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Helms Burton: A View From Abroad

Runa Kinzel*

Part 1—Introduction

On March 12, 1996, the United States legislature passed the highly controversial Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, also known by the names of its initiators, Jesse Helms and Dan Burton, as the Helms-Burton Act.¹ The Helms-Burton Act has often been criticised for its non-conformity with international law. This note will examine the legal issues surrounding the controversy, present the European Union position on the Act and its conflict with international law, and critique the American stance toward the Act's formulation and implementation.

The History of the Helms-Burton Act

The Helms-Burton Act, or Libertad, was but another step in a history of almost forty years of the United States' foreign policy to promote the downfall of the Castro government and to support the transition to a democratically elected government in Cuba.² The United States' interest in Cuban affairs dates back to the late 19th century when, following the explosion of the U.S. "Maine" in Havana in 1898, the U.S. stepped in to assist Cuba against Spain, of which Cuba was then a colony.

The Spanish-American War of 1898 resulted in a defeat of the Spanish colonial power and the handing over of Cuba to the U.S.³ In 1902, Cuba formally became an independent state, but remained de facto dependent on the U.S. due to its almost exclusive trade-relations with the United States. In 1959, Fidel Castro took power in Cuba, supported initially by the U.S.. But with an official denomination of Castro's government to a Marxist-Leninist-oriented policy, relations between Cuba and the U.S. worsened significantly. From 1959 until 1960, all land-owners in Cuba were expropriated. With respect to expropriated United States nationals, compensation still remains to be paid. Relations continued to worsen because of the threat of Russian nuclear weapons

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¹ Pub. L. No. 104-114, 110 Stat. 785 (Mar. 12, 1996) [hereinafter Act].

² Meng, *EuZW* 1997, 423.

³ See the Treaty of Paris, Dec. 10, 1898, U.S.-Spain, T.S. No. 343.

which were temporarily stationed on Cuban territory, and which caused the Cuban Missile Crisis of 1962. Since 1962, the U.S.' reaction to Cuban policy has been one of political isolation and economic embargo, a policy reflected in U.S. legislation. The Cuban Democracy Act of 1992 was passed, followed by the downing of two American civil aircraft in March 1996 led to the passage of the Cuban Liberty and Democratic Solidarity Act, despite a former resentment by President Clinton.⁴

Title 1—Strengthening International Sanctions Against the Castro Government

Title 1 includes further enforcement of the economic embargo against Cuba,⁵ additional penalties under the Trading with the Enemy Act,⁶ the denial of visas to certain Cuban nationals,⁷ a prohibition against indirect financing of Cuba⁸ and an expression of the United States opposition to Cuban membership in international financial institutions⁹ as well as a condemnation of the Cuban attack on American aircraft.¹⁰

Title 2—Assistance to a Free and Independent Cuba

This Title describes the kind of assistance the U.S.A will render when a transition or democratically elected government has been established in Cuba, including economic support, coordination of assistance programs and the termination of the economic embargo against Cuba.¹¹ The factors and requirements for determining a transitional or democratically elected government are also set forth.¹² Section 207 handles the settlement of outstanding United States claims to confiscated property in Cuba. A satisfactory resolution of those claims by a Cuban Government recognised by the United States remains an essential condition to rebuilding normal economic and diplomatic relations.¹³

⁴ Compare Nissen, RIW 1999; 350, 352.

⁵ Act § 102 (a) (1), (a) (2).

⁶ Act § 102 (d)(1).

⁷ Act § 102 (e).

⁸ Act § 103.

⁹ Act § 104.

¹⁰ Act § 115.

¹¹ Act § 201-204.

¹² Act § 205-206.

¹³ Act § 207 (b).

