The European Union's Response to the Libertad Act and the Iran-Libya Act: Extraterritoriality without Boundaries

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Comment
The European Union's Response to the Libertad Act and the Iran-Libya Act: Extraterritoriality Without Boundaries?

I. INTRODUCTION

On May 12, 1996, President Clinton signed the Cuban Liberty and Democratic Solidarity (Libertad) Act ("Libertad Act").1 Title II2 and Title IV3 of the Libertad Act provide United States nationals with various means to punish foreign investors in Cuba who utilize American property confiscated by the Cuban government after the Cuban Revolution of 1957.4 On August 5, 1996, President Clinton signed the Iran and Libya Sanctions Act of 1996 ("Iran-Libya Act") into law.5 The Iran-Libya Act imposes sanctions on persons who aid the development of petroleum resources in Iran and Libya.6

The international community has harshly criticized the enactment of both Acts.7 In particular, the European Union ("EU") has strongly opposed the Acts and has demanded that the United States repeal

3. Id. § 401, 110 Stat. at 822-24.
4. Title III imposes liability on individuals trafficking in confiscated property. Id. § 302(a)(1), 110 Stat. at 815. Title IV provides for exclusion from the United States of foreigners who have confiscated or trafficked in confiscated property. Id. § 401(a), 110 Stat. at 822.
6. Id. § 5(a), 110 Stat. at 1543.
7. Canada, for example, enacted blocking legislation to offset the effects of the Libertad Act. Undersecretary of Commerce Stuart Eizenstat, Address to the American Chamber of Commerce of Cuba (Nov. 20, 1996), available in LEXIS, Nexis Library, CURNWS File. Essentially, "[i]t would be hard to overstate the level of anger and resentment in Europe and Latin America about [the Libertad Act] based on what they see as the principle of extra territoriality [sic], from their perspective." Id. The Vatican criticized the Act not only because of its extraterritoriality but also because its effects may threaten the survival of the Cuban people. Vatican Criticises Helms-Burton Law on Cuba, REUTERS, Oct. 18, 1996, available in LEXIS, Nexis Library, REUWLd File. See also infra text accompanying notes 8-10 (noting the strong negative response to the Libertad Act by the Member States of the European Union).
them. Alleging that the Acts violate international law by imposing American jurisdiction extraterritorially, the European Union adopted several legal measures to neutralize the effects of the Acts on European companies. Furthermore, the European Union filed a complaint with the World Trade Organization ("WTO"), claiming that the Libertad Act transgresses international trade treaties.

The purpose of this Comment is to analyze the validity of the European Union’s allegations that the Libertad Act and the Iran-Libya Act violate international law and international trade treaties. This Comment first provides an overview of fundamental principles of international law. Next, this Comment describes the essence of international trade treaties embodied in the World Trade Organization Agreements, and highlights provisions relevant to the dispute. This Comment describes the Libertad Act, focusing on provisions of the Act objected to by the European Union, and examining the retaliatory measures the European Union has taken in its effort to neutralize the effects of the Act on European companies. Then, this Comment discusses the Iran-Libya Act and the European Union’s response to the Act. This Comment proceeds to analyze the Libertad Act and the Iran-Libya Act, determining that the Libertad Act violates the principles of international law and international trade treaties, while the Iran-Libya Act does not. Finally, this Comment proposes that the United States repeal the Libertad Act and that the United States and the European Union resolve the conflict by diplomatic means.

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9. See infra Parts III.B, D.
10. See infra Part III.D. The World Trade Organization is an international trade dispute settlement body. See infra Part II.B.
11. See infra Part II.A.
12. See infra Part II.B.
13. See infra Part III.A.
14. See infra Part III.B.
15. See infra Part III.C.
16. See infra Part III.D.
17. See infra Part IV.A.
18. See infra Part IV.B.
19. See infra Part IV.C.
20. See infra Part V.
II. BACKGROUND

The European Union alleges that the Libertad Act and the Iran-Libya Act violate fundamental principles of international law. The recurring argument is that the Acts are "extraterritorial"; that is, the Acts impose United States legal standards on subjects outside the territory of the United States.


International law is defined as a "[b]ody of consensual principles which have evolved from customs and practices civilized nations utilize in regulating their relationships and such customs have great moral force." International customs and treaties are generally considered to be the two most important sources of international law.

Thus, international law is an evolving concept, a function of custom and consent, for there is no supranational authority and no supranational legislator to impose its principles upon sovereign nations. However, custom and tradition validate three fundamental principles of international law:

1. See infra Parts III.B, D.
2. See infra text accompanying note 180.
4. Id. An alternative and less formal definition came from Abba Eban, the Israeli ambassador to the United States, who defined international law as "the law which the wicked do not obey and which the righteous do not enforce." Person to Person (CBS television broadcast, Sept. 20, 1957), quoted in GERHARD VON GLANN, LAW AMONG NATIONS 4 (1981).
5. The role of custom in international law is aptly summarized in the following statement:

A series of definitions tend to fix the elements necessary for the establishment of an international custom. There must have been acts of State accomplished in the domain of international relations, whilst mere municipal laws are insufficient; moreover, the foundation of a custom must be united will of several and even of many States constituting a union of wills, or a general consensus of opinion among the countries which have adopted the European system of civilization, or a manifestation of international legal ethics which takes place through the continual recurrence of events with an innate consciousness of their being necessary.

6. A formulation of the concept of the lack of a supranational legislature comes from a classic treatise on international law:

There is no legislative or judicial authority, recognized by all nations, which determines the law that regulates the reciprocal relations of States . . . . As nations acknowledge no superior, as they have not organized any common paramount authority, for the purpose of establishing by an express declaration their international law, and as they have not constituted any sort of Amphictyonic magistracy to interpret and apply that law, it is impossible that
principles respected by civilized nations: (1) the principle of territoriality; (2) the principle of nationality; and (3) the effects doctrine. These fundamental principles are broad enough to allow room for interpretation. Each nation ultimately determines which interpretation to adopt and how to apply those principles to its own laws.

1. The Territorial Principle

Under the territorial principle, a nation maintains complete jurisdiction within its own territory but may not legislate

...
extraterritorially. Justice John Marshall’s opinion in Schooner Exchange v. McFadden described the limits on national jurisdiction:

The jurisdiction of a nation within its own territory is necessarily exclusive and absolute . . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

Justice Marshall essentially proposed that a state’s jurisdiction should coincide with its territorial boundaries. Justice Joseph Story, in his Commentaries on the Conflict of Laws, has offered a converse definition of extraterritoriality, stating that “no state or nation can, by its own laws, directly affect or bind property out of its own territory, or bind persons not resident therein.”

A modern interpretation of the territorial principle appeared in the milestone Case of the SS Lotus. In Lotus, the Permanent Court of International Justice addressed a French-Turkish jurisdictional controversy which arose out of a collision between a French steamer, Lotus, and a Turkish collier, Boz-Court. The Turks arrested and charged two French officers with manslaughter. Responding to French diplomatic protests, the Turkish authorities agreed to present the matter before an international tribunal. A divided court found for the Turks and upheld their right to exercise jurisdiction over the French officers.

RELATIONS LAW OF THE UNITED STATES § 401 (1987). Since the distinction is not relevant for this Comment, the term “jurisdiction” as used in this Comment embodies all three categories.

32. 11 U.S. (7 Cranch) 116, 136 (1812).
33. Id.
36. Id. at 10, 2 WORLD CT. REP. at 28.
37. Id. at 11, 2 WORLD CT. REP. at 29.
38. Id., 2 WORLD CT. REP. at 29.
39. Because the votes were equally divided, the decisive vote of the Court’s President, Judge Huber, in favor of Turkey, resulted in a judgment against France. Id. at 32 (Huber, J.), 2 WORLD CT. REP. at 45. Judges Moore, de Bustamante, Oda, Anzilotti and Pessoa also agreed with the Turkish position and voted accordingly. Id. at 4, 32, 2 WORLD CT. REP. at 23, 46. Conversely, Judges Loder, Weiss, Lord Finlay, Nyholm, Moore and Altamira voted against the right of Turkey to exercise jurisdiction over the French officers. Id., 2 WORLD CT. REP. at 23, 46.
First, the court defined the territorial rule, explaining that a state "may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial." Then, however, the court proceeded to formulate an exception to this rule: Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

The *Lotus* decision has aroused much controversy for removing outer limits from the territorial principle. The majority opinion allowed for the broad exercise of national power beyond a state's territory. The only limits suggested by the majority were to be provided by explicit international agreements. However, the dissenting judges stood firmly by the principle that a state's jurisdiction may not exceed its territorial boundaries.

2. The Nationality Principle

Under the nationality principle, a state has the right to impose its jurisdiction extraterritorially over persons who are "nationals" of the

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40. *Id.* at 18, 2 *WORLD CT. REP.* at 35.
41. *Id.* at 19, 2 *WORLD CT. REP.* at 35.
42. NEALE & STEPHENS, supra note 26, at 19-20.
44. *Id.*, 2 *WORLD CT. REP.* at 35. The opinion mentions only unspecified "prohibitive rules". *Id.*, 2 *WORLD CT. REP.* at 35.
45. Judge Loder wrote:

The fundamental consequence of [States'] independence and sovereignty is that no municipal law [i.e., State law] . . . can apply or have binding effect outside the national territory . . . [a law] cannot extend to offenses committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned, since in that State the State enacting the law has no jurisdiction.

*Id.* at 35, 2 *WORLD CT. REP.* at 47 (Loder, J., dissenting). Lord Finlay concluded in his dissent that "[a] country is no more entitled to assume jurisdiction over foreigners than it would be to annex a bit of territory which happened to be very convenient for it." *Id.* at 56, 2 *WORLD CT. REP.* at 61 (Lord Finlay, J., dissenting). His dissent is illustrative of the traditional British dislike of the concept of extraterritoriality. See infra notes 106-11 and accompanying text.

46. See infra text accompanying notes 50-52 for a discussion of the various definitions of "national."
state and who are temporarily outside of that state's territory. Clearly, the nationality principle justifies infringement upon another state's sovereignty.

Although most states recognize the nationality principle, they apply and interpret it differently. First, there exist differences in interpretation because the definition of "national" varies among nations. The United States, for instance, has extended the definition of "national" to include foreign-incorporated companies which are majority-owned by United States citizens. Meanwhile, the United Kingdom has assumed a contrary interpretation, firmly standing on the position that the nationality of a corporation is determined by its place of incorporation.

Second, the application of the nationality principle varies because of the differing laws among nations. A frequent source of international conflict arises when a state requires its nationals temporarily residing in a host state to engage in conduct which is illegal under the laws of the host state. This is a frequent and unresolved source of international conflicts.

47. NEALE & STEPHENS, supra note 26, at 12. Justice Story wrote that "[t]he laws of no nation can justly extend beyond its own Territories, except so far as regards its own citizens." The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824).

48. NEALE & STEPHENS, supra note 26, at 13. There is an inevitable tension between the territoriality and nationality principles because, under a strict interpretation of the territoriality principle, such as that of Justice Marshall, a state is completely precluded from exercising jurisdiction beyond its national boundaries. See supra Part II.A.1.

