Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act

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COMMENTS

VIOLATION OF INTERNATIONAL LAW
AND DOOMED U.S. POLICY:
AN ANALYSIS OF THE
CUBAN DEMOCRACY ACT

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It comes down to the strength of our belief in the power of the democratic idea. If we pursue a policy that cultivates contacts . . . promotes commerce to our benefit, we could help to create a climate for democratic change. No nation on earth has discovered a way to import the world's goods and services while stopping foreign ideas at the border. . . . We can advance our cherished ideas only by extending our hand, showing our best side, sticking patiently to our values.1

I. INTRODUCTION

On New Year’s Day 1959, Cuba’s President Fulgencio Batista fled the island. One week later, Fidel Castro marched triumphantly into Havana. Since then, nine U.S. Presidents “have maintained an invariable policy of more or less open hostility, as well as a fierce economic blockade, and have persistently tried to isolate Cuba politically and diplomatically—particularly from the rest of Latin America.”

The most recent solidification of this policy occurred when President Bush signed the Cuban Democracy Act (CDA) on October 23, 1992. The CDA tightens the present U.S. embargo against Cuba by reimposing a thirty-two-year-old trade ban which previously prevented U.S. foreign subsidiaries from trading with Cuba.

This latest step in U.S. foreign policy seeks “a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people . . . .”

Cubans and other United States nationals have hailed the CDA as the final phase in the long campaign of the United States to oust Fidel Castro and return democracy to Cuba. Other com-
mentators have praised it for eliminating the loophole\textsuperscript{10} in the present U.S. embargo, which allowed U.S. foreign subsidiaries to trade with Cuba.\textsuperscript{11}

This Comment maintains that the CDA is the latest of a series of irrational attempts by the United States to oust Fidel Castro and return democracy to Cuba. The United Nations General Assembly, as well as some of the United States' closest allies, have denounced the CDA as a violation of international law because it reimposes a ban on U.S. foreign-subsidiary trade with Cuba.\textsuperscript{12} Further, the CDA will have its harshest impact on the long-suffering Cuban population, not on the object of the embargo—the Cuban regime.\textsuperscript{13} This Comment concludes that the CDA, indeed, violates


10. This exception was not a loophole, but rather a conscious decision by the United States. Prior to the CDA, the United States banned all direct trade between U.S. companies and Cuba. 31 C.F.R. § 515.541 (1992). However, there was an exception for foreign subsidiaries trading with Cuba, provided they obtained a license from the Treasury Department. 31 C.F.R. § 515.559(a) (1992). The United States allowed these licenses because of harsh international criticism the United States received regarding its regulation of foreign subsidiaries when no licenses were available. See infra notes 47-65 and accompanying text.


international law. Further, it fails to achieve even its most fundamental policy objectives because it will either strengthen, rather than weaken, Castro's control over the Cuban people or lead to a state of anarchy.

II. HISTORICAL BACKGROUND

A. Genesis of the Embargo

Despite the fact that Castro came to power in 1959, the United States did not take its first steps toward an embargo until 1960. In May 1960, the United States ordered U.S. oil companies in Cuba to refuse to refine Soviet crude because they were concerned that Cuba was turning toward socialism. When the refineries refused to process Soviet oil, Castro responded by nationalizing the refineries. This nationalization and Cuba's growing connection with the Soviet Union caused President Eisenhower to take the first step toward the implementation of the U.S. embargo of Cuba.

On July 6, 1960, "President Dwight D. Eisenhower canceled the 700,000 tons of sugar remaining in Cuba's 1960 quota under the Sugar Act of 1948." Following the cancelation of the sugar quota, nearly all trade between the United States and Cuba ended, and a de facto economic embargo was created.

On February 6, 1962, President Kennedy imposed a formal trade embargo between the United States and Cuba, issuing Presidential Proclamation No. 3447. President Kennedy reasoned

15. There were several reasons for U.S. concern that Cuba was becoming socialist as early as 1960. First, Castro had come to power through a revolution, and in May, only five months after taking power, he carried out his promise of agrarian reform by passing the first Agrarian Reform Law, nationalizing approximately one-third of the "arable land in Cuba." Id. at 98. Second, in February of 1960, Soviet Foreign Minister Anastas Mikoyan visited Cuba and signed trade and aid agreements which led to Cuba and the Soviet Union establishing full diplomatic relations on May 8, 1960. Id.; see also Department Reports on Cuban Threats to the Western Hemisphere, 46 DEP'T BULL. 129 (1962) (discussing Cuba's extensive ties with the Sino-Soviet Bloc).
16. SEIS LEYES DE LA REVOLUCIÓN 49 (1976); see also BRENNER, supra note 2, at 98.
18. Id.
19. BRENNER, supra note 2, at 13.
20. Id.
that such an embargo was necessary because the Cuban government was at odds with the "principles and objectives of the Inter-American system," and Cuba's alignment with the Soviet powers posed a security risk for the United States as well as the Western Hemisphere.\textsuperscript{22}

\textbf{B. Legal Framework}

The legal authority for the embargo is from section 620(a) of the Foreign Assistance Act of 1961\textsuperscript{23} which provides that:

\textquote[\textbf{Inter-American Law Review}]{[n]o assistance shall be furnished under this Act to the present government of Cuba. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo on all trade between the United States and Cuba.}\textsuperscript{24}

Although the Act granted presidential authority to implement an embargo, it did not grant statutory authority for the accompanying regulations necessary to implement such an embargo.\textsuperscript{25} Presidential Proclamation No. 3447\textsuperscript{26} divided administrative responsibility for implementing the trade embargo between the Commerce Department, which controls exports of goods produced in the United States\textsuperscript{27} to Cuba,\textsuperscript{28} and the Treasury Department, which controls

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item See id.
\item [Goods produced in the United States include, "goods and technical data of United States origin, components of United States origin to be incorporated into goods assembled or manufactured abroad, and goods to be produced abroad from technical data of United States origin." Marlene Hammock, Comment, U.S. Prohibitions on Cuban Trade: Are They Effective?, 1 Fla. Int'l L.J. 61, 62 (1984) (citing Address by Stanley L. Sommerfield, Acting Director of the Office of Foreign Assets Control 4 (Apr. 25, 1974)).
\item The Commerce Department has control over the exportation of U.S. goods produced in the United States only. "The Commerce Department has no legal power to control goods or data produced abroad by subsidiaries or by other American-controlled firms, nor does it have power to control purely financial transactions." Stanley L. Sommerfield, Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba, 19 Bus. Law. 861 (1964). The Treasury Department has power over those transactions by "virtue of the authority delegated to the Secretary of the Treasury under Section 5(b) of the Trading with the Enemy Act, as amended (50 U.S.C. app. 5(b), and Executive Order No. 9193)." Id.
\item This Comment focuses on the Treasury Department regulations, and analyzes the effect of the CDA on U.S. foreign subsidiary trade with Cuba. For a discussion of the Commerce Department Controls, see Hammock, supra note 27; Peter J. Grilli et al., Legal Impediments to Normalization of Trade With Cuba, 8 Law & Pol'y Int'l Bus. 1007, 1023 (1976).
\end{enumerate}
\end{footnotesize}
importation of Cuban-origin goods and goods imported from or through Cuba.29

1. Treasury Department Controls

On March 23, 1962, the Treasury Department issued the Cuban Assets Control Regulations (CACR).30 The CACR controlled "purely financial transactions, the importation of Cuban goods, Cuban assets in the United States, and goods produced by foreign firms which were owned or controlled by U.S. firms."31 These regulations, patterned after the Foreign Assets Control Regulations (FACR),32 prohibited trade by persons subject to U.S. jurisdiction.33

2. The CACR Exception

However, the CACR differed from the FACR regulations in one major respect. The CACR, unlike the FACR, expressly accepted and, therefore, allowed transactions by any non-banking corporation both chartered and conducting business in a foreign

30. The legal authority for the CACR regulations is Presidential Proclamation 3447 and section 5(b) of the Trading with the Enemy Act of 1917 (TWEA). 50 U.S.C. app. § 5(b) (1988). Under section 5(b) of the TWEA, the President has authority to issue regulations during wartime or a presidentially declared national emergency. 50 U.S.C. app. § 5 (1990).
The legal justification for the Cuban embargo was the national emergency declared by President Harry S. Truman in 1950, the Korean conflict. Proclamation No. 2914, 3 C.F.R. 99 (1950). Although more than forty-years-old, the emergency is still in effect as it has never been terminated by the President, Congress, or the courts. See Sardino v. Federal Reserve Board, 361 F.2d 106, 109 (2d. Cir.), cert. denied, 385 U.S. 898 (1966).
31. Hammock, supra note 27, at 64 (citing Stanley L. Sommerfield, Acting Director of the Office of Foreign Assets Control (Apr. 25, 1974)).
33. The regulations define a person subject to the jurisdiction of the United States as:
(a) Any individual, wherever located, who is a citizen or resident of the United States;
(b) Any person within the United States as defined in § 515.329;
(c) Any corporation organized under the laws of the United States or of any State, territory, possession, or district of the United States; and
(d) Any corporation, partnership, or association, wherever organized or doing business, that is owned, or controlled by persons specified in paragraph (a) or (c) of this section.
The CACR regulations created this exception to avert the difficulties with foreign subsidiaries that the United States originally experienced with foreign countries when it first applied the FACR regulations to them. The exception, however, turned out to be no exception at all. It quickly plunged the United States into major foreign policy difficulties.

From its very inception, the Treasury Department limited the exception's scope and application. For instance, the exception was not deemed applicable to businesses involved in U.S. merchandise, financing, or vessels owned or controlled by U.S. corporations.

Most notably, while the language of subsection (e) does not prescribe any person engaged in trade having "a financial interest," the Office of Foreign Assets Control (OFAC) has interpreted that subsection to, nevertheless:

prohibit[ ] an American citizen who was an officer or director or otherwise . . . actually or potentially in control of a foreign firm from engaging in unlicensed trade with Cuba. Inaction by a person in control was regarded as a violation. In other words, if an American was actually or potentially able to control a foreign firm's trade with Cuba he was required to do so.

Thus, while the exception expressly allowed for transactions between Cuba and non-banking corporations, OFAC's narrow construction of the exception effectively made it non-existent.

Furthermore, it was clear that the United States, irrespective of the exception, still had every intention of prohibiting foreign

37. 31 C.F.R. § 515.541(c) & (d) (revoked by 40 Fed. Reg. 41,108 (1975)).
38. 31 C.F.R. § 515.541(e) (revoked by 40 Fed. Reg. 41,108 (1975)).
39. Thompson, supra note 36, at 331 n.44 (quoting Letter from Stanley Sommerfield, former Director of the Office of Foreign Assets Control, to Robert B. Thompson, (Mar. 28, 1963)). Commentators have criticized this interpretation as "strained" and "rather slim ground with which to establish a violation." Id. See William L. Craig, Application of the Trading with The Enemy Act to Foreign Corporations Owned By Americans: Reflections On Fruehauf v. Massardy, 83 HARV. L. REV. 579, 600 (1970); Corcoran, supra note 35, at 182.
trade—even with foreign subsidiaries meeting the requirements of the CACR exception. Stanley Sommerfield, chief counsel of the Treasury Department's OFAC, stated, for example, that “[i]f it develops that a substantial amount of trade is being conducted by subsidiaries with Cuba (and constant checks are being made on this point) then the exemption will be reconsidered.”

The Treasury Department also tried to prohibit foreign-subsidiary trade through its “voluntary compliance” program. Under this program, compliance was not, in fact, voluntary; it was coerced. The United States informed the parent corporation that trade with Cuba violated U.S. foreign policy as well as the national interest, regardless of its legality. Where “informing” the parent corporation proved to be inadequate, the U.S. government resorted to:

threats of adverse publicity against the parent in the United States. In this regard it is understandable that an American corporation would prefer the American purchasing public not know its foreign subsidiary has been trading with . . . [Cuba]. Sales are likely to take a sharp drop. Similarly, the authorities may threaten future difficulties in securing governmental contracts. Considering the size of the Federal budget, this could be a harsh blow to any corporation [accustomed] to a share of the pie. While both these methods are non-statutory, the strength of the pressure they exert for compliance must be recognized.

Thus, the “voluntary compliance” program, the threat of the exception's revocation, the statutory exemption’s narrowness, and the broad interpretation of the exceptions to the exemption successfully prohibited U.S. foreign subsidiaries from trading with Cuba. But rather than accept the U.S. prohibitions, the host countries objected to these actions as a threat to their sovereignty.

