

# University of Miami International and Comparative Law Review

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Volume 10

Issue 1 *The University of Miami-University of Leipzig Bi-National Conference in Leipzig May 16-20, 2001 UNITED STATES VS. EUROPEAN UNION: TRASATLANTIC DEBATE ON ISSUES CLOSE TO HOME*

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Article 3

10-1-2002

## Comments On The University Of Miami University Of Leipzig Bi-National Conference In Leipzig

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### Recommended Citation

David Abraham, *Comments On The University Of Miami University Of Leipzig Bi-National Conference In Leipzig*, 10 U. Miami Int'l & Comp. L. Rev. 1 (2001)

Available at: <https://repository.law.miami.edu/umicl/vol10/iss1/3>

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**Comments on  
The University of Miami-University of Leipzig  
Bi-National Conference  
in Leipzig**

Professor David Abraham\*

The end of the Cold War in 1990 led many observers East and West to conclude that the major divides in the world had been closed. The 75-year-old battle between revolution and stasis, and the 45-year-old battle between the two Empires and the two worlds, had come to a close. With closure on the Cold War, a number of things happened. One of them, of course, was the unification of Germany. No doubt, the unification, or re-unification, of Germany was one development that made possible the seminars in Leipzig and in Miami, which in turn provided the opportunity for the production of the work appearing in this volume. More specifically the Universities of Miami and Leipzig were able in the post-cold-war world to inaugurate a joint seminar that would have escaped them, and did escape them, in the preceding period. In the course of the German university reform and expansion of the 1990's, the University of Leipzig, often in the past a center of great learning in the sciences and social sciences, also expanded its law faculty and its law offerings. Likewise, but in a very different way, the University of Miami in the 1990's was able to develop from a provincial university with a few venues of excellence into a significant and serious research institution. The law school of the university is a significant beneficiary of that development. This dual development in Leipzig and in Miami made possible the introduction and popularity of the exchange seminar between the two faculties and their students.

In May of 2001, faculty members and students from the University of Miami School of Law went to historic Leipzig to exchange views with German faculty members and students. That exchange was reciprocated in March of 2002 by a visit and discussion with members of the faculty and student body from Leipzig in sunny Miami. Those two occasions produced the papers presented in this volume. This is an

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\* Professor of Law, University of Miami School of Law. Co-Director of the University of Miami-University of Leipzig Bi-National Conference. Special thanks to my colleagues and Co-Directors Richard Williamson, Professor of Law, University of Miami School of Law, and Rudolph Geiger, Professor of Law, University of Leipzig. This conference would not have been possible without their efforts.

entirely welcome development, both as an intellectual matter and as a matter of cultural exchange.

As the subject matter of the papers contained here amply demonstrates however, there is far more going on than study abroad. The end of the Cold War produced unanticipated changes in the legal and political structures of the world. Many observers expected, perhaps naively, that with the abandonment of the effort at socialist development represented by the Soviet Union, the competing and opposing model, represented by the United States and its rather unregulated capitalism, would simply triumph and present an unchallenged *Weltanschauung*, which the rest of the world would willingly and to its own great benefit adopt. Although it is certainly true that free market liberalism has in the past dozen years spread its wings or, in the view of some, cast its shadow world wide, the matter in Europe itself has proven more complicated. Europe is, as Americans sometimes forget, home to the leading and most ancient western civilization. It has proven far from easy for Frenchmen, Germans, Italians, Britons, and others to accept unchallenged American leadership or as some might see it, domination. So, ironically, our Leipzig-Miami exchange has taken place in the shadow of considerable debate and disagreement between the leaderships and citizenries of our two respective countries.

