COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURÍDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-14/96

RESOLUTION ON THE OPINION OF THE INTER-AMERICAN JURIDICAL COMMITTEE IN FULFILLMENT OF RESOLUTION AG/DOC. 3375/96 OF THE GENERAL ASSEMBLY OF THE ORGANIZATION OF AMERICAN STATES, ENTITLED "FREEDOM OF TRADE AND INVESTMENT IN THE HEMISPHERE"

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS the mandate contained in Resolution AG/doc.3375/96, approved by the General Assembly on June 4, 1996 during its XXVI regular period of sessions under the title "Freedom of Trade and Investment in the Hemisphere," instructed the Inter-American Juridical Committee "to examine and decide upon the validity under international law of the Helms-Burton Act ... as a matter of priority, and to present its findings to the Permanent Council ";

HAVING CARRIED OUT a complete, broad-ranging and detailed examination on this matter, taking into account the various viewpoints discussed during its consideration, and in accordance with conclusions reached,

RESOLVES:

1. To approve unanimously the Opinion of the Inter-American Juridical Committee that constitutes an Annex to this Resolution, issued in compliance with Resolution AG/doc.3375/96 of the General Assembly, adopted on June 4, 1996 during its XXVI Regular Period of Sessions, and entitled "Freedom of Trade and Investment in the Hemisphere";

2. To instruct the Chairman of Committee, in fulfillment of the above-mentioned Resolution AG/doc.3375/96, to forward this Resolution to the Permanent Council, by the hand of the Secretary-General of the Organization of American States, together with the Opinion of the Committee.

In a regular session held on 23 August 1996, this Resolution was approved unanimously in the presence of the following members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., Jonathan T. Fried, João Grandino Rodas, Luis Herrera Marcano, Alberto Zelada Castedo and José Luis Siqueiros.

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ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.67/96 rev. 5
23 August 1996
Original: Spanish

OPINION OF THE INTER-AMERICAN JURIDICAL COMMITTEE IN RESPONSE TO RESOLUTION AG/DOC.3375/96 OF THE GENERAL ASSEMBLY OF THE ORGANIZATION, ENTITLED "FREEDOM OF TRADE AND INVESTMENT IN THE HEMISPHERE"

INTRODUCTION

1. This Opinion is adopted pursuant to the provisions of Resolution AG/doc.3375/96 approved by the General Assembly on 4 June 1996 during its XXVI regular period of sessions and entitled "Freedom of Trade and Investment in the Hemisphere" (Annex A), by which it instructed the Inter-American Juridical Committee, during this period of sessions, "to examine and decide upon the validity under international law of the Helms-Burton Act [known as the "*Cuban Liberty and Democratic Solidarity Act - Libertad Act*"] ... as a matter of priority, and to present its findings to the Permanent Council."

2. The Committee understands that this Opinion, issued in accordance with the jurisdiction assigned to it by Article 98 of the Charter of the Organization,[1] has no binding effect on Member States or the organs of the Organization.

3. The Committee issues this Opinion on the basis of the following premises:

a) In the performance of its assignment the Committee did not intend to interpret or pronounce on the internal legislation of any Member State.

b) The expression "the legislation" used in this document refers to a law whose content is similar to that of the Helms-Burton Act.

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1. Article 98 (formerly Article 104): "The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters; to promote the progressive development and codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation."

c) The Committee understands that Resolution AG/doc.3375/96 adopted by the General Assembly is intended to safeguard the international public order of the hemispheric system. It is thus necessary to stress the prevalence of certain rules of international law in the inter-American system that should be respected by the juridical systems of Member States.

d) The Committee interpreted its mandate set forth in paragraph 1 of this Introduction as relating to the conformity of the legislation under examination with public international law. This has been identified with the rules of international law as alluded to in Article 38, paragraph 1 of the Statute of the International Court of Justice. However its application excludes those rules contained in instruments of a sub-regional or universal character to which not all States of the O.A.S. are party.

e) The Committee considered that the mandate received from the General Assembly did not require an opinion on bilateral issues between Member States, which is why it makes no statement on the specific measures adopted by the Government of the United States of America in relation to Cuba such as the embargo imposed for over three decades, while nevertheless noting that such measures raise legal questions in the light of the norms established in Articles 18 and 19 of the Charter of the OAS.

f) The Committee examined the provisions of the legislation covering matters such as the admission of aliens and activities with regard to international financial institutions. Regarding these matters the Committee did not deem it convenient to issue a statement, as it notes that there are legal mechanisms for settling any possible disputes regarding these issues. Nonetheless the Committee stresses that these matters may bring up questions of international law such as respect for human rights and the principle of *pacta sunt servanda*.

g) The Committee examined two principal areas of legal questions suggested by the legislation: the protection of the property rights of nationals and the extraterritorial effects of jurisdiction.

