

**THE CUBAN DEMOCRACY ACT OF 1992:
THE EXTRATERRITORIAL SCOPE
OF SECTION 1706(a)**

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1. INTRODUCTION

For more than thirty years, the United States has maintained an economic embargo against the socialist government of Cuba. In light of the decline of communism in Europe and the failing Cuban economy, the United States decided to tighten this embargo through the enactment of the Cuban Democracy Act of 1992 ("CDA").¹ By restricting U.S. foreign subsidiaries² and pressuring foreign countries from trading with Cuba, the statute aims to increase the level of economic and social unrest that would cause the Cuban people to demand democratic political reform.³

Until the enactment of the CDA, many nations supported the U.S. embargo of Cuba. The CDA, however, has caused great international concern and protest. Specifically, foreign nations object to section 1706(a)⁴ of the CDA because it

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¹ Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992) (codified at 22 U.S.C.S. §§ 6001-10 (1993)).

² This Comment uses the term "U.S. foreign subsidiaries" to refer to U.S.-owned or controlled subsidiaries located in a foreign country.

³ See *infra* Section 3 for a detailed description of the provisions of the Cuban Democracy Act of 1992.

⁴ The Cuban Democracy Act § 1706(a) provides:

(a) Prohibition on certain transactions between certain United States firms and Cuba: (1) Prohibition. Notwithstanding 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;

(2) Applicability to Existing Contracts. Paragraph (1) shall not affect any contract entered into before the date of the enactment of this Act [October 23, 1992].

22 U.S.C.S. § 6005(a) (1993). The provision of the Cuban Assets Control Regulations to which the Cuban Democracy Act § 1706(a) refers provides: "Specific licenses will be issued in appropriate cases for certain categories of transactions between U.S.-owned or controlled firms in third countries and Cuba, where local law requires, or policy in the third country favors,

prohibits *all* foreign subsidiaries of U.S. companies from trading with Cuba.⁵ These countries⁶ contend that section 1706(a) hurts their economic interests and usurps their authority to fashion laws reflecting national priorities. For these reasons, several nations have threatened to invoke blocking statutes to prevent U.S. subsidiaries operating within their territories from complying with this provision.⁷

This Comment examines the tension between section 1706(a) and the norms of public international law, as well as the economic impact of this provision upon the U.S. economy. Section 2 reviews the history of U.S. economic sanctions against Cuba. Section 3 presents an overview of the purposes and provisions of the CDA. Section 4 discusses the unconditionality of section 1706(a) and its incompatibility with public international law. Section 5 examines the condition of the Cuban market, the likely impact of section 1706(a) on U.S. businesses, and the potential benefits that Cuban trade would have on the U.S. economy. This Comment concludes by arguing for the repeal of section 1706(a) and for an end to the U.S. embargo against Cuba.

trade with Cuba." 31 C.F.R. § 515.559(b) (1993).

⁵ The scope of this Comment is primarily confined to the discussion of § 1706(a).

⁶ Within the international community, Canada, Britain, and the European Community ("E.C.") have been the most vocal in opposing the provision. *Cuba Plays Down U.S. Sanctions' Impact on Sugar Trade*, Reuter Bus. Rep., Oct. 22, 1992, available in LEXIS, Nexis Library, Omni File. Specifically, the E.C. Ruling Commission warned that "the extension of the U.S. trade embargo against Cuba [which jeopardizes the E.C.'s \$500 million trade with Cuba] has the potential to cause grave damage to the transatlantic relationship." Martin Sieff, *U.S. Bill on Cuban Trade Angers Canada, E.C.*, WASH. TIMES, Oct. 9, 1992, at A7. Similarly, Canada challenged the U.S. measure, which would affect \$20 million worth of trade between Canadian-based subsidiaries and Cuba. *Canada Seeks to Block Curbs on Trade with Cuba*, WALL ST. J., Oct. 12, 1992, at B6.

⁷ Responding to the enactment of the CDA, Canada issued an order forbidding U.S. subsidiaries located in its territory from complying with § 1706(a). *Canada Issues Order Blocking U.S. Trade Restrictions*, External Affairs and International Trade Canada News Release, Oct. 9, 1992, at 5. Similarly, Britain has issued an order directing British-based U.S. subsidiaries not to comply with § 1706(a). *U.K. Acts to Counter U.S. Trade Ban on Cuba*, Dept. of Trade and Industry Press Release, Oct. 16, 1992. For a discussion of Canada's and Britain's blocking provisions, see *infra* Sections 4.2.1, 4.2.2.

2. HISTORICAL BACKGROUND: U.S. ECONOMIC SANCTIONS AGAINST CUBA

Shortly after Fidel Castro took power in 1959 and established a socialist regime, the United States imposed broad economic sanctions against Cuba, which then relied heavily on U.S. trade.⁸ In late 1960, President Eisenhower invoked the 1949 Export Control Act⁹ to ban exports to Cuba.¹⁰ Later that year, the United States banned all Cuban sugar imports.¹¹ In February 1961, President Kennedy asked National Security Advisor McGeorge Bundy whether it would “make things more difficult for Castro” if the United States prohibited Cuban imports, such as tobacco, vegetables, and fruits.¹² Subsequently, the State Department asked the Treasury Department to examine the legality of “a complete economic blockade.”¹³

The Treasury Department determined that “traditional international law and principles do not afford much support for the unilateral imposition of such a blockade.”¹⁴ Nonetheless, the Treasury Department ultimately suggested that an embargo be based on section 620(a) of the Foreign Assistance Act of 1961¹⁵ and section 5(b) of the Trading with the Enemy Act.¹⁶ Additionally, Treasury Secretary Henry Fowler suggested that the United States impose the following restrictions as a means to disrupt the Cuban economy: (1) prohibiting U.S. foreign subsidiaries from trading with Cuba;

⁸ Toward the end of 1958, U.S. imports from, and exports to, Cuba amounted to approximately 75% of Cuba's total trade. See MORRIS H. MORLEY, *IMPERIAL STATE AND REVOLUTION, THE UNITED STATES AND CUBA, 1952-1986* 410 n.93 (1987). See *id.* for a comprehensive discussion of U.S. policy and economic sanctions against Cuba.

⁹ Export Control Act of 1949, ch. 11, 63 Stat. 7 (1949) (codified as amended at 50 U.S.C.S. §§ 2021-32 (1993)).

¹⁰ MORLEY, *supra* note 8, at 121.

¹¹ PHILIP BRENNER, *FROM CONFRONTATION TO NEGOTIATION: U.S. RELATIONS WITH CUBA* 13 (1988).

¹² MORLEY, *supra* note 8, at 188.

¹³ *Id.*

¹⁴ *Id.* at 189.

¹⁵ Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 620(a), 75 Stat. 424 (1961), 22 U.S.C. § 2370 (1989).

¹⁶ Trading with the Enemy Act, ch. 106, § 5(b), 40 Stat. 411 (1917) (codified as amended at 10 U.S.C.S. 904 (1993)).

(2) terminating aid to countries which send strategic goods, such as weaponry, to Cuba; (3) sanctioning the transportation of goods to and/or from Cuba; and (4) preventing foreign trade with Cuba.¹⁷ With the exception of the fourth restriction, Secretary Fowler's suggestions were incorporated in the Cuban Assets Control Regulations,¹⁸ which forbade any trade with Cuba unless authorized by the Secretary of Treasury.

From 1963 until 1975, a near total embargo was imposed against Cuba and U.S. foreign subsidiaries were effectively forbidden from engaging in Cuban trade. Although the Cuban Assets Control Regulations permitted foreign subsidiaries, except for banking corporations, to trade with Cuba as long as U.S. goods, dollars, credit, or transport were not involved, such transactions could only be "incidental to the conduct of business activities."¹⁹ If a U.S. foreign subsidiary engaged in a substantial amount of Cuban trade, its trade license could be

¹⁷ MORLEY, *supra* note 8, at 188.

¹⁸ See 31 C.F.R. § 515 (1963).

¹⁹ 31 C.F.R. § 515.541 (1963) (revoked by 40 Fed. Reg. 47,108 (1975)) provided:

(a) Except as provided in paragraphs (b), (c), (d) and (e) of this section, all transactions incidental to the conduct of business activities abroad engaged in by any non-banking association, corporation, or other organization, which is organized and doing business under the laws of any foreign country in the authorized trade territory are hereby authorized.

