

## CREATIVE DESTRUCTION — IDIOSYNCRATIC CLAIMS OF INTERNATIONAL LAW AND THE HELMS-BURTON LEGISLATION

Paul B. Stephan\*

When does a nation's law of property have to conform to the rules of international law, and what are those rules? This problem lies at the core of the Helms-Burton legislation.<sup>1</sup> The United States asserts that confiscation of a person's property without appropriate standards, fair procedures, and complete compensation violates international law. Victims of such violations who now enjoy U.S. nationality may invoke the U.S. courts to obtain redress. The rest of the world either denies that such a general right can exist, concedes that such a right might exist but only if a treaty establishes it, or posits the independent existence of such a right but limits it to confiscations carried out against foreigners. Thus, most of the countries with which the United States has substantial trade and investment ties, in particular Canada, Mexico, and the members of the European Union (E.U.), decry our unilateral attempt to implement our desired international rule.

What does this dispute tell us about the dynamics of international law creation? I want to extract the Helms-Burton legislation from the somewhat tawdry context in which it was enacted and look at it as an instance of creativity in international lawmaking. We tend to think of rebellion and subversion as undermining legal systems. When a nation defies a norm of international law, we regard such actions as harming the development of stable and reliable regimes. Other than branding this behavior as irresponsible and out-law, scholars for the most part have not given it close analysis.<sup>2</sup> Yet

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\* Percy Brown, Jr. Professor and Barron F. Black Research Professor, University of Virginia. I am grateful for comments made by John K. Setear and participants at Stetson University College of Law's Economic Sanctions, Trade Controls, and Foreign Policy Symposium. Responsibility for errors and misjudgments remains solely mine.

1. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997)) [hereinafter LIBERTAD Act].

2. Representative of the critical scholarship is Raj Bhala, *Fighting Bad Guys with*

there is a case to be made for defection. Under certain circumstances, opposition to the prevailing consensus can strengthen multilateral legal structures.

My thesis is that rebellion and subversion by individual states advance two desirable ends. First, they create space for creativity in the development of international norms. Second, and for my purposes the more interesting proposition, defection from multilateral regimes serves to discipline international lawmakers. Given the weak forms of accountability that generally exist in the various processes that produce international rules, this discipline is especially desirable.

One can establish these virtues without making a general argument for lawlessness. Too much rebellion and subversion can destroy a system, canceling the benefits it could otherwise bring. But too little can lead to ossified and costly structures that do more harm than good. The trick is to identify the conditions under which rebellion and subversion may be defensible.

I will explore this problem by comparing the private litigation provisions of the Helms-Burton legislation to Title III of the Trade Act of 1974, which permits the government to create a process for imposing trade sanctions on countries that impair the economic rights of U.S. firms.<sup>3</sup> Both of these laws are at least inconsistent with, and arguably violate, the rights and duties of the General Agreement on Tariffs and Trade (GATT) system as embodied most recently in the Uruguay Round Agreements.<sup>4</sup> Both rest on assumptions about universal economic rights that the GATT system has not embraced. Both might be characterized as opportunistic efforts to reward domestic interest groups at the expense of the international system. But both might also be seen as (possibly flawed) contributions to the legal regimes governing international business.

I begin by characterizing these enactments as examples of idiosyncratic claims about international law. First, I trace the familiar history of Title III of the Trade Act and review the scholarly discus-

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*International Trade Law*, 31 U.C. DAVIS L. REV. 1 (1997). For an important exception to the statement in text, see David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from Within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297 (1997).

3. See 19 U.S.C. § 2411 (1994).

4. The Uruguay Round Agreements, with an introductory note, appear at 33 I.L.M. 1 (1994).

sion of its functions and legality. This literature is suggestive of the general problem of defections. Next, I explore what the Helms-Burton legislation does and how it may violate international law. I then put these actions in perspective by discussing why states form multilateral legal regimes and the role of defection within those systems. I will conclude with a general survey of the uses and abuses of rebellion and subversion in the context of multilateral legal regimes.

*I. FORMALIZED UNILATERALISM—TITLE III IN THEORY  
AND PRACTICE*

International trade and investment rests on a variety of explicit treaties and implicit understandings. The United States, possessed of the largest and most developed national economy as well as unchallenged strategic power, has taken upon itself a leading role in extending and strengthening this body of law, or at least that portion that emphasizes the rights of investors and exporters. Not surprisingly, countries that host U.S. investment or who might import U.S. goods or services do not always agree with the United States about these obligations' content. When we disagree, there arises a question of appropriate dispute resolution. Most of the treaties until recently did not create formal institutions and procedures for resolving contested interpretations, and implicit understandings by their nature do not create a formal dispute resolution procedure. In broad brush, the United States has two choices: It might announce its unilateral interpretation of the international obligation or custom at issue, or it might submit to some multilateral procedure. If it takes the former route, it may back up its decisions with domestically applied trade and investment controls but run the risk of retaliation. If it takes the latter route, the danger of retaliation goes down but the risk that the multilateral process will produce substantive outcomes not in accord with U.S. views goes up.

Each approach has attractions and drawbacks. Not surprisingly, the United States has sought to ride both horses. On one hand, the United States has led an effort to build greater formality and judicial qualities into dispute resolution conducted under GATT, and now World Trade Organization (WTO), auspices. This effort has culminated in an international agreement that recognizes the jurisdiction and authority of an independent tribunal over trade,

investment, and intellectual property cases involving WTO members.<sup>5</sup> The North American Free Trade Agreement (NAFTA) similarly has enhanced the role of international tribunals to deal with conflicts among that agreement's signatories.<sup>6</sup> Viewed in isolation, these arrangements suggest a strong commitment to the formation of a jurisprudence of international economic law based on a professional and disinterested judiciary.