49. INTERNATIONAL CHAMBER OF COMMERCE, THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 37-38 (Dieter Lange & Gary Burn eds., 1987) [hereinafter EXTRATERRITORIAL APPLICATION].

50. Id. at 38.

51. In 1982, the United States asserted jurisdiction over foreign subsidiaries of American companies and prohibited them from delivering technical assistance to a Soviet Siberian pipeline construction project. 47 Fed. Reg. 27,250-27,251 (1982). This prohibition provoked the Siberian Pipeline Dispute with the European Community, which refused to comply with the embargo. EXTRATERRITORIAL APPLICATION, supra note 49, at 19-20. The foreign ministers of the European Community noted that "[t]his action, taken without consultation with the Community, implies an extraterritorial extension of US jurisdiction, which in the circumstances is contrary to international law." Statement of the Foreign Ministers of the European Communities, 23 June 1982, quoted in EXTRATERRITORIAL APPLICATION, supra note 49, at 19.

52. See infra note 111.

53. EXTRATERRITORIAL APPLICATION, supra note 49, at 38.

54. Id.

55. Id. This is one of the points of conflict between the European Union and the United States. The EU has enacted a blocking statute prohibiting EU domiciled companies to comply with the Libertad Act. Council Regulation (EC) 2271/96 of 22 November 1996 Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting
3. The Effects Doctrine

The effects doctrine is an often invoked, albeit unrefined doctrine, which allows a state to exercise jurisdiction over activities that occur outside the territory of that state as long as such activities have certain "effects" within the state's territory.56 The effects doctrine is rooted in a recognized concept of criminal law—the objective territorial principle which proclaims "that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where evil is done."57 However, while the objective territorial principle requires that the "effect" be a direct or immediate consequence of conduct,58 the effects doctrine relaxes the nexus between the conduct and its effect.59

a. The Alcoa Definition of the Effects Doctrine

The effects doctrine is a product of American jurisprudence, its formulation coming from the landmark case of United States v. Aluminum Co. of America ("Alcoa").60 In Alcoa, the Aluminum Corporation of America ("ALCOA") by monopolizing the market of aluminum ingot production.62 Aluminum Limited ("Limited"), a Canadian company previously

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56. EXTRATERRITORIAL APPLICATION, supra note 49, at 36.
57. JOHN BASSET MOORE, 2 A DIGEST OF INTERNATIONAL LAW § 202, at 244 (1906).
59. NEALE & STEPHENS, supra note 26, at 16.
60. 148 F.2d 416 (2d Cir. 1945). Although the Second Circuit decided the case, "the opinion holds the authority of a de facto Supreme Court decision" because it had been certified from the Supreme Court for failure of quorum. James J. Friedberg, The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine, 52 U. PITT. L. REV. 289, 298 n.31 (1991). One year later, the Supreme Court declared that Alcoa "was . . . decided under unique circumstances which add to its weight as a precedent." Id. (quoting American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946)).
61. Section 2 of the Sherman Act provides:
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.
62. Alcoa, 148 F.2d at 432.
connected to ALCOA, was also a defendant in the case.\textsuperscript{63} Despite Limited's prior ties with ALCOA, the court held Limited to be a completely foreign entity.\textsuperscript{64} To subject a completely foreign entity to United States laws, the court had to determine "whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it."\textsuperscript{65} In writing the opinion, Judge Learned Hand answered the question in a statement that later became known as the definition of the effects doctrine:\textsuperscript{66}

On the other hand, it is settled law—as 'Limited' itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.\textsuperscript{67}

\textit{Alcoa} proposed a two prong "effects test" to determine whether a United States court would have jurisdiction over an antitrust claim against a foreign entity.\textsuperscript{68} First, the test requires the showing of an intent to affect "imports or exports," and second, the showing of actual effect upon imports or exports.\textsuperscript{69} However, the \textit{Alcoa} "effects test" does not distinguish between actual, objective "effects" and mere consequences or repercussions of an activity.\textsuperscript{70}

\begin{itemize}
  \item 63. \textit{Id.} at 439.
  \item 64. \textit{Id.} at 439-41. Limited, along with one French corporation, two German corporations, one Swiss corporation and one British corporation formed a cartel incorporated under the laws of Switzerland. \textit{Id.} at 442.
  \item 65. \textit{Id.} at 443.
  \item 66. \textit{NEALE \\& STEPHENS, supra} note 26, at 45-46.
  \item 67. \textit{Alcoa}, 148 F.2d at 443. Judge Hand cited the following authorities to support this statement: Ford v. United States, 273 U.S. 593, 620-21 (1927); Lamar v. United States, 240 U.S. 60, 65-66 (1916); Strassheim v. Daily, 221 U.S. 280, 284-85 (1911). \textit{Alcoa}, 148 F.2d at 443. Neale and Stephens critically analyze the "fragile foundation [of Alcoa] on previous legal authority." \textit{NEALE \\& STEPHENS, supra} note 26, at 49. According to Neale and Stephens, the first two cases, \textit{Strassheim} v. \textit{Daily} and \textit{Lamar} v. \textit{United States}, were purely domestic case[s] . . . far removed from the situation in ALCOA . . . they concerned federal jurisdiction in interstate matters rather than international transactions. . . . More crucially, the fraudulent representations which were initiated in each case in other states were targeted on and clearly reached their intended victims in the states claiming jurisdiction. . . . The third case cited by Judge Hand . . . Ford v. United States, . . . clearly rests . . . upon acts, not effects within the jurisdiction. \textit{Id.} at 46-47.
  \item 68. \textit{Alcoa}, 148 F.2d at 444.
  \item 69. \textit{Id.}
  \item 70. \textit{NEALE \\& STEPHENS, supra} note 26, at 168. This proposition has been aptly summarized in the following statement:

  The type of 'effect' which the \textit{Alcoa} ruling has in mind has nothing in common with the effect which by virtue of established principles of
During the thirty years following Alcoa, American courts frequently invoked the Alcoa effects test to assert jurisdiction over foreign entities in antitrust claims. Nonetheless, Alcoa partially lost its vitality in 1976 when United States courts sought to curb the extraterritorial jurisdiction of the United States. For instance, Timberlane Lumber Co. v. Bank of America modified the Alcoa effects test by adding a third requirement of determining whether subject matter jurisdiction would be reasonable. To resolve the reasonableness of imposing jurisdiction upon foreign entities, the court considered several factors: the extent of conflict with foreign law or policy; the nationality of the parties; the likelihood of compliance with the ruling, the significance and foreseeability of effects upon the United States in comparison to the impact on other states; actual intent to harm American commerce; and the relative importance of violations of conduct in the United States as compared to violations of conduct abroad.
Despite several attempts to revise Alcoa, the original effects test has never been rejected, and over the years other courts have attempted to return to the original Alcoa test, which allowed for expansive extraterritorial jurisdiction. The decision in In re Uranium Antitrust Litigation ("Uranium") illustrates this expansionist attempt. In Uranium, the United States Court of Appeals for the Seventh Circuit upheld nine default judgments against foreign defendants who failed to appear, despite strong protest from the governments of Australia, Canada, South Africa and the United Kingdom, all of which claimed their national interests were violated. Clearly, the Uranium court was not compelled to consider the reasonableness of imposing American jurisdiction over foreign subjects.

b. The Effects Doctrine Under the Restatement (Third)

Although the Alcoa and Timberlane courts ruled only on issues strictly limited to antitrust law, the Restatement (Third) of Foreign Relations Law incorporated both the Alcoa and Timberlane tests. In addition to deciding whether an activity has an effect in the territory of a State, one must evaluate whether an imposition of jurisdiction would be unreasonable. The Restatement provides that the following factors should be considered:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

Id.

75. Friedberg, supra note 60, at 303-04.
76. 617 F.2d 1248 (7th Cir. 1980).
77. Id. at 1258.
78. Id. at 1253. The British Government contested the validity of the Alcoa test. Id. at 1254.
79. Id. at 1255.
80 RESTATMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).
81. Id. In addition to deciding whether an activity has an effect in the territory of a State, one must evaluate whether an imposition of jurisdiction would be unreasonable. Id. § 403(1). To determine whether an exercise of jurisdiction would be unreasonable, the Restatement provides that the following factors should be considered:
The Restatement purported to balance the expansionist trend evident in *Uranium* and the retrenchment of the effects doctrine proposed by *Timberlane*. Although the Restatement has adopted a balancing test similar to that in *Timberlane*, the Restatement nevertheless waives the *Alcoa* requirement of showing both the intent and actual effects within the regulating state. Consequently, under the Restatement, any activity occurring entirely abroad falls under American jurisdiction if it has, or merely intends to have, effects within the territory of the United States, as long as the exercise of jurisdiction does not "unreasonably" infringe upon the interests and expectations of other states.

A quasi-official exposé of then Secretary of State George Schultz confirmed the effects doctrine as adopted by the Restatement:

The United States for its part will continue to maintain that it is entitled under international law to exercise its jurisdiction over conduct outside the United States in certain situations. We will continue to preserve the statutory authority to do so. But we will exercise the authority with discretion and restraint, balancing all the important interests involved, American and foreign, immediate and long-term, economic and political.

While the United States is unwilling to relinquish the right to extraterritorial jurisdiction, it also recognizes the need to harmonize its jurisdiction with the interests of foreign states, which otherwise could be adversely affected by the imposition of extraterritorial jurisdiction.

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(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.

*Id.* § 403(2).  
82. *Id.* § 403. Unlike *Uranium*, the Restatement does not mechanically impose jurisdiction on an activity which has effects in the territory of a State. See supra text accompanying notes 75-79. Conversely, the Restatement test follows *Timberlane* in accommodating interests of other states. See supra note 74.

83. **RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES** § 403 (1987). Under the Restatement, a State may exercise jurisdiction over "conduct outside its territory that has or is intended to have substantial effect within its territory." *Id.* § 402(1)(c). An expansionist interpretation has been criticized. See, e.g., Friedberg, supra note 60, at 304 (criticizing expansive application of the *Alcoa* test). See also Kathleen Hixson, Note, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT’L L.J. 127, 128-29 (1988) (criticizing the vagueness of the Restatement test).

84. See supra note 81.

85. Secretary of State George Schultz, Address to the South Carolina Bar Association (May 1984), quoted in NEALE & STEPHENS, supra note 26, at 166.