The first years after 1990 were, arguably at least, dominated by a certain innocent optimism, which blocked out any perception of the differences in interests between European countries and the United States. Likewise the second half of the 1990's saw a particular conjuncture of social democratic governments in Europe and Democratic governments in the United States. The social democratic and statist traditions of Europeans—Catholic, red, and green—seemed able to co-exist with the liberal and libertarian impulses of America. This changed dramatically in the year 2000 with the election in the United States of President George W. Bush. Given the much more conservative and hegemonialist orientation of the Bush government, it is not surprising that differences would develop between the United States and its European partners and allies. Undoubtedly the question marks that continue to hover over President Bush's election, and indeed over the legitimacy of his presidency, have for many Europeans grown rather than receded in the two years since. Differences between American and German governing elites are visible in both macro political matters -- namely a vastly different view of the relationship of individual States to the world system -- and in the micro issues, that is to say in the treatment of specific individual issues that have arisen in the relationships among the countries. The looming threat of war exacerbates anxieties about one-

sided partnerships and makes many Europeans wish they could more effectively challenge Washington. Chancellor Schroeder has made that clear.

The central issue dividing the United States under its current leadership from its European allies is, namely, the relationship between uni-lateralism and multi-lateralism in today's world. The United States is the only hegemon in the world today, of that there is no doubt. The question however, remains whether that hegemon should proceed unilaterally and as it wishes in its dealings with others; the question is whether that sole hegemon should flex and use its muscles as it sees fit; the question is whether the absence of a challenge to the United States should in turn lead the United States to act in the world without consultation, without consideration, and without deference to the needs of others. The Europeans for the most part believe in multi-lateralism because they are the "multies", that is to say, they are the ones who are included when the United States does not act alone, but they are themselves not really capable of acting alone, not even on the European continent, let alone elsewhere in the world. This conflict between the power politics of an unchallenged hegemon, and the multilateral, more human-rights oriented politics of western multi-lateralism, occupies the backdrop behind all of the specific issues discussed at our two sessions at Leipzig and in Miami, as well as a backdrop for the papers collected in this volume.

Let us now turn to the individual papers presented in this volume and the issues they seek to address.

Mamedov Muschwig of Leipzig and Jeff Cazeau of Miami open the volume with a discussion of European security and defense policy as organized around the ESDI, European Security and Defense Initiative or European Security and Defense Identity. The issue underlying their debate is whether the European nations can function as a significant military power on their own, that is independently or semi-independently of NATO. NATO has from its inception been an American-led, if not an American-dominated, collective security instrument. This understanding made significant sense and was tolerable to the European partners so long as the major threats in the world were of two sorts: a major confrontation between the Soviet Union and the Western powers, or brush fires on the periphery of the conflict between the Soviet Union and the U.S. or between the Warsaw Pact and NATO. The 1990's, however, witnessed to the surprise of many, conflicts within the European continent. Above all, the dissolution of Yugoslavia generated a series of conflicts known in Bosnia and in Kosovo, where European interests seemed to be much more directly implicated than American interests. In

addition, the dissolution of Yugoslavia generated a number of human-rights claims, claims that seemed to transcend the limits of mere power politics or interest politics, and to implicate larger doctrines of nationality rights, the sovereignty of small groups, etc.

The experience of the post-Yugoslav wars is a mixed one. It seemed that the European states were themselves not able to administer and handle the problem effectively. From the American perspective, Europe remains an economic powerhouse with little if any military muscle, organization or desire. From the European point of view, it seems impossible to organize local collective security devices without either inviting the United States to participate or without being muscled aside by the United States. The problems that this uncertainty causes between the United States and its European partners within the framework of NATO and beyond it are the topics of the discussion by Muschwitz and Cazeau. Each of them pays generous heed to the perspective of the other, and their exchange is both enlightening and an exercise in close legal thinking. Whether in the end it is possible to establish a European Security and Defense Policy, ESDP, or not, remains to be seen. For the moment, it seems that our military attention has again been drawn away from Europe itself and to the near and middle East. Ongoing conflict in Russian Chechnya reminds us that Russia is not and will not in any conceivable future become a member of NATO, and therein lies the limit of these discussions. Russia is a member of Europe, but not a member of NATO. This dilemma is perhaps in the long run more significant than the disjunction between the interest of the NATO partners on the two sides of the Atlantic.