On the other hand, the United States has also formalized and strengthened its mechanism for unilateral action. For more than two decades, Title III of the Trade Act of 1974 has authorized the U.S. Trade Representative unilaterally to determine U.S. claims involving the same issues as the international tribunals and to impose appropriate sanctions.<sup>7</sup> Amendments in 1988 augmented this authority and reduced the discretion of the Trade Representative to take no action.<sup>8</sup> Before 1974, the President possessed virtually unlimited discretion to intervene in international trade for reasons of state, but Title III marked the advent of an increasingly belligerent approach to trade disputes. Beginning in the Carter Administration and with greater frequency in the 1980s, the United States used both the threat of sanctions and their imposition as a tool for promoting its conception of international economic law.<sup>9</sup>

The heart of Title III lies in Section 301(a) and (b), which divides foreign misconduct into two categories: (a) that which is "unjustifiable," defined as an "act, policy, or practice [that] is in violation of, or inconsistent with, the international legal rights of the United States,"<sup>10</sup> and (b) that which is "unreasonable," defined as an

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5. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1226 (1994).

6. See North American Free Trade Agreement, *done* Dec. 17, 1992, ch. 20, 32 I.L.M. 289, 693-99 (1993).

7. See generally Trade Act of 1974, 19 U.S.C. § 2411 (1994).

8. See *id.* (amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1164-68).

9. For summaries of U.S. action under Section 301, see THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 355-465 (1994). See also United States Trade Representative, *Report to Congress on Section 301 Developments Required by Section 309(a)(3) of the Trade Act of 1974* (last modified Dec. 20, 1996) <<http://www.ustr.gov/reports/301report/report.html>>.

10. Trade Act of 1974 § 301(d)(4)(A), 19 U.S.C. § 2411(d)(4)(A); see also *id.* § 301(a)(1)(B)(ii), (b)(1), 19 U.S.C. § 2411(a)(1)(B)(ii), (b)(1). The foreign conduct must also "burden or restrict United States commerce." This last restriction means only that a U.S.

“act, policy, or practice [that], while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.”<sup>11</sup> In the first case, where the United States asserts a violation of international law, the Trade Representative must retaliate against the malefactor, unless one of two exceptions applies. The Trade Representative may withhold action if he submits the dispute to the formal settlement proceedings provided by a trade agreement, or finds that the malefactor is doing everything possible to solve the problem, that trade sanctions would have a disproportionately negative impact on the U.S. economy, or that sanctions would “cause serious harm to the national security of the United States.”<sup>12</sup> In the second case, where the United States claims no international law violation but does want to discourage what the malefactor has done, the Representative may take any action that is “appropriate,” including inaction.<sup>13</sup>

The more interesting provision is the discretionary prong, which requires a determination that the foreign practice is “unfair and inequitable.”<sup>14</sup> The Trade Representative has used this authority to extend the protection that other governments give U.S. interests, and in particular to bolster the property rights of U.S. firms. Many actions, for example, have rested on the assertion that the right to do business in a country includes an obligation on the part of the host country to protect adequately the foreign investor's intellectual property rights. Putting aside the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights, which for most developing countries will not go into effect for many years, the existing international instruments governing patent and trademark mostly require a host country only to not discriminate against foreign property holders.<sup>15</sup> A state that fails to recognize any patent rights in, for example, pharmaceuticals, whether foreign or domestic, honors its international obligations even as it frustrates foreign investors. Yet

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export activity must suffer.

11. Trade Act of 1974 § 301(d)(3)(A), 19 U.S.C. § 2411(d)(3)(A).

12. Trade Act of 1974 § 301(a)(2)(B)(v), 19 U.S.C. § 2411(a)(2)(B)(v); *see also id.* §§ 301(a)(2)(A)–(B), 19 U.S.C. §§ 2411(a)(2)(A)–(B).

13. *See id.* § 301(b)(2).

14. *See* 19 U.S.C. § 2411(d)(3)(A).

15. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994).

the United States has used Section 301 to bully Brazil, Korea, Argentina, Thailand, India, the Republic of China, and the People's Republic of China, *inter alia*, into giving greater protection to U.S. intellectual property owners.<sup>16</sup>

Title III in general, and in particular the 1988 amendments that limit the Trade Representative's discretion not to invoke sanctions for unilaterally determined violations, provoked strong protests in both the international and academic communities. Economic liberals, especially those associated with the GATT Secretariat, attacked these changes as misguided at best, and as, in all likelihood, a smokescreen for protection.<sup>17</sup> In today's world of free flows of goods, capital, and people, the argument went, a nation seldom acknowledges that it has erected trade barriers to serve particular local interests. Rather, a nation must justify protection by pretending that it is doing the opposite. Cloaking protection in the guise of fighting unfair trade barriers, if permitted, would erode the progress made since World War II in lowering tariffs and other national impediments to the world economy.

Institutional internationalists have a different objection. The success of the world economy depends on the development of multilateral institutions that can rise above national self interest. Title III undermines these developments because it competes directly with GATT dispute resolution. Using the terminology of European Union constitutional law, Title III represents an assertion by the United States of *Kompetenz Kompetenz*<sup>18</sup> over the rules of international business. This variant of the old nullification doctrine cuts the heart out of the multilateral system, just as John C. Calhoun had hoped to retard U.S. constitutional development.<sup>19</sup> The assertion is all the more offensive because the world's only superpower makes it.<sup>20</sup>

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16. See sources cited *supra* note 9.

17. See, e.g., AGGRESSIVE UNILATERALISM 49–89, 261–65 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (collecting scholarship critical of Section 301).

18. See generally J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (stating that the European Court of Justice “has the ‘Kompetenz Kompetenz’ in the Community legal order, i.e., it is the body that determines which norms come within the sphere of application of Community law”).

19. See generally COLUMBIA ENCYCLOPEDIA 422–23, 1983 (5th ed. 1993) (discussing the nullification doctrine and its most vocal proponent, John Calhoun).