Title 3—Protection of Property Rights of United States Nationals

Under Title 3, liability is established for any person's trafficking in confiscated property claimed by U.S. nationals in order to provide the latter with a judicial remedy.¹⁴

Thus, Title 3 enables U.S. nationals who own a claim to property which was confiscated by the Cuban government on or after Jan. 1, 1959 to sue any person trafficking in that property for money damages up to the sum of three times the amount of the fair market value of the property plus interest, court costs and reasonable attorneys' fees.¹⁵

Furthermore, the inapplicability of the act of state doctrine is announced¹⁶ and certain procedural requirements for claims of U.S. nationals are described.¹⁷

Section 306 (b) grants the President suspension authority for a period of not more than six months. Under this section, the President may postpone the effective date of Title 3 if it is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba. This authority was used continuously every six months during the Clinton Administration and was exercised by President Bush on January 16, 2001.¹⁸

Title 4—Exclusion of Certain Aliens

Title 4 contains an exclusion clause, which excludes from the United States those aliens who have or traffic in the confiscated property of U.S. nationals,¹⁹ a right to the secretary of state to grant exemption from exclusion for medical reasons or for litigation under Title 3, and definitions of "confiscated" and "traffics." Of particular importance in the liability provision of Title 3 is the definition of trafficking, as it is extremely broad. For example, it provides that "...entering into a commercial arrangement using or otherwise benefiting from confiscated property..." as well as "...causing, directing, participating in or profiting from..." are included in the definition of trafficking, as is transferring, trading, purchasing, selling and improving the confiscated property.²⁰

¹⁴ Act § 302.

¹⁵ *Id.*

¹⁶ Act § 302 (a) (6).

¹⁷ Act § 302(c).

¹⁸ U.S. Department of State, *Libertad Act* (May 1, 2001) <<http://www.state.gov/p/wha/rls/fs/2001/2596.htm>>.

¹⁹ Act § 401.

²⁰ Act § 401 (b) (2).

Secondary Boycott

Another aspect arises with a closer look at the combination of the provisions of Title 3 and 4 of the Act. Title 3 liability serves not only to compensate U.S. nationals, but also serves the purpose of imposing severe sanctions upon Cuba.²¹ The threat of liability within the United States with damages up to three times the value of the confiscated property combined with exclusion from U.S. territory would be of serious detriment to businesses worldwide. The United States' economic market is one of the largest and most significant in the global economy; the decision between trading within it, or trading with Cuba and being denied access to the U.S. market would be rather an easy one for a business enterprise concerned with its own viability.²² Thus, non-U.S. based business enterprises are indirectly forced to choose between trading with the United States or Cuba, which constitutes a so-called *secondary boycott*.²³ The legality of this effect will also be reviewed.

Part 2—Reaction to the Helms-Burton Act: Europe's Position

I. General Reaction

Prior to the passing of the Helms-Burton Act, a wave of international protest had already begun to form against the United States, with the major premise that the U.S. was unlawfully exercising its jurisdiction extraterritorially.

When the Act entered into force in March 1996, diplomatic measures turned into defensive action. Canada and the United Kingdom, for instance, reactivated their blocking statutes and Mexico passed one.²⁴ In November 1996, the General Assembly of the United Nations demanded that the United States eliminate the infringement of sovereignty that the Act imposed on other States.²⁵

Amongst the protestors was the European Union. On the diplomatic level, the EU consistently expressed its opposition both as a matter of law and as a matter of policy to the extraterritorial applications

²¹ As it is stated in the Act itself in § 3 (2).

²² Compare Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, 90 AM. J. INT'L L. 419, 429-430 (1996).

²³ *Id.*

²⁴ See, e.g., *Foreign Extraterritorial Measures Act* (as amended by Bill C-54 passed by the House of Commons on 9 October, 1996), 36 I.L.M. 117 (1997).

²⁵ G.A. Res. 51/17, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/17 (1996).

of U.S. jurisdiction with respect to its restriction of EU trade in goods and services with Cuba.²⁶

II. WTO Complaint

After the exchange of diplomatic notes and the passing of the Act and no solution to the dispute, the EU applied to the WTO for the introduction of a dispute settlement procedure according to Article 23 of GATT. Then, following fruitless consultations between the EU and the United States during the summer of 1996, the EU requested the establishment of a dispute settlement panel on Sept. 30th 1996. Despite initial resentment by the U.S.A, the panel was put into place by the Dispute Settlement Body by the end of that year.²⁷ But instead of delivering what would have been an enlightening panel report, the parties reached an agreement. On April 11th, 1997, the Understanding on U.S. Extraterritorial Legislation between the EU and the United States was proclaimed.

