Florida Journal of International Law

Volume 8 | Issue 3 Article 3

September 1993

Extraterritorial Jurisdiction and the Cuban Democracy Act

Harold G. Maier

EXTRATERRITORIAL JURISDICTION AND THE CUBAN DEMOCRACY ACT

*Harold G. Maier**

I. INTRODUCTION

Relations between the governments of the United States and the Republic of Cuba have been seriously strained ever since Fidel Castro retaliated against limitations on the quota of sugar that the U.S. would purchase from Cuba at special prices by confiscating Cuban situs American-owned property in the early 1960s.[1] Until early 1992, most commercial and private dealings with Cuba were controlled by the licensing provisions of the Cuban Asset Control Regulations (Regulations).[2] Some provisions in those Regulations defined the parameters within which the foreign subsidiaries of U.S. corporations could carry on trade with Cuba.

In October 1992, the U.S. Congress passed the U.S. Cuban Democracy Act (Democracy Act) as section 1706(a)(1) of the National Defense Authorization Act of 1993.[3] The Democracy Act generally prohibits foreign firms that are owned or controlled by U.S. nationals from entering into any trade or financial transactions with Cuba, without regard to the strategic importance of the goods traded. That legislation wiped out the existing

---

* David Daniels Allen Distinguished Chair in Law, Vanderbilt University. This paper was prepared with the aid of a summer grant from the Vanderbilt University School of Law.

1. For a useful summary of these events, see Jason S. Bell, Comment, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act,* 25 U. MIAMI INTER-AM. L. REV. 77, 81-82 (1993); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

2. 31 C.F.R. § 515.559 (1989).

3. Pub. L. No. 102-484, §§ 1706-1712, 106 Stat. 2315, 2578-81 (1992) (H.R. 5006).

licensing criteria under the old Assets Control Regulations.[4]

The Democracy Act and the legislation preceding it amounts to an embargo on U.S.-Cuban trade.[5] All of this legislation is intended to limit trade with Cuba by non-U.S. firms in situations where the United States can exercise power over those foreign firms by means of its authority over those in the United States who own or control them. Put more bluntly, under the Democracy Act the U.S. government can limit or prohibit foreign business activity with Cuba by coercing the U.S. nationals who control that foreign activity.

II. THE JURISDICTIONAL RULES: A SUMMARY

A. *Sovereignty and Jurisdictional Limitations*

This legislation raises important questions about the permissible effect of U.S. regulations and the policies that inform them on the international commercial affairs of nations in which local businesses owned by U.S. nationals carry on trade with Cuba. Under customary international law, a nation may validly assert jurisdiction with respect to any matter unless it is prevented from doing so by an international prohibitory rule.[6] This conclusion flows almost *a fortiori* from the nature of the international legal system. Lacking a centralized decisionmaking authority, the international legal system is consensual in nature. If law is created only by community consensus (or its equivalent in particular circumstances), then necessarily nation states operate in complete freedom until such consent coalesces around acceptable limitations on that freedom. Until that occurs, nations must be presumed free of legal restraint, at least with respect to the exercise of jurisdiction.[7]

B. *The Limitations on Jurisdiction to Prescribe Law*

The extraterritorial affects of the Democracy Act differ from the ordinary assertions of extraterritorial authority because the act affects activities in

4. *See supra* text accompanying note 3.

5. *See* Bell, *supra* note 1, at 81.

6. *See* The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C. I. J., (ser. A) No. 10 (Judgment of Sept. 7) at 9.

7. This proposition is derived by necessary inference from the structure of the world community and from the way in which its member states actually behave. Whether it applies to other "substantive" rules of international law outside the jurisdictional realm is problematic. Some rules of international law, for example, those comprising the international law of human rights, may reflect limitations that human beings have a right to expect on the actions of those persons who act in the name of the entities, called nation-states, that human beings have created. *See, e.g.*, International Military Tribunal (Nuremberg), *Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947).

foreign countries by using local U.S. corporations, clearly subject to the authority of the United States, as a conduit to carry U.S. governmental power abroad. Therefore, the situations addressed by the Democracy Act do not fit clearly within any of the established international jurisdictional categories that result in concurrent jurisdiction by more than one state over the same subject.