20. See, e.g., Thomas O. Bayard, *Comment on Allan Sykes' “Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301,”*

Almost the only dissenter from this consensus is Alan Sykes.<sup>21</sup> He recognizes that nothing in the language of Title III prevents the United States from using Title III to mask protectionism.<sup>22</sup> But he predicts that interest-group politics will produce a less undesirable outcome.<sup>23</sup> He expects that alliances of exporters and domestic consumers seeking to expand liberalization will prevail more often than domestic producers in failing industries seeking protection.<sup>24</sup> And, he argues, if employed for its stated purpose of strengthening the global economy, Title III could play a constructive role.<sup>25</sup>

With respect to explicit violations of international law, Sykes argues that Title III may bolster rather than detract from multilateral dispute resolution by giving the U.S. a means of enforcing claims that multilateral institutions have upheld.<sup>26</sup> As for the more open-ended prong of Section 301, it permits the United States to implement implicit bargains with foreign governments.<sup>27</sup> Some of those governments might face constitutional or political obstacles to making explicit commitments concerning imports and foreign investment. In particular, Sykes envisions a niche use of Title III with respect to developing countries eligible for the Generalized System of Preferences (GSP).<sup>28</sup> Countries that receive nonreciprocal tariff concessions under this program have less of an incentive to liberalize their economies, because GSP status already gives them all the rewards that their trading partners can offer. Title III sanctions fill this gap by permitting negative actions against countries that abuse their developing status to obtain entry to foreign markets while doing too little to promote structural reform in their domestic economies.

The theoretical foundation for Sykes' benign predictions draws

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8 B.U. INT'L L.J. 325 (1990).

21. See generally Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263 (1992) [hereinafter *Constructive Unilateral Threats*]; Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301 (1990) [hereinafter "Mandatory" Retaliation].

22. See *Constructive Unilateral Threats*, supra note 21, at 264–65.

23. See "Mandatory" Retaliation, supra note 21, at 310–12.

24. See *id.* at 302, 324 n.6; *Constructive Unilateral Threats*, supra note 21, at 264–65.

25. See *Constructive Unilateral Threats*, supra note 21, at 266.

26. See *id.* at 285–87.

27. See *id.* at 287–88.

28. See *id.* at 301–02.

on game theory. One of the issues that game theory explores involves coordination problems, defined as situations where both sides in a game would benefit from coordinated behavior but do not have a credible means of guaranteeing cooperation.<sup>29</sup> The well known prisoners' dilemma illustrates the issue. Each suspect is questioned separately and offered leniency in return for a confession implicating the other. Each knows that, if the other holds out, he also will be better off refusing to confess, but that if the other confesses he will be much worse off if he remains silent. Absent some means of coordinating their actions, each will confess.

One of the more robust solutions to the prisoners' dilemma is the tit-for-tat strategy. In situations where the game is played more than once, a player can commit (and demonstrate the commitment through his behavior) to a bifurcated strategy. He will take the cooperative course (not confess) initially and then only so long as the other player similarly cooperates. If the other player defects (confesses), he will retaliate with an exactly proportionate defection. Computer simulations have verified the hypothesis that, in an environment where the game is played many times and the final game is not in sight, the tit-for-tat approach provides a stable means of promoting cooperation even where players cannot make credible advance commitments to each other.<sup>30</sup>

In Sykes' view, Title III can be simply a means for implementing the tit-for-tat strategy.<sup>31</sup> It permits the Trade Representative to respond proportionately to defections from explicit or implicit norms in trade and investment relations.<sup>32</sup> And tit-for-tat should work for the United States, both because it faces many potential defections, thus having ample opportunities to demonstrate a commitment to this strategy, and because the process is ongoing with no end in sight, thereby eliminating end-game issues. To be sure, nothing in Title III forces the Trade Representative to take this course, but then nothing in the statute precludes the tit-for-tat strategy.

The record to date suggests that the critics' worst fears have not been realized and that the benign interpretation of Title III is, at a

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29. See *id.* at 272-75; "Mandatory" Retaliation, *supra* note 21, at 305-07.

30. See "Mandatory" Retaliation, *supra* note 21, at 307-10; *Constructive Unilateral Threats*, *supra* note 21, at 276-77.

31. See "Mandatory" Retaliation, *supra* note 21, at 310-15.

32. See *id.* at 310-23.

minimum, plausible. The United States for the most part has used this legislation to make productive threats that encourage change in other nations' practices, rather than as a basis for erecting trade barriers.<sup>33</sup> Seldom has the Trade Representative miscalculated about the efficacy of sanctions as an inducement to produce the desired change. In the few cases where the Trade Representative has used Title III to bar imports, thus harming domestic consumers, the sanctions did not benefit the kinds of industries that normally seek protection.<sup>34</sup> In no case has the Trade Representative used Title III in the face of a conclusion by a multilateral dispute body that the United States had no claim.<sup>35</sup>

## II. SPORADIC UNILATERALISM—HELMS-BURTON WITHOUT TEARS

Title III of the Trade Act of 1974 provides an organized, systematic, focused, and government-controlled mechanism to respond to perceived failures on the part of other governments to honor their obligations with respect to the world economy. The Helms-Burton legislation similarly responds to an urge to hold foreign states to what the United States considers acceptable commercial standards, but in other respects it differs significantly from the earlier law. Rather than addressing foreign lapses as a global matter, the legislation focuses on a particular transgression, namely expropriations carried out by Castro's regime after he came to power in 1959. Rather than concentrating on the transgressing government, the legislation applies to all states that condone what Cuba did and are in a position to do something about it. Finally, rather than putting the power to act in an arm of government, the legislation allows private persons and their legal representatives to control the sanctions.

The Helms-Burton legislation does many things, but what inter-

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33. See *Constructive Unilateral Threats*, *supra* note 21, at 316–17. For descriptions of the cases where the Trade Representative has invoked Title III up to the end of 1994, see BAYARD & ELLIOTT, *supra* note 9, at 355–465. For an update through June 1996, see United States Trade Representative, *supra* note 9.

34. See Canadian Exports of Softwood Lumber (301–87), 56 Fed. Reg. 58,944 (1991); Iccle Seafoods (301–55), 53 Fed. Reg. 33,207 (1988); Withdrawal of Increased Rates of Duty on Certain Pasta Articles from the European Economic Community, 51 Fed. Reg. 30,146 (1986); Industrial Union Dep't, AFL-CIO (301–32), 47 Fed. Reg. 42,059 (1982).