Manuel Rodriguez of Miami and Runa Kinzel of Leipzig next discuss the issue of the Helms-Burton Act and the extension of the ongoing U.S. embargo of Cuba. The U.S. has maintained a boycott of Cuba virtually since Fidel Castro secured the Communist regime there. This boycott has never made much sense to Europeans or other Latin Americans who know very well that the lack of internal democracy rarely functions as a basis for external boycott. Nonetheless, in the United States, and especially in Miami, the boycott of Cuba has taken on something of a holy mission. It represents the central organizing principle of the Miami exile elite, and as such is central to that elite's continued control over the nearly one million Cubans who now live in the United States and especially in South Florida. Perversely, of course, the boycott of Cuba most likely entrenches President Castro's regime. Having a large external foe take you this seriously, and be willing to do so much damage to the patrie, must indeed suggest that something is being done right in Cuba and for Cubans.

The United States has however decided that the value of continuing the boycott far exceeds the boycott's role in entrenching the Castro government. Of course, since it cannot be admitted that the boycott exists primarily for domestic American political purposes, it must be presented as a continuing moral obligation either to those whose property was expropriated in Cuba some 40 years ago, or at the very least, as a moral crusade against contemporary injustice and lack of democracy in Cuba. None of this sits very well with Europeans who find it a hollow, shallow, and hypocritical policy on the part of the United States given the readiness of the United States to engage massively in trade with China and even Vietnam, to name only two former dictatorial regimes. Indeed it can easily be argued that Cuba is nowhere nearly as repressive a country or regime as China, but rather that it is only a smaller and weaker one and hence more easily manhandled. A stable boycott of Cuba would take its place in the international order without at this late date arousing much additional attention.

In 1996 however, Congress, in its infinite wisdom, passed the Cuban Liberty and Democratic Solidarity Act, commonly known as the Helms-Burton Act named after two of the most conservative and residually anti-communist members of the Congress. As Rodriguez makes clear, it is Title III of the Act that destabilizes the current situation. Title III "creates a federal cause of action, on behalf of U.S. citizens whose property was confiscated without compensation by Cuba, against those who traffic in that property", etc. What this means is that a cause of action now exists against European and other parties who may be involved with property in Cuba that once had owners who are now American citizens or descendants of such owners. Put somewhat differently, the Helms-Burton Act creates a secondary boycott of Cuba and seeks to punish those Europeans involved with nationalized properties in Cuba. In one respect, this is an extraordinarily ironic development. Of all Western countries, the United States is probably the least sympathetic to the principle of secondary boycotts. If, for example, workers striking Pepsi-Cola sought to preclude the arrival of Pepsi-Cola products from independent supermarkets, the organizers of such a secondary boycott would face rather stiff legal penalties. What Helms-Burton proposes to do is precisely to extend the boycott to those who are not involved in the U.S./Cuban conflict.

As Kinzel points out, Cuba offered to discuss nationalized properties and the possibilities of compensation with United States officials as part of an overall settlement of outstanding issues and problems. Cuba sharply defends its policy of land and property nationalizations undertaken during more radical phases in the

Communist regime there. Nonetheless Cuba stands on the principle that as an independent sovereign even one living in the shadow of the United States, that it has a right to nationalized property with or without compensation as it sees fit, and that when compensation is plausible, it is to be a negotiated outcome by both parties.

The two authors take a subtle look at principles of boycott, extraterritorial effect, political legitimacy, and legal rationale. Are there other commitments to which the U.S and Europeans are party that might preclude Helms-Burton and its effective reach? For example, GATT and GATS might both affect the jurisdictional or territorial legitimacy of the Act. It is nothing new for states to attempt to interfere in the internal politics of others; what is striking about Helms-Burton is the explicitness with which such efforts are undertaken, and the centrality of the political advocates of that policy within the United States, a situation that Rodriguez underscores.

