

1-1-1994

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### Recommended Citation

Julia P. Herd, *The Cuban Democracy Act: Another Extraterritorial Act That Won't Work*, 20 Brook. J. Int'l L. 397 (1994).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol20/iss2/5>

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# NOTE

## THE CUBAN DEMOCRACY ACT: ANOTHER EXTRATERRITORIAL ACT THAT WON'T WORK

### I. INTRODUCTION

The Cuban Democracy Act, passed by Congress and signed by President George Bush in October 1992, is designed to tighten the trade embargo against Fidel Castro's government in order to force political and economic reform in Cuba. The explicit purpose of the Act is to "promote a peaceful transition [to democracy] in Cuba"<sup>1</sup> and to end Cuba's thirty-plus-year history with communism. The Cuban Democracy Act continues the longstanding United States policy of forbidding domestic trade with Cuba.<sup>2</sup> In addition, the Act now forbids American-owned or controlled firms incorporated in other countries from trading with the island country.<sup>3</sup> The passage of the Act has engendered many protests by those nations that are home to the firms affected by the Act. Those nations' officials are angered and concerned that the United States is interfering in their sovereign affairs by attempting to control the actions of businesses incorporated outside of the United States, although owned or controlled by United States nationals.<sup>4</sup>

This Note examines the Cuban Democracy Act from the perspective of both United States law and international law in order to show how the extraterritorial nature of the Cuban

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1. 22 U.S.C. § 6001(8) (Supp. IV 1988). For a full discussion of the Act, see *infra* Part II.

2. 22 U.S.C. § 6003(b) (Supp. IV 1988).

3. See *infra* notes 43-46 and accompanying text.

4. See *infra* part IV.B.1.

Democracy Act, like other United States trade embargoes, cannot be justified by principles of international law because it unjustifiably interferes with the sovereignty of other nations. Part II examines the Cuban Democracy Act, its legal bases, goals, and enforcement procedures. Part III addresses the legal principles that underlie the dispute concerning the Cuban Democracy Act. It first examines the nature of subsidiaries incorporated abroad and then examines the internationally accepted principles of jurisdiction and highlights the differences between the international perspective on jurisdiction and that of the United States. Part IV examines the problems that have or should ensue, given the lack of jurisdiction, when the United States attempts to enforce the Cuban Democracy Act. These problems include harming diplomatic relations, causing international legal responses that blunt the effect of the Cuban Democracy Act, and creating difficult legal situations for American-owned, foreign-based subsidiaries. Part V offers some suggestions for amending the Cuban Democracy Act and offers some thoughts for congressional action. This Note concludes that the Cuban Democracy Act is an unwarranted extraterritorial act, hurting United States diplomatic and long-term trade interests, as well as international friendships. This Note suggests that it is in the best interests of the United States to work more closely with other countries and with bodies such as the United Nations in order to effect peaceful change, rather than act in a unilateral extraterritorial fashion as it did in this instance.

## II. THE CUBAN DEMOCRACY ACT OF 1992

### *A. The Laws Affecting Trade with Cuba Prior to the Passage of the Cuban Democracy Act*

#### 1. Historical Background

The Cuban Democracy Act of 1992 is the most recent of many actions taken by the United States government against Cuba since Cuba's revolution in 1959 and the creation of its communist government.<sup>5</sup> In 1961 the United States attempted

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5. Even before the Communist takeover, the United States had been closely involved in Cuban life. When Cuba won its independence from Spain in 1899, Cuba was under the military occupation of the United States. In 1901 it was

to incite the toppling of the Castro government through a failed military invasion by Cuban exiles known as the Bay of Pigs.<sup>6</sup> The next year, the United States forced the Soviet Union to halt and dismantle its missiles installed in Cuba that threatened the security of this country.<sup>7</sup> Also in 1962, import and export controls were instituted under the authority of the Foreign Assistance Act of 1961.<sup>8</sup> In 1963 Congress enacted a comprehensive set of regulations, the Cuban Assets Control Regulations (CACRs)<sup>9</sup> to control American involvement with Cuba.

## 2. The Cuban Assets Control Regulations

The CACRs were designed to control closely the conduct of individuals and businesses wishing to have any dealings with Cuba.<sup>10</sup> The CACRs prohibit almost all commercial, financial,

forced to approve a constitutional amendment (the Platt Amendment) that gave the United States the right to monopolize the economy, intervene in domestic political affairs, and approve international treaties. An indefinite lease was also granted to the United States to what has become the Guantanamo Bay military station. The Platt Amendment remained in force until 1934, but America's control continued to remain a key factor in Cuba's political life. Thus, from its first days, the Cuban Republic was dominated by the on-site, pervasive American presence until the revolution of 1959 which brought President Fidel Castro and the Communists to power. Franklin W. Knight, *Cuba, in THE MODERN CARIBBEAN* 169, 170-71 (Franklin W. Knight & Colin A. Palmer eds., 1989).

6. CARIBBEAN 1993 BUSINESS DIRECTORY: INTERNATIONAL EDITION 79 (1993); see also Anthony P. Maingot, *Caribbean International Relations, in THE MODERN CARIBBEAN, supra* note 5, at 259, 267.

7. See Proclamation No. 3504, 3 C.F.R. 232 (1959-1963), reprinted in 50 U.S.C.A. app. at 13-14 (West 1990) and in 77 Stat. 958 (1962); Proclamation No. 3507, 3 C.F.R. 236 (1959-1963), reprinted in 50 U.S.C.A. app. at 14 (West 1990) and in 77 Stat. 961 (1962).

8. 22 U.S.C. § 2370(a)(1) (1982). The initial controls were instituted in 1962 and read, in part, "No assistance shall be furnished under this chapter to the present government of Cuba . . . . [T]he President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba." *Id.* These controls had a tremendous impact on Cuban trade. In 1985 there was more than one billion dollars worth of trade; in the first half of 1962, trade was only \$373,000, all of which was exports from the United States. A.L.C. DE MESTRAL & T. GRUCHALLA-WESIERSKI, *EXTRATERRITORIAL APPLICATION OF EXPORT CONTROL LEGISLATION: CANADA AND THE U.S.A.* 212 (1990) (citing DEP'T ST. BULL., Oct. 1962, at 591, 592).

9. The United States instituted the Cuban Assets Control Regulations (CACRs) on July 9, 1963. 31 C.F.R. § 515 (1993). The CACRs are administered by the Office of Foreign Assets Control, Department of the Treasury. *Id.*

10. The CACRs were issued under the authority of § 5(b) of the Trading With the Enemy Act of 1917 (TWEA). For the text of TWEA, see 50 U.S.C. app. §§ 1-

or trade transactions, either direct or indirect, with Cuba by persons within the United States.<sup>11</sup> The CACRs have remained in force since 1963, with several revisions, including those generated by the passage of the Cuban Democracy Act.<sup>12</sup>

The CACRs regulate trade<sup>13</sup> with Cuba<sup>14</sup> by demanding

44 (1988). The TWEA allows the president to prohibit trade between the United States and other states deemed to be enemies of the United States. Between 1933 and 1977, the TWEA allowed the president to invoke special measures, including trade embargoes, both during times of war and under a declared national emergency. In 1977 the TWEA was modified so that the president can now institute an embargo using the powers of the TWEA only during wartime. Although a new act, the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (1988), was drafted to supplement the now restricted powers of the TWEA, the Cuban regulations and other existing economic sanctions programs were grandfathered by Title I of Pub. L. No. 95-223 (1977) which stated that presidential authority exercised over a country prior to July 1, 1977, as a result of a presidentially declared national emergency may continue to be exercised with respect to such country. For the language of the grandfather clause, see 50 U.S.C.A. app. § 5 (West 1990), historical and statutory notes. For a brief history of the TWEA and the CACRs, see *Regan v. Wald*, 468 U.S. 222, 226-27 & nn.1-4 (1984).

11. The exceptions to the prohibitions, all of which are limited, have been in the areas of travel, 31 C.F.R. § 515.415 (1993), family remittances, 31 C.F.R. § 515.521-522 (1993), the importing and exporting of publications and informational materials, 31 C.F.R. § 515.206 (1993), and foreign subsidiary trade, 31 C.F.R. § 515.559 (1992). This latter exception was eliminated in 1992 by the Cuban Democracy Act. See *infra* text accompanying notes 43-46.

12. The CACRs were amended in 1993 to conform with the Cuban Democracy Act. For a discussion of these changes, see *infra* text accompanying notes 43-46.

13. The CACRs pertain to any person within the United States, including:

- (1) Any person, wheresoever located, who is a resident of the United States;
- (2) Any person actually within the United States;
- (3) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; and
- (4) Any partnership, association, corporation, or other organization, wheresoever organized, or doing business, which is owned or controlled by any person or persons specified in paragraphs . . . (1), (2), or (3) of the section.

31 C.F.R. § 515.330 (1993).

The CACRs, like the Foreign Assets Control Regulations, 31 C.F.R. § 500 (1993) and the Transaction Control Regulations, 31 C.F.R. § 505 (1993), are export control laws that potentially apply to foreign-based subsidiary corporations. All three sets of regulations are authorized by the TWEA.

14. Cuba has been classified by the Export Administration Regulations (EARs) as a "Group Z Country," meaning that it is an embargoed destination. As of De-

that exporters apply<sup>15</sup> for an export license and receive approval through the Department of the Treasury.<sup>16</sup> While it was initially difficult for a foreign-based subsidiary of an American company to trade with Cuba, the CACRs did allow foreign-based subsidiaries to trade as long as the law of the foreign country favored or "required" such trade.<sup>17</sup> However,

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799 (1993). The EARs are derived from the Export Administration Act. 50 U.S.C. app. §§ 2401-2420 (1988).

15. This process has been established by the Export Administration Act (EAA) and its regulations, the EARs, and applies to all export regulations, not only those to Cuba. "The Export Administration Regulations shall apply to individual export license applications and to individual validated licenses . . ." 15 C.F.R. § 772.1(a) (1993). "Individual license" is defined as "[a]ny validated license . . . authorizing the export of specific technical data or a specified quantity of commodities during a specified period to a designated consignee." 15 C.F.R. § 770.2 (1993). In general, most exports require either a general license, which is a standing authority to export and requires no special application or approval from any United States government entity, 15 C.F.R. § 771.1 (1993), or a validated license which authorizes specific transactions as described in the license application, 15 C.F.R. § 772.9(a) (1993), and requires governmental approval of transactions, for a period of twenty-four months, or longer if the project warrants it. 15 C.F.R. § 772.9(d)(1)-(2) (1993). The application for, and decision to grant, a license is handled on a case-by-case basis, and there is generally no precedential value to a previous history of exporting. W. Clark McFadden, II et al., *The Structure of Export Licensing*, in 1 THE COMMERCE DEPARTMENT SPEAKS 389 (Corporate Law & Practice Course Handbook Series No. 570, 1987).

Holders of licenses are held "strictly accountable" for use of the license. 15 C.F.R. § 787.9 (1993). Sanctions for violations of export control rules may be imposed on persons and firms within the United States and outside its borders. 15 C.F.R. § 770.2 (1993) (definition of "person or firm"). In addition, persons who are related by ownership control, position of responsibility, affiliation, or other connection to a violator may be subject to sanctions. 15 C.F.R. § 769.1(b) (1993). A party's property may be seized and subjected to forfeiture if it is, or is intended to be, exported in violation of export controls, even if the party is not otherwise involved in the violation. 15 C.F.R. § 787.1(b)(4) (1993). Sanctions may also include criminal fines and imprisonment and administrative actions such as the denial of export privileges, ineligibility as a recipient of United States export or re-exports, and exclusion from practice before the International Trade Administration. 15 C.F.R. §§ 787.1, 788.3 (1993).

16. While the Department of Commerce has been given general authority over most export licenses by the EAA, 50 U.S.C. app. §§ 2401-2416 (1988), and the related EARs, 15 C.F.R. §§ 768-799 (1993), when a country such as Cuba has been designated by the president as the target of an embargo because of a national emergency or war, the Treasury Department's Office of Foreign Assets Control (OFAC) will regulate all transactions pursuant to either the TWEA or IEEPA. *See, e.g.*, 15 C.F.R. § 768.2(9) n.1 (discussing those countries with whom United States person must have approval by the Treasury Department); 31 C.F.R. § 515.801(b)(6) (1993) (issuing of licenses to trade with Cuba); 515.502(a)(1993) (licensing by Treasury pursuant to TWEA). The regulations concerning Cuba are similar, though not exact, to the EARs. For the Cuban regulations, see 31 C.F.R. §§ 500-545 (1993).

17. According to the CACRs in force prior to the passage of the Cuban De-

for several years after the CACRs were instituted, the United States exerted informal governmental pressure on parent companies to direct their subsidiaries to minimize or stop trade with Cuba.<sup>18</sup>

Licensing policies were liberalized in 1975, at which time the Department of Commerce was advised to look "favorably" on exports from United States foreign-based subsidiaries to Cuba.<sup>19</sup> However, within two years the regulations were again revised so that no domestic corporation, officer, or employee could assist in a subsidiary transaction involving Cuba.<sup>20</sup> Sub-

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mocracy Act, subsidiary trade with Cuba was permitted if:

- (i) The commodities to be exported are non-strategic;
- (ii) United States-origin technical data (other than maintenance, repair and operations data) will not be transferred;
- (iii) If any U.S.-origin parts and components are included therein, such inclusion has been authorized by the Department of Commerce;
- (iv) If any U.S.-origin spares are to be re-exported to Cuba in connection with a licensed transaction, such reexport has been authorized by the Department of Commerce;
- (v) No U.S. dollar accounts are involved; and
- (vi) Any financing or other extension of credit by a U.S.-owned or controlled firm is granted on normal short-term conditions which are appropriate for the commodity to be exported.

31 C.F.R. § 515.559(b)(1) (1992).

18. Robert B. Thompson, *United States Jurisdiction Over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 LAW & POL'Y INT'L BUS. 319, 330 n.42 (1983) (quoting the former Chief Counsel for Foreign Assets Control, Stanley Sommerfield).

Foreign nations, in particular Canada, have protested attempts by the United States to curtail foreign subsidiary trading, and in some cases obtained modification of the policies. For example, the United States issued a Canadian subsidiary of an American automobile company the necessary license to trade with Cuba after Canada's Prime Minister Trudeau personally intervened. *Id.* at 332 n.45. The United States also made an exception in the case of Argentina after that country threatened to nationalize an American-owned subsidiary that was facing United States restrictions in trading with Cuba. *Id.* Then Secretary of State Henry Kissinger stated that the 1974 Argentinean and Canadian deals were licensed so as to allow the behavior of American companies in those countries to comply with the Cuban policies of the host countries. DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 8, at 213 (citing DEP'T ST. BULL., May 1974, at 537).