35. See sources cited *supra* note 9.

ests me most is its cause of action for victims of Cuba's revolutionary confiscations. Section 302 of the Act states that "any person" who "traffics" in property confiscated by the Cuban government after Castro took over will be liable in money damages (in some circumstances trebled) to any U.S. national who "owns or claims" that property.<sup>36</sup> This provision must be read in conjunction with the International Claims Settlement Act, which gave only persons who were U.S. nationals at the time of those confiscations a mechanism for asserting claims against the Cuban government.<sup>37</sup> Section 302(a)(5) of the Libertad Act in effect treats decisions of the Foreign Claims Settlement Commission as *res judicata* and regards claims that could have been filed before that body but were not as time-barred.<sup>38</sup> What remains are claims by persons who did not have the right to file before the Commission, namely persons who were not U.S. nationals when Castro seized their property. Thus under the Act, two kinds of potential plaintiffs exist: (1) persons who were U.S. nationals when the Castro regime took their property and availed themselves of the Foreign Claims Settlement Commission to reduce their claims to something like a judgment; and (2) persons who were not U.S. nationals at the time of the confiscation but have since assumed that status and may or may not have invoked any legal process to seek redress. The latter class comprises almost entirely people who were Cuban nationals at the time that they lost their property. And for the most part, the property that these people lost was real estate.

The Act empowers the President to suspend the operation of Section 302 for successive six-month intervals, an authority that President Clinton has exercised continuously since Congress enacted the legislation.<sup>39</sup> The President has represented to the E.U. that he will keep Section 302 in limbo as long as the E.U. holds off prosecuting its complaint against the Act before the WTO Dispute Resolution

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36. LIBERTAD Act § 302(a)(1), 22 U.S.C.A. § 6082(a)(1).

37. See 22 U.S.C. § 1643c(a) (1994).

38. See LIBERTAD Act § 302(a)(5), 22 U.S.C.A. § 6082(a)(5).

39. See *id.* § 306(b), 22 U.S.C.A. § 6085(b); President's Message to Congress Reporting on Payments to Cuba, 33 WEEKLY COMP. PRES. DOC. 1314 (Sept. 15, 1997); Statements on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 33 WEEKLY COMP. PRES. DOC. 1078 (July 21, 1997); 33 WEEKLY COMP. PRES. DOC. 3 (Jan. 6, 1997); 32 WEEKLY COMP. PRES. DOC. 1265 (July 22, 1996).

Body.<sup>40</sup> Moreover, the Act terminates all rights under Section 302 upon the determination of the President that a democratically elected government has achieved power in Cuba.<sup>41</sup> Thus, it is conceivable that no cause of action under Section 302 ever will arise, if presidential suspensions continue until the inevitable overtakes the Castro regime. But it is also possible that Castro will outlast the patience of the current President or his successor; after all, he already has survived the tenures of Presidents Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan, and Bush. For present purposes, we must assume Section 302 might some day go into effect.

Why does the nationality of a victim of expropriation matter for purposes of international law? The question is rich and deeply contested. Within the swirl of controversy, one may identify at least six distinct positions, only some of which assign significance to the victim's nationality: (1) At one extreme, some revolutionary regimes have asserted that the determination of ownership of domestic property is inherent in state sovereignty and that international law may not limit this power in any way.<sup>42</sup> (2) A more modest version of this position is that customary international law does not address the issue of confiscation, but that states remain free to contract away their freedom to confiscate through treaties and similar commitments.<sup>43</sup> (3) Alternatively, some countries that host foreign investment acknowledge the existence of a minimal obligation, independent of any treaty commitments, to treat foreign owners of property no worse than they do their own nationals.<sup>44</sup> (4) Some countries whose nationals invest capital abroad have maintained that international law contains a duty not to confiscate the property of foreigners except in a nondiscriminatory fashion, with due process and

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40. See Bruce Barnard, *E.U. Approves Accord with U.S. over Cuba, but Tensions Remain*, J. COM., Apr. 17, 1997, at 2A.

41. See LIBERTAD Act § 302(h)(1)(B), 22 U.S.C.A. § 6082(a)(5).

42. This seems to have been Libya's position in *Texas Overseas Petroleum Co. v. Libyan Arab Republic*, 17 I.L.M. 1 (Int'l Arb. Trib. 1978). See also Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974); Permanent Sovereignty over Natural Resources, G.A. Res. 317, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9400 (1973).

43. This is one plausible interpretation of the arbiter's decision in *Texas Overseas Petroleum Co.*, 17 I.L.M. 1.

44. This is the Calvo doctrine. See PAUL B. STEPHAN ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS* 572-73 (2d ed. 1996).

full compensation.<sup>45</sup> (5) An extension of the foregoing position is that states also may commit themselves by treaty not to confiscate the property of anyone, its own nationals included, except in a non-discriminatory fashion, with due process and full compensation.<sup>46</sup> (6) Finally, the most extreme position in favor of property rights would hold that international customary law embraces the principle of nonconfiscation except in accordance with fair standards, due process and full compensation, independent of any treaty commitment. The Act contradicts all but the last position.

Complicating the position of the United States is the issue of retroactivity in international lawmaking. The Act reaches confiscations that took place in the late 1950s and early 1960s. One would have a hard time maintaining that a custom then existed that forbade a state from confiscating its nationals' property located within its territory. U.S. judicial precedent holds to the contrary, and no other contemporary authority presents itself.<sup>47</sup> So even if, in today's post-communist world, one might detect the emergence of a customary rule along the lines of the U.S. position, one could not credibly claim that this custom covers the seizures for which Section 302 proposes compensation.

The Act might still pass muster under international law, however, if one could demonstrate that no treaty or custom forbade one country from regulating property rights held by its nationals in another country's territory. Here, however, the venerable principle of comity presents an obstacle. As with the rules governing confiscation, no clear consensus exists concerning the content and boundaries of the comity principle and the concept of territoriality on which it rests. But almost everyone accepts that, as a matter of customary international law, a state has the right to specify property rights in tangible assets located in its territory, and that other states have a duty to accept that specification *unless* the specification itself violates international law.<sup>48</sup> And no one quarrels with the

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45. This is the position articulated by the respondent in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 433 (1964).