Within the Agreement, the two parties fostered their intention to develop disciplines and principles before Oct 15,th 1997, concerning the dispute in bilateral consultations.²⁸

The EU sought a continued suspension of the liability provision of Title 3 as well as an amendment by Congress of Title 4, leading to a Presidential waiver. As of the date of this article, that waiver has not been provided, but the exclusion clause has not been applied to EU citizens and firms since the Agreement was reached.

The Agreement ended the dispute settlement procedure but the EU reserved all rights to resume the panel procedure or to begin a new one, if action is taken against EU companies or individuals under Titles III or IV of the Helms-Burton Act.²⁹

²⁶ *European Union: Demarches Protesting The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act [March 5, 1996 and March 13th, 1995]* 35 I.L.M. 397, 397-400 (1996).

²⁷ Proposal for a Council Regulation (EC) Protecting Against the Effects of the Application of Certain Legislation of Certain Third Countries, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (C 296), *available at* <http://www.europa.eu.int>.

²⁸ Understanding Between the European Union and the United States on US Extraterritorial Legislation (April 11, 1997) *at* <http://www.europa.eu.int>.

²⁹ *Id.*

III. European Legislative Action

On November 22, 1996, the EU passed Council Regulation (EC) NO. 2271/96 (hereafter Regulation), which protects its citizens against the effects of the extra-territorial application of legislation adopted by a third country³⁰ based on jurisdiction granted by Articles 133 and 308 of the EC Treaty.³¹

The Regulation was aimed at blocking recognition and enforcement of the Helms-Burton Act and the Iran and Libya Sanctions Act, which is laid out in Titles 1, 3 and 4 of the Annex. Article 5 contains a prohibition of compliance with foreign orders resulting from the two Acts, whereas an exception is granted when non-compliance could result in serious damage to a natural or legal person. Article 6 offers a basis for a counter-claim to recover damages caused by the application of the two laws against those persons.³²

But since the Regulation only serves to protect natural and legal persons in the European Community, the potential legal wrongs committed by the U.S.A against citizens of other countries in applying the Helms-Burton Act are yet to be corrected. Therefore, the legality of the Act must still be scrutinized.

Part 3—Helms-Burton in International Law

I. Violations of International Treaties

A. The Helms-Burton Act and GATT/GATS

First, the Helms-Burton Act violates a number of provisions of the General Agreement on Tariffs and Trade (GATT) and of the General Agreement on Trade in Services (GATS), and therefore stands in contravention to the World Trade Organization (WTO). A counter-argument to this is often advanced in that a violation of any GATT or GATS provisions is not an issue because trade with stolen goods does not fall within the scope of GATT and GATS.³³ However, it is well-

³⁰ Council Regulation (EC) Protecting Against the Effects of the Application of Certain Legislation of Certain Third Countries, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309)

³¹ *Id.*

³² Council Regulation, *supra* note 30.

³³ Compare Brice M. Clagett, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act Continued, A Reply to Professor Lowenfeld*, 90 Am. J. Int'l L. 641, 641-642 (1996).

recognized that States have the right to expropriate land.³⁴ Here, the only missing piece is the payment of adequate compensation, and the fact that Cuba entered into compensation treaties with Canada and the United Kingdom does not foster the assumption that the Cuban government is unwilling to pay it. These circumstances are therefore not comparable to theft.³⁵

i. Most Favoured Nation Principle—Art. I GATT and Art. II GATS

The Most-Favoured Nation principle, which is laid down in both Article 1 of the GATT in respect to the trade of products (goods) and in Article 2 of the GATS regarding the trade of services, states that any advantage, favour, privilege or immunity granted by any contracting party to any product or service originating in or destined for another country shall be accorded immediately and unconditionally to the like product or service from or for the territories of all other contracting parties.³⁶

In the case of the Helms-Burton Act, section 302 imposes liability—among other things—for trading with Cuban products originating from “confiscated” property and investing in such property. Traders or investors doing business in the United States have to face that liability as well as the danger of exclusion under section 401. Thus, they and their products and services are treated differently by the U.S. from the ones without “a trace of connection” to Cuba, who therefore have a competitive business advantage. This difference in treatment is a clear violation of the most-favoured nation principle laid out in GATT and GATS.

ii. National Treatment Provision—Article 3 GATT and Article 17 GATS

Following this provision, the United States is required to treat equally all goods and services of the contracting parties and of their own nationals. Title 3 of the Helms-Burton Act includes non-U.S. nationals in the already existing embargo prohibiting almost all trade between U.S. nationals and Cuba. Viewed from that perspective, Title 3 rather produces equality in the sense of treating non-nationals like nationals.