(b) This section does not authorize any transaction involving United States dollar accounts or any other property subject to the jurisdiction of the United States.

(c) This section does not authorize any transaction involving the purchase or sale or other transfer of any merchandise of United States origin or the obtaining of credit in connection therewith.

(d) This section does not authorize the transportation aboard any vessel which is owned or controlled by any organization described in paragraph (a) of this section of any merchandise from a designated foreign country to any country or from any country directly or indirectly to a designated foreign country.

(e) This section does not authorize any person subject to the jurisdiction of the United States other than an organization described in paragraph (a) of this section to engage in or participate in or be involved in any transaction. For the purpose of this section only, no person shall be deemed to be engaged in or participating in or involved in a transaction solely because of the fact that he has a financial interest in any organization described in paragraph (a) of this section.

revoked. According to Stanley Sommerfield, then Chief Counsel for the Foreign Assets Control Office of the Treasury Department, “[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.”²⁰

Despite the existence of the Cuban Assets Control Regulations, the Ford Administration recognized that it needed to be “flexible about U.S. [foreign] subsidiaries trading with Cuba so as not to drift into ‘conflict situations’ with important allies and ‘complicate . . . [U.S.] relations with those countries.’”²¹ Accordingly, the Ford Administration granted trade exemptions to U.S. foreign subsidiaries when necessary to avoid a confrontation with a foreign country. For example, to avoid a clash with the Canadian government in February 1975, the Ford Administration permitted the Canadian-based subsidiary of California’s Litton Industries, Inc. to sell \$500,000 worth of desks, chairs, and filing cabinets to Cuba.²²

In August 1975, after the Organization of American States lifted its economic embargo of Cuba, the Ford Administration decided to relax the U.S. restrictions against Cuban trade.²³ Its decision was motivated by the desire to “remove a recurrent source of friction” between the United States and the foreign countries that encouraged companies in their territories to trade with Cuba.²⁴ The United States revised the Cuban Assets Control Regulations by making the following changes:

²⁰ Stanley L. Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 19 BUS. LAW. 861, 868 (1963-64).

²¹ MORLEY, *supra* note 8, at 277.

²² *Id.* at 276-77. The potential for a confrontation was real. Canada’s Trudeau government actively demanded the exemption, and Canadian Foreign Minister Alastair Gillespie publicly challenged the U.S. regulations for infringing on Canada’s national sovereignty. Moreover, less than a year before, Prime Minister Pierre Trudeau had threatened to terminate the government’s relationship with the Canadian-based U.S. subsidiary MLW-Worthington Ltd. unless the United States permitted the subsidiary to execute its \$15 million contract with Cuba. At that time, the Nixon Administration chose to ignore the sale while the Canadian government played down the subsidiary’s transaction and abandoned a confrontation with the United States about the U.S. regulations’ violation of Canada’s national sovereignty. *Id.*

²³ *Id.* at 277.

²⁴ *Id.*

(1) licensing Cuban trade by U.S. subsidiaries based in foreign countries that encourage such trade,²⁵ (2) licensing ships involved with Cuban trade to enter U.S. ports,²⁶ and (3) lifting the ban on aid to foreign countries that trade with Cuba.²⁷

In 1978 and 1979, members of Congress urged the Carter Administration to strengthen restrictions on Cuban trade by reverting to the pre-1975 policy with respect to U.S. foreign subsidiaries, in order to punish Cuba for its military involvement in Angola.²⁸ The Carter Administration rejected this recommendation because it did not wish to antagonize other nations or hurt "important bilateral economic understandings" by extending U.S. law extraterritorially.²⁹ Under the Reagan Administration, however, the embargo against Cuba was tightened.³⁰

3. THE CUBAN DEMOCRACY ACT OF 1992

During the Bush Administration, Congress made several proposals to strengthen the Cuban embargo. One of these proposals, the Mack Amendment, would have prohibited all U.S. foreign subsidiaries from trading with Cuba. This amendment was introduced in Congress several times but was enacted into law only in 1992. The United States feared that imposing restrictions upon foreign countries would alienate these nations without resulting in Castro's overthrow. This hesitation to strengthen the embargo against Cuba was based

²⁵ 31 C.F.R. § 515.559 (1975).

²⁶ 31 C.F.R. §§ 515.207, 515.562 (1975).

²⁷ MORLEY, *supra* note 8, at 277.

²⁸ See Robert B. Thompson, *United States Jurisdiction Over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 LAW & POL'Y INT'L BUS. 319, 333 (1983).

²⁹ *Id.*

³⁰ The Reagan Administration sought to restrict Cuba's access to hard currency and U.S. goods. Specifically, in 1982, the Treasury Department restricted the use of U.S. dollars or credit cards to pay travel-related expenses incurred in Cuba. Additionally, the Treasury Department forced the shut-down of American Airways Charter of Miami, the major carrier from the United States to Cuba. These restrictive actions effectively limited Cuba's tourism business and, thus, the country's revenues. Further adding to Cuba's economic difficulties, the Reagan Administration maintained constant pressure on foreign countries to end their trade with Cuba. See

MORLEY, *supra* note 8, at 337-38.

on the belief that the Castro government would not fall any time soon. However, the United States found that the worldwide decline of communism and the sharp reduction in financial assistance from the former Soviet Union and Eastern Europe have made the Castro government politically vulnerable.³¹ Additionally, the U.S. government found that increasing internal pressure made the collapse of the Castro government more likely.³² Prompted by these findings, Congress, with President Bush's approval, adopted the Mack Amendment as section 1706(a) of the Cuban Democracy Act of 1992.³³

³¹ Cuban Democracy Act of 1992 § 1702(6).

³² *Id.* § 1702(7).

³³ It should be noted that arguments existed against enacting the CDA. Those rejecting the CDA not only objected to the economic deprivation for the Cuban people, but also criticized the bill's ineffectiveness in achieving its purposes and its negative impact on U.S. businesses and foreign relations. Summarizing arguments against the CDA, Rep. Nancy Johnson stated:

[T]he market share American subsidiaries provide to Cuba is so small it is easily filled by European and Asian producers. And the only people that will be hurt are Americans who work hard and who care a lot about their jobs.

Unfortunately, this bill seeks to punish Castro by punishing United States companies, United States products, and worst of all, United States jobs. People [are] losing their jobs. Scheduled layoffs are already great, and this bill will increase those estimates.

138 CONG. REC. H9090 (1992). Additionally, Rep. Charles B. Rangel questioned the motivation behind the legislation:

[I]t appears to me that this bill is not just a legislative initiative, but it is more of a political statement, and I think . . . we might take a look at this as not being concerned so much about the future of the people living in Cuba as it is an appeal to the Cuban Americans in Dade County.

If we really take a look at where we are today, we do find that the Communist nations that have fallen have done so internally. It has not done so as a result of the United States providing sanctions against them.

Id. at H9086. Moreover, according to Sen. Tom Harkin, the United States lacks authority to implement legislation which impose U.S. laws upon U.S. subsidiaries operating in other countries. See 138 CONG. REC. S15,081 (1992).

3.1. Objectives And Provisions Of The Cuban Democracy Act

The purpose of the Cuban Democracy Act is "to seek a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government."³⁴ At the same time, Congress also expressed an interest in shielding the Cuban people from as much suffering as possible. The statute attempts to reconcile these seemingly contradictory goals by prohibiting trade with Cuba while permitting humanitarian assistance to the Cuban people. Specifically, unless licensed by the Secretary of the Treasury, the statute prohibits ships from entering U.S. ports if they (1) carry goods in which Cuba or any of its nationals have an interest or (2) were in Cuba within 180 days prior to arrival in the United States.³⁵ As noted above, the CDA prohibits foreign subsidiaries of U.S. companies from trading with Cuba.³⁶ However, the statute permits licensed donations of food and medicine to non-governmental groups or individuals.³⁷ The CDA also permits U.S. businesses to establish telecommunication services and facilities in Cuba to provide information to the Cuban people in order to foster democratic reform.³⁸

³⁴ Cuban Democracy Act of 1992 § 1703(1).

³⁵ *Id.* § 1706(b)(1).

³⁶ *Id.* § 1706(a). Section 1706(a) deprives the Secretary of the Treasury of its former authority under the Cuban Assets Control Regulations to license U.S. foreign subsidiaries to trade with Cuba. Note, however, that the regulation only prevents entry into agreements after Oct. 23, 1992. Contracts made before that date are still valid.

