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HITTING THE WRONG GUYS: EXTERNAL CONSEQUENCES OF THE CUBAN DEMOCRACY ACT

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I. THE PROBLEM OF EXTRATERRITORIAL JURISDICTION

Expanding international trade is tying economies of different countries closer together so that business transactions in one country affect other countries as well. Such economic interdependence have traditionally given governments a chance to influence not only their own economies but also foreign economies by favoring or restricting exports or imports. This potential influence enlarged significantly as multinational enterprises became more developed, often putting them in a position to shift goods, materials, production and earnings from their subsidiary in one country to the subsidiary or to the mother company in another country, in order to avoid high taxes, higher wages or stringent environmental laws. By prescribing to directors of multinational enterprises what they are allowed to do or not do, a state may exert a powerful economic influence, not only within its own borders, but also in the countries where the subsidiaries are domiciled.[1] That influence may be used by such a state to retain effective control over its own economy and to prevent the multinational enterprise from escaping the state's regulatory power. But this regulatory power also may be a means to influence or even severely hurt the economy of other states and their individuals, be it for economic or for political reasons, by chance or intentionally. As far as one state's legislation has an impact on other states, the problem of extraterritorial jurisdiction must be faced.

Through the Cuban Democracy Act, the United States extended the prohibition of trading with Cuba and almost all trade including "transactions between U.S.-owned or controlled firms in third countries and Cuba,"[2] and

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1. *See also* A. Vaughan Lowe, *Extraterritorial Jurisdiction, The British Practice*, 52 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 157 (1988).

2. National Defense Authorization Act for the Fiscal Year 1993, § 1706(a)(1) (1993) (excluding the prior licensing mechanisms under the Cuban Asset Control Regulations).

thereby expressly extended its regulatory power to firms outside its borders. This clearly points to the intentional use of extraterritorial jurisdiction and possibly the borderlines of such jurisdiction.

II. EUROPEAN PROTEST

Unlike Canada, the European Union (EU) and its member states did not enact "blocking statutes,"[3] but the EC (European Community) and its member states on October 7, 1992 tried to convince President Bush not to sign the Cuban Democracy Act. After the enactment on October 23, 1992, the Commission of the EC officially regretted the Act and mentioned the possibility of bringing the issue before the GATT or Organization for Economic Cooperation and Development (OECD).[4] Also the European Parliament on December 19, 1992 passed a resolution asking for the revocation of the Act.[5] France and Great Britain protested expressly against the Act and on November 24, 1992 the Assembly of the UN condemned the Act with the votes of France and Spain, the other EC-member states abstaining.[6]

The protest might have confined itself to resolutions and formal protests because the trade volume at stake between Cuba and the EC amounted "only" to about 500 million U.S. dollars per year. In a previous similar conflict concerning the construction of a gas-pipeline from the former Soviet Union to Western Europe there was much more protest, including a blocking statute by Great Britain as well as confiscation by the French government of the goods concerned in order to ship them to Russia.[7]

The pipeline embargo case raised much discussion among legal scholars, with a consensus that the principles of international law did not justify the use of extraterritorial jurisdiction because the requirements of neither the principle of universality, the nationality principle, the passive personality principle nor the protective principle were met. Therefore a Netherlands' court, the Arrondissementsrechtbank Den Haag, held that the U.S. order prohibiting exports to Russia may not be considered binding under the laws

3. As to Canada, see Selma G. Lussenburg, *Trade with Cuba*, 16 CANADIAN L. NEWSL. 5 (Winter 1993).

4. Trade Policy: Bush's Signing of Cuba Embargo Law May Trigger GATT Complaint, E.C. Warns, 9 Int'l Trade Rep. (BNA) 1848 (Oct. 28, 1992).

