

1995

The Proposed Cuban Liberty Act of 1995

Clint N. Smith

Duncan B. Hollis

Follow this and additional works at: <https://scholar.smu.edu/lbra>

Recommended Citation

Clint N. Smith et al., *The Proposed Cuban Liberty Act of 1995*, 1 LAW & BUS. REV. AM. 72 (1995)
<https://scholar.smu.edu/lbra/vol1/iss4/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

The Proposed Cuban Liberty Act of 1995¹

Clint N. Smith

Duncan B. Hollis²

Introduction

U.S. trade relations with Canada and the European Union could encounter significant difficulties in the near future if the United States enacts a bill to tighten sanctions against the Castro government in Cuba. The Cuban Liberty and Democratic Solidarity (*Libertad*) Act of 1995 (hereinafter the "Cuban Liberty Act"), a Republican-sponsored bill now before Congress, seeks to encourage democracy in Cuba in tightening existing sanctions and providing for U.S. aid in the event a transitional or democratic Cuban government comes to power.³ The Cuban Liberty Act could cause friction with Canada and other major U.S. trading partners because the Act would (i) ban all U.S. sugar imports from countries which purchase Cuban sugar; (ii) deny U.S. visas and loans to anyone who uses, manages or profits from property expropriated by the Cuban government where ownership is claimed by a United States person; and (iii) permit U.S. citizens with claims for expropriated property in Cuba to bring suit in U.S. courts against any foreign person, company or government now trafficking in those properties.

Canada and the European Union may respond that such provisions violate customary international law and U.S. commitments in the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO), justifying the application of blocking legislation and/or retaliatory trade measures.⁴ Canada, for instance, has already threatened to impose equivalent import restrictions on the U.S. in the event the Cuban Liberty Act affects any of Canada's \$500 million in sugar exports.⁵

This article begins with an analysis of the Cuban Liberty Act. The article then reviews Canadian and European positions on existing U.S. sanctions against Cuba under the Cuban Democracy Act of 1992. The article concludes with some tentative thoughts on the consequences of the Cuban Liberty Act's passage, specifically whether U.S. trading partners could

1. Previously published in 26 A.B.A. Sec. Pub. Can. L. Newsl. 21 (Summer 1995), reprinted with permission.
 2. Clint N. Smith and Duncan B. Hollis are attorneys with Steptoe & Johnson, Washington, D.C.
 3. See The Cuban Liberty and Democratic Solidarity (*Libertad*) Act of 1995, S. 381, 104th Cong., 1st Sess. (1995); H.R. 927, 104th Cong., 1st Sess. (1995) (hereinafter the "Cuban Liberty Act"). Hereinafter, unless otherwise noted, all citations to the Cuban Liberty Act will refer to sections in the original Senate version.
 4. See, e.g., *Canada Set to Retaliate Against U.S. Bill to Limit Trade with Cuba, Official Says*, 12 Int'l Trade Rep. (BNA) 865 (May 15, 1995); S. Greenhouse, *Allies of U.S. Seek to Block Bill on Cuba*, N.Y. TIMES, April 13, 1995.
 5. S. Greenhouse, *Clinton Opposes Tougher Embargo on Cuba*, N.Y. TIMES, May 5, 1995, at A1.
-

challenge the legislation as incompatible with the WTO, NAFTA and extraterritoriality principles of customary international law.

Current Law: The Cuban Democracy Act of 1992

Since the Castro government came to power, the United States has consistently restricted trade by U.S. nationals with Cuba. Nevertheless, from 1974-1992, the Office of Foreign Assets Control (OFAC) did permit foreign subsidiaries of U.S. companies to trade with Cuba on a limited basis. The Cuban Democracy Act of 1992, however, revoked OFAC's licensing regulations; U.S. owned or controlled foreign subsidiaries can no longer trade with Cuba.⁶ In addition, the Cuban Democracy Act authorized the President to cut off U.S. aid and loan forgiveness programs to any state which provides Cuba with financial assistance. The Act also prohibited vessels which have docked in Cuba from loading or unloading freight in the United States for a period of six months after such landing. To give force to these provisions, the Cuban Democracy Act amended the Trading with the Enemy Act, 22 U.S.C. App. § 16, to grant the Secretary of the Treasury authority to impose \$50,000 civil penalties for violations of the Cuban Democracy Act and to confiscate property that is the subject of a violation.

The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995

Introduced in February 1995 by Senator Jesse Helms (R-North Carolina) and Congressman Dan Burton (R-Indiana), the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995 seeks to strengthen existing sanctions against the Castro government as a means of bringing democracy to Cuba. Divided into three sections, the Cuban Liberty Act would establish tighter sanctions against the Castro government (Title I), authorize aid to Cuba in the event it adopts a transitional or democratic government (Title II), and introduce measures to enable an expanded class of U.S. nationals to claim compensation for property expropriated by the Castro government (Title III).

