

RECENT DEVELOPMENTS

EXTRATERRITORIAL APPLICATION OF THE UNITED STATES' TRADE EMBARGO AGAINST CUBA: THE UNITED NATIONS GENERAL ASSEMBLY'S CALL FOR AN END TO THE U.S. TRADE EMBARGO

I. FACTUAL BACKGROUND

On November 3, 1993, the Forty-Eighth General Assembly of the United Nations adopted a momentous resolution calling for the end of the United States' trade embargo against Cuba.¹ In the historic vote, the United States mission was overwhelmed by international support for the Cuban-proposed resolution.²

In accepting the resolution, the United Nations brought a bitter debate between the Cuban mission and the U.S. delegation to a close. The debate began in the United Nations in 1991, but actually found its roots decades earlier when the United States first imposed its embargo against Cuba in 1963.³ The Cubans called for the United States to lift its embargo in the

¹ *NECESSITY OF ENDING THE ECONOMIC, COMMERCIAL AND FINANCIAL EMBARGO IMPOSED BY THE UNITED STATES OF AMERICA AGAINST CUBA*, G.A. Res. 48/16, U.N. GAOR, 48th Sess., Agenda Item 30, U.N. Doc. A/Res/48/16 (1993).

The final resolution was the subject of much debate, requiring amendments to the original language. See *Cuba: Draft Resolution*, U.N. GAOR, 48th Sess., Agenda Item 30, at 1-2, U.N. Doc. A/48/L.14 (1993) for the draft form of the resolution.

The resolution was required because of the United States' non-compliance with an earlier resolution calling for a cessation of acts by any member nation which violated the U.N. Charter. See *Cuba: Revised Draft Resolution*, U.N. GAOR, 47th Sess., Agenda Item 39, at 1-2, U.N. Doc. A/47/L.20/Rev. 1 (1992), which was printed in its final form as G.A. Res. 47/19, U.N. GAOR, 47th Sess., Agenda Item 39, U.N. Doc. A/Res/47/19 (1993).

² Eighty-eight countries voted in favor of the resolution presented by the Cuban mission; four voted against it; fifty-seven countries abstained. *Forty-eighth General Assembly GA/8580 Plenary 3 November 1993 48th Meeting (AM) Assembly Urges All States to Refrain from Applying Laws and Measures Affecting Sovereignty of Others*, Federal News Service, Nov. 4, 1993, available in LEXIS, News library, FEDNEW File.

³ For a general overview of the history of the animosity between Cuba and the United States, see MORRIS H. MORLEY, *IMPERIAL STATE AND REVOLUTION: THE UNITED STATES AND CUBA, 1952-1986* (1987).

The United States embargo was implemented, at least in part, in retaliation for Cuba's

summer of 1991.⁴ The Cuban mission finally prevailed with the passage of Resolution 47/19, which called on nations to refrain from infringing on the sovereignty of other member nations.⁵ The resolution was intended to urge the United States to lift the embargo, or at least the provisions which seemed to infringe on the sovereignty of Cuba and third nations.⁶ A year later, after the United States had taken no action, the Cubans pushed Resolution 48/16 through the General Assembly. Like its predecessor, the resolution specifically named the U.S. embargo in its title, and advocated lifting the embargo.⁷ The months following the passage of the resolution have seen little change in relations between Cuba and the United States,⁸ and no end to the embargo is in sight.

The resolutions, in reality, have done little to alter the United States' position. Cuba has successfully convinced the international community that the embargo violates international law, and the U.N. resolutions were a victory for Cuba. The victory, however, rings hollow for Cuba despite the defeat suffered by the United States in the General Assembly vote. The United Nations seems unprepared to enforce its resolution against the United States, and no enforcement actions are pending. Absent a method of enforcement, neither international law nor the United Nations can force the United States to cease in its unyielding effort to cripple the Cuban economy.

nationalization of U.S.-owned property during and following Fidel Castro's communist revolution in Cuba. RICHARD FALK, UNITED STATES ECONOMIC MEASURES AGAINST CUBA 13-14 (1993).

⁴ Cuba sent a memorandum to the General Assembly entitled REQUEST FOR THE INCLUSION OF A SUPPLEMENTARY ITEM ON THE AGENDA OF THE FORTY-SIXTH SESSION, NECESSITY OF ENDING THE ECONOMIC, COMMERCIAL AND FINANCIAL EMBARGO IMPOSED BY THE UNITED STATES OF AMERICA AGAINST CUBA, U.N. GAOR, 46th Sess. at 1, U.N. Doc. A/46/193 (1991).

⁵ G.A. Res. 47/19, U.N. GAOR, 47th Sess., Agenda Item 39, U.N. Doc. A/Res/47/19 (1993).