Customary practice of nations indicates that a nation is not prohibited from asserting jurisdiction to prescribe rules of conduct concerning:

(1) Events occurring within its territory or occurring outside its territory but having effects within its territory;[8]

(2) Activities of its own nationals or, in some circumstances, those of permanent resident aliens, without regard to where those activities may occur;[9]

(3) Activities of non-nationals that threaten its processes of government, including threats to its national security, wherever those acts may occur and without regard to any effect such activities may have within its national borders.[10]

A state may validly assert jurisdiction under one of the situations above only if its assertion of jurisdiction is otherwise reasonable under the circumstances.[11] This proposition flows from the consensual nature of the international legal system and from the nature of the rules limiting jurisdiction. In the absence of a written agreement, consent to be governed by legal restrictions is inferred from the activities of nation states. Such inferences would have to be exceedingly strong to conclude that the community of nations has accepted the legality of unreasonable conduct by other nations when that conduct threatens or otherwise injures community members.[12]

The coexistence of the principles of sovereign freedom and the accepted limitations on that freedom described above[13] confirm that public international law does not prohibit concurrent jurisdiction by two or more states over a single event, person, or group of persons when the states in question meet all the appropriate tests. As long as a state's nationals travel or reside in other states, the nationality and territoriality principles recognize the existence of concurrent state authority.

The mere existence of such concurrent jurisdiction creates few practical

---

8. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 402(1) (c-c) (A.L.I. Tentative Draft No. 2, 1981) [hereinafter RESTATEMENT (THIRD)].

9. *Id.* § 402(2).

10. *Id.* § 402(3).

11. *Id.* § 403(1)-(2).

12. *See* Harold G. Maier, *Comity and Transnational Litigation*, 25 N.Y.U. J. INT'L L. & POL. 699, 710 (1993) (reviewing ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION (1993)).

13. *See supra* notes 7, 9-12 and accompanying text.

difficulties.[14] Rather, it is the exercise of concurrent authority to establish conflicting standards of conduct for a corporation subject to the concurrent prescriptive jurisdiction of two or more nation states which may place the subject of that jurisdiction in a no-win situation. But customary international law has not developed a definitive rule for resolving otherwise reasonable conflicting assertions of concurrent jurisdiction when such jurisdiction is exercised to require such conflicting acts. At most, customary international law establishes a *modus operandi* for resolving such conflicts without dictating the necessary results of that process.[15]

C. *The Role of the Comity Principle*

The principle of international comity, a kind of international "golden rule," guides the resolution of conflicting assertions of concurrent jurisdiction by domestic decisionmakers.[16] The comity principle assists national courts and other decisionmakers in determining the appropriate relative roles of states that share concurrent jurisdiction over the same persons or events, but give conflicting commands to those subject to that concurrent authority.[17]

Under the comity principle, states should seek to resolve conflicting assertions of national jurisdiction in favor of the state having the greatest interest in applying its own policies to the persons, entities, or issues in question. Although there is no convincing evidence of international community consent to an international legal requirement that this be done, the natural interest that each state has in encouraging future reciprocal treatment by other states encourages attention to the comity principle. As Justice Joseph Story put it:

> The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconvenience

---

14. Of course, the threat of the exercise of concurrent jurisdiction to order conflicting acts by the same party necessarily has some practical consequences. *See* F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 38 (1964 I). The consequences may be especially important when the threat is in the laws of a great commercial power like the U.S.. Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 582 (1983); *see* DOUGLAS E. ROSENTHAL & WILLIAM M. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE 8, 26-27, 61 (1982).

15. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 40 (1965); RESTATEMENT (THIRD) § 403(3); *see also*, Harold G.Maier, Book Review, 83 AM. J. INT'L L. 676, 678-79 (1989) (reviewing THE EXTRATERRITORIAL APPLICATION OF THE ANTITRUST LAWS (Dieter Lange Gary Born eds., 1987)).

16. Harold G. Maier, *Resolving Territorial Conflicts or "There and Back Again,"* 5 VA. J. INT'L L. 7, 15 (1984).

17. *See* Harold G. Maier, Remarks for the Panel, *International Comity and U.S. Federal Common Law*, 1990 PROC. AMER. SOC. INT'L L. 339-42.