³⁷ *Id.* §§ 1705(b)-(c).

³⁸ *Id.* § 1705(e)(2). To encourage the Cuban government to democratize, hold free and fair elections, and respect human rights, the CDA offers rewards to the Cuban government for such changes. *Id.* § 1708(a). Incentives include: (1) the U.S. government providing food and medical supplies for humanitarian purposes to Cuba, *id.* § 1707; (2) the President lifting restrictions on trade between foreign subsidiaries and Cuba and allowing ships having been to Cuba or carrying goods of Cuban interest to dock at U.S. ports, *id.* §§ 1706(b)(1), 1708(a); and (3) the U.S. government facilitating Cuba's reentry into the international community and financial organizations, *id.* § 1708(b)(1). Additionally, the United States shall provide emergency relief to Cuba during its transition to democracy. *Id.* § 1708(b)(2). Also, further measures to end the trade embargo shall be taken. *Id.* § 1708(b)(3).

3.2. Sanctions

Under the CDA, the President may impose sanctions upon any country that provides assistance to Cuba in a form that is "more favorable than generally available."³⁹ These sanctions may include: (1) disqualification for assistance under the Foreign Assistance Act of 1961⁴⁰ or the Arms Export Control Act⁴¹ and (2) denial of requests to forgive or reduce loans owed to the U.S. government.⁴² The sanctions are valid until the Castro regime moves toward "democratization and greater respect for human rights."⁴³ In addition to authorizing the President to impose sanctions against countries which provide such assistance, the CDA also permits the Secretary of the Treasury to impose civil penalties of up to \$50,000 against companies trading with Cuba.⁴⁴ Civil penalties, however, may be imposed only after there has been an opportunity for an agency hearing and prehearing discovery. Any decision to impose a civil penalty is subject to judicial review.⁴⁵

4. THE INCOMPATIBILITY OF SECTION 1706(a) WITH PUBLIC INTERNATIONAL LAW

Section 1706(a) of the Cuban Democracy Act unconditionally denies licenses to U.S. foreign subsidiaries for trade with Cuba, regardless of the particularity of the situation or the appropriateness of the extraterritorial provision. Such regulation of U.S. subsidiaries conducting business abroad offends public international law in three ways. First, section 1706(a) infringes upon a State's exercise of national sovereignty. Second, the unconditionality of section 1706(a) does not accommodate those U.S. foreign subsidiaries caught between the conflicting laws of the United States and

³⁹ *Id.* § 1704(b)(2)(A).

⁴⁰ 22 U.S.C. §§ 2151 *et seq.* (1992).

⁴¹ 22 U.S.C. §§ 2751 *et seq.* (1992).

⁴² Cuban Democracy Act of 1992 § 1704(b)(1)(B).

⁴³ *Id.* § 1703(6).

⁴⁴ *Id.* § 1710(c)(2). Before the enactment of the CDA, the Secretary of the Treasury had only the authority to impose criminal penalties against violations of the Cuban Assets Control Regulations. *See* 31 C.F.R. § 515.701 (1993).

⁴⁵ Cuban Democracy Act of 1992 § 1710(c)(2)(b)(4).

another country. Third, section 1706(a) ignores instances when U.S. prescriptive jurisdiction is unreasonable and, thus, limited by public international law.

4.1. *Extraterritorial Prescriptive Authority*

Under accepted principles of international law, a State generally has the authority to prescribe laws to govern acts beyond its own borders when those acts: (1) affect the State's own territory, (2) threaten its national security, or (3) are conducted by its citizens.⁴⁶ Of the three bases for asserting prescriptive jurisdiction extraterritorially—effect, national security, and nationality—the United States may only rely on the nationality principle to prescribe section 1706(a).⁴⁷ Neither the effects nor the national security principle sufficiently justifies the exercise of jurisdiction to prescribe section 1706(a).

First, trade between a subsidiary domiciled in a foreign country and Cuba takes place outside of U.S. territory. While Cuban trade by foreign subsidiaries may affect U.S. foreign policy toward Cuba, the specific "effect" on the United States itself is uncertain. Second, trade between U.S. foreign subsidiaries and Cuba is unlikely to hurt U.S. national

⁴⁶ Prescriptive authority is defined as follows:

Subject to Section 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 relations of its nationals outside as well as within its territory; and
- (3) 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 LAW § 402 (1986).

⁴⁷ Generally, the extraterritorial application of law is discouraged. For this reason, the Cartel Restriction Act of 1979, which imposes a burden on foreign subsidiaries of U.S. companies and U.S. subsidiaries of foreign companies to report anti-competitive activity, was not enacted. See Kenneth R. Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U. L. REV. 323, 340-41 (1981).

security. In fact, the Inter-American Dialogue's Special Report⁴⁸ states:

Deprived of military and economic assistance from the Soviet Union, with all of its own troops recalled from abroad, and with its support for foreign insurgencies sharply curtailed, Cuba can no longer be considered a threat to the United States or to the nations of Latin America and the Caribbean.⁴⁹

Moreover, food and medicine comprise 90% of all exports by U.S. foreign subsidiaries to Cuba.⁵⁰ Specifically, 72% or \$347 million of the \$483 million worth of exports by U.S. foreign subsidiaries to Cuba consist of food items.⁵¹ Plainly, section 1706(a) is more likely to harm the Cuban people than trade with Cuba is likely to harm U.S. national security.

On the other hand, the nationality of a corporation, as defined by Comment (d) of section 213 of the Restatement (Third) of Foreign Relations Law, could serve to establish the nationality principle as the basis for U.S. prescriptive jurisdiction over the conduct of U.S. foreign subsidiaries. According to the Restatement, the nationality of a corporation may be defined as that nation with significant connection to the corporation, such as substantial corporate ownership by its nationals, management by its nationals, or location of the corporation's principal place of business.⁵² Because section 1706(a) specifically grounds its jurisdictional authority on the U.S. nationality of those owning and controlling the foreign subsidiary,⁵³ the United States could base its prescriptive authority on the nationality principle.

The traditional rule of public international law, however,

⁴⁸ The Inter-American Dialogue task force is comprised of approximately 100 Western Hemisphere leaders who periodically review policies and offer recommendations regarding U.S.-Latin American relations. This report identifies ways in which the United States may foster greater cooperation with Latin America.

⁴⁹ 138 CONG. REC. S14,066 (1992) (statement of Elliot L. Richardson, Chair, Inter-American Dialogue Task Force on Cuba).

⁵⁰ 138 CONG. REC. H9086 (1992) (statement of Rep. Charles B. Rangel).

⁵¹ Pascal Fletcher, *Cuba Says U.S. Sanctions Will Hurt Trade*, in Reuters, Nov. 12, 1992.

⁵² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 (1986).

⁵³ Cuban Assets Control Regulations, 31 C.F.R. § 515.329 (1993).

considers a corporation's nationality to be its state of incorporation. As businesses generally incorporate in the State in which they are domiciled, the nationality of U.S. foreign subsidiaries would likely be their host country. Thus, the foreign country where U.S. foreign subsidiaries are based could also claim nationality as the basis for regulating the conduct of U.S. subsidiaries within its territory. The foreign country could also claim territoriality and effect to justify regulating corporate activities conducted within its territory.

4.2. *Exercise Of State Sovereignty*

Despite U.S. prescriptive authority, based on the nationality principle to apply section 1706(a) extraterritorially, a foreign country may require U.S. subsidiaries located within its territory to comply with policies which are contrary to U.S. law.⁵⁴ The authority of a foreign country to regulate conduct within its territory is known as the exercise of state sovereignty.⁵⁵ Acting to protect their national sovereignty, Canada and Britain have already taken measures to counteract section 1706(a), which they believe infringes upon their authority to regulate their own trading interests. Specifically, Canada and Britain have issued what are known as "blocking orders" to prohibit U.S. subsidiaries within their territory from complying with section 1706(a).

4.2.1. *Canada's Blocking Order*

Canada's Foreign Extraterritorial Measures Act authorizes Canada's Attorney General to "issue an order blocking the application in Canada of foreign legislation or other legal measures which will have an extraterritorial effect in Canada

⁵⁴ In general, a State may not require a person

- (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or
- (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441(1) (1986).

⁵⁵ See A.D. NEALE & M.L. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION 94 (1988).