46. See *Lithgow v. United Kingdom*, 8 Eur. H.R. Rep. 329, 397 (1986).

47. See *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397-98 (5th Cir. 1985); cf. *United States v. Pink*, 315 U.S. 203 (1942) (implementing an executive agreement recognizing the legitimacy of Soviet confiscations of property located outside Soviet Union territory).

48. See *STEPHAN ET AL.*, *supra* note 44, at 560.

notion that, whatever ambiguities otherwise might complicate application of the territoriality concept, real estate and its appurtenances are located in the state that has sovereignty over their location.

Of course, if assets seized by Cuba later were to find their way to U.S. territory, the same concept of territoriality might allow the United States to redetermine their ownership. But unlike earlier legislation involving Cuban expropriations, the LIBERTAD Act does not provide a rule of ownership only with respect to property currently found in the United States. By creating a damages action, the Act affects the rights and duties of putative owners who bring themselves within the scope of U.S. jurisdiction, even if the property in dispute never leaves Cuba.

Assume, for example, that Northern Telecom, Canada's principal telecommunications company, rents land from the Cuban government as part of its operations in that country. Assume further that the government seized that land from a Cuban national during Castro's takeover. Further assume that the victim of that confiscation emigrated to the United States and has assumed U.S. nationality. Section 302 of the LIBERTAD Act would permit the victim to sue Northern Telecom in a U.S. court for the value of the property, and U.S. law generally would allow a successful plaintiff to satisfy a judgment with any property of the defendant found within the court's jurisdiction. Thus, any assets that Northern Telecom might have in the United States would be subject to a U.S. court's determination of who owned the Cuban land.

At first blush, then, the LIBERTAD Act appears to violate international law with respect to an important subset of transactions to which it applies. It seeks to upset property rights in land seized from Cuban nationals by the Cuban government nearly forty years ago. The comity principle seemingly obligates the United States to accept Cuba's decision to seize the land unless that seizure violated international law, and no rule of international law widely recognized at the time of the seizure would have forbidden what Cuba did.

The legislative boilerplate to the LIBERTAD Act seeks to justify the statute by referring to the "effects" test for extraterritorial jurisdiction.<sup>49</sup> This principle, asserted early on by the United States and

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49. See LIBERTAD Act § 301(9), 22 U.S.C.A. § 6081(9) (West Supp. 1997).

more recently embraced by the European Union, authorizes a state to regulate conduct outside its territory if that conduct has a substantial and intended effect on people or things within its territory.<sup>50</sup> But, as applied by the Act, the “effects” argument seems a naked bootstrap. It rests on the assumption that anyone who suffers an economic injury anywhere in the world, and later comes into the United States, suffers an ongoing injury that constitutes a cognizable effect under international law. Such an expansive interpretation robs the test of any constraining consequences. In a case under the U.S. securities laws, Henry Friendly put it succinctly. When faced with an argument that any instance of fraud anywhere in the world raises the cost of capital for U.S. firms, he responded that U.S. law should not apply “where acts simply have an adverse effect on the American economy or American investors generally.”<sup>51</sup> If the comity principle is to have any life at all, this application of the “effects” test must fail.<sup>52</sup>

There remains one strategy for salvaging the Act. Even if Cuba's initial seizure of its nationals' property did not violate international law at that time, ratification of such seizures at a later date may. A third party who acts as if Cuba rightfully seized this property perpetuates and compounds the injury. One might regard such behavior as an independent action to which today's evolved standards might apply. Neither comity nor the attenuation of the effect on the United States should require the United States to respect contemporary conduct that transgresses international norms now in force.

Take another look at the hypothetical claim against Northern Telecom. Suppose that the land now used by Northern Telecom previously belonged to ITT, a U.S. corporation, at the time of the confiscation. Further assume that Northern Telecom used the land to generate telecommunications revenues that customers paid into

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50. See *id.*; RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987); cf. *In re Wood Pulp Cartel*, 1988 E.C.R. 5193.

51. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir. 1975).

52. See also Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act: Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 430-32 (1996). But see Brice M. Claggett, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Continued: A Reply to Professor Lowenfeld*, 90 AM. J. INT'L L. 641, 643 (1996) (arguing that any effect is sufficient if all other states' interests rest on a violation of international law).

an account maintained by Northern Telecom at a New York bank. In 1959 most developed countries seemed to accept a customary norm that would have forbidden Cuba's lawless and uncompensated expropriation of ITT's property and recognized the right of the United States to intercept the proceeds of that seizure. During the early 1970s, for example, German and French courts provided some support for the efforts of the foreign victims of Chile's Allende regime to intercept proceeds from the sale of copper produced in confiscated mines.<sup>53</sup>

One could not find much authority for remedying unlawful confiscations through tort damages rather than restitution, but the two concepts seem sufficiently related to justify the leap.<sup>54</sup> In a world in which services, rather than tangible products, have assumed a larger share of global economic life and currency controls largely have disappeared among the developed countries, it seems excessively formalistic not to recognize the fungibility of money. Thus, ITT's hypothetical claim against Northern Telecom should not turn on whether customers paying for services originating in Cuba pay money into U.S. bank accounts. It should be enough to show that Northern Telecom made money out of its use of the Cuban property and that it had assets in the United States.

Look what the last argument accomplishes. By maintaining that remedies for confiscations that violate international law may be *in personam*, and not only *in rem*, it expands significantly the power of a state to put foreign-owned assets at risk. A country representing aggrieved citizens now has to show only that its nationals suffered an illegal confiscation and that the beneficiary of that confiscation has come into its jurisdiction. Suddenly the ambitious claims implicit in Section 302 seem much closer to accepted practice.