> which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.[18]

Thus, the concept of comity is most accurately treated as a pragmatic principle of reciprocal expectations, informed by a perception of a fundamental attribute of human nature — that when one treats another human being fairly, he or she is likely to be treated fairly in return.[19]

The above analysis is reflected in section 403(3) of the *Restatement (Third) of the Foreign Relations Law of the United States*.[20] That section provides that when two or more states having concurrent jurisdiction issue conflicting prescriptions, each state must evaluate the relative interests of the states involved and "should defer to the other state if that state's interest is clearly greater."[21] In this way, the state having the greatest interest in having its law applied in a concurrent jurisdiction situation could give effect to its policies.

Conversely, the state having a lesser interest in having its policies applied could give way, without the fear that it was creating a dangerous international legal precedent for future cases. Its forbearance in this respect would recognize only that the forbearance of another state or states having equally valid claims to jurisdiction was done as a matter of courteous self-interest, not as a matter of law. In those situations in which a local legislative rule bound the courts to apply their own law without regard to conflicting state interests, the forum court would be free to follow the commands of its sovereign's legislature without fear that it might cast its nation into an unintentional violation of its international legal obligations.

Employed as above, the comity principle informs the judicial resolution

---

18. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 33 (Bigelow ed., 1883). *Accord*:

> Although the laws of one country can have no direct force in another country, yet nothing could be more inconvenient to the commerce and general intercourse of nations than that transactions valid by the law of one place should be rendered of no effect elsewhere owing to a difference in law.

ULRICH HUBER, DE CONFLICTU LEGUM, *quoted in* D.J. Llewelyn Davies, *The Influence of Huber's de Conflictu Legum on English Private International Law,* 18 BRIT. Y. B. INT'L L. 49, 59 (1937).

19. This concept of reciprocal expectation should be distinguished from that wholly different concept of required reciprocity suggested by the U.S. Supreme Court in Hilton v. Guyot, 159 U.S. 113 (1895). In that case, the Court held that the judgment of a foreign court would not enforced in the U.S. unless the courts of that foreign country would enforce a like judgment from the U.S. in a similar case. *Id.* at 227-28.

20. RESTATEMENT (THIRD) § 403(3).

21. *Id.* § 403(3). For a discussion of the drafting history of this section, see Maier, *supra* note 16, at 678-79.

of problems raised by conflicting assertions of concurrent jurisdiction. However, such judicial solutions do not appear to be available to the courts when interpreting the Democracy Act. An examination of the Cuban Democracy Act under these principles suggests that there is little to support its objective of subjecting controlled foreign subsidiaries of U.S. firms to prohibitions against trade with the Republic of Cuba. On the other hand, its solid base in U.S. constitutional law and the clear intent of Congress embodied in the act suggest that the appropriate forum for eliminating its politically harmful effects on U.S. international relations is not the courts of the United States, but rather the forum of international diplomacy.

III. EXTRATERRITORIAL JURISDICTION UNDER THE CUBAN DEMOCRACY ACT

A. *Congressional Intent*

The legislative and political history of the Democracy Act make it clear that Congress intended to exercise governmental control over U.S. domestic corporations to prevent economic intercourse between their foreign branches and subsidiaries and Cuba.[22] Therefore, U.S. courts have no choice but to apply the Act's provisions in cases that come before them.[23] Once congressional intent is clear and the statute in question is not otherwise unconstitutional, U.S. courts must give effect to the statute, even though such an application is forbidden by customary international law.[24] This aspect of domestic U.S. law has not inhibited continuing protests by foreign governments about U.S. interference with otherwise lawful trade between local branches and subsidiaries of U.S. parents and Cuba.

22. For an excellent outline of this history, see *Analysis, supra* note 1, at 93-99.

23. *See* Laker Airways v. Sabena Belgian World Airlines, 731 F.2d 909, 949 (D.C. Cir. 1984).

24. RESTATEMENT (THIRD) § 403 cmt. g. This proposition was called into question, in part, by the Reporters for the RESTATEMENT (THIRD) when they proposed, in § 135(1), Tentative Draft No. 1 (1976), that "[a] rule of international law . . . that becomes effective as law in the U.S. supersedes any . . . inconsistent preexisting provision of the law of the U.S." Under this rule, congressional statutes would become inoperative as domestic law if they came to conflict with a rule of customary international law. *See* Louis Henkin, *International Law as Law in the U.S.*, 82 MICH. L. REV. 1555, 1559-60 (1984). The submitted section was withdrawn because the American Law Institute was unwilling to take a position, believing that the rule's correctness had not been established. See excerpts from testimony in Fernandez-Roque v. Smith, 622 F. Supp. 887 (N.D. Ga. 1985), *in* Harold G. Maier, *The Authoritative Sources of Customary International Law in the U.S.*, 10 MICH. J. INT'L L. 450, 479 & n.121 (1989).