⁶ *Id.*

⁷ G.A. Res. 48/16, *supra* note 1.

⁸ The most significant development in Cuban-American relations has been Castro's lifting of Cuba's emigration restrictions, which caused an exodus of refugees from Cuba bound for Miami and a sudden reversal in the Clinton administration's open-door policy. This incident has given rise to bilateral immigration talks between the United States and Cuba. Pascal Fletcher, *Sanctions Prove a Thorny Issue in US-Cuba Talks*, FIN. TIMES, Oct. 26, 1994, at 6.

II. LEGAL BACKGROUND

A. *Trading with the Enemy Act: Foundations of the Cuban Trade Embargo and the Cuban Democracy Act*

The statutory and regulatory scheme of the United States' position on Cuba is intricate and far-reaching. The statutory foundation of the embargo is based on the Trading with the Enemy Act of 1917 (TWEA).⁹ This law, initially passed in the wake of World War I, gives the President the power to authorize sanctions against any country in times of crisis. In 1950, for example, President Truman declared a national emergency caused by what he perceived as a growing Communist threat. President Kennedy based the embargo against Cuba on the Truman proclamation of national emergency. In the mid-1970s, Congress called for a revocation of the Truman proclamation, but the successful use of TWEA led Congress to allow all existing measures under the Truman proclamation to remain in effect, thereby preserving the embargo against Cuba.¹⁰ The regulatory and statutory framework has continuously evolved since before the embargo began in 1963.¹¹

In recent years, however, the international community has grown critical of the United States' measures.¹² When the Cuban mission introduced Resolution 47/19 to the U.N. General Assembly, Cuba stressed that its complaint stemmed from violations of international law by the United States.¹³ Specifically, the Cubans vigorously argued that the United States

⁹ 50 U.S.C. App. § 5(b) (1988).

¹⁰ FALK, *supra* note 3, at 92-93.

¹¹ For an excellent chronology of U.S. measures against Cuba, both statutory, regulatory, and those enacted by administrative and executive fiat, see *id.* at 107-27.

¹² Most analysts agree that Cuba's economy has reeled out of control, crushed by the recent U.S. efforts to enforce the trade embargo and the collapse of the Soviet empire. Andrew Zimbalist, *Dateline Cuba: Hanging on in Havana*, FOREIGN POL'Y, Sept. 22, 1993, at 151. This phenomenon can probably be traced to the collapse of the Council of Mutual Economic Assistance (COMECON), the economic program of Warsaw Pact countries. Soviet bloc countries relied on COMECON for trade and financial assistance. *Id.* at 152.

¹³ U.N. General Assembly Calls for End to U.S. Embargo on Cuba, AGENCE FREE PRESSE, Nov. 3, 1993, available in LEXIS, News Library, TAFP file.

had applied its laws extraterritorially.¹⁴ Cuba relied on the impact of these U.S. statutes and regulations to gain support for its successful measures in the United Nations.

Since President Kennedy's proclamation ordering the embargo against Cuba, an evolving regulatory and statutory framework has modified the embargo.¹⁵ The most recent enhancement of the embargo's impact on Cuba was the adoption of the Cuban Democracy Act of 1992 (CDA).¹⁶ The CDA was intended to "encourage" the Cuban government to begin a transition to a democratic regime, and currently dictates U.S. policy toward Cuba.¹⁷

Section 1704 of the Act allows the President to apply sanctions against any country which trades with Cuba.¹⁸ Such countries are restricted from receiving any assistance under the Foreign Assistance Act of 1961,¹⁹ or under the Arms Export Control Act.²⁰ The Cuban-trading countries are also

¹⁴ The Cubans were specific in their accusations, delineating twelve specific reasons that the U.S. embargo was an extraterritorial application of its laws against Cuba. *Annex to Cuba's Specification of the Extraterritorial Reach of the United States Measures*, U.N. GAOR, 46th Sess., Annex, at 1-8, U.N. Doc. A/46/193/Add.7 (1991). The allegations generally concerned the statutes and regulations which made it either difficult or impossible for companies with American roots or affiliations located in third countries to trade with Cuba without facing potential or actual consequences in the United States. 15 C.F.R. §§ 515.303, 515.329, 515.559, 774.1, 785.1, 779.1, 779.8, & 779.4 (1993); 31 C.F.R. §§ 515.204 & 515.306 (1993); 22 U.S.C. §§ 283(r), 284(j), 286(aa)(1988), & 2370(a) (1988 & Supp. IV 1992). See also Jose de Cordoba, *Cuba Woos Capitalists Feebly, Driven by Need Instead of Desire*, WALL ST. J., Sept. 11, 1991, at A13 (arguing that the United States had a general, unwritten policy to coerce third countries into severing ties with Cuba).