A. PROTECTION OF THE PROPERTY RIGHTS OF NATIONALS

4. The Committee considered that the enactment of the legislation in some cases and its possible application in others could have the juridical effect of:

a) Transforming the espousal [2] of a State-to-State claim under international law into a domestic legal claim asserted under internal law by a national against nationals of third States.

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2. The expression "*arrogación*" in the Spanish text is used as the equivalent to "*interposición diplomática*" (diplomatic interposition) which is also used when a State espouses a claim by a national.

b) Conferring the right to make such claims on persons who were not nationals at the time of the alleged loss.

c) Attributing responsibility for acts of a foreign State to private persons who might be nationals of third States.

d) Authorizing the determination of the quantum of compensation in a manner that could increase it to three times the loss caused by the act of expropriation.

e) Creating liability for a private defendant for the total value of an asset expropriated without taking into account the value of the "benefit" derived by him from its use or the claimed "loss" caused to the alleged original owner by such use.

f) Allowing claims that should be filed against a foreign State to be enforced by means of proceedings brought against the nationals of third States without endowing them with effective means to refute or contest the allegations against them or the third State in respect of the existence or the valuation of such claims, including on the basis of conclusive certifications issued by an internal administrative commission.

g) Confusing a claim for damages or restitution, based on nationalization, with an action *in rem* to claim wrongfully "confiscated property" and in addition with an action *in personam* for unjust enrichment from the use of such wrongfully "confiscated property" by any person subsequently involved in such use in a broad-ranging and indeterminate manner.

h) Creating liability for nationals of third States for the lawful use of expropriated property in the territory of the expropriating State or for the lawful use of property which does not itself constitute expropriated property.

5. The Committee considered the rules of international law applicable to diplomatic protection, State responsibility, and the minimum rights of aliens regarding the protection of property rights of nationals. In the Committee's view the following principles and rules are generally accepted by the Member States in this regard:

a) Any State that expropriates, nationalizes or takes measures tantamount to expropriation or nationalization of property owned by foreign nationals must respect the following rules: such action must be for a public purpose, non-discriminatory, and accompanied by prompt, adequate and effective compensation, granting to the expropriated party effective administrative or judicial review of the measure and quantum of compensation. Failure to comply with these rules will entail State responsibility.

b) The obligation of a State in respect of its liability for acts of expropriation consists of the restitution of the asset expropriated or adequate compensation for the damage caused, including interest up to the time of payment.

c) When a national of a foreign State is unable to obtain effective redress in accordance with international law, the State of which it is a national may espouse the claim through an official State-to-State claim. It is a condition for such espousal that from the time of the occurrence of the injury until the settlement of the claim the holder thereof must without interruption have been a national of the claimant State and not have the nationality of the expropriating State.

d) Claims against a State for expropriation of the property of foreign nationals cannot be enforced against the property of private persons except where such property is itself the expropriated asset and within the jurisdiction of the claimant State. Products grown or produced on such property do not under customary international law constitute expropriated property.

e) Any use by nationals of a third State of expropriated property located in the expropriating State where such use conforms to the laws of that State, as well as the use anywhere of products or intangible property not constituting the expropriated asset itself, does not contravene any norm of international law.

f) The nationals of foreign States have the right to due process of law in all judicial or administrative procedures that may affect their property. Due process includes the possibility of effectively contesting both the basis and quantum of the claim in a legal or administrative proceeding.

