State to the crimes or perpetrators involved, is a good example in point. Here, the common interest of all States substitutes for the lack of jurisdictional links. Currently, we seem to witness a trend to enlarge this kind of universal jurisdiction. For the acceptance by other States of this kind of extraterritorial jurisdiction it is crucial, however, that the values protected are indeed shared ones.[65] That is exactly the problem with the legislation at hand. The Helms-Burton Act seeks to redress the consequences of allegedly internationally unlawful expropriations. The legal rules governing expropriation and in particular the issue of compensation, however, belong to the most controversial areas of public international law.[66] Significantly, most contemporary international human rights instruments even fail to mention the protection of private property as a human right.[67] Certainly, one should not underestimate the US as a last stronghold of protecting proprietary rights as human rights. But the unilateral motive can hardly substitute for international substance.

B. Wrong Defendant?

The second fundamental problem under the Helms-Burton legislation concerns the 'object' of the attempted redress. The Act is not directly addressed precisely towards the internationally unlawful expropriation, but rather against the benefits derived from such takings, the result of 'trafficking'.[68] The Act does not – because it cannot – remedy the uncompensated expropriations, but rather seeks to provide for alternative compensation from those 'aiding and abetting' the unlawful Cuban activity.

64 Cf. Art 5(2)(e)(iii) ILC Draft Articles on State Responsibility, *YBILC* (1985) II, part 2, 25, which regards any State (and not only the home State of the persons aggrieved) as an 'injured State', if another State has violated a customary or treaty-based obligation 'for the protection of human rights or fundamental freedoms'.

65 Even US cases based on the Alien Torts Statute, which seem to rest on similar assumptions, make it clear that their reasoning will hardly apply in situations where the implicit consensus as to the content of a rule of customary international law is less uniform. Cf. *Filartiga v. Pena-Irala*, *supra* note 57, regarding the right to be free from torture '[a]mong the rights universally proclaimed by all nations'.

66 Schachter, Compensation for Expropriation, 78 *AJIL* (1984), 121.

67 However, a large number of recent bilateral investment protection treaties indicate a trend towards protection of property rights, regularly providing for 'full compensation'. Cf. Dolzer and Stevens, *Bilateral Investment Treaties* (1995) 108 et seq.

68 Cf. remarks of Brice Claggett at the American Society of International Law panel on the Helms-Burton Act, to be published in *ASIL Annual Meeting 1996*.

Even from a purely semantic point of view, it becomes apparent that by the recent legislation, the US attempts to penalize foreign investment behaviour by approximating it to something forbidden under domestic law. The Act expressly equates 'expropriation' with 'theft'[69] and defines the investment activities of foreign nationals involving expropriated property as 'trafficking'[70], a term usually reserved for particularly wrongful activities, such as dealing with narcotic substances.[71] It thus leaves it to the reader to conclude that investment implies 'receiving stolen property' or 'conversion'.

Here, however, hides the further problem of whether investing in property that has previously been expropriated can be seen as an internationally unlawful activity. The first objection might derive from the problematic private/criminal law analogy intended by the Act. An expropriation, even if unlawful under international standards, cannot be equated with 'stealing'. The taking of private property by public authorities, even if contrary to a State's own constitutional rules or to international obligations, is different from the unauthorized removal of such property by another private person. Most importantly, a State's confiscatory act will effect a transfer of title to the property involved. International practice generally recognizes that such takings are effective within the territory of the foreign expropriating country, even if they are unlawful.[72] Thus, property effectively vests in Cuba and it can effectively dispose of it now. That does not mean that it can rid itself of claims as to compensation, but 'de-recognition' would be against fundamental assumptions concerning a State's authority to regulate property ownership within its territory.[73]

VII. Critique of US Unilateralism

In addition to the specific critique valid against the Helms-Burton Act, there are a number of general considerations that caution against a unilateral approach in trying to enforce international law by domestic courts. First, unilateralism can be applied only by States that do not have to fear, or at least only to a minor and probably negligible extent, economic or other counter-measures. The lack of potential reciprocity in its application makes it a strong man's weapon only and thus, suspicious in a system based on sovereign equality of States in law coupled with extreme factual inequalities. Second, it might prove to be an overly costly method, similar to the unilateral trade embargo weapon that frequently ends up ineffective for the punish-

69 Sec. 3(3).

70 Sec. 4(13); See text *supra* at note 15.

71 *Black's Law Dictionary* (6th ed., 190) 1495, defines 'trafficking' as '[t]rading or dealing in certain goods and commonly in connection with illegal narcotic sales.'

72 Seidl-Hohenveldern, *supra* note 13, 156. Significantly this is also the consequence of the application of the act of State doctrine, cf. *supra* note 16.