<https://scholarship.law.upenn.edu/jil/vol14/iss4/4>

[or] . . . infringes Canadian sovereignty.”⁵⁶ After determining that section 1706(a) would hurt Canadian trade relations with Cuba, worth approximately \$30 million (Canadian), former Canadian Attorney General Kim Campbell concluded that “such displacement of Canadian law and policy by United States law and policy constitutes an infringement of Canadian sovereignty.”⁵⁷ Accordingly, she issued an order blocking compliance with section 1706(a), “thereby counteracting the violation of Canadian sovereignty.”⁵⁸ Although Campbell recognized that this blocking order would place Canadian-based U.S. subsidiaries in the difficult position of violating U.S. law, she placed the blame on the United States for “the extraterritorial imposition of United States law to Canada in violation of Canadian sovereignty, and in violation of generally accepted principles of international law.”⁵⁹ Furthermore, she asserted that issuing the blocking order was a “necessary measure to protect and safeguard Canadian sovereignty.”⁶⁰

Specifically, the blocking order requires Canadian-based U.S. subsidiaries to disregard and report any instructions they receive from their parent companies ordering them to stop trading with Cuba.⁶¹ Canada’s Department of External Affairs and International Trade monitors companies’ trade with Cuba and investigates companies that decrease their Cuban trade. Penalties for violation of this order include fines of up to \$10,000 (Canadian), equivalent to approximately \$8,600 (U.S.), and/or jail sentences of up to five years.⁶² The maximum penalties for an indictment or a summary conviction are \$10,000 (Canadian) and \$5,000 (Canadian), respectively, each with the alternative or additional penalty of up to five years in prison.⁶³

⁵⁶ Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 5 (1985) (Can.).

⁵⁷ Foreign Extraterritorial Measures (United States) Order, 1992, CAN. GAZ., Vol. 126, No. 22 (Can.).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

4.2.2. Britain's Blocking Order

Similarly, Britain's Protection of Trading Interests Act 1980 ("PTIA") enables the British government to counter extraterritorial measures which adversely affect British economic interests.⁶⁴ Under the PTIA, the British government, probably the Secretary of State for Trade and Industry and/or the Secretary of State for Foreign Affairs, may take any or all of three actions to guard British national sovereignty over the country's economic affairs. First, it may forbid British persons or businesses, including subsidiaries of U.S. companies, from complying with foreign laws which threaten British trade.⁶⁵ Second, it may forbid British persons or businesses from complying with a request from another country to produce documents and/or evidence which may hurt the sovereignty or security of Britain.⁶⁶ Third, it may order British courts not to enforce foreign judgments related to restrictions on British trade.⁶⁷ Moreover, any British persons or businesses may bring an action in a British court to recover noncompensatory damages imposed by a foreign court in a trade restriction matter.⁶⁸

Section 1706(a) jeopardizes British trade with Cuba, which in 1990 was worth approximately \$120 million annually,⁶⁹ and conflicts with the British policy of encouraging "firms to exploit civil market opportunities in Cuba."⁷⁰ For these reasons, the British government thought it necessary to take

⁶⁴ Britain's opposition to the extraterritorial application of U.S. law preceded the enactment of the CDA. In fact, disagreement over the extraterritorial scope of U.S. antitrust laws, particularly concerning the shipping industry, dated back to 1964 and led to the Shipping Contracts and Commercial Documents Act. See A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 258 (1981) (discussing the development of British policy and legislation limiting the extraterritorial prescription of U.S. laws). Although the PTIA applies to other countries, it was passed with the United States in mind. *Id.* at 257.

⁶⁵ Protection of Trading Interests Act 1980, Mar. 20, 1980, ch. 11, § 1 (U.K.).

⁶⁶ *Id.* §§ 2, 4.

⁶⁷ *Id.* § 5.

⁶⁸ *Id.* § 6.

⁶⁹ *British Official Warns Congress Against Interfering in U.K. Trade*, 8 Int'l Trade Rep. (BNA) 1363 (Sept. 18, 1991).

⁷⁰ *U.K. Acts to Counter U.S. Trade Ban on Cuba*, *supra* note 7.

action under the PTIA to block section 1706(a). According to Trade Minister Richard Needham:

The British government, not the U.S. Congress, will determine the U.K.'s policy on trade with Cuba. I will not accept any attempt to superimpose U.S. law on U.K. companies. . . . That is why I have taken action under the Protection of Trading Interests Act. . . . I regret having had to take this step. There was no alternative. We are determined to safeguard the interests of all British companies trading with Cuba, whatever their parentage.⁷¹

On October 14, 1992, the British government issued an order prohibiting British subsidiaries of U.S. companies from complying with section 1706(a).⁷² Additionally, British-based U.S. subsidiaries must report any directives they receive requiring them to cease trading with Cuba.⁷³

4.3. *Foreign Sovereign Compulsion*

Under public international law, States have the right to regulate conduct within their territory, but they cannot compel their nationals located in a foreign country to act contrary to the laws of that foreign country.⁷⁴ Moreover, States may not punish their nationals who violate that State's law in order to comply with foreign law. This doctrine is known as foreign sovereign compulsion.⁷⁵

United States courts recognize foreign sovereign compulsion as an affirmative defense to charges of violating of U.S. law. Courts have realized that without such a defense, defendants would be penalized for complying with the laws of the foreign country where they are located.⁷⁶ United States

⁷¹ *Id.*

⁷² Protection of Trading Interests (U.S. Cuban Assets Control Regulations) Order 1992, Statutory Instruments, 1992, No. 2449 (U.K.).

⁷³ *Id.*

⁷⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441(1) (1986).

⁷⁵ See NEALE & STEPHENS, *supra* note 55.

⁷⁶ See Don Wallace, Jr. & Joseph P. Griffin, *The Restatement and Foreign Compulsion: A Plea for Due Process*, 23 INT'L LAW. 593 (1989). See generally Steven J. Hawes, Comment, *The Sovereign Compulsion Defense in Admiralty Jurisdiction and the Role of Statements by Foreign Governments*, 62

courts, however, allow the foreign sovereign compulsion defense only when "true" compulsion exists. Mere acquiescence to sovereign rule does not rise to the level of "true" compulsion.⁷⁷

A line of case law has developed this distinction between acquiescence and true compulsion. The U.S. Supreme Court held in *Continental Ore Co. v. Union Carbide & Carbon Corp.*⁷⁸ that government authorization to discriminate in mineral purchases did not constitute compulsion because no Canadian law required the defendant to engage in discriminatory activity. Similarly, the U.S. Court of Appeals for the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*⁷⁹ rejected Congoleum Corporation's claim that a patent granted by a foreign government compelled its practice of trade monopolization and shielded it from antitrust liability under U.S. law. In dismissing the defendant's argument that government approval of a patent constituted compulsion, the court stated:

Where the governmental action rises no higher than mere approval, the compulsion defense will not be recognized. It is necessary that foreign law must have coerced the defendant into violating [U.S.] law. The defense is not available if the defendant could have legally refused to accede to the foreign power's wishes.⁸⁰

Likewise, the Supreme Court in *United States v. Sisal Sales Corp.*⁸¹ held that Mexican legislation causing the defendant's practice of trade monopolization did not constitute compulsion, given the defendant's lobbying efforts for the legislation. Conversely, the Court found true compulsion in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,⁸² which raised the issue of

WASH. L. REV. 129, 137 (1987).

⁷⁷ See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979).

⁷⁸ 370 U.S. 690 (1962).

⁷⁹ 595 F.2d 1287 (3d Cir. 1979).

⁸⁰ *Id.* at 1293 (citations omitted).

⁸¹ 274 U.S. 268 (1927).