19. This liberalization brought United States policy in line with the policy of the Organization of American States, which allows each member state to determine the nature of its economic and diplomatic relations with Cuba. 15 C.F.R. § 785.1(c) (1993). The Department of Commerce was directed to grant licenses on a case-by-case basis as long as the subsidiary's domiciliary state permitted such trade. *Id.*; see also DEP'T ST. BULL., Sept. 1975, at 404.

20. Thompson, *supra* note 18, at 332 nn.48-49 (citing 31 C.F.R. § 515.559, .559(c) (1982)). Congress further attempted to rein in trade with Cuba after Cuba's involvement in Africa became known in the late 1970s, but the Carter administra-

subsidiaries had to demonstrate a high degree of separateness from their corporate parent in order to take advantage of the export exemption available to them.<sup>21</sup> Even with these restrictions, from 1982 to 1989 more than 1,236 licenses were granted to United States foreign subsidiaries and only forty-three applications were denied.<sup>22</sup> As a result, in 1991 alone, United States subsidiaries did \$718 million in trade with Cuba, which represented eighteen percent of the total goods that Cuba purchased with hard currency on the world market.<sup>23</sup>

These statistics deeply disturbed anti-Castro forces in the United States who believe Fidel Castro will likely remain in power as long as Cuba continues to be the recipient of cash from trade. Many have favored the complete economic isolation of Cuba in order to force the ouster of both Castro and communism.<sup>24</sup> The Cuban Democracy Act was passed in October 1992 in an attempt to do just that.

## *B. The Cuban Democracy Act*

### 1. The Purpose of the Act

The Cuban Democracy Act<sup>25</sup> was enacted based upon congressional belief that the United States has an opportunity to promote a peaceful transition to democracy in Cuba because of the fall of communism in the Soviet Union,<sup>26</sup> and the "now

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tion refused, believing that more restrictions on foreign-based subsidiaries would damage international economic relations. Thompson, *supra* note 18, at 333.

21. A subsidiary had to show general independence from its parent in its decisions, negotiations, financial arrangements, and transactions concerning Cuba. If a subsidiary had many managers in common with the parent, it would not be considered independent and thus would not qualify for a license. In effect, many foreign-based subsidiaries of American corporations continued to be prohibited from trading with Cuba. Thompson, *supra* note 18, at 333 (citing 31 C.F.R. § 515.559(c) (1982)).

22. Connie Mack, *Should U.S. Ban Trade With Cuba by U.S. Subsidiaries? Yes*, MIAMI HERALD, Jan. 12, 1992, at 6C. Mr. Mack was a sponsor of the predecessor bill to the Cuban Democracy Act, which also called for a cutoff of foreign subsidiary trade. *Id.*

23. *The Cuban Democracy Act of 1992*, CARIBBEAN UPDATE, Nov. 1992, available in LEXIS, Predicasts (ISSN: 8756-324X).

24. Mack, *supra* note 22.

25. 22 U.S.C. §§ 6001-6010 (Supp. IV 1988). The Act was sponsored by United States Congressman Robert Torricelli, and is colloquially known as the "Torricelli Bill."

26. The sponsors of the Act were "[s]timulated by the dramatic changes in Eastern Europe and the Soviet Union that sharply reduced trade, assistance, and

universal recognition in Latin America<sup>27</sup> and the Caribbean that Cuba provides a failed model of government."<sup>28</sup> According to the sponsors of the Act, Fidel Castro may be ousted by imposing further restrictions on trade with Cuba. The Act justifies these further restrictions by reference to the Castro government's consistent disregard for internationally accepted standards of human rights and democratic values<sup>29</sup> and because "[t]here is no sign that the Castro regime is prepared to make any significant concessions to democracy or to undertake any form of democratic opening."<sup>30</sup>

Among other goals, the Act intends to speed the termination of any remaining military or technical assistance from any former state of the Soviet Union,<sup>31</sup> to oppose human rights violations perpetrated by the Castro regime,<sup>32</sup> to maintain sanctions until the Castro regime moves toward democracy and

ideological support to which Cuba was accustomed." S. REP. NO. 35, 103d Cong., 1st Sess. 124 (1993).

27. While this statement may be correct, it is also true that "virtually every Latin American nation maintains diplomatic and trade ties with Havana and opposes the [Cuban Democracy Act]." Ben Barber, *US Policy Toward Cuba Shows Signs of Change*, CHRISTIAN SCIENCE MONITOR, Dec. 28, 1993, at 6.

28. 22 U.S.C. § 6001(6) (Supp. IV 1988).

While the Cuban revolution certainly benefitted Cuba's ordinary citizens—all Cubans, for instance, have free medical, dental, and ophthalmological care—the deepening poverty of the country has changed the free daily glass of milk provided to each school child to sugared water. Russell Warren Howe, *Fidel's Little Hell: Cuba Without Libre—or Coffee*, WASH. POST, June 27, 1993, at C3. In 1991, prior to the passage of the Cuban Democracy Act, Cuba's per capita income was less than \$1,500. Its economy had declined at an annual rate of 0.8% between 1986 and 1989. Mack, *supra* note 22. The poverty stems, at least in part, from the many years it has been under embargo by the United States, and more recently because Cuba lost the Soviet Union as its major trading partner. The Soviet Union provided, among other things, 100% of Cuba's wood and cotton imports, 99% of its petroleum, 80% of its fertilizer, and 96.3% of its tractors. CARIBBEAN 1993 BUSINESS DIRECTORY, *supra* note 6, at 78. In 1990 the Soviet Union provided 66% of Cuba's imports (by value) and received 81% of Cuba's exports. THE STATESMAN'S YEAR-BOOK 1993-1994, at 470 (Brian Hunter ed., 1993). Many believe that Cuba was in such dire economic straits prior to the enactment of the Cuban Democracy Act that its passage was "like stabbing a corpse." Guy Gugliotta, *Exiles Urge Moderation Toward Cuba*, WASH. POST, Jan. 19, 1993, at A5 (quoting Eloy Gutierrez Menoyo).

29. 22 U.S.C. § 6001(1) (Supp. IV 1988). Americas Watch, an international monitoring group, has reported that there have been many instances of human rights abuses in Cuba. Mimi Whitefield, *Rights in Cuba: A Bleak Report*, MIAMI HERALD, Dec. 12, 1992, at 22A.

30. 22 U.S.C. § 6001(4) (Supp. IV 1988).

31. 22 U.S.C. § 6002(4) (Supp. IV 1988).

32. 22 U.S.C. § 6002(5) (Supp. IV 1988).

a greater respect for human rights and then to reduce sanctions in response to positive developments in Cuba,<sup>33</sup> and to initiate the development of a comprehensive policy toward a post-Castro Cuba.<sup>34</sup> The Act states that the president should "encourage" the governments of countries that trade with Cuba to restrict their trade in order to further the purposes of the Act.<sup>35</sup>

## 2. The Provisions of the Act

The Act's provisions are varied.<sup>36</sup> Perhaps looking toward the future, the Act permits the establishment of telecommunications between Cuba and the United States<sup>37</sup> as well as di-

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33. 22 U.S.C. § 6002(6)-(7) (Supp. IV 1988). Congress will eliminate all sanctions when the president reports that Cuba has held free and open elections, has moved to establish a free market economic system, and is committed to constitutional change to ensure continued free and fair elections. 22 U.S.C. § 6007(a)(1)-(5) (Supp. IV 1988).

34. 22 U.S.C. § 6002(10) (Supp. IV 1988).

35. 22 U.S.C. § 6003(a) (Supp. IV 1988). If a nation does assist Cuba, the president may designate that country ineligible for either assistance under the Foreign Assistance Act of 1961 or debt forgiveness under the Arms Export Control Act. 22 U.S.C. § 6003(b)(1)(A)-(B) (Supp. IV 1988). By the terms of the Act, "assistance" means "grant, concessional sale, guaranty, or insurance, or by any other means on terms more favorable than that generally available in the applicable market, whether in the form of a loan, lease, credit, or otherwise . . ." 22 U.S.C. § 6003(b)(2)(A) (Supp. IV 1988). Since the Soviet Union and the Eastern bloc countries were the only countries likely to provide these favorable terms, and those governments no longer exist, it may be that this language was inserted for political reasons, without any real need or intent to back it up.

36. The report of the House of Representatives summing up the legislative year described the Act's provisions as "consisting of both carrots and sticks, designed to hasten a democratic transition in Cuba . . ." H.R. REP. NO. 1079, 102d Cong., 2d Sess. 14 (1992).

37. 22 U.S.C. 6004(e) (Supp. IV 1988). This provision may undermine the Act's intention to limit access by Cuba to cash because it will allow United States telephone companies to pay Cuba for handling calls. The likely increase in the number of calls from Cuba means that Cuba "stands to reap millions of dollars annually" since, like most foreign countries, it charges seven times the cost of completing an international call. Jube Shiver, Jr., *U.S. to Ease Rules on Phone Access to Cuba*, L.A. TIMES, July 24, 1993, at D1.

The Congressional Budget Office (CBO) did not believe Cuba would allow the establishment of telecommunications service, and therefore did not budget any federal funding for such a project. H.R. REP. NO. 615 (II), 102d Cong., 2d Sess. 9 (1992). The CBO appears to have been correct in its assumptions. As of October 1993, negotiations to rebuild telephone links between American telephone companies and the Cuban government had stalled. Anthony Faiola, *The Elusive Connection: Cuba Balks at Terms for Phone Service*, MIAMI HERALD, Oct. 21, 1993, at 1C.

rect mail delivery.<sup>38</sup> However, travel is closely monitored and strict limits are established on remittances to Cuba by United States persons who finance travel of Cubans to the United States.<sup>39</sup> In addition, the Act restricts American-owned or controlled vessels without a license from entering a Cuban port for any reason and from loading or unloading freight anywhere in the United States within 180 days after departure from Cuba,<sup>40</sup> although there is a limited exception to allow humanitarian donations of food,<sup>41</sup> medicine, and medical supplies.<sup>42</sup>

Lastly, the Cuban Democracy Act amends the longstanding provision of the CACRs that allowed foreign-based subsidiaries to trade with Cuba. The Act prohibits the Treasury Department's OFAC from issuing future export licenses<sup>43</sup> to all United States foreign-based subsidiaries wanting to export to Cuba with the exceptions, as noted above, for medical supplies, food, and telecommunications-related matters.<sup>44</sup> Those who violate its provisions will be assessed the penalties set forth in the TWEA.<sup>45</sup> A violation by a foreign-based subsidiary

38. 22 U.S.C. § 6004(f) (Supp. IV 1988). The CBO, noting Cuba's history of refusing to accept direct mail service from the United States, assumed that mail service would not be established and thus did not budget for it. H.R. REP. NO. 615(II), *supra* note 37.

39. 22 U.S.C. § 6005(c) (Supp. IV 1988). This provision is to prevent the Cuban government from gaining access to excess United States currency. *Id.*

40. 22 U.S.C. § 6005(b)(1) (Supp. IV 1988). Furthermore, no vessel may carry goods or passengers, or goods in which Cuba or a Cuban national has any interest, to or from Cuba without authorization from the Secretary of the Treasury. 22 U.S.C. § 6005(b)(2) (Supp. IV 1988). These rules are reflected in amendments to the CACRs. *See* 31 C.F.R. § 515.207 (1993).

41. 22 U.S.C. § 6004(b) (Supp. IV 1988).

42. 22 U.S.C. § 6004(c) (Supp. IV 1988). The provisions concerning food and medical supplies derive from the Foreign Assistance Act of 1961. For the general policy of the Foreign Assistance Act, *see* 22 U.S.C. § 2151 (1990).

43. The Act allows licenses only for transactions arranged by contract entered into prior to October 23, 1992. 22 U.S.C. § 6005(a)(2) (Supp. IV 1988).

44. 22 U.S.C. § 6005(a)(1) (Supp. IV 1988). The Cuban Democracy Act thus amends the CACRs, which had read, in relevant part: "Transactions by U.S.-owned or controlled foreign firms with Cuba . . . . 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, trade with Cuba." 31 C.F.R. § 515.559 (1992).

45. 22 U.S.C. § 6009(d) (Supp. IV 1988). TWEA imposes criminal fines of up to \$1,000,000 and/or prison sentences of up to ten years, and/or civil penalties of up to \$50,000. 50 U.S.C. app. § 16(a)-(c) (Supp. IV 1988).

In a curious provision, the Cuban Democracy Act states that its provisions pertain to "any United States citizen or alien admitted for permanent residence in the United States, and any corporation, partnership, or other organization *orga-*

occurs if it is apprehended in a trade with Cuba without the necessary license, which of course it will not have been able to obtain due to the passage of the Cuban Democracy Act.<sup>46</sup>

The passage of the Cuban Democracy Act caused international uproar. Many nations' officials have been outspoken about their disagreement with United States attempts to regulate the trade of American-owned or controlled subsidiaries located and incorporated in non-United States territory. These officials have stated that such action violates the sovereignty of other nations, has no jurisdictional basis, and contravenes established principles of international law.<sup>47</sup>

### III. INTERNATIONAL LAW PRINCIPLES OF JURISDICTION AND THEIR APPLICATION TO THE CUBAN DEMOCRACY ACT

The existence of the Cuban Democracy Act highlights some of the differences in how the international community understands certain principles of international law. As this next section will discuss, the legal status of international corporations that own foreign-based subsidiaries remains unsettled.<sup>48</sup> As a result, each state interprets the existing laws and principles to further its own interests and the interests of organizations incorporated within its territory. Such diversity in interpreting international law has created great conflict between how the United States and other countries identify and implement principles of international jurisdiction,<sup>49</sup> especially

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nized under the laws of the United States." 22 U.S.C. § 6010 (Supp. IV 1988) (emphasis added). However, were a foreign-based subsidiary to engage in unlicensed trade with Cuba, it would violate both § 6005(a)(1) of the Cuban Democracy Act and the section of the CACRs amended by the Cuban Democracy Act, 15 C.F.R. § 515.559 (1993). The CACR penalties, like those of the Cuban Democracy Act, are those provided for in the TWEA. See 22 U.S.C. § 6009(d) (Supp. IV 1988); 31 C.F.R. § 515.701(a) (1993). It therefore appears that § 6010 of the Cuban Democracy Act is not particularly meaningful in the context of the whole Act.