³⁴ Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht*, 3.

³⁵ Nissen, *supra* note 4, at 353.

³⁶ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT] art. I, sub. 1 and art. II subsec. 1 GATS.

A violation of Article 3 of the GATT and Article 17 of the GATS by Title 3 of the Helms-Burton Act is to be denied.

iii. Freedom of Transit—Article 5 of the GATT

Article 5, subsection 2 of the GATT obliges the United States to guarantee free transit of goods and persons through their territory for the trades people of the contracting parties. The exclusion clause of section 401 of the Helms-Burton Act has been used against a trader from one of the contracting parties, thus infringing the right of free transit, and with it GATT's Article 5.³⁷

iv. Elimination of Quantitative Restrictions—Article 11 of the GATT

Following Article 11, subsection 1 of GATT, no prohibition or restriction other than duties or taxes (in other words, tariffs) shall be instituted or maintained by any contracting party concerning the import, export and sale of products of/from or in any territory of one of the contracting parties.

The United States has imposed an embargo on Cuba and with the Helms-Burton Act—as established above—is indirectly including all their business partners through the secondary boycott. Embargoes are prohibiting the trade with the isolated country altogether, which is why they do not qualify as tariffs, but as non-tariff trade-restrictions. Cuba, the EU Member States as well as the EU are members to the GATT Agreement. Thus, the embargo on Cuban products constitutes an infringement of Article 11.³⁸

B. Relevance of the Security Exception of Article 21 GATT and Article 14 GATS

The United States' measures, which as argued above are violating GATT and GATS provisions in a topical way, could be justified under the security exceptions of Article 21(B) (iii) GATT and Article 14 GATS. The United States invoked that exception clause by passing the Helms-Burton Act, which states that the purpose of the Act is "to provide for the continued national security of the United States in the face of the continued threats from the Castro government of terrorism, theft of property from United States nationals..."³⁹ The security exception permits a diversion from all GATT provisions (and respectively, all GATS provisions) in time of war or other emergency in international

³⁷ Compare Nissen, *supra* note 4, at 354.

³⁸ Meng, *supra* note 2, at 427.

³⁹ Act § 3 (3).

relations,⁴⁰ when the State considers it necessary for the protection of its essential security interests. The controversy surrounding this exception stems from how much discretion States have to determine what is "necessary", because the wording of the exception leaves it to their consideration.⁴¹

But, however broad that discretion is interpreted, it is only open when the requirements of Article 21 are present: a war or other emergency in international relations.⁴² The United States is not currently engaged in a war with any of the contracting parties, so only an emergency could qualify. Again the wording of the security exception clause provides some guidance, since it is "...war or other emergency..." the causing emergency must have a significance coming somewhere close to the one of a war.

One possible argument for an emergency situation is that the Cuban expropriations were not executed in accordance with international law, and thus constitutes an emergency for those U.S. nationals who have had their property removed by the Cuban government. However, this argument is weakened by two points. First, this situation has existed for almost forty years and therefore does not likely constitute such an emergency. Second, compensation may easily be secured through negotiations with the Castro government; thus, alternative means for resolving the dispute exist, another factor that suggests that this is not an emergency. That the U.S. government currently refuses to negotiate with the Castro government does not alter the conclusion.

Another argument posited for including the Helms-Burton Act within GATT's security exception refers to the potential refugee waves from Cuba once relations with Cuba are re-established is likewise not persuasive. When Cuban markets are open to all foreign investors, the economic situation will stabilise and generally improve, a factor that normally works to discourage, rather than to encourage, emigration. Refugee waves are thus not to be expected, in this case, cannot suffice as justification for applying the security exception. This situation cannot be qualified as an emergency justifying the suspension of all GATT obligations, and especially not towards all third parties.

⁴⁰ Compare HAHN, DIE EINSEITIGE AUSSETZUNG VON GATT-VERPFLICHTUNGEN ALS REPRESSALIE 293.