¹⁵ For a summary of many of the regulatory and statutory measures to which the Cubans have vehemently objected, see FALK, *supra* note 3. Falk illustrates the comprehensive regulatory guidelines which have evolved over three decades and the extent of the U.S. measures.

¹⁶ 22 U.S.C. §§ 6001-6010 (Supp. IV 1992). President Bush signed the bill into law amid much fanfare in a ceremony in the Cuban-American community in Miami. *Remarks on Signing the Cuban Democracy Act of 1992*, 28 WEEKLY COMP. PRES. DOC. 2071 (Oct. 23, 1992). Furthermore, then-presidential candidate Bill Clinton announced his support for the legislation before it was signed into law, also in a rally in the Cuban-American community in Miami. Tom Fielder, *Clinton Backs Torricelli Bill*, MIAMI HERALD, Apr. 24, 1992, at 1A.

¹⁷ Mimi Whitefield, *Democracy Act Tries to Reach Cuban People: Embargo Just One Side of the Coin*, TIMES-PIYAYUNE, Jan. 23, 1994, at A28.

¹⁸ 22 U.S.C. § 6003 (1988 & Supp. IV 1992).

¹⁹ 22 U.S.C. § 2151, *et seq.* (1988 & Supp. IV 1992).

²⁰ 22 U.S.C. § 2751 (1988 & Supp. IV 1992).

ineligible for forgiveness or reduction of debt owed to the United States.²¹

Section 1706 of the Act²² is an even more restrictive aspect of the embargo. In addition to suspending the grant of any license under 31 C.F.R. § 515.559 as of July 1, 1989,²³ the Act also severely limits the ability of vessels previously docked in Cuba to dock in the United States.²⁴ Under the Act, any vessel which docks in Cuba is prohibited from docking in the United States for 180 days thereafter.²⁵

The goal of the CDA is to force Cuba to adopt a democratic form of government. Section 1708 of the Act states that Cuba can regain American-based assistance by implementing "free and fair elections for a new government."²⁶ There are a variety of other statutes which dictate American policy toward Cuba and were designed in some manner to end the current regime in Cuba by inflicting economic stress on the country.²⁷

Although the U.S. measures had a forceful impact from the outset, Cuba was able to insulate itself by relying on trade with Soviet-bloc nations.²⁸ Only recently have the Cubans asserted arguments in favor of limiting the U.S. sanctions against it.

²¹ 22 U.S.C. § 6003(b) (1988 & Supp. IV 1992).

²² 22 U.S.C. § 6005 (1988 & Supp. IV 1992).

²³ See 22 U.S.C. § 6005(a)(1), which limited licenses under 31 C.F.R. § 515.559(b). The regulation had previously allowed licenses for transactions between U.S.-owned or U.S.-controlled entities organized under the laws of a third country and Cuba for a set of specifically designated purposes.

²⁴ 22 U.S.C. § 6005(b) (1988 & Supp. IV 1992).

²⁵ 22 U.S.C. § 6005(b)(1) (1988 & Supp. IV 1992).

²⁶ 22 U.S.C. § 6006(1) (1988 & Supp. IV 1992).

²⁷ See, e.g., Dire Emergency Supplemental Appropriations Act of 1990, Pub. L. No. 101-302, 104 Stat. 213, 244 (1990) (preventing funds for foreign assistance from being sent to any country which provides military or economic assistance to Cuba); Food Security Act of 1985, 7 U.S.C. § 1446 (Supp. IV 1992) (directing the president not to allocate any U.S. sugar quota to any country that is a net importer of sugar unless that country certifies that it does not re-export to the United States any Cuban sugar).

²⁸ See *supra*, note 12.

B. Extraterritoriality

Extraterritoriality is best defined simply. A country has free reign to impose laws governing all events within its jurisdiction.²⁹ A country may not reach outside of the confines of its borders and impose its will on those not validly under its jurisdiction.³⁰

According to the United States, the various measures against Cuba are a valid exercise of sovereignty.³¹ This position must be examined in accordance with basic tenets of international law and agreements such as the U.N. Charter and the General Agreement on Tariffs and Trade (GATT).³²

1. Principles of International Law

The Restatement (Third) of Foreign Relations dictates the bases for jurisdiction to prescribe laws. Sections 402³³ and 403³⁴ outline the

²⁹ This tenet of international law, of course, assumes the absence of crimes against humanity, which are generally thought to be violations of international law even if committed exclusively within the borders of the offending country. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1986).

³⁰ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 401 (1986) (setting forth limitations on jurisdiction to prescribe, adjudicate and enforce laws and regulations under international law).