TITLE I — STRENGTHENING SANCTIONS AGAINST CUBA

Title I of the Cuban Liberty Act, Strengthening International Sanctions Against the Castro Government, would attempt to tighten the U.S. embargo against Cuba in four specific ways. First, if enacted, the President would be required to propose and seek U.N. Security Council approval for a mandatory international embargo against Cuba under Chapter VII of the U.N. Charter. Second, the United States would withhold aid from various international financial institutions (e.g., the IMF, World Bank, etc.)⁷ and independent

6. Cuban Democracy Act of 1992, Pub. L. No. 102-484 [H.R. 5006], 106 Stat. 2315 (1992) (codified at 22 U.S.C. § 6001 *et seq*); see also 58 Fed. Reg. 34709 (1993) (amending 31 C.F.R. § 515.559 to bar new licenses permitting foreign subsidiaries of U.S. companies from trading with Cuba).
7. Cuban Liberty Act § 104 defines "international financial institution" to include the International Monetary Fund, the International Bank for Reconstruction and Development (World Bank), the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, and the Inter-American Development Bank.

states of the former Soviet Union (e.g., Russia) to the extent such organizations or states provide Cuba with various forms of financial assistance.⁸

Third, Section 103 of the Cuban Liberty Act would make it unlawful for a United States person to extend any form of financial assistance to a foreign person that traffics in property confiscated by the Cuban government, the claim to which is owned by a U.S. person.⁹ The Cuban Liberty Act defines "United States person" broadly, including all corporate entities 50% or more beneficially owned by U.S. citizens. As a result, the Cuban Liberty Act would forbid foreign incorporated subsidiaries of U.S. corporations from extending financial assistance (e.g., loans, credit, or other financing) to foreign individuals or corporations which use, manage or profit from most property expropriated by the Castro government. In addition, the Cuban Liberty Act includes, within the class of United States persons possessing a claim to confiscated property, those persons who became U.S. citizens after their property was confiscated but prior to a final resolution of their claim. By thus expanding the class of U.S. claimants to include Cubans and other naturalized persons who became U.S. citizens after the Cuban government confiscated their property, the Cuban Liberty Act prohibits many more transactions than if it limited U.S. claimants to those who were U.S. citizens at the time of confiscation.

Finally, Title I would sanction states which trade with Cuba by creating import barriers for those states trading in Cuba's largest crop — sugar. Under Section 109 of the Cuban Liberty Act, the United States would ban all sugar, syrup and molasses imports into the United States from any country that the President determines imported any Cuban sugar, syrup or molasses. Only those states certifying that they will not import Cuban sugar, syrup or molasses until after Cuba holds free elections can receive an exception to this restriction. While a Section 109 import restriction is in effect, the U.S. would reallocate to other countries the quota of sugars, syrups, and molasses originally allocated to the offending country.¹⁰

TITLE II — SUPPORT FOR A TRANSITIONAL OR DEMOCRATIC CUBAN GOVERNMENT

Title II of the Cuban Liberty Act, Support for a Free and Independent Cuba, authorizes U.S. financial assistance and trade benefits in the event a Cuban government meeting certain defined criteria comes to power. Section 202 of the Cuban Liberty Act anticipates two levels of assistance: (i) humanitarian aid for a "transition government"; and (ii) considerable political, financial and trade assistance for a "democratically elected government." Section 205 defines a transitional Cuban government in part as one which is demonstrably moving from a communist dictatorship to a representative democracy, taking steps to ensure respect for human rights and private property as well as being publicly committed to

8. With respect to the independent states of the former Soviet Union, the Cuban Liberty Act would withhold U.S. aid in the amount of any military or intelligence assistance such states provide to Cuba. Any independent state engaging in nonmarket based trade with Cuba would be considered ineligible for U.S. assistance. See Cuban Liberty Act § 106.
9. When it came to power, Castro's government carried out massive and comprehensive expropriations of property. Most, but by no means all, of the owners of such property were Cuban or U.S. nationals.
10. G. Gunn, Director of Cuba Project, *Committee Hearings in re H.R. 927*, House Committee on International Relations — Subcommittee on Western Hemisphere, February 23, 1995.

holding internationally monitored free elections. Section 206 defines a democratically elected Cuban government in part as a market-oriented government, resulting from internationally supervised elections, which has established an independent judiciary and returned or provided full compensation for all property confiscated from U.S. citizens.¹¹ In either case, the Act only provides for U.S. assistance *after* the transition or democratically elected government has come to power.

TITLE III — PROTECTION OF U.S. PROPERTY RIGHTS ABROAD

Title III of the Cuban Liberty Act, Protection of American Property Rights Abroad, attempts to protect the foreign property rights of U.S. persons by imposing immigration sanctions and civil liability on any person or government trafficking in expropriated property to which a U.S. person possesses a claim.

Pursuant to Section 301, the Cuban Liberty Act would amend the Immigration and Nationality Act, 8 U.S.C. 1182(a), to exclude any alien trying to enter the United States who has confiscated, converted for personal gain, trafficked in, used or benefitted from confiscated property, the claim to which is owned by a U.S. person. The Cuban Liberty Act specifically defines alien to include corporate officers, principals, and even shareholders of entities which utilized the confiscated property in a prohibited manner. In addition, where an alien actually confiscated property or converted it for personal gain, the alien's spouse and dependents are excludable as well.