⁴¹ Meng, *supra* note 2, at 428.

⁴² Hahn, *supra* note 40, at 293; Nissen, *supra* note 4, at 355; Meng, *supra* note 2, at 428.

II. General Public International Law

A. Applicability of Public International Law

To apply any public international law norm as justification, the governed circumstance must be a subject of public international law.

Doubts concerning the latter can only arise in connection with the Title 3 provisions which provide a remedy for U.S. nationals, whose property was confiscated by the Cuban State on or after Jan. 1st, 1959. The circle of favoured persons includes *all* United States nationals as well as non-U.S. nationals and even Cubans who immigrated and became U.S. nationals *after* the expropriation. Section 301 (10) of the Helms-Burton Act states that "the United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens." As for the Cuban émigrés, the situation is somewhat unclear because at the time of the expropriation they were Cuban citizens, thus they were expropriated by their own government, which is why Cuban domestic law is to be applied not international law.⁴³

Where international claims are concerned, there are established principles governing States' entitlement to make such claims. An injured person must have the nationality of the claimant State at the time the injury occurs and must retain it at least until the claim is presented, which is clearly not the case here.⁴⁴

Accordingly, the provision of Title 3 of the Helms-Burton Act providing a claim for U.S. nationals, who were nationals of Cuba or another country other than the United States at the time of expropriation, infringes the sovereign right of that State to adjudicate it under international or, as in the case of Cubans émigrés, its domestic law. This constitutes a prohibited interference in internal affairs of another State and is a breach of international law.

B. The Exercise of Jurisdiction

The application of Title 3 of the Act, which refers to actions carried out by third country-nationals outside U.S. territory, also raises jurisdictional questions. In international law, the notion of jurisdiction refers to the power of States to govern persons, property and circumstances and therefore includes judicial, legislative and

⁴³ Compare Vaughan Lowe, *U.S. Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts*, 46 Int'l Comp. L. Q. 1997, 378, 384.

⁴⁴ *Id.*

administrative competence,⁴⁵ also known as jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.⁴⁶ Despite the fact that Title 3 of the Helms-Burton Act does not formally prohibit a certain behaviour, but rather provides a private law liability claim, its practical effect is prescriptive. The Act's express purpose is to serve the public order enforcing and utilizes tools like the secondary boycott that work a public prohibition. For these reasons, Titles 3 and 4 of the Helms-Burton Act must be considered an exercise of jurisdiction to prescribe.⁴⁷

i. Justification Under International Law

To constitute a lawful act under international law, Title 3 of the Act has to be a justified exercise of extraterritorial jurisdiction.

First, as for the exercise of jurisdiction, there is no positive rule requiring States to exercise jurisdiction, but international law restricts a recognised universal competence by prohibitive rules.⁴⁸ If there is no such rule, the State "... remains free to adopt the principles which it regards as best and most suitable. ..."⁴⁹

Because all States are subject to international law, a somewhat general freedom to exercise jurisdiction is to be applied within the limits imposed by the basic principles of international law, like state sovereignty, equality of States and non-interference in domestic affairs.⁵⁰ Thus, the competence to jurisdiction is basically rooted in the principle of territoriality.⁵¹

⁴⁵ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 298 (Clarendon Press 1990) (1966); REBECCA M.M. WALLACE, *INTERNATIONAL LAW: A STUDENT INTRODUCTION* 101 (Sweet & Maxwell 1986); MALCOLM N. SHAW, *INTERNATIONAL LAW* 452 (Cambridge Univ. Press 4th ed. 1997).

⁴⁶ Doehring, *Völkerrecht*, § 16 Rn. 808.

⁴⁷ August Reinisch, *Widening the US Embargo Against Cuba Extraterritorially: A Few Public International Law Comments on the 'Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996'*, 7 *Eur. J. Int'l L.* 545, 550 (1996).

⁴⁸ Dr. Martin Gebauer, *Kollisionrechtliche Auswirkungen der US-amerikanischen Helms-Burton-Gesetzgebung*, 18 *IPRax* 145, 150 (1998); Meng, *supra* note 2, at 427.

⁴⁹ Ipsen, *Völkerrecht*, § 23 Rn. 94; S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 19.

