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# The U.S. Embargo Against Cuba and the Diplomatic Challenges to Extraterritoriality

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# The U.S. Embargo against Cuba and the Diplomatic Challenges to Extraterritoriality

JOY GORDON

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Many analysts have criticized the U.S. embargo against Cuba as an anachronistic holdover from the Cold War. Yet its problems go well beyond that. In many regards, the U.S. embargo against Cuba represents a caricature of the various American misapplications of economic sanctions: if the goal is to end the Castro regime this policy has not only failed, but has spent half a century doing so. If the intent is to support Cubans in their aspirations for a different political system the sanctions have failed in that regard as well, since even the most vocal dissidents in Cuba criticize the embargo. In the face of the “smart sanctions” movement to develop economic tools that target the leadership rather than the people, the embargo against Cuba represents the opposite pole: it impacts the Cuban population indiscriminately, affecting everything from family travel, to the publication of scientific articles by Cuban scholars, to the cost of buying chicken for Cuban households.

This article will briefly describe the history and the main components of the U.S. embargo against Cuba, and the impact of the unilateral measures on Cuba’s economy. It will look at some of the ways in which the U.S. embargo is “extraterritorial”—impacting Cuba’s trade with third

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countries—as well as ways in which the United States’ unilateral embargo functions in effect as a global measure. It will then examine the overwhelming response of the international community, and in particular, the United Nations General Assembly, in condemning the embargo as a violation of international law. This response represents a diplomatic challenge to the United States that is unparalleled in the last fifty years of global governance.

#### **THE U.S. EMBARGO AGAINST CUBA**

The U.S. embargo against Cuba began when President Eisenhower severed ties with Cuba in early 1961 under the Trading with the Enemy Act (TWEA) which allowed the president to impose economic sanctions on a hostile country during wartime “or any other period of national emergency declared by the President.” Later that year, Congress passed the Foreign Assistance Act banning all aid to communist countries. Under its authority, in 1962, President Kennedy issued a proclamation which prohibited “the importation into the United States of all goods of Cuban origin and goods imported from or through Cuba.” This was the original framework for the embargo.

The Cuban Assets Controls Regulations (CACR), issued under the TWEA, authorized the Treasury Department to regulate commercial transactions. The Treasury Department’s Office of Foreign Assets Control (OFAC) issues the specific regulations that implement the embargo. These regulations have varied to some extent with changes in administration. However, the discretion of the President to remove or alter the terms of the embargo was limited when Congress passed two additional laws in the 1990s, the “Cuba Democracy Act” and the “Liberated Act,” which further tightened the embargo. In 2000, Congress passed the Trade Sanctions Reform and Export Enhancement Act providing limited exceptions to the embargo, primarily by allowing U.S. companies to sell agricultural and medical products to Cuba, subject to a number of limitations. In addition, there are other measures, outside the embargo legislation and regulations, that have the effect of tightening the embargo further, such as the restrictions on selling technology to countries the United States considers to be “state sponsors of terrorism”, and the denial of visas to Cubans who wish to visit the United States for personal or professional reasons.

The embargo not only deprives Cuba of access to U.S. markets and goods, but interferes in its trade with third countries; prohibits U.S. dollar transactions, even with banks and trade partners in third countries; prohibits most travel to Cuba by U.S. citizens; interferes in Cuba’s internet access and

roaming agreements for cell phones; denies Cuba access to global financial institutions; prohibits the sale of equipment to Cuban research scientists by U.S. companies or their foreign subsidiaries; prevents Cubans from visiting family members in the United States; and often blocks scientific and cultural exchanges. Other embargoes, such as the Security Council sanctions imposed on Iraq in the 1990s, have caused greater humanitarian harm than the U.S. embargo against Cuba. Yet, in some regards the U.S. measures against Cuba are far more extensive, affecting every aspect of commerce, travel, economic development, and even humanitarian contributions. Overall, Cuba estimates the total damages from the U.S. embargo to be in excess of \$100 billion.<sup>1</sup>