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40. Sommerfield, supra note 28, at 868.
41. Corcoran, supra note 35, at 181; Hammock, supra note 27, at 66-67; Sommerfield, supra note 28, at 868; Thompson, supra note 36, at 330.
42. Corcoran, supra note 35, at 181; Hammock, supra note 27, at 66-67.
43. Hammock, supra note 27, at 66 n.45 (quoting Address by Stanley L. Sommerfield, acting director of the Office of Foreign Assets Control (Apr. 25, 1974)).
44. Jack W. Hodges, Comment, The Trading with the Enemy Act of 1917 and Foreign-Based Subsidiaries of American Multinational Corporations: A Time to Abstain from Restraining, 11 SAN DIEGO L. REV. 206, 218-19 (1973); see also, Berman & Garson, supra note 35, at 870 (discussing a successful compliance action in July 1966 in which three flour firms canceled their contract to mill Canadian wheat destined for Cuba); Corcoran, supra note 35, at 180.
45. Thompson, supra note 36, at 330 n.42.
and a violation of international law.  

C. U.S. Policy and Resulting Problems with U.S. Foreign Subsidiaries

1. International Conflicts Prior to July 29, 1975

The United States' successful prohibition of U.S. foreign subsidiary trade with Cuba led to serious international conflicts for the United States, especially with Canada. These conflicts evidenced the foreign countries' view that the enforcement of this prohibition was a threat to their sovereignty. They also illustrated the serious economic consequences that such prohibitions could have for the host country.

For instance, in March 1974, MLW-Worthington, a Canadian firm, negotiated a contract with Cuba for approximately fifteen million dollars to provide thirty diesel locomotives and to refurbish existing ones. The agreement would have resulted in one and one-half million hours of work for the Canadian plant and its suppliers. The Canadian government and the Canadian directors of MLW-Worthington protested the application of the CACR regulations as a violation of Canadian sovereignty because of the possible delay that applying for a Treasury license could cause. As the Canadian government stated in a note to the United States:

"The Canadian government holds that the Cuban Assets Control Regulations of the U.S.A. should not be given effect in Canada through the parent-subsidiary relationship or in any other way ."

46. See infra notes 47-65 and accompanying text.
47. See Hammock, supra note 27, at 67-69. For a thorough discussion of all incidents between the United States and Canada with regard to the Cuban Assets Regulations, see A.L.C. de Mestral & T. Gruchalla-Wesierski, Extraterritorial Application of Export Control Legislation: Canada and the U.S.A. 161-70 (1990); Hammock, supra note 27, at 67-69.
48. See Hammock, supra note 27, at 68.
49. See Locomotive Sale to Cuba Verified, N.Y. TIMES, Mar. 19, 1974, at 47 (stating that one sale to Cuba was valued at $15 million and would generate 1.5 million hours of work for a Canadian Plant); Jonathan Kandell, 200-Man Argentine Mission in Cuba For the Start of $1-Billion Trade Deal, N.Y. TIMES, Dec. 27, 1974, at 30 (discussing a sale by American automobile subsidiaries to Cuba valued between $130 and $150 million).
51. Locomotive Sale to Cuba Verified, supra note 49, at 47.
52. Id.
53. See A.L.C. de Mestral & Gruchalla-Wesierski, supra note 47, at 166.
... the Canadian Government wishes to emphasize the significance of this issue and to urge the U.S.A. Government to remove on an urgent basis any restraint on the directors or officers of MLW-Worthington, who are also U.S.A. citizens, which might interfere with the proposed sale of the Canadian company.\(^5\)

MLW-Worthington completed the contract without U.S. approval and over the objection of two U.S. directors.\(^6\) The United States eventually granted a waiver for the sale, but this was apparently connected with a similar problem that the United States was having with Argentina.\(^6\)

Argentine executives of two U.S. foreign automobile subsidiaries, Ford and Chrysler, travelled to Cuba during the early part of 1974 to negotiate a possible sale of 44,000 vehicles worth between $130 and $150 million.\(^5\) The Argentine government stated that it would consider any U.S. attempt to block the sale a violation of Argentine sovereignty.\(^5\) Argentina threatened to nationalize the plants involved and to proceed independently to fulfill the contract.\(^5\) The United States responded by granting Argentina a special license, in the "interest of good relations with Argentina."\(^6\)

The United States again deferred to foreign pressure during a third incident, the Litton affair, in 1974. Late in 1974, a Canadian subsidiary of Litton Industries, a U.S. corporation, asked whether the Treasury Department would prohibit a proposed furniture contract with Cuba.\(^6\) When the Treasury Department stated that it could deny such an application as violative of the regulations, the U.S. parent company canceled the sale.\(^6\) In response, the Cana---

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54. Id. at 166 (quoting Note from Canada to the U.S. State Department (Jan. 13, 1974)). In addition to sending the note, Prime Minister Pierre Trudeau indirectly threatened to withdraw federal orders and subsidies to MLW-Worthington. Morley, supra note 50, at 276.


60. Id.; see also Economic Sanctions, 1974 Digest § 12, at 604.


62. Id.
adian government pressured the United States to allow the sale on
the grounds that Canadian companies should be governed by
Canadian, not United States, law.63 The United States again re-
lented.64 These direct foreign policy conflicts made it clear that
U.S. policy had to change, and an opportunity arose shortly after
the Litton affair.66

2. July 29, 1975: Change of Policy or More of the Same

The United States found an opportunity to change its policy
toward control of third-country exports to Cuba in 1975. On July
29th, the Organization of American States (OAS)68 voted to re-
move economic and political sanctions against Cuba and to allow
each signatory country to decide for itself its economic and diplo-
matic relations with Cuba.67 The United States changed its policy
on subsidiary trade, primarily because of pressure from U.S. allies
which had complained about the extra-territorial application of
purely domestic U.S. trade regulations.68

The United States responded to the OAS resolution by an-
nouncing that it would license U.S. subsidiaries to trade with Cuba
when the policy of the host country permitted such trade.69 Such

63. Id.
64. See Hammock, supra note 27, at 69.
65. U.S. Secretary of State Henry Kissinger commented on March 1, 1975, that the
United States was “prepared to move in a new direction” in its policy toward Cuba.
Brenner, supra note 2, at 101. Those statements preceded, by three months, the Organiza-
tion of American States (OAS) vote to lift the diplomatic and economic sanctions against
Cuba. Id.
66. On July 26, 1964, the OAS adopted a trade resolution that banned all trade with
Cuba “‘whether direct or indirect’” except food and medicine. Final Act, Ninth Meeting of
Consultation of Ministers of Foreign Affairs Serving as Organ of Consultation in Application
of the Inter-American Treaty of Reciprocal Assistance, OEA/ser.C/II.9, doc. 48, rev. 2
(1964); Mestrál & Gruchalla-Wiesierski, supra note 47, at 163.
67. Final Act, Sixteenth Meeting of Consultation of Ministers of Foreign Affairs, Serv-
ing as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal
Assistance (TIAR), July 29, 1975, OEA/ser.F/II doc. 9/75 rev. 2 (1975); Freedom of Action
of the States Parties to the Inter American Treaty of Reciprocal Assistance to Normalize
or Conduct Their Relations with the Republic of Cuba at the Level and in the Form that
Each State Deems Advisable, (July 29, 1975), reprinted in ORGANIZATION OF AMERICAN
STATES, THE INTER-AMERICAN SYSTEM: TREATIES CONVENTIONS & OTHER DOCUMENTS, vol. 1,
68. DONNA R. KAPLOWITZ & MICHAEL KAPLOWITZ, NEW OPPORTUNITIES FOR U.S.-CUBAN
TRADE 11 (1992) (available from the Paul H. Nitze School of Advanced International Stud-
ies, Johns Hopkins University) (quoting interview with Catherine Mann, U.S. Treasury De-
partment (July 19, 1988)).
69. U.S. Takes Steps To Conform with OAS Action on Cuba, 73 DEP'T ST. BULL. 404
authorized trade included both exportation of commodities produced in the host country and importation of goods of Cuban origin. Although licenses now could be granted, the United States would continue to enforce its existing restrictions on goods containing components of U.S. origin, financing, strategic goods, or technology.

Fifteen months later, the United States restricted the regulations. They did so by licensing only those foreign subsidiaries engaging in trade with Cuba that were, in all respects, independent of their parent corporation. In other words, "the affiliate must be generally independent, in the conduct of transactions of the type for which the license is being sought, in such matters as decision-making, risk-taking, negotiation, financing or arranging for financing, and performance." The new restriction, in essence, sought to prevent U.S. firms from manipulating the CACR regulations through their foreign subsidiaries.

The new regulations even prevented "subsidiaries that were separately incorporated but nevertheless not independent from the U.S. parent in either their decision-making or key personnel"
from trading with Cuba. These restrictions, along with falling world sugar prices, helped to prevent the subsidiaries from taking advantage of the new regulations.

In 1978 and 1979, the United States almost completely repealed the subsidiary exemption because of Cuba’s African activities. In 1979, Congress responded to the Cuban military’s increasing activity in Africa by passing the Foreign Relations Authorization Act, calling upon the President to review diplomatic and economic relations with Cuba. The Act’s preface “specifically referred to the president’s ability under the Export Administration Act of 1969 to limit Cuban trade with foreign subsidiaries of U.S. firms.” However, “[t]he Carter administration opposed these efforts, asserting that attempts to exert greater extraterritorial control over foreign subsidiaries would irritate Canada and Mexico and damage ‘important bilateral economic understandings.’” The Carter administration fully recognized other

77. For a discussion of examples of the strict enforcement of the new control restrictions as applied to Canadian firms, see MESTRAL & GRUCHALLA-WESIERSKI, supra note 47, at 168.

78. In response to high world sugar prices, Cuba increased its trade with Western countries from 594 million pesos in 1970 to 2.07 billion pesos in 1975. KIRBY JONES & DONNA RICH, OPPORTUNITIES FOR U.S.-CUBAN TRADE 11 (1988) (available from Johns Hopkins University School of Advanced International Studies). However, Cuba soon learned that it had overextended itself while sugar prices were high. Id. As prices dropped so did Cuba’s total trade with the West, falling to 1.5 billion pesos in 1976 and then to 967 million pesos in 1978. Id. This decline in sugar prices and hence total foreign trade with the West by Cuba limited, at least initially, the possible advantages that U.S. foreign subsidiaries could gain from the new regulations.

Kirby Jones, in her study of United States-Cuban trade, notes that the high levels of expenditures by Cuba between 1970 and 1975 show that “when possible Cuba chooses to trade with the West,” rather than the Soviet Union. Id. at 5, 11.

79. KAPLOWITZ & KAPLOWITZ, supra note 68, at 60; David Leyton-Brown, Extraterritoriality in Canadian-American Relations, 36 Int’l J. 185, 188 (1980-81) (Can.).

80. From 1975 through 1978, Cuba became heavily involved in Africa. BRENNER, supra note 2, at 101-02. On November 5, 1975, Cuba sent a battalion of troops to Angola to help repel an invasion by South African forces. Id. at 101. In May of 1977, the State Department received reports that Cuban military advisors had arrived in Ethiopia. Id. at 102. In 1978, the State Department “charged that Cuban troops in Angola were involved in training and encouraging the Katangese rebels in Zaire’s Shaba province.” Id.


84. Thompson, supra note 36, at 333 n.54. For a discussion of the Export Administration Act, see Thompson, supra note 36, at 333 nn.109-18 and accompanying text.

85. U.S. SENATE, REPORTS SUBMITTED TO CONGRESS PURSUANT TO THE FOREIGN RELATIONS AUTHORIZATION ACT OF 1979, 95TH CONG., 1ST SESS. 125-33.
countries’ views, particularly those of our allies, that the imposi-
tion of the United States-Cuban trade regulations on foreign sub-
sidiaries constituted nothing less than a serious infringement upon
their sovereignty.

3. U.S. Foreign Subsidiary Trade Following the Carter
Administration

From the Reagan administration’s inception, it “pursue[d] a
more hostile policy toward Cuba than [the] Carter [administra-
tion],” which never excluded military action. This shift toward a
more hostile policy included tightening the embargo against
Cuba. Notwithstanding the new administration’s efforts to
tighten this embargo, licensed U.S. subsidiary trade did not de-
cline in the Reagan era.