Section 302(a) of the Cuban Liberty Act creates a federal, civil cause of action for U.S. owners of property confiscated by foreign governments (e.g., Cuba) against any person or government which traffics in that property. The Cuban Liberty Act would amend the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, to deny sovereign immunity to foreign governments trafficking in such property. Furthermore, U.S. claimants need not exhaust "local" remedies in the foreign country unless a foreign government confiscated the property on or after the effective date of the Cuban Liberty Act.

With respect to remedies, Section 302(a)(1) would establish the liability of persons, companies or governments trafficking in confiscated property as the greater of (i) the amount certified by the Foreign Claims Settlement Commission plus interest; (ii) the amount determined valid by a court or administrative agency of the country in which the property was confiscated; or (iii) the fair market value of the property, calculated as being the current value of the property, or the value of the property when confiscated plus interest at the commercially recognized normal rate, whichever is greater. In the event the foreign company or government trafficking in confiscated property has notice of a U.S. person's ownership claim, the Cuban Liberty Act will treble the amount of damages awarded.

Like Title I, Title III also defines U.S. persons broadly. Section 303 of the Cuban Liberty Act provides for an expanded class of U.S. claimants, including those who were Cuban nationals at the time their property was confiscated, but who are now U.S. citizens. In cases of confiscation occurring after enactment of the Cuban Liberty Act, however, the Act would only provide causes of action to those who are U.S. citizens at the time of confiscation.

11. In defining a democratically elected Cuban government, the House version of the Cuban Liberty Act, H.R. 927, does not require such a government to have either established an independent judiciary or returned/provided full compensation for all confiscated property, but only requires progress towards these ends.

Under the current classification of U.S. claimants (i.e., where the property confiscated was owned by U.S. citizens at time of confiscation), the estimated total value of the claims for Cuba's confiscation of property is now roughly \$5.6 billion. If the expanded class of U.S. claimants comes into effect pursuant to the Cuban Liberty Act, however, the value of such claims could exceed \$20 billion. Thus, Title III would create a significant new cause of action for U.S. persons whose property was confiscated by the Castro government, allowing them to pursue in U.S. courts the assets of any person, company or government currently trafficking in such properties.¹² Moreover, by providing such significant awards to U.S. claimants, including treble damages in the case of a defendant with notice of a U.S. person's claim, the Cuban Liberty Act would make it extremely difficult for foreign companies to operate both in Cuba and the United States.

U.S. Obligations Under International Law: Extraterritoriality, GATT and NAFTA

In contrast to U.S. policy, Canada and several European nations have traditionally permitted their nationals and companies incorporated in their territory to trade with Cuba. Since the demise of the Soviet Union, moreover, the scope of this Cuban trade and investment has increased. For example, in 1991 Canada imported CDN \$152 million worth of goods from Cuba.¹³ That amount rose to CDN \$171 million in 1993 and CDN \$194 million in 1994. Total bilateral trade between Canada and Cuba now exceeds CDN \$300 million annually.¹⁴ Before the Cuban Democracy Act came into effect, Canadian subsidiaries of U.S. companies accounted for approximately CDN \$30 million of this trade.¹⁵

Given this pattern of investment and trade, the Canadian and European reaction to the Cuban Democracy Act was extremely hostile. The European Community (now the European Union) threatened to lodge a complaint under the General Agreement on Tariffs and Trade (GATT) concerning the extraterritorial effects of the Cuban Democracy Act's provisions. The United Kingdom invoked blocking legislation — the Protection of Trading Interests Act — prohibiting U.K. subsidiaries of U.S. companies from complying with the Cuban Democracy Act's prohibition on trade with Cuba.

Canada took perhaps the strongest position. Canada's Attorney General issued regulations entitled "Foreign Extraterritorial Measures (United States) Order, 1992," barring corporations registered in Canada from complying with U.S. extraterritorial restrictions on trade between Canada and Cuba.¹⁶ These Canadian regulations, issued under the authority of the 1984 Foreign Extraterritorial Measures Act (FEMA), also require Canadian compa-

12. Given that the Cuban Liberty Act allows suits under Title III against *any* person, company or government trafficking in confiscated property, the possibility exists the Act will permit suits between U.S. nationals — i.e., in the case where a Cuban national who acquired confiscated property and later became a U.S. citizen is sued by a U.S. claimant.
13. S. Lussenberg, *Trade with Cuba*, 16 A.B.A. Sec. Pub. Can. L. Newsl. 5 (Winter 1993).
14. C. Mollins, *Canada is Threatened with Retaliation by Americans*, MACLEAN'S, May 15, 1995.
15. S. Lussenberg, *Trade with Cuba*, 16 A.B.A. Sec. Pub. Can. L. Newsl. 5, 9 (Winter 1993).
16. For a survey of European and Canadian responses to the Cuban Democracy Act see M. Leigh and P. Lichtenbaum, *Law Without Borders: The Cuban Democracy Act of 1992*, 16 A.B.A. Sec. Pub. Can. L. Newsl. 13 (Winter 1993).

nies which receive any instructions or directives relating to the U.S. restrictions on trade with Cuba from a person in a position to influence corporate policy to report such communications to Canada's Attorney General.¹⁷ Violations of the Canadian regulations carry penalties ranging from 2-5 years imprisonment and fines from CDN \$5,000 - CDN \$10,000.