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#### UNILATERAL MEASURES

Conventional wisdom holds that multilateral embargoes are more effective than unilateral embargoes. But while U.S. unilateral measures have not been effective at ending the Castro regime, they have had a far greater impact on Cuba's economy and society than would ordinarily be expected of a unilateral trade embargo. This is partly because the United States would be Cuba's largest and closest trading partner, and the lack of access to U.S. markets means that Cuba is excluded from buying a broad range of U.S. goods that cost less to buy and transport than comparable goods produced elsewhere in the world. According to a study by the Congressional Research Service, imports to Cuba were 30 percent higher overall as a result of the embargo.<sup>2</sup> For example, Braille machines produced in the United States, used for teaching blind and partially sighted children, are significantly less expensive than those produced elsewhere. Consequently, Cuba's costs when it buys Braille machines for schools are \$1100 per machine, rather than \$700 for the machines produced in the United States.<sup>3</sup> Likewise, because cytostatic serums, used to treat certain types of malignant tumors, cannot be purchased from U.S. companies, Cuba buys them from Europe or Asia, or through third countries, which significantly increases their costs.<sup>4</sup> Additionally, according to the UN Human Settlements Program, Cuba's inability to purchase construction materials from U.S. sources adversely affects cost and logistics to such a degree that it undermines the availability

of adequate housing in Cuba. On one occasion, this lack of access to cheap U.S. materials compromised Cuba's "response to housing reconstruction needs resulting from destructive hurricanes in 2001 and 2002, in both cases primarily affecting the most vulnerable sectors of the population."<sup>5</sup> Thus, even as a unilateral measure, the fact that the embargo denies Cuba access to U.S. markets is itself costly and damaging to the Cuban economy.

Even cultural exchanges between the two countries are affected by the embargo and related measures. Under the Bush administration, Cuban artists, musicians, scientists, and scholars were routinely denied visas to come to the United States to attend professional conferences, to perform their music, or to attend a gallery opening when their art was exhibited. There were harsh restrictions on family visits. There were regulatory roadblocks making it prohibitively difficult for U.S. universities to establish academic partnerships with Cuban universities. The Obama administration has eased up on some of these, allowing greater family travel and issuing more visas for artists and professionals, but most of the restrictions remain in place.

#### **EXTRATERRITORIALITY**

The U.S. embargo is not limited to unilateral measures of the sort described above. The embargo is also extraterritorial: it interferes in Cuba's trade with companies located in third countries. The Torricelli and Helms-Burton laws greatly increased the extraterritorial impact of the embargo, and they came at a time when Cuba's economic situation was particularly precarious. Eighty-five percent of Cuba's trade had been with the Eastern bloc, and in the aftermath of the collapse of the Soviet Union, Cuba made drastic changes in its economy. In 1991, Cuba rapidly began establishing new trading partners, focusing on Canada, Mexico, Europe, and Latin America. Thus, the extraterritorial measures imposed by the United States were particularly damaging at the juncture when Cuba was working as quickly as possible to establish new trade relations.

In 1992, Congress passed the "Cuban Democracy Act," introduced by Senator Robert Torricelli.<sup>6</sup> Since 1975, foreign subsidiaries of U.S. corporations had routinely been given licenses to trade with Cuba, as long as the subsidiary functioned independently of the parent corporation and no U.S. goods or U.S. dollar transactions were involved.<sup>7</sup> The Torricelli law prohibited these licenses, with the result that foreign subsidiaries were treated the same as U.S. corporations, with violators subject to the same penalties as U.S. companies. This constituted a clear international law, which holds that "a company is ordinarily considered to be a national

of the state under the laws of which it is organized.”<sup>8</sup> In addition, the Torricelli law imposed restrictions on shipping; any vessel that enters Cuba to provide goods or services, regardless of the country of origin, cannot stop at a U.S. port for 180 days; otherwise, both the ship and its cargo are subject to confiscation. This applies even to goods that the United States considers permissible such as Cuban imports of food from third countries.