Kara Davis of Miami next offers an essay on U.S. obligation to lower greenhouse gas emissions. The Kyoto Protocol was adopted in 1992 as a global effort to reduce greenhouse emissions. A large number of states including the United States undertook at that time to work together within a framework that would allocate emission quotas to different states over an extended period of time. The larger goal is to reduce both the gross quantity of emissions and to redistribute those emissions away from the more glutinous developed countries such as the United States and Europe toward the developing countries and regions of the world to which much industrial production has shifted in the last 30 to 40 years. European unhappiness with America's failure to follow through on its Kyoto commitment is manifest and widespread. Davis acknowledges that the issue goes beyond emissions themselves. To be sure, the U.S. uses approximately  $\frac{1}{4}$  of all the energy used in the world while representing a very small fraction of that  $\frac{1}{4}$  in population terms. Beyond the question of gluttony however, is the question of cooperation versus going solo. It angers Europeans, as Davis also acknowledges, that politicians in the United States have been able to mobilize rejection of international standards in order to further their own careers. This area of contention may be less urgent than matters of war and peace, but the blatancy of America's desire to go it alone and to go it the American way is most offensive to Europeans and perhaps dangerous to the future environmental standards of the world as a whole.

Davis analyzes America's obligation to do something to lower emissions and the dangers they pose to the planet as a whole while defending the choice of the U.S. government to withdraw from the obligations anticipated in the Kyoto Protocol. It is impossible to

understand European unhappiness about developments in regard to Iraq or the Middle East generally without appreciating the role of slights such as that represented by the current American position on the Kyoto accords. Davis makes clear how ranking these policies are and yet also makes clear that the United States is in a position to pursue its own environmental agenda, one whose content does not necessarily conflict with the Kyoto agreements.

Robert Gregg of Miami explores another area in which European/American differences are striking. The United States is the last self-described democracy to maintain and employ capital punishment. Europeans pride themselves on having abolished what they see as a relic of an inegalitarian and unenlightened society and to have substituted for capital punishment, more ambitious measures of individual reform, reintegration, and rehabilitation. For whatever reasons, and they are several, the United States adheres to the position that its member states may employ capital punishment as a deterrent and as an act of vengeance against those who have ripped asunder the fabric by committing heinous crimes. Though it may be that democratic societies like the United States are more likely to punish their members so severely, than are societies that are more paternalistic in their social organization, it is nevertheless the fact that by now among democracies only the United States adheres to the position that capital punishment is neither cruel nor unusual. Gregg explores these themes both as a historical and legal matter and attempts to establish the differences between Europe and the United States which have brought us to this current divide. Gregg defends the American practice in legal terms and in terms of state sovereignty, while respecting the rights of other countries, cultures, and societies to differ on this matter. As fairly as he can, Gregg explains why the situation in the United States is what it is and why Americans feel entitled to maintain this position regardless of how isolated we are in doing so.

Let us look next at what seems to be a relatively minor issue involving relatively minor people, namely adherence to the Vienna Convention on Consular Notification. The Convention requires that individuals arrested abroad be notified by the authorities holding them of their right to see a representative of the embassy of their home country. Alas, in the past several years, two or more Germans, Italians, and other foreigners have been arrested, tried and even punished without being apprised of this right. To be sure, the Germans and Italians in question were not particularly attached to Germany or Italy, but the United States state officials, in whose custody they sat, were aware of their foreign citizenship yet nonetheless made no effort to contact the consulates of their countries. This is particularly significant because Germany and Italy



have repealed the death penalty, and that was precisely the penalty which their nationals faced, and in at least one case were subjected to, here in the United States. Arrogance, ignorance, hubris, whatever lay behind the decision on the part of the state and federal officials in the United States to ignore the Vienna Convention on Consular Notification, whatever the reasoning, however unappealing the felons involved, this course of action has left Europeans with a very bitter taste.

European agreements with the United States on extradition are likewise implicated in the Miami-Leipzig debates. The United States leaves the death penalty to individual states, and there is a limited federal death penalty at this time as well. European countries, having abolished the death penalty, refuse to extradite people to the United States on those occasions where they may face the death penalty. From the American perspective, this course of action contradicts obligations in individual extradition agreements where there is no provision made for different policies toward the death penalty. The American position is that treaties should be renegotiated but not violated. To the Europeans and particularly to the cultural elites, the insistence on the death penalty, particularly in the state of which the president was the governor, and in the state of which the president's brother is the governor, the persistence and relentless use of the death penalty in those two states mark the barbarity of America or at least of the American political elite. Given that the abolition of the death penalty in Europe generally took place in the context of anti- and post-fascist reform, American insistence on employing the death penalty demonstrates that European societies are now more democratic and progressive than the America that earlier liberated them and instructed them in liberal democracy. Compared to the violence of the death penalty, the violation of extradition obligations can only appear a minor and perhaps justifiable breach.