⁸² 357 U.S. 197 (1958).

whether Swiss nondisclosure laws relieved the defendant from liability for refusing to comply with a U.S. discovery order. The Court recognized that “[the defendant’s] failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control.”⁸³

Legislation is not the only way compulsion may be effected. In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,⁸⁴ a federal district court held that oral instructions to defendant Texaco from a Venezuelan regulatory agency official compelled Texaco to discriminate against plaintiff Interamerican Refining Corp. and was sufficient to constitute sovereign compulsion.⁸⁵ Whatever form the compulsion may take, true compulsion has three characteristics: the activities (1) occur within the territory of the foreign sovereign, (2) comply with the mandate of the foreign government, and (3) are actively supervised by that government.⁸⁶

Section 1706(a) makes no exception for cases where U.S. foreign subsidiaries face foreign sovereign compulsion to continue trade with Cuba. For example, Canadian-based U.S. subsidiaries are not exempt from section 1706(a) even though they face “true” compulsion from the Canadian government. These subsidiaries manifest the three characteristics of compulsion. First, their commercial activity with Cuba occurs within Canadian territory. Second, the Canadian blocking order prohibits Canadian-based U.S. subsidiaries from terminating trade relations with Cuba, requiring noncompliance with section 1706(a).⁸⁷ Finally, the Canadian government monitors the trade of Canadian-based U.S. subsidiaries with Cuba and penalizes compliance with section 1706(a).⁸⁸ In fact, the Canadian government recognized the

⁸³ *Id.* at 211.

⁸⁴ 307 F. Supp. 1291 (D. Del. 1970).

⁸⁵ *Id.* at 1296.

⁸⁶ See Wallace & Griffin, *supra* note 76.

⁸⁷ For a discussion of the Canadian order blocking § 1706(a), see Section 4.2.1.

⁸⁸ Currently, the Canadian Justice Department is investigating 20 Canadian-based U.S. subsidiaries which have complied with the directives from their parent companies demanding that they terminate their Cuban trade to conform with § 1706(a). Two such Canadian-based U.S. subsidiaries under investigation are H.J. Heinz Co. of Canada Ltd., which

difficult position of Canadian-based U.S. subsidiaries. It noted, however, the U.S. judiciary's acceptance of the foreign-sovereign compulsion defense when it evaluated the impact of the blocking order.⁸⁹

Although a U.S. court may ultimately exonerate U.S. subsidiaries in Canada or elsewhere, section 1706(a) should not, by its categorical language, subject these subsidiaries to uncertainty and impose upon the U.S. judiciary the costs of adjudicating such cases. Moreover, section 1706(a) places these foreign subsidiaries in the uncomfortable position of appearing to violate U.S. law, and thus tarnish their image as law abiding corporate citizens. In short, section 1706(a) should accommodate those cases in which U.S. foreign subsidiaries are compelled by their domiciliary country to continue trade with Cuba, just as the Cuban Assets Control Regulations formerly did.⁹⁰ It is neither fair nor efficient to compel these U.S. foreign subsidiaries to resort to administrative and judicial proceedings in order to establish those rights clearly required by public international law and affirmed by U.S. courts.

4.4. *Prescriptive Jurisdiction Limited By Reasonableness*

Although the United States has prescriptive jurisdiction over U.S. foreign subsidiaries, this jurisdiction should be exercised only when reasonable.⁹¹ According to the Restatement (Third) of Foreign Relations Law, in order to determine the reasonableness of exercising jurisdiction over a

terminated its food exports to Cuba, and Eli Lilly Canada Inc., which stopped its pharmaceutical sales to Cuba. See Peter Benesh, *Canadians Profit from Connection with Cuba*, ST. PETERSBURG TIMES, Sept. 12, 1993, (Business) at 11.

⁸⁹ Anticipating the impact of issuing a blocking order, then Attorney General Kim Campbell noted that "[s]hould any corporation be prosecuted in the United States for a violation of the amended regulation, the existence of this Order can be considered by the American courts." Foreign Extraterritorial Measures (United States) Order, 1992, CAN. GAZ. Part II, Vol. 126, No. 22.

⁹⁰ Section 1706(a) of the CDA overrides § 515.559 of the Cuban Assets Control Regulations, which authorized the Secretary of the Treasury to license U.S. foreign subsidiaries to trade with Cuba when their host country favors such trade. See *supra* note 4.

⁹¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1986).
<https://scholarship.law.upenn.edu/jil/vol14/iss4/4>

person or activity, the following factors are to be considered:

- (a) [T]he 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.⁹²

There would undoubtedly be instances when applying section 1706(a) would be unreasonable considering these eight factors. In fact, applying section 1706(a) may often fail to meet many of the eight factors of reasonableness. First, the link between the United States and the regulated activity may be tenuous. The activity occurs outside of U.S. territory. Any effect on the United States may be the debatable strengthening of U.S. attempts to isolate Cuba economically. Second, the U.S. foreign subsidiary may not be connected to the United States. Its places of nationality, residence, and economic activity may all be outside of U.S. territory. At least, the places of residence and economic activity of most U.S. foreign subsidiaries would not be within the United States.

⁹² *Id.* § 403(2) (1986).

Third, although the United States may consider it important to terminate all trade with Cuba, not all countries share this perspective.⁹³ In fact, no other country forbids its foreign based subsidiaries to trade with Cuba. Moreover, the United Nations General Assembly passed a resolution seeking to end the U.S.-Cuba embargo, suggesting international disapproval of the CDA.⁹⁴ Fourth, other countries may rely on the subsidiary trade and expect to regulate such trade as part of their national economy. Section 1706(a) threatens these interests. Fifth, the importance of section 1706(a) to the international political, legal, and economic system may be questionable given the United Nations General Assembly's reconsideration of the Cuban embargo and the countermeasures taken by countries such as Britain and Canada. Sixth, section 1706(a) may be greatly inconsistent with international traditions.⁹⁵ As discussed in Section 4.2 of this Comment, the U.S. law may infringe upon a State's sovereignty. Additionally, as discussed in Section 4.3, the U.S. law may subject U.S. foreign subsidiaries to foreign sovereign compulsion. Seventh, a State may have a great interest in its subsidiaries' Cuban trade, depending on the extent and importance of the trade to its national economic interests. Finally, the potential for conflict between U.S. and foreign law may be real. The Canadian blocking order, for example,

⁹³ Canada, for example, protested vigorously against the U.S. attempt to override Canadian authority to regulate its own trade. According to former Attorney General of Canada, Kim Campbell, § 1706(a) "would be an unacceptable intrusion of U.S. law into Canada and could adversely affect significant Canadian interests in relation to international trade or commerce. Canadian companies will carry out business under the laws and regulations of Canada, not those of a foreign country." *Canada Issues Order Blocking U.S. Trade Restrictions*, External Affairs and International Trade Canada News Release, No. 199, Oct. 9, 1992.

⁹⁴ A year before the enactment of the CDA, the United Nations General Assembly refused to consider a resolution which sought to end U.S. economic sanctions against Cuba. Soon after the enactment of the CDA, however, the General Assembly not only voted on but passed the resolution. Although 79 member countries of the General Assembly abstained, 57 nations passed the resolution with only the United States, Israel, and Romania voting against it. This change in perspective toward the U.S.-Cuba embargo reflects international resentment of the extraterritorial expansion of U.S. policy through the CDA.

⁹⁵ International law recognizes the authority of a State to regulate conduct within its territory. See NEALE & STEPHENS, *supra* note 55, at 12.

presents such a direct conflict.

Although the United States may have the authority to regulate the conduct of U.S. foreign subsidiaries in some instances, situations may arise when exercising jurisdiction to prescribe section 1706(a) is unreasonable under the Restatement of Foreign Relations Law. In such cases, public international law requires that the United States refrain from applying section 1706(a) to those U.S. foreign subsidiaries. Moreover, even when prescribing section 1706(a) is reasonable, where there is conflict with another country that has a greater expectation and interest in regulating the subsidiaries' trade, the United States should defer to that nation and moderate its prescriptive authority accordingly.⁹⁶ Thus, the unconditionality of section 1706(a) contravenes public international law.

Before the enactment of section 1706(a), the Cuban Assets Control Regulations permitted the Secretary of the Treasury to respect foreign laws and/or policies that require or favor trade with Cuba and to license, under certain circumstances, U.S. subsidiaries domiciled in those foreign countries to trade with Cuba.⁹⁷ The Secretary of the Treasury had the authority to license Cuban trade by U.S. foreign subsidiaries so long as the trade did not include strategic exports, U.S. technical data, unauthorized U.S. parts, unauthorized U.S.-origin spares, U.S. dollar accounts, or long-term financing by a U.S. entity.⁹⁸ The Cuban Assets Control Regulations enabled the United States to take a case-by-case approach and to restrict trade by U.S. foreign subsidiaries only where there is no competing foreign interests. Section 1706(a), by withholding licenses for U.S. foreign subsidiaries to trade with Cuba under any circumstances, expands U.S. law

⁹⁶ According to the Restatement:

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 LAW § 403(3) (1986).