46. For the licensing procedure in general, see *supra* notes 15-16.

47. See *infra* Part IV.B.1.

48. See *infra* note 52.

49. The United States' understanding can be gleaned from a publication of the American Law Institute. THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, (American Law Institute, 1987) [hereinafter RESTATEMENT (THIRD)]. The *Restatement (Third)* sought to articulate rules of public international law for the use of American policymakers, judges, lawyers, and scholars. It should be remembered that it is a product of American minds and American legal understandings. Other countries do not always agree with the law as articulated. A.D. NEALE AND M.L. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL

over corporate subsidiaries. This discord<sup>50</sup> will be resolved only when such jurisdictional questions are settled consistently within the international community.

### A. *Foreign Branches and Subsidiaries*

Can a state establish laws that govern companies incorporated in other countries? The law of corporations is, of course, state law. Special jurisdictional issues<sup>51</sup> arise, therefore, when a corporation expands beyond its national borders.<sup>52</sup> If a parent corporation establishes a branch, it establishes an extension of the main office and is allowed to be present in the country through that branch.<sup>53</sup> The parent will also be held liable for the branch's actions by the state in which the branch is domiciled.<sup>54</sup> If a parent corporation instead establishes a subsidiary,<sup>55</sup> it establishes an entity with a separate and inde-

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JURISDICTION 166 & n.1 (1988). There is no unanimous agreement with either its perspective or that the specific applications suggested can be used as rules of international law to resolve jurisdictional disputes. MARK J. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 341 (1993); Thompson, *supra* note 18, at 321 (1983); see Kathleen Hixson, Note, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L L.J. 127 (1988). Nonetheless, it is often relied on and will be used throughout this Note. When it differs from customary international law understandings, it will be so noted.

50. For further discussion, see *infra* part IV.B.1.

51. Until the early twentieth century, corporate law, which is a part of municipal law, and the territorial principle of international law were in harmony. A corporation was created by or under the laws of a single state and it operated only in that state, with its activities subject only to the laws of that state. If a state permitted a foreign corporation to act in its territory without local incorporation, then the corporation was subject to that state's laws. RESTATEMENT (THIRD), *supra* note 49, § 414 illus. 1; see also *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1835) ("corporation[s] can have no legal existence out of the boundaries of the sovereignty by which [they are] created.").

52. The term for this corporate entity is a multinational or transnational corporation or entity. Such a corporation is usually made up of "a group of corporations, each established under the law of some state, linked by common managerial and financial control and pursuing integrated policies." RESTATEMENT (THIRD), *supra* note 49, § 213 cmt. f (1987). The *Restatement (Third)* notes that while multinationals are established as a part of international economic life, their status in municipal and international law is not well defined, *id.*, thus causing problems such as the one under discussion in this Note.

53. CLIVE M. SCHMITTHOFF, SCHMITTHOFF'S EXPORT TRADE 318 (9th ed. 1990).

54. *Id.* at 320. For instance, in the United Kingdom, the parent company of a branch must register as an "oversea company," and provide the name and address of a resident authorized to accept service of process on its behalf. Thus, the non-British corporation can be sued in English courts just as any resident. *Id.*

55. A subsidiary corporation is one controlled by another corporation and may

pendent legal personality<sup>56</sup> from the parent.<sup>57</sup> A corporation located in one state with a subsidiary in another state is thus both a single entity *and* two entities that share common ownership and control. Multinational corporations raise questions in international law: How is it determined which state has jurisdiction over the subsidiary located in a separate nation from its parent? Does the state of incorporation have the right to prescribe and enforce laws over the subsidiary because it is located and incorporated within that state? When, if ever, does

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be wholly owned or partially owned by that parent. DETLEV F. VAGTS, *BASIC CORPORATION LAW* 810 (3d ed. 1989).

56. The legal separation between parent and subsidiary may be extinguished and the multinational corporation treated as one economic unit when to do otherwise "would lead to inequitable results or to results contrary to legal policy." IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* 5 (1987). For instance, international law recognizes that a foreign-based subsidiary has no protection from the parent's state if the parent is using the subsidiary to engage in activities that are illegal in the parent state. Judgment of Sept. 17, 1982, (*Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*), District Court at the Hague, *reprinted in* 22 *I.L.M.* 66, 73 (1983). In these situations, international law allows the court to look behind the legal entity and consider who are the actual beneficiaries in a particular situation. SEIDL-HOHENVELDERN, *supra*, at 5.

57. SCHMITTHOFF, *supra* note 53, at 318. The laws to establish a subsidiary vary greatly. For instance, some countries, including the Commonwealth countries, the United States, France, Spain, and Germany, allow free registration of subsidiaries. SCHMITTHOFF, *supra* note 53, at 325. In others, such as the Netherlands and Finland, permission must be obtained prior to establishing a subsidiary. Other states, including Turkey, Indonesia, Argentina, Bolivia, Chile, Guatemala, Haiti, and Honduras require a license, and permission may be refused. SCHMITTHOFF, *supra* note 53, at 325. Still others, such as Nigeria, require a subsidiary's establishment in order for a foreign company to carry on business within that country. SCHMITTHOFF, *supra* note 53, at 321 & n.19 (citing the Nigerian Decree No. 51 of 1968). Others have rules covering particular industries. Canada, for instance, only gives development rights in certain areas relating to oil exploration to locally chartered companies with a certain amount of local ownership. Thompson, *supra* note 18, at 392.

Many states legislate how much control can be wielded by non-nationals. States vary widely as to restrictions on non-resident participation in the corporate structure. For instance, in the member states of the European Community, as well as many commonwealth countries, Austria, and Israel, there are no restrictions on participation of non-residents or foreign shareholders or directors. In Sweden all the founders of a company must be Swedish subjects; in some states of the United States, including New York and Pennsylvania, a majority of promoters must be American citizens. In Mexico and the United Arab Republic, fifty-one percent of the share capital must be owned by nationals. In Sweden and Finland, four-fifths of the capital must be owned by nationals and cannot be transferred to aliens. Restrictions on the right of a company to own land occur in Canada, Mexico, and the Philippines, among others. SCHMITTHOFF, *supra* note 53, at 325-26.

the parent corporation's state of incorporation have the right to prescribe and enforce laws over the entire multinational? Which state has the right to claim a corporation as its national?<sup>58</sup>

### *B. Principles of Prescriptive Jurisdiction*<sup>59</sup>

There are several recognized bases of sovereign<sup>60</sup> jurisdiction in international law. The first and most basic principle is that of territoriality—that each sovereign nation has the right to exercise jurisdiction and control over matters within its territory.<sup>61</sup> Related to territorial jurisdiction are two other

58. A well-established principle of international law is that the law does not allocate individuals to states; the state is to claim persons as its nationals. Christopher Staker, *Diplomatic Protection of Private Business Companies: Determining Corporate Personality for International Law Purposes*, 61 BRIT. Y.B. INT'L L. 155, 160 (1990). It is possible to make an analogy between a state's conferring of citizenship upon an individual, thereby creating the presumption that it will also confer nationality in international law, and a state's incorporating a company under its municipal law, raising the presumption that it intends to consider the company a national under international law. *Id.* at 160-61. Staker suggests that the act of incorporation may not usually include such a presumption. *Id.* at 161. It will be suggested later in this note that such a presumption should be created. See *infra* part V.B.2.

59. "Jurisdiction" in international law refers to the legal power or competence of a state to exercise governmental functions. JANIS, *supra* note 49, at 322. There are three aspects of jurisdiction, based on function. This section will discuss jurisdiction to prescribe, which refers to the ability of a state to create legislation that passes municipal and international muster. See Otto Schachter, *General Course in Public International Law in 5 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 245 (1982). Whether the United States has prescriptive jurisdiction is often a crucial question in foreign policy trade embargoes. The second type of jurisdiction is that of adjudication which, according to the *Restatement (Third)*, gives the courts of a state the right to exercise jurisdiction "if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable." RESTATEMENT (THIRD), *supra* note 49, § 421(1). The third type of jurisdiction is that of enforcement, which requires that the state's law be internationally valid in order for the state to be allowed to "induce or compel compliance" of its laws. Schachter, *supra*, at 249; RESTATEMENT (THIRD), *supra* note 49, § 401(c). For enforcement jurisdiction of the Cuban Democracy Act, see *infra* part IV.A. All three types are closely connected; this Note will mainly be concerned with the first and third types.

60. "Sovereignty" describes the "whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States." *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 43 (Apr. 9).

61. "[A] state occupies a definite part of the surface of the earth, within which it normally exercises . . . jurisdiction over persons and things to the exclusion of the jurisdiction of other states." J.L. BRIERLY, *THE LAW OF NATIONS* 162 (6th ed. 1963). In its purest form, territoriality states that "the character of an act as

important concepts. One is that of territorial integrity, which gives a state the right to demand that other states refrain from committing acts that violate the independence or territorial supremacy of that state. The other is nonintervention, which requires that a state not interfere with the internal or external affairs of another state.<sup>62</sup> A state may thus make laws that pertain to persons and activities within its territory and no other state may interfere.

In addition to territoriality, there are five other recognized bases of jurisdiction. These other principles are based on extraterritorial principles.<sup>63</sup> They are the principles of nationality, passive personality, universality, protection, and a subgroup of territoriality called objective jurisdiction, or "the effects doctrine."<sup>64</sup> In brief, the nationality principle allows a state to have jurisdiction over its nationals, wherever they are located.<sup>65</sup> Passive personality gives jurisdiction based on the na-

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lawful or unlawful must be determined wholly by the law of the country where the act is done." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). The *Restatement (Third)* says a state has territorial jurisdiction when there is "conduct that, wholly or in substantial part, takes place within its territory" and involves "the status of persons, or interests in things, present within its territory." RESTATEMENT (THIRD), *supra* note 49, § 402(1)(a)-(b). Territoriality is the most commonly accepted basis of state jurisdiction. RESTATEMENT (THIRD), *supra* note 49, § 402 cmt. b.

62. Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1319 & nn.70-71 (1983) [hereinafter *Extraterritorial Application of EAA*].

63. Extraterritoriality refers to the operation of laws upon persons or rights outside the borders of the enacting state. BLACK'S LAW DICTIONARY 588 (6th ed. 1990). The use of extraterritorial jurisdiction was given international approval in the *Lotus* case. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (addressing the question of whether international law forbade Turkey from applying its criminal laws to the conduct of the French officer in control of the French ship that collided with a Turkish vessel on the high seas, causing several Turkish deaths). The Permanent Court of International Justice (PCIJ) held that a state may use its municipal law in an international sphere unless it can be shown that there exists a principle of international law which restricts the state from acting. *Id.* at 23. Legislative acts that are considered extraterritorial include those on the part of the United States, such as the Cuban Democracy Act, that attempt to control the activities of multinational corporations outside United States territory. See SEIDL-HOHENVELDERN, *supra* note 56, at 14.

64. For a brief definition by the Third Circuit of all these principles, see *United States v. Wright-Barker*, 784 F.2d 161, 167 n.5 (3d Cir. 1986).

65. See *Blackmer v. United States*, 284 U.S. 421 (1932) (holding that an American citizen, living in Paris, still has the responsibilities of citizenship and must respond to a subpoena served on him); *Kawakita v. United States*, 343 U.S. 717 (1952) (holder of American and Japanese citizenship, residing in Japan, still

tionality of the victim of an action.<sup>66</sup> The universality principle allows a state to have jurisdiction over individuals who have engaged in certain heinous, universally condemned crimes.<sup>67</sup> The protective principle allows a state jurisdiction over non-nationals when their conduct is directed against the security of the state.<sup>68</sup> Objective jurisdiction, or the effects doctrine, gives a state jurisdiction when conduct occurs outside the state's territory which is intended to have, and which does have, an injurious effect within the state.<sup>69</sup> If any of these

owes allegiance to United States and can be punished for acts of treason). The *Restatement (Third)* states that a state has jurisdiction to prescribe law with respect to "the activities, interests, status, or relations of its nationals outside as well as within its territory." *RESTATEMENT (THIRD)*, *supra* note 49, § 402(2).

66. This principle, though accepted in the United States and elsewhere, is used sparingly. *See, e.g.*, Schachter, *supra* note 59, at 245 ("controversial base of jurisdiction"); IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* 296 (2d ed. 1973) (the "least justifiable" of all bases). The *Restatement (Third)* allows the use of passive personality when a criminal act is committed outside a state's territory by a non-national against a victim who is a national. The principle is accepted most often when applied to terrorism or other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives. *RESTATEMENT (THIRD)*, *supra* note 49, § 402 cmt. g. The *Restatement (Third)* notes that the United States applied passive personality in the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. § 2231 (1988), which makes it a crime to kill or conspire to kill a United States national outside of American territory. *RESTATEMENT (THIRD)*, *supra* note 49, § 402(2), reporters' note 3.

67. *See Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (allowing a person charged with crimes committed in Nazi concentration camps to be extradited to Israel); *see also* *RESTATEMENT (THIRD)*, *supra* note 49, § 404 (allowing universal jurisdiction to define and punish certain offenses "recognized by the community of nations as of universal concern . . . even where none of the [other] bases of jurisdiction . . . is present").

68. Besides the security of the state, the protective principle might allow a state to have jurisdiction over those whose actions are against certain other crucial state interests. *RESTATEMENT (THIRD)*, *supra* note 49, § 402(3); *see* *United States v. Archer*, 51 F. Supp. 708 (S.D. Cal. 1943) (giving United States jurisdiction over alien who committed perjury in Mexico when applying for a non-immigrant visa). One commentator has noted that United States law, which embraced the protective principle later than most of European law, "scarcely distinguish[es]" the protective principle from the effects principle. D.P. O'CONNELL, 2 *INTERNATIONAL LAW* 830 (1970). For the effects principle, *see infra* note 69 and accompanying text.

69. *See* *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (defining the effects doctrine as it pertains to antitrust law). In intervening years, this formulation has been modified in the United States. NEALE & STEPHENS, *supra* note 49, at 16. *See Restatement (Third)* which states that a state has jurisdiction with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory." *RESTATEMENT (THIRD)*, *supra* note 49, § 402(1)(c) (emphasis added); *see also* *United States v. Wright-Barker*, 784

bases of jurisdiction is present, the minimum requirement for jurisdiction has been met in international law and a state may prescribe laws that will have effect over the actions of non-nationals who are not present in the state's territory.<sup>70</sup>

In an ideal world, the fact that a subsidiary is physically "located" in a particular state would lead to the assumption that by the principle of territoriality, the subsidiary is under the jurisdiction of its state of incorporation. In most situations, this is in fact the case. However, when a state chooses to act

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F.2d 161, 168 (3rd Cir. 1986) (holding that a conspiracy to import 23 tons of marijuana would have had a harmful effect within the United States); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 32-34 (1992) (effects in antitrust law).