In the next essay, Marc Kleiner discusses bananas, airplanes and the World Trade Organization the question of subsidies.

Of all the significant countries of the northern hemisphere, the United States is by far the most committed to free market capitalism. Ideologically, Americans proclaim the principle of sink or swim, proclaim the principle of let the market decide. Europeans on the other hand, often view economics as a social matter, and economic success and economic failure must be conditioned and even measured by social needs and social requirements. Hence, Europe is in almost all respects a much more insured society. And that insurance covers the entire range from individual health insurance and welfare insurance to the policy of protecting agricultural production, subsidizing farmers of all sorts both

domestically and in the export market, and offering subventions to both businesses and labor organizations involved in a range of production.

Such protection and subsidy is not only afforded agriculture or decaying heavy industry; it is also extended to successful novel ventures, like Airbus Industries. Airbus Industries has become a very viable and strong competitor to the American aircraft industry. That American aircraft industry once had several significant players. At present however, it is overwhelmingly dominated by one player, Boeing Industries. Boeing has seen its market shares reduced significantly in the last decade by effective competition from Airbus Industries. Without question Airbus is subsidized by European governments. The subsidy, or subvention policy, has raised hackles in the United States on the grounds that it represents unfair competition. The European response to this claim is to argue that Boeing is also subsidized, but it is subsidized indirectly. Namely, it is subsidized through a defense industry and a research and development mechanism in the United States in which public costs are funneled through military expenditures and then returned to domestic producers in the form of improved technology. To Europeans, the differences are minor. But in the eyes of most Americans, the indirect subventions of this sort to Boeing are either invisible or do not count.

At the consumer subvention end, some European countries are committed to furthering the economies of their former colonies; for example, places like the French Caribbean, the British South American coast, French, Central and North Africa. The result has become known as the "Mini-Banana War". Some Central American producers, not former British or French colonies, find that their efforts to export into the European market are rendered more difficult by the subsidies being paid to competitors. Now this might provide good reason for Honduras, or Mexico, or Salvador to complain, but why does the United States complain on behalf of those countries? From the European perspective, such American complaints are disingenuous. They are not made bona fide in the name of the peasants of Honduras for example, but rather in the name of multinational American companies such as United Fruit, Chiquita, etc., operating in the Spanish speaking lands of Central America.

Although most of the contributions in this volume reflected a European unease with the American way of doing business the Leipzig-Miami discussions reflected precisely the opposite situation in regard to the "abduction" of children by separated parents. Under the Hague Convention, the jurisdiction in which international child custody disputes are to be settled is determined by that Convention, ratified in 1980. Primarily effecting separated couples engaged in nasty controversies

over the custody of their children, the convention stipulates that custody cases are to be heard in the jurisdiction of the child's conventional abode. Parents who feel that they will not get the better of the case in the jurisdiction in which they currently reside, have on occasion been known to abduct their children and take them out of the country to their own home countries, in order to do better there in the local courts.

Ximena Skovron looks at the existing cases involving citizens of the United States and citizens of Europe, Germany in particular, to examine the reluctance of European and especially German courts to recognize their obligations under the Hague Convention. Far more children are permitted to stay with the abducting parent in Germany than ought to be the case. German courts appear to consider it inherently in the best interest of a German child to remain in Germany. Hence all a German parent needs to do is bring the child to the country and the child's continued presence in that country will be assured. This seems to fly in the face of the obligation to hear the case and judge the case in the country of the child's abode, more often the United States. In the eyes of most American analysts, this German reluctance to adhere to the Hague Convention reflects the arrogant proposition that German culture and German society must be better for any child with a half German background than life in the United States. Alternatively, it reflects the suspicion that American courts will not treat foreign parents fairly. Such suspicion, of course, is not entirely unknown in the United States either. Two or three years ago, when Elian Gonzalez arrived in Miami, relatives and supposed supporters did not consider it even remotely possible that Cuba, the place where Elian lived with his divorced parents, would be the appropriate place to settle any disagreement between Elian's distant relatives in Miami and his father in Cuba. Notwithstanding such unusual cases as Elian's, Americans have reconciled themselves to the notion that jurisdiction in child custody matters belongs in the child's place of habitual residence. Skovron shows the courts of Europe and the administrative agencies of Germany in particular wrestling with this matter and perhaps coming to grips with it as well.