86. See generally NEALE & STEPHENS, supra note 26, at 175-81.
c. European Skepticism Towards the Effects Doctrine

Outside of the United States, the effects doctrine exists only in German and European Union anti-monopoly law.\(^7\) Other European legal systems have either explicitly rejected the doctrine or abstained from declaring their position.\(^8\)

Among European states, Germany employs the most liberal construction of the effects doctrine.\(^9\) Germany has adopted the doctrine known as "Auswirkungsprinzip" in its antitrust laws.\(^9\) Similar to the American understanding, the German version of the doctrine subjects foreign enterprises engaged in anti-competitive activities to German jurisdiction even though such enterprises are not active in Germany.\(^9\) Nevertheless, the German Federal Supreme Court has warned against unreasonable extraterritorial extension of this doctrine merely when an activity originating abroad may have "effects" on the German market.\(^9\)

The European Union has also recognized a quasi-effects doctrine in competition law.\(^9\) However, the European Court of Justice ("ECJ")\(^9\)

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87. Friedberg, supra note 60, at 316 n.118. "Anti-monopoly" or "competition" laws are synonymous to "antitrust," and are commonly used terms in European jurisprudence. Id. at 289 n.1.
88. Id. at 316.
89. Id. at 317. "Germany, as the most aggressive enforcer of national competition law among the European states, has been the only country to approximate the propounding of an antitrust effects jurisdiction." Id.
90. Gesetz gegen Wettbewerbsbeschränkungen ("GWB") § 98(2) (F.R.G.), 1957 BGBI.I 1081 (W. Ger.). The statute proclaims that: "This Act shall apply to all restraints of competition which have effects within the territory in which this Act applies, even if they are caused outside the territory in which this Act applies." Id., translated in RUDOLF MUELLER ET AL., DAS RECHT GEGEN WETTBEWERBSBESCHRÄNKUNGEN; EINE EINFÜHRUNG IN DAS DEUTSCHE RECHT GEGEN WETTBEWERBSBESCHRÄNKUNGEN MIT DEUTSCH-ENGLISCHER TEXTAUSGABE DES GWB 293 (1984).
91. MUELLER, supra note 90, at 142.
93. Treaty Establishing the European Community, Feb. 7, 1992, arts. 85-86, O.J. (C 224) 1, 1 C.M.L.R. 573 (1992) arts. 85-86 [hereinafter EC Treaty]. Article 85 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member-States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Article 86 proclaims that: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member-States."

It is important to understand the EU structure and decision-making process. The Treaty on European Union provides for the existence of various decision-making institutions. First, the role of the European Council is to "provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof."
Id. art. D. The European Council is composed of the Heads of States of Member States.
“made it absolutely clear that it chose to be unclear on the applicability of an American-style effects doctrine under European Community law.” 95 Despite having several opportunities to adopt the effects doctrine, the ECJ consistently refused to do so. 96 Only in In re Wood Pulp Cartel did the ECJ come close to recognizing the American-style effects doctrine. 97 Wood Pulp involved a violation of Article 85 of the Treaty Establishing the European Community (“EC Treaty”). 98 The European Commission found that several entirely foreign companies, including American corporations, conspired to fix prices in violation of Article 85. 99 Relying exclusively on the “effects” provision of Article 85, 100 the Commission proclaimed jurisdiction over those foreign entities and imposed fines upon them 101. The ECJ reluctantly affirmed the Commission’s decision and, arguably, implicitly recognized a moderated form of the effects doctrine. 102 Wood Pulp did not,

and the President of the Commission, along with the Ministers of Foreign Affairs and a Member of the Commission. Id. The European Commission consists of 17 nationals of the EU Member States—each state must have at least one representative in the Commission. Id. art. 157, § 1. The Commissioners act independently of their national states. Id. art. 157, § 2. The Commission ensures the application of the EC Treaty, formulates recommendations or delivers opinions, participates in the shaping of measures taken by the Council, and exercises the powers conferred on it by the Council. Id. art. 155. The Council [of Ministers] consists of representatives of each Member State at ministerial level. Id. art. 146. The Council has the power to undertake decisions and to confer upon the Commission the power to implement those decisions. Id. art. 145. The European Parliament is composed of 518 Members of Parliament (MEP) of the 12 EU member states. Id. art. 138, § 2. The Parliament exercises advisory power by proposing provisions which are subsequently recommended for the adoption by Member States. Id. art. 138, § 3.

The European Court of Justice has jurisdiction to rule on the EC Treaty, the acts of Community institutions, and the statutes of bodies established by the Council. Id. art. 177.

94. See id.
95. Friedberg, supra note 60, at 311 (commenting on the ECJ’s ruling in Imperial Chemical Indus. Ltd. v. E.C. Comm’n [hereinafter Dyestuffs] in which the ECJ refused to recognize the Alcoa effects test. Case 48/69, 1972 E.C.R. 619, 11 C.M.L.R. 557 (1972)).
96. Dyestuffs, 1972 E.C.R. at 619; Case 6/72, Europemballage Corp. v. E.C. Comm’n, 1973 E.C.R. 215, 12 C.M.L.R. 199 (1973); Cases 6-7/73, Instituto Chemioterapico Italiano v. E.C. Comm’n, 13 C.M.L.R. 309 (1974). In these cases, the courts refused to adopt the effects doctrine but did not explicitly reject it.
100. See supra note 93.
102. Id. at 5247. The Court explained that although the entities entered into a concerted practice outside the European Community, “[t]he decisive factor [was]
however, represent a major shift in the European understanding of the effects doctrine. First, *Wood Pulp* interpreted only Article 85 regulating European Union competition law and, therefore, has a narrow application. Second, the decisions of the ECJ do not affect national laws of the European Union member states.

Approaching the effects doctrine with traditional conservatism and reluctance, the United Kingdom is on the other side of the spectrum. Accordingly, the United Kingdom has opposed any attempts by foreign states, particularly the United States, to exercise their jurisdiction in a manner interfering with British law. The *Uranium* case and the 3M UK Ltd. proceeding illustrate this conservative British position. In *Uranium*, the British government challenged the validity of the *Alcoa* effects test because of its failure to consider the interests of other nations. Similarly, in the 3M UK Ltd. dispute

therefore the place where [the concerted practice was] implemented . . . . Accordingly the Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.” *Id.* at 5243. See also Friedberg, supra note 60, at 321 (construing the Court’s decision in the context of the Advocate General’s opinion to conclude that the Court in fact recognized a modified version of the effects doctrine).

103. But see Friedberg, supra note 60.
105. E.C. Treaty, supra note 93 arts. 177-83. The ECJ only has jurisdiction to interpret the EU Treaty and related acts and regulations. *Id.*
107. The United Kingdom made its position absolutely clear:

The nationality principle justifies proceeding against nationals of the state claiming jurisdiction in respect of their activities abroad only provided that this does not involve interference with the legitimate affairs of other states or cause such nationals to act in a manner which is contrary to the laws of the state in which the activities in question are conducted.


108. See supra notes 75-79 and accompanying text.
110. See supra note 78 and accompanying text.
involving an American subsidiary incorporated in the United Kingdom, Britain strongly opposed the imposition of American jurisdiction over that subsidiary, explaining that the United Kingdom believes that a state may not exercise jurisdiction over a company which is not incorporated under the laws of that state.\textsuperscript{111}

\textbf{B. The World Trade Organization Agreements}

The World Trade Organization ("WTO"), established on January 1, 1995, is an international forum for negotiation and resolution of trade conflicts.\textsuperscript{112} The purpose of the WTO is to bring a new era of global economic cooperation.\textsuperscript{113} Specifically, the WTO is designed to "facilitate the implementation, administration and operation, and further the objectives" of the WTO Agreement and Multilateral Trade Agreements.\textsuperscript{114} The WTO also "provide[s] the forum for negotiations" for Members to resolve multilateral trade conflicts.\textsuperscript{115} In order to attain harmony in international trade, the WTO expects its members to conform their laws to the provisions of the WTO Agreements.\textsuperscript{116} Among these Agreements are the General Agreement on Tariffs and

\begin{footnotesize}
\begin{enumerate}
\item[(111)] Extraterritorial Jurisdiction, supra note 106, at 149-55. Concluding that there were fundamental differences of principle between the two Governments [the United States and the United Kingdom] as to what constitutes the proper exercise of national jurisdiction, Her Majesty's Government therefore [found] it necessary to set out their views on the issue [of extraterritoriality]. . . . The view of Her Majesty's Government is that while it may be legitimate in certain circumstances for a State to exercise jurisdiction over its nationals in respect to their activities in the territory of another State, it may only do so, consistent with the principles of international law, if it sufficiently takes into account the effect on the interests of that other State consequent on the exercise of that jurisdiction. . . . In the view of Her Majesty's Government, the nationality of a corporation is determined by its place of incorporation.
\end{enumerate}


113. WTO Agreement, supra note 112, art. III, § 5.

114. Id. art. III, § 1. Several Multilateral Trade Agreements, including GATT, are incorporated into the WTO Agreement. Id. art. II, §§ 2-4.

115. Id. art. III, § 2.

116. Id. art. XVI, § 4.
\end{footnotesize}
Trade ("GATT") and the General Agreement on Trade in Services ("GATS").

1. General Provisions of GATT and GATS

The General Agreement on Tariffs and Trade (GATT) prohibits contracting parties from discriminating against import or export by imposing "customs duties and charges of any kind" on international trade. GATT prohibits parties from using "internal taxes and other internal charges," and "laws, regulations and requirements" to give their domestic products preferential treatment. Accordingly, GATT eliminates quantitative restrictions on importation and prohibits dumping practices.

Although, structurally and substantively, the General Agreement on Trade in Services (GATS) is similar to GATT, it differs from GATT because it focuses on regulating trade in services. Any legislation enacted by a Member and affecting service providers and service suppliers falls under the scope of GATS.

2. Relevant GATT and GATS Provisions

Several provisions of GATT are pertinent to the Libertad Act and the Iran-Libya Act. First, if a signatory to the agreement grants "any advantage, favour, privilege or immunity" to a product originating in a third country, Article I requires that the signatory "immediately and
unconditionally" accord equal treatment to "the like product" from another country. 125 Second, Article III dictates that "internal taxes" and "other internal charges of any kind" that affect importation and sale of articles, may not be implemented to protect "domestic production." 126 Specifically, imported products "shall be accorded treatment no less favourable than that accorded to [domestic] like products of national origin in respect of all laws" affecting the transportation, sale and distribution of imported products. 127 Third, Article V requires unconditional freedom for the transit of goods through the contracting party’s territory. 128 Finally, Article XI forbids any measures having a prohibitive or restrictive effect upon imports and exports. 129

125. GATT, supra note 117, art. I. Article I proclaims:
   With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters [referred to in art. III, §§ 2 and 4], any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Id. art. I § 1.

126. Id. art. III, § 1.

127. Id. art. III, § 2.

128. Id. art. V, § 2.

There shall be freedom of transit through the territory of each contracting party. . . . No distinction shall be made which is based on the flag of the vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

Id.

129. GATT, supra note 117, art. XI, § 1.

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or exportation or sale for export of any product destined for the territory of any other contracting party.

Id.

In 1984, the GATT Panel examined and concluded that Section 601 of Title 17 of the United States Code [the “manufacturing clause” of the copyright law which prohibited the importation of copies of copyrighted work containing non-dramatic literary material in the English language unless the copyrighted portions were manufactured in the United States or Canada] breached GATT Article XI, § 1. The United States did not contest the finding. GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 291-92 (6th ed. 1994) [hereinafter GATT, ANALYTICAL INDEX].
Alternatively, the General Agreement on Trade in Services prohibits discrimination against services and service suppliers of any member of the WTO. GATS accordingly obliges members to afford services and service providers a market access no less favorable than that offered to other members. Furthermore, a Member may not favor its own suppliers at the cost of discriminating against foreign suppliers. A Member discriminates when it facilitates the achievement of a competitive advantage by a domestic supplier.