³¹ The United States has maintained this argument in every communication it has made concerning the U.N. resolutions pertaining to its embargo against Cuba since August 21, 1991. On that date, in a Department of State press release, the United States maintained that "the U.S. embargo of Cuba is not an appropriate issue for discussion at the U.N. Every government has the right and responsibility to choose the governments with which it wishes to have commercial and political relations." U.S. Dept. of State Press Release, Aug. 21, 1991, cited in FALK, *supra* note 3, at 20.

³² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 188 [hereinafter GATT].

³³ Section 402 reads as follows:

§ 402- Bases of Jurisdiction to Prescribe

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1)
 - (a) conduct that, wholly or in substantial part, takes place within its territory;
 - (b) the status of persons, or interests in things, present within its territory;
 - (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relation of its nationals outside

requirements for such jurisdiction. Generally, and subject to limitations and exceptions, a country can regulate matters which take place within its territory, control the status of people or things within the territory, or control

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- (3) as well as within its territory; and certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1986).

³⁴ Section 403 reads as follows:

§ 403—Limitations on Jurisdiction to Prescribe

- (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
- (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
- (a) the link of the activity to the territory of the regulating state, *i.e.* the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
 - (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
 - (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
 - (d) the existence of justified expectations that might be protected or hurt by the regulation;
 - (e) the importance of the regulation to the international political, legal, or economic system;
 - (f) the extent to which the regulation is consistent with the traditions of the international system;
 - (g) the extent to which another state may have an interest in regulating the activity; and
 - (h) the likelihood of conflict with regulation by another state.
- (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1986).

conduct outside the territory which affects the territory itself.³⁵ It is vitally important to note that the American system often views international law as a part of American law.³⁶

2. *The Charter of the United Nations*

Various provisions of the U.N. Charter hold signatory nations to the principles of non-intervention and both expressly and implicitly forbid extraterritorial application of laws which would thereby violate another country's sovereignty. Article 1 of the Charter states that the purpose of the United Nations is, *inter alia*, to promote international cooperation for solving "problems of an economic, social, cultural, or humanitarian character"³⁷ Article 2 forcefully commands all member nations to respect the sovereignty of all other member nations.³⁸ Article 2, paragraph 1 articulates the necessity of sovereign equality of all members.³⁹ Article 2, paragraph 4 explicitly states that sovereignty shall not be abridged: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"⁴⁰ Article 2, paragraph 7 echoes the rationale of the Restatement, commanding that the United Nations shall not "intervene in matters which are essentially within the domestic jurisdiction of any state. . . ."⁴¹

The inherent difficulties of the embargo are apparent in careful analysis of the Charter. The United States urges that its measures against Cuba are of domestic concern, thereby falling outside U.N. domain.⁴² Such an argument brings the embargo under the rubric of Article 2, paragraph 7,

³⁵ For a background of the supporting law for these measures, see the Reporter's notes for each of these sections. *Id.* at §§ 402, 403.

³⁶ U.S. CONST. art. VI. Article VI explicitly refers to treaties between nations as the law of the land. Specifically, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the *supreme Law of the Land*" (emphasis added). Congress also alludes to a superseding "law of nations" in Article I, § 8, when it dictates that "[the Congress shall have power] [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the *Law of Nations*" (emphasis added).

³⁷ U.N. CHARTER, art. 1, ¶ 3.

³⁸ *Id.* at art. 2, ¶ 1.

³⁹ *Id.*

⁴⁰ *Id.* at art. 2, ¶ 4.

⁴¹ *Id.* at art. 2, ¶ 7.

⁴² U.S. Dept. of State Press Release, Aug. 21, 1991, cited in FALK, *supra* note 3, at 20.

being "essentially within the [United States'] domestic jurisdiction."⁴³ Conversely, Cuba relies on Article 2, paragraphs 1 and 4, maintaining that the United States is violating its and third countries' sovereignty with the broad reach of its trading regulations.⁴⁴ The United Nations has elaborated on the goals set forth in the Charter and has since established a series of guidelines, adopting most of the accepted principles of international law.⁴⁵

3. *General Agreement on Tariffs and Trade*

GATT was established to prevent member nations from mandating unfair trading practices in the international market.⁴⁶ Several GATT provisions are particularly germane to the United States' Cuban trade embargo.

Article 5 specifically reserves freedom of transit of international goods, no matter where those goods originated.⁴⁷ United States measures restricting ports based on the goods carried by the docking ships, or even the prior destinations of those ships, would seem to be in conflict with this provision.⁴⁸ Article 11 proscribes any limitation or restriction upon the importation of a product of another GATT member.⁴⁹

⁴³ U.N. CHARTER art. 2, ¶ 7.

⁴⁴ *Id.* at art. 2, ¶ 1, 4.