70. However, the mere existence of a basis in itself may not be sufficient in itself to confer jurisdiction. Schachter, *supra* note 59, at 245-46. In recent years, there has been a move to require that actions be "reasonable" as well as legally possible. Schachter, *supra* note 59, at 245-46. This view is reflected in *Restatement (Third)*'s § 403, entitled "Limits on Jurisdiction to Prescribe." The *Restatement (Third)* acknowledges that "[e]ven when one of the bases for jurisdiction . . . 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." RESTATEMENT (THIRD), *supra* note 49, § 403(1). To determine whether a particular course of action is reasonable, the *Restatement (Third)* calls for an evaluation of the relationship of the parties, the activities, and the particular states involved, as well as the importance and international acceptance of the regulation causing the dispute. The *Restatement (Third)* lists "relevant factors" that are used to determine when jurisdiction would be reasonable. These factors include:

- (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.

RESTATEMENT (THIRD), *supra* note 49, § 403(2)(a)-(h).

extraterritorially, the principle of territoriality and its allied concepts of territorial integrity and nonintervention<sup>71</sup> are challenged. The Cuban Democracy Act is an example of extra-territorial action because it explicitly forbids most foreign-based American-owned or controlled subsidiaries from trading with Cuba, regardless of the interests of the incorporating state. The United States bases its jurisdictional reach on the fact that the subsidiaries it seeks to regulate are American-owned or controlled, and that this "control" makes the subsidiary a national of the United States and thus subject to its jurisdiction. The determination of corporate nationality takes on international legal importance because international subsidiaries are often located in one state but are owned or controlled or both by a foreign corporation.

### C. The Nationality of a Corporation

To speak of the "nationality" of a corporation is to speak of a concept the characteristics of which are defined by municipal law.<sup>72</sup> It is municipal law that confers nationality upon the citizens of a state, either by birth or through well-established "links" between the individual and the state.<sup>73</sup> Municipal law also confers legal existence on corporations organized within a state.<sup>74</sup> However, municipal law in general has not addressed the characteristics that establish a primary bond between a corporation and a state when that corporation is multinational and therefore has links with more than one state.<sup>75</sup>

The International Court of Justice (ICJ) gave its imprimatur to the "traditional" rule in international law in the case of *Barcelona Traction*.<sup>76</sup> *Barcelona Traction* was brought before

71. For territorial integrity and non-intervention, see *supra* text accompanying note 62.

72. Municipal law grants natural persons their nationality through family ties or other genuine "links" with a state. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 22 (Apr. 6). "[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." *Id.* at 23. See RESTATEMENT (THIRD), *supra* note 49, § 211 & cmt. c; O'CONNELL, *supra* note 68, at 1040.

73. See *Nottebohm Case*, 1955 I.C.J. at 20, 23.

74. BROWNLIE, *supra* note 66, at 409.

75. O'CONNELL, *supra* note 68, at 1040.

76. Concerning the *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4 (Second Phase) (Feb. 5). The *Barcelona Traction Company*, whose principal shareholder was a Belgian company, was incorporated under Cana-

the ICJ to determine whether Canada, the state in which Barcelona Traction was incorporated, or Belgium, the state of which its shareholders were nationals, had the legal capacity to bring suit on behalf of the corporation against Spain, where the corporation was conducting business. The ICJ held that Belgium lacked a legal interest in the subject matter of the claim. It stated that "the general rule of international law authorizes the national State of the company alone to make a claim."<sup>77</sup> Since the question concerned the protection of corporate rights, it is the place of incorporation or seat of business that has predominant rights to the corporate life, not the state of the shareholders' nationality.<sup>78</sup>

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dian law and had its registered office in Toronto. It was formed to develop electric power in Spain, and had created several subsidiaries for that purpose. A suit had been brought against Spanish authorities for various misdeeds. BROWNLEE, *supra* note 66, at 477-80.

"The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office." *Barcelona Traction*, 1970 I.C.J. at 42. See J.G. CASTEL, EXTRATERRITORIALITY IN INTERNATIONAL TRADE 134 (1988) ("international law, generally, does not recognize a state's prescriptive jurisdiction over foreign corporations abroad on the basis of the status of their shareholders"). British law, for instance, "stands firmly on the principle that the nationality of a corporation is determined by the place of incorporation and that a state is not entitled to regulate the activities of a company incorporated in another state on the basis that a whole, or substantial part, of its shareholding is owned or controlled by nationals of the state concerned." THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 38 n.170 (Dieter Lange & Gary Born, eds., 1987) (quoting remarks by William Beckett (July 17, 1985) in William C. Beckett, *Extraterritorial Jurisdiction: The Broader Context of the Conflict*, 54 ANTITRUST L.J. 829 (1985)). The United States has, at least sometimes, accepted that mere incorporation can give a state the right to protect its corporation. See O'CONNELL, *supra* note 68, at 1040-41 & nn.49-51 (citing several arbitration agreements between the United States and other countries affirming nationality based on incorporation); see also *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) (holding that Japanese subsidiary incorporated in New York was subject to the laws of the United States). A European case following the same logic is that of Judgment of Sept. 17, 1982 District Court at the Hague (*Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*), reprinted in 22 I.L.M. 66 (1983) (holding that American subsidiary based in Holland was subject to laws of the Netherlands and not the United States).

77. *Barcelona Traction*, 1970 I.C.J. at 46.

78. *Id.* at 42-45. The "seat of business" is also termed the "registered office." *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, reproduced in 21 I.L.M. 891, 894 (1982) (stating that *Barcelona Traction* declared that "two traditional criteria for determining the nationality of companies; i.e. the place of incorporation and the place of the registered office of the company concerned, had been 'confirmed by long practice . . . .'").

Many commentators have suggested that corporate nationality should be conferred only if, in addition to the act of incorporation, there exist "genuine links" to the state of incorporation.<sup>79</sup> Three "links" have been identified to determine jurisdiction.<sup>80</sup> The first link between the corporation and the state is domicile, defined as the location of the company's managerial, administrative, and legal existence.<sup>81</sup> The second is control, the location of the seat of economic control and influence.<sup>82</sup> The third is *siege social*, a term that derives from French law and is quite similar to the concept of "domicile"; *siege social* includes both incorporation and administrative direction.<sup>83</sup> A state of incorporation that has other "links" to the subsidiary is in a much stronger position to assert jurisdiction over the subsidiary on the basis of nationality.

By the traditional rule, in order to determine a corporation's nationality, the act of incorporation alone will tend to confer jurisdiction. The existence of links will add weight to such a designation. However, the existence of links

79. See BROWNLIE, *supra* note 66, at 409; O'CONNELL, *supra* note 68, at 1040-41. These commentators have borrowed the municipal law concept of "genuine links" between the individual and the state of nationality and applied it to corporate existence. In *Barcelona Traction*, the ICJ noted that sometimes "further or different links" are thought to be required, but then stated that there is no "absolute test" which has found general acceptance. *Barcelona Traction*, 1970 I.C.J. at 42. However, although the ICJ seemed to reject the "genuine links" test, it also explicitly listed *Barcelona Traction's* links to Canada, including that the company had been incorporated for more than fifty years in Canada, had maintained its registered office in Toronto, had its accounts and share registers there, often had board meetings there, and was listed in the records of the Canadian tax authorities. BROWNLIE, *supra* note 66, at 476 (citing *Barcelona Traction*, 1970 I.C.J. at 42).

80. BROWNLIE, *supra* note 66, at 409 (writing post-*Barcelona Traction* and stating that nationality is derived either from incorporation or from "links" such as the "centre of administration (*siege social*) and the national basis of ownership and control"); cf. O'CONNELL, *supra* note 68, at 1040-41 (writing prior to *Barcelona Traction* and stating there are four "links," incorporation being the first link, and the others being those the ones discussed *infra* at text accompanying notes 82 and 83).

81. O'CONNELL, *supra* note 68, at 1041. Professor O'Connell uses "domicile" as a criterion when a company is simultaneously incorporated in several companies. O'CONNELL, *supra* note 68, at 1041.

82. BROWNLIE, *supra* note 66, at 474. At least one commentator suggests this should be confined to times when a corporation is owned by "enemies" of a state who wish to confiscate it. O'CONNELL, *supra* note 68, at 1042.

83. For *siege social*, see O'CONNELL, *supra* note 68, at 1041; BROWNLIE, *supra* note 66, at 474.

without incorporation will normally be insufficient to confer nationality. Under established international law, as long as a subsidiary and its parent operate as "different legal persons,"<sup>84</sup> the subsidiary, as an independent entity operating separately with its own seat of business, will be considered a national of its state of incorporation and fall within the jurisdiction of its incorporating state.<sup>85</sup>

There are situations when no genuine links exist between the subsidiary and the country in which it is located.<sup>86</sup> *Barcelona Traction* acknowledges that situation. However, the *Barcelona Traction* court stated that because there are as yet no accepted international rules to deal with these situations, the court would not make any conclusions about the absence of links.<sup>87</sup> This decision appears to reinforce the international law tenet of corporate separation between parent and subsidiary.<sup>88</sup>

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84. SCHMITTHOFF, *supra* note 53, at 321; *see supra* note 56.

85. Conversely, when there is no act of incorporation, as in the case of the establishment of a branch or agency by a parent corporation, then there is much less likelihood of the host state being able to claim jurisdiction over the branch or agency. The branch or agency remains an "arm" of the parent corporation and under the jurisdiction of the state having jurisdiction over the parent corporation. SCHMITTHOFF, *supra* note 53, at 318. Of course, in the case of wrongdoing by a branch, the law allows the host state to reach the parent company. *See supra* note 56 and accompanying text. The Supreme Court in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), made a clear distinction between subsidiaries incorporated abroad and companies not so incorporated, stating that because the Japanese-owned subsidiary, Sumitomo, was " 'constituted under the applicable laws and regulations' of New York . . . it is a company of the United States, not a company of Japan." *Id.* at 182 (quoting the Friendship, Commerce and Navigation Treaty between the United States and Japan). The Court then compared Sumitomo's legal status with that of "companies of Japan operating in the United States." *Id.* at 183. These companies, i.e., branches and agencies, were not considered companies of the United States and thus did not fall under United States jurisdiction.

86. An example might be a subsidiary established to function only as a midpoint through which goods pass on their way to a third country. *See infra* note 167.

87. Concerning the *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 47 (Feb. 5). In some situations, however, treaty provisions between the two states involved will cover such circumstances. *Id.*

88. "The decision [to make no distinctions between subsidiaries with links and those without] thus constitutes a further instance of the tendency to respect the corporate veil even in circumstances where such respect appears to be at variance with economic realities." SEIDL-HOHENVELDERN, *supra* note 56, at 12.

Some commentators have questioned whether jurisdiction premised on incorporation gives too much weight to the act of incorporation. *See* Thompson, *supra* note 18, at 391-92. Thompson notes that a host state should not be able to force

The actual practice of states confirms acceptance of the act of incorporation as the primary factor in determining nationality. This is most clearly seen in the many modern treaties that define "nationals" to include corporations.<sup>89</sup> The existence of these treaties lends further weight to the customary international rule that corporate nationality is determined primarily through the act of incorporation.

#### D. *The Validity of the Cuban Democracy Act*

##### 1. Testing the Validity of Asserting Jurisdiction over Foreign-Incorporated American Subsidiaries under International Law

The Cuban Democracy Act, similar to other United States foreign policy trade embargoes, claims the authority to regulate foreign-based subsidiaries owned or controlled by American corporations.<sup>90</sup> The question is whether there is a basis in international law to make such a claim. The answer can be found by testing the Act under each of the previously discussed bases of jurisdiction: territoriality, nationality, passive personality, universality, protection, and the effects doctrine.<sup>91</sup>

The principle of territoriality does not, of course, apply in this situation. The Cuban Democracy Act is concerned with regulating subsidiary corporations located and incorporated

the parent corporation to forego all regulation of its foreign-based subsidiary where there is a clear national interest of the parent state involved. A state may, for example, require in-state incorporation in order to control use of its own natural and human resources. Thompson, *supra* note 18, at 392. Thompson's concerns are important, but they could be satisfied by the application of international jurisdictional principles and the use of "reasonableness" to determine whether the parent corporation's state should be allowed prescriptive or enforcement jurisdiction. For further discussion, see *infra* text accompanying notes 168-69.

89. BROWNLIE, *supra* note 66, at 409. See CASTEL, *supra* note 76, at 132-33 (noting that many United States friendship treaties state that subsidiary corporations are to be considered nationals of their state of incorporation). Examples of such treaties include the treaty of commerce between the United Kingdom and Iran which defines corporations incorporated within the state as being nationals, and the Treaty of Rome, establishing the European Economic Community, which provides that companies are considered to be nationals if incorporated and having their *administration centrale* within the state. BROWNLIE, *supra* note 66, at 409-10. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 189 (1982) (holding that the friendship and commerce treaty between the United States and Japan states that a Japanese subsidiary incorporated in New York "is a company of the United States").

90. See *infra* text accompanying notes 107-11.

91. See *supra* text accompanying notes 60-70.

outside United States territory. Thus, the basis for the Act's jurisdiction will have to be found in a principle of extraterritorial jurisdiction.

The nationality principle may appear to offer a basis of jurisdiction. According to the language of the Cuban Democracy Act, "United States person" means United States citizens and permanent residents and organizations "organized under the laws of the United States."<sup>92</sup> This language would suggest that the Cuban Democracy Act claims jurisdiction based on nationality.<sup>93</sup> However, the Act's amendment of section 515.559 of the CACRs<sup>94</sup> revoking the ability of American-owned, foreign-based subsidiaries to obtain a license to trade with Cuba is explicitly intended to affect the activity of companies not incorporated under United States law.<sup>95</sup> As previously discussed, and affirmed by the *Restatement (Third)*, nationality cannot be extended to those corporations incorporated under the laws of foreign states.<sup>96</sup> Therefore, the validity of applying the Cuban Democracy Act to foreign-based subsidiaries cannot be based on the principle of nationality.

The protective principle, which offers a basis of jurisdiction if the security of a state is threatened,<sup>97</sup> is not useful in this situation since the activity of foreign subsidiaries trading with

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92. 22 U.S.C. § 6010 (Supp. IV 1988).