In fact, during the Reagan administration, U.S. licensed for-

digenous subsidiary trade increased from $209 million in 1981 to $306.5
million in 1987. Most of the exports from U.S. subsidiaries to
Cuba consisted of grain, wheat, or other consumable items. Thus,
even before the Soviet Union’s collapse, Cuba had turned to the
West, including U.S. foreign subsidiaries, to obtain essential

86. Morley, supra note 50, at 320. For a thorough discussion of the relations between
the United States and Cuba during the Reagan administration, see id., at 317-66; Wayne S.
87. Morley, supra note 50, at 337.
88. These steps included re-imposing the 1963 travel restrictions and refusing visas to
Cuban officials. See Hammock, supra note 27, at 74. In addition, the Reagan administration
required companies that shipped products containing nickel to the U.S. to certify that the
nickel was not of Cuban origin. Kaplowitz & Kaplowitz, supra note 68, at 62. Most signifi-
cant was the Office of Foreign Assets Control of the U.S. Treasury Department’s publication
for “the first time [of] a ‘partial listing of persons and firms who are specially designated
nationals under the Treasury Department’s Foreign Assets Control Regulations,’” in order
to prevent further transactions with these firms. Id. See Morley, supra note 50, at 338-39.
These firms were suspected of being fronts set up by the embargoed countries in order to
circumvent the embargo. Id. Although this list was supposed to be for all Treasury Depart-
ment Asset Control Regulations, it clearly aimed at stiffening Cuban trade. The list in-
cluded 167 firms to be designated Cuban nationals, one for Cambodia, and zero for North
Korea or Vietnam. See Kaplowitz & Kaplowitz, supra note 68, at 62.
89. See Kaplowitz & Kaplowitz, supra note 68, at 72.
90. Office of Foreign Assets Control, U.S. Department of the Treasury, Special
Report: An Analysis of Licensed Trade with Cuba by Foreign Subsidiaries of U.S. Com-
panies 5 (1992) [hereinafter Special Treasury Report on Foreign Subsidiary Trade with
Cuba].
91. A sampling of U.S. subsidiary exports to Cuba between 1980 and 1988 showed that
the percentage of consumable exports fluctuated between 93.2% in 1980 to 57.73% in 1988.
Kaplowitz & Kaplowitz, supra note 68, at 13.
Licensed U.S. foreign subsidiary trade with Cuba increased sharply at the end of the 1980s, with the collapse of communism in Eastern Europe and the Soviet Union.84 As trade between Cuba and the former Soviet Union dwindled, U.S. foreign subsidiary trade grew to counter-balance the shortage. Between 1988 and 1989, U.S. foreign subsidiary trade with Cuba increased from $232.7 million to $331.9 million.85 From 1989 to 1990, it more than doubled to $705.3 million dollars.86

Exports to Cuba rose from less than $100 million in 1988 to more than $500 million in 1990.87 The trade increase did not consist of durable goods, but rather food and medicine from U.S. foreign subsidiaries.88 In 1990, grain, wheat, and other consumables comprised approximately ninety-four percent of the $533 million goods exported to Cuba from U.S. subsidiaries.89 This three-fold increase over 1988 directly resulted from the Soviet Union’s and Comecon’s collapse.100

Despite extra foodstuff imports from U.S. foreign subsidiaries, the Cuban people have suffered.101 In 1990, Castro announced the beginning of the “‘Special Period in Time of Peace.’”102 This expression does not symbolize the improved well-being that new peace brings, but rather “heightened austerity and rationing.”103 In the words of one author, the “Special Period” only represents “Special Hardship.”104 “Many Cubans have lost 20 or 30 pounds . . . over the past year or so, both because food is scarcer and be-

92. See Kaplowitz & Kaplowitz, supra note 68, at 2-3; see generally id. at 12 (listing a partial list of goods sold to Cuba by U.S. subsidiaries from 1985-91).
93. Id. at 11.
95. Special Treasury Report on Foreign Subsidiary Trade with Cuba, supra note 90, at 5.
96. Id.
97. Kaplowitz & Kaplowitz, supra note 68, at 70.
98. Cuba’s Ties to a Changing World 233 (Donna Rich Kaplowitz ed., 1993); Kaplowitz & Kaplowitz, supra note 68, at 11.
99. Cuba’s Ties to a Changing World, supra note 98, at 233; Kaplowitz & Kaplowitz, supra note 68, at 11.
100. Cuba’s Ties to a Changing World, supra note 98, at 233; Kaplowitz & Kaplowitz, supra note 68, at 11.
101. See supra note 13; see also infra notes 281-86 and accompanying text.
102. González & Ronfeldt, supra note 94, at v.
103. Id.
104. Kenen, supra note 13.
cause fuel shortages mean they walk or ride bicycles instead of driving a car or taking a bus." According to a newspaper report issued in late December 1992, beef or pork has not been available to Cubans in one year, and many of the foodstuffs that are supposed to be available are never distributed.

The suffering in Cuba is attributed, at least in part, to U.S. policy there. President Clinton, former President Bush, and the United States Congress apparently believe the best way to bring about a "peaceful transition to democracy and a resumption of economic growth" in Cuba is to cut off shipments of foodstuffs and medicine by tightening the existing embargo, thus, the Cuban Democracy Act.

III. THE CUBAN DEMOCRACY ACT: BACKGROUND, PURPOSE, AND POLICY

A. Background

The saga of the Cuban Democracy Act began in 1989 when Senator Connie Mack of Florida introduced the Mack Amendment. This Amendment, which became part of the CDA, called for a ban on U.S. foreign subsidiary trade with Cuba. However, the CDA would never have become law without the influence of a powerful domestic Cuban lobbying group, the Cuban American

105. Id.
106. Id.
111. 22 U.S.C.A. § 6005(a) (West Supp. 1993) provides that transactions between certain United States firms and Cuba are prohibited “[n]otwithstanding any other provision of law, no license may be issued for any transaction described in section 515.559 of title 31, Code of Federal Regulations, as in effect on July 1, 1989.”
National Foundation (CANF).\textsuperscript{114}

In 1981, the CANF was formed to organize Cubans and bring their political influence to Washington.\textsuperscript{116} Because of their power in Washington, the CANF and its Chairman, Jorge Mas Canosa,\textsuperscript{118} were able to ensure passage of the CDA through Congress.\textsuperscript{117}

The CANF's power comes from enormous political action committee contributions to political campaigns.\textsuperscript{118} This money has bought the CANF power, that brought about the creation of Radio and TV Marti, and regulations limiting the amount of money that Cuban exiles can send to relatives back home.\textsuperscript{119}

These campaign contributions were especially important in 1992 because it was an election year. From its inception, the CANF, through its directors and the Free Cuba Political Action Committee (PAC), has donated more than one million dollars to candidates in both the Senate and the House.\textsuperscript{120} The Free Cuba PAC donated more than $200,000 in the 1992 election year, alone, including $26,750 to Representative Robert Torricelli who became the CDA's House sponsor.\textsuperscript{121}

In fact, the CANF was so powerful that members of Congress supported the CDA even though their aides "ridiculed the bill privately as 'a dog' and a 'throwback to the 1960s.'"\textsuperscript{122} According to at least one Congressional aide, Democrats supported the bill only to put the Bush Administration "'on the wrong side' of the Foun-
Democrats supported the bill all the while hoping the President would veto it. Despite the CANF's strong financial support, the Bush Administration did, in fact, initially block passage of the Mack Amendment. The Mack Amendment was initially part of the Omnibus Export Amendments Act of 1990, which former President Bush opposed, in part, because of the strong foreign reaction to the Amendment.

Of the international community's members, Canada and the United Kingdom's reactions to the Mack Amendment were strongest. Canada took two actions. The "Canadian Attorney General Kim Campbell issued an order barring Canadian corporations from complying with U.S. measures precluding subsidiary trade, and required companies to report any directives relating to such measures to the Canadian Attorney General." The Foreign Affairs Minister of Canada, Joe Clark, sent a message to James Baker declaring that Canada considered the Mack Amendment "an intrusion into Canadian sovereignty." Britain responded by threatening to invoke the Protection of Trading Interests Act. Such a threat would block the effects of the Mack Amendment because the Act "forbid[s] compliance by British citizens and businesses with orders of foreign authorities, where those orders have extraterritorial effect and prejudice British trading interests."

When the Mack Amendment neared approval in Congress, as part of the Omnibus Export Amendments Act of 1990, President Bush issued a Memorandum of Disapproval which stated that:

H.R. 4653 [The Export Administration Act] would be harmful to closely linked U.S. economic and foreign policy interests. For

123. Robbins, supra note 115, at 165.
124. Id. at 166.
129. KAPLOWITZ & KAPLOWITZ, supra note 68, at 15.
130. Id.
132. Lowe, supra note 131, at 257.
example under section 128 of the bill there would be extraterritorial application of U.S. law that could force foreign subsidiaries of U.S. firms to choose between violating U.S. or host country laws.133

The Bush administration also disapproved because it realized that if, for example, Japan passed an act which banned its subsidiaries in the United States from trading with Europe, the United States would also protest violently.134

In addition, the State Department opposed the Mack Amendment. A cable from the U.S. State Department to U.S. embassies in Brussels, Paris, and Ottawa in 1989 demonstrates this initial opposition:

We permit these activities [subsidiary trade] . . . because we recognize that attempting to apply our embargo to third countries will lead to unproductive and bitter trade disputes with our allies. A number of our major trading partners have enacted so-called blocking statutes that could prohibit any company organized under local laws from complying with U.S. embargoes . . . . The Department of State has opposed the amendment sponsored by Senator Mack because of its extraterritorial implications.135

Despite the State Department's disapproval, the Mack Amendment became law in 1992, as part of the CDA.136

B. The Cause of Such a Drastic Change in Policy: Politics and the 1992 Presidential Election Year

In the 1992 Presidential Election, Bill Clinton targeted Florida as one of the key states to win his presidential bid. To increase his chance of winning Florida, Clinton sought the Cuban-American voters who, in 1988, voted for George Bush by greater than eighty-five percent.137 Accordingly, Clinton used the CDA as a means to

133. Memorandum of Disapproval for the Omnibus Export Amendments Act of 1990, supra note 125. The host country is the country in which the subsidiary is incorporated.
134. See Guy Gugliotta, The Castro Bill: No Cigar; Congress Gets a Bad Plan to Oust Fidel and Bring on Democracy, WASH. POST, Mar. 29, 1992, at C5.
137. Rohter, supra note 107, at A6. Florida, after all, ranks fourth among the nation's most populated states. Id.
secure the Cuban-American vote.\textsuperscript{138}

On April 23, 1992, Bill Clinton, speaking in Little Havana,\textsuperscript{139} told Cuban exiles that he supported the CDA.\textsuperscript{140} At his fund-raising dinner,\textsuperscript{141} Mr. Clinton stated, "I think this Administration has missed a big opportunity to put the hammer down on Fidel Castro and Cuba."\textsuperscript{142}

Several days later, President Bush switched from his unfavorable position on the CDA.\textsuperscript{143} Yet, even as George Bush signed the CDA, he continued to express his opposition to the foreign subsidiary prohibition.\textsuperscript{144}

The bill’s signing was a truly partisan event. While the key sponsors of the bill were New Jersey Representative Robert Torricelli and Florida Senator Bob Graham, both Democrats, President Bush flew to Miami to sign the bill at a Republican campaign rally.\textsuperscript{145} Mr. Clinton meanwhile retorted, after the bill’s signing, that Bush only signed the CDA because Clinton backed it, and exclusion of the Democratic sponsors from the signing ceremony was the "'cheapest kind of politics.'"\textsuperscript{146} In short, the CDA passed with


\textsuperscript{139} Little Havana is an area in Miami which is heavily populated by Cuban-Americans.


\textsuperscript{141} Mr. Clinton's fund-raiser raised $125,000. Rohter, \textit{supra} note 107, at A6. At least one other authority has stated that Mr. Clinton only received $75,000 for the dinner. Alexander Cockburn, \textit{Embracing the Carcass of Cold War; Candidate Clinton Makes President Bush Look Like a Dove}, \textit{L.A. Times}, Aug. 9, 1992, at M5. In fact, Alexander Cockburn commented in his article that "Clinton's surrender to the exile lobby was bought fairly cheaply . . ." Id.


\textsuperscript{142} Rohter, \textit{supra} note 107, at A6.

\textsuperscript{143} “Mr. Bush reluctantly endorsed the bill despite reservations about provisions affecting United States allies and American companies whose foreign subsidiaries do business with Cuba.” Rohter, \textit{supra} note 107, at A6.

\textsuperscript{144} “‘The President did not like that part of the bill but decided it was not sufficient reason to veto the entire bill, as he had done before . . .’” Rick Eyerdam, \textit{Running the Cuban Agenda: Mas & Co. Are on a Roll}, \textit{S. Fla. Bus. J.}, Nov. 2, 1992, at A1, A12.


the help of election-year politics and the CANF “political machine.”