Opposition to U.S. Cuba policy, particularly to the extent it involves extraterritorial assertions of jurisdiction, continues to serve as a point of contention between the U.S. and its trading partners. For the past three years, Canada, France, and Spain, among others, have backed resolutions in the United Nations General Assembly condemning the U.S. trade embargo against Cuba on the grounds that the Cuban Democracy Act infringes on the legal sovereignty of other nations.¹⁸ In 1993, the European Parliament officially condemned the Cuban Democracy Act as a violation of international law, calling on its member states to refuse to comply with the Act's attempts to control foreign subsidiaries' trade activities.¹⁹

Both Canada and the European Union have contested the legality of several provisions of the Cuban Liberty Act under international law. With respect to international trade, three sections in particular have drawn strong condemnation: (i) the prohibition of financial assistance to foreign persons trafficking in confiscated property; (ii) the ban on all sugar imports from states which purchase Cuban sugar; and (iii) the creation of a cause of action against the assets of foreign corporations and governments trafficking in confiscated property, to which a U.S. person has a claim. In particular, these provisions raise two legal issues. First, do such provisions comply with U.S. obligations under either the WTO or NAFTA? Second, do such provisions constitute an illegal attempt to give U.S. law extraterritorial effect?

U.S. OBLIGATIONS UNDER THE WTO

As a member of the World Trade Organization (WTO), the United States has consented to apply Article XI of the General Agreement on Tariffs and Trade 1947, as amended (GATT), to its trade with other WTO Contracting Parties, including Canada and the European Union. Article XI:1 expressly prohibits WTO members from imposing prohibitions or restrictions, whether made effective through quotas or licenses, on the importation of any product from the territory of another Contracting Party. Article XI:2 permits limited exceptions to this rule in the case of agricultural products if quantitative restrictions are necessary to protect or encourage the use of like products in the domestic industry. Article XXI(b) creates additional security exceptions when a state considers quantitative restrictions essential to its security interests relating to arms trafficking, supplying a military establishment, or protections taken in time of war or other international emergency. Even in situations in which a state can apply import restrictions, moreover, GATT Article XIII:2(d) prohibits states which have allocated a quota among supplying countries from imposing additional conditions which would prevent a Contracting Party from fully utilizing its allocated share of the quota during a prescribed period.

In the event a Contracting Party considers that any benefit accruing to it directly or indirectly under the GATT is being nullified or impaired by a measure imposed by another

17. See Foreign Extraterritorial Measures Act, 1984, ch. 49, s. 1 *et seq.* (Can.).

18. See J. Preston, *U.N. Urges United States to End Cuban Embargo*, WASH. POST, Oct. 27, 1994, at A18.

19. *Embargo Against Cuba*, 1993 O.J. (35) 14.

Contracting Party, GATT Article XXIII provides that party with a right to seek a panel review of the measure. Under the WTO's dispute resolution mechanism, panels have authority to issue binding determinations on whether a measure nullifies or impairs benefits, leading to the possibility of compensation or the suspension of concessions in the event a nonconforming measure is left uncorrected.²⁰ With respect to import restrictions, moreover, the GATT Panel Report in *Japanese Measures on Imports of Leather* found a presumption of nullification or impairment of benefits whenever a state imposes quantitative restrictions on the importation of goods.²¹

Despite the language of Article XI and Article XXIII, the United States has consistently asserted a right to place quantitative restrictions on the importation of sugar. In 1989, a GATT Panel Report determined in *United States Restrictions on Imports of Sugar* that the United States quota regime for the importation of raw and refined sugar was inconsistent with the application of Article XI:1.²² In 1955, however, GATT Contracting Parties had granted the United States an Article XXV:5 waiver of GATT obligations with respect to import restrictions imposed under Section 22 of the Agricultural Adjustment Act of 1933, which authorized quantitative restrictions when the President finds that imports materially interfered with a U.S. program for a specific commodity or product. Thus, in the 1990 GATT Panel Report, *United States — Restrictions on the Importation of Sugar and Sugar-Containing Products*, the United States argued that even if its sugar import quotas violated Article XI:1, so long as the quotas were consistent with Section 22 of the Agricultural Adjustment Act, Article XI:1's restrictions did not apply. The Panel agreed and found that the 1983 and 1985 sugar quotas established pursuant to Section 22, while inconsistent with Article XI:1, were subject to a waiver of the United States' GATT obligations in accordance with GATT Article XXV:5.²³ As a result of the Uruguay Round negotiations, however, the United States finally agreed to abandon Section 22 and gradually "tariffy" all existing Section 22 quotas over a period of several years. For 1995, the U.S. will continue to maintain a tariff-rate quota of 1,117,195 tons for raw sugar and 22,000 tons for other sugars and syrups.²⁴