⁴⁵ The principles of international law are generally the same as those outlined in the Restatement. See *supra* notes 33-35 and accompanying text. For a careful examination of the provisions of international law adopted by the United Nations which are especially germane to the discussion of the United States/Cuba trade embargo, see FALK, *supra* note 3, at 238, citing G.A. Res. 2625, U.N. GAOR, 1883d plen. mtg., U.N. Doc. A/8082 (1970).

⁴⁶ GATT, *supra* note 32. Over one hundred nations, including the United States and Cuba, have joined GATT. *Id.*

⁴⁷ Article 5 reads in part:

The freedom of transit through the territory of each contracting party, via the routes most convenient for international transit [is guaranteed, and said right applies notwithstanding] place of origin, departure, entry, exit, or destination, or on any circumstances relating to the ownership of the goods.

Id. at art. 5.

⁴⁸ See text accompanying note 16, *supra*, and text accompanying note 61, *infra* (discussing provisions of the Cuban Democracy Act of 1992).

⁴⁹ Article 11 forbids "prohibitions or restrictions other than duties, taxes or other charges [upon products of other member nations]." GATT, *supra* note 32, at art. 11.

Article 21 relieves signatories from applying GATT provisions to the extent necessary to preserve the security interest of the regulating state.⁵⁰ A signatory nation, therefore, may be permitted to impose protectionist measures if it feels that such measures are necessary to preserve its national security.

C. United Nations Measures

The U.N. resolutions, which were overwhelmingly passed by the General Assembly, made only vague references to the United States. Resolution 47/19, though naming the United States in its title, contained no specific reference or direction in its body to steer U.S. policy.⁵¹ The resolution merely urged all states to avoid "laws and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction, as well as freedom of trade and navigation."⁵²

Resolution 48/16 re-emphasized the points made in 47/19 and noted, *inter alia*, that Resolution 47/19 had not been implemented.⁵³ In a sense, therefore, the November 1993 vote passing Resolution 48/16 was nothing more than a reaffirmation of the call made a year before to condemn extraterritorial application of a state's laws. However, even if the United

⁵⁰ Article 21 provides that a contracting party is not required to adhere to GATT requirements to the extent that such non-adherence is necessary for "protection of its essential security interests . . . in time of war or other emergency in international relations. . . ." *Id.* at art. 21.

The embargo was enacted under the Truman declaration of national emergency, which would presumably bring the U.S. embargo under Article 21 of GATT. See text accompanying note 10, *supra*, for a discussion of the Truman declaration.

But see Statement of Robert S. Gelbard, Principal Deputy Assistant Secretary of State for Inter-American Affairs, before the Committee on Foreign Affairs of the House of Representatives (April 8, 1992) cited in FALK, *supra* note 3, at 137. Gelbard suggested that the embargo against Cuba no longer exists because of a perceived security threat, but rather as an effort to foster a political change within Cuba. He stated, "The United States has followed a policy of isolating Cuba diplomatically and economically for three decades. We continue that policy today in an effort to encourage a change to a democratic government in Cuba. To do otherwise would only bolster the regime's repression at home and delay democratic reform." *Id.* at 143.

⁵¹ G.A. Res. 47/19, *supra* note 5.

⁵² *Id.* The resolution drew its authority from the U.N. Charter. *Id.*

⁵³ G.A. Res. 48/16, *supra* note 1.

Nations had set out assertive standards and requested specific action from the United States, the lack of any enforcement mechanism still would prevent the resolution from having any practical impact.

III. ANALYSIS

Careful examination of the issues giving rise to the U.N. resolutions calling for a change in the status of the U.S. embargo might shed light on the legal and political issues motivating the United States and Cuba. Such a one-dimensional analysis, however, overlooks the crucial changes sustained by the Cuban people and the impact that the embargo has had on that society. The resolutions were proposed by the Cuban delegation in response to the failing integrity of the Cuban market, and the horrendous living conditions in Cuba, both of which were largely the result of the embargo.⁵⁴

Thoughtful analysis of the existing structure of international legal principles leads to the conclusion that the U.S. policy⁵⁵ is unjustifiable under international law. This examination shows further that the source of the embargo, the Trading with the Enemy Act, is no longer applicable, and that the embargo violates the standards set forth by the American Law Institute in the Restatement (Third) of Foreign Relations, the U.N. Charter, and GATT.

A. *Trading with the Enemy Act: TWEA's Application in a Modern Setting*

No longer able to rely upon the Soviet bloc either for raw materials or as a trading partner,⁵⁶ the Cubans are forced to abstain from some of the

⁵⁴ Cesar Chelala, *Cuba's Citizens Suffer from U.S. Blockade*, CHRISTIAN SCI. MONITOR, June 30, 1993, at 19.