The Torricelli law also prohibits third countries from selling goods to the United States that contain any amount of Cuban materials or any materials that have passed through Cuba.<sup>9</sup> For example, no metal products can be sold to the United States that contain even trace amounts of Cuban nickel, one of Cuba’s major exports. Likewise, no Belgian chocolate may be sold in the United States unless the Belgian government provides assurances to the U.S. government that the chocolate contains no Cuban sugar, an export that is critical to the Cuban economy.<sup>10</sup>

In 1996, the Helms-Burton Act, known as the “Libertad Act,”<sup>11</sup> added other extraterritorial provisions. Title III of the act stipulates that foreign companies that invest in Cuban properties that were nationalized by the Cuban state after the Revolution are subject to suit by the original owners, if they are now U.S. nationals, in U.S. courts.<sup>12</sup> Thus, a former Cuban citizen who owned a plantation in Cuba in the 1950s could now sue a Spanish hotel chain that built a hotel on that land in 2010, if the ex-Cuban is now a U.S. citizen. In addition, Title IV provides that the officers and executives of companies using or investing in those Cuban properties, and their families, may be barred from entering the United States.<sup>13</sup> The Helms-Burton Act also prohibits the import of any goods that are of Cuban origin, in whole or in part, or were manufactured or produced in Cuba, in any part, or were ever located in or transported from or through Cuba. These restrictions apply not only to goods imported into the United States, but to transactions that take place entirely outside the United States.<sup>14</sup>

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## IMPACTS OF THE EXTRATERRITORIAL MEASURES

### *International banking*

The U.S. embargo measures interfere in Cuba's access to international banks in several ways, even when they are not U.S. financial institutions. The United States prohibits Cuba from engaging in any transactions in U.S. dollars, and likewise prohibits any bank—including foreign banks—from facilitating commercial transactions by Cuba in U.S. dollars. In recent years, particularly under the Bush administration, the United States has enforced the banking provisions aggressively. The United States fined the Swiss bank UBS \$100 million for engaging in U.S. dollar transactions with Cuba, and also imposed smaller fines on Italian and Spanish banks. In 2006, the United States blacklisted the Dutch bank, UNG, which had done business in Cuba for over a decade; the following year UNG terminated its banking operations in Cuba.<sup>15</sup> In 2009, the Treasury Department imposed a fine of \$5.75 million on the Australia and New Zealand Banking Group, Ltd., for financial transactions involving Cuba and Sudan, and also fined Credit Suisse Bank almost half a billion dollars for financial transactions involving Cuba and other countries subject to U.S. embargoes.<sup>16</sup>

By 2007, in spite of their own national legislation prohibiting compliance with the U.S. embargo, a number of major Canadian and European banks stopped doing business with Cuba including Barclays, the Bank of Nova Scotia, Credit Suisse, Deutsche Bank, Royal Bank of Canada, and HSBC.<sup>17</sup> These measures impede Cuba's commerce in a number of ways. For many transactions, there are additional costs in using currencies other than the dollar. Because so many major international banks no longer provide banking services to Cuba out of fear of U.S. retaliation, Cuba has had to turn to other banks, which charge higher rates for their services. For 1998, a State Department official maintained that, because of U.S. measures, interest rates for financing Cuban development projects reached 22 percent.<sup>18</sup> In 2009, Cuba estimated that the losses related to financing costs attributable to the embargo came to \$164 million.<sup>19</sup>

### *International mergers and acquisitions*

The extraterritoriality impact of the U.S. embargo expands further when U.S. companies acquire or merge with foreign companies, since the Torricelli law treats these new subsidiaries as U.S. entities. For example, Cuba contracted with the German company, Bayer, to buy pesticides. After