President Bill Clinton\textsuperscript{147} and his Secretary of State, Warren Christopher,\textsuperscript{148} have remained committed to following the terms of the CDA.\textsuperscript{149} Yet, the United Nations (U.N.) has overwhelmingly condemned the United States’ extraterritorial application of the CDA.\textsuperscript{150}

C. What “Politics as Usual” Has Given the People of the United States

The Cuban Democracy Act\textsuperscript{151} has two major provisions which are designed to strengthen the present embargo against Cuba. Section 6005(a), the first provision, revokes OFAC’s licensing authority.\textsuperscript{152} By removing this licensing authority, the first provision bans U.S. foreign subsidiaries from legally trading with Cuba.\textsuperscript{153} Corporations which violate the CDA face penalties under the Trading with the Enemy Act.\textsuperscript{154} These penalties include criminal liability not to exceed one million dollars\textsuperscript{155} and civil liability no greater than fifty thousand dollars.\textsuperscript{156} In addition to criminal\textsuperscript{157} and civil fines,\textsuperscript{158} individuals face a possible ten-year prison term.\textsuperscript{159}

However, the Act contains an important exception to these

\begin{itemize}
\item \textsuperscript{147} See Tom Fiedler, Clinton: Cuba Embargo ‘Right’; Vows to Keep Pressure Up, MIAMI HERALD, Sept. 6, 1993, at A1; UN Setback ‘Will Not Change’ Washington’s Policy on Cuba, supra note 107.
\item \textsuperscript{148} Pat M. Holt, Put Policy Toward Cuba on a More Rational Basis, THE CHRISTIAN SCIENCE MONITOR, Feb. 4, 1992, at 18.
\item \textsuperscript{149} U.N. Backs Cuba on U.S. Embargo, WASH. POST, Nov. 25, 1992, at A14.
\item \textsuperscript{150} See supra note 12. The U.N. vote on the Act took place on November 24, 1992, and Mr. Clinton confirmed his support for the Act after this date. See Fiedler, supra note 147.
\item \textsuperscript{151} 22 U.S.C.A. § 6001 (West Supp. 1993).
\item \textsuperscript{152} 22 U.S.C.A. § 6005(a) (West Supp. 1993).
\item \textsuperscript{153} See Cuban Assets Control Regulations, 58 Fed. Reg. 34,709 (1993) (to be codified at 31 C.F.R. § 515) (detailing the rule amendments to the Cuban Assets Control Regulations).
\item \textsuperscript{154} 22 U.S.C.A. § 6009(d) (West Supp. 1993) (stating that penalties set forth under the Trading with the Enemy Act apply to violations of the CDA).
\item \textsuperscript{155} Trading with the Enemy Act, § 106, 40 Stat. 411, 425 (codified as amended at 50 U.S.C.A. app. § 16(a) (West Supp. 1993)).
\item \textsuperscript{156} 50 U.S.C.A. app. § 16(b)(1).
\item \textsuperscript{157} Id. § 16(a).
\item \textsuperscript{158} Id. § 16(b)(1).
\item \textsuperscript{159} Id. § 16(a).
\end{itemize}
provisions. It does not apply to existing contracts.160 This exception appears to have been created to sidestep the quagmire and international outcry prompted by the Reagan administration’s 1981 ban on the “export and re-export to the U.S.S.R. of equipment manufactured in the United States for use in the Soviet gas pipeline then under construction.”161

Most notably, the Act does not limit itself to the interests of the United States or to U.S. corporations. It also contains a section encouraging the President to persuade “the governments of countries that conduct trade with Cuba to restrict their trade and credit relations with Cuba . . . .”162 The CDA also states that the President may deny eligibility “for assistance under the Foreign Assistance Act of 1961 . . . or assistance or sales under the Arms Export Control Act . . . .”163 Originally, this section required the President to enter into talks with countries trading with Cuba, and the sanction automatically applied to those countries who failed to stop their trade.164 However, in part because this section would necessarily terminate aid to Russia, who still trades with Cuba,165 Congress changed the President’s duty to terminate aid into a discretionary, rather than mandatory, one.166 Because the major provisions of the Act are designed to affect foreign corporations, the legal underpinnings of this provision are crucial.

165. Id.
IV. THE CUBAN DEMOCRACY ACT'S EXTRATERRITORIAL JURISDICTION: THE U.S. VIEW

A. Extraterritorial Jurisdiction Generally

The CDA is more than one isolated attempt by the United States to achieve its policy objectives through export controls. Over the last twenty years, the United States has increasingly used export controls to expand its influence around the world. Notably, many of these U.S. attempts to influence world politics through export controls, such as prohibiting the exportation of arms and ammunition to certain countries, comport with international law.

However, U.S. regulation of its foreign subsidiaries has been less credible internationally. While the United States maintains that its extraterritorial regulation of foreign subsidiaries, like the CDA, complies with international law, its closest allies vehemently assert the contrary.

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170. See John R. Stevenson, Extraterritoriality in Canadian United States Relations, Address Before the Canadian Bar Association (Oct. 12, 1970), in UNITED STATES ECONOMIC MEASURES AGAINST CUBA, supra note 12, at 230, 232. In a speech to the Canadian Bar Association regarding the application of U.S. laws to subsidiaries of U.S. corporations in Canada, John R. Stevenson, the Legal Adviser to the State Department, stated that "[i]t is important to recognize here, as in the antitrust field, that these conflicts are due to two separate but valid exercises of jurisdiction . . . ." UNITED STATES ECONOMIC MEASURES AGAINST CUBA, supra note 12, at 230, 232; see also, DOUGLAS E. ROSENTHAL & WILLIAM M. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY 58 (1982).

1. Prescriptive Jurisdiction

The legality of U.S. regulation of its foreign subsidiaries under international law requires that the United States be able to exercise prescriptive jurisdiction\(^\text{172}\) over those subsidiaries. Yet, traditional international law affords a state prescriptive jurisdiction to pass laws regulating conduct only within its own territory.\(^\text{173}\)

2. Nationality Principle

As international communications advanced, however enterprises expanded internationally, and commercial relations became more sophisticated. The result of this expansion was a trend towards expanding the bases of jurisdiction.\(^\text{174}\) One of these expanded bases of jurisdiction was the nationality principle.\(^\text{175}\)

The United States asserts that its regulation of foreign U.S. subsidiaries falls squarely within the nationality principle.\(^\text{176}\) Under the current interpretation of this principle, the United States can control all of its nationals.\(^\text{177}\) The generally accepted rule of the United States is that the state of incorporation determines a corporation's nationality.\(^\text{178}\) Yet, when the need for a more expansive view of jurisdiction arises, the United States asserts that the place of a corporation's control, rather than the state of incorporation, determines its nationality.\(^\text{179}\) Thus, the United States claims that it has prescriptive jurisdiction over foreign subsidiaries because their parent corporations in the United States control them.\(^\text{180}\)

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\(^{172}\) The Restatement (Third) of Foreign Relations of the United States defines prescriptive jurisdiction as:

jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.

**Restatement (Third) of Foreign Relations of the United States** § 401(a) (1986) [hereinafter Restatement (Third)].


\(^{175}\) Restatement (Third), supra note 172, § 402 cmt. e.

\(^{176}\) Craig, supra note 39, at 588.

\(^{177}\) Id. at 589.

\(^{178}\) Id. at 588.

\(^{179}\) Id. at 589.

The Second Restatement of Foreign Relations of the United States supports this view that:

[w]hen the nationality of a corporation is different from the nationality of the persons . . . who own or control it, the state of the nationality of such persons has jurisdiction to prescribe, and to enforce in its territory, rules of law governing their conduct. It is thus in a position to control the conduct of the corporation even though it does not have jurisdiction to prescribe rules directly applicable to the corporation.181

Yet, the U.S. government’s and the Second Restatement’s positions on prescriptive jurisdiction squarely contradict that of the international community.182

B. The International Community’s Position on Extraterritorial Jurisdiction

Other nations insist that the true test of a corporation’s nationality is not control; rather, it is the place of incorporation.183 The International Court of Justice supported this view in Barcelona Traction, holding that “[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.”184 Thus, an international law dispute has


181. Restatement (Second) of Foreign Relations Law of the United States § 27 cmt. (d) (1965) [hereinafter Restatement (Second)].


184. Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3, 43 (Judgment of Feb. 5). The court also noted that the incorporation test had been “confirmed by long practice and by numerous international instruments.” Id. at 43; see also Havers, supra note 169, at 792 (stating that his country, the United Kingdom, believed that the incorporation test was supported by the International Court of Justice). But see Marcuss & Richard, supra note 180,
developed between the United States and foreign nations regarding extraterritorial jurisdiction over foreign subsidiaries.

C. The Second Restatement’s Position on Extraterritorial Jurisdiction: The Comity Requirement

Rather than promulgate rules for determining which nation has prescriptive jurisdiction over foreign subsidiaries, the Second Restatement has developed a comity requirement to determine prescriptive jurisdiction. Under the principle of comity, international law recognizes that more than one state may have a jurisdictional claim to regulate a particular activity. Where two states prescribe rules that “require inconsistent conduct” upon a person:

each state is required . . . to consider, in good faith, moderating the exercise of its enforcement jurisdiction in light of such factors as:

(a) vital national interests of each of the states,
(b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

However, the Second Restatement’s comity requirement applies to limited circumstances only. It applies only when the requirements of a foreign nation conflict with those of the forum state. It does not apply when the foreign jurisdiction merely permits commerce between itself and a third country, because in that situation the laws of the two nations are not in conflict.

at 457 (stating that even though the court in Barcelona Traction accorded the incorporation test great weight, “the court’s acknowledgement that no test had found general acceptance leaves room for argument on the question of precisely how dispositive the place of incorporation [test] should be in any specific situation”).

186. See RESTATEMENT (SECOND), supra note 181, § 40.
187. RESTATEMENT (SECOND), supra note 181, § 40.
188. Craig, supra note 39, at 596.
189. Id.
For example, if Spain merely permits trade with Cuba, then the Restatement's comity section would not apply because there would be no conflict of requirements between United States and Spanish law. Comity would apply only if Spain enacted a blocking order which forbade Spanish companies from discontinuing trade with Cuba because of U.S. law. Therefore, the Second Restatement favors states engaging in expansive regulation and "disregard[s] the interests of those states which favor freedom from regulation and the territorial concept of jurisdiction."\(^{190}\)

Although the United States realizes that foreign nations disagree with the extraterritorial application of U.S. laws, it continues to exercise this broad grant of authority under the Second Restatement.\(^{191}\) As Andreas F. Lowenfeld, the Deputy Legal Adviser to the State Department, stated:

[T]he United States has been the most ambitious of the major democratic states in trying to regulate international commerce; it has at least a claim to jurisdiction over vast commercial enterprises abroad owned and controlled by American parent companies; and it has tried with fair success to impose various programs of economic denial . . . .

. . . . With regard to protests from other countries (or from private persons sought to be subjected to regulation), I think one can fairly say that there is little substance to the charge of violation of international law. As to conflicts with the domestic law of other countries, both courts and federal agencies in the United States have been careful not to put persons, particularly aliens, in the position of having to violate one law or the other.\(^{192}\)

However, the United States' expansive view of extraterritorial jurisdiction, irrespective of its doctrinal underpinnings, is politically inflammatory because it triggers deeply-embedded national interests of foreign nations. As one commentator stated, "[a] state may have certain deeply rooted policies or customs, infringement of which can touch a sensitive nerve of the sovereign and cause

\(^{190}\) Id.


\(^{192}\) Lowenfeld, supra note 191, at 1705; see also Craig, supra note 39, at 592-93.
perhaps a more severe reaction than infringement of its law.”\textsuperscript{193} As the Attorney General for the United Kingdom said in a speech regarding the Siberian pipeline episode:\textsuperscript{194}

Extraterritoriality, or “ET” as it is known for short requires control. We say most firmly “ET-Go home!” \ldots. We cannot afford a repetition of the pipeline fiasco, a fiasco that damaged the Western alliance far more than it hurt the Russians. We cannot allow our trading partnerships to be placed under the strains and uncertainties which the Export Administration Act engenders.\textsuperscript{195}

The \textit{Second Restatement}'s approach was problematic because it suggested political, rather than legal, solutions to the exercise of extraterritorial jurisdiction. Under the \textit{Second Restatement}'s position, foreign countries could prevent, with certainty, the United States from asserting such extraterritorial jurisdiction only by employing political treaties, agreements,\textsuperscript{196} or international pressure.\textsuperscript{197} Foreign nations could not rely on the courts.\textsuperscript{198} The courts could only moderate those countries that attempted to enforce their extraterritorial jurisdiction; courts could not moderate those countries that merely asserted extraterritorial jurisdiction.\textsuperscript{199} This distinction has been critical because the international community has objected to \textit{both} forms of extraterritorial jurisdiction—its assertion \textit{and} its enforcement.