93. The nationality principle is frequently applied in the areas of trade policy and export controls. EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS, *supra* note 76, at 37.

94. 22 U.S.C. § 6005(a)(1) (Supp. IV 1988).

95. The Cuban Democracy Act is explicitly directed toward subsidiaries. It therefore does not affect foreign branches or agencies of American corporations. These entities, legally recognized as extensions of the parent corporation, are forbidden to trade with Cuba under the CACRs, the previously existing regulations that affect United States domestic trade with Cuba. For the CACRs, see *supra* notes 9-12 and accompanying text.

96. "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." RESTATEMENT (THIRD), *supra* note 49, § 213. See discussion *supra*, notes 72-85 and accompanying text. The *Restatement (Third)* does not recognize that a state has jurisdiction simply because a corporation is "owned" by its nationals. RESTATEMENT (THIRD), *supra* note 49, § 414 cmt. e. Furthermore, if one uses either of the accepted tests of a corporation's nationality, i.e., whether the subsidiary is incorporated in the United States or has its "seat" inside the United States, it is clear that a foreign-incorporated subsidiary is not an American national and the Act cannot be justified by using the nationality principle. *Extraterritorial Application of EAA*, *supra* note 62, at 1323-24.

97. RESTATEMENT (THIRD), *supra* note 49, § 402(3) & cmt. f.

Cuba do not pose a security threat to the United States.<sup>98</sup> Their trade may lessen the impact of the embargo, but that is a foreign policy issue, not one of security. The trade of foreign-based subsidiaries did not pose a threat from 1975 to 1992, the years in which the CACRs allowed foreign-based subsidiaries to trade with Cuba prior to the passage of the Cuban Democracy Act. Nothing has changed, except that Cuba has lost its former support from the Soviet Union. There is no security threat, and therefore the protective principle cannot be used to assert jurisdiction.

The effects principle may appear to offer a basis of jurisdiction since it pertains to actions conducted outside the United States<sup>99</sup> and could therefore apply to trade between foreign subsidiaries and Cuba. According to the *Restatement (Third)*, which differs from the standard accepted in international law, in order for the United States to exert jurisdiction based on the effects doctrine, there must be conduct outside the United States which "has or is intended to have *substantial* effect within its territory."<sup>100</sup> Thus, the question becomes whether foreign subsidiaries trading with Cuba will cause a substantial effect in the United States. However, there is no effect on domestic trade or on the welfare of American citizens, two tests that American courts have used.<sup>101</sup> Indeed, the only effect of

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98. Furthermore, there are no allegations of espionage, counterfeiting, falsification of official documents, perjury before consular officials, or conspiracy to violate customs or immigrations laws, the other possible reasons for use of the protective principle according to the *Restatement (Third)*. RESTATEMENT (THIRD), *supra* note 49, § 402 cmt. f.

99. RESTATEMENT (THIRD), *supra* note 49 § 402(1)(c).

100. RESTATEMENT (THIRD), *supra* note 49, § 402(1)(c) (emphasis added). This standard is the looser American version. The established international law standard requires both substantial *and* intentional effect. See *supra* note 69 for discussion of the differences between the United States and other countries when applying the effects doctrine.

It must be noted that because of these differences, the United States has claimed jurisdiction based on "effects," particularly in antitrust cases, when other countries might not have. BROWNLEE, *supra* note 66, at 300. The United States has somewhat tempered this broad jurisdiction by use of the *Restatement (Third)*'s "reasonableness" test. See *supra* note 70. However, as noted *infra* note 170, United States courts appear nonetheless to lean very favorably in the direction of finding jurisdiction, which suggests that a balancing test of reasonableness may be limited in its usefulness.

101. See *United States v. Baker*, 609 F.2d 134, 137 (5th Cir. 1980) (citing with approval the Comprehensive Drug Abuse & Prevention And Control Act of 1970, 21 U.S.C.A. § 801 (West 1980), which states that the importing and distribution of

continued trade with Cuba by subsidiaries may be that the United States might change its perceptions of its foreign policy goals due to its failure to influence foreign-based subsidiary trade with Cuba.<sup>102</sup> If one applies the international law definition of the effects doctrine, it is not at all obvious that such an effect can be termed "substantial." If there is a substantial effect by the trading with Cuba, that effect will take place primarily within Cuba.<sup>103</sup>

The intentionality of the subsidiaries to produce an effect within the United States should also be examined.<sup>104</sup> It can

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controlled substances illegally has "substantial" and detrimental effect on the American people); see also *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945) (conspiracy to create aluminum cartel impacts substantially on American commerce); *Securities and Exch. Comm'n v. Kasser*, 391 F. Supp. 1167 (1975) (defendants' fraudulent foreign securities transactions relating to a Canadian forestry complex had no known impact on either the domestic investing public or domestic securities markets, even though the Americans involved may have committed various miscellaneous acts in the United States in furtherance of the scheme); *United States v. Watchmakers of Switz. Info. Ctr. Inc.*, 133 F. Supp. 40 (1955) (compelling of American companies by Swiss organizations to restrict manufacture and export of American watches intentionally affects American commerce); *United States v. Holophane Co. Inc.*, 119 F. Supp. 114 (1954) (conspiracy by French, English, and American companies to control manufacturing and sale of prismatic materials was restraint in trade); BROWNLIE, *supra* note 66, at 300. For further discussion of intentionality, see *infra* note 104.

102. *Extraterritorial Application of EAA*, *supra* note 62, at 1328.

103. It is instructive to look at Judgment of Sept. 17, 1982 (*Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*), District Court at the Hague reprinted in 22 I.L.M. 66 (1983), a case to determine whether the Netherlands or the United States had jurisdiction over an American-owned subsidiary incorporated in the Netherlands. The subsidiary had declared it was obliged to support an American boycott of the Soviet Union and thus could not ship products destined for that country, breaking a contractual agreement with a French company. The court, in examining the effects principle, concluded that "[i]t cannot, however, be seen how the export to Russia of goods not originating in the United States by a non-American exporter could have any direct and illicit effects within the United States." *Id.* at 73. For further discussion of this case, see *infra* notes 115, 164.

104. "Intentionality" can also be inferred from the nature of the actions. See *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945), the case that first clearly articulated the effects doctrine, in which the foreign defendants were accused of violating the Sherman Antitrust Act by setting up and executing an international aluminum cartel abroad that, by its very nature, was intended to adversely impact United States commerce. See also *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 693-94 (1962) (establishing a monopoly of 99% of all ferrovanadium and 90% of all vanadium oxide produced in this country was intended to eliminate other producers and distributors). For examples of cases where the courts specifically required some kind of intent, and some that did not so require, see Roger P. Alford, *The Extraterritorial Application of Antitrust Laws:*

be assumed that subsidiaries that trade do so purposefully, but it is not at all clear that they would trade with Cuba with the intention of impacting on the United States. Their intent is more likely related to the making of profits. Thus, if there was no intent to have an effect in the United States, and if any realized effect is insubstantial, the effects doctrine will not support United States jurisdiction over the subsidiary.<sup>105</sup>

The universality principle is obviously not applicable in this situation. A subsidiary's trade with Cuba cannot be termed an offense "recognized by the community of nations as of universal concern."<sup>106</sup> Similarly, trading with Cuba by subsidiaries does not create an American "victim," which would be necessary in order for the passive personality principle to be used. Thus, the Cuban Democracy Act's extraterritorial features do not pass muster under any of the international law principles of jurisdiction. Nonetheless, the United States asserts that it does have jurisdiction over American-owned or controlled foreign-based subsidiaries.

## 2. United States Justifications for Asserting Jurisdiction over Foreign-Incorporated Subsidiaries

In spite of the seeming lack of a basis in international law to justify its assertion of jurisdiction, the United States asserts that it has jurisdiction and will enforce the Act against non-complying American foreign-based subsidiaries. Its position is derived from the Constitution, which gives the United States Congress the right to regulate commerce,<sup>107</sup> a power that Congress interprets broadly.<sup>108</sup> Of course, as a member of the

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*The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 9 n.44 (1992).

105. Of course, were a case to arise under the Cuban Democracy Act in United States courts, the Act would probably not be deemed unconstitutional. See *infra* notes 163-65 and accompanying text. The United States might try to show that violations of the Act constituted an impact on foreign policy that is substantial, if not intentional. Were this argument to prevail, it would highlight the differences between the American and international understandings of the elements needed to establish jurisdiction under the effects doctrine.

106. RESTATEMENT (THIRD), *supra* note 49, § 404. Such universal concerns include piracy, slave trade, hijacking, genocide, and war crimes. RESTATEMENT (THIRD), *supra* note 49, § 404.

107. U.S. CONST. art. I, § 8, cl. 3.

108. An example of the breadth of Congressional power in the area of foreign trade is that of its asserted ability to regulate trade. By law, there is no inherent

international community, the United States also includes customary international law as a part of its law, and the United States will usually follow those principles.<sup>109</sup> However, the United States has also reserved the right to differ from international law. The Supreme Court has stated that the United States may pass laws or judicial decisions that are not in accord with international law; those laws will nonetheless be given authority within the United States.<sup>110</sup> Furthermore, the Supreme Court has noted that in the realm of foreign policy in particular, the federal government has wide latitude and is not restricted to the Constitution's enumerated powers.<sup>111</sup>

These justifications, of course, are all domestically oriented; that is, they explain United States law to United States enforcers and courts. The United States must also justify its broad policies to the international community. In examining United States practice, it appears that the United States is attempting to create either another principle of jurisdiction, or an expanded definition of the nationality principle. The United States appears to believe it can assert jurisdiction over entities that are "controlled"<sup>112</sup> by United States "persons."<sup>113</sup> To "control" a foreign-incorporated subsidiary means that a parent corporation owns either a majority or a substantial block of the voting shares of the subsidiary corporation and no other entity owns a comparable block.<sup>114</sup> Thus, a foreign-based subsidiary

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right to export, and all such trade is prohibited unless a license for export has been issued by the Department of Commerce. 15 C.F.R. § 770.3 (1993). Licensing, of course, is premised on enforcement jurisdiction. Schachter, *supra* note 59, at 249.

109. "International law is part of our law, and must be ascertained and administered by the courts . . ." *The Paquette Habana*, 175 U.S. 677, 700 (1899).

110. When a "controlling executive or legislative act or judicial decision" exists, it will have precedence over the customary international law. *Id.* at 700; see also *JANIS*, *supra* note 49, at 102 ("international common law plainly has *no more* supremacy than do treaties; that is, statutes later in time prevail").

111. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 316-18 (1936). The president in particular has been acknowledged as having powers that are very broad in the realm of international relations. *Id.* at 319-21.

112. Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1317 (1985) [hereinafter *Predictability and Comity*]; see also *RESTATEMENT (THIRD)*, *supra* note 49, § 414 cmt. e (declaring that control is a sufficient basis to exercise jurisdiction).

113. Remember that "United States person" is often defined, as for instance in the CACRs, to include corporations and other organizations. 31 C.F.R. § 515.329 (1993).

114. *CASTEL*, *supra* note 76, at 176 n.456.

owned or controlled by an American corporation should, under the United States viewpoint, fall under the jurisdiction of United States law.

However, this principle of control is not yet accepted in international law. Although control is considered a "link" in international law that helps establish a relationship between the state and the subsidiary corporation, absent the act of incorporation, control is not enough in itself to confer jurisdiction.<sup>115</sup> Additionally, the use of control to determine nationality conflicts with the principle, articulated in *Barcelona Traction*, that nationality is derived from either incorporation or the seat of activities.<sup>116</sup>

In conclusion, the United States will not be able to justify the jurisdictional basis of the Cuban Democracy Act because the Act applies to companies incorporated in other countries. Furthermore, because it cannot successfully justify the premise of the Act, the United States will have difficulties enforcing the Act.

#### IV. THE IMPLEMENTATION OF THE CUBAN DEMOCRACY ACT

##### A. *Enforcement*

The CACRs, the overall regulatory scheme affecting United States interactions with Cuba,<sup>117</sup> have established the procedures to be followed when there is a presumed violation of

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115. See Judgment of Sept. 17, 1982 (*Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*), District Court at the Hague *reprinted in* 22 I.L.M. 66 (1983), a case which grew out of a contract dispute between a Netherlands-based American subsidiary and a French company. The United States had declared that no American-owned or controlled foreign-based subsidiary could involve itself in any transactions that had to do with the Soviet Union, in particular with its project to build a trans-Siberian pipeline for natural gas. The Netherlands-based American subsidiary, Sensor, had contracted with a French corporation to deliver gas equipment that would have then been shipped to the pipeline production. After the embargo was announced, Sensor attempted to break its contract. The Hague court used the *Barcelona Traction* test of incorporation or place of business, and the international law principles of jurisdiction to decide that Sensor was not an American national, not under American jurisdiction for purposes of the embargo, and therefore incorrect in refusing to deliver the equipment. See also *infra* note 164. But see SEIDL-HOHENVELDERN, *supra* note 56, at 8-9, 21, 27 (stating that control is a sufficient link to establish nationality, although acknowledging that *Barcelona Traction* does not agree).

116. See *supra* notes 76-78 and accompanying text.

117. See *supra* part II.A.2.

the Cuban trade embargo.<sup>118</sup> These procedures include the issuing by the Treasury Department's OFAC of a pre-penalty notice,<sup>119</sup> the right of the subsidiary to make a written reply or request a hearing within thirty days,<sup>120</sup> and its right to judicial review.<sup>121</sup> Should the subsidiary not pay the penalty imposed within thirty days, the matter is referred for administrative collection measures or to the Department of Justice to recover the penalty in a civil suit in a federal district court.<sup>122</sup> The penalties can be severe.<sup>123</sup>

However, the question remains as to whether the penalties can ever be enforced. The Cuban Democracy Act, without prescriptive jurisdiction, will face difficulties because there can be no effective enforcement scheme. Enforcement is essentially a territorially based phenomenon. While a state may attempt to

118. See 31 C.F.R. §§ 515.702-707 (1993) (penalty procedures).

119. This notice will designate the possible fine to be imposed and whether or not there may be forfeiture of future licenses. 31 C.F.R. § 515.702(a), (b) (1993). The penalties are those imposed by the TWEA. 31 C.F.R. § 515.701(a) (1993). See *infra* note 123 for the relevant language of the TWEA.

120. 31 C.F.R. §§ 515.702(b)(2), 515.703(a), 515.704(a) (1993).