73 Interestingly even the EC Treaty, building on a large consensus of values among the member States, left issues of regulating private property rights to their disposition. Cf. Article 222 EC Treaty.

ing State as other States continue to do business with the 'punished' State. It might also be costly in that it carries with it the inherent risk of trade disputes, as in the case at hand where – although the US did not fear the European and Canadian objections over the proposed legislation to an extent that it would not enact it – the potential trade frictions could prove 'expensive' in an economic sense. Third, to be judge in one's own case might lead to a wrong interpretation of what is indeed required under international law – which is particularly true in the case of expropriations. As Judge *Kaufman* has stated in *Filartiga* 'the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.'[74]

Finally, on a more general level, this US attempt to 'de-recognize' property transfers effectuated abroad through its judicial system is likely to prove overly burdensome for the individuals involved and has the inherent danger of creating legal fictions deviating strongly from the real world. Certainly, it can be seen as being in line with past American attempts to fight internationally wrongful acts by their non-recognition.[75] However, experience has shown that this is by and large a doubtful policy artificially differentiating between *de jure* and *de facto* situations, regimes, etc. It places a great burden on private parties if, for instance, it implies that certain acts lawful or effective in one country will not be recognized in another because this, in turn, might lead to multiple litigation, forum shopping etc.[76]

VIII. Seeking International Redress against the Helms-Burton Act: WTO Dispute Settlement – A Way Out or a *Cul de Sac*?

Assuming that the EU possesses a plausible argument for the Act's illegality both under traditional views on jurisdictional principles as well as under a 'reasonableness' test or comparatively flexible considerations on the jurisdictional reach of a State's legislation, the need arises to find an appropriate forum to adjudicate this genuine dispute.[77]

In the past – and in the absence of any specialized dispute settlement procedure – jurisdictional quarrels have been usually handled by diplomatic means. Probably still the best known incidence was the pipeline embargo where – after strong diplo-

74 *Filartiga v. Pena-Irala, supra* note 57.

75 According to the Stimson doctrine the US denied recognition to any situation, treaty or agreement brought about by non-legal, in particular forceful, means. Cf. US note to China and Japan of 7 January 1932, 26 *AJIL* (1932) 342.

76 The Act does not stand alone in its de-recognition policy. In a totally different context, recently discussed US legislation might use the legal de-recognition weapon in an even more perplexing way, i.e. not on the international, but on the domestic intra-State level. The pending 'Defense of Marriage Act' would enable any State to ignore gay marriages sanctioned by another State. Cf. The Gay Marriage Trap, *The Washington Post*, June 16, 1996, C4.

77 The EU has indicated in its Démarche that it 'intends to defend its legitimate interests in the appropriate international fora.' European Union: Démarches Protesting the Cuban Liberty and Democratic Solidarity Act, *supra* note 2, 399.

matic protests from the European Communities[78] – the US stepped back in enforcing its extraterritorial ban on re-exports of 'American' technology by foreigners or of any technology by 'American-controlled persons' from third countries to the Soviet Union.

In the present instance, the EU seems to follow a procedural double strategy, not relying exclusively on the diplomatic mode, but rather having recourse as well to the more institutionalized WTO dispute settlement mechanism. This in turn raises interesting questions about the feasibility of such a claim in the multilateral trade organization's realm. Granted that the WTO is no longer purely a trade organization, but rather a 'trade and ...' organization, it remains unclear whether the WTO is indeed the 'appropriate forum' for an international jurisdictional dispute of this kind.

Other than the sugar import restrictions of the Helms-Burton Act requiring a non-Cuban origin certification which seem to violate GATT principles banning indirect import barriers, it is difficult to see how the extraterritoriality dispute concerning potential property claims could fall under the GATT regime in a technical sense. An interesting argument was advanced by the EU ambassador to the US and is likely to be raised by the EU in the current 'consultations' and – if it ever reaches this stage – before a dispute settlement panel.[79] He expressed the view that a WTO dispute settlement panel might rule against the US because the 'reasonable trade expectations' of the aggrieved party, the EU, both with respect to the target country and the country imposing the boycott had been disappointed and that compensation was due. This concept, in fact, alludes to a so-called 'non-violation nullification or impairment' complaint under Article XXIII (1)(b) of the GATT.[80] The 'nullification or impairment' procedure provides a remedy where a GATT party's action, that might not even be an infringement of GATT rules, nonetheless impairs the 'reasonable expectations' of another contracting party. In other words, the EU would not even have to demonstrate that the extraterritorial provisions of Title III violate any GATT provisions but could be successful merely by showing that 'any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired [...] as the result of [...] the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement.'[81]

While it might be relatively easy to qualify the Act as a 'measure' in the sense of Article XXIII, to show that it caused a 'nullification' or an 'impairment' of a 'benefit' under the GATT might be less so.[82] As far as the required causality is

78 European Communities, Comments on the U.S. Regulations Concerning Trade with the U.S.S.R, reproduced in 21 ILM (1982), 891.