B. *The Democracy Act and Domestic Jurisdiction*

At first glance, international legal limitations on the Democracy Act's asserted jurisdiction to prescribe what are essentially domestic rules of law to effect a foreign country's foreign trade appear to be weak at best. Under the test in section 402(1), the United States may establish standards of conduct for its own corporations and may punish violations of those standards. The United States has jurisdiction over its domestic corporations based both on the presence of the parent corporation within U.S. territory and on its U.S. nationality.[25] Under the Democracy Act, the U.S. government uses its power over domestic corporations to control the actions of their foreign subsidiaries. In effect, the U.S. government turns the domestic parent corporations into unwilling government agents, requiring them to coerce conduct abroad that the government itself would be impotent to require.

Technically at least, such an assertion of jurisdiction does not create concurrent jurisdiction with the foreign subsidiary's country of nationality because it is the conduct of the U.S. parent, not that of the foreign subsidiary, that is the direct object of U.S. normative and enforcement control. Thus, the interest balancing provisions of section 403(3) of the *Restatement (Third)* do not come into play.[26]

The legitimacy of the exercise of this indirect coercion that meets the requirements of both the territoriality and nationality principles is called into question by the reasonableness requirements described in section 403(1) and (2) of the *Restatement (Third)*, as well as by the specific text of *Restatement (Third)*, section 414 (2) (b) (iii).[27]

Absent a direct threat to the national security of the United States, the use of jurisdiction over parent corporations to coerce participation by their foreign subsidiaries in an economic boycott of Cuba is patently unreasonable. It flies in the face of the economic and, perhaps, political interests of the foreign governments involved.[28] Whether those foreign interests have been

---

25. Under international law, a corporation is treated as a national of the state in which it is incorporated. *See* Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3, 43 (Judgment of Feb. 5).

26. *See supra* text at note 19.

27. RESTATEMENT (THIRD) § 414(2) & cmt. b, RESTATEMENT (THIRD), contain a presumption against extraterritorial control of a foreign subsidiary via authority over a local parent such as the Democracy Act involves. That presumption is subject to the test of reasonableness in § 403(1)-(2). *See also* § 441, dealing with foreign state compulsion in terms not relevant to the Democracy Act except in very limited circumstances.

28. *E.g.*, Legislative forerunners of the Democracy Act were opposed by the Department of State on the grounds that it would lead to "unproductive and bitter trade disputes with our allies." DONNA R. KAPLOWITZ & MICHAEL KAPLOWITZ, NEW OPPORTUNITIES FOR — CUBAN TRADE 11 (1992), *quoted in* Bell, *supra* note 1, at 96.

injured can often be ascertained by examining relevant governmental protests.[29]

Furthermore, use of governmental power over the local parent to require conduct by the subsidiary is, in effect, the use of a power to enforce the provisions of the Democracy Act abroad without first establishing jurisdiction to prescribe the rules sought to be enforced. A nation may not exercise jurisdiction to enforce a rule that it has no jurisdiction to prescribe.[30] International community consensus could hardly permit a nation to do indirectly what it cannot do directly. Permitting the use of coercive power in this manner could only lead to chaos in international commercial dealings. Such a practice would expose foreign subsidiaries to the vagaries of the domestic politics of their parents' countries of nationality and to the whims of decisionmakers having no political stake in the subsidiary's ability to carry on business effectively.

IV. THE ROLE OF INTERNATIONAL DIPLOMACY

Unfortunately, interest balancing at the adjudication stage cannot resolve the clash of governmental interests that the Democracy Act creates. The statute's clear congressional command admits to no further comparative evaluation of U.S. political or economic interests by the courts.[31] Also, the prerequisites are lacking for a judicial resolution of the conflicting sovereign interests involved since no party before the U.S. court will be subject to conflicting sovereign commands reflecting the exercise of valid concurrent jurisdiction.[32] If the principle of reciprocal goodwill embodied in the