121. 31 C.F.R. § 515.706 (1993). Judicial review is that provided under 5 U.S.C. § 702. *Id.*

122. 31 C.F.R. § 515.707 (1993).

123. The Cuban Democracy Act employs the same penalties that are imposed for violations of the TWEA. The TWEA states in pertinent part:

(a) Whoever shall willfully violate any of the provisions of this Act . . . shall, upon conviction, be fined not more than \$1,000,000, or if a natural person, be fined not more than \$100,000, or imprisoned for not more than ten years or both; and the officer, director, or agent of any corporation who knowingly participates [sic] in such violation shall, upon conviction, be fined not more than \$100,000 or imprisoned for not more than ten years or both.

(b)(1) The Secretary of the Treasury may impose a civil penalty of not more than \$50,000 on any person who violates any license, order, rule, or regulation issued under this Act . . . .

(c) Upon conviction, any property, funds, securities, papers, or other articles or documents, or any vessel, together with tackle, apparel, furniture, and equipment, concerned in any violation of subsection (a) may be forfeited to the United States . . . .

50 U.S.C. app. § 16(a)-(c) (Supp. IV 1988).

A person can violate the Cuban Democracy Act by trading without a license. If the goods are non-American, that is, they do not involve American technology or materials, the person will have violated the CACRs. If the goods are American, then the person may also have violated the EARs. Violation of the CACRs, including the Cuban Democracy Act, involves fines, normally up to \$50,000 in civil penalties. 31 C.F.R. § 515.701(3) (1993). Violation of the EARs might also include suspension, revocation, or denial of export privileges. 15 C.F.R. § 787.1(b)(1) (1993).

extend its laws extraterritorially, unless it has valid jurisdiction it will be unable to enforce these measures by punitive actions against an entity located outside of its territory and beyond its reach.<sup>124</sup> Thus, the United States may choose to legislate extraterritorial export controls such as the Cuban Democracy Act; however, when these controls conflict with the laws of a foreign state, according to international law they cannot be enforced.<sup>125</sup>

Nonetheless, it appears that many foreign-based firms comply with United States embargoes and seem to hold themselves accountable to the United States. Over the years, the United States has used different mechanisms to ensure compliance, including informal means of persuading the parent corporation to regulate its foreign-incorporated subsidiary,<sup>126</sup>

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124. Enforcement within a foreign state requires that the law being enforced has international validity, meaning that the enforcing state has recognized prescriptive jurisdiction. Schachter, *supra* note 59, at 249. If that condition is met, then the states involved have concurrent jurisdiction. However, according to the *Restatement (Third)*, even if jurisdiction exists, a state may not exercise it if such exercise would be unreasonable, based on an evaluation of relevant factors. RESTATEMENT (THIRD), *supra* note 49, § 403 (1)-(2) (1987). For the list of relevant factors contained in § 403(2), see *supra*, note 70. If it is agreed by both states that it would not be unreasonable to assert jurisdiction, then the "host" state will allow the "enforcing" state to carry out its legal procedures.

The principles of international comity may also be relied on by two states in order to carry out judicial cooperation. Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Alternatively, two states may have entered into a treaty that encompasses particular jurisdictional actions; the most common example of which is treaties of extradition for specified criminal activities. See, e.g., *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986) (murder of a London police constable), *cert. denied*, 479 U.S. 882 (1986).

125. DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 8, at 254. For example, Minnesota-based Cargill Inc., one of the world's largest agricultural companies is known to have traded with Cuba without the necessary licenses but will probably never face charges because its trading was done through a Swiss subsidiary. Dean Baquet, *U.S. Companies Use Affiliates Abroad to Skirt Sanctions*, N.Y. TIMES, Dec. 27, 1993, at A1, D3.

The results of the United States embargo against Libya also exposes the inability of the United States to assert jurisdiction when it lacks the necessary prescriptive and enforcement jurisdiction. In 1987, the Treasury Department reported that, despite the embargo which is similar to that against Cuba, there were 169 foreign subsidiaries of 80 United States corporations doing at least \$266 million in trade with Libya. Baquet, *supra* at D3. In reality, the United States has had to give tacit approval to this trade because there is no way to enforce the trade ban.

126. Earlier United States embargoes, although they theoretically applied to

"blacklisting" subsidiary corporations from further trading privileges with any domestic American firm,<sup>127</sup> and claiming jurisdiction over American directors of foreign-based subsidiaries.<sup>128</sup> These actions violate or test the limits of customary international law, and these tactics are today seldom if ever used officially.

Foreign states have generally attempted to accommodate intrusive United States laws, so long as they feel their sovereignty is not overtly threatened.<sup>129</sup> However, underlying differences between the United States and other nations concerning the jurisdictional principles have never disappeared. The

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foreign subsidiaries, were actually enforced against the parent company by "informal" means. Thompson, *supra* note 18, at 328 (discussing the embargoes affecting Southeast Asia enacted in the 1960s and 1970s). While the practice of holding the parent corporation responsible for the actions of its subsidiary is less directly confrontational with the foreign country, it is still violative of international law because the parent will probably attempt to force the subsidiary to comply with the American policy, even though the subsidiary's state of incorporation may not agree with that policy or want its nationals to comply. The practice is a less than satisfactory solution to the problem of extraterritorial regulation.

127. A United States foreign subsidiary found in violation of a trade regulation can be barred from trading with any United States corporation. Thompson, *supra* note 18, at 328 n.34. This, however, is not part of the CACRs.

128. The United States might attempt to claim jurisdiction over American directors of foreign-based subsidiaries who are responsible for the actions of the corporations. However, this also does not resolve the problem. While these individuals would most likely be American nationals, under the corporations laws of most European countries, the affirmative duty of directors is "to carry out their functions in the best interests of their company. Any actions which they may take at the direction of the controlling shareholders contrary to the interests of the subsidiary could subject them to civil actions by creditors, employees or minority shareholders, and possibly even to criminal proceedings." Harold H. Tittmann, *Extraterritorial Application to U.S. Export Control Laws on Foreign Subsidiaries of U.S. Corporations: An American Lawyer's View from Europe*, 16 INT'L LAW. 730, 735-36 (1982). Thus, the foreign corporation would be caught between two countries' laws.

129. This undoubtedly explains why, for instance, other nations allow corporations owned and controlled by American nationals but incorporated in their territory, to still apply to the United States Commerce Department in order to obtain a license to trade with a third country. A Canadian official described this "gentlemen's agreement" that had evolved between Canada and the United States concerning Cuba: "When the licensing procedure was in place, it allowed the Canadian and American governments to continue to disagree on the principles of jurisdictional reach, while permitting Canadian-based subsidiaries to trade with Cuba." LEGAL AFFAIRS BUREAU, CANADIAN DEPARTMENT OF EXTERNAL AFFAIRS AND INTERNATIONAL TRADE, SOME EXAMPLES OF CURRENT ISSUES OF INTERNATIONAL LAW OF PARTICULAR IMPORTANCE TO CANADA, 1, 14 (1993) (on file with the *Brooklyn Journal of International Law*).

passage of the Cuban Democracy Act has exacerbated the differences. It appears that the Act is a law that other states do not wish to accommodate, as the international reaction to its passage demonstrates.

## B. International Reaction

### 1. International Condemnation

Within a matter of weeks following the passage and signing into law of the Cuban Democracy Act, the United Nations General Assembly passed a resolution by an overwhelming majority<sup>130</sup> to rebuke member states whose laws apply extraterritorially.<sup>131</sup> The resolution, sponsored by Cuba,<sup>132</sup> was understood to be a response to the passage of the Cuban Democracy Act.<sup>133</sup> Many nations that usually align themselves with the United States in matters before the United Nations either voted for the resolution or abstained from voting.<sup>134</sup> The votes in favor of the resolution, as well as many of

130. *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, G.A. Res. 47/19, U.N. GAOR, 47th Sess., Agenda Item 39, U.N. Doc. A/RES/47/19 (1993) [hereinafter *Necessity of Ending the Embargo*]. The vote, taken on November 24, 1992, was 59-3, with 71 abstentions. Stanley Meisler, *U.N. Rebuffs U.S. on Cuba Embargo Trade*, L.A. TIMES, Nov. 25, 1992, at 1A. Resolutions of the General Assembly are not binding, unlike those passed by the United Nations Security Council. UNITED NATIONS DEPT OF PUBLIC INFORMATION, EVERYONE'S UNITED NATIONS, 14, 16 (10th ed. 1986).

131. The Resolution does not mention the United States by name. Its preamble expresses concern for "the promulgation and application by Member States of laws and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction . . ." and calls on all nations to "refrain from promulgating and applying" such laws "in conformity with their obligations under the Charter of the United Nations and international law . . ." *Necessity of Ending the Embargo*, *supra* note 130, at 1.

132. The Cuban ambassador, Alcibiades Hidalgo Basulto, told the United Nations General Assembly that the United States embargo was an attempt "to impose upon the Cuban people a political, social and economic system to the liking of the United States." Meisler, *supra* note 130, at 1A.

133. A cursory scanning of newspaper headlines attests to this. See, e.g., Meisler, *supra* note 130, at 1A; Frank J. Priol, *U.N. Votes to Urge U.S. to Dismantle Embargo on Cuba*, N.Y. TIMES, Nov. 25, 1992, at A1; *UN Votes Against U.S. on Embargo of Cuba*, CHI. TRIB., Nov. 25, 1992, at 1.

134. The only countries voting against the Resolution were the United States, Israel, and Romania. The vote was "almost bizarre" for a United Nations resolution since those in favor included communist countries such as Vietnam and North Korea, North Atlantic Treaty Organization allies, Latin American friends of the United States, and developing world governments such as Nigeria and Kenya, as

the abstentions, illustrated the concern and disagreement with United States foreign policy.<sup>135</sup> For example, a high-ranking United Nations diplomat representing Great Britain, a country that abstained from voting on the resolution, stated that the new United States embargo was "a violation of a general principle of international law and the sovereignty of independent nations."<sup>136</sup> Mexico's foreign relations secretary called the Act an affront to Mexican sovereignty.<sup>137</sup> Uruguayan and Venezuelan legislators declared that the Act interferes with their commercial affairs.<sup>138</sup> New Zealand, a country which voted in favor of the resolution, did so because "there is an important underlying principle at stake . . . [C]ountries such as our own must be able to go about their ordinary trade and commercial business free from the extraterritorial reach of legislation imposed unilaterally by third countries."<sup>139</sup>

International disagreement has not lessened with the passage of time.<sup>140</sup> The European Communities Parliament

well as American enemies such as Iraq. Countries voting in favor of the Resolution included Brazil, Canada, France, Indonesia, Mexico, New Zealand, Spain, and Venezuela. The countries of the European Community abstained, as did Armenia, Great Britain, Italy, Russia, Rwanda, and Zaire. Representatives from forty-two countries failed to show up for the vote. Meisler, *supra* note 130, at 1A; *see also* Prial, *supra* note 133, at A1.

According to one report, most of the United States allies who abstained or voted for the Resolution did so both because it was nonbinding and could give expression to their anger at the extraterritorial nature of the Cuban Democracy Act. Prial, *supra* note 133. It appears that the collapse of the Soviet Union and the end of the Cold War has allowed traditional American allies to vote or abstain with the confidence that they can rebuke an ally, or not support its actions, without sparking an international crisis or tipping the East-West balance. Prial, *supra* note 133.

135. *See* Prial, *supra* note 133, at A1; *UN Votes against U.S. on Embargo of Cuba*, *supra* note 133, at 1.

136. Prial, *supra* note 133, at A1.

137. David Clark Scott, *The World From . . . Mexico City*, CHRISTIAN SCI. MONITOR, Oct. 28, 1992, at 3.

138. *Id.*

139. Permanent Representative Terence O'Brien, Statement Before United Nations General Assembly Vote by New Zealand (Nov. 24, 1992) (on file with the *Brooklyn Journal of International Law*). The statement notes that New Zealand would have preferred a resolution solely on the extraterritorial issue, rather than on "certain extraneous material." *Id.*

140. Domestically, calls for the Act's change or repeal began within weeks of its passage. A bill was introduced in the House in the late spring of 1993 to end the trade embargo. Christopher Marquis, *Activists Turn D.C. into a Soapbox as Fight over Cuba Policy Intensifies*, MIAMI HERALD, May 24, 1993, at 1A. "Prominent lawmakers" and Cuba experts began to voice concern that current United

adopted a resolution in December 1992 that called on the United States to repeal the Act because it "constitutes a violation of international law on free trade and transit, going against the principles of the EC-US declaration . . ." <sup>141</sup> At the Ibero-American summit held in Brazil in July 1993, the heads of state in attendance condemned the United States for the embargo. <sup>142</sup> In September 1993, the European Communities Parliament adopted another, fuller resolution calling on the United States to end the embargo. <sup>143</sup> In November 1993, the United Nations General Assembly passed yet another resolution condemning the United States for its actions in Cuba. <sup>144</sup> The international community has clearly remained concerned about the United States policy, <sup>145</sup> and a primary reason for its dis-

States policy will do little to avert a possibly violent transition in Cuba. Asked one senator, "How can we help Cuba avoid catastrophe during and after Castro's downfall—catastrophe in the form of starvation or disease epidemic or mass migration to the U.S. or civil war?" Christopher Marquis, *Cuba's Reforms Called Too Weak*, MIAMI HERALD, July 30, 1993, at 12A (quoting Senator Robert Kerrey of Nebraska).

141. Parliament Resolution on Int'l Trade Restrictions by the U.S. (Cuban Democracy Act), 1993 O.J. (C 21), *reprinted in* 25 BULLETIN OF THE EUROPEAN COMMUNITIES 130 (1992).

142. Andres Oppenheimer, *Four Reasons for Summit Resolution*, MIAMI HERALD, July 19, 1993, at 8A. According to Oppenheimer, the language of this statement was similar to the November 1992 UN General Assembly Resolution. *See Necessity of Ending the Embargo*, *supra* note 130.

143. Parliament Resolution on the Embargo Against Cuba and the Toricelli Act 1993 O.J. (C 268), *reprinted in* 26 BULLETIN OF THE EUROPEAN COMMUNITIES COMMISSION 64 (1993). The Parliament also advocated more dialogue between Cuba and the Community, and suggested that Cuba be made eligible for Community-financed regional cooperation programmes geared toward the Caribbean and Latin America. *Id.*

144. The UN General Assembly passed a resolution by an 88-4 vote with Albania, Israel, Paraguay, and the United States voting against it. There were 57 abstentions. "It is hard to recall a comparable humiliation for American diplomacy." *The Hammer that Failed on Cuba*, N.Y. TIMES, Nov. 9, 1993, at 15A.