Bayer began manufacturing one of the ingredients in the United States, it sought a license from the United States to continue exporting the pesticides to Cuba but was denied. Bayer then cancelled its contract with Cuba. Likewise, Cuba had a longstanding business relation with Sanachem, a South African company. After the U.S. company Dow Chemical bought shares in Sanachem, the South African company no longer sold goods to Cuba.<sup>20</sup> On another occasion, a British company which had agreed to sell meteorological equipment to Cuba, Pascall Electronics Limited, was acquired by the U.S. company EMRISE. Cuba's purchase from the British company was cancelled after the U.S. government denied EMRISE a license.<sup>21</sup>

The impact is particularly visible in Cuba's medical and biotechnology sectors. Indeed, this is an explicit priority of the Torricelli law, which provides that while exceptions may be granted to allow sales of medicines and medical supplies, even those are not permitted if they "could be used in the production of any biotechnological product."<sup>22</sup> For example, in 1995, Cuba lost access to medical goods when "the U.S. company Upjohn merged with the Swedish firm Pharmacia, which since 1970 had been selling medical equipment, reagents, chemotherapy drugs, and other products to a Cuban company. Cuba also lost an important supplier of diagnostic materials when Wisconsin's Sybron International acquired Germany's Nuc. Sales of pacemakers for heart patients were suddenly halted when Siemens of Sweden and Teletronics Pacing System of Australia transferred production and ownership to the United States."<sup>23</sup>

The mergers, in conjunction with the measures targeting Cuba's medical and biotech industries, affect not only the activities of Cuban institutions, but also the work of international humanitarian organizations in Cuba. In 2004, the World Health Organization (WHO) had purchased certain radioactive isotopes used to treat malignant tumors in the Cuban population from the Canadian company MDS Nordion. The WHO could no longer do so after MDS Nordion was acquired by the U.S. company Varian Medical Systems.<sup>24</sup> In 2004, when the WHO sought to buy laboratory reagents to provide medical services in Cuba from the British company Oxoid, it could not, because Oxoid had been acquired by a U.S. company.<sup>25</sup>

### *Global effects*

In some regards, because of the extraordinary power held by the United States in many domains, the U.S. unilateral embargo functions as a global embargo. The Helms-Burton Act effectively blocks Cuba's access

to global financial institutions—including the International Monetary Fund, the World Bank, the International Bank for Reconstruction and Development, and the Inter-American Development Bank—by requiring

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the U.S. representatives on their boards to vote against granting Cuba membership or access to loans or development funds. Because voting is weighted, it is nearly impossible for any of these organizations to admit Cuba or provide loans or development aid. In the IMF, the United States holds almost 17 percent of the votes; only three other countries—France, Germany, and the United Kingdom—hold more than

4 percent of the votes. By contrast, over 90 countries hold 0.1 percent of the vote or less.<sup>26</sup> The World Bank has roughly the same structure.<sup>27</sup> In the unlikely event that the U.S. vote is not sufficient to deny Cuba access to financing from the organization, the Helms-Burton Act would then impose punitive measures: if the institution were to somehow extend loans or aid to Cuba, the United States will reduce its contribution to that institution by the same amount.<sup>28</sup>

Cuba's lack of access to major global financial institutions has been particularly damaging in the context of Cuba's economic crisis, "increasing the difficulties of negotiating debt settlements and credit with public and commercial creditors, including Paris Club creditors."<sup>29</sup> The UN coordinator of aid activities in Cuba notes that, while it is difficult to quantify the effect of this exclusion, "Cuba is one of the few countries in the world facing a deep restructuring of its economy without assistance from international financial institutions."<sup>30</sup>

There are also other ways in which the U.S. embargo effectively excludes Cuba from global financial networks. For example, international monetary transfers between banks take place through a network called the Society for Worldwide Interbank Financial Telecommunication (SWIFT) system. Without access to this system, it is not possible to wire money or deposit a check sent from another country. The SWIFT system has released new software which will be the only means of accessing the system starting in March 2012. The SWIFT network has informed Cuba that it will not provide Cuba with this software, "because it contains United States technologies and components subject to the restrictions of the economic embargo."<sup>31</sup>