79 *International Trade, EU Still Undecided on WTO Action Against U.S. Over Cuba Bill, Envoy Says*, The Bureau of National Affairs, Daily Report for Executives, 28 March 1996; see also remarks of Ambassador Hugo Paemen in *ASIL Annual Meeting 1996*, forthcoming.

80 Cf. GATT, *Guide to GATT Law and Practice* (6th. ed., 1994) 610.

81 Art XXIII(1)(b) GATT.

82 Article 26(1)(a) of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* entitled 'Non-violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994' seems to shift the 'burden of proof' on the 'complaining party' which 'shall

concerned, the EU seems to rely on the trade diminishing effect either as between the US and the EU or between Cuba and the EU as a result of the deterrent effect of potential law-suits against European traders investing in Cuba. In effect, the legislation might require individuals to choose between maintaining business relations with the US or with Cuba – a choice that will in the aggregate diminish the expected European trade volume with both. However, whether this diminishing effect on the total trade flow between the EU and the US and Cuba respectively could be viewed as an impairment of a 'benefit' 'accruing under' the GATT, is a difficult issue. In the past, non-violation panel reports have regularly concerned nullification or impairment of tariff concessions.[83] The only panel report[84] where a benefit other than a concession was found to have been impaired was not adopted, with the opposing EC representative arguing that 'it would be a dangerous precedent to extend its [i.e. Article XXIII(1)(b)] application to situations in which no such commitment [i.e. a tariff binding] had been infringed.'[85]

A further obstacle for the EU will be the potential invocation of the GATT's 'national security' exception by the US which, in effect, might immunize the legislation from WTO scrutiny. According to the Article XXI(b)(iii) 'Security Exception' of the GATT '[n]othing in this Agreement shall be construed [...] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests [...] taken in time of war or other emergency in international relations [...].'[86] The US seems to have anticipated this potential justification and already prepared for its 'defence' by writing 'national security' purposes directly into the wording of the legislation.[87]

However, although Article XXI gives considerable discretion to the State invoking it in determining when its essential security interests are affected, the issue of its 'justiciability' remains open. While past GATT practice has indeed shown a wide deference to contracting parties' determinations of their national security interests,[88] it is not totally excluded that a strengthened dispute settlement mechanism calls for a judicial examination of the existence of a state of 'war or other emergency in inter-

present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement.'

83 GATT, *Guide to GATT Law and Practice, supra* note 80, 614.

84 1985 Panel Report, *EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region.*

85 C/M/186, 17, cited in GATT, *Guide to GATT Law and Practice, supra* note 80, 615.

86 The other security exceptions immunizing unilateral action under (i) and (ii) of Article XXI(b) relating to fissionable materials and to trade in arms are clearly inapplicable.

87 While in Sec. 2(28) Congress finds that '[f]or the past 36 years, the Cuban government has posed and continues to pose a *national security* threat to the United States', Sec. 3(3) specifically lists among the purposes of the Act 'to provide for the continued *national security* of the United States in the face of continued threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, [...].' (*Emphasis added*).

88 It seems that the EC sanctions against Argentina have been viewed justified by 'essential security' interests, while the panel established to scrutinize the US trade embargo against Nicaragua succumbed to the US wishes by limiting its jurisdiction to the sugar quota reduction, excluding the total trade ban from its review. Cf. Benedek, *Die Rechtsordnung des GATT in völkerrechtlicher Sicht* (1990) 389.

national relations'. Read closely, the legitimate auto-determination of a contracting party under Article XXI(b)(iii) relates to the necessity of a contemplated action for the protection of its security interests, not to the existence of a certain situation triggering this right. The present case might prove that the fact that a contracting party's nationals have been denied compensation for another State's expropriation of their property – despite all assertions to the contrary – can hardly be qualified as an 'emergency under international relations', in particular, if this incident dates back 36 years.

IX. Concluding Remarks

Given the serious uncertainties of pushing a claim against the extraterritorial reach of Title III of the Helms-Burton Act successfully before a WTO panel, recourse to WTO dispute settlement procedure appears all the more surprising and one wonders what might be the political reasons for such a step. One explanation could certainly lie in the current enthusiasm for international trade dispute settlement. Whether it will suffice to persuade a panel of trade experts to look beyond pure trade issues remains to be seen.