On its face, the Cuban Liberty Act's prohibition of sugar imports from countries which purchase sugar from Cuba would violate Article XI:1. The Cuban Liberty Act would erect complete barriers to the import of sugar, syrups and molasses from those countries which purchase sugar from Cuba. By prohibiting imports based on the behavior of the supplying country, the Cuban Liberty Act constitutes a measure similar to the U.S. attempt to prohibit

20. For a review of previous GATT dispute resolution procedures as well as the rules introduced under the WTO, see J. Jackson et al., *Legal Problems of International Economic Relations* 338-71 (1995).
21. *Panel on Japanese Measures on Imports of Leather*, GATT Doc. L/5623 (May 15 & 16, 1984), reprinted in B.I.S.D., 31S/94, 112-13.
22. *Panel on United States — Restrictions on Imports of Sugar*, GATT Doc. L/6514 (June 22, 1989), reprinted in B.I.S.D., 36S/331, 341-45.
23. *Panel on United States — Restrictions on the Importation of Sugar and Sugar Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*. GATT Doc. L/6631 (November 7, 1990), reprinted in B.I.S.D., 37S/228, 255-56.
24. *Fact Sheet — Sugar*, GATT/Uruguay Round, Foreign Agriculture Service, U.S. Department of Agriculture (1995).

tuna imports from countries which catch tuna through methods dangerous to dolphins and countries which purchased such tuna for eventual reexport to the U.S. An unadopted 1991 GATT Panel Report, *United States — Restrictions on Imports of Tuna*, concluded that these U.S. tuna import restrictions violated Article XI:1 as applied both to the fishing states and to intermediary states which purchased such tuna for reexport to the United States.²⁵ However, unlike the U.S. tuna ban, which only barred intermediary countries from importing tuna caught in a prohibited manner, the Cuban Liberty Act would completely prohibit all sugar imports from offending countries, not just the proportion of sugar products such countries purchased from Cuba.

On its face the Cuban Liberty Act's sugar, syrups and molasses import restrictions would not appear to qualify for either a waiver or an Article XI:2 exception. The 1955 waiver related specifically to quantitative restrictions for programs protecting like domestic products, while the Cuban Liberty Act's restrictions operate as a sanction against those states trading with Cuba. For the same reasons, the Cuban Liberty Act's restrictions would not appear to qualify for a GATT Article XI:2 agricultural products exception for the protection of domestic industries.

Nevertheless, the United States could assert that the sugar import ban relates to national security because of the continuing threat posed by Castro's communist government in Cuba, qualifying the U.S. for an exception under Article XXI(b). Although, in principle, the national security exemption is limited to the three specified instances, states are generally reluctant to challenge another state's reliance on an Article XXI(b) defense of national security. The question of whether and to what extent GATT Contracting Parties can review a state's claim to a security exception has arisen infrequently and remains controversial. Most recently, in *United States — Trade Measures Affecting Nicaragua*, a GATT Panel formed to examine U.S. trade restrictions against Nicaragua was specifically prohibited by its mandate from examining the United States reliance on Article XXI(b). Accordingly, the Panel found that it was unable to determine whether the U.S. trade restrictions against Nicaragua complied with U.S. obligations under the General Agreement.²⁶ Thus, in the case of import restrictions relating to Cuban sugar trade, the U.S. could likely claim an Article XX(b) exception with little likelihood that its assertion would be challenged by other Contracting Parties.

NAFTA OBLIGATIONS

Under NAFTA, the United States has similar obligations to refrain from imposing quantitative restrictions on Canadian and Mexican imports. NAFTA Article 309 expressly incorporates the proscriptions of GATT Article XI. To the extent that a party to NAFTA imposes import restrictions on certain goods against a non-party, however, NAFTA Article 309:3 permits that member state to restrict the importation of such goods through other member states.

Like GATT, NAFTA also includes national security exceptions under Article 2102, per-

25. *Panel on United States — Restrictions on Imports of Tuna*, GATT Doc. DS21/R (unadopted), reprinted in B.I.S.D., 39S/155, 196.

26. See GATT, *Analytical Index: Guide to GATT Law and Practice*, 6th Edition 555 (1994) (citing *Panel on United States — Trade Measures Affecting Nicaragua*, GATT Doc. L/6053).

mitting quantitative restrictions which a state considers essential to security interests relating to arms trafficking, supplying a military establishment, non-proliferation, wars or international emergencies. In addition, NAFTA Annex 2004 provides a mechanism for the resolution of disputes over quantitative restrictions — including provisions for compensation or the suspension of concessions — if a party believes that another party has taken an action inconsistent with NAFTA which nullifies or impairs NAFTA benefits.