The remaining gap involves two issues. First, Section 302 punishes flagrant exploiters of confiscated property with super-compensatory damages. Second, Section 302 treats as illegal all lawless and uncompensated confiscations, not just those directed at

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53. See *Sociedad Minera El Teniente, S.A. v. Aktiengesellschaft Norddeutsche Affinerie*, 20 AWD 410 (Hamburg Landgericht 1974) (F.R.G.), translated in 13 I.L.M. 1115 (1974); *Braden Copper Co. v. Groupement d'Importation des Metaux*, [1973] J.D.I. 227 (Fr.), translated in 12 I.L.M. 182 (1973).

54. Cf. *Republic of Haiti v. Duvalier*, 2 W.L.R. 261, 270 (Eng. C.A. 1989) (discussing the distinction between proprietary and money claims in action to recover assets stolen from nation).

foreigners. Treating each aspect as valid adds something to contemporary international law, but neither assertion is completely novel.

Consider first the treble damages. For most of the post-World War II period the United States has stood opposed to its major trading parties in its insistence on the propriety of private claims for punitive damages to deter economic misconduct with international implications. The justification of the U.S. position rests on the argument that for some kinds of harmful activity, only supercompensatory damages will effectively deter a wrongdoer.<sup>55</sup> If a state otherwise has the authority to regulate the behavior in question, then surely it has the right to do so effectively. The rejoinder contends that supercompensatory damages operate as a delegation to private litigants of governmental power to criminalize behavior, and that the test for criminalization of extraterritorial conduct is more restrictive than that for the application of private law.<sup>56</sup> There are principled arguments on either side of this debate, but that is exactly the point: the treble damages rule embedded in the Act represents a legitimate application of a position on international law that the United States has conscientiously maintained since the end of World War II.

Next, reflect on the nature of an individual's right not to have his sovereign seize his property without legitimate reasons, due process, or full compensation. The United States has set an example for the rest of the world by using the Takings Clause of the Fifth Amendment as a mechanism for regulating its own confiscations in a way that protects domestic and foreign property holders alike.<sup>57</sup> The basis of this practice is not international obligation, but rather a conception of the fundamental relationship between sovereign and subject in a just society. Since its founding, the United States has regarded the protection of property as a human right. We may not have spoken of this right as a universal obligation binding on all states, but then it is only in the post-war period that we have begun

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55. For the canonical articulation of the theoretical underpinnings of this argument, see Robert Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 90 (1982).

56. *Cf.* *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] App. Cas. 547, 612 (appeal taken from C.A.).

57. *Cf.* *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (allowing a foreign corporation to obtain just compensation from the United States for wartime requisitioning).

to conceive of such rights as having an international dimension.<sup>58</sup>

The European experience is instructive here. The European Convention on Human Rights sought to codify the post-war understanding of the minimal obligations all decent states owe their citizens. The European Court of Human Rights in turn has interpreted an appendix to this Convention as requiring a signatory state to provide full compensation when it confiscates its citizens' property.<sup>59</sup> On one level, this ruling indicates only that states may agree by treaty to protect the property of their own citizens. At a deeper level, however, one might read the European experience as a tacit endorsement of the universality of the principles that undergird the U.S. Constitution's Takings Clause.

Suddenly the argument that the Act violates international law becomes more problematic. We have a principle that the United States has adhered to throughout its history, which in some abstract fashion we have believed to inhere in all decent societies. Other countries have come around to the U.S. position, albeit through treaty interpretation rather than by customary practice. Until the LIBERTAD Act, we have not backed up our conviction with clear and specific sanctions, but neither can one find evidence of clear disavowals of the property right principle by the United States.

A forward look at international law gives even greater support for the claim that the LIBERTAD Act may prod the international community into a widening and strengthening of the multilateral system governing investment. Partly in response to this legislation, the members of the OECD are negotiating the Multilateral Agreement on Investment (MAI).<sup>60</sup> Unlike earlier investment treaties, this agreement may contain language that goes beyond the duty not to confiscate and instead obligates the signatories not to recognize improper expropriations by other states.

### III. DEFECTIONS AND DISCIPLINE

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58. Cf. Brice M. Clagett, *Title III of the Helms-Burton Act Is Inconsistent with International Law*, 90 AM. J. INT'L L. 434, 438-39 (1996) (suggesting that confiscations may implicate international human rights law).

59. See *Lithgow v. United Kingdom*, 8 Eur. H.R. Rep. 329 (1986).

60. See *The Multilateral Agreement on Investment, OECD Policy Brief No. 2-1997* (visited Feb. 25, 1998) <[http://www.oecd.org/publications/Pol\\_brief/9702\\_pol.htm](http://www.oecd.org/publications/Pol_brief/9702_pol.htm)>.

The prior discussion of Title III of the Trade Act of 1974 sets out the analytical framework for evaluating the more extreme, or at least less disciplined, authority created by the LIBERTAD Act. We might begin by breaking down the inquiry into two components. First, will Section 302 of the LIBERTAD Act, if it ever takes effect, promote or retard the dual desiderata of liberal trade and investment and respect for law? Second, will that provision and the precedent it seeks to establish undermine or bolster the development of a strong multilateral regime for promoting more and better international trade and investment?

Who wins if Section 302 were to take effect, who loses, and how likely is it that the gains would exceed the losses? At a first iteration, it seems clear that former owners of Cuban assets (and their lawyers) plus domestic producers who compete with foreign firms that traffic in Cuban assets would benefit, while traffickers and their customers would suffer. If we may assume that the LIBERTAD Act may have some effect on future conduct, however, the equation changes. Firms likely to invest abroad would gain from the added security attached to their property rights, while firms interested in doing business with revolutionary regimes would experience greater insecurity.

The last point requires some elaboration. The principle underlying Section 302 promotes two different kinds of instability. The first and more obvious arises when firms do business with regimes whose confiscations have been under continuous attack since the time of seizure. Such transactions now create some exposure to U.S. liability, depending on the likelihood that the United States will extend the LIBERTAD Act's principle to similar situations (for instance, the subjugation of South Vietnam in 1975, or the Iranian revolution of 1979) and that the victims of seizures will migrate to the United States. The second instability involves old and dormant property claims, such as those arising from the Bolshevik takeover in Russia or, even more farfetched, the expropriation of Tory property in early post-colonial America. How selectively will states apply the emerging principle opposing confiscations, and what will it take to treat claims as lapsed?