6. In the light of the principles and norms set out in paragraph 5. above the Committee considers that the legislation under analysis does not conform to international law in each of the following respects:

a) The domestic courts of a claimant State are not the appropriate forum for the resolution of State-to-State claims.

b) The claimant State does not have the right to espouse claims by persons who were not its nationals at the time of injury.

c) The claimant State does not have the right to attribute liability to nationals of third States for a claim against a foreign State.

d) The claimant State does not have the right to attribute liability to nationals of third States for the use of expropriated property located in the territory of the expropriating State where such use conforms to the laws of this latter State, nor for the use in the territory of third States of intangible property or products that do not constitute the actual asset expropriated.

e) The claimant State does not have the right to impose liability on third parties not involved in a nationalization through the creation of liability not linked to the nationalization or unrecognized by the international law on this subject, thus modifying the juridical bases for liability.

f) The claimant State does not have the right to impose compensation in any amount greater than the effective damage, including interest, that results from the alleged wrongful act of the expropriating State.

g) The claimant State may not deprive a foreign national of the right in accordance with due process of law to effectively contest the bases and the quantum of claims that may affect his property.

h) Successful enforcement of such a claim against the property of nationals of a third State in a manner contrary to the norms of international law could itself constitute a measure tantamount to expropriation and result in responsibility of the claimant State.

B. EXTRATERRITORIALITY AND THE LIMITS IMPOSED BY INTERNATIONAL LAW ON THE EXERCISE OF JURISDICTION

7. The Committee understands that the legislation would result in the exercise of legislative or judicial jurisdiction over acts performed abroad by aliens on the basis of a concept termed "trafficking in confiscated properties."

8. The Committee has also examined the applicable norms of international law in respect of the exercise of jurisdiction by States and its limits on such exercise. In the opinion of the Committee, these norms include the following:

a) All States are subject to international law in their relations. No State may take measures that are not in conformity with international law without incurring responsibility.

b) All States have the freedom to exercise jurisdiction but such exercise must respect the limits imposed by international law. To the extent that such exercise does not comply with these limits, the exercising State will incur responsibility.

c) Except where a norm of international law permits, the State may not exercise its power in any form in the territory of another State. The basic premise under international law for establishing legislative and judicial jurisdiction is rooted in the principle of territoriality.

d) In the exercise of its territorial jurisdiction a State may regulate an act whose constituent elements may have occurred only in part in its territory: for example an act initiated abroad but consummated within its territory ("objective territoriality") or conversely an act initiated within its territory and consummated abroad ("subjective territoriality").

e) A State may justify the application of the laws of its territory only insofar as an act occurring outside its territory has a direct, substantial and foreseeable effect within its territory and the exercise of such jurisdiction is reasonable.

f) A State may exceptionally exercise jurisdiction on a basis other than territoriality only where there exists a substantial or otherwise significant connection between the matter in question and the State's sovereign authority, such as in the case of the exercise of jurisdiction over acts performed abroad by its nationals and in certain specific cases of the protection objectively necessary to safeguard its essential sovereign interests.

9. The Committee examined the provisions of the legislation that establish the exercise of jurisdiction on bases other than those of territoriality, and concluded that the exercise of such jurisdiction over acts of "trafficking in confiscated property" does not conform with the norms established by international law for the exercise of jurisdiction in each of the following respects:

a) A prescribing State does not have the right to exercise jurisdiction over acts of "trafficking" abroad by aliens unless specific conditions are fulfilled which do not appear to be satisfied in this situation.

b) A prescribing State does not have the right to exercise jurisdiction over acts of "trafficking" abroad by aliens under circumstances where neither the alien nor the conduct in question has any connection with its territory and where no apparent connection exists between such acts and the protection of its essential sovereign interests.

Therefore, the exercise of jurisdiction by a State over acts of "trafficking" by aliens abroad, under circumstances whereby neither the alien nor the conduct in question has any connection with its territory and there is no apparent connection between such acts and the protection of its essential sovereign interests, does not conform with international law.

CONCLUSION

10. For the above reasons the Committee concludes that in the significant areas described above the bases and potential application of the legislation which is the subject of this Opinion are not in conformity with international law.

In a regular session held on 23 August 1996, this Resolution was approved unanimously in the presence of the following members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., Jonathan T. Fried, João Grandino Rodas, Luis Herrera Marcano, Alberto Zelada Castedo and José Luis Siqueiros.