3. Security Exceptions to GATT and GATS

Both GATT and GATS contain provisions exempting the parties from compliance with the agreements when essential security interests are present. Thus, a country may take "any action which it

130. GATS, supra note 118, art. II, § 1. Article II provides that each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

Id.

131. Id. art. XVI, § 1. Article XVI proclaims:

With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

Id. This section is similar to Article II § 1, providing for equal treatment of foreign and domestic producers. See supra text accompanying note 130.

132. GATS, supra note 118, art. XVII, § 1.

Each Member shall accord to services and service suppliers of any other Member in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Id.

133. Id. art. XVII, § 3.

Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Id.

134. GATT, supra note 117, art. XXI. The Security Exceptions provide:

Nothing in this Agreement shall be construed
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
consider necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations."\textsuperscript{135} Similarly, both GATT and GATS may not prohibit a country "from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."\textsuperscript{136}

Several countries have invoked the national security provision of GATT.\textsuperscript{137} For instance, during the Arab-Israeli war, the United Arab Republic proclaimed a boycott against Israel and firms dealing with Israel.\textsuperscript{138} Despite the protest of the United States, the GATT Working Party, a dispute settlement body of GATT, recognized that "[i]t would not be reasonable to ask that the United Arab Republic should do business with a firm that transferred all or part of its profits from sales to the United Arab Republic to an enemy country."\textsuperscript{139}

In another instance, the United States successfully invoked the National Security Exception to justify the 1962 embargo against Cuba.\textsuperscript{140} The United States also used this provision in 1985, when it prohibited all imports of goods and services from Nicaragua.\textsuperscript{141} The United States asserted that it had complete discretion to decide whether its national security interest was endangered, thus precluding the GATT panel from considering whether the United States justifiably resorted to the Security Exception.\textsuperscript{142} Although the GATT panel debated whether it had the power to determine the validity of the application of the Security Exception, it failed to reach a conclusion before the United States lifted the embargo.\textsuperscript{143}

\begin{itemize}
\item[(iii)] taken in time of war or other emergency in international relations;
\item or
\item (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
\end{itemize}

\textit{Id.}

The GATS Security Exceptions embodied in Article XIV bis are almost identical. \textit{Compare} GATT, \textit{supra} note 117, art. XXI with GATS, \textit{supra} note 118, art. XIV bis.

\textsuperscript{135} GATT, \textit{supra} note 117, art. XXI (b)(iii); GATS, \textit{supra} note 118, art. XIV bis (1)(b)(iii).

\textsuperscript{136} GATT, art. XXI (c); GATS, \textit{supra} note 118, art. XIV bis (1)(c).

\textsuperscript{137} GATT, \textit{ANALYTICAL INDEX, supra} note 129, at 556-59.

\textsuperscript{138} Id. at 556.

\textsuperscript{139} Id. at 556 & n.20.

\textsuperscript{140} Id. at 559. Apparently, although Cuba alleged the violation of GATT, the issue was not considered by the panel. Id.

\textsuperscript{141} Id. at 557 & n.28.

\textsuperscript{142} Id. at 557-58 & n.32.

\textsuperscript{143} Id. at 558.
GATS contains a security exception provision almost identical to that provided in GATT. However, unlike the analogous GATT provision, the security exception of GATS has not been invoked in the past by any Member. According to European observers, the United States will likely resort to the GATS security exception to defend the Libertad Act.

III. DISCUSSION

A. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996

The purpose of the Libertad Act is to bring democracy and prosperity to Cuba, to enhance international sanctions against the current Cuban government, to secure national interests of the United States, to offer a framework for future United States assistance to independent Cuba, and to secure property interests of United States nationals whose property was confiscated in Cuba.

The Act consists of four titles. Title I presents United States policy with respect to Cuba and provides for international sanctions against

144. GATS, supra note 118, art. XIV bis.
146. Libertad Act, supra note 1, § 3(1), 110 Stat. at 788. Interestingly, the European Union had voiced its concerns about the Libertad Act and the Iran-Libya Act even before the United States Congress enacted them. Parliament Resolution on Cuba, April 22, 1996 O.J. (C 96) 4 (1996). In an official statement issued in April, 1996, the EU Council pointed out that it was opposed to any measures having extraterritorial application and in breach of the WTO rules. See infra text accompanying note 180.
147. Libertad Act, supra note 1, § 3(6), 110 Stat. 788-89. The Act formulates the following purposes:

(1) to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere;
(2) to strengthen international sanctions against the Castro government;
(3) to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States;
(4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers;
(5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and
(6) to protect the United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.

Id.
the Castro government.\textsuperscript{148} Title II describes American assistance to an anticipated transitional and democratically elected government in Cuba.\textsuperscript{149} International criticism, however, has primarily focused on Titles III and IV of the Act, which respectively provide for protection of property rights of United States nationals in Cuba\textsuperscript{150} and for exclusion of aliens who have confiscated or who traffic in property of United States nationals.\textsuperscript{151}


A congressional statement of policy reveals the motive behind the enactment of the Libertad Act.\textsuperscript{152} Specifically, Congress found that the Castro regime “systematically” and “massively” violates the human rights of the Cuban people.\textsuperscript{153} Congress perceived Cuba’s attempts to develop operational nuclear facilities as “a threat to the national security” of the United States.\textsuperscript{154} Accordingly, Congress demanded the continuation of the economic embargo of Cuba and recommended that President Clinton advocate the imposition of international sanctions against the totalitarian regime.\textsuperscript{155} To strengthen an international embargo against Cuba, Congress requested the President of the United States and the Secretary of State to apply sanctions against countries assisting Cuba.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{148} See id. §§ 101-116, 110 Stat. at 791-805.
\item \textsuperscript{149} See id. §§ 201-206, 110 Stat. at 805-13.
\item \textsuperscript{150} See id. §§ 301-306, 110 Stat. at 813-23.
\item \textsuperscript{151} See id. § 401, 110 Stat. at 822-24.
\item \textsuperscript{152} See id. § 101, 110 Stat. at 792.
\item \textsuperscript{153} See id. § 101(1), 110 Stat. at 792. Congress proclaims that “[i]t is the sense of the Congress that—(1) the acts of the Castro government, including its massive, systematic, and extraordinary violations of human rights, are a threat to international peace.” Id.
\item \textsuperscript{154} Id. § 101(3), 110 Stat. at 792. Apparently, the United States has been particularly concerned with the Cuban efforts to complete the construction of the Juragua nuclear plant. Id. § 111(a)(1). Congress firmly believes that Cuba lacks sufficient technology and nuclear regulatory structure to guarantee the safety of this construction. Id. § 111(a)(4), 110 Stat. at 801.
\item \textsuperscript{155} Id. § 102(a)(1), 110 Stat. at 792. Congress reaffirmed the Cuban Democracy Act of 1992, stating that the President should advocate that foreign countries restrict credit relations and trade with Cuba. Id. The Cuban Democracy Act of 1992 imposed sanctions for international assistance to Cuba on terms and conditions more favorable than those available in the general market. Id. at 111(a)(4). The Cuban Democracy Act has already caused international criticism. See generally Gabriel M. Wilner, International Reaction to the Cuban Democracy Act, 8 FLA. J. INT’L L. 401 (1993).
\item \textsuperscript{156} Libertad Act, supra note 1, § 102(a)(2)-(3), 110 Stat. at 792. Persons who violate regulations pursuant to the Act may be subject to penalties imposed by the Secretary of the Treasury. Id. § 102(d)(1), 110 Stat. at 793. The Secretary of Treasury
2. Title III Imposes Sanctions on Individuals Trafficking in Property of United States Nationals

Title III of the Libertad Act is the subject of widespread international criticism.\[^{157}\] In general, Title III imposes liability on persons trafficking in property confiscated by the Cuban government to which United States nationals have claims.\[^{158}\] “Confiscated property” refers to real, personal and mixed property interests, as well as present and future rights and other interests in property\[^{159}\] confiscated by the Cuban government since January 1, 1959.\[^{160}\] The Act defines trafficking as the sale, transfer, lease, control, management or use of property “without the authorization of any United States national who holds a claim to the property.”\[^{161}\]

may impose the following sanctions:

(b)(1) A civil penalty not to exceed $50,000 may be imposed by the Secretary of the Treasury on any person who violates any license, order, rule, or regulation issued in compliance with the provisions of this Act.

(2) Any property, funds, securities, papers, or other articles or documents, or any vessel, together with its tackle, apparel, furniture, and equipment, that is the subject of a violation under paragraph (1) shall, at the direction of the Secretary of the Treasury, be forfeited to the United States Government.

\[^{157}\] See infra Part III.B.

\[^{158}\] Title III imposes liability on “any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959.” Libertad Act, supra note 1,§ 302(a)(1), 110 Stat. at 815.

\[^{159}\] Libertad Act, supra note 1, § 4(12)(A), 110 Stat. at 790. The Act defines property as follows:

The term “property” means any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.

\[^{157}\] The definition excludes, however, “real property used for residential purposes” if the claim to the property has not been filed as of the date of enactment, and property “occupied by an official of the Cuban Government or the ruling political party.” \[^{160}\] Id. § 4(12)(B), 110 Stat. at 790.

\[^{160}\] Id. § 4(4)(A), 110 Stat. at 789. This section provides in pertinent part:

[T]he term “confiscated” refers to—

(A) the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property, on or after January 1, 1959—

(i) without the property having been returned or adequate and effective compensation provided; or

(ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure;

\[^{161}\] Id. § 4(13)(A), 110 Stat. at 790-91.

[A] person “traffics” in confiscated property if that person knowingly and
Title III first sets forth the congressional findings justifying the legislation in terms of American and international law principles. The findings begin with the assertion of an individual's constitutional right to own and enjoy property. 162 According to these congressional findings, confiscation and trafficking of property "undermines the comity of nations, the free flow of commerce, and economic development." 163 Congress also invokes the effects doctrine, stating that a nation has the right to control "conduct outside its territory that has or is intended to have substantial effect within its territory." 164 Further, Congress notes that current international judicial systems lack efficiency to remedy cases of wrongful confiscation of property. 165

Finally, Congress appears to indicate that United States policy intends to hasten the downfall of the Castro regime by imposing intentionally—

(i) sells, transfers, distributes, dispenses, brokers, manages or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
(iii) causes, directs, participates in or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

Id.

The definition of trafficking excludes the "delivery of international telecommunications signals to Cuba," "the trading or holding of securities publicly traded or held," "transactions and uses of property incident to lawful travel to Cuba," "transactions and uses of property by a person who is both a citizen and a resident of Cuba [but not a party or government official]." Id. § 4(13)(B), 110 Stat. at 791.

162. Id. § 301(1), 110 Stat. at 814. "Individuals enjoy a fundamental right to own and enjoy property which is enshrined in the United States Constitution." Id.

163. Id. § 301(2), 110 Stat. at 814. "The wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development." Id.

164. Id. § 301(9), 110 Stat. at 815. "International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory." Id. This provision invokes the Alcoa effects doctrine. See supra Part II.A.3.a.