145. One commentator who supports the embargo suggests that the issue is not really "sovereignty," but rather that countries protesting United States actions oppose anything that will "disrupt their exploiting—on the backs of the Cuban people, of course—Fidel Castro's current survival strategy of luring Western exports and investment to Cuba on attractive terms." Jose R. Cardenas, *Why Our Allies are Wrong on Cuba Trade Issue*, MIAMI HERALD, Oct. 11, 1992, at 5M. Cardenas is undoubtedly correct, at least in part. Individuals and businesses do sense potential economic opportunity in Cuba. Cuba is the largest one-island consumer market in the Caribbean, a market that has long been isolated from normal trade. John D. Harbron, *U.S. Embargo on Cuba: It's Hurting U.S. Firms*, MIAMI HERALD, Dec. 28, 1993, at 9A. Indeed, the Cuban-American National Foundation, which had helped draft the Cuban Democracy Act, has itself commissioned "an

approval of the United States actions concerning Cuba is that the actions disregard customary international law principles.

## 2. The Use of Blocking Statutes

Many countries, in response to the implementation of the Cuban Democracy Act, have responded with a legal mechanism, the blocking statute. These statutes in essence void the impact of the Act for all nationals within the territory of the particular country and penalize those within the territory who adhere to the Act. Fourteen countries have enacted such legislation in response to the Cuban Democracy Act.<sup>146</sup> The Act has no legal effect within these fourteen countries. These blocking statutes exploit the fact that the territorial state has both prescriptive and enforcement jurisdiction over the person, while the state relying upon other bases of jurisdiction has, at most, only prescriptive jurisdiction.<sup>147</sup>

Canada's Foreign Extraterritorial Measures Act (FEMA)<sup>148</sup> is typical of these blocking orders. FEMA was designed primarily as a defense to requests by other countries for record production in antitrust proceedings.<sup>149</sup> FEMA can also be used in situations when Canada feels a country is infringing on its sovereignty.<sup>150</sup> When the Cuban Democracy Act was

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elaborate economic blueprint for post-Castro Cuba, and a prestigious Washington law firm has held jam-packed seminars on preparing to invest in Cuba." Pamela Constable, *New Voices of Exile*, BOSTON GLOBE, July 25, 1993, (Sunday Magazine), at 10. Nonetheless, this does not negate the international law question of the right of the United States to prescribe to companies incorporated in other countries to whom they can and cannot ship.

146. The countries involved are Canada, Japan, and the twelve members of the European Community. Russell Warren Howe, *supra* note 28, at C3.

147. The effectiveness of blocking statutes is another example of the dominance of the territorial principle over all extraterritorial principles. DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 8, at 40. There are at least eighteen states that have blocking legislation. DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 8, at 39-40 (noting that some statutes give great discretion to the government to intervene on a case-by-case basis, while others detail specific interests the state wishes to protect). For examples of blocking statutes, see A.V. LOWE, *EXTRATERRITORIAL JURISDICTION* 79-225 (1983).

148. Foreign Extraterritorial Measures Act (FEMA), R.S.C. ch. F-29 (1985) (Can.). "Canadians are now increasingly concerned with the burgeoning of extraterritorial intent in U.S. laws and with the expansion of claims to extraterritorial jurisdiction by U.S. regulatory bodies." Allan E. Gotlieb, *The Legal Aspects of International Investment: The Canada-U.S. Experience*, 76 AM. SOC'Y INT'L L. 47, 51 (1982).

149. See FEMA, R.S.C. ch. F-29 (Introduction) (1985) (Can.).

150. FEMA states in pertinent part:

passed, Canada passed its 1992 FEMA Order to be applied specifically against the American Act. It "bars compliance with the application in Canada of the United States measure prohibiting trade with Cuba, and requires these businesses to report to the Attorney General of Canada, and not comply with, any directions given by persons in a position to influence their decisions in this regard."<sup>151</sup> Penalties for failure to report or comply to the FEMA order include fines and possible prison sentences.<sup>152</sup>

As the Canadian Act demonstrates, the blocking statute is a powerful weapon. Foreign nations learned of its utility after the United States imposed widely unpopular extraterritorial measures in 1982 as part of its embargo against the Soviet Union for that country's imposition of military law in Poland. The embargo caused international turmoil because the United States attempted to forbid American, American-owned subsid-

A. Where, in the opinion of the Attorney General of Canada, a foreign state or foreign tribunal has taken or is proposing or is likely to take measures affecting international trade or commerce of a kind or in a manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty, the Attorney General of Canada may . . .

(a) require any person in Canada to give notice to him of such measures, or of any directives, instructions, intimations of policy or other communications relating to such measures from a person who is in a position to direct or influence the policies of the person in Canada; or

(b) prohibit any person in Canada from complying with such measures, or with any directives, instructions, intimations of policy or other communications relating to such measures from a person who is in a position to direct or influence the policies of the person in Canada.

FEMA, R.S.C. ch. F-29, § 5(1) (1985). "Measures taken" by a foreign state include "laws . . . to be made by the foreign state . . ." *Id.* § 5(2).

151. SOR/92-584, Foreign Extraterritorial Measures (United States) Order of 1992, 126 Can. Gaz. 4048, 4050 (1992).

152. Maximum penalties are \$10,000, with an additional or alternative penalty of up to five years in prison. *Id.* at 4052. As of September 1993, the Canadian Justice Department was investigating about twenty American subsidiaries for possible violations of FEMA. Peter Benesh, *Canada Takes Advantage of Embargo Against Cuba*, MIAMI HERALD, Sept. 5, 1993, at 1K. It can only be assumed that any American-owned subsidiary under investigation by Canada has either overtly halted exports or has discontinued documented plans concerning trade with Cuba due to the passage of the Cuban Democracy Act. Otherwise, it appears that it will be very difficult for Canada to prove that a corporation's actions were due to the Cuban Democracy Act, rather than to an exercise of ordinary business judgment.

iary, and European companies from honoring contract obligations having to do with the building of the Soviet trans-Siberian pipeline.<sup>153</sup> Several countries refused either to join in the embargo or to allow its implementation.<sup>154</sup> The United Kingdom enjoined its nationals, including American-owned subsidiaries, from participating in the embargo. When the United States then issued sanctions against several British companies, the United Kingdom, in a burst of inspiration, invoked its blocking legislation, the Protection of Trading Interests Act of 1980, as a defensive legal move to protect its nationals.<sup>155</sup>

Because a nation's blocking statute essentially allows it to bar the application of another country's law, the effect is to nullify the foreign state's action. As such, an international equilibrium of sorts is maintained. However, blocking statutes are not a panacea. Their implementation makes a strong statement on the part of the blocking state against the laws and policies of the other state. While not a slap in the face, they certainly cause international embarrassment, and thus are not used lightly. Furthermore, when a country employs a blocking statute, it creates legal difficulties for any subsidiaries incorporated within its territory whose parent corporations exist in the state whose legislation has been blocked.

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153. The 1982 embargo was authorized by the 1979 EAA. The EAA was amended so that foreign-based American subsidiaries could not export even completely foreign-origin equipment or technology to the Soviet Union or to any third country dealing with the pipeline. If a foreign company had United States technological information, it was to apply for a license from the Commerce Department before it could re-export anything using that information. DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 8, at 201-02 (citing 47 Fed. Reg. 27,251 (1982)). For discussion of the 1982 embargo, see Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, & Policy Lessons of Three Recent Cases* 15 LAW & POL'Y INT'L BUS. 1, 60-92 (1983).

154. France invoked its requisition law in order to enforce all contracts with the Soviet Union, despite the American embargo. John Ellicott, *Extraterritorial Application of U.S. Export Controls—The Siberian Pipeline*, 77 AM. SOC'Y INT'L L. 241, 262, 264 (1983).

155. The British Act provides that if measures "have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade," and the measures "threaten to damage the trading interests of the United Kingdom," the Secretary of State may prohibit compliance "with any such requirement or prohibition . . . as he considers appropriate for avoiding damage to the trading interests of the United Kingdom." Protection of Trading Interests Act, 1980, ch. 11 (Eng.)

### 3. The Effect on American-owned Foreign Subsidiaries

The existence of statutes such as the Cuban Democracy Act and blocking statutes such as Canada's FEMA put American-owned foreign-based subsidiaries in a difficult legal position. They either comply with United States law and possibly violate the laws of their state of incorporation, or they obey the state's laws and risk penalties from the United States. The United States courts in the past have not been understanding of the difficulties of the situation.<sup>156</sup> However, the Commerce Department has been persuaded at certain times to "make an exception" for a company, and it is conceivable that it will do so again when a particular subsidiary in a particular country is being greatly squeezed between two sets of laws.<sup>157</sup> In addition, the existence of laws such as the Cuban Democracy Act makes it difficult for American-owned or controlled foreign

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156. See *Dresser Industries, Inc. v. Baldrige*, 549 F. Supp. 108 (D.D.C. 1982) (a case arising out of the 1982 American embargo against the Soviet Union). *Dresser France*, an American-owned French subsidiary, was ordered by the French government to fulfill its contractual obligations concerning equipment bound for the Soviet Union, and when *Dresser France* did so, it was fined by the United States. *Dresser* was unsuccessful in its challenge of the suit. The court did not give weight to the fact that *Dresser France* was ordered by the French government to carry out its contract obligations with the Soviet Union. *Id.* The case was ultimately dismissed when the embargo was lifted. Five other American-owned licensees or subsidiaries located in West Germany, Italy, France, and the United Kingdom also had fines dismissed. ANDREAS F. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 296, 304 n.j (2d ed. 1983). For further discussion of the *Dresser* case, see Moyer & Mabry, *supra* note 153, at 126-29. For the 1982 Soviet pipeline embargo, see *id.* at 60-92.

157. Many times American-owned corporations have been caught between the laws of two countries. In 1964, for example, the United States informed its domestic corporation, Fruehauf, that its French subsidiary would violate the Foreign Assets Control Regulations (31 C.F.R. pt. 500 (1964)) if it fulfilled its contract to ship tractor trailer parts to the People's Republic of China, a state then under American embargo. Fruehauf, in order to avoid penalties, eventually instructed its 70%-owned subsidiary not to fulfill its contracts. However, the French Court of Appeals, outraged at this interference with its commerce, appointed a judicial administrator to take control of the subsidiary to make sure the contracts were fulfilled, finding that default would have endangered the subsidiary's existence. 5 I.L.M. 476 (1966) (summarizing Judgement of May 22, 1965 (*Fruehauf Corp. v. Massardy*, Cours d'appel [1965] 2 La Gazette du Palais at 86 (Fr.)); see also *supra* note 18 concerning subsidiaries in Argentina and Canada that were caught between the laws of their countries and United States law; *supra* note 115 and *infra* note 164 for the Netherlands-based subsidiary caught between American and Dutch law in 1982; *supra* note 156, regarding *Dresser France*, the American-owned subsidiary caught between American and French law in 1982. For more discussion, see Thompson, *supra* note 18, at 326-28.

subsidiaries to compete on a fair plane with other companies, in addition to the possibility of breaking laws established by one or both countries claiming jurisdiction over them.

## V. SUGGESTIONS FOR THE FUTURE

### A. *Amending the Cuban Democracy Act*

Because the Cuban Democracy Act violates international law principles and has been the cause of much rancor by other nations, Congress should revoke the Act's application to foreign-based American subsidiaries. The revision can be justified by the language of the Act itself, which allows for change in American policy after there are changes in Cuba's policies.<sup>158</sup> Since the implementation of the Act in 1992, there have been many changes in Cuba, made undoubtedly in response to the embargo that, although not enough to end a complete embargo by the Act's terms, are enough to allow for modifications. For instance, investors are now allowed to own more than fifty percent of joint ventures,<sup>159</sup> United States currency has been legalized,<sup>160</sup> travel restrictions by Cuban exiles have been eased,<sup>161</sup> and a certain amount of private enterprise is now allowed.<sup>162</sup>

Congress should also modify the Act because, as it stands, the United States has passed a law that does not accord with the understandings of the majority of the international community, and yet the world also knows that the United States will

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158. "It should be the policy of the United States . . . to be prepared to reduce the sanctions in carefully calibrated ways in response to positive developments in Cuba." 22 U.S.C. § 6002(7) (Supp. IV 1988).

159. Andres Oppenheimer, *Is Business Interest in Cuba Waning?*, MIAMI HERALD, July 22, 1993, at 18A.

160. Christopher Marquis, *supra* note 140.

161. Christopher Marquis, *supra* note 140.

162. Individuals may go into 117 categories of work, including plumbing, hairdressers, and clowns. Mimi Whitefield, *Rapid Changes Push Cuba into Unknown*, MIAMI HERALD, Sept. 27, 1993, at 1A.

In response to some of these measures, the Clinton administration was reported to be preparing to allow more Americans to visit Cuba. Marjorie Miller, *U.S. Cuba Policy Undefined, But a Thawing of Relations is Evident*, L.A. TIMES, July 9, 1993, at 5. In recent months, there were signs that Washington had both toned down its rhetoric and eased certain restrictions. See Ben Barber, *supra* note 27; Christopher Marquis, *Stance on Cuba Changing*, PHILADELPHIA INQUIRER, Aug. 13, 1993, at A21; Christopher Marquis, *U.S. Policy Toward Cuba is Softening Despite Denials*, MIAMI HERALD, Aug. 12, 1993, at 1A.

be unable to enforce the Act. A revision of the Act will stop the possible mockery of the United States by the international community. The Act does not reinforce the prestige of the United States when a corporation can disobey the United States law and face no consequences. When a law is openly defied and is difficult if not impossible to enforce, it makes the United States look weak and foolish. An act with no "teeth" is only international bluster without substance. Since Congress cannot provide "teeth," due to the Act's violation of international jurisdictional principles, it would do well to rewrite the Act so that no bluster remains.

One thing that is clear is that within the United States, the Cuban Democracy Act is not likely to be deemed unconstitutional. Foreign policy decisions are accorded great deference by the courts, and no court is likely to question a foreign policy embargo currently in force.<sup>163</sup> Courts would be likely to consider any question concerning the validity of an embargo as a political question and not within the purview of the courts.<sup>164</sup>

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163. See *Dresser Industries, Inc. v. Baldrige*, 549 F. Supp. 108, 110 (D.D.C. 1982) (foreign policy embargo against Soviet Union creates a "grave interest" in enforcement; no interests of an individual company outweigh the "potentially serious detriment" to the undermining of the embargo).