⁹⁷ 31 C.F.R. § 515.559 (1993).

⁹⁸ *Id.*

extraterritorially without regard for the competing interests or rights of a foreign sovereign which may outweigh U.S. interests. Because section 1706(a) violates public international law, it should be repealed.

5. ECONOMIC RAMIFICATIONS

Section 1706(a) should also be repealed and the embargo against Cuba should be lifted for self-interested economic reasons. The long-standing embargo against Cuba has already hurt U.S. companies by excluding them from participation in Cuban trade while their foreign competitors advance in the Cuban market. Section 1706(a) only further disadvantages U.S. companies at a time when Cuba is courting foreign investment. Moreover, restricting the activities of U.S. foreign subsidiaries located in foreign countries threatens the reliability and competitiveness of U.S. businesses. In short, section 1706(a) harms the U.S. business community as it hurts the Cuban economy.

5.1. *The Cuban Market*

Historically, Cuba has had one of the strongest economies in the Caribbean basin. From 1965 to 1980, it had an annual industrial growth rate of 6.3%.⁹⁹ Recently, however, the Cuban economy has stagnated because its primary benefactor, the former Soviet Union, is no longer able to provide it significant financial support.¹⁰⁰ In fact, Soviet aid decreased 73%, dropping from \$8.1 billion in 1989 to \$2.2 billion in 1992.¹⁰¹ Cuba's economy suffered greatly; its gross domestic

⁹⁹ Kenneth P. Jameson, *U.S.-Cuban Economic Relations in the 1990s*, in *U.S.-CUBAN RELATIONS IN THE 1990S* 209, 217 (Jorge I. Dominguez & Rafael Hernandez eds., 1989).

¹⁰⁰ Cuban trade relied greatly on trade with the former Soviet Union and socialist countries of the Council for Mutual Economic Assistance. From 1959 until 1988, Cuban trade with the former Soviet Union amounted to 60.3% of its external trade. Trade with socialist countries of the Council for Mutual Economic Assistance, totaled 87% of all Cuban trade in 1988 and 80% of foreign investment in Cuba from 1959 until the early 1990s. Jose Luis Rodriguez, *Economic Relations Between Cuba and Eastern Europe: Present Situation and Possible Developments*, in *CUBAN FOREIGN POLICY CONFRONTS A NEW INTERNATIONAL ORDER* 53, 53-54 (H. Michael Erisman & John M. Kirk eds., 1991).

¹⁰¹ *Recovery Predicted for Cuba Under Certain Circumstances*, Daily Rep.

product shrank by 20% in 1991 and may continue to plummet by as much as 60%.¹⁰²

Despite Cuba's current economic crisis, foreign investors continue to see great financial promise in the Cuban market.¹⁰³ According to Vicente Gutierrez Camposeco, president of Mexico's National Association of Manufacturing Industry, "the future of . . . [Cuba is certain, and] Mexican investments in that country will continue to be strengthened without fears."¹⁰⁴ Cuba's production of nickel, its major revenue generating export, should double by the end of the decade.¹⁰⁵ In addition, Cuba may increase its hard currency through exports of metallic nickel products.¹⁰⁶ The recent revision of the Cuban constitution, reducing state ownership from all means of production to ownership of the "fundamental" means of production, indicates the government's willingness to permit privatization in an effort to encourage foreign investment.¹⁰⁷ Additionally, Cuba is considering providing foreign investors with incentives such as special tax benefits, repatriation of all profits, and duty-free import of supplies.¹⁰⁸

for Exec. (BNA) (Dec. 23, 1992). Reduction in Soviet oil caused a series of adverse effects on the Cuban economy. Shortages of fuel, fertilizer, and spare parts reduced Cuba's recent sugar harvest to six million tons, the lowest since 1975, and forced factories to shut down, raising unemployment to about 10%. The decline in production reduced the gross domestic product to an estimated \$20.3 billion in 1992, down from \$32.8 billion in 1989. *Capitalism, Castro Style*, BUS. WEEK, Aug. 3, 1992, at 36. Consequently, Cuba lost half of its buying power, formerly at approximately \$4 billion. Pascal Fletcher, *Cuba Believes it Has Right Strategy to Survive Economic Crisis*, Reuter Bus. Rep., May 5, 1992, available in LEXIS, Nexis Library, Fin File.

¹⁰² Michael G. Wilson, *Hastening Castro's Downfall*, Heritage Found. Rep., July 2, 1992, available in LEXIS, Nexis Library, Currnt File.

¹⁰³ *Mexicans See Good Business Prospects in Cuba*, Reuter Bus. Rep., Dec. 19, 1992, available in LEXIS, Nexis Library, Omni File.

¹⁰⁴ *Id.*

¹⁰⁵ Pascal Fletcher, *Cuban Nickel Industry Expands Into World Market*, in Reuter Libr. Rep., May 25, 1992, available in LEXIS, Nexis Library, Fin File.

¹⁰⁶ *Id.*

¹⁰⁷ *Capitalism, Castro Style*, supra note 101, at 37.

¹⁰⁸ Tim Golden, *Cuba's Economy, Cast Adrift, Grasps at Capitalist Solutions*, N.Y. TIMES, Jan. 12, 1993, at A1, A6.

5.1.1. Investment

Given Cuba's economic recession, the Cuban government is particularly anxious to promote foreign investment and commercial trade.¹⁰⁹ Accordingly, Castro has relaxed trade restrictions to facilitate joint ventures between foreign and Cuban companies.¹¹⁰ An estimated fifty to sixty joint venture agreements or other financial partnerships have been established, and 200 more are under negotiation.¹¹¹

Castro is particularly interested in developing the tourism industry.¹¹² European countries are investing heavily in Cuba in anticipation of a thriving tourist business.¹¹³ Six hotels financed by foreign investment have been constructed since 1990, and Mexico recently agreed to a \$15 million joint investment in tourism.¹¹⁴ Additionally, the Cuban government, with the support of foreign partners, plans to build 3,000 to 4,000 hotel rooms each year until 1995. The government expects to recover this investment within three years.¹¹⁵

¹⁰⁹ In October 1991, Castro met with leaders of Mexico, Venezuela, and Colombia to discuss business prospects between Cuba and their nations. See *Mexico Shows Growing Interest in Cuba for Investment, Despite U.S. Embargo*, Int'l Fin. Daily (BNA) (Nov. 20, 1991) available in LEXIS, Nexis Library, Fin File. In June 1992, Castro welcomed 125 potential foreign investors to the government palace for business talks. See Damian Fraser, *Cuban Revolutionary in an Army Green Business Suit*, FIN. TIMES, July 14, 1992, at 4.

¹¹⁰ Actually, as early as 1982, Cuba expressed an interest in encouraging foreign investment and, thus, enacted its Joint Venture Law of 1982, Decree No. 50, which allows for 50% foreign ownership in Cuban businesses. See Gareth Jenkins, *Western Europe and Cuba's Development in the 1980s and Beyond*, in CUBAN FOREIGN POLICY CONFRONTS A NEW INTERNATIONAL ORDER, *supra* note 100, at 183, 192. In 1988, Cuba's Foreign Trade Ministry launched a campaign to attract foreign industrial ventures, particularly with former West Germany and Japan. *Id.* at 189.

¹¹¹ Stephen Fidler, *Investors Find the Door Ajar in Cuba*, FIN. TIMES, July 29, 1992, at 4.

¹¹² Howard W. French, *Castro Steels a Suffering Nation for Confrontation*, N.Y. TIMES, Oct. 12, 1992, at A3.

¹¹³ *Heads of Mexico, Colombia, Venezuela Call for End to U.S. Blockade of Cuba*, Int'l Trade Rep. (BNA) (Oct. 30, 1991).

¹¹⁴ As an example, the 218-room, \$18 million Tuxpan Hotel, is a 50-50 joint venture between Cuba and Mexican real estate developer CDC Inmobiliaria. *Capitalism, Castro Style*, *supra* note 101, at 37. See also *Mexicans See Good Business Prospects in Cuba*, *supra* note 103.

¹¹⁵ Fidler, *supra* note 111.