165. Libertad Act, supra note 1, Pub. L. No. 104-114, § 301(8), 110 Stat. at 814. "The international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of property." Id.
Any investment in Cuba "provides badly needed financial benefit" to the regime thus delaying its collapse, and consequently jeopardizing United States policy.167

3. Liability Under Title III

Title III imposes liability on individuals trafficking in confiscated property in order to compensate the owners of the confiscated property who indirectly inhibit foreign investment in Cuba.168 Trafficking individuals are liable to United States claimants to the property for monetary damages triple the value of the property and related court and attorney costs.169 Title III does not require any United States agency to license a settlement.170 Thus, a United States claimant may obtain a judgment on any claim settled with a foreign person.171

However, there are significant limitations to filing claims under the Act. First, United States nationals who acquired claims after the enactment of the Act are barred from bringing any action.172 Second,
only those claims which have been filed with the Foreign Claims Settlement Commission are actionable. Third, claims to property valued at less than $50,000 are not actionable.

4. Title IV Excludes Individuals Found Trafficking in Property From the United States

Title IV of the Act excludes liable aliens from the United States (i.e., those aliens found guilty of confiscating or trafficking in confiscated property). Under the exclusion, those individuals are denied an entry visa and are expelled from United States territory. Title IV does not limit the definition of an “individual” to the persons who have actually confiscated or trafficked property. Rather, the definition extends to corporate officers, principals and controlling shareholders in entities dealing in confiscated property, as well as their spouses, minor children and agents. Similarly, the term “trafficking” has been defined even more broadly than in Title III. Under Title IV, “traffic” also means improvement, investment and “commercial arrangement using or otherwise benefiting from confiscated property.”

enactment.”

173. Id. § 302(a)(5)(A), 110 Stat. at 816. However, claims which have not been registered will still be actionable two years after the enactment of this Act. Id. § 302(a)(5)(C), 110 Stat. at 817.

174. Id. § 302(b), 110 Stat. at 817.

175. Id. § 401, 110 Stat. at 822. The Act provides:

The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after the date of the enactment of this Act—

(1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national;

(2) traffics in confiscated property, a claim to which is owned by a United States national;

(3) is a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national; or

(4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).

Id.

176. Id.

177. Id.

178. Id.

179. Id. § 401(b)(2), 110 Stat. at 822. Title IV defines trafficking as follows:

A person “traffics” in confiscated property if that person knowingly and
B. The European Union Persuades President Clinton to Delay the Enforcement of Title III

Immediately following the enactment of the Libertad Act, the European Parliament unambiguously condemned the legislation and also warned the United States against the enactment of the Iran-Libya Act:

The Council noted with deep concern the extraterritorial implications of new and prospective Libya-Iran US legislations likely to affect transatlantic trade, and considered how to best avoid damage to EU companies, their investments in the US, and their US trading partners.

The Council expressed its deep regret and disappointment at [the Libertad Act] which in its view is in conflict with international law and harms EU rights in trade and investment sectors.

Finally, the Council stressed the negative influence which these measures might have for the harmonious [Euro-American relationship].

The European Parliament also indicated that it would not hesitate to introduce legal countermeasures to offset the effects of the Libertad Act. Furthermore, the European Parliament asked experts to "draw up all WTO and other options regarding EU action in defense of its rights and interests," including the possibility of counter-measures.

\[\text{intentionally—}\]

(i)(I) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property,

(II) purchases, receives, obtains control of, or otherwise acquires confiscated property, or

(III) improves (other than for routine maintenance), invests in (by contribution of funds or anything in value, other than for routine maintenance), or begins after the date of the enactment of this Act to manage, lease, possess, use, or hold an interest in confiscated property,

(ii) enters into a commercial arrangement using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking [as described in clause (i) or (ii)] by another person, or otherwise engages in trafficking [as described in clause (i) or (ii)] through another person, without the authorization of any United States national who holds a claim to the property.

\[\text{Id. See also supra note 161 (defining "trafficking" under Title III of the Act).}\]


181. Id.

182. Id.
Despite their apparent irritation with the Libertad Act, however, European Union officials warned against hasty reactions which could undermine the stability of Euro-American relations. Ignoring this admonition, Germany manifested its opposition to the Libertad Act by entering into a bilateral investment promotion and protection agreement with Cuba to provide security for German investors. Similarly, the United Kingdom condemned the "short-sighted, unilateral actions" of the United States. Referring to the Libertad Act, the British Foreign Secretary stated succinctly that "[n]o country [had] the right to tell companies in another country how they should behave in third countries."

Initially, European Union officials hoped to persuade the United States to waive the enforcement of Titles III and IV of the Libertad Act. However, since the United States refused to accommodate the European demand, the European Union announced that it would consider strong, yet undefined, retaliatory measures against the Act. A communiqué issued at the end of the EU summit in Florence, Italy in the summer of 1996 stated that "[t]he EU assert[ed] its right and intention to react in defense of the EU’s interest in respect to this legislation and any other secondary boycott legislation which has extraterritorial effects."

Unpersuaded by the European opposition, the United States State Department proceeded to execute Title IV of the Libertad Act by issuing warnings of exclusion to certain aliens in the United States.

183. An identified European diplomat stated: "It is an outrageous attempt to extend U.S. domestic law into the international arena but we have to think carefully about how we react." Robert Evans, Furious U.S. Trading Partners Weigh Options on Cuba, Reuters, Mar. 12, 1996, available in LEXIS, Nexis Library, REUBUS File.
184. Pascal Fletcher, German Investment Accord with Cuba, Financial Times (London), May 1, 1996, at 5.
186. Id.
188. See, e.g., Lionel Barber, Italy Condemns US Law on Cuba, Financial Times (London), June 20, 1996, at 8 (reporting on the proposal by the Italian Government to introduce retaliatory measures).
In response, the EU specified its proposed retaliatory measures against the Libertad Act. The measures included imposing visa restrictions on certain United States citizens entering Europe, filing an appeal to the WTO, legislating unidentified measures to neutralize extraterritorial effects of the Act, creating a watch list of United States companies and individuals filing claims under Title III, and passing a blocking statute authorizing European companies to countersue United States companies in Europe.

Under this pressure, President Clinton executed his right to postpone the imposition of sanctions pursuant to the Libertad Act for six months. Nevertheless, the EU remained dissatisfied with this partial appeasement of its claims. The European Commission formally proposed the suggested retaliatory measures for adoption by the Council of Ministers of the EU Member States. Additionally,
the Commission advised banning European companies from complying with the Libertad Act.\textsuperscript{196} The EU Trade Commissioner Sir Leon Brittan commented on the Commission's decision: "[W]e cannot remain inactive when this Sword of Damocles hangs over European companies and individuals. Today the Commission has responded swiftly to the Ministers' unanimous condemnation of the law by proposing a Regulation that will outlaw the Helms-Burton Act in Europe . . . .\textsuperscript{197}

\section*{C. The Iran and Libya Sanctions Act of 1996}

Despite the fact that the European Commission also extended the proposed retaliatory measures to cover the Iran-Libya Act,\textsuperscript{198} President Clinton signed the Iran and Libya Sanctions Act of 1996 on August 5, 1996.\textsuperscript{199} This event further aggravated the European Union.\textsuperscript{200}

In passing the Iran-Libya Act, Congress attempted to use economic sanctions in order to disrupt Libya's and Iran's military development.\textsuperscript{201} The congressional findings concluded that Iran has attempted to acquire weapons of mass destruction and has promoted international terrorism.\textsuperscript{202} Libya poses a similar threat to the United States national interest by supporting international terrorism and

\begin{footnotesize}
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\item[196.] Regulation, supra note 195, at Art 5.
\item[197.] Commission Proposes European Anti-Boycott Law, Rapid, July 30, 1996, available in LEXIS, Nexis Library, RAPID File.
\item[198.] See Regulation, supra note 195.
\item[199.] Nancy Dunne, Clinton Plea to US Allies over Iran and Libya, FINANCIAL TIMES (London), Aug. 6, 1996, at 4. The European Commissioner, Sir Leon Brittan, condemned this move because it "establishes the unwelcome principle that one country can dictate the foreign policy of others." Id.
\item[200.] France, Italy, and Germany opposed this legislation with a particular vigor. EU Oil Fears over US Sanctions Law, FINANCIAL TIMES (London), Aug. 7, 1996, at 4. Italy imports almost 44\% of its total oil imports from Iran and Libya. Id. Similarly, French oil companies have significant investments in the oil industry of Iran and Libya. Id.
\item[201.] Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (to be codified at 50 U.S.C. § 1701). The purpose of the Act is "to impose sanctions on persons making certain investments directly and significantly contributing to the enhancement of the ability of Iran and Libya to develop its petroleum resources, and on persons exporting certain items that enhance Libya's weapons or aviation capabilities or . . . petroleum resources . . . ." Id.
\item[202.] Id. § 2, 110 Stat. at 1541. Section 2 provides:

(1) The efforts of the Government of Iran to acquire weapons of mass destruction and the means to deliver them and its support of acts of international terrorism endanger the national security and foreign policy interests of the United States and those countries with which the United States shares common strategic and foreign policy objectives.

Id. § 2(1).
\end{enumerate}
\end{footnotesize}
attempting to acquire means of mass destruction.\textsuperscript{203} Accordingly, the United States policy strives to prevent Iran's and Libya's development and accrual of weapons of mass destruction and to eliminate international terrorism.\textsuperscript{204}

1. Sanctions Under the Iran-Libya Act

To achieve the goal of inhibiting Iran's and Libya's military capabilities, the Iran-Libya Act imposes sanctions on individuals who, through investments in petroleum resources, contribute to the development of Iranian and Libyan petroleum resources and weapons of mass destruction capabilities.\textsuperscript{205} The president must impose sanctions on those individuals who, after the enactment, invested $40,000,000 or more in Iran's or Libya's petroleum resources and whose investment "directly and significantly contributed" to the development capabilities of the petroleum resources of either country.\textsuperscript{206} Additionally, with respect to Libya, sanctions extend to persons who, in violation of the United Nations Resolution 748,\textsuperscript{207}

\begin{itemize}
  \item Congressional finding on Libya: \textit{"international terrorism, and [makes] efforts to acquire weapons of mass destruction [which] constitute a threat to international peace and security that endangers the national security and foreign policy interests of the United States and those countries with which it shares common strategic and foreign policy objectives."} \textit{Id.} § 2(4), 110 Stat. at 1541.
  \item Policy of the United States with respect to Libya and Iran: \textit{to prevent them from acquiring weapons of mass destruction and to prevent them from supporting international terrorism.} \textit{Id.} § 3(a), (b), 110 Stat. at 1541-42.
  \item The term “investment” has a broad meaning and includes:

\begin{enumerate}
  \item\textit{[A]ny of the following activities if such activity is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Iran or a nongovernmental entity in Iran, or with the Government of Libya or a nongovernmental entity in Libya, on or after the date of the enactment of this Act:}

\begin{enumerate}
  \item The entry into a contract that includes responsibility for the development of petroleum resources located in Iran or Libya (as the case may be), or the entry into a contract providing for the general supervision and guarantee of another person’s performance of such a contract.
  \item The purchase of a share of ownership, including an equity interest, in that development.
  \item The entry into a contract providing for the participation in royalties, earnings, or profits in that development, without regard to the form of the participation.
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provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially"208 contributed to Libya's acquisition of either weapons of mass destruction or conventional weapons, contributed to Libya's acquisition of either weapons of mass destruction or conventional weapons, contributed to Libya's acquisition of either weapons of mass destruction or conventional weapons, contributed to Libya's acquisition of either weapons of mass destruction or conventional weapons,208 (2) "enhanced Libya's military or paramilitary capabilities," provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" provided Libya with services or technologies which "significantly and materially" enhanced Libya's military or paramilitary capabilities, enhanced Libya's military or paramilitary capabilities, enhanced Libya's military or paramilitary capabilities, enhanced Libya's military or paramilitary capabilities,209 contributed to the development of Libyan petroleum resources, contributed to the development of Libyan petroleum resources, contributed to the development of Libyan petroleum resources, contributed to the development of Libyan petroleum resources,210 or (4) "contributed to Libya's ability to maintain its aviation capabilities."211