Consider an analogy from the law of property. Most societies prohibit theft and, at a minimum, require the thief to compensate the owner by disgorging the illicit gains. But the world's legal systems employ a variety of rules to determine which claimant prevails

where the thief has dropped out of the picture and a dispute has arisen between those who can trace their interest back to the victim and those who have acquired possession of the property without culpability for the original theft.<sup>61</sup> The core problem is that most owners acquire their rights by purchase, in the broadest sense of the term, and that any rule that protects former owners from subsequent losses impairs the rights of subsequent purchasers. And a desire to bolster the institution of property does not lead *a priori* to any systematic preference for old owners or new purchasers.

States that seize private property improperly and without compensation stand in the shoes of a thief, but what does it take to convert later possessors into innocent takers? States may have a continuous legal identity, but their governments change over time. At some point, too much has happened to justify holding a later regime, and those who transact with it, culpable for the transgressions of a distant predecessor. Once one acknowledges that culpability for a confiscation need not be eternal, one has to recognize that under some circumstances an ongoing obligation to compensate the victim may undermine the goals and purposes, including predictability and stability, that the institution of property presumably serves.<sup>62</sup>

The LIBERTAD Act implies one response to the problem of open-ended liability. The Act terminates all rights to compensation upon the determination by the President that “a democratically elected government in Cuba is in power.”<sup>63</sup> The United States seems to reject the “sins of the fathers” principle or, put differently, seems willing to let old wrongs go uncorrected once a state has embraced political structures that make future confiscations unlikely. One might generalize this concept to suggest an outer limit to the principle underlying the U.S. assertion of a duty to compensate victims of improper expropriations.

As a matter of interest-group politics, the limitation implied in the LIBERTAD Act also makes sense. Past victims who have emigrated to the United States stand the best chance of deriving bene-

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61. See, e.g., Saul Levmore, *Variety and Uniformity in the Treatment of the Good Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987).

62. For an extensive discussion of this problem in the context of the former socialist states, see JON ELSTER ET AL., *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* (forthcoming 1998).

63. 22 U.S.C.A. § 6082(h)(1)(B) (West Supp. 1997). Such termination will not affect pending suits. See *id.* § 6082(h)(2).

fits from their former homeland once a liberal democratic regime has come to power. Stale claims over past misconduct may impede exploitation of these opportunities.

These issues acquire a different salience if one considers them from the perspective of regime building. Does the LIBERTAD Act retard the development of a multilateral system for protecting and promoting international trade and investment, or, following Sykes' analysis of Title III of the Trade Act of 1974, does it contribute to the development of multilateral standards? Is it an example of destructive or constructive unilateralism?

As an initial matter, one should put aside the question of whether the LIBERTAD Act was intended to be a useful contribution to the development of international law. The visible political impetus for the legislation was narrow and sordid. Those who fled Castro and their families form a concentrated and cohesive interest group in an electorally significant state, and during a presidential election year both parties competed for their favor. This context both explains why the Act does not apply to other regimes' confiscations and supports an argument that the legislation may do nothing more than tax the system of international trade and investment for the benefit of Cuban expatriates. But the legislation's history does not exclude the possibility that the politically influential exiles embraced an important general principle in the course of pursuing their parochial concerns, and that the Act might have general benefits for the development of the world economy to which the group seeking the legislation was indifferent.

Can the LIBERTAD Act bolster the WTO dispute resolution process by serving as an inducement to the settlement of disputes over past confiscations? The case against this proposition seems clear enough. Once the President agrees to let LIBERTAD Act litigation proceed, the government has no control over the scope or severity of the costs imposed on persons who deal with confiscated property. Depending on the greed and ambition of private plaintiffs and their lawyers, the penalties could be enormous. The game theory argument for unilateral sanctions rests on the concept of a response that is symmetrical with the costs inflicted by the other player's defection. The damages portion of the LIBERTAD Act seems more like a nuclear weapon launched against a minor border incursion.

Nor does the LIBERTAD Act stand as anything but an implicit threat to defectors other than Cuba. By its own terms the legislation

applies only to a situation where governmental misconduct, for the most part, occurred nearly four decades ago. The lesson that future confiscatory regimes are likely to learn is either not to let their exiles gather in the United States, or not to let them gain too much concentrated and cohesive power if they do land on our shores.

The positive case for the future of the LIBERTAD Act is more difficult to make, but not impossible. It rests ultimately on arguments about the need not to give multilateral institutions a monopoly over the development of international norms. In particular, it justifies actions that constitute an excessive response to a too-narrowly-defined problem as a variation of the "puny prince" strategy for promoting cooperation under conditions of uncertainty.

The first part of this argument draws on my earlier analysis of the political economy of international lawmaking.<sup>64</sup> In brief, bodies such as the WTO do not have to account fully for their actions. The organization comprises executive branches that, individually, can face down their parliaments with take-it-or-leave-it deals, hiding behind what I call the veil of collective mandate.<sup>65</sup> They also have some incentive to produce legal rules that either are vacuous or serve special interests.<sup>66</sup> In addition, the organization, and especially its dispute resolution body, may have a tendency to engage in institutional self-aggrandizement and to produce legal rules that support a process of broadening bureaucratic competency.

How credible are these concerns? With respect to the institutional biases of the WTO organs, the scant evidence we have at present is suggestive but hardly conclusive. The WTO dispute resolution process now has a two-year history. As of January 1998, the Dispute Resolution Body has produced twelve panel decisions, in all of which it found grounds for providing some form of relief.<sup>67</sup> The Appellate Body has issued opinions in ten disputes, all of which have either upheld the panel decision at issue or ruled that the Uruguay Round agreements entitled the aggrieved party to greater relief than the

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64. See generally Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1997).