THE RESPONSE OF THE INTERNATIONAL COMMUNITY

*Retaliatory legislation*

The intrusiveness of the 1992 Cuban Democracy Act and the 1996 Libertad Act created a backlash among American allies, and a number of major American trading partners responded with retaliatory legislation. After the passage of the Helms-Burton Act, Canada's Prime Minister Jean Chretien denounced it as interference in Canada's affairs: "If you want to have an isolationist policy, that's your business. But don't tell us what to do. That's our business."<sup>32</sup> Canada additionally denounced the U.S. law as a violation of the North American Free Trade Agreement (NAFTA) on the grounds that the U.S. Congress was seeking to impose its foreign policy on other nations,<sup>33</sup> and initiated a complaint under NAFTA procedures.<sup>34</sup> Canada also responded by passing an amendment to its Foreign Extra-Territorial Measures Act (FEMA): in the event that a plaintiff obtained a judgment against a Canadian national under the Helms-Burton Act, the "clawback legislation" authorized Canada's attorney general to block enforcement. FEMA also imposed penalties of up to 1 million Canadian dollars on Canadian nationals if they complied with the Helms-Burton Act. Similarly, Mexico responded with retaliatory legislation, which went into effect in October 1996. Like FEMA, Mexico's Law for Protection of Trade and Investment prohibits compliance with extraterritorial measures, authorizes Mexican courts to decline to recognize judgments issued by U.S. courts under the Helms-Burton Act, and authorizes Mexicans subject to such judgments to bring suit in Mexican court for compensation.<sup>35</sup>

The European Union took a similar course in response to Helms-Burton. A European Council regulation stated: "The U.S. has enacted laws that purport to regulate activities of persons under the jurisdiction of the member states of the European Union; this extra-territorial application violates international law and has adverse effects on the interest of the European Union."<sup>36</sup> In addition, the EU brought an action against the United States before the newly-minted World Trade Organization (WTO) in February 1997, for interfering in trade in violation of the General Agreement on Tariffs and Trade (GATT). In its defense, the United States argued that the Helms-Burton Act was a matter of national security, and therefore exempt from GATT.<sup>37</sup> The United States then maintained that, having asserted the Helms-Burton Act was a matter of national security, no WTO panel could review that determination or question its validity.<sup>38</sup> The matter nearly created an institutional crisis for the new organization:

if any nation could claim exemption for national security, using its judgment to determine for itself what constituted “national security,” then the WTO as an institution of global governance and dispute resolution would be profoundly undermined. Ultimately, the matter was resolved diplomatically when the Clinton administration agreed to suspend the enforcement of Titles III and IV, and work with Congress to repeal the legislation. In return, the EU did not pursue its action before the WTO.

Despite the “clawback” legislation adopted by Canada, Mexico, and the EU, there were nevertheless cancellations of significant foreign investment projects, particularly in the first few years after the Helms-Burton Act went into effect. CEMEX, a Mexican company, cancelled a joint venture with Cuba for cement production; Redpath, a Canadian sugar refiner that had been purchasing 100,000 tons of sugar from Cuba per year, withdrew from Cuba; and British Borneo Petroleum Syndicate cancelled an exploration project in Cuba.<sup>39</sup>

### *Statements of condemnation*

In addition to the WTO action and retaliatory legislation by Canada, Mexico, and the European Union, U.S. embargo measures have also met broad, consistent international condemnation. In 2009 and 2010, for example, statements of condemnation came from the XV Summit of the Non-Aligned Movement held in Egypt in 2009,<sup>40</sup> the II Africa-South America Summit (ASA) in 2009,<sup>41</sup> the VII Summit of the countries of the Bolivarian Alliance for the Peoples of the Americas (ALBA) in 2009,<sup>42</sup> the Unity Summit of 2010, consisting of the XXI Rio Group Summit and the II Summit of Latin America and the Caribbean on Integration and Development (CALC),<sup>43</sup> and the VI Summit of Latin America and the Caribbean and the European Union.<sup>44</sup>