The Cuban Liberty Act sugar ban could violate U.S. commitments to NAFTA if found inconsistent with NAFTA Article 309 and found to nullify benefits expected by other parties. NAFTA Article 309:3 does allow the U.S. to restrict or prohibit imports of Cuban sugar through Canada, but it does not provide a basis for the U.S. to deprive Canada of all its current sugar imports to the United States. Indeed, under the current regime of sugar quotas, Canada possesses an expectation that it will continue to export sugar to the U.S., an expectation protected by Article 309. Under Chapter 17 of the 1995 Harmonized Tariff Schedule of the United States, the U.S. has committed to providing Canada with a specific quota of sugar imports (8,000 metric tons) and special duty rates, on the basis of the NAFTA agreement.²⁷ The Schedule provides for modifications of import quotas only where it would be appropriate to promote U.S. economic interests or to comply with U.S. commitments to an international agreement. The Cuban Liberty Act appears on its face to fulfill neither condition. However, the Article 2102 national security exception may nonetheless justify the sugar ban.

EXTRATERRITORIALITY

International law recognizes two basic grounds upon which a state may assert jurisdiction to prescribe law: nationality and territoriality. When a state seeks to exercise control over activities outside its territory, therefore, customarily it may do so only to the extent that it can show the law addresses (i) its nationals, or (ii) acts which cause direct effects within its own territory (i.e., the effects doctrine) or threaten the security or territorial integrity of the state itself (i.e., the protective principle). Where a state has no basis for jurisdiction over acts occurring outside its borders, or where the exercise of such jurisdiction is unreasonable, international law does not recognize that state's right to prescribe legal rules.²⁸

The United States has in the past asserted jurisdiction over the activities of foreign subsidiaries of U.S. companies, a view adopted by the Cuban Liberty Act provisions prohibiting U.S. persons (including foreign subsidiaries) from engaging in financial transactions with foreign persons who traffic in confiscated property. The *Restatement (Third) of the Foreign Relations Law of the United States* acknowledges that states may reasonably exercise jurisdiction in such circumstances, but only for limited purposes in "exceptional cases."²⁹ Actual state practice and international judicial opinions, moreover, do not appear to give effect to the U.S. view. For example, in the *Barcelona Traction Case*, the International Court of Justice declared that a corporation is a national of the state under the laws of which it is incorporated and in whose territory it has its registered office.³⁰ This interpretation paralleled a

27. Harmonized Tariff Schedule of the United States IV/17-1 *et seq.* (1995).

28. See *Restatement (Third) of the Foreign Relations Law of the United States* § 402-03 (1986).

29. *Id.* at §§ 414, 441.

30. *Barcelona Traction, Light and Power Co.*, 1970 I.C.J. 3, 41-45 (Feb. 5).

view taken by a French Court of Appeals in *Fruehauf v. Massardy*,³¹ a case which arose during the U.S. embargo of China. The *Fruehauf* court appointed a French administrator to ensure that Fruehauf, a French subsidiary of a U.S. corporation, fulfilled its contract to sell tractors to China, despite orders from its U.S. parent company to comply with the U.S. embargo.

On several more recent occasions, foreign states have continued to reject U.S. attempts to control foreign subsidiaries or goods of U.S. origin. In 1982, for example, the United States issued regulations which prohibited foreign subsidiaries of U.S. firms and foreign corporations using U.S. technology from exporting controlled items to the Soviet Union for use in constructing a natural gas pipeline to Europe. An attempt by a Netherlands subsidiary of a U.S. company to comply with these orders was rejected in the *Sensor* case, in which a Netherlands court found that the United States could not establish jurisdiction over the Netherlands subsidiary on the grounds of nationality, the effects doctrine or the protective principle.³² Accordingly, it ordered the Netherlands subsidiary to meet its contractual obligations despite the U.S. order or face a penalty of 10,000 Netherlands florins per day of noncompliance. Britain and France also opposed the U.S. pipeline regulations, enacting blocking legislation requiring companies organized under British or French law, regardless of ownership, to ignore the U.S. directives or face severe sanctions.³³ Such opposition to the extraterritorial application of U.S. law was confirmed most recently when Canada and the U.K. invoked blocking legislation following the U.S. enactment of the Cuban Democracy Act.

U.S. attempts under the Cuban Liberty Act to control the loans or financial transactions of foreign subsidiaries of U.S. companies would also appear to conflict with customary international law. Unless the U.S. can show that acts of foreign subsidiaries of U.S. companies will have direct effects within the U.S. or serve interests essential to the security of the United States, the Cuban Liberty Act appears to lack a proper foundation for establishing jurisdiction over acts occurring outside U.S. borders.

The Cuban Liberty Act's two other controversial provisions — i.e., the sugar import ban and the new cause of action against foreign entities trafficking in confiscated property — do not purport to grant the U.S. control over the activities of foreign entities operating outside the United States. Instead, these sections seek to discourage foreign trade with Cuba indirectly, by creating legal sanctions in the event a foreign entity does trade with Cuba. International law does not prohibit such indirect attempts to influence foreign entities' activities although they may still provoke objections from U.S. trading partners.