The various sanctions on investors in Libya and Iran include: 1) the denial by the United States Export-Import Bank of credit and credit guarantees to a sanctioned person;212 2) the prohibition of United States financial institutions from making loans to a sanctioned person;213 3) the prohibition of any sanctioned financial institution from serving as a dealer of the United States government debt instruments or as a repository of the United States government funds;214 and 4) the prohibition of the United States government from entering into procurement contracts with any sanctioned person.215 This list is not exclusive and the Act empowers the president to impose additional sanctions.216 The sanctions imposed on investors in petroleum resources of both countries are extended to subsidiaries, parents, and affiliates of entities violating the provisions of the Act.217

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209. Id. § 5(b)(1)(A), 110 Stat. at 1543.
210. Id. § 5(b)(1)(B), 110 Stat. at 1543.
211. Id. § 5(b)(1)(C), 110 Stat. at 1543.
212. Id. § 6(1), 110 Stat. at 1545.
213. Id. § 6(3), 110 Stat. at 1545.
214. Id. § 6(4), 110 Stat. at 1545.
215. Id. § 6(5), 110 Stat. at 1545.
216. Id. § 6(6), 110 Stat. at 1546. These additional sanctions may be imposed to restrict imports. Id.
217. Id. § 5(c), 110 Stat. at 1544. Sanctions will be imposed on:
   (1) any person the President determines has [invested in the petroleum resources]; and
   (2) any person the President determines—
      (A) is a successor entity to a person referred to in paragraph (1);
      (B) is a parent or subsidiary of the person referred to in paragraph (1) if that parent or subsidiary, with actual knowledge, engaged in the activities referred to in paragraph (1); or
      (C) is an affiliate of the person referred to in paragraph (1) if that affiliate, with actual knowledge, engaged in the activities referred to in paragraph (1) and if that affiliate is controlled in fact by the person referred to in paragraph (1).

Id.
2. Presidential Authority to Delay or Waive Sanctions

The Iran-Libya Act authorizes the president of the United States to withhold the imposition of sanctions on persons procuring defense articles or services which are essential to the national security of the United States. Consequently, the president may exempt from sanctions the importation of parts, materials or technology "essential to United States products or production." Moreover, the president has the discretion to delay or waive the sanctions against foreign persons. The president may delay imposition of sanctions for up to ninety days in order to request governments which have primary jurisdiction over foreign persons to terminate the prohibited activities of those persons. The president also has broad discretionary authority to completely waive the sanctions against foreign persons if "it is important to the national interest of the United States to exercise such waiver authority."

218. Id. § 5(f)(1)(A), 110 Stat. at 1544. The President may waive the imposition of sanctions:

(1) in the case of procurement of defense articles or defense services—
   (A) under existing contracts or subcontracts, including the exercise of options for production quantities to satisfy requirements essential to the national security of the United States;
   (B) if the President determines in writing that the person to which the sanctions would otherwise be applied is a sole source supplier of the defense articles or services, that the defense articles or services are essential, and that alternative sources are not readily or reasonably available; or
   (C) if the President determines in writing that such articles or services are essential to the national security under defense coproduction agreements;

(2) to—
   (A) spare parts which are essential to United States products or production;
   (B) component parts, but not finished products, essential to United States products or production;

(3) to—
   (A) routine servicing and maintenance of products, to the extent that alternative sources are not readily or reasonably available.

219. Id. § 5(f), 110 Stat. at 1544.

220. Id. § 9(a), 110 Stat. at 1546. The president may delay the imposition of sanctions to "initiate consultations immediately with the government with primary jurisdiction over" a foreign person found violating the Iran-Libya Act. Id. § 9(a)(1), 110 Stat. at 1546.

221. Id. § 9(c), 110 Stat. at 1547.

222. Id. § 9(a), 110 Stat. at 1546.

223. Id. § 9(c), 110 Stat. at 1547.
D. The European Union Retaliates Against the Libertad Act and the Iran-Libya Act

After signing the Iran-Libya Act, President Clinton dispatched a special envoy to Europe to persuade the European Union not to oppose or retaliate against the Iran-Libya or the Libertad Act. After the special envoy had failed, on November 7, 1996, the proposed retaliatory measures to counter the effects of the Libertad Act and the Libya Sanctions Act went into effect in the European Union. Subsequently, the European Council filed a complaint with the WTO. On November 20, 1996, the WTO set up the Dispute Settlement Body to consider the European Union claims.

The United States and the European Union became concerned, however, that the conflict posed a danger to the stability of the global economy and the WTO in particular. Consequently, the two opposing sides began to consider compromises. On January 3, 1997, President Clinton decided to postpone once again the execution of Title III of the Libertad Act. Although the European Union welcomed this move, it has remained unappeased, apparently expecting the United States to repeal the Libertad Act.

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224. Nancy Dunne, Eizenstat Named as Envoy to EU, FINANCIAL TIMES (London), Aug. 16, 1996, at 5 (reporting on the appointment of the special envoy, Mr. Stuart Eizenstat).


228. Nancy Dunne & Frances Williams, EU Forces Dispute Panel on Cuba Trade, FINANCIAL TIMES (London), Nov. 21, 1996, at 14. In addition to the European Union, Canada and Mexico requested participation in the panel as interested third parties. Id.

229. Evans, supra note 145. The ruling of the WTO, regardless of the result, will threaten the stability of this young trade organization. See infra Part IV.B.3.

230. Evans, supra note 145.

231. President['s] Statement on Helms Burton Suspension 01/03/97, 1997 WL 2485 (White House) (Jan. 6, 1997).

232. David Fox, European CommissionWelcomes Cuban Law Suspension, Reuters, Jan 3, 1997, available in LEXIS, Nexis Library, REUEC File. European Commission President Jacque Sauter issued the following response to this decision: “I welcome this initiative [to postpone the execution of Title III] as a constructive move... a step in the right direction... I should point out, however, that today’s announcement does not change the European Union’s position of principle... that we remain firmly opposed to all extraterritorial legislation, whatever its source, and will continue to defend our interests.” Id.
IV. ANALYSIS

The European Union has a valid objection to the Libertad Act because the Act violates principles of international law and, to a certain extent, infringes upon certain provisions of GATS. In contrast, the EU criticism of the Iran-Libya Act is unwarranted because the Act complies with international law and is in accordance with international trade treaties.

A. The Libertad Act Violates Principles of International Law

The Libertad Act clearly violates the principle of territoriality because it adjudicates beyond the territory of the United States. Similarly, the Act infringes upon the nationality principle because it subjects foreign nationals to American jurisdiction. The Libertad Act cannot be justified by the effects doctrine because the legislation is “unreasonable.”

1. The Libertad Act Violates the Nationality and Territorial Principles

Congress invoked the effects doctrine when it enacted the Libertad Act. Thus, implicitly, Congress admitted that the Libertad Act is not warranted by either the territorial or the nationality principle. In fact, an argument to the contrary would be futile because the territorial principle prohibits a state from exercising jurisdiction beyond its territory. By definition, the Libertad Act regulates activities in a foreign country and thus imposes American jurisdiction outside United States territory.

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233. See infra Parts IV.A and IV.B.2.
234. See infra Part IV.C.
235. See supra Part II.A.1.
236. See supra Part II.A.2.
237. See supra Part II.A.3.
238. See supra note 164 and accompanying text. Congressional findings include an assertion of American jurisdiction over conduct taking place abroad. See Libertad Act, supra note 1, 22 U.S.C. § 2(9).
239. See supra Part II.A.1 and text accompanying note 41. Although Lotus apparently left States “a wide measure of discretion” in determining the extent of their jurisdiction, most authority supports a contrary belief that under the territorial principle a State’s jurisdiction coincides with its territorial boundaries. See S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19, 2 WORLD CT. REP. at 35 (Manley O. Hudson ed., 1969) See also supra text accompanying note 33 (highlighting Justice John Marshall’s opinion regarding limitations on national jurisdiction).
Similarly, the Libertad Act exceeds the United States power, recognized in the nationality principle, to legislate extraterritorially.\(^\text{241}\) The nationality principle allows a state to exercise extraterritorial jurisdiction only upon individuals who are nationals of that state and who temporarily reside abroad.\(^\text{242}\) On its face, the Libertad Act exceeds the United States authority under the nationality principle because it subjects foreign individuals to American jurisdiction.\(^\text{243}\)

2. The Effects Doctrine Does Not Justify the Libertad Act

Congress enacted the Libertad Act pursuant to the effects doctrine.\(^\text{244}\) In general, the effects doctrine permits a state to impose jurisdiction over activities occurring outside the territory of that state but which have certain effects within that state’s territory.\(^\text{245}\) American and European jurisprudence differ significantly in their interpretation of this doctrine.\(^\text{246}\) Accordingly, there are several tests used to evaluate the legitimacy of a state’s extraterritorial jurisdiction pursuant to the effects doctrine.\(^\text{247}\) The Act fails to withstand scrutiny under any variation of the effects doctrine.

a. The Libertad Act is Inconsistent With the European Understanding of the Effects Doctrine

While Germany and the European Union have recognized the effects doctrine, they have only done so to a limited extent.\(^\text{248}\) Generally, European states have consistently objected to the application of the effects doctrine beyond antitrust law.\(^\text{249}\) On the other hand, the United Kingdom has opposed the doctrine with particular vehemence and has

\(^{241}\) See supra Part II.A.1.
\(^{242}\) See supra notes 46-47 and accompanying text. It is an established principle of law that a State may exercise jurisdiction over its subjects who are temporarily abroad. See, e.g., NEALE & STEPHENS, supra note 26, at 12.
\(^{244}\) Congressional findings invoke the effects doctrine. Libertad Act, supra note 1, 22 U.S.C. § 2(9).
\(^{245}\) See supra Part II.A.3. for a discussion of the effects doctrine.
\(^{246}\) See supra Part II.A.3. The effects doctrine is a creation of American jurisprudence and has received limited recognition in European legal systems.
\(^{247}\) See supra Part II.A.3. The tests are: (1) the Alcoa effects test, (2) the Timberlane factors, and (3) the Restatement (Third) balancing test.
\(^{248}\) See supra Part II.A.3.c. The EU and Germany recognize the doctrine only in antitrust law. See supra note 87 and accompanying text.
\(^{249}\) See supra Part II.A.3.c.
refused to recognize it. Accordingly, the Libertad Act, which does not involve antitrust matters, cannot be justified by the effects doctrine as defined in European jurisprudence.

b. The Libertad Act Fails the Balancing Test

The Libertad Act also fails the most liberal effects test found in the Restatement (Third) of Foreign Relations Law. Under the Restatement balancing test, a state may not impose extraterritorial jurisdiction if such imposition would be "unreasonable." The Libertad Act is "unreasonable" because any benefit resulting from the Act is minimal in comparison to the general interest of the United States and of the international community.