164. The "political question" issue was discussed by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962).

While the Cuban Democracy Act will not be deemed unconstitutional in this country, that does not mean that other nations will not be faced with cases arising out of the Act's implementation. For example, it appears likely that Canada would fine an American-owned Canadian subsidiary if it were shown to have violated Canada's FEMA order against complying with the Cuban Democracy Act. See *supra* notes 148-52 and accompanying text.

In addition, courts in other nations will potentially have to address United States jurisdictional claims should an American foreign-based subsidiary be alleged to have violated a nation's municipal law in order to comply with the Cuban Democracy Act. Should that situation occur, the particular court will undoubtedly be guided by the reasoning of The Hague's District Court in 1982 which had to determine whether a Netherlands-based American subsidiary was responsible for obeying the American boycott against the Soviet Union. See Judgment of Sept. 17, 1982 (*Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*), District Court at the Hague, reproduced in 22 I.L.M. 66 (1983); see also *supra* note 115. In that case, the court held that the subsidiary was a national of the Netherlands as it was "organized in the Netherlands under Netherlands law and both its registered office and its real centre of administration [were] located within the Netherlands." *Id.* at 71. The court examined international legal principles to determine whether another principle of jurisdiction could give the United States authority to assert jurisdiction over the subsidiary. While dismissing the universality principle as being inapplicable in the situation, it questioned whether the protective principle could be applied, but held that "[s]uch other State interests do not include the

Therefore, foreign policy decisions must be addressed legislatively.<sup>165</sup>

## B. Considerations for Congress

### 1. Education of Congress

First, in order to change the kind of extraterritorial legislation that has appeared over the last twenty-five years, the State Department must undertake a program to educate the members of Congress concerning the important principles of international law. If Congress is more cognizant of jurisdictional principles, it can tailor its legislation accordingly.<sup>166</sup> While there might be occasions when extraterritorial application of a law is necessary,<sup>167</sup> at least the law will be more likely to be

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foreign policy interest that the U.S. measure [the Soviet pipeline embargo] seeks to protect" and that "[t]he protection principle cannot therefore be invoked." *Id.* at 72. It also dismissed the use of the effects doctrine, after finding that there was no direct and illicit effects within the territory of the United States due to the exporting to the Soviet Union of goods produced outside of the United States. *Id.* at 72-73. The district court concluded that there was no international principle sufficient to override the Netherlands territorial right to jurisdiction and that the American-owned subsidiary was therefore to honor its contracts as a Netherlands national. *See supra* note 115.

165. In the case of foreign trade embargoes, the EARs would have to be modified, along with explicit extraterritorial regulations such as the CACRs and the Foreign Assets Control Regulations to eliminate their extraterritorial features.

166. A very real problem may be that lawmakers may not be aware of customary international law principles, or of their significance. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 730 (1986). For instance, the sponsor of the Cuban Democracy Act was quoted as saying that every effort was made to make the Act non-extraterritorial. *UN Votes Against U.S. on Embargo of Cuba*, *supra* note 133, at 1.

In addition, there exists a "lack of institutional memory," Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1262 (1987). This lack may account for the 1982 American boycott of the Soviet Union (see *supra* notes 153-55 and accompanying text), in which the members of the Reagan administration seemed unaware of the ramifications that grew out of earlier international confrontations with United States allies over its imposition of extraterritorial controls concerning China and Cuba. In the years following the Soviet embargo, other trade embargoes were more limited in scope. Carter, *supra*, at 1262. However, ten years later, with the imposition of the Cuban Democracy Act, there again seems to have been a certain amount of collective memory loss. The State Department is perhaps in the best position to both keep abreast and inform the legislature and Executive departments of international law principles.

167. There will be situations when the United States may be justified in exerting extraterritorial control over a foreign subsidiary. First might be when the subsidiary is only a middleman through which goods pass on their way to their

grounded in principles that will mute criticisms from other countries. Second, the members of Congress must also be referred to the *Restatement (Third)*<sup>168</sup> as a guide. The *Restatement (Third)*'s test of "reasonableness," which requires balancing the varying interests of the states involved, helps to determine when extraterritorial jurisdiction is appropriate.<sup>169</sup> Ideally, Congress should enact legislation that incorporates the reasonableness test rather than making the courts determine what is "reasonable" after the fact,<sup>170</sup> or forcing ambassadori-

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intended destination in a third country. Second is "when the subsidiary is deliberately used to circumvent controls over exports from the United States." Third is "when the subsidiary is manufacturing high technology strategic products based on U.S. technology." In these situations, however, it would be important to follow the dictates of comity and consult with the subsidiary's host government to establish that the United States needs to retain some control. These suggestions all derive from Tittmann, *supra* note 128, at 737.

168. The *Restatement (Third)* declares that a state may not normally regulate activities of corporations organized under the laws of a foreign state simply because they are owned or controlled by nationals of the regulating state. If a determination were made that a major national interest exists that can only be carried out effectively if it is applied to foreign-based subsidiaries as well as domestic ones, the state would still have to assess the extent to which a conflict would result with the law or policy of the subsidiary's domiciliary state. Weighing these factors, it might be deemed appropriate to issue an essential regulation to further the state's program. RESTATEMENT (THIRD), *supra* note 49, § 414(2)(a)-(c). However, "orders issued directly to a foreign corporation are regarded as particularly intrusive and can be justified only by a clear showing of necessity . . ." RESTATEMENT (THIRD), *supra* note 49, § 414 cmt. c. Furthermore, "[a] command by the parent state may conflict with a clearly expressed policy of the state under whose law the subsidiary is organized. If that state is also the state in whose territory the activity regulated is to be carried out or precluded, exercise of jurisdiction on the basis of intercorporate affiliation may be unreasonable under § 403." RESTATEMENT (THIRD), *supra* note 49, § 414 cmt. d.

169. RESTATEMENT (THIRD), *supra* note 49, § 403. For the text of this section of the *Restatement (Third)*, see *supra* note 70.

170. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-50 (D.C. Cir. 1984) (complaining of the impossibility of balancing competing state interests); see also Hixson, *supra* note 49, at 145 (noting that the *Restatement (Third)* is limited in providing guidance to the judiciary and that many times the resolution should be achieved through diplomatic, not judicial, means). In the courts, the balancing test has often simply led to the conclusion that United States interests are primary. For instance, in the area of antitrust litigation which has often dealt with extraterritoriality, between 1909 and 1985 there was no reported United States appellate court decision in which jurisdiction was found lacking. *Predictability and Comity*, *supra* note 112, at 1324-25. This is an "extraordinary lack of jurisdictional restraint" and suggests that balancing tests are not useful. *Predictability and Comity*, *supra* note 112, at 1324-25. For the views of a commentator who does not believe the American courts have been or will be incapable of balancing items in the best interests of the matter before them, see Born,

al representatives to smooth ruffled feathers. This balancing of interests can be best accomplished at the rule-making stage.<sup>171</sup>

## 2. Principles to be Incorporated into Future Legislation

Because the international community is growing closer through technology and other means, the United States, as well as other nations, must do what it can to avoid sources of friction between nations. To the extent that the posture of the United States is that it can legislate extraterritorially and with impunity, it invites other nations to strike the same posture. Furthermore, it will not ease international relations if countries begin to block every piece of legislation, because it is extraterritorial, including acts that might be considered of highest concern to the legislating nation. Nor will it be useful if other states begin to employ extraterritorial legislation, particularly embargoes, in the same manner as the United States.<sup>172</sup> Above all, in the international arena, United States jurisdictional policy must be viewed as fair by other nations. The United States should incorporate into its own

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*supra* note 69, at 95-96.

171. See Hixson, *supra* note 49, at 144 (citing *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891, 900 (1982)).

172. Already, Canada and some developing countries exercise limited jurisdiction over foreign subsidiaries of multinational enterprises based in their countries. See RESTATEMENT (THIRD), *supra* note 49, § 414, reporters' note 1. The European Economic Community, for instance, employs the effects doctrine in the area of antitrust. Its competition law is applied specifically to conduct carried on outside the Community that has the effect of substantially restricting competition within the Community. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], art. 85. This law allows the European Court of Justice to assume jurisdiction over a parent company incorporated in a non-Member State with a subsidiary in a Member State if that subsidiary "does not determine its behaviour on the market in an autonomous manner but essentially carries out the instructions of the parent company." SCHMITTHOFF, *supra* note 53, at 322-23 & n.26 (citing EEC TREATY, arts. 85-90). Compare this with the United States, which applies its laws extraterritorially with respect to antitrust, disclosure, tax law, and foreign policy. Schachter, *supra* note 59, at 243-44.

When the United States faced an extraterritorially enforced embargo by the Arab nations against Israel, begun in 1954 but only of real import in the middle 1970s, it suddenly found itself on the other end of the stick. "In this case many of the arguments used by the U.S. Administration and in debates in Congress resemble strangely those of other governments contesting the legality of U.S. extraterritorial measures." DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 8, at 255.

practice, and lobby for inclusion in the practice of other states, the presumption that when a state undertakes to incorporate a company within its territorial jurisdiction, it means to make that corporation a national in the eyes of international law. This would bring United States practice in line with the many friendship and commerce treaties that explicitly state that corporations are nationals of the state of their incorporation,<sup>173</sup> and with recent United States court decisions that hold the same position.<sup>174</sup>

### 3. Future Use of Trade Embargoes

The policy expressed in the Cuban Democracy Act, to control corporations owned or controlled by United States nationals for foreign policy reasons, is not unique to the situation with Cuba. More than any other country, the United States regulates the trade of its nationals in order to influence or punish countries.<sup>175</sup> When these regulations have applied to subsidiaries incorporated abroad, it has usually resulted in tension between the countries involved, sometimes leading to diplomatic and legal problems.<sup>176</sup>

Congress should limit the use of export controls for foreign policy purposes. The imposition of embargoes causes foreign nations to question whether United States corporations and American-owned or controlled foreign subsidiaries are reliable as suppliers of goods.<sup>177</sup> The use of trade sanctions entails a sometimes heavy economic cost for the United States, including costs that may be long-term.<sup>178</sup> The Cuban embargo, simi-

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173. For discussion of these treaties, see *supra* note 89.

174. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) (Title VII applies to employees of a United States-based Japanese subsidiary); see also *Walker v. Newgent*, 583 F.2d 163, 167 (5th Cir. 1978) (holding that the fact that a German subsidiary was one hundred percent owned by General Motors did not, in itself, allow the court to ignore the fact that the subsidiary was a separately incorporated entity).

175. A study of foreign policy economic sanctions employed between 1945 and 1984 showed that the United States employed sanctions 62 times. There were 29 other embargoes: 12 by the United Kingdom, 10 by the Soviet Union, and 4 by the Arab League. Carter, *supra* note 166, at 1170 (citing G. HUFBAUER & J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* (1985)).

176. See *supra* note 157.

177. Moyer & Mabry, *supra* note 153, at 90.

178. The application of United States laws extraterritorially generates significant competitive problems. "Subjecting U.S. companies to the often substantial

lar to the 1982 Soviet pipeline embargo, has been deeply divisive of the international community. It has damaged international relations between the United States and many allies, including those in Europe and South America, and has undermined the credibility and reliability of American foreign-based subsidiaries.<sup>179</sup> The United States can reduce international tension and increase its international stature if it appeals to an international body such as the United Nations for its imprimatur against a country's actions rather than proceeding unilaterally. Indeed, in the case of Cuba, the House of Representatives passed a "sense of Congress" that called on President Clinton to seek a mandatory international embargo against Cuba at the United Nations Security Council.<sup>180</sup> A reliance on the United Nations by the United States can only strengthen the United States' position in the international

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costs of compliance with U.S. law, while exempting their foreign rivals from such costs, would have significant competitive effects." Born, *supra* note 69, at 91. American multinationals such as Cargill, Continental Grain, Beatrice Foods, and Del Monte have subsidiaries abroad that trade with Cuba and have been affected by the embargo. Christopher Marquis, *Cuba Bill to Cost U.S. Firms Millions*, MIAMI HERALD, Aug. 6, 1992, at 22A. Among multinationals whose subsidiaries have refused trade proposals with Cuba are H.J. Heinz Co. and Eli Lilly, Inc. Both subsidiaries are located in Canada. Peter Benesh, *supra* note 152. These firms, and many others, have been unable to take advantage of Cuba's active seeking of foreign investments, particularly in sugar, tourism, textiles, tobacco, pharmaceuticals, nickel, and shipping. CARIBBEAN 1993 BUSINESS DIRECTORY, *supra* note 6, at 78

Foreign corporations will benefit from a United States embargo by being able to enter a market formerly dominated by the United States. Indeed, despite the United States embargo, Spain, France, Canada, Mexico, Chile, and Italy are investing in Cuba, mainly in tourism. Ben Barber, *supra* note 27. The final result is that United States trade and United States foreign subsidiaries are injured. This has happened in the past. In 1973, the United States embargoed the export of soy products. Its embargo allowed Brazil to become a major soybean producer and diminished the world market share of United States producers. Other examples include the 1980 United States boycott of the Moscow Olympics boycott, in which Argentina, Brazil, and the European Community replaced the United States as the principal grain suppliers to the Soviet Union, and the Soviet pipeline embargo in which Japan's Komatsu replaced Caterpillar as the principal supplier of large machines to the Soviet market. Moyer & Mabry, *supra* note 153, at 159-60 & n.921.

179. For the impact on United States' international relations following the 1982 embargo, see Moyer & Mabry, *supra* note 153, at 159. For the international reaction to the passage of the Cuban Democracy Act, see *supra* part IV.B.1.

180. Christopher Marquis, *House Panel Endorses Global Cuban Embargo*, MIAMI HERALD, Apr. 23, 1993, at 24A. There has been no further action reported on the matter.

community.

## VI. CONCLUSION

The extraterritorial features of the Cuban Democracy Act of 1992 do not comply with the principles of international law and will be difficult to enforce without further violating international principles of territorial sovereignty. For this reason the Act should be modified so that foreign-based subsidiaries are excluded from the provisions of the Act. The Act also raises the question of the usefulness of economic trade bans applied extraterritorially because they strain international relations, hurt United States foreign-based companies, and harm the credibility of the United States as a trading partner. In the end, it may be that growing international pressure on the United States to conform with international principles, along with the need of the United States to maintain friendly relations with trading partners and with other countries, will lead to a lessening of their use as a foreign policy weapon.

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