65. See *id.*

66. See *id.*

67. The decisions of the panels and Appellate Body are published on the WTO's Internet site at *Overview of State-of-Play of WTO Disputes* (visited May 27, 1998) <<http://www.wto.org/dispute/bulletin.htm>>.

panel had allowed.<sup>68</sup>

When a dispute resolution tribunal possesses a track record and its process generates cumulative and symmetrical costs to the parties, one normally would expect decided cases to divide evenly between relief seekers and relief opposers. This expectation rests on the assumption that parties would choose to settle disputes that had predictable outcomes, rather than taking such cases through the entire costly process.<sup>69</sup> The extraordinary success of relief seekers in the WTO Dispute Resolution Body clearly does not comport with this prediction.

We might interpret the WTO's track record as reflecting one of three circumstances. First, the number of cases may be too small to present a significant pattern. Second, the lack of an institutional history may have lulled WTO members into an overly conservative interpretation of their rights, and as a result the Dispute Resolution Body has been presented with only clear violations. Third, the Body may wish to send a signal to the members to make more aggressive claims about the scope of their WTO rights. Only the last scenario validates the interest-group hypothesis. But one can argue, at a minimum, that this evidence provides no comfort to those who might maintain that the Dispute Resolution Body will not become a self-aggrandizing bureaucracy.

Why would institutional aggrandizement not lead the WTO to embrace the ambitious principle of strong property rights implicit in the LIBERTAD Act? Two speculations suggest a response, if not a convincing answer. A consensus among WTO members may exist today that future confiscations should be avoided: exporters of capital want reassurance, and importers of capital want to attract investment. But this collective wisdom does not translate into a commitment to rectify old wrongs, especially if committed during the period when the United States supplied much of the direct foreign investment. The past is another country, and in this case especially so. New investors, the majority of whom are not U.S. firms, might tolerate a slightly greater risk of future confiscation if they can duck the obligation to compensate old U.S. owners. Hence, the United States may find itself outnumbered within the WTO when it seeks

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68. *See id.*

69. For a fuller development of this argument, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

to promote the rights of old property owners at the expense of new investors.

At first blush, it may seem that the WTO bureaucracy, including the Dispute Resolution Body, could just as easily expand its competence by constituting itself as a forum for vindicating the rights of old owners. But it seems more plausible to expect that it will not seek to expand its powers generally, but rather will specialize in its aggrandizement. Specialization makes it easier to develop a reputation on which future claims of authority may be based. Ambitious claims confined to areas of traditional competence are also less alarming than an assertion of authority over a new field. Other institutions, especially arbitration bodies, traditionally have dealt with the concerns of the dispossessed investor, while the WTO and its predecessor GATT organs historically have promoted free flows of trade. Thus, rather than holding itself out as the arbiter of all questions concerning international economic law, the Dispute Resolution Body more likely will stake out a more precisely defined territory and defend it fiercely. In this struggle the interests of old owners are likely to suffer.

Once one concedes that the WTO may need some external check on its decisionmaking to reduce the likelihood of a bias against the protection of victims of expropriation, the issue becomes what strategies might best correct these tendencies without creating an excessive threat to the benefits generated by a stable and organized multilateral system. Here the concept of the “puny prince” comes into play. Thomas Schelling originated the terminology of hostage taking to capture the idea that, under the right circumstances, holding assets captive can promote cooperation in pursuit of common benefits.<sup>70</sup>

Imagine a world where people acting collectively can achieve a common goal, but each actor has an incentive to chisel or otherwise default on his responsibility. One way each actor can demonstrate good faith, and therefore induce others to rely on his future cooperation, is to offer a hostage against his conduct. But such an offer exposes the hostage giver to the hostage taker's opportunism: the

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70. See Thomas O. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 300 (1956). Robert Scott originated the term “puny prince” to replace the politically incorrect “ugly princess” that previously existed in the literature. See Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 930 (1986).

taker might prefer keeping the hostage to cooperating with the giver. One way to reduce this risk is to give only an asset that the giver would greatly regret losing, but that the taker would prefer not to keep. Hence the puny prince: the giver does not want to lose a prince, no matter how inadequate, because that would harm the royal family, but the taker does not want to keep the prince because his puniness makes him worthless.

The LIBERTAD Act might be such a puny prince. Were the President ever to let Section 302 come into effect, the United States would suffer a costly rupture in its relations with some of its closest economic partners, in particular Canada and the European Union. A wide range of business relationships would suffer and retaliation likely would follow, with only a small number of former Cuban property owners coming out ahead. These costs make it unlikely that any President, no matter which party or professed ideology, will permit private litigants to hector multinational firms that do business with Cuba. At the same time, it seems plausible that most firms interested in investing in Cuba care greatly about access to the U.S. market. The chances that Section 302 may take effect may be small, but for these firms exposure to that risk still may be unacceptable.

Seen from this perspective, the LIBERTAD Act may serve as a healthy corrective to an overly cautious multilateral process. The threat that the President actually might allow enforcement of the private rights provisions may be sufficiently credible to force the WTO members to think seriously about the scope of property rights within the context of a growing global economy. At the same time, the members must appreciate that giving effect to Section 302 of the Act would cost the United States a great deal. They should infer that the United States would welcome compromises that would allow it to back off the threat without sacrificing the threat's credibility. Rather than wrecking the emerging multilateral regime for trade and investment, then, the Act may create the space for formalization and strengthening of an important component of an international system for supporting the global economy.

#### IV. CONCLUSION

We still are feeling our way through the post-Cold War world. There seems to be some agreement that the United States wields remarkable geopolitical power, yet remains exposed to the risks created by a robust and largely unmastered global economy. Many observers fear that the United States will respond to this paradox by lashing out with futile and destructive gestures, trying to substitute geopolitical suzerainty for economic power. For some, the LIBERTAD Act is an instance of self-destructive railing at the limitations on U.S. might that globalization implies.

I have sought to suggest a less pessimistic explanation for what the United States has done. Credible and nonopportunistic threats help to keep the international system honest. It is exactly the perversity of the LIBERTAD Act — that, if implemented, so many would suffer for the benefit of so few — that should give us hope. An important principle, central to the emergence of free trade and investment, lurks behind the naked interests that seem to drive the Act. We may yet see a renewed multilateral commitment to the protection of private property rights against the omnivorous state. And what the United States has done, parochial though it seems, yet may play a crucial role in that process.