⁵⁵ It should be noted that the American policy called into question here is not the embargo, *in toto*; rather it is the measures instigated subsequent to the initial embargo which have extraterritorial application, especially those which serve to penalize third countries or entities therein for association and trade with the Cubans. Specifically called into question are those U.S. measures delineated by the Cuban mission to the United States in *Letter Dated 11 September 1991 from the Permanent Representative of Cuba to the United Nations Addressed to the Secretary General*, U.N. GAOR, 46th Sess., at 1-2, U.N. Doc. A/46/193/Add.7 (1991), in addition to the measures called for by the United States Congress and the President in CDA. See *supra* note 16 and accompanying text for further exposition.

⁵⁶ See Zimbalist, *supra* note 12.

necessities of life that they had heretofore taken for granted.⁵⁷ The impact is felt throughout the nation. Many of the factories in Cuba only operate for three hours a day because of the fuel shortage on the island.⁵⁸ Much of the Cuban population suffers from malnutrition, a malady also blamed on the embargo.⁵⁹ The malnutrition has given rise to impaired vision and blindness in epidemic proportions.⁶⁰ The United States, however, has claimed that it has not cut off humanitarian and medical aid to the island because the Cuban Democracy Act makes reservations for purely humanitarian assistance to Cuba.⁶¹

Absent the impending threat of Communist rule on a large portion of the globe, the regime in Cuba appears to be little more than an anomaly. The United States no longer claims that its embargo exists because of a Communist threat.⁶² Clearly, the motivating force of the embargo is to foster political change within Cuba.⁶³ There is little doubt that the objective of the embargo would be more quickly realized were the Cubans cut off from all U.S. assistance. A loophole in CDA which allows for humanitarian assistance to Cuba actually strengthens the Cuban government, because revolutionary sentiment is curbed by the aid received from American humanitarian sources. Furthermore, Castro has used the embargo to rally support against the United States, blaming the United States for the conditions within Cuba.⁶⁴

Curiously, a more broad-reaching embargo appears to be necessary to foster political change in Cuba. The difficulty with this and existing measures imposed on the Cuban people is that the embargo violates basic tenets of international law. Still, the United Nations and the international

⁵⁷ See, e.g., Ricardo Chavira and David Marcus, *Cuba: Communist Dream on the Brink of Disaster*, CALGARY HERALD, Sept. 29, 1993, at A5, available in LEXIS, News library, CALHER file.

⁵⁸ Christine Tierney, *Cuba: Cuban Workers Face Sharp Salary Cuts*, REUTER TEXTLINE, Oct. 31, 1991, available in LEXIS, News library, Reuter file.

⁵⁹ *Id.* at A5 (noting cases of malnutrition in Cuban children's clinics); Pascal Fletcher, *Cuba: Economic Problems Hit Sugar, Eggs Ration in Cuba*, REUTERS, Jan. 6, 1993, available in LEXIS, News library, Reuter file.

⁶⁰ *Cuba Eye Epidemic Traced to Diet Deficiency*, REUTERS, Sept. 30, 1993, available in LEXIS, News library, Reuter file.

⁶¹ 22 U.S.C. § 6004 (1988 & Supp. IV 1992).

⁶² Statement of Robert S. Gelbard, *supra* note 50.

⁶³ *Id.*

⁶⁴ Anthony Boadle, *U.S. Cuba Policy Said Helping, Not Hurting, Castro*, REUTERS, Sept. 26, 1993, available in LEXIS, News library, Reuter file.

community at large lack either the resolve or the facilities to end U.S. oppression and extraterritorial application of its laws.

The most troublesome development in the embargo, which removes the United States action even further from the valid exercise of sovereignty under international law, is the admission that the Cuban Communist government is no longer perceived as a threat.⁶⁵ Most notably, this removes the embargo from the GATT exception for national security, and prevents the embargo from being applied under the Truman declaration of national emergency created by a Communist threat. The embargo, therefore, is not protected by TWEA and may be questioned under the originating documents of the United Nations.

TWEA, the source of the embargo against Cuba, has no application in a post-Cold War setting. TWEA applies to measures which are made in times of national emergency.⁶⁶ The national emergency to which the embargo with Cuba applied was the Communist threat during the Cold War. With the dissolution of the Soviet bloc countries, the threat of Communist rule has all but diminished entirely.⁶⁷ Because the United States has voiced the contention that the embargo is no longer maintained for national security measures, TWEA no longer applies.⁶⁸

⁶⁵ Statement of Robert S. Gelbard, *supra* note 50.

⁶⁶ For a discussion of the evolution of TWEA's application to the Cuban trade embargo, see text accompanying notes 9-28, *supra*.