### *UN General Assembly resolutions*

It is not surprising that Cuba would have support from the developing world, particularly its trading partners in Latin America and the Caribbean. A more dramatic demonstration of the breadth of international opposition to the legality of the U.S. embargo legislation was the series of annual votes before the UN General Assembly, which began in 1992. After the Torricelli law was passed, Cuba introduced a resolution before the UN General Assembly that called upon member states not to implement its provisions and expressed concern about the extraterritorial effects

and their consequent violation of the principle of equal sovereignty.<sup>45</sup> The resolution passed by a vote of 59 to 3, with 71 abstentions and 46 nations not voting. International support for Cuba's resolutions has grown steadily from 1992 through the present, as states that had abstained in one year voted "yes" the next, and then continue to do so each year. While the 1992 resolution had 59 votes in favor, the next year's resolution had 88 votes in favor, 4 opposed, and 92 abstaining or not voting.<sup>46</sup> For each of the last several years, over 180 members—out of 193 in the United Nations—have joined Cuba in condemning this U.S. violation of international trade law. Most recently, in October 2011, 186 countries voted in support of Cuba's resolution, two opposed it, and three abstained.

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The only nation that has consistently joined the United States in voting against the resolutions has been Israel, the highest recipient of U.S. foreign aid amounting to \$3 billion annually.<sup>47</sup> The United States and Israel are typically joined by, at most, one or two other states in opposing the Cuban resolution. Last fall, only the United States and Israel voted against the measure, while Palau, the Marshall Islands, and Micronesia abstained — all of them dependent on the United States.

The annual resolutions call upon member states "to refrain from promulgating and applying laws and measures" such as the Helms-Burton Act, and request the Secretary General to prepare a report on the implementation of the resolutions. Consequently, each year the Secretary General has produced a report incorporating information from member states and international organizations regarding their compliance with the resolution. In these reports, Cuba provides detailed lists of the particular transactions that were canceled or affected by the embargo, as well as an estimate of the financial cost of its damages. Some nations simply state that they are in compliance and have normal commercial relations with Cuba, while others provide a more extensive statement of condemnation. In the 2010 report, for example, Burundi responded, "Burundi has never enforced the embargo against the Republic of Cuba,"<sup>48</sup> whereas countries with strong commercial or political ties to Cuba provide additional commentary. Bolivia, for example, states, "the embargo is a criminal policy which, according to very conservative estimates, has caused losses of over \$230 billion since it was

imposed almost 50 years ago, constituting an unlawful act from every viewpoint.”<sup>49</sup> The EU comments each year on its agreement with the Clinton administration, which had agreed to take certain measures in exchange for the withdrawal of the EU’s WTO complaint:

[O]n 18 May 1998, at the European Union/United States Summit in London, a package was agreed covering waivers to titles III and IV of the Helms-Burton Act; a commitment by the United States administration to resist future extraterritorial legislation of that kind; and an understanding with respect to disciplines for the strengthening of investment protection.<sup>50</sup>

Each year, the EU states rather pointedly that it “continues to urge the United States to implement its side of the Understanding of 18 May 1998.”<sup>51</sup>

## CONCLUSION

Security Council resolutions are often said to represent “the international community.” Formally, this is correct because the UN Charter authorizes the Security Council to act on behalf of the international community, and member states are signatories to the Charter.<sup>52</sup> But of course, the Council is a counter-majoritarian institution, consisting of only fifteen members with no permanent representation from the Arab world, Africa, or Latin America. Internally, the Council is also counter-majoritarian in that any of the permanent members can veto a measure even if every other member of the Council supports it. Thus, the Council can only repre-

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sent “the international community” in a republican sense, while its positions may in fact diverge from those of the majority of nations, or the majority of the world’s population.