Other than tourism, foreign countries are investing in industries such as construction, electronics, plastics, and biotechnology.¹¹⁶ In addition, a number of foreign banks have approached Cuba about the possibility of opening branch offices on the island.¹¹⁷ Foreign companies are also eager to help Cuba meet the need created by the withdrawal of Soviet oil supplies. France's Total, Brazil's Petrobras, Sweden's Taurus Petroleum, and Canada's Northwest Energy have already finalized or are in the process of finalizing agreements with Cuba to search for oil.¹¹⁸

5.1.2. Trade

Many foreign countries are already actively trading with Cuba. Britain exports products such as chemicals, pharmaceuticals, and food to Cuba and receives Cuban rum, tobacco, and citrus products.¹¹⁹ Canadian trade with Cuba consists mainly of nickel imports.¹²⁰ Iran, South Korea, and Morocco recently began importing Cuban sugar.¹²¹ Other countries trading with Cuba include France, Spain, Switzerland, West Germany, and Italy.¹²² Recognizing the potential of Cuban trade, increasing numbers of foreign businesses are exploring opportunities in Cuba. The British company Body Shop International PLC is considering purchasing natural ingredients such as eucalyptus, lime, basil, and tangerine from Cuba.¹²³ Canadian companies hope to

¹¹⁶ *Id.*

¹¹⁷ Pascal Fletcher, *Cuban Banking Sector Draws Foreign Interest*, Reuters, Nov. 11, 1992, available in LEXIS, Nexis Library, Fin File.

¹¹⁸ *Capitalism, Castro Style*, *supra* note 101, at 36.

¹¹⁹ *British Business Executives Explore Opportunities in Cuba*, Reuters, June 13, 1993, available in LEXIS, Nexis Library, Fin File.

¹²⁰ *Canadians Pursue Cuban Mining Deals*, CHI. TRIB., Sept. 12, 1993, at F11.

¹²¹ Pascal Fletcher, *Cuba Plays Down U.S. Sanctions Impact on Sugar Trade*, Reuter Bus. Rep., Oct. 22, 1992, available in LEXIS, Nexis Library, Fin File.

¹²² Office of Foreign Assets Control, U.S. Dep't of Treas., Special Report: An Analysis of Licensed Trade with Cuba by Foreign Subsidiaries of U.S. Companies (1992).

¹²³ Pascal Fletcher, *British Cosmetics Group Explores Opportunities in Cuba*, Reuter Bus. Rep., June 8, 1993, available in LEXIS, Nexis Library, Fin File.

tap into Cuba's sources of precious and base metals, such as copper, lead, zinc, silver, and gold.¹²⁴ Mexican businessmen are interested in trade with Cuba in commodities, including pharmaceutical and medical products, beauty aids, textiles, foods, and electrical equipment.¹²⁵ According to Frank Smeenk, head of the Toronto-based MacDonald Mining, a gold prospecting firm which will enter into a joint-venture with the Cuban government, there are "lots and lots of business opportunities in that country. It will absorb billions of dollars in capital."¹²⁶

Any decrease in trade by U.S. foreign subsidiaries merely presents greater opportunities to foreign businesses already exploiting or intending to exploit the growing Cuban market.¹²⁷ For example, according to Carrier Co., a supplier of air conditioners to Cuba before section 1706(a) came into effect, European and Asian companies are more than eager to acquire the \$10-20 million trade abandoned by Carrier.¹²⁸ As long as other countries do not restrict their trade with Cuba, the U.S. objective of economically crippling the Castro government cannot be achieved.

¹²⁴ *Canadians Pursue Cuban Mining Deals*, *supra* note 120.

¹²⁵ *Mexican Business Confident of Increased Investment in Cuba*, Notimex Mexican News Service, Dec. 20, 1992, available in LEXIS, Nexis Library, Fin File.

¹²⁶ *Canadians Profit from Connection with Cuba*, *supra* note 88.

¹²⁷ *Id.* Furthermore, agricultural export embargoes generally fail due to the lack of effective enforcement, according to Thomas Kay, administrator of the U.S. Department of Agriculture's Foreign Agricultural Service. Given the massive global market in agricultural products, it is extremely difficult to monitor U.S. agricultural shipments to ensure that they do not reach embargoed destinations. The difficulty in distinguishing U.S. agricultural products from those of other countries complicates the problem of tracking any embargoed shipments. That other countries which purchase U.S. agricultural products could ship their own products to the embargoed destination creates a loophole to circumvent such an embargo. Moreover, agricultural trade embargoes, according to Kay, are ineffective in promoting foreign policy objectives. 138 CONG. REC. H9084 (1992). Of all the forms of economic pressure, an import control has been considered the most effective. See GARY C. HUFBAUER & JEFFREY SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY & CURRENT POLICY* 89 (1985).

¹²⁸ 138 CONG. REC. S14,058, 14,064 (1992).

5.2. *Economic Impact*

Section 1706(a) relegates U.S. businesses to the sidelines, while foreign companies capitalize upon the business potential in Cuba. Indeed, many U.S. corporations and their foreign subsidiaries recognize, and wish to avail themselves of, the lucrative opportunities available in Cuba. This interest in Cuban trade and investment is not new. Prior to the enactment of the CDA, many U.S. foreign subsidiaries sought licenses from the Treasury Department to trade with Cuba under the Cuban Assets Control Regulations.¹²⁹ From 1981 to 1991, the Treasury Department received 2,549 license applications.¹³⁰ During the same period, U.S. foreign subsidiaries conducted \$3.765 billion worth of trade with Cuba.¹³¹ Of the \$3.765 billion in trade in that ten-year period, \$780.9 million came from subsidiaries based in Britain, \$1.56 billion from those based in Switzerland, \$479.89 million from those based in Canada, \$197 million from those based in Bermuda, \$349.29 million from those based in Argentina, \$34.79 million from those based in Panama, \$86.13 million from those based in France, \$80.87 million from those based in Spain, \$50.20 million from those based in Mexico, and \$75.92 million from those subsidiaries based in the West Indies.¹³² From 1982 to 1991, trade between U.S. foreign subsidiaries and Cuba increased more than two-fold.¹³³

5.2.1. *Undermining Business Reliability And Competitiveness*

The extraterritorial application of restrictive U.S. trade laws effectively limits business opportunities and overall economic activity by discouraging foreign businesses from investing or merging with U.S. companies for fear of being

¹²⁹ 31 C.F.R. § 515.559 (1993).

¹³⁰ Office of Foreign Assets Control, *supra* note 122.

¹³¹ *Id.* According to the Treasury Department, trade between Cuba and foreign subsidiaries totaled \$253 million in 1982; \$142 million in 1983; \$275 million in 1984; \$288 million in 1985; \$354 million in 1986; \$243 million in 1987; \$246 million in 1988; \$332 million in 1989; \$705 million in 1990; and \$718 million in 1991. *Id.*

¹³² *Id.*

¹³³ *Id.*

subjected to U.S. law.¹³⁴ For instance, the U.K. Monopolies and Mergers Commission prohibited a merger between Enserch, a U.S. corporation, and Davy, a British company, out of concern that U.S. export laws would extraterritorially restrict the post-merger company's activity.¹³⁵ Unlike section 1706(a), which affects only U.S. foreign subsidiaries, this negative impact on U.S. companies is not limited to the short term or to a narrow sector of business.

5.2.2. *Economic Loss Due To Embargo*

The estimates indicate that U.S. trade with Cuba could be worth as much as \$3.8 billion per year.¹³⁶ Additionally, U.S. consumers could save a considerable amount of money if trade restrictions were relaxed. U.S. consumers pay more for goods purchased elsewhere than they would for comparable goods purchased from Cuba.¹³⁷ The price differential is largely due to savings from reduced transportation costs, given the proximity of Cuba to the United States.¹³⁸ For instance, buying sugar from Cuba rather than Asia would save the United States \$13 per ton of sugar.¹³⁹ Similarly, the United States could save between \$500 and \$800 per ton of nickel.¹⁴⁰ The United States could save another \$34 million a year buying citrus products from Cuba rather than Brazil.¹⁴¹

¹³⁴ The International Chamber of Commerce, *THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS* 35 (Dieter G. Lange & Gary B. Born eds., 1987).

¹³⁵ Monopolies and Mergers Commission, *Enserch Corporation and Davy Corporation Limited: A Report on the Proposed Merger* (1981).