---

29. *See generally* Marlene Hammock, Comment, *U.S. Prohibitions on Cuban Trade: Are They Effective?*, 1 FLA. INT'L L.J. 61 (1984). For a description of foreign government response to U.S. efforts to halt the construction of the Soviet gas Pipeline in Europe, see Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, n.3 (1983); *see also British Aide-Memoirè to the Commission of the European Communities* (1969), *in* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 311 (4th ed., 1990). Perhaps the best known incident is that involving the Fruehauf Company when the French Government took over the French subsidiary of Fruehauf, U.S., to fulfill a contract for delivery of trucks to Mainland China in the face of a U.S. government order to the American parent to prevent the sale. *See* Fruehauf Corp. v. Massardy, Court of Appeal of Paris, 14th Chamber, Decision of 22 May 1965, Gaz. Pal., 1965 II, at 86 *in* 5 I. L. M. 476 (1966). For a summary description of Fruehauf, see ALAN VAUGHAN LOWE, EXTRATERRITORIAL JURISDICTION xix (1983); *see also* Benz v. Compania Naviera Hildago, S.A., 353 U.S. 138, 146 (1957) (diplomatic protests against plans to extend the territorial scope of the Seamen's Act to prohibit advance payment of wages to seamen in foreign ports).

30. RESTATEMENT (THIRD) § 431(1); *see* FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1316-18 (D.C. Cir. 1980).

31. *See supra* text at note 24.

32. *Compare* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244 (1991). In that case, the Supreme Court found no congressional intent to apply Title VII of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§ 2000e-2000e-17, to alleged

concept of international comity is to have any effect at all in connection with the Democracy Act, the balancing of national interests that inform that principle will have to occur in the diplomatic forum, not in the national courts.

Differences with respect to the conflicting national policies can be much more easily worked out in the context of diplomatic exchange when the creation of adverse legal precedents is not a danger arising from effective diplomatic *ad hoc* resolution of concurrent jurisdiction problems. To the extent that achievement of international comity requires the balancing of the interests of the various states involved in an actual or potential policy conflict, the forum of diplomatic exchange is characterized by just such a dispute resolution process of demand, response, and eventual accommodation. In international relations, there is a natural impetus toward resolving disputes by compromise to avoid counterproductive confrontation based on unalterably fixed positions.[33]

Such negotiations need not address the issue as one requiring the creation of new legal rights or duties. The Democracy Act does not, in fact, raise issues about the legality of the extraterritorial exercise of prescriptive authority. Rather, it raises issues of good faith accommodation under a pragmatic principle of mutual expectations.[34] The genesis of the comity theory was the need to coordinate the conflicting international legal principles of absolute territorial power of the local sovereign with the reality that persons subject to various national allegiances would necessarily find themselves and their legal rights subject to control by a sovereign other than their own.[35]

Unlike those situations in which conflicting commands from concurrent established jurisdictional bases are issued to the same subject, the Democracy Act reflects differences in policy that may, in fact, be able to be accom-

---

employment discrimination by a U.S. company against the plaintiff employed in Saudi Arabia. The Court refused to apply the statute on the grounds that legislation will not apply extraterritorially unless Congress clearly exhibits such an intent. This conclusion is based on the assumption that the judicial branch should not put the U.S. in potential conflict with a foreign country without clear political direction to do so. 499 U.S. at 248, 255. The record, however, indicated no evidence of any objection by the Saudi Arabian government or even the existence of any conflicting laws. Since Araamco was a Delaware Corporation and since any order of the EEOC would be directed at it, no issue of either comity or extraterritoriality is raised. The Court's use of the explicit statement rule was not justified. It should have decided the case as a domestic case containing some foreign elements. That is, in fact, what it was.

33. Professor Andreas F. Lowenfeld aptly characterized this as a "dynamic of accommodation." A. Lowenfeld, *International Commodity Controls — Some Lessons from the Coffee Agreement*, 61 AM. J. INT'L L. 785, 787 (1967).

34. Story, *supra* note 18, at 33; *see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 40 (1965).

35. *See* Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 26 (1966).

modated only by mutual understanding and an agreement to disagree. Given the current political situation in the United States and the efforts of Cuban expatriates to prepare to reenter Cuba once the Castro regime has passed, it is highly unlikely that any effective change would occur in U.S. policy, whether subject to diplomatic discussions or not. The most that might be hoped for is implicit understanding by those nations who protest U.S. policy that the Democracy Act is, for the foreseeable future or until the unlikely event that some settlement is reached with Castro's Cuba, a matter of unalterable political reality.