Had the United States captured the spirit of the \textit{Second Restatement}—that extraterritorial jurisdiction should be imposed

\begin{footnotes}
\footnotetext{194. See supra note 161 and accompanying text (discussing the Siberian pipeline episode).}
\footnotetext{195. Havers, supra note 169, at 792.}
\footnotetext{197. See supra notes 47-65 and accompanying text (discussing examples of foreign countries exerting pressure on the U.S.).}
\footnotetext{198. Under the \textit{Second Restatement}, courts are only able to limit the U.S. exercise of expansive jurisdiction if the regulations that the United States prescribes requires a person to perform conduct which would be in conflict to conduct required by the host state. \textit{Restatement (Second)}, supra note 181, § 40. Even then, the United States is only required to consider moderating its conduct when certain factors are present. \textit{Id.}}
\footnotetext{199. \textit{Restatement (Second)}, supra note 181, § 40.}
\end{footnotes}
only in limited circumstances after weighing the foreign government's interest in the regulations—\(^\text{200}\) the Second Restatement's position might have worked. However, the United States ignored both the spirit of the Restatement and other states' interests\(^\text{201}\) to enlarge its extraterritorial jurisdiction.\(^\text{202}\) In short, the Second Restatement failed to influence the extraterritorial application of U.S. laws, while it concurrently recognized that two states may have an interest in regulating trade. A new approach was long overdue.

V. THE LEGALITY OF THE FOREIGN SUBSIDIARY PROHIBITION UNDER THE THIRD RESTATEMENT

The Third Restatement of the Foreign Relations of the United States\(^\text{203}\) has enunciated a new approach. Under the Third Restatement, jurisdictional conflicts are legal, rather than primarily political.\(^\text{204}\) A court no longer decides which state should moderate its practice of jurisdiction.\(^\text{205}\) Rather, the court weighs the factors applicable to the conflict to determine, as a matter of law, whether the state may exercise prescriptive jurisdiction.\(^\text{206}\) Application of this approach to the U.S. regulation of U.S. owned for-

\(^{200}\) Id.

\(^{201}\) One commentator has noted that the foreign states interests are so strong that: [t]he United States government should not attempt to regulate the export activities of foreign subsidiaries of United States corporations unless the subsidiaries are simply a conduit through which a United States origin commodity passes on its way to its intended destination in a third state in order to circumvent controls over export from the United States or when the subsidiaries are manufacturing high technology strategic products based on United States technology because in that case the security of the United States is involved.


\(^{202}\) For law review articles and court decisions that discuss the problems that emerged as a result of the Reagan Administration's pipeline restrictions, see supra note 161.

\(^{203}\) Although the Third Restatement is not binding authority, it is influential in U.S. courts. See Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614 (9th Cir. 1976) (using the Second Restatement when determining what elements to be weighed when determining whether extraterritorial jurisdiction should be exercised); Rosenthal & Knighton, supra note 170, at 57. Furthermore, in 1979 the Department of State sent a letter to Senator Kennedy stating that the jurisdictional analysis used by the Department of State generally follows the approach of the Restatement (Second) of the Foreign Relations Law of the United States. Marian L. Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l L. 158, 180 n.2 (1980).

\(^{204}\) Robinson, supra note 185, at 1152.

\(^{205}\) See Restatement (Second), supra note 181, § 40.

\(^{206}\) Restatement (Third), supra note 172, § 403 reporters' note 10.
eign subsidiaries trading with Cuba reveals the illegality of such regulation.

A. Territorial Principle

The Third Restatement recognizes several bases for jurisdiction of which the territorial and nationality principles are relevant here. The territorial principle is the most common basis for the exercise of jurisdiction. The territorial principle includes two concepts, subjective territoriality and objective territoriality. The re-imposition of the ban on foreign subsidiary trade to Cuba is rooted in neither of these concepts.

Under the subjective territoriality principle, a state has jurisdiction over any corporation performing the requisite act or omission within the state asserting such jurisdiction. Yet, the United States is attempting to regulate foreign subsidiaries which do business beyond its territorial limits. Thus, the subjective territoriality principle provides no basis for this ban.

Under the objective territoriality principle, a state may assert jurisdiction over a corporation, even if the regulated activity takes place outside that state, as long as the activity in question has a "substantial effect" within the regulating state. For example,
two commentators have suggested that, under this "effects doctrine" of objective territoriality, a foreign subsidiary's refusal to comply with the U.S. embargo of Cuba would constitute an "effect" for purposes of establishing jurisdiction because this non-compliance makes the embargo less effective.214

Yet, this reasoning is problematic under the objective territoriality principle because U.S. subsidiary trade with Cuba does not have a substantial effect within the United States, as the principle requires. United States subsidiary trade with Cuba only effects a decrease in the impact of a U.S. ban that controls trade outside the United States.215 "[I]t can hardly be argued that the objective territorial principle covers such an effect, because the effect is not within the territory of the state."216 Thus, the objective territoriality principle is as inapposite a legal basis for the Cuban trade embargo as the subjective territoriality principle.

The "effects doctrine" might be used to prohibit the export of certain items to Cuba where those items would have an effect within the United States. Under this reasoning, the United States involves normal commercial commodities the use of which in Cuba would have no effect within the U.S. See Kaplowitz & Kaplowitz, supra note 68, at 12, 13.

213. Restatement (Third), supra note 172, § 402 cmt. d; see also United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d. Cir. 1945), where Judge Learned Hand first articulated the "effects test" when he stated 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."

However, as any action in one state may have some remote or speculative effect in another, Learned Hand's articulation of the effects test has been limited so that only real and substantial effects are sufficient for establishing extraterritorial jurisdiction. Mestral & Gruchalla-Wiesierski, supra note 47, at 20; Kathleen Hixson, Note, Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States, 12 Fordham Int'l L.J. 127, 138 (1988); Marcus & Richard, supra note 180, at 443.


214. Thompson, supra note 36, at 363-64; Zipper, supra note 11, at 1054, (noting that one could argue plausibly that subsidiary non-compliance would constitute a sufficient effect for purposes of the objective territorial principle).

215. As one commentator stated, this argument would only be tenable "where the effect was to make ineffective the state's laws with respect to things within its territory." Mestral & Gruchalla-Wiesierski, supra note 47, at 34.

216. Mestral & Gruchalla-Wiesierski, supra note 47, at 34.
could ban factory equipment exports to Cuba that would emit pollutants affecting air quality over Southern Florida. On the other hand, the United States could not, under this doctrine, ban the food or harvesting equipment exports to Cuba; these would have no effect within the United States.

However, the CDA is an across-the-board prohibition of exports from U.S. foreign subsidiaries, irrespective of the product’s potential effect or non-effect within the United States. Therefore, the “effects doctrine” is, in fact, inapplicable to this analysis and provides no legal justification for this new U.S. prohibition.

Even if the CDA were not an across-the-board prohibition, the “effects doctrine” would remain inapplicable to proscribe most U.S. subsidiary trade. First, almost three quarters of all Cuban imports from U.S. subsidiaries are foodstuffs having no effect within the United States. Second, ninety-three percent of all subsidiary exports to Cuba consist of consumables—the Cuban use of which, again, has no effect within the United States. In short, the territorial principle provides no legal justification for the CDA because the CDA has no impact within U.S. borders.

B. Nationality Principle

A state may also assert jurisdiction under the nationality principle to prescribe laws governing the conduct of its nationals, whether occurring inside or outside its territory. The Third Restatement defines the nationality of a corporation by its state of incorporation. A fortiori, the nationality principle precludes U.S. assertion of jurisdiction over U.S. foreign subsidiaries precisely because those subsidiaries are incorporated in foreign states, rather than the United States.

217. Marcuss & Richard, supra note 180, at 469.
218. Id.
219. Id.
220. KAPLOWITZ & KAPLOWITZ, supra note 68, at 11.
221. Marcuss & Richard, supra note 180, at 469.
222. See KAPLOWITZ & KAPLOWITZ, supra note 68, at 13.
223. Restatement (Third), supra note 172, § 402 cmt. e.
224. Id. The Third Restatement § 402(2) does not directly address the U.S. jurisdiction over foreign subsidiaries. The Third Restatement § 402 cmt. e provides that the “[e]xercise by a state of jurisdiction over foreign corporations owned or controlled by its nationals, by extension of or by analogy to the nationality principle, is addressed in § 414.” See infra, notes 229-34 and accompanying text for a discussion of § 414.
225. Restatement (Third), supra note 172, § 414 cmt. a.
Under the nationality principle, the United States can prohibit U.S. nationals from participating in the U.S. foreign subsidiary trade with Cuba.\textsuperscript{226} In other words, the nationality principle only applies to the extent that the person is a U.S. national. Yet, because the CDA prohibits U.S. nationals’ and non-nationals’ participation in trade with Cuba, the nationality principle only partially supports the CDA prohibition as to nationals.\textsuperscript{227} Second, the Third Restatement’s construction of the nationality principle expressly precludes the United States from regulating the activities of any foreign subsidiary solely because that subsidiary is owned or controlled by U.S. nationals.\textsuperscript{228} In short, U.S. prohibitions of foreign subsidiary trade necessarily fail under the nationality principle.

C. Third Restatement § 414 Jurisdiction with Respect to Activities of Foreign Subsidiaries\textsuperscript{229}

1. A Standard of Reasonableness

The Third Restatement provides a specific basis for foreign subsidiary jurisdiction. Section 414(2)\textsuperscript{230} provides “that subject to section 403 and section 441, it may not be unreasonable for a state to exercise jurisdiction for limited purposes with respect to activi-

\begin{footnotes}
\item[226] Id.
\item[227] See 22 U.S.C.A. § 6005 (West Supp. 1993) (stating that licenses will no longer be granted for U.S. foreign subsidiary trade to Cuba irrespective of whether no U.S. nationals are involved in the trade). In addition, the pre-CDA regulations had the practical effect of prohibiting U.S. nationals from participating in U.S. foreign subsidiary trade because the present regulations bar any employee or officer of the U.S. parent firm from participating in the trade. 31 C.F.R. § 515.559(c) (1992).
\item[228] RESTATEMENT (THIRD), supra note 172, § 414(2) cmt. f.
\item[229] The Third Restatement § 414(1) also applies to jurisdiction over foreign branches. However, this section is not applicable here because a foreign branch differs from a foreign subsidiary. A foreign branch is not a distinct legal entity as it is not incorporated in the host state. See Restatement (Third), supra note 172, § 414 cmt. a.
\item[230] At least one commentator has suggested that § 414 of the Third Restatement is not a proper basis for analyzing U.S. jurisdiction over foreign subsidiaries as “the priorities suggested in that section are not shared by the United States.” Thompson, supra note 36, at 382-83. This reasoning is unsound for two reasons. First, it is irrelevant that these priorities are not shared by the United States. The Restatement is not simply an enunciation of the U.S. views; it is intended to be an accurate reflection of the international community’s views. See Restatement (Third), supra note 172, at 3. Furthermore, that the United States does not share these priorities is obvious, because this section is intended to improve on the Second Restatement by limiting the U.S. expansive view of jurisdiction over foreign subsidiaries. See supra text accompanying notes 200-06.
\end{footnotes}
ties of affiliated foreign entities." Section 414 expresses what is implicit in foreign subsidiary jurisdiction—the state of the parent corporation and the host state of the subsidiary may both have legitimate interests in regulation. As the Third Restatement notes:

[t]hat a subsidiary is incorporated in another state and is subject to its laws limits the jurisdiction to prescribe of the state of the parent. On the other hand, a host state cannot, by requiring a foreign-owned enterprise to incorporate under its laws, deprive the state of the parent corporation of all authority over the enterprise. The enterprise itself cannot, by incorporating in a foreign state, escape all regulatory authority of the state of the parent corporation.\(^2\)

The Third Restatement recognizes that extraterritorial subsidiary regulation has generated "substantial controversy" among states.\(^3\) Thus, such regulation is exceptional and should be exercised in limited circumstances.\(^4\)

2. The Meaning of "Exceptional Cases"

With respect to export controls, the Third Restatement provides that extraterritorial jurisdiction may not be unreasonable in exceptional cases.\(^5\) This depends upon all relevant factors, including the extent to which:

(i) the regulation is essential to the implementation of a program to further a major national interest of the state exercising jurisdiction;
(ii) the national program of which the regulation is a part can be carried out effectively only if it is applied also to foreign subsidiaries;
(iii) the regulation conflicts or is likely to conflict with the law or policy of the state where the subsidiary is established.\(^6\)

Furthermore, the Third Restatement provides that "the burden of establishing reasonableness is heavier when the direction is issued

\(^{231}\) See Restatement (Third), supra note 172, § 414 (2). For the purposes of this analysis, it will be assumed that the requirements of sections 403 and 436 have been satisfied.
\(^{232}\) Restatement (Third), supra note 172, § 414 cmt. b.
\(^{233}\) Id. § 414 cmt. a.
\(^{234}\) Id.
\(^{235}\) Id. § 414(2)(b).
\(^{236}\) Id.
to the foreign subsidiary than when it is issued to the parent corporation.\textsuperscript{237} Thus, the CDA's direct application to foreign subsidiaries would require a heavier burden of reasonableness under the \textit{Third Restatement} section 414. The prohibition against foreign subsidiaries trading with Cuba in the CDA cannot meet this heavier burden of reasonableness.