⁶⁷ The remaining Communist nations which are potentially a threat to the United States are all suffering from problems which diminish that potential threat. North Korea is preoccupied with the increased armament of South Korea. See David Callahan, "Saving Defense dollars," *Foreign Pol'y* Sept. 22, 1994, p. 94 (discussing armament of both South Korea and North Korea). Communist China has to quash internal insurgency and deal with the potentially crippling problems of supporting an economy of over a billion citizens. James Flanigan, "China in its Chrysalis Requires a Deft Touch by U.S.," *L.A. Times*, June 5, 1994, p. D1 (discussing China's struggle to modernize its huge economy). To be sure, the Cubans have been an agent of insurgency in the recent past, funding and actually sending ground troops to Angola to assist in that country's efforts to overcome South African control of Angola's southern neighbor, Namibia. UPI, "Cuba Pulls Last Troops out of Angola," available in LEXIS, UPI File. Cuba was also a supporter of the Sandinista movement in Nicaragua, but with the waning of Soviet support, Cuba can no longer afford to support such insurgencies abroad. Maria Newman, "A Former Cheerleader of Revolution Looks Back in Indignation at Cuba," *N.Y. Times*, Sept. 4, 1984, § 4, at 7.

⁶⁸ The language of TWEA explicitly permits economic sanctions in the realm of international trade "during any . . . period of national emergency declared by the President." 50 U.S.C. App. § 5(b).

B. Extraterritoriality

Careful consideration of the nature of the U.S. embargo against Cuba and how it is implemented reveals that the United States' policy is to apply its laws beyond its borders. Such an extraterritorial application of the embargo violates the standards set forth in the Restatement, the U.N. Charter, and the provisions of GATT.

1. Violations of the Restatement Standards

Measuring the actions of the United States and its necessary impact on international sovereignty can easily be accomplished through a mechanical application of the guidelines set forth in the Restatement (Third) of Foreign Relations sections 402 and 403.⁶⁹

It is clear that the embargo does not regulate exclusively within the borders of the United States.⁷⁰ The crucial question, therefore, is whether the embargo seeks to regulate conduct which has an effect within the borders of the United States despite the extraterritorial application of those laws. When the United States feared a legitimate communist threat, section 402(3) was applicable, but in light of the United States' changing mandate toward Cuba, it is unlikely that this exception continues to apply.

The United States argues that proper application of section 402(1)(c), allowing regulation of U.S. nationals within and outside of U.S. territory, justifies the United States' regulations of American companies' holdings abroad. Such an argument, however, ignores the fact that these corporations are organized under the laws of a third country which suffers when the United States regulates that third country's concerns.

Section 403 of the Restatement essentially sets forth a balancing test to determine if jurisdiction is valid under section 402. Limits on jurisdiction can be made subject to the interest of another country.⁷¹ In essence, the regulating state must weigh its interest against those of a country which may suffer damage to its sovereignty by regulation. If the other country's interest is of prevailing importance, then the regulating nation should defer to that

⁶⁹ For a discussion of the requirements of these sections of the Restatement, and for the language of the same, see *supra* notes 33-35 and accompanying text.

⁷⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 402(1) (a) & (b) (1986).

⁷¹ For discussion of the Restatement section 403, see *supra* note 34 and accompanying text.

nation.⁷²

2. *Violations of the U.N. Charter*

The U.N. Charter clearly reserves, among all members, absolute sovereignty for every nation of the world.⁷³ It is a basic idea of international law that a state is free to govern within its borders without interference from the outside.⁷⁴ The Charter also clearly removes purely domestic laws from the United Nations.⁷⁵ There is obvious tension inherent in a series of laws which are of domestic concern but have an impact outside of that state's borders. This is the nature of the Cuban embargo.

The United States is certainly justified in its position that it can choose those nations with which it wishes to trade. In this most basic sense, the embargo is a valid exercise of national sovereignty. The character that the embargo has taken in the years since its inception has, however, removed it from this valid exercise of sovereignty. These strongarm tactics by the United States serve as simple attempts to apply U.S. laws extraterritorially.

3. *Violations of GATT*

The GATT agreement specifies that signatory nations will not interfere with the free flow of trade of other member nations.⁷⁶ These measures specifically apply to any action of member nations that restricts the flow of trade of another member nation in any manner.⁷⁷ There is no question that the U.S. measures violate these provisions.

The U.S. measures which impact third countries are especially suspect. For example, the CDA restricts docking third country ships in U.S. ports within 180 days of having previously been docked in Cuba.⁷⁸ This measure serves as a restriction on the free trade of third countries which would

⁷² RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1986).

⁷³ See *supra* notes 37-45 and accompanying text for a brief discussion concerning the contents of the U.N. Charter.