⁵⁰ Ipsen, *Völkerrecht*, § 26 Rn. 7; Shaw, *supra* note 45, at 452.

⁵¹ Brownlie, *supra* note 45, at 298; Ipsen, *Völkerrecht*, § 23 Rn. 93; Organisation of American States: Inter-American Committee Opinion Examining the U.S. Helms-Burton Act, 35 *I.L.M.* 1322, 1333 (1996).

Also, applying this first observation to the Act and the liability-provision of Title 3 for non-U.S. nationals at the time of the expropriation, such prohibiting rules would be infringed as observed above.

Second, it is doubtful whether Titles 3 and 4 of the Helms-Burton Act fulfil the criteria of the classical approach for qualifying a State that exercises extraterritorial jurisdiction. There are several traditional starting points for justification: the territory, nationality, security or protective aspects, and universality principles.⁵² Other legal commentators define the criteria with one requirement, the genuine link requirement (see below).⁵³ Both opinions are grounded in observations of the practise of States and the first four appear to be concrete examples or cases of the genuine link requirement.

The Genuine Link Requirement

As a general principle of international law, the so-called genuine link is constituted when the governed circumstance occurring abroad is substantially and sufficiently linked to an adequate circumstance occurring within the territory of the governing State.⁵⁴ The substantiality and sufficiency of the genuine link is to be determined with the help of criteria of international law,⁵⁵ which is why a closer look at the following principles would be helpful.

The Territoriality Principle (Objective and Subjective)

As stated above, States may exercise jurisdiction full and absolute on the State's territory.⁵⁶ Persons staying or events taking place within a State's territory are as a rule subject to domestic law. Extraterritorial jurisdiction would fall under that principle, when for example the commencement of a crime is in one country (it would have jurisdiction following the *subjective territorial principle*), and completed in another, where the injury occurs. The latter would have jurisdiction under the *objective territorial principle*. Since the "trafficking" of Title 3 of the Act is taking place entirely outside U.S. territory, neither of these territoriality principles apply as justification here.

⁵² J. G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 243, 274-284 (Butterworths 7th ed. 1972).

⁵³ Ipsen, Völkerrecht, § 23 Rn. 95.

⁵⁴ *Id.*; Cf. *Nottebohm* (Liech. v. Guat.) 1955 I.C.J. 4 (Apr. 6); Cf. *Barcelona Traction, Light and Power Co., (Belg. v. Spain)* 1970 I.C.J. 4 (Feb. 5).

⁵⁵ Ipsen, Völkerrecht, § 23 Rn. 95.

⁵⁶ INGRID DETTER, THE INTERNATIONAL LEGAL ORDER 402 (Dartmouth 1994); Doebring, Völkerrecht, § 16 Rn. 808.

The Nationality Principle

It is universally acknowledged that jurisdiction exercised extraterritorially according to this principle is based on the nationality of the person governed.⁵⁷ Following this, the United States could impose rules concerning the *conduct of U.S. nationals abroad* (instead of a primary embargo against Cuba), but as for *the conduct of non-nationals abroad* the nationality principle would not qualify as a justification.

The Protective (Security) Principle

Jurisdiction based on this principle may be claimed in respect to conduct (offences), which, even if committed abroad and by a non-national, is regarded as a threat to the State's security.⁵⁸ Trading with Cuban products or investing in Cuba while building a hotel on formerly confiscated property does not qualify as a threat to the U.S' security.

Universality Principle

According to the universality principle, jurisdiction can be claimed regardless of the territorial and nationality connection, when the offence is contrary to the interests of the international community. It is applied in reference to criminal law, namely the crime of piracy and war crimes,⁵⁹ which is clearly not analogous to the trafficking of confiscated property.

Effects Doctrine

Another starting point on a different level is expressed through the very controversial, so-called effects doctrine, invoked when regulating the conduct abroad of foreign nationals, because the conduct has an economic impact in the regulating State.⁶⁰ It can be applied "when the effect or the intended effect is substantial and the exercise of jurisdiction is reasonable."⁶¹

Title 3 of the Helms-Burton Act is—as cited in the Act itself⁶²—an example of exercising jurisdiction based on the effects doctrine. An effect *within United States territory could have been caused by the expropriation without compensation; whether this is substantial remains questionable. But even conceding this, the effect was caused by the*

⁵⁷ Wallace, *supra* note 45, at 103.