By contrast, a vote in the General Assembly, as a democratic body with equal representation for all member states, is an explicit, direct expression of “the will of the international community.” The disparity between the Security Council, which is so thoroughly dominated by the permanent members, and the General Assembly, is particularly evident in the case of the U.S. embargo against Cuba. The Security Council presumably could

never castigate the U.S. for any action it took under any circumstances, given the veto power held by the U.S. But in the General Assembly—a venue that operates democratically, and where the U.S. holds no extraordinary powers—it is clear that the opposition is nearly universal. It is striking that Cuba has achieved such extraordinary support from nearly every nation in the international community, all of whom have nothing to gain and everything to lose by risking the wrath of the U.S.

For decades, American administrations have consistently portrayed the Cuban regime as isolated and marginalized by the international community for its human rights record. But in the case of the American embargo against Cuba, it seems that the international community is nearly unanimous in the view that it is the United States that has little respect for international law and global governance. This is evident from the challenges within the WTO; retaliatory legislation from Mexico, Canada, and the European Union; broad diplomatic denunciations in Africa, Latin America, and the Caribbean; and the annual UN General Assembly votes of condemnation. The fact that nearly all U.S. allies and trading partners endorse Cuba's condemnation of the United States, and have done so every year for almost two decades, says a great deal about the global opinion of the American actions. ■

#### ENDNOTES

- 1 "Report of the Secretary-General: Necessity of Ending the Economic, Commercial and Financial Embargo imposed by the United States of America against Cuba." A/65/83. August 2010, 24.
- 2 Ian F. Fergusson and Jennifer E. Stevens, "Cuba: An Economic Primer," Congressional Research Service, June 20, 2002,8.
- 3 "Report of the Secretary-General: Necessity of Ending the Economic, Commercial and Financial Embargo imposed by the United States of America against Cuba." A/61/132. August 2006, 29.
- 4 Office of the Resident Coordinator of the United Nations System for Operational Activities for Development, "Report of the Secretary-General: Necessity of Ending the Economic, Commercial and Financial Embargo imposed by the United States of America against Cuba." A/58/287. August 2003, 68.
- 5 United Nations Human Settlements Programme, "Report of the Secretary-General—Part II: Necessity of Ending the Economic, Commercial and Financial Embargo imposed by the United States of America against Cuba." A/59/302 (Part II), 20.
- 6 22 U.S.C. § 6007 (1992).
- 7 The Torricelli law provides that "no license may be issued for any transaction described in section 515.559 of title 31, Code of Federal Regulations." 22 U.S.C. §6005(a)(1). 31 C.F.R. 515.559 (a) provides that "Effective October 23, 1992, no specific licenses will be issued pursuant to paragraph (b) of this section for transactions between U.S.-owned or controlled firms in third countries and Cuba," except in very limited circumstances. Prior to the Torricelli law, the U.S. embargo law on Cuba viewed

foreign subsidiaries of U.S. corporations as subject to U.S. law, at least in principle. However, this was offset by liberal licensing provisions. From the inception of the Cuban embargo in July 1963 until October 1975, the CACR [Cuban Assets Control Regulations] restricted trade transactions by foreign subsidiaries of U.S. firms with Cuba. However, in the mid-1970s, because of protests from foreign subsidiaries of U.S. firms coupled with diplomatic protests and a softened stand by the Organization of American States, which had formerly supported the embargo against Cuba, the U.S. Treasury amended the CACR to allow the issuance of specific licenses for certain kinds of foreign subsidiary trade with Cuba, pursuant to section 515.559. The key requirements to obtain such a license were that:

- a. The transactions must have been by a U.S. subsidiary, defined as a foreign-incorporated firm operating in a third country with a separate foreign legal personality.
- b. No U.S. goods or technology or dollar accounts or dollar financing could have been involved.
- c. No person within the United States could have been involved; the subsidiary must have acted on its own and have conducted the transaction completely offshore.
- d. The subsidiary must have been generally independent of the U.S.-based parent firm in the conduct of transactions of the type for which the license was sought in such matters as decision-making, risk-taking, negotiation, financing, or performance.
- e. The law or policy of the country in which the subsidiary was incorporated must have required or favored trade with Cuba.