⁷⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 401 (1986).

⁷⁵ See *supra* note 20 and accompanying text.

⁷⁶ GATT, *supra* note 32, at art. 5.

⁷⁷ See *supra* note 50 and accompanying text for specific discussion of the GATT provisions which are especially germane to the Cuban trade embargo.

⁷⁸ 22 U.S.C. § 6005(b)(1) (1988 & Supp. IV 1992).

otherwise take advantage of Cuba's close proximity to the United States.⁷⁹ Trade certainly does not flow freely in this situation, and such a disruption of the free flow of trade clearly suggests a *prima facie* violation of GATT.⁸⁰

Until recently, the United States has maintained that its actions against Cuba have been justified under Article XXI of the GATT treaty,⁸¹ which specifically exempts member nations from compliance with provisions of the treaty in light of potential threats to national security. As a result of the end of the Cold War, the United States is no longer justified in claiming such an exemption from GATT provisions under Article XXI. It is difficult to escape the conclusion that the United States is violating the treaty.

C. U.N. Measures

The United Nations responded to the U.S. trade embargo against Cuba by passing resolutions 47/19 and 48/16.⁸² The resolutions renounced the embargo as violating international law,⁸³ but the resolutions have no binding effect on member nations.⁸⁴ As such, the resolutions do little more than put the world on notice while sounding a call for support for Cuba.

⁷⁹ It is very likely that a country which trades with Cuba, despite the voluminous United States measures which would potentially impact that country, would send a ship to the United States after it had delivered goods to Cuba. The Cuban island is less than 100 miles from the Florida keys.

⁸⁰ In addition to the restrictive measures of CDA, an entire spectrum of American regulations also impose upon third countries identical deleterious effects. For example, any entity organized under the laws of a third country which is tied to the United States through shareholders (a 25% interest in the company is sufficient to trigger the embargo) is prohibited from trading with the Cubans. Enforcement of these measures, if instigated, could result in the U.S. entity being penalized as if it had violated the trade embargo. See 31 C.F.R. §§ 515.559, 515.329, & 515.302. These measures certainly reach well beyond the borders of the United States. For example, when a British company that is organized, chartered, and taxed under British law is fined by the U.S. government because of trade with Cuba (an activity which is freely permitted by the British government), Britain's sovereignty is breached.

⁸¹ GATT, *supra* note 32, at art. 5.

⁸² GA. Res. 48/16, and GA. Res. 47/19, *supra* note 1.

⁸³ *Id.*

⁸⁴ *Id.*

IV. CONCLUSION

While a country such as the United States has the right, under international law, to choose its own trading partners and, by logical extension, to impose an embargo against whichever country it wishes, this right is not entirely without limit. Whenever an embargo infringes on a third country's sovereignty, it is likely that the embargo violates international law. Careful examination of different sources of law has revealed that the U.S. practice of the Cuban trade embargo is contrary to both domestic and international law.

The embargo is based on the Trading with the Enemy Act which, by its very name, allows restrictions on trade with enemy countries. While Cuba was once the enemy of the United States, the fall of Communism has rendered Cuba nothing more than a harmless neighbor. Furthermore, TWEA requires a crisis or national emergency. Because the embargo is based on a decades-old declaration of national emergency linked to a Communist threat, the TWEA application of the embargo is tenuous.

Notwithstanding the problems with the domestic origins of the embargo, the embargo in practice violates the sovereignty of third countries through the imposition of U.S. policy on their trade practices. As such, the embargo violates the sovereignty principles set forth in the Restatement, the U.N. Charter, and GATT.

The United Nations' call on member nations to avoid infringing upon the sovereignty of other Member nations by way of trade practices was designed to direct the United States to cease its actions against Cuba, namely those of CDA and its regulatory restrictions of third countries. The U.N. vote clearly signaled the international community's disdain for the U.S. trade embargo against Cuba. The difficulty, however, remains in any effort to enforce the U.N. mandate. The United States contributes more to the budget of the United Nations than any other nation,⁸⁵ and often leads the charge in asserting compliance with U.N. mandates abroad. The United Nations rarely takes a position against the United States, its biggest benefactor, but the resolutions condemning the Cuban trade embargo have sounded the alarm. The U.S. measures against Cuba are, nevertheless, unlikely to come to an

⁸⁵ See BASIC FACTS ABOUT THE UNITED NATIONS, 22, 261-64 (1992) (outlining the U.N. budget structure and noting that the United States contributes 25% of the U.N. budget, the maximum allowable amount, and more than any other member).

end absent some drastic change in Cuba's political structure. While Castro is in power, it is unlikely that there will be any drastic change in the U.S. posture toward Cuba.

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