The next and final area of contention discussed so far in the Miami-Leipzig seminars is the question of so-called hate speech on the Internet. The American legal model, as applied so far to the Internet, derives from America's libertarian commitments. According to these commitments, free expression, free speech, and maximum latitude are to be the norm. Any deviation from the free speech norm, whether in the area of hate speech, racial incitement, pornography, or racist group insult, must be very strictly limited. European societies on the hand, and perhaps especially Germany, have had the experience in this past century

of extreme right wing regimes availing themselves of the opportunity offered by free speech to undermine the very foundation of free speech and indeed of freedom and democracy itself. This has led to a much more social and much less libertarian attitude towards speech that incites.

It is, for example, illegal in Germany and in France to deny the existence of Nazi gas chambers, to deny the existence of the Nazi final solution, to promote racial or religious incitement and discord. In the United States it has proven virtually impossible for public authorities to regulate speech in a comparable way. Occasionally one does see so-called voluntary speech codes on university campuses in the United States, but these are overwhelmingly matters involving private universities. Even so, they are treated with considerable suspicion and regularly denounced. As Joshua Spector amply demonstrates in his fine contribution, the Internet is a new terrain and one which needs to be approached cautiously and with adequate deliberation. Spector quite wisely avoids taking an extreme position on this matter while comparing German angst with American confidence in the area of Internet speech. Spector works by examining first the Constitutional jurisprudence of free speech in both Germany and the United States, and then seeking to apply that jurisprudence to the novel area of Internet speech. It is certainly clear by now that the early vision of the Internet as a self-governing, self-regulating community of participants must be abandoned. Such an image is no longer adequate for describing the concerted and concentrated resources available to some of those who buy, sell, and organize through the Internet. Self-regulation now would strengthen those who are already strongly represented in Internet property matters while perhaps filtering out those minor players who are responsible for a great deal of the hate speech on the Internet. Self-regulation according to Spector might therefore be adequate for organizations such as Yahoo, E-bay, and others to restrict, for example, the sale of Nazi paraphernalia, or neo-Nazi refutations of WWII genocide, etc. On the other hand, it may be the case that it is precisely small and unpopular voices which need to be protected. This is at the root of the most liberal of American jurisprudence, which has always been more comfortable regulating commercial speech than political speech, religious speech, etc. The American position, however, stands rather powerless before the racist and other hate speech that pervades the Internet airwaves. Unlike published materials, it is much more difficult to ascertain the nationality or jurisdiction of materials appearing internationally on the Internet. Therefore, the jurisdictional issues become as important as the actual substantive principles underlying national law on speech and incitement.

France and other European countries have, for example, attempted to halt the distribution or reception, or downloading of hate speech from the French transmitters of international or multinational hate speech materials. Deciding where such speech is coming from, that is to say, what country is responsible for determining the legitimacy and legality of such speech, is no easy matter. It has become so easy to camouflage and misidentify the origin of Internet transmissions that no single national jurisdiction can be imputed to any transmission. As with so many U.S.- German controversies, there is no easy solution to this one. Somewhere between the libertarian and perhaps excessively relaxed American standard and the more socially-minded German and European standard a compromise that resides among Internet distributors but which is overseen by national governments will undoubtedly come into being.

The Miami-Leipzig seminars provided a forum for in-depth discussion of a number of relevant issues of international law among students of diverse legal and cultural backgrounds. Although these disputes are not likely to be resolved in the near future, debates such as these encourage critical political thought and hopefully, improve the level of understanding among citizens who will shape the legal landscape in the years to come.