The benefits resulting from the Libertad Act are minimal. First, the only beneficiaries of the Libertad Act are wealthy Cuban émigrés. The Act selectively protects the interests of American citizens because it excludes United States claimants whose property is valued at less
than $50,000,\textsuperscript{255} as well as claimants to residential property in Cuba.\textsuperscript{256} Second, contrary to its stated purpose, the Act will not bring democracy to Cuba.\textsuperscript{257} Rather, it will further deteriorate the standard of living of the Cuban people\textsuperscript{258} and decrease the chances for a peaceful transition in Cuba.\textsuperscript{259} Consequently, although the United States has a strong interest in the downfall of the Castro regime,\textsuperscript{260} the Libertad Act defies its purpose because it fails to completely eliminate the flow of funds into Cuba.\textsuperscript{261} Finally, the Act allegedly protects the constitutional right of United States nationals "to own and enjoy property."\textsuperscript{262} However, the Act violates the Equal Protection Clause of the United States Constitution because it prevents American citizens, who do not meet the property threshold of the Act, from filing claims against foreign property traffickers.\textsuperscript{263}

Admittedly, foreign activities utilizing property to which United States nationals have unsettled claims have a "direct and foreseeable effect" upon the United States, but the effect is not "substantial" enough to warrant the Act's extraterritorial effect.\textsuperscript{264} Furthermore, the Act not only fails to protect the interests of all United States nationals, but it also hurts the justified expectations of foreign individuals.\textsuperscript{265}

\begin{thebibliography}{99}
\item \textsuperscript{255} Libertad Act, \textit{supra} note 1, § 302(b), 110 Stat. 785 at 817 (1996). The Act imposes a property value threshold on filing claims. \textit{Id.}
\item \textsuperscript{256} \textit{Id.} § 4(12)(B), 110 Stat. at 790. The Libertad Act excludes claims to real property used for residential purposes in Cuba unless the claims were filed prior to the Act's enactment, or unless the property was used by Cuban governmental officials. \textit{Id.} § 302(a)(4)(B).
\item \textsuperscript{257} \textit{See id.} § 3. The stated purpose of the Act is to help the Cuban people regain their freedom and "to encourage the holding of free and fair democratic elections . . . ." \textit{Id.} § 3(4).
\item \textsuperscript{258} \textit{Vatican Criticises Helms-Burton Law on Cuba}, Reuters, Oct. 18, 1996, \textit{available in} LEXIS, Nexis Library, REUWLD File (noting that the Vatican has criticized the Act for this very reason). \textit{See also supra} note 7 (discussing criticism of the Libertad Act).
\item \textsuperscript{260} \textit{See Libertad Act, supra} note 1, § 3, 110 Stat. 785, 787-88 (1996). The implicit purpose of the Act is to cause the downfall of the Castro regime by imposing economic sanctions. \textit{Id.} § 3(3), 110 Stat. at 788.
\item \textsuperscript{261} \textit{See supra} text accompanying note 254.
\item \textsuperscript{262} Libertad Act, \textit{supra} note 1, Pub. L. No. 104-114, § 301(1), 110 Stat. 785, 813 (1996).
\item \textsuperscript{263} \textit{Cf.} Ratchik, \textit{supra} note 253, at 361 (arguing that United States citizens of Cuban ancestry should have equal right to pursue their property rights in Cuba).
\item \textsuperscript{264} \textit{See supra} note 81. The first element of the \textit{Restatement} test is to determine the extent to which an activity has "substantial, direct, and foreseeable effect upon or in the territory." \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES} § 403(2)(a) (1987).
\item \textsuperscript{265} The \textit{Restatement} requires one to analyze whether there are any justified expectations which may be hurt by the legislation. \textit{See RESTATEMENT (THIRD) OF}
The Act punishes not only foreign persons who acquired property from the Cuban government, but also those who merely invest in confiscated property without claiming any rights to that property.\textsuperscript{266} Clearly, the United States could have asserted its right to confiscated property in Cuba prior to the influx of foreign investment. Yet despite several opportunities Congress failed to do so, thus sending a confusing message to the international business community.\textsuperscript{267}

The Libertad Act also fails the remaining elements of the effects test.\textsuperscript{268} First, the United States may not claim any connection with foreign investors in Cuba because they are subjects of foreign jurisdictions.\textsuperscript{269} Second, the Act is inconsistent with the "traditions of the international system"\textsuperscript{270} because it legislates extraterritorially and because there are no analogous precedents in the jurisprudence of other states.\textsuperscript{271} Third, the primary jurisdiction over foreign investors in Cuba belongs to foreign states which have the absolute right and interest in regulating the conduct of their nationals.\textsuperscript{272}

Furthermore, the Libertad Act conflicts with the EU legislative measures which allow EU citizens to countersue American companies in Europe.\textsuperscript{273} The Act also conflicts with EU regulations because

\textsuperscript{266} Libertad Act, \textit{supra} note 1, § 4(13)(A), 110 Stat. 785, 790-91. The Act defines "trafficking" very broadly and includes even commercial use of property. \textit{Id.}

\textsuperscript{267} The Cuban Democracy Act of 1992 merely imposed sanctions on countries assisting Cuba but did not raise the issue of property. 22 U.S.C. § 5001.

\textsuperscript{268} \textit{See} \textit{Restatement (Third) of Foreign Relations Law of the United States} § 403(2)(a) (1987); \textit{see also} notes 56-86 and accompanying text.

\textsuperscript{269} \textit{See} \textit{Restatement (Third) of Foreign Relations Law of the United States} § 403(2)(a) (1987). The Restatement test requires a determination of whether there is any connection between the regulating State and the individuals involved in regulated activities. \textit{Id.} § 403(2)(d).

\textsuperscript{270} \textit{Id.} § 403(2)(f). \textit{But see} Ratchik, \textit{supra} note 253, at 364 (admitting the Act's inconsistency with the international legal system but arguing in favor of the Act's reasonableness).

\textsuperscript{271} Apparently, international law stands for the principle that "confiscations that violate international law are not effective in passing title to property, and a state is under no obligation to recognize a title acquired by such confiscation." Brice M. Clagett, \textit{Title III of the Helms-Burton Act is Consistent with International Law}, 90 AM. J. INT'L. L. 434, 438 (1996). However a study of history offers no suggestion as to how far in time one may go back to reclaim one's property. Illustrative of this problem is the recently proposed satirical Canadian legislation seeking compensation to Canadian descendants of Tory loyalists whose property was confiscated after the American Revolution. Andrew Petkofsky, \textit{The Canadians Are Coming: For Williamsburg}, RICHMOND TIMES, Oct. 27, 1996, at C-1.

\textsuperscript{272} \textit{See} \textit{Restatement (Third) of Foreign Relations Law of the United States} § 403(2)(g) (1987). Therefore, the United States should exercise diplomatic means to solve the problem of foreign investment in Cuba. \textit{See infra} note 273.

\textsuperscript{273} Buckley & de Janquieres, \textit{supra} note 194. Consequently, the economic benefit
European companies complying with the Act will be subject to prosecution in Europe.274

The American business community made a powerful argument against the Libertad Act.275 In a letter to President Clinton members wrote that:

the United States' ability to benefit from the global economy is dependent on strong, stable and reliable rules. We believe that these benefits are jeopardized by the enormous friction that will result if Title III is allowed to take effect. Some of our closest allies and most important trading partners are contemplating or have legislated countermeasures. U.S. firms will bear the brunt of these countermeasures. . . .

Many of our member companies had property in Cuba that was expropriated by the Castro regime. Yet, many of these companies, constituting some of the largest certified claimants, do not believe that Title III brings them closer to a resolution of these claims. To the contrary, Title III complicates the prospect of recovery and threatens to deluge the federal judiciary with hundreds of thousands of lawsuits. These companies, Title III's intended beneficiaries, support our view that Title III should be suspended at this time.

. . . .

Finally, we believe that if Title III were to become effective, it would drive a wedge between the United States and our democratic allies that would significantly hinder any future multilateral efforts to encourage democracy in Cuba.276

This letter expresses a well-founded concern of the business community that any extraterritorial application of United States laws can often be self-defeating and disastrous for American business.277

\[\text{to United States nationals filing claims under the Libertad Act will be limited.}\

274. *Id.*


276. *Id.*

277. Comment, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355, 368 (1984) [hereinafter Export Controls]. "Aside from the international tension caused by this jurisdictional battle, individuals and corporations are often caught in the crossfire and are placed in the untenable situation where obedience to one sovereign will result in liability to the other. That increases the cost of international trade and investment, and creates stress in the international system." *Id.*
Thus, the few benefits resulting from the Libertad Act do not outweigh the unreasonableness of the legislation.\textsuperscript{278}

\section*{B. The Libertad Act Risks Violating International Trade Agreements}

Alleging that the Libertad Act violates the World Trade Organization Agreements, the European Union filed a complaint with the WTO.\textsuperscript{279}

1. The Libertad Act Is Consistent With GATT

It is questionable whether the Libertad Act violates GATT. Although GATT prohibits discrimination against imports or exports, this prohibition refers to laws regulating trade with the legislating state.\textsuperscript{280} The Libertad Act, however, does not limit the trade in goods with the United States but imposes restrictions on trade with a foreign state.\textsuperscript{281} Although such restriction is questionable in the context of international law, it nevertheless remains beyond challenge with respect to GATT.\textsuperscript{282}