¹³⁶ Alfonso C. Montero & Pedro M. Gonzalez, *Cuba and the United States: The Potential of Their Economic Relations*, in *U.S.-CUBAN RELATIONS IN THE 1990S*, *supra* note 99, at 235, 242. If the United States were to normalize relations with Cuba, air travel between the two countries would be "very substantial." *Torricelli, Hamilton Oppose Idea that Cuban Trade Embargo Be Eased*, 8 Int'l Trade Rep. (BNA) 1841 (Dec. 18, 1991). In fact, a plan has already been devised to handle the increase in air traffic. *Id.*

¹³⁷ Montero & Gonzalez, *supra* note 136, at 243.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 244.

¹⁴¹ Larry Luxner, *Cuba Cultivating Citrus Presence; The Communist Nation is Increasing Exports to Europe, but Embargoes Prevent Trade with the United States*, *ORLANDO SENTINEL*, Sept. 5, 1993, at F1.

While the trade embargo cost Cuba \$11.5 billion for the period from 1960 until 1987, it cost the United States \$30 billion for the period from 1960 to 1985.¹⁴² It is 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, flour, dry milk, and poultry.¹⁴³ A joint study by the Center for Business and Economic Research at Arkansas State University and the School for Advanced International Studies at Johns Hopkins University concluded that from 1965 to 1986, 4,500 jobs were lost as a result of the embargo.¹⁴⁴

The harm that section 1706(a) inflicts upon U.S. businesses is real and considerable. Carrier Co. estimates that it will lose between \$10 and \$20 million because its foreign subsidiaries can no longer trade with Cuba.¹⁴⁵ At least 103 U.S. companies whose foreign subsidiaries have been trading with Cuba since 1985 will be similarly affected.¹⁴⁶ According to Donna Rich Kaplowitz, one of the authors of the Johns Hopkins University study and a consultant on the Cuban market, "there's no question [that] the U.S. is losing business to Europe, Canada, and South America. . . . The best beaches are being divided by Canada, Spain, and Italy."¹⁴⁷ Already, it may be too late for the United States to find a foothold in the Cuban market. In telecommunications, for example, Italcable recently entered into a \$65 million joint venture to service Cuba's overseas calls, pushing AT&T out of the market.¹⁴⁸

In 1985, former New York Congressman Ted Weiss

¹⁴² Jameson, *supra* note 99, at 209.

¹⁴³ 138 CONG. REC. H9084, 9093 (1992).

¹⁴⁴ *Id.*

¹⁴⁵ 138 CONG. REC. S14,058, 14,064 (1992).

¹⁴⁶ *Id.* Such companies include ALCOA, Borg-Warner, Beatrice Companies, Bonnie Bell, Caterpillar, Dow Chemical, Drexel Burnham Lambert, E.I. Dupont, Eli Lilly, Exxon, Ford Motor, GTE International, General Electric, Gillette, Goodyear Tire and Rubber, Honeywell, IBM World Trade, ITT, Ingersoll-Rand, International Multifoods, Johnson and Johnson, Mennen, Philipp Brothers, RCA Global, R.J. Reynolds, Rohm & Haas, Joseph E. Seagram & Sons, and Westinghouse Electric. *Id.*

¹⁴⁷ Cyndee Miller, *Cuba Looks for Investors; U.S. Firms Would Be Glad to Oblige*, in Marketing News TM, July 6, 1992, available in LEXIS, Nexis Library, Wire File.

¹⁴⁸ *Id.*

recognized that "[o]ur economic denial of Cuba has really amounted to self-denial, cutting off a major market for American manufactured goods."¹⁴⁹ Similarly, in 1988, Representative Bill Alexander urged limits on the agricultural trade embargo against Cuba because of the loss of \$450 million of business to rice farmers.¹⁵⁰ Far from improving U.S.-Cuban economic relations, section 1706(a) further excludes U.S. businesses from the Cuban market. According to Senator Christopher Dodd, section 1706(a) "is not going to hurt Fidel Castro one bit. It is going to do serious damage to a lot of companies in this country, and a lot of jobs will be lost in the process."¹⁵¹

With the hope that the Cuban embargo will ultimately be lifted, many U.S. companies have been preparing to enter the Cuban market. Cuba/USA Venture Enterprises, Inc. was established in 1991 to provide advisory and management services to companies interested in competing for future Cuban trade.¹⁵² Similarly, U.S. entrepreneurs are preparing for the moment when the embargo is lifted and they may conduct business with Cuba. The chairman of the Cuban American National Fund, an organization studying the economic conditions and markets in Cuba, plans to raise \$19 billion to purchase Cuban businesses and resources.¹⁵³ Thomas Herzfeld, head of the Miami-based Herzfeld Advisors, founded and registered a \$10 million investment company, The First Cuba Fund, Inc., which will purchase stock in, or enter into joint ventures with, companies trading with Cuba.¹⁵⁴ According to a report by the Greater Miami Chamber of

¹⁴⁹ *Also in the News*, Int'l Trade Rep., Jan. 23, 1985, available in LEXIS, BNA Library, Intrad File.

¹⁵⁰ *Administration Opposes Legislative Limits on Authority to Impose Farm Trade Embargoes*, Int'l Trade Rep., June 15, 1988, available in LEXIS, BNA Library, Intrad File.

¹⁵¹ *House Follows Senate Lead in Voting to Tighten U.S. Embargo Against Cuba*, Int'l Trade Rep., Sept. 30, 1992, available in LEXIS, BNA Library, Intrad File.

¹⁵² *New South Florida Group to Acquire Companies to Prepare for Business in a Free Cuba*, Bus. Wire, May 4, 1992, available in LEXIS, Nexis Library, Wire File.

¹⁵³ *Running the Cuban Agenda: Mas & Co. Are on a Roll*, S. FLA. BUS. J., Nov. 2, 1992, available in LEXIS, Nexis Library, Fin File.

¹⁵⁴ *Id.*

Commerce:

There are cruise shipping lines which have contingency plans to get into Cuba quickly. Fast food and car rental franchises have already been awarded and can be made operational at a very short notice. The Port of Miami and the Miami International Airport are the logical points through which Cuba will export sugar, nickel, fish, tobacco, citrus and other commodities. Similarly, flowing . . . [into Cuba] will be consumer products, machinery, computers, medical equipment, pharmaceutical and construction equipment needed to rebuild Cuba's infrastructure.¹⁵⁵

Until the embargo is lifted, U.S. entrepreneurs can only watch their foreign competitors control markets which could otherwise be theirs.

6. CONCLUSION

As early as 1985, former Representative Weiss introduced legislation in Congress seeking to end trade sanctions and to establish full diplomatic relations with Cuba.¹⁵⁶ He argued that the embargo has not isolated or destabilized the Castro government, but has only hurt U.S. business interests.¹⁵⁷

By enacting the CDA, particularly section 1706(a), the United States has violated public international law, alienated allied nations,¹⁵⁸ and weakened U.S. business competitiveness. Moreover, the Cuban Democracy Act has brought international attention and condemnation of U.S. attempts to control other sovereigns' public policies.¹⁵⁹ The

¹⁵⁵ Canute James, *Dreaming of a Big Return to Profit*, FIN. TIMES, Dec. 12, 1991, § 1 at 8.

¹⁵⁶ *House Follows Senate Lead in Voting to Tighten U.S. Embargo Against Cuba*, *supra* note 151.

¹⁵⁷ *Id.*

¹⁵⁸ Canada's External Affairs Minister Joe Clark warned that § 1706(a) would have a negative impact on U.S.-owned enterprises in Canada and on the United States' relationship with Canada. See *Canada Orders Firms Not to Comply with U.S. Ban on Trade with Cuba*, 7 Int'l Trade Rep. (BNA) 1699 (Nov. 7, 1990).

¹⁵⁹ See generally Paul A. Shneyer & Virginia Barta, *The Legality of the U.S. Economic Blockade of Cuba Under International Law*, 13 CASE W. RES. J. INT'L L. 451 (1981) (arguing that the Cuban blockade is illegal under both

irony is that in attempting to destabilize Castro's regime, the United States may have actually prolonged Castro's tenure.¹⁶⁰

traditional and contemporary international law).

¹⁶⁰ According to a fifth-grade Cuban girl, in a speech to several hundred cheering soldiers, "[w]e are more determined now than ever that only socialism will make us free. Our loyalty is to Fidel. Down with the . . . [Cuban Democracy Act]. Socialism or death." See Douglas Farah, *Castro Uses Stiffer U.S. Embargo to Justify Economic Straits*, WASH. POST, Dec. 17, 1992, at A33.