⁵⁸ Schwarze, *Die Jurisdiktionsabgrenzung im Völkerrecht* 28.

⁵⁹ Starke, *supra* note 52, at 212.

⁶⁰ Wallace, *supra* note 45, at 102.

⁶¹ Restatement (Third) of the Foreign Relations Law of the United States § 402, cmt. d, § 403, note 3 (1987), *noted in* Shaw, *supra* note 45, at 485.

⁶² Act § 301 (9).

expropriation of the Cuban government, not by persons now being held liable under the liability provision.

As for the requirement of *reasonableness*, if Cuban sugar originating from once confiscated land is traded in Europe by European traders, how does the trade negatively influence the still existing claim of a U.S. national for compensation for that confiscation? Surely this tenuous connection does not meet the requirement of reasonableness. Therefore, the liability provision is not justified by the effects doctrine either.

ii. Title 3 of the Helms-Burton Act as a Reprisal

A reprisal is an illegal act committed by an injured State, which will be justified if initiated as a counter-measure in retaliation to a previous violation of international law by the offending State.⁶³

With some imagination, the Act could be seen as the U.S.'s delayed reaction to the expropriations by the Cuban Government as well as to the shoot-down of the two U.S. registered aircraft by the Cuban military in February 1996.

But here again it must be emphasized that even provided both acts are contrary to international law, they were conducted by the Cuban government, not by the third party nationals, who are now held liable under the Title 3 provision. The justification of a reprisal does not include the violation of rights of third party States' nationals,⁶⁴ which again precludes the liability provision from justification under the reprisal principle. Because the requirements of a genuine link as well as the basis for invoking the effects doctrine are not met, the "trafficking in confiscated property by U.S. nationals" provision of Title 3 of the Act does not fall within the limits of lawful extraterritorial jurisdiction, nor is it justified as a reprisal. The United States presumed foreign jurisdiction as their own, which constitutes a prohibited interference with internal affairs of another State.⁶⁵

iii. Title 4

The exclusion clause of Title 4 constitutes the proper exercise of jurisdiction on territoriality principle grounds, and therefore must be regarded as lawful.

⁶³ Ipsen, *Völkerrecht*, § 59 Rn. 45; Wallace, *supra* note 45, at 226.

⁶⁴ Seidl-Hohenveldern, *Völkerrecht*, Rn. 1776.

⁶⁵ Ipsen, *Völkerrecht*, § 23 Rn. 97.

iv. Secondary Boycott

Since Title 3 of the Act is unlawful under international law, the secondary boycott cannot be justified either. Again, the argument of the danger of another wave of Cuban emigrants applying for asylum in the United States and thus endangering the public order does not persuade. On the contrary, foreign investment in Cuba is likely to create additional employment and improve the general economic situation, which would then be reflected in the lives of the Cuban people. Thus, the security principle does not apply. The secondary boycott infringes the right of another State to regulate whom their nationals are allowed to trade with, thus constituting an unlawful interference with internal affairs and a breach of General International Law.

Part 4—Conclusion

As shown above, Titles 3 and 4 of the Helms-Burton Act contain serious violations of WTO law.

Title 3 of the Act, which provides a claim for now U.S. nationals who were nationals of another State at the time of the expropriations, infringes the sovereign right of that State to adjudicate under its domestic or international law, and therefore constitutes a prohibited interference in the internal affairs of another State.

Moreover, Title 3 constitutes an unlawfully extended exercise of extraterritorial jurisdiction in respect to the provision of a claim for U.S. nationals at the time of the expropriations, and thus constitutes an infringement of the States' sovereignty whose nationals are held liable.

Apart from those purely legal aspects, the Helms-Burton Act is designed to indirectly force other States to comply with United States foreign policy, which in this instance, differs from theirs. Indeed, the worldwide protest against the Helms-Burton Act began as soon as plans for its passage became public. The international community, by common agreement, will not isolate Cuba. Nevertheless, foreign policy in respect to trade with Cuba remains and should remain within the sovereign discretion of each States. All States are equal and regardless of their "power-potential" should be respected in their political decisions.