5. European Parliament Resolution 1993 (C 021) 156.

6. G.A. Res. 47/19, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/47/L.20/Rev.1 (1992).

7. *See* Hans-Jörg Ziegenhain, 39 RECHT DER INTERNATIONALEN WIRTSCHAFT 897, 901 (1993) (specifically dealing with the French situation in Dresser Industries, Inc. v. Baldridge, 549 F. Supp 108 (D.C.D.C. 1982).

of the Netherlands.[8]

The facts before the court were that in 1982, Compagnie Européenne des Pétroles S.A. (C.E.P.), a French corporation, had ordered 2400 "strings of geophones" from Sensor Nederland B.V. for delivery into the former Soviet Union not later than September 20, 1982. Sensor was a 100% owned subsidiary of Geosource International, Nederland, which was 100% owned by Geosource, Inc., a U.S. corporation located in Houston, Texas. Sensor accepted the offer on June 18, 1982. On July 27, and again on August 12, 1982, Sensor informed C.E.P. that as a subsidiary of a U.S.-corporation Sensor had to comply with the U.S. President's order from June 22, 1982 prohibiting exports to the Soviet Union and therefore could not deliver on time.

Following this, C.E.P. applied for an injunction before the Netherland Court asking for specific performance and damages of 100,000 dutch guilders for every day of default. Sensor argued that the sanctions under Section 385.2(c) of the U.S. Export Administration Regulation must be considered as force majeur, and therefore it should not be liable under Article 74 of the U.N. Convention on Contracts for the International Sale of Goods.

The court did not accept this argument and granted the injunction.[9] It held that Sensor was a Dutch corporation because it was founded in the Netherlands under the law of the Netherlands and was domiciled in the Netherlands and that Section 385.2(c) of the U.S. Export Administration Regulation claiming extraterritorial jurisdiction over Sensor was inconsistent with international law.[10]

The court based its findings on the principle that a state generally may not extend its jurisdiction into the territory of another state and the acts committed there with exceptions only insofar as the nationality principle or the protective principle applies.[11] As Sensor was a Dutch company, the nationality principle did not apply. Under the protective principle, according to the court, a state may extend its jurisdiction over acts which threaten its safety, its credit rating or other interests of this state wherever and by whomever these acts are committed. But the court held that the embargo served only the interest of U.S. foreign policy and that such interests did not fall under the protective principle.[12]

As a third exception the court asked whether the exports had immediate

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8. See Jügen Basedow, *Das Amerikanische Pipeline-Embargo vor Gericht Niederlande: Pres. Rb. Den Haag 17.9 1982 (Az. 82/716)*, 47 RABELS ZEITSCHRIFT FÜR AUSLÄNDISHES UND INTERNATIONALES PRIVATRECHT 141, 147 (1983) (analyzing Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V., 22 Int'l Legal Mat. 66 (Dist. Ct. The Hague 1983)).

9. *Id.* at 144.

10. *Id.* at 145.

11. *Id.*

12. *Id.*

and prohibited effects in the territory of the United States, which under international law would give extraterritorial jurisdiction to the United States.[13] Such prohibited effects on the territory of the United States, however, the court could not find in case of goods not stemming from the United States and being exported to Russia by a non-U.S. firm.[14]

The court would have approved an extraterritorial measure in a case where a U.S. citizen had founded a firm outside the United States for the sole purpose of circumventing the embargo.[15] But as such a case was not before the court and considering that there was no other connecting link between the sales contract and the United States, the court held that the U.S. embargo could not be binding on the contract.[16] Therefore, Sensor could not rely on Section 385.2(c) of the Export Regulation Act, but had to comply with the Dutch law requiring specific performance of the sales contract.[17]

III. GENERAL BALANCING OF INTERESTS

The principles mentioned above are, according to the German understanding, not exclusive, but extraterritorial jurisdiction might also be justified under a general balancing of the interests involved.[18] Thereby, the more the interests of other states are affected, the stronger the ties to the state claiming extraterritorial jurisdiction must be. On the other hand, the ties to the regulating state may be looser if this state is pursuing objectives of the international community. As the U.S. State Department relies on a general justification of its extraterritorial jurisdiction in the Cuban Democracy Act,[19] it is important to come to a general balancing of interests.