The \textit{Third Restatement} is unclear as to whether the term "exceptional cases" is a separate factor to be analyzed or is simply an indication that regulation of foreign subsidiaries is normally unacceptable. Two commentators have analyzed the term exceptional as a separate factor under section 414(2)(b), while another has not.\textsuperscript{238} The two commentators who have addressed this term have suggested that, short of U.S. involvement in war or an imminent threat, no situation will qualify as exceptional.\textsuperscript{239} For this analysis, it will be assumed that under the \textit{Third Restatement} the term, exceptional case, is a separate factor to be analyzed.

According to the CDA, an exceptional opportunity now exists to bring about "a peaceful transition to democracy in Cuba."\textsuperscript{240} Section 6001(6) of the CDA states that:

\begin{quote}
[t]he fall of communism in the former Soviet Union and Eastern Europe, the now universal recognition in Latin America and the Caribbean that Cuba provides a failed model of government and development, and the evident inability of Cuba's economy to survive current trends, provide the United States and the international democratic community with an unprecedented opportunity to promote a peaceful transition to democracy in Cuba.\textsuperscript{241}
\end{quote}

Although bringing democracy to Cuba does not rise to the level of U.S. involvement in war, it does seem to rise to the level of exceptional. First, the situation is exceptional in that the opportunity for change in Cuba has developed only with the collapse of the

\begin{footnotes}
\item[237] Id. § 414(2)(c).
\item[238] Compare Extraterritorial Subsidiary Jurisdiction, supra note 161, at 81-82 (analyzing the term exceptional as it applied to the Soviet pipeline incident); Allen DeLoach Stewart, Comment, \textit{New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992}, \textit{53 LA. L. REV.} 1389, 1397-98 (1993); (analyzing the term exceptional as it applied under to the CDA) with Zipper, supra note 11, at 1064 (simply mentioning that in exceptional cases it may not be unreasonable to exercise direct regulation of a foreign subsidiary).
\item[239] See Extraterritorial Subsidiary Jurisdiction, supra note 161, at 82; Stewart, supra note 238, at 1397-98.
\end{footnotes}
Soviet Union and Eastern Europe. This collapse has helped to create an “unprecedented opportunity” to bring about a peaceful transition to democracy in Cuba, a country under communist control for more than thirty years, and must be considered an exceptional case.\textsuperscript{242} Even if this case were exceptional, it would merely be a factor in extraterritorial jurisdiction. All of the remaining relevant factors in section 414 must also be analyzed to ensure that the CDA foreign subsidiary regulation is not unreasonable.

In short, despite the Third Restatement’s failure to define the term “exceptional,” all the Third Restatement’s relevant factors still prohibit the U.S. extension of its Cuban trade embargo to foreign U.S. subsidiaries.\textsuperscript{243}

3. The Meaning of “Major National Interest” Within the Restatement § 414

a. Third Restatement § 414(2)(b)(i)

First the United States may claim, as it has before, that the new prohibitions satisfy section 414(2)(b)(i) because they “further a major national interest.”\textsuperscript{244} As Assistant Secretary of State for Congressional Relations, J. Brian Atwood, stated to Senator Edward Kennedy in a letter concerning the proposed Energy Antimonopoly Act of 1979:\textsuperscript{245}

[T]he United States has taken the position that foreign subsidiaries can be subjected to extraterritorial control in accordance with international law, and we have justified our actions in these instances as needed to prevent adverse effects on U.S. commerce or evasion of an important U.S. policy.\textsuperscript{246}

The Third Restatement provides no guidance for determining whether such a program is of major national interest.\textsuperscript{247} Yet, like the “effects doctrine,” what constitutes a major national interest must bear limits. Otherwise, section 414 would become meaning-

\textsuperscript{242} Cf. Stewart, supra note 238, at 1398 (stating that arguably democratizing Cuba is not an exceptional case).
\textsuperscript{243} See Extraterritorial Subsidiary Jurisdiction, supra note 161, at 82 (suggesting that, short of U.S. involvement in a war or an imminent threat, nothing may be considered exceptional under § 414 of the Third Restatement); Stewart, supra note 238, at 1397.
\textsuperscript{244} See Nash, supra note 203, at 182.
\textsuperscript{245} S. 1246, 96th Cong., 1st Sess. (1979).
\textsuperscript{246} Nash, supra note 203, at 182.
\textsuperscript{247} See Restatement (Third), supra note 172, § 414(2)(b)(11).
less. Every state asserting jurisdiction over a foreign subsidiary would otherwise claim that it was doing so pursuant to a major national interest. Most important, the Restatement cautions that this type of regulation be implemented in limited circumstances only.

A "major national interest" must be a major national interest of the country asserting the exception. Here, the United States must be asserting an interest of its citizens, not those of Cuba. Yet, the United States' asserted interest is one of democracy in Cuba. To construe "major national interest" to encompass national interests of any country, rather than the country attempting to implement the regulations, expands the term too far and sets a dangerous precedent for international law. In short, these prohibitions are designed to further the Cuban people's interest, rather than that of the United States; and, therefore, fail to meet the Third Restatement's requirements for extraterritorial subsidiary regulation.

The CDA states that the fall of communism in the former Soviet Union and Eastern Europe, Latin America and the Caribbean's recognition that Cuba represents a failed model of government, and the Cuban economy's downturn "provide the United States and the international democratic community with an unprecedented opportunity to promote a peaceful transition to democracy in Cuba." Democratizing Cuba is a major national interest of Cuba; but it is not a major national interest of the United States.

248. Cf. Marcuss & Richard, supra note 180, at 443 (stating that unless real limits were placed upon the interpretation of the "effects doctrine" the widespread application of the rule would make "a shambles" of the "effects doctrine").

249. Cf. id.

250. Restatement (Third), supra note 172, § 414(2).


252. See Extraterritorial Subsidiary Jurisdiction, supra note 161, at 82 (arguing that the U.S. foreign policy objective of helping Poland was a national interest of Poland and not the U.S. and therefore the national interest section was not satisfied).


254. Contra Zipper, supra note 11, at 1064 (stating that the elimination of Communism from Cuba has been a major national interest). Zipper's argument is facially incorrect. In 1962 when President Kennedy issued Presidential Proclamation No. 3447 he stated that the embargo was being implemented because: (1) the Cuban government was at odds with the "principles and objectives of the Inter-American system" and (2) that Cuba's alignment with the Soviet powers was a security risk for the United States as well as the hemisphere. 3 C.F.R. 157 (1959-63 comp.), reprinted in 22 U.S.C. § 2370 app. at 551 (1988). Furthermore, although the U.S. list of preconditions to re-engagement with Cuba expanded over the years
Further, Cuba no longer threatens U.S. national security. With the end of the Cold War, the United States and the Soviet Union have grown to accommodate each other, and that accommodation has also neutralized Cuba's importance. Cuba has renounced publicly its former support of revolutionary movements abroad. Wayne S. Smith, former chief of the U.S. Interest Section in Cuba from 1979 until 1982, has described Cuba as "a minor domestic problem." In short, the CDA does not embody a "major national interest" of the United States, as required by section 414(2)(b)(i).

b. Third Restatement § 414(2)(b)(ii)

Section 414(2)(b)(ii) requires that the regulations' application to foreign subsidiaries be an essential element of the national program. Support for the current U.S. policy is rooted in blaming the Cuban embargo's ineffectiveness on U.S. subsidiary trade with Cuba. One commentator has insisted, for example, that this is evinced by the rapid increase in recent years of U.S subsidiary trade with Cuba.

However, such reasoning is grossly simplistic. Generally, Cuba's trade with U.S. foreign subsidiaries is a very small percentage of their total imports. Furthermore, of the $705 million that U.S. subsidiaries traded with Cuba in 1990, $500 million was food to include improvement of human rights and renouncing the support of subversion in Latin America and Africa, this list did not include renouncing Communism. Wayne S. Smith, A Pragmatic Cuba Policy, FOREIGN SERVICE J., Apr. 1991, at 22.

255. Smith, supra note 254, at 24.
258. RESTATEMENT (THIRD), supra note 172.
259. Zipper, supra note 11, at 1064.
260. In 1992 Cuba's total imports represented $4 billion. See Kaplowitz & Kaplowitz, supra note 68, at 3. Comparing this 1992 value with 1991 estimates of Cuban imports from U.S. subsidiaries ($383 million), U.S. subsidiary trade during 1991 and 1992 generally comprised less than 10% of Cuba's total imports. Compare KAPLOWITZ & KAPLOWITZ, supra note 68, at 3 (quoting Raúl Taladrid, Vice President of the Cuban Agency for Economic Cooperation) with SPECIAL TREASURY REPORT ON FOREIGN SUBSIDIARY TRADE WITH CUBA, supra note 90, at 2. While these estimates are based on different years, there has been a general decline in Cuban imports from 1988 until 1992. Cuba's imports have fallen from $7.5 billion in 1988 to $4 billion in 1992. KAPLOWITZ & KAPLOWITZ, supra note 68, at 3. Thus, the real number is probably less than 10%.
exported to Cuba.\textsuperscript{261} This statistic demonstrates that hunger and human welfare drive Cuban trade with U.S. foreign subsidiaries. As Continental Grain so accurately stated in a letter to members of Congress urging them to oppose the Mack Amendment, "it will not deter Cuba's imports of food commodities and it is not in the best interest of United States trade."\textsuperscript{262}

Because Cuban people are already suffering from lack of food—their principal objective of trade—the CDA will not impact Cuban trade in foodstuffs; Cuba will simply purchase elsewhere from non-U.S. subsidiaries.\textsuperscript{263} The same argument applies to Cuba's exports to U.S. subsidiaries. In 1990, almost all of Cuba's exports to U.S. subsidiaries consisted of sugar and molasses. If U.S. subsidiaries are prevented from engaging in this trade, another firm will simply buy these products. Thus, enforcing a U.S. foreign subsidiary prohibition does nothing to strengthen a U.S. embargo against Cuba. It merely prevents U.S. foreign subsidiaries from trading with Cuba, and ensures Cuban trade with other international sources which recognize the insanity of this extraterritorial policy.\textsuperscript{264} In short, section 414(2)(b)(ii) also fails because the U.S. foreign subsidiary prohibition is not an essential element of this national program.

c. Third Restatement § 414(2)(b)(iii)

Under the Third Restatement's § 414(2)(b)(iii), the U.S. prohibition must not conflict or be likely to conflict with the law or the policy of the state where the subsidiary is incorporated.\textsuperscript{265} The new U.S. prohibition will conflict directly with the laws of at least three other nations.\textsuperscript{266}

For instance, the Canadian Foreign Extraterritorial Measures Order of 1992\textsuperscript{267} prohibits corporations from complying with such measures, and requires corporations to notify the Attorney General

\textsuperscript{261} Kaplowitz & Kaplowitz, supra note 68, at 13.
\textsuperscript{262} Id. at 15 (quoting Letter from Rebecca Fraily, Continental Grain Company, to U.S. congressmen (Oct. 12, 1989)).
\textsuperscript{263} Smith, supra note 114.
\textsuperscript{264} Since most of what Cuba imports is food and medicine, Cuba will simply buy these necessities from non-U.S. subsidiaries. See infra notes 317-18; see also Cuba's Ties to a Changing World, supra note 98, at 233; Kaplowitz & Kaplowitz, supra note 68, at 11.
\textsuperscript{265} Restatement (Third), supra note 172, § 414(2)(b)(iii).
\textsuperscript{266} See infra notes 267-72 and accompanying text.
\textsuperscript{267} Foreign Extraterritorial Measures (United States) Order, 1992, 124 C. Gaz. SOR/90-751 (Can.).
of Canada whenever there is a directive, instruction, or even an intimation relating to an extraterritorial measure with respect to trade or commerce between Canada and Cuba. If a Canadian corporation violates provisions of this Order, the penalties are stiff. The corporation or its officers are subject to imprisonment, not to exceed five years, and a fine as large as ten thousand dollars.

On October 20, 1992, Britain invoked the Protection of Trading Interests Act which, like the Canadian Foreign Extraterritorial Measures Order, also blocks the implementation of the U.S. prohibition. In addition, Mexican-based firms which comply with the restrictions of the CDA, face severe sanctions from the Mexican government.