The new cause of action against persons, corporations, or governments trafficking in confiscated property would provide causes of action not just for those who were U.S. nationals at the time of the confiscation, but for all those who have since become U.S. citi-

31. The circumstances surrounding the *Fruehauf* case are reviewed in W. Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans*, 83 Harv. L. Rev. 579 (1970).
32. See *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, 22 I.L.M. 66 (1983), summarized in 77 Am. J. Int'l L. 636 (1983).
33. For a summary of the E.C.'s legal arguments against the extension of U.S. law in the Soviet pipeline context, see *European Communities: Comments on U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891 (1982).

zens. While this extension is not unprecedented — the U.S. pursued similar claims on behalf of Italian nationals injured by the events of World War II who later became U.S. citizens — it does not comport with any established right to compensation under international law.³⁴ Moreover, by providing relief to those becoming U.S. citizens after their property was confiscated, the Cuban Liberty Act could adversely affect the claims of those who were U.S. citizens at the time of confiscation; there is no guarantee that the U.S. assets of persons, companies, or governments trafficking in confiscated property will prove sufficient to compensate for the four-fold increase in the amount of claims accompanying the expanded class of U.S. claimants.

Finally, with respect to extraterritoriality issues, the Cuban Liberty Act would appear to add a “secondary boycott” (i.e., where sanctions are applied against states who deal directly with the subject of a boycott) to the existing U.S. embargo of Cuban products.³⁵ In effect, all three sections of the Cuban Liberty Act under discussion would sanction states (e.g., Canada, European Union Member States) and their companies for dealing with Cuba or trafficking in property confiscated by the Cuban government. In the past, the United States has consistently opposed such secondary boycotts, specifically the League of Arab States’ boycott of companies which trade with Israel. Under the Export Administration Act, 50 U.S.C. App. §§ 2407, 2410, the United States prohibits U.S. persons from complying with any boycott “fostered or imposed by a foreign country against a country which is friendly to the United States” on the threat of severe criminal and civil penalties, including the suspension of export privileges.

The Cuban Liberty Act: Consequences and Remedies

Canada and the European Union have intimated that they might respond to the Cuban Liberty Act with blocking legislation and trade retaliation.

In terms of blocking legislation, Canada could issue an order under the Foreign Extraterritorial Measures Act (FEMA), with several likely consequences. First, an order made pursuant to FEMA could require all Canadian corporations (including those owned by U.S. companies) to refuse to comply with the U.S. legislation. Thus, Canadian corporations could not refuse to lend to corporations trading with Cuba on the grounds of complying with the Cuban Liberty Act. Second, Canadian corporations could be required to report any attempts to exact compliance with the U.S. statute by either the U.S. government or U.S. persons in a position to influence the corporation. FEMA § 5(a). Third, under FEMA Section 3, Canada’s order could block the production of records and documents residing in Canada in any U.S. suits brought under the Cuban Liberty Act. Finally, in the event a U.S. court awards damages against a Canadian corporation whose trade with Cuba involved confiscated property, FEMA Sections 8 and 9 provide “clawback” provisions. Canadian courts could refuse to recognize judgments awarded under extraterritorial statutes such as the Cuban Liberty Act as well as provide a cause of action for Canadian defendants to

34. For a brief discussion of the U.S. claims on behalf of Italian nationals injured by events during World War II, see *Foreign Claims Settlement Commissions of the United States, 1981 Annual Report* 215 (1981).

35. U.S. policy and the distinction between primary and secondary boycotts is summarized in M. Malloy, *Economic Sanctions and U.S. Trade* § 10.3.1 (1990).

recover damages they were forced to pay to successful U.S. claimants in U.S. courts. Together, statutes like FEMA and its European equivalents could constitute serious obstacles to the enforcement of the Cuban Liberty Act.

If a Canadian corporation is brought before a U.S. court, the existence of Canadian blocking legislation might also provide the Canadian defendant with the "foreign state compulsion" defense. Outlined in Section 441 of the *Restatement (Third) of Foreign Relations*, the foreign state compulsion defense provides that a state may not require a foreign person to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national. The defense is generally only available when the other state's requirements involve severe sanctions, a condition which could be fulfilled by FEMA's provisions for CDN \$5,000-\$10,000 fines and up to five years imprisonment in case of a violation. However, U.S. courts would in all likelihood be reluctant to apply this doctrine as a defense to clear violation of a U.S. statute.

Canada could also challenge the Cuban Liberty Act under NAFTA's dispute resolution procedures. NAFTA Chapter 20 provides dispute resolution whenever a party considers that the actual or proposed measure of another party is or would be inconsistent with the obligations of NAFTA or would cause nullification or impairment of benefits expected under that Agreement. Parties are required first to consult under NAFTA Article 2006, the failure of which leads to conciliation and mediation by the NAFTA Free Trade Commission. If the recommendations of the Free Trade Commission fail to resolve the dispute, the complaining party can request an Arbitral Panel. The Arbitral Panel investigates the matter and issues interim and final reports, the latter of which is binding on both parties. In the event a Panel finds a non-conforming measure which a party subsequently fails to correct, the complaining party can suspend equivalent benefits to the party complained against, pursuant to NAFTA Article 2019, until such time as the parties reach a settlement.

Given that the scope of Chapter 20 provides dispute resolution procedures even with respect to proposed measures of a party, Canada currently has a right to begin consultation followed by conciliation or perhaps even an Arbitral Panel on the issue of the proposed Cuban Liberty Act's conformity with NAFTA. Canada could use such procedures either to force the U.S. to abandon the offending provisions of the Cuban Liberty Act, or to provide a basis for the suspension of equivalent benefits.