In this context it has to be considered that with the Cuban Democracy Act, unlike with the pipeline embargo, the U.S. government is striving to establish democracy in Cuba, which, in general, is an internationally approved objective. But such an internationally approved objective does not justify any measures of extraterritorial jurisdiction. Even if it is conceded that the present situation in Cuba does not comply with democratic standards, it is doubtful what would come after change. Could a democratic government and a democratic system really be expected to emerge?

Furthermore, the embargo must be a proper means to achieve the objective intended. This could be contested, too. Because the embargo lacks

13. *Id.* at 146.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 147.
18. *Id.* at 165; Ziegenhain, *supra* note 7, at 899.
19. *See* David H. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283, 290-93 (1987).

international support, Cuba might get all goods needed from other countries. In addition, it could be argued that a country might be influenced more by a friend than by an enemy. Therefore, the establishment of friendly and profitable relations with a country could be more effective in achieving democratic standards than by using boycott measures. According to German understanding, many events in history and in recent times, including the fall of communist governments in the former eastern states, are convincing examples that cooperation may bring better results than confrontation.

Under a general balancing of interests standard it is useful to keep in mind that only such means that are less harmful to other nations which are not a direct goal of the boycott measures can be justified. Considering the Cuban Democracy Act in this context, by preventing U.S.-owned or controlled subsidiaries in third countries from trading with Cuba, these third countries' economies could be seriously and detrimentally affected. The prohibition of trade will probably reduce the turnover and the earnings of the subsidiary, which could lead to dismissals, thereby enlarging the unemployment rate in the third state and causing higher social security expenses. At the same time, because of lower profits, the third state will receive lower tax revenues causing serious budgetary problems. Also, the trade balance of the third state could be affected and a serious currency decline might follow.

In order to protect itself, the third state could undertake counter-measures such as blocking statutes or trade restrictions with the United States. But such measures would cause a severe detriment to international trade. In addition, the trade prohibitions imposed by the U.S. government on the subsidiaries of U.S. firms will force these subsidiaries to breach contracts already formed. The expected result includes damages as well as a destruction of the trustworthiness of U.S. firms in international trade.

In addition to the interests of the states, the rights and interests of individuals should be considered under a general balancing of interests. Traditionally there has been a strong opinion that only states, and not individuals, could have rights in international law.[20] According to this opinion, interests of individuals could hardly be part of the balancing. But this view which treats individuals only as objects, not as subjects in international law, seems to be very formal and outdated. It does not comply with modern thinking which ranks human dignity and human rights as high values to be protected by all states. Following this, a state claiming extraterritorial jurisdiction should take into consideration the rights of foreign individuals which could be infringed upon by extraterritorial measures and, if such extraterritorial measures are not in conformity with international law,

20. *See* OTTO KIMMINICH, EINFÜHRUNG IN DAS VÖLKERRECHT, 215-20 (1987); JÖRG MANFRED MOESSNER, EINFÜHRUNG IN DAS VÖLKERRECHT 93-107 (1977).

such a state should be liable for damages caused to individuals[21] losing their jobs or their property because of the exercise of an unjustified extraterritorial jurisdiction.[22]

These are only some of the possible serious and often unforeseen side-effects which could arise from such acts as the Cuban Democracy Act, and they clearly indicate that third countries and individuals could suffer more from such extraterritorial jurisdiction than the state to which the boycott is directly aimed. Therefore, the one-sided assumption of extraterritorial jurisdiction in the Cuban Democracy Act cannot be justified by a general balancing of interests either. Instead of one-sided conflict measures, cooperation with other countries is the better and probably the more effective way to achieve democratic results. To strive for democracy in Cuba by unilaterally imposing unjustified trade restrictions affecting other states and their individuals is not what democracy stands for.

21. *See generally* Georg Dahm, *Die Subsidiarität des internationalen Rechtsschutzes bei Völkerrechtswidriger Verletzung von Privatpersonen, in* FESTSCHRIFT FÜR HANS DÖLLE 3 (Ernst von Caemmerer et al. eds., 1963).

22. Under the exhaustion-of-local-remedies-rule, the individual must first try to recover his damages before the courts of the unjustified acting state. If such recovery is denied, the home state of the individual injured should grant him diplomatic protection. *See* MOESSNER, *supra* note 20, at 100.