In short, the Third Restatement correctly states that an extension of jurisdiction by a foreign state in this situation should be prohibited. United States prohibition will truly put U.S. foreign subsidiaries and their U.S. parent corporations in an impossible position. In the simplest case, foreign subsidiaries can either

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268. These provisions state in full:

Notice

3. Every corporation and every officer of a corporation who receives, in respect of any trade or commerce between Canada and Cuba, any directives, instructions, intimations of policy or other communications relating to an extraterritorial measure of the United States from a person who is in a position to direct or influence the policies of the corporation in Canada shall give notice thereof to the Attorney General of Canada.

Prohibition

4. No corporation shall comply with an extraterritorial measure of the United States in respect of trade or commerce between Canada and Cuba or with any directives, instruction, intimations of policy or other communications relating thereto that are received from a person who is in a position to direct or influence the policies of the corporation in Canada.

Foreign Extraterritorial Measures (United States) Order, 1992, 124 C. Gaz. SOR/90-751 (Can.).

269. Id.

270. 1980, ch. 11 (Eng).


273. One commentator argues that if there is a conflict with the laws of the host state, the United States should simply refine the application of its laws. See Zipper, supra note 11, at 1066-67. However, this approach misses the difference in approaches between the Second and the Third Restatement. See supra notes 185-206 and accompanying text. Under the Third Restatement, if the conflict is severe, then as a matter of law the United States has no jurisdiction over the foreign subsidiaries. RESTATEMENT (THIRD), supra note 172, § 403 reporters' note 10.

274. Cf. Jan Malia Lundelius, Comment, Reaction Sanctions and Foreign Incorporated
continue trading with Cuba, thereby subjecting their parent corporations to possible U.S. civil and criminal liability for violating the CDA, or they can discontinue trade with Cuba altogether, subjecting themselves to criminal and civil liability under the foreign states’ laws. Although democratizing Cuba may be an exceptional case, an application of the three factors under section 414(2)(b) as well as the restrictive language of the section demonstrates that the CDA regulation of foreign subsidiaries is unreasonable under international law.

VI. POLICY IMPLICATIONS OF THE CUBAN DEMOCRACY ACT’S EXTRATERRITORIAL PROHIBITION

Notwithstanding the prohibition’s direct conflict with international law, the CDA’s prohibitions also fail to promote a rational U.S. foreign policy. The CDA’s principle objective is to bring about a peaceful democratization of Cuba by eliminating Cuba’s U.S. foreign subsidiary trade to end the Castro government. But the policy is, in fact, irrational. As a report by the Inter-American Dialogue correctly stated:

We find no good evidence, however, to sustain the argument that such a hard-line policy would provoke positive change in Cuba . . . . [The hard-line policy] would also communicate continuing U.S. hostility to the people of Cuba. We reject this option as shortsighted, costly for the people of Cuba, and probably


276. Id. § 16(a).
277. See Leyton-Brown, supra note 79, at 191-92. Section 16(a) provides that:
Whoever shall willfully violate any of the provisions of this Act . . . shall, upon conviction, be fined . . . or if a natural person, be fined . . . , or imprisoned . . . ; and the officer, director, or agent of any corporation who knowingly participates [sic] in such violation shall, upon conviction, be fined . . . or imprisoned . . . or both.

The language of this statute is open-ended. “Whoever” is not defined, and could be any person, including the foreign subsidiary or employees thereof, over whom the United States may obtain jurisdiction.

counterproductive. 280

Reports since 1989 strongly suggest that the embargo has been remarkably effective at perpetuating the suffering of the Cuban people. 281 In today's Cuba, all food is rationed and people do not always receive their rationed share. 282 Food is so scarce, in fact, that Cuban officials moved thousands of city dwellers to the countryside, in an effort to bolster food production. 283 Even Cuba's famous cigars are rationed. 284

The Austerity Program, initiated in 1990, best exemplifies the average Cuban's plight. This program resulted in:

Drastic rationing of gasoline and fuel oil to both the state and private sectors; sharp reduction in bus transportation; use of 700,000 or more bicycles for personal transportation; substitution of some 400,000 draft animals for trucks, tractors, and combines.

Reduction of the work week to five days; reassignment of surplus Communist Party workers to more "productive" jobs in industry and agriculture; reduction in the hours of plant operation in various industries; and the closing down of a nickel-processing plant and oil refinery.

Inclusion of an additional 180 consumer goods and 28 food items to the list of rationed items; and the halting of construction of new schools, day-care centers, and urban housing. 285

Because food and medicine comprise most of the U.S. foreign subsidiary trade with Cuba, the current plight of the average citizen of Cuba, as evidenced by the Austerity Program, will only worsen under the CDA. 286

The U.S. plan seeks to move Cuba to democracy by worsening Cuba's already bleak situation. 287 This expectation, however, is ill-conceived. A democracy which makes Cubans hungrier will not

281. See sources cited supra note 13.
284. Stoic to the Last, supra note 13.
285. GONZALEZ & RONFELDT, supra note 94, at 4 (citations omitted).
286. See KAPLOWITZ & KAPLOWITZ, supra note 68, at 11.
bring democracy to Cuba. As one Cuban-American expert noted, "no regime falls when people are spending twenty hours a day thinking about how to find food. If anything happens in Cuba, it will happen only when things improve."288 Even the dissidents in Cuba realize this is true.288 Further, if the CDA’s expectations were realized and impoverished Cubans miraculously rose somehow to protest against the Cuban government, they would merely be met by an even stronger response of political repression.289 In short, the CDA merely aggravates impoverishment and perpetuates the imbalance of power in Cuba—it neither attracts nor encourages democratic principles.

The CDA will force Cubans to protest against Castro, even

288. Tom Carter, Some Say U.S. Embargo Keeps Castro in Power, WASH. TIMES, Aug. 9, 1992, at A9; see also Mimi Whitefield, Energy Diet Leaves Cuba Run-Down, MIAMI HERALD, Jan. 27, 1992, at A1, A9 (quoting Harvard Cuban Specialist Jorge Dominguez, who stated that "increasing economic hardship makes the politics of opposition more difficult"). In fact, testimony to this effect was presented to the House Committee on Foreign Affairs:

[D]espite the increasingly harsh material conditions of life, and in large part because most ordinary citizens right now are consumed by the daily struggle for survival, the Castro regime is not disintegrating. People are not focusing on politics right now. They are focusing on survival.

Cuban Democracy Act House Hearings 1992, supra note 1, 103 (statement of Enrique Baloyra, Representative, Cuban Democratic Party); see also Cuban Democracy Act House Hearings 1992, supra note 1, at 541, 544 (prepared statement of Ernesto F. Betancourt) ("Individuals struggling to survive in the face of massive shortages are unlikely to have spare time and energy to engage in revolutionary activities.").


For example, Elizardo Sánchez Santa Cruz, Cuba's most prominent and often-jailed human rights activist, was besieged only recently by a rapid action brigade after speaking against the Cuban government. One reporter described the ambush:

The mob, estimated to number between three hundred and five hundred, destroyed his garage, where he did his work, and the files and furniture inside. It tried to break down the back door of his house but couldn't, because the door was reinforced with steel bars. It broke the windows and threw pots of paint and bottles of ink at the walls. It called for Sánchez to come out and face his accusers. The mob was directed by police, and they called for Sánchez to come out so that they could protect him.

John Newhouse, A Reporter At Large-Socialism or Death, NEW YORKER, Apr. 27, 1992, at 56; see also Howard W. French, Castro Meets Dissent with an Iron Hand, N.Y. TIMES, Dec. 8, 1991, at 3 (reporting on the abduction and imprisonment of dissident Cuban poet Maria Elena Cruz Varela).
though the United States and the world community are aware that retribution for such protests will be swift and painful.\textsuperscript{291} In essence, CDA prohibitions irrationally force Cubans to make a Hobson’s choice: starve or face Castro’s iron fist.

A report on Cuban Human Rights prepared for the United Nations noted the irrationality of the United States position.\textsuperscript{292} While the report did not specifically refer to the United States, it noted that international sanctions against Cuba “[were] totally counterproductive if it is the international community’s purpose to improve the human rights situation.”\textsuperscript{293} The report crystallizes what should be obvious: Cuba’s only viable option, apart from capitulating to outside pressure, is to “continue [its] desperate efforts to stay anchored in the past.”\textsuperscript{294}

Dissidents within Cuba agree with the United Nations’ position. Elizardo Sánchez Santa Cruz stated, “[t]here is a real danger of national tragedy on the horizon. Cuba is a volcano waiting to explode.”\textsuperscript{295} The prominent leaders of the human rights and dissident movements within Cuba have also demonstrated their disdain for the embargo, signing a “Declaration of Goodwill” to oppose the CDA in favor of diplomacy and discussion between the two countries.\textsuperscript{296} Congress, however, has ignored these pleas, and voted for an Act that, according to Representative David Nagle, could foster civil violence in Cuba\textsuperscript{297} and a new wave of Cuban immigration.


\textsuperscript{292} Special Rapporteur, supra note 291, at 22.

The United Nations adopted a resolution which called upon Cuba:

\begin{itemize}
  \item to cease the persecution and punishment of citizens for reasons related to freedom of expression and peaceful association, to permit legalization of independent groups, to respect guarantees of due process, to permit access to the prisons by national independent groups and international humanitarian agencies, to review sentences for crimes of a political nature; and to cease retaliatory measures towards those seeking permission to leave the country.
\end{itemize}


\textsuperscript{293} Special Rapporteur, supra note 291, at 22.

\textsuperscript{294} \textit{Id.}

\textsuperscript{295} Simon Tisdall, Cuba’s Kissing Cousin; Clinton’s Administration is At A Crossroads on Cuba. Either It Can Drive Castro’s Government to Collapse or It Can Forge a New and Mutually Beneficial Alliance, \textit{The Guardian}, Aug. 9, 1993, available in LEXIS, Nexis Library, GUARDN File.

\textsuperscript{296} Cuban Democracy Act House Hearings 1992, supra note 1, at 164-65.

\textsuperscript{297} See also Andrew Zimbalist, Teetering on the Brink: Cuba’s Current Economic
reminiscent of the Mariel Boat Lift, toward the United States.\(^{298}\)

Furthermore, the United States has overestimated Cuban desire to adopt a democratic system. While many Cubans want change, Cubans on the island fear democracy. As one reporter noted: "Thirty-four years after the triumph of the revolution, Cubans live between encroaching walls of worry. They fear nothing will change soon to improve their decaying existence. Yet they also fear the ground will suddenly shift, drawing them into a maelstrom of post-Castro pain."\(^{299}\)

The Castro government plays on these fears, emphasizing the unsuccessful changes in Eastern Europe and the former Soviet Union. The Cuban people learn that eighty percent of the people in the former Soviet Union have plunged into poverty, while Boris Yeltsin struggles with the Russian Congress for control of the country.\(^{300}\) As Castro remarked in a speech: "You are already witnessing what those countries which used to call themselves socialist are now going through: millions of unemployed, inequality, injustice. They were offered miracles . . . and what they got instead is the other side of the coin."\(^{301}\)

Many Cubans appreciate the Revolution. In fact, entire classes of Cubans profess that they "owe everything they are and everything they have to the Castro regime."\(^{302}\) These include both the common workers, many of whom received redistributed property and higher socioeconomic status as a result of the revolution and the elites who fear retribution or displacement from exiles.\(^{303}\) Non-whites in Cuba, who make up more than sixty percent of the population,\(^{304}\) especially fear the downfall of Castro; they perceive that it would eviscerate racial equality.\(^{305}\) Thus, the U.S. policy overestimates many Cubans’ desire to embrace democracy and under-

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\(^{298}\) and Political Crisis, 24 J. LATIN AM. STUD. 407, 417 (1992) (noting that the outcome of the U.S. policy could be a civil war in Cuba with tens of thousands of deaths).

\(^{299}\) See Cuban Democracy Act House Hearings 1992, supra note 1, at 201-12.


\(^{301}\) Golden, supra note 289.

\(^{302}\) GONZALEZ & RONFELDT, supra note 94, at 19 n.32.

\(^{303}\) Falcoff, supra note 290, at 43.

\(^{304}\) GONZALEZ & RONFELDT, supra note 94, at 20.