2. The Libertad Act Violates GATS

In contrast, the Libertad Act infringes upon GATS, which prohibits legislation affecting services and service suppliers.\textsuperscript{283} The Libertad Act discriminates against foreign suppliers of services who are active both in the United States and in Cuba.\textsuperscript{284} Under the Act, those

\begin{itemize}
\item \textsuperscript{278} \textit{But see} Clagett, \textit{supra} note 271, at 440 (arguing that Title III of the Libertad Act "furthers both the development and the implementation of international law").
\item \textsuperscript{279} \textit{See supra} text accompanying note 227. Although the European Union has objected to the Iran-Libya Act, the EU filed a complaint with the WTO only regarding the Libertad Act. \textit{See generally} Dunne & Williams, \textit{supra} note 228. Implicit in the lack of formal objection to the Iran-Libya Act is the admission that the Act complies with the WTO Agreements.
\item \textsuperscript{280} \textit{See} GATT, \textit{supra} note 117, art. I. GATT prohibits a legislating State from enacting laws negatively affecting trade with that State. \textit{See supra} note 120 and accompanying text.
\item \textsuperscript{281} Libertad Act, \textit{supra} note 1, § 302, 110 Stat. 785, 815-19 (1996). (the Libertad Act does not impose customs or duties on trade with the United States). \textit{See generally} discussion of liability under the Libertad Act, \textit{supra} Part III.A.3.
\item \textsuperscript{282} \textit{See supra} Part IV.A (discussing the Libertad Act’s violation of the territoriality principle and nationality principle). Since GATT is a trade agreement, it does not involve issues of international law.
\item \textsuperscript{283} \textit{See} GATS, \textit{supra} note 118, art. I. GATS is more expansive than GATT because it prohibits discrimination against services and service suppliers, whereas GATT covers the trade in goods and does not protect the goods suppliers. \textit{See supra} notes 123-24 and accompanying text.
\item \textsuperscript{284} Libertad Act, \textit{supra} note 1, § 302, 110 Stat. 785, 815-19 (the Libertad Act imposes sanctions on any person trafficking in confiscated property). \textit{See also supra} note 158 and accompanying text (discussing the Act).
\end{itemize}
suppliers will suffer detrimental economic effects. For instance, if they decide to continue their economic presence in Cuba, the suppliers face several equally unfavorable options. First, if they remain active in Cuba, they have to terminate activities in the United States to avoid liability. This option is clearly prohibited by GATS which requires states to treat foreign service suppliers “no less favourably” than domestic suppliers. Alternatively, to avoid liability, foreign companies may settle with United States nationals who have claims to the property utilized by those companies. However, this option also discriminates against foreign suppliers present in the United States because it forces them to bear the economic consequences of settlements. Moreover, a settlement defies the Act’s purpose of imposing economic embargo in Cuba, because it allows foreign companies to continue their economic activities in Cuba after having settled their claims. Finally, the Act offers a competitive advantage to American companies, thus violating the GATS provision which prohibits a facilitation of competitive advantage for domestic suppliers.

3. The Conflict May Jeopardize the Future of the WTO

The United States government has strongly opposed the WTO’s involvement in the dispute regarding the Iran-Libya and Libertad Acts. Admittedly, pursuing this matter in the WTO is a “lose-lose proposition.” If the WTO rules in favor of the United States, the


286. See GATS, supra note 118, art. II, § 1 (prohibiting discrimination against services and service suppliers of member states). See supra note 132 for the text of GATS art. XVII, § 1.

287. See Libertad Act, supra note 1, § 302(a)(7), 110 Stat. 785, 817 (1996) (allowing for an out of court settlement). See also supra note 170 (providing an exposition of section 302(a)(7)).

288. See Ratchik, supra note 253, at 357-58; see also Letter to President Clinton, supra note 275.

289. See Desloge, supra note 254, and Fidler, supra note 254 (noting the paradoxical effect of allowing out-of-court settlement of claims). Article XVII of GATS prohibits any measures affecting services supply. See GATS, supra note 118, art. XVII §§ 1, 3; see also supra notes 132-33 (outlining sections 1 and 3 of article XVII).

290. See GATS, supra note 118, art. XVII § 3. See also supra note 133 and accompanying text (discussing this provision).

291. Eizenstat, supra note 7. Undersecretary Eizenstat noticed that “pursuing this matter in the WTO will only provide aid and comfort, and sustain and support those elements in the United States who are already opposed to the WTO, and it will invite an incitement of protectionist pressure.” Id.

292. Id.
ruling may encourage other states to undertake similar actions which in
turn would jeopardize the authority of the WTO and global trade in
general. Such a ruling would create a precedent approving
extraterritorial legislation and implicitly encourage other WTO
members to enact similar legislation widely protecting their national
interests. Conversely, a ruling against the United States may be
even more detrimental to the future of the WTO, as such ruling might
eventually lead to the withdrawal of the United States from the
WTO.

Apparently, the United States has decided to defend the Libertad Act
before the WTO by using “every defense at [its] disposal.” Therefore, to
defend its position, the United States is likely to invoke
the security exceptions to GATS. Since the WTO has not
considered the application of this provision in the past, there is no
indication as to how the WTO would rule. However, because the
 provision is analogous to the security exceptions provision of
GATT, it appears the United States would fail to persuade the WTO
that trafficking in confiscated property poses a national security threat
to the United States.

293. EU, U.S. face off at World Trade Body over Cuba, Reuters, Nov. 20, 1996,
available in LEXIS, Nexis Library, REUBUS File (citing the concerns expressed by
United States Ambassador to the WTO, Booth Gardner).

294. EXTRATERRITORIAL APPLICATION, supra note 49, at 45. In its 1984 Report, the
International Chamber of Commerce Committee strongly criticized extraterritorial
legislative measures. Id. The Committee found that such measures, and particularly
those based on the effects doctrine, create commercial and legal uncertainty; they
courage risk avoidance and distort international investment. Furthermore, they result
in unwarranted costs often born by “innocent companies.” Id. See also Letter to
President Clinton, supra note 275 (fearing that the ability of the United States to benefit
from the global economy, “[is] jeopardized by . . . friction that will result if Title III is
allowed to take effect”).

295. EXTRATERRITORIAL APPLICATION, supra note 49, at 45.

296. Evans, supra note 145 (describing concerns that a WTO ruling unfavorable to
the United States would strenthen American opponents to the United States membership
in the WTO).

297. Eizenstat, supra note 7. Eizenstat implies that the United States will not
hesitate to invoke the national security exception. See Iran and Libya Sanctions Act of
and accompanying text (discussing the exception).

298. Eizenstat, supra note 7.

299. Id.

300. See supra Part III.A.1.
C. The Iran-Libya Act Does Not Violate International Law

Under the territorial and nationality principles of international law, a state has jurisdiction within its territory and over its nationals.\textsuperscript{301} The Iran-Libya Act does not violate principles of international law because, unlike the Libertad Act, it does not subject foreign individuals to United States jurisdiction.\textsuperscript{302} The Act merely requires United States financial institutions to discontinue assistance to, and cooperation with, foreign persons who have engaged in activities prohibited by the Act.\textsuperscript{303} Consequently, sanctions under the Iran-Libya Act differ fundamentally from those imposed by the Libertad Act, which is a statute that attaches legal consequences to certain types of investment in Cuba.\textsuperscript{304} On the contrary, the Iran-Libya Act employs economic mechanisms to discourage activities deemed harmful for the United States.\textsuperscript{305} Accordingly, the Act remains outside the sphere of international law.

V. PROPOSAL

The United States and the European Union should resolve the present conflict in the spirit of comity to attain a mutually satisfactory solution. Although both sides have a profound interest in protecting their causes, the means of defending their respective positions are not entirely legitimate.\textsuperscript{306}

\begin{itemize}
\item \textsuperscript{301} See supra Part II.A (discussing nationality and territorial principles). No principle of international law may prohibit a State from imposing jurisdiction within the State's territory. See NEALE & STEPHENS, supra note 26, at 13; see also supra text accompanying notes 30-31 (discussing the territorial principle).
\item \textsuperscript{302} See supra notes 201-17 and accompanying text. The Iran-Libya Act does not impose any legal sanctions; rather, it only prohibits American institutions from offering financial assistance to foreign entities investing in Iran and Libya. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541, 1545-46.
\item \textsuperscript{304} Libertad Act, supra note 1, § 302(a)(1), 110 Stat. 785, 815 (1996) (imposing liability upon individuals trafficking in confiscated property in Cuba). See also supra notes 168-74 (detailing provisions of the Libertad Act).
\item \textsuperscript{305} Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 3, 110 Stat. 1541 (describing the purpose of the Act). See supra text accompanying notes 201-05 (discussing the role of economic sanctions). Under the Act, foreign entities are not prohibited from investing in Iran and Libya. Id. Such limited investment, however, may not be profitable for them. Id.
\item \textsuperscript{306} International conflicts should be resolved by diplomatic means. See Export Controls, supra note 277, at 379. Diplomacy is "[t]he art and practice of conducting negotiations between foreign governments for the attainment of mutually satisfactory political relations." BLACK'S LAW DICTIONARY 315 (abridged 6th ed. 1991).
\end{itemize}
United States nationals have a significant interest in restitution of their property rights in Cuba. Accordingly, the European Union should concede to the demands of the United States government to resolve the issue of confiscated property. On the other hand, the European Union’s objection to the Libertad Act as a means of protecting American interests is fully warranted.

In its present form, the Libertad Act is not acceptable. Contrary to its stated purposes, the legislation does not threaten the stability of the Castro regime, and it does not promote peaceful democratic change in Cuba. Although the Act confers a limited benefit upon one group of United States nationals, it adversely affects the general interests of the United States. First, the legislation antagonizes traditional American allies because it threatens their economic interests. Second, the extraterritorial aspects of the Libertad Act jeopardize a harmonious development of international trade by injecting instability and uncertainty into the sphere of international investment.

Although the European Union is likely to obtain a favorable WTO ruling regarding the Libertad Act, the EU has a profound interest in resolving the dispute with the United States without the involvement of the WTO. In light of recurring American objections to the role and validity of the WTO, the WTO ruling against the United States would further weaken the already fragile American support for the organization and pose a threat to the vitality and authority of this entity. On the other hand, if the WTO upholds the Libertad Act, it

307. Unquestionably, the right to enjoyment of one’s property is historically recognized as an absolute one. See, e.g., U.S. Const. amend. IV.; Magna Carta, para. 28-32 (1215); Pope Leo XIII, Rerum Novarum (1878).

308. In fact, many European jurisdictions do not recognize any legal effects of international confiscations. Clagett, *supra* note 271, at 438. However, “no consensus exists that an internationally unlawful confiscation does pass good title that a ‘purchaser’ can rely on....” *Id.*

309. The essence of the European Union’s objection to the Libertad Act is the extraterritorial effect of the Act. See *supra* text accompanying note 180.

310. *See supra* Part IV.


312. *Id.*

313. *See supra* note 199; see also *Letter to President Clinton, supra* note 275.

314. *See Export Controls, supra* note 277 and accompanying text. Instability of laws in different jurisdictions has a substantial adverse effect on international trade. *See Export Controls, supra* note 277.

315. Eizenstat, *supra* note 7. Secretary of Commerce Eizenstat noted that “pursuing this matter [Libertad Act] in the WTO will only provide aid and comfort, and sustain and support those elements in the United States who are already opposed to the WTO, and it will invite an incitement of protectionist pressure.” *Id.* at 3.
will create a valid precedent for states to legislate extraterritorially, a precedent the international business community will not welcome.  

VI. CONCLUSION

The conflict over the Libertad and the Iran-Libya Acts results in an unnecessary threat to the stability of international legal order and an adverse effect on global trade. Therefore, the United States and the European Union should resolve the conflict in the spirit of comity. To achieve a satisfactory solution, both sides should not hesitate to make necessary concessions. The United States should consider repealing Title III of the Libertad Act. Conversely, the European Union should immediately withdraw its complaint from the WTO to preserve the organization’s authority and coherence. The EU must withhold its objections to the Iran-Libya Act and repeal the implemented countermeasures against both Acts. Finally, the United States and the EU should employ diplomatic means to resolve the problem of property rights in Cuba.

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316. See generally Export Controls, supra note 277; Extraterritorial Application, supra note 49.