In addition, NAFTA Article 2005 gives Canada the option to use WTO dispute resolution procedures (an opportunity also available to European states and the E.U.). Under the newly enacted *Understanding On Rules and Procedures Governing Settlement of Disputes* (Dispute Settlement Understanding), WTO Contracting Parties, including the United States, have agreed to a distinct, binding process of dispute resolution.³⁶ All WTO Contracting States have an initial obligation to consult over issues involving the nullification or impairment of benefits established pursuant to the GATT. If such consultations fail to resolve a dispute, the complaining state can request a Panel which can issue findings on a given measure's conformity with WTO provisions or its nullification or impairment of WTO benefits. Pursuant to Dispute Settlement Understanding Article 16(4), the WTO's Dispute Settlement Body, made up of representatives of WTO Contracting States, will then adopt the Panel Report unless it unanimously decides not to adopt the report. Like NAFTA Panel decisions, Article 22 of the Dispute Settlement Understanding provides for the sus-

36. Agreement Establishing the World Trade Organization, Annex 2 (1994).

pension of concessions or even compensation in the event an adopted Panel Report is not appealed or implemented within a reasonable time.

Like NAFTA, a successful WTO claim on the part of either Canada or the E.U. would allow either party to seek compensation or suspend like concessions against the United States in the event the United States refused to abandon offending portions of the Cuban Liberty Act.³⁷

Conclusions

If enacted, the Cuban Liberty Act could cause significant friction between the United States and its major trading partners because the legislation would tighten existing U.S. restrictions on trade with Cuba which in their present form have already been the subject of considerable controversy.

The Cuban Liberty Act, if enacted, could both provoke blocking legislation and attract challenges under international law. Either WTO or NAFTA dispute resolution mechanisms could serve as the means for Canada to press for the repeal of the Cuban Liberty Act or provide justification for trade retaliation against the United States. The aggregate result of these consequences — blocking legislation, dispute resolution challenges, and trade retaliation — could put a severe strain on U.S. trade relations with Canada and Europe.

Postscript

On September 21, 1995, after this article's original publication, the House of Representative by more than a two-thirds majority vote, 294-130, passed an amended version of the Cuban Liberty Act.³⁸ Among the major changes adopted, the House version (i) no longer defines foreign subsidiaries of U.S. corporations as U.S. nationals for the purposes of banning financial assistance to entities trafficking in confiscated property; (ii) deletes provisions restricting all sugar imports from countries purchasing Cuban sugar; and (iii) requires the President to report annually on assistance and commerce received by Cuba, including determinations as to which foreign commercial activities in Cuba involve facilities that are subject to claims by United States nationals.

On October 19, 1995, by an overwhelming majority of 74-24, the Senate passed the amended House version of the Cuban Liberty Act, but in the process included a number of additional amendments.³⁹ Specifically, the amended Senate version of the Cuban Liberty Act deletes the original Act's provision authorizing U.S. persons who became U.S. nationals

37. However, the possibility also exists that Canada or the E.U. might opt to undertake retaliatory trade measures against the Cuban Liberty Act outside of either NAFTA or the WTO processes. In such a situation, it would be the U.S. which could presumably challenge the scope of legitimacy of such Canadian or European retaliatory measures under NAFTA or the WTO's dispute resolution mechanisms.

38. See *House Approves "Cuban Liberty Act" To Tighten Embargo Against Castro*, Int'l Trade Rept. (BNA) 1606 (Sept. 27, 1995).

39. See *Senate Passes Watered-Down Cuba Bill After Controversial Provision is Dropped*, BNA International Trade Daily 203 (Oct. 20, 1995).

after their property was confiscated to sue foreign entities who traffic in that property. The Senate version also includes a new provision that affirms the existing prohibition of Cuban sugar imports to the United States by requiring states to certify, subject to the threat of confiscation, that their sugar imports to the U.S. did not originate in Cuba. Both the House and Senate versions of the Cuban Liberty Act will now proceed to conference to reconcile inconsistent provisions — e.g., whether to permit naturalized U.S. persons a cause of action against foreign entities trafficking in confiscated property — before Congress can send the bill to the White House for signature or veto.

Even with these recent changes, however, the Cuban Liberty Act continues to threaten U.S. trade relations with its NAFTA and European trading partners. Most recently, Mexico, which has invested heavily in Cuba and whose trade with Cuba topped \$100 million in the first six months of 1995, joined Canada, Great Britain and the E.U. in criticizing the Cuban Liberty Act. In particular, Mexico strongly condemned the House's approval of the amended version of the Cuban Liberty Act, which Mexico considered inconsistent with the objectives of both NAFTA and the WTO.⁴⁰ Thus, if enacted in an amended form, the Cuban Liberty Act will still likely strain U.S. trade relations with Mexico, Canada and Europe.

40. See *Mexico's Foreign Ministry Condemns U.S. Bill to Tighten Cuba Embargo*, Int'l Trade Rept. (BNA) 1606 (Sept. 27, 1995).