\(^{305}\) Slevin, supra note 299, at A16; cf. Zimbalist, supra note 297, at 416 (estimating the percentage of the Cuban population who are black or mulatto between 40% to 50%).
estimates their appreciation for what socialism has given them.\textsuperscript{306} As one analyst declared, even as economic conditions deteriorate, "the size of the force ready to defend Castro, Cuban nationalism and the social gains of the revolution will always remain substantial and formidable."\textsuperscript{307}

Several analysts suggest that increasing the embargo's severity will actually strengthen Castro.\textsuperscript{308} Foreign economic sanctions provide "ammunition" to the target government to rally political support and morale against external pressure.\textsuperscript{309} Hence, the very economic sanctions designed to overthrow the target government can actually strengthen that government.\textsuperscript{310}

Prior to the CDA, the Cuban people had just one person to blame for Cuba's economic crisis, Fidel Castro.\textsuperscript{311} Today, the Castro regime blames the United States for the island's economic crisis.\textsuperscript{312} Thus, many Cubans do not look to the United States for solutions, but rather blame them for their troubles.\textsuperscript{313} This problem is compounded by Cuban fear that the downfall of Castro will be accompanied by the reimposition of U.S. influence upon the island.\textsuperscript{314}

The CDA also penalizes U.S. business, and it does so in two ways. First, the CDA proscribes U.S. foreign subsidiaries from trading food or medicine with Cuba.\textsuperscript{315} Yet, since most of Cuban

\begin{itemize}
\item \textsuperscript{306} See Cuddy, supra note 141.
\item \textsuperscript{307} Zimbalist, supra note 297, at 417.
\item \textsuperscript{310} Id.
\item \textsuperscript{311} Haskel, supra note 308.
\item \textsuperscript{312} Id. As one of the leading Cuban dissidents noted, "[t]his [law] has just strengthened Castro's only argument to continue his intransigent position. . . . The law is repudiated by everyone here, and that is logical. It will have the opposite effect of what was intended." Farah, supra note 308, at A1 (brackets in original) (quoting Vladimiro Roca, the son of a revolutionary hero and now a leading dissident).
\item \textsuperscript{314} Cuban Democracy Act House Hearings 1992, supra note 1, at 546 (prepared statement of Ernesto F. Betancourt).
\item \textsuperscript{315} An amendment offered by New York's Representative Ted Weiss (D.), which would have "allowed U.S. companies to sell food to the Cuban government for humanitarian purposes," was defeated by voice vote. David Masci, \textit{House Panel Moves To Tighten Eco-
imports from U.S. subsidiaries is food and medicine, Cuba will simply buy these necessities from non-U.S. subsidiaries. "U.S. subsidiaries, not Castro, [become] the loser."  

But not only do U.S. subsidiaries suffer; U.S. companies suffer as well. United States companies suffer directly under the embargo because they are prevented trade with Cuba. The case of food illustrates this point. One study "estimated that between 1965 and 1986, the embargo cost the United States nearly $2 billion in lost export sales of corn, cotton, potatoes, rice, wheat, wheat flour, dry milk and poultry." Given this tremendous opportunity cost, that the United States does not export food to Cuba is curious, especially in light of what the Administrator of the Foreign Agriculture Service of the Department of Agriculture said in 1989:

Export limitations on agricultural commodities have been employed by the United States half a dozen times over the last few decades. However, none of the export controls for foreign policy or national security purposes has appreciably reduced the total flow of agricultural imports to the target country.

The CDA will also devastate agricultural commodities trad-
Commodities traders deal with direct and string trades. In a string trade, traders may buy and resell a commodity several times before its ultimate destination is established. Under the former licensing requirement, if Cuba were involved in any part of this trade, no matter how far removed, the U.S. firm had to obtain a license from OFAC, even where there were no direct business contact between the U.S. firm and Cuba or even if there was no foreseeable Cuban participation in the string trade. Without the ability to obtain a license, U.S. firms would be forced to withdraw from world commodity markets for human necessities—sugar, wheat, corn, and vegetable oils. Logically, excluding U.S. firms from these types of transactions does not democratize Cuba.

Secondly, because other nations have enacted CDA-blocking legislation, U.S. foreign subsidiaries must either violate the host country's blocking law or the U.S. parent company must violate the Trading with the Enemy Act. This places subsidiaries in an irreconcilable position. Additionally, it puts the directors of the parent and subsidiary corporations in an untenable situation.

324. Id.
325. Id.
326. Id. at 2.
327. Id. at 3. Forcing the United States to pull out of the commodities markets is especially devastating to companies at this time. With the collapse of the markets in Soviet Union and Eastern Europe, Cuba is more dependent on world commodity markets. UNITED STATES ECONOMIC MEASURES AGAINST CUBA, supra note 12, at 132. For example, now that sugar sales will no longer be made to the Soviet Union, Cuba's sugar will have to be sold on the world market. Id. at 132. According to one estimate, if sugar sales were allowed, the value would be over one billion dollars. Id. at 132.
328. See supra note 267 and text accompanying notes 267-72.
331. See Trading with the Enemy Act, 50 U.S.C.A. app. § 16(a) (West Supp. 1993) (stating that a U.S. director who knowingly participates in a violation faces up to a $100,000 or imprisonment for ten years or both); Foreign Extraterritorial Measures (United States) Order, 1992, 124 C. Gaz. SOR/90-751 (Can.) (stating that officers who violate the order face
placing U.S. business in this position, the United States, not Cuba, suffers. United States business, rather than Cuba, bears the final backlash of the CDA.

By passing the CDA, the United States has alienated its allies, as well as the international community. On November 24, 1992, the United Nations\textsuperscript{332} denounced the extraterritorial aspects of the CDA by a vote of fifty-nine to three (seventy-one abstentions).\textsuperscript{333} The European Community has threatened to file a complaint under the General Agreement on Tariffs and Trade\textsuperscript{334} regarding the CDA.\textsuperscript{335} Latin America, which strongly opposed the U.S. embargo of Cuba, has been even more hostile to the CDA, which strengthens that embargo.\textsuperscript{336} This international dissension could result in problems similar to those which the United States experienced prior to its licensing scheme in July 29, 1975.\textsuperscript{337} If the President tries to enforce § 6003(a), by encouraging countries that presently trade with Cuba to restrict their trade,\textsuperscript{338} this foreign disapproval could only stiffen.

up to five years in prison and a fine of up to ten thousand dollars.)

The situation can be even worse for the directors of European companies. Under European law, the directors have an affirmative duty to carry out their duties in the best interests of the company. Harold H. Tittman, \textit{Extra-territorial Application to U.S. Export Control Laws on Foreign Subsidiaries of U.S. Corporations: An American Lawyer's View from Europe}, 16 Int'l Law. 730-35 (1982). Therefore, if the directors voted to cut off trade to Cuba at the bequest of the controlling shareholder, U.S. parent corporation, the directors could become subject to "civil actions by creditors, employees or minority shareholders, and possibly even criminal proceedings." \textit{Id.} at 736.


\textsuperscript{333} \textit{Id.} at 20; \textit{see also supra} note 12.


Some commentators have suggested that the original United States embargo of Cuba violates GATT. \textit{See United States Economic Measures Against Cuba, supra} note 12, at 319-22; Shneyer & Barta, \textit{supra} note 6, at 474-75.

\textsuperscript{336} \textit{See Resolution of the Latin American Parliament, A/46/193/Add.1} (August 27, 1991), \textit{reprinted in United States Economic Measures Against Cuba, supra} note 12, at 333-34 (expressing solidarity with the people of Cuba and asking for an end to the thirty year old economic and trade blockade); \textit{see also Latin Leaders Ask End of Embargo on Cuba, supra} note 12 (stating that the leaders of Latin America, Spain and Portugal called for an end to the thirty-one-year-old United States embargo against Cuba).

\textsuperscript{337} \textit{See supra} notes 47-65 and accompanying text.

\textsuperscript{338} 22 U.S.C.A. § 6003(a) (West Supp. 1993).
Part of the anger of our allies and the rest of the world is rooted in the United States’ inconsistency when it comes to its policy regarding the regulation of foreign subsidiaries.\textsuperscript{339} The United States, which emphatically asserts that the CDA’s prohibition against foreign subsidiaries trading with Cuba is legal under international law, is also the United States which has adopted blocking-legislation to prohibit U.S. businesses from participating in the Arab Boycott of Israel.\textsuperscript{340} As the Senate Report noted:

\begin{quote}
[T]he committee strongly believes that the United States should not acquiesce in attempts by foreign governments through secondary and tertiary boycotts to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions. Accordingly, the bill reported by the committee directly attacks attempts to interfere with American affairs . . . [F]oreign nations would be put on notice that the U.S. Government will not tolerate such interference with its sovereignty.\textsuperscript{341}
\end{quote}

In simplest terms, it is this undisguised hypocrisy which infuriates the international community.

\textbf{VII. Plotting a Course for the Future}

The spirit behind the CDA is correct. The rapid decline in subsidized trade between the Soviet Union and Cuba presents an opportunity for change in Cuba. But the CDA will not realize such change. Most authorities and analysts advise that, to bring about change in Cuba, a combination of the following should be enacted:

\begin{itemize}
\item \textsuperscript{341} S. Rep. No. 95-104, 95th Cong., 1st Sess. 16-18 (1977) (emphasis added).
\end{itemize}
(1) increase the flow of information to Cuba through increased mail service, phone service, as well as allowing U.S. citizens and tourists to travel to Cuba;\textsuperscript{342} (2) take all possible steps toward reducing Cuba's fear of a U.S. military attack;\textsuperscript{343} (3) make it easier for food and medicine to be delivered to Cuba;\textsuperscript{344} and, most important, (4) begin diplomatic discussions with Cuba.\textsuperscript{345}

Such a program has the benefit of flexibility.\textsuperscript{346} If the Castro government responds positively to these efforts, then the United States can reciprocate in kind. Alternatively, the United States can tighten provisions in response to negative signals from Cuba.\textsuperscript{347}

Secondly, this program has the benefit of focusing attention upon Castro and his government, rather than the United States. Under this alternative, the world would pressure Castro, not the United States, to change its policies. Presently, the United States and anachronistic policy, evidenced by the CDA, occupy the world's attention.

VIII. SIGNS OF HOPE

Despite the CDA, there are reasons to believe that the U.S. government's position is becoming more reasonable. The Clinton administration has taken several steps to indicate that its policy toward Cuba is changing. First, the Clinton administration has reiterated that the United States has no hostile intentions toward Cuba.\textsuperscript{348} The Treasury Department has rewritten some of the travel regulations to Cuba, which will open up expanded visits by educational and religious groups, professionals, art dealers, and

\textsuperscript{342} See United States Economic Measures Against Cuba, supra note 12, at 172 (quoting the U.S. Army War College Report which cited a consensus of experts from the defense, foreign policy, intelligence, and academic communities); Inter-American Dialogue Task Force on Cuba, supra note 256, at 6; Gonzalez & Ronfeldt, supra note 94, at 80-81; Jorge I. Dominguez, The Secrets of Castro's Staying Power, 1993 Foreign Affairs 97.

\textsuperscript{343} See United States Economic Measures Against Cuba, supra note 12, at 172 (quoting the U.S. Army War College report); Inter-American Dialogue Task Force on Cuba, supra note 256, at 6; Gonzalez & Ronfeldt, supra note 94, at 81-82; Dominguez, supra note 342.

\textsuperscript{344} See United States Economic Measures Against Cuba, supra note 12, at 172 (quoting the U.S. Army War College report); Inter-American Dialogue Task Force on Cuba, supra note 256, at 7.

\textsuperscript{345} See Inter-American Dialogue Task Force on Cuba, supra note 256, at 6-7;

\textsuperscript{346} Cuban Democracy Act House Hearings 1992, supra note 1, at 548-49.

\textsuperscript{347} Id. at 548.

publishers. Further, the administration is considering phone service expansion into Cuba.

In addition, there are signs that Cuba itself is changing. Fidel Castro has released four leading dissidents from jail. Castro has allowed Elizardo Sánchez to embark on a speaking tour—outside Cuba. Finally, Castro offered to talk about drug interdiction and compensation for U.S. assets seized during the Revolution.

The United States should seize this opportunity for change and execute the steps of the policy recommended by the analysts. If the United States does not, the Cuban people may regret that choice for decades.

IX. Conclusion

Although the Cold War is over, one would not recognize it by U.S. policy toward Cuba. The U.S. Cold War stance toward Cuba is best evidenced by the CDA. Rather than adopt a policy of reconciliation with Cuba, the United States has adopted a systematic policy of hostility. This policy penalizes the Cuban people and U.S. businesses, who might otherwise be meaningful vehicles for democratic change, while concurrently strengthening Castro.

The ban on U.S. foreign subsidiary trade with Cuba is the most counter-productive provision of the CDA. When originally enacted, this prohibition lead to serious conflicts with foreign governments. Those governments, as well as the Third Restatement, view this type of regulation as illegal under international law. Yet, no one has challenged this statutory ban in court. Until such a challenge is mounted, a change in U.S. policy—to promote reason, consistency, and meaningful democratic change—appears to be Cuba's only hope.

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351. Tisdall, supra note 295.
352. Id.
353. Id.
354. See supra part VII.
355. See supra notes 47-65 and accompanying text.

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