THE LIBERTAD ACT: MUCH ADO ABOUT NOTHING

BY JEAN-G. CASTEL

The downing by the Cuban air force of two unarmed American civilian airplanes near or within Cuban airspace prompted Congress to pass the *Cuban Liberty and Democratic Solidarity (Libertad) Act* of 1996 and the President to sign it.

It is rumoured that the Canadian government is planning to have recourse to the dispute settlement procedures of chapter 20 of the NAFTA on the ground that the legislation is inconsistent with the international obligations of the United States government.

Of particular interest are Titles III and IV. The purpose of Title III is to protect the rights of American nationals whose property was confiscated on or after January 1959 without the payment of compensation by the Cuban government. Any person, including any agency or instrumentality of a foreign state, trafficking in confiscated property worth more than $50,000 is liable for damages to any American national who owns the claim to such property, whether or not the owner was an American national at the time of confiscation. United States District courts are given exclusive jurisdiction over such actions. Enforcement of a judgement would be against the defendant's United States-based assets.

Title IV directs the Secretary of State to exclude from the United States aliens or their spouses and minor children or agents involved in the confiscation of the property or in the trafficking in such property. Waivers of the exclusion are permitted in the national interest of the United States and the right to sue does not take effect until 1 August 1996.

As a major trading partner of both the United States and Cuba, Canada has been very vocal in expressing its opposition to this legislation on the ground that it violates customary international law and several provisions of the GATT/WTO, the GATS, and the NAFTA. The Canadian Government has already invoked the provisions of the *Foreign Extraterritorial Measures Act* [S.C. 1985, c. 20] to issue an order to prohibit compliance with the American legislation. [Foreign Extraterritorial Measures (United States) Order, 1992, amendment, SOR 96-84, 15 January 1996.]

Space does not permit a detailed analysis of all the arguments that can be advanced by those who support or oppose the American legislation. What must be made clear is that the potential impact of this legislation has been grossly exaggerated by the Canadian government. The legislation does not prevent a Canadian corporation or individual from doing business with Cuba. However, there is a price attached to it if confiscated assets belonging to American nationals are involved: the corporation or individual can no longer do business with or enter the United States. This is a legitimate exercise of the territorial principle and not an attempt to regulate the activities abroad of foreign corporations. [For an analysis of the Siberian pipeline controversy, see Castel, *Extraterritoriality in International Trade, Canadian and United States of America Practices Compared* (1988), at 159-68.] A state is free to decide who can enter its territory. In practical terms, the American legislation may affect only a handful of companies or individuals.

In the name of economic self-interest, Canada should support the United States and not Cuba as no customary rules of international law or GATT, GATS, and NAFTA provisions have been infringed by the American legislation.

With respect to foreign expropriations or confiscations of property, Canadian courts have refused to give effect to such expropriations or confiscations in the past unless adequate compensation was paid to the former owners. [See, for instance, *Loane and Baltser* v. *Estonian State Cargo and Passenger Steamship Line*, [1949] S.C.R. 530.]

It is also well established that a state may legitimately impose liability for conduct outside its borders which has effect within its borders. In Canada, a number of federal laws contain provisions intended to have an extraterritorial effect.

It is rumoured that the Canadian government is planning to have recourse to the dispute settlement procedures of chapter 20 of the NAFTA on the ground that the legislation is inconsistent with the international obligations of the United States government. [NAFTA, Art. 2004.] Similar action is contemplated for alleged violation of the GATT/WTO and GATS/WTO obligations. In its defence the United States may wish to rely on the security exceptions found in the NAFTA [Art. 2102.1 b], the GATT/WTO [Art. XXI b], and the GATS/WTO [Art. XIV bis 1 b]. Furthermore, with respect to the exclusion of certain business persons and their families from the United States, Article 1603.1 of the NAFTA, which deals with the grant of temporary entry, makes it clear that these persons must be otherwise qualified for entry *under applicable measures relating to national security.*

In the name of economic self-interest, Canada should support the United States and not Cuba as no customary rules of international law or GATT, GATS, and NAFTA provisions have been infringed by the American legislation. Although this legislation may be considered ill- suited to bring democracy back to Cuba, on a higher moral plane, there is no justification for giving comfort to a totalitarian government that has a long record of serious human rights violations.

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