Section 6005(a) of the CDA now prohibits the issuance of licenses that would have been granted pursuant to section 515.559 of the CACR. This prohibition is generally referred to as the “Mack Amendment,” in reference to its long-time sponsor, Senator Connie Mack of Florida. *As cited in:* Clara David, “Trading with Cuba: The Cuban Democracy Act and Export Rules,” *Florida Journal of International Law*, Vol. 8 (1993): 386-387.

- 8 *Restatement (Third) of Foreign Relations Law*, Sec. 213 (1987). *As cited in:* Harry L. Clark, “Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures,” *University of Pennsylvania Journal of International Business Law*, Vol. 20 (1999): 66.
- 9 22 U.S.C. §6040(a).
- 10 22 U.S.C. §§6040(c) and (d).
- 11 Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§6021 et seq.
- 12 22 U.S.C. Subchapter III.
- 13 22 U.S.C. Subchapter IV.
- 14 22 U.S.C. §6040(a).
- 15 Paolo Spadoni, *Failed Sanctions: Why the U.S. Embargo against Cuba Could Never Work* (Gainesville, Fl.: University Press of Florida, year?), 113.
- 16 Sistema Económico Latinoamericano y del Caribe, “Follow-up Report on the Application of the Helms-Burton Law, 2009-2010,” October 2010, 6.
- 17 Government Accountability Office, “Economic Sanctions: Agencies Face Competing Priorities in Enforcing the U.S. Embargo on Cuba,” GAO-08-80, November 2007, 108.
- 18 Spadoni, *Failed Sanctions*, 111.
- 19 “Report of the Secretary-General: Necessity of Ending the Economic, Commercial and Financial Embargo imposed by the United States of America against Cuba.” A/64/97, June 2009, 31.

- 20 Vilma Hidalgo and Milagros Martinez, "Is the U.S. Embargo on Cuba Morally Defensible?," *Logos: A Journal of Catholic Thought and Culture*, 3(4)(Fall 2000), 108.
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- 22 22 U.S.C. §6004 (c)(4).
- 23 Hidalgo and Martinez, "Is the U.S. Embargo on Cuba Morally Defensible?," 109-110.
- 24 World Health Organization/Pan American Health Organization (WHO/PAHO), "Report of the Secretary-General—Part II: Necessity of Ending the Economic, Commercial and Financial Embargo imposed by the United States of America against Cuba." A/59/302 (Part II), 24.
- 25 *Ibid.*, 24.
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- 27 "World Bank Voting Powers," last updated: August, 26, 2011< <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:21429866~menuPK:64020035~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html>>
- 28 Helms-Burton Law, Title I, Sec. 104 (b).
- 29 Office of the Resident Coordinator of the United Nations System for Operational Activities for Development, "Report of the Secretary-General: Necessity of Ending the Economic, Commercial and Financial Embargo imposed by the United States of America against Cuba." A/52/342 (September 1997), 32.
- 30 *Ibid.*, 32.
- 31 "Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba," Report of the Secretary-General, A/65/83 (2010), 30.
- 32 Joaquín Roy, *Cuba, the United States, and the Helms-Burton Doctrine: International Reactions* (Gainesville, Fl.: University Press of Florida, 2000), 84.
- 33 *Ibid.*, 87.
- 34 *Ibid.*, 88.
- 35 *Ibid.*, 93.
- 36 *Ibid.*, 120.
- 37 Article XXI of the General Agreement on Tariffs and Trade provides that "Nothing in this Agreement shall be construed:
  - a. to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
  - b. to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
    - i. relating to fissionable materials or the materials from which they are derived;
    - ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
    - iii. taken in time of war or other emergency in international relations; or
  - c. to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

- 38 See discussion in John A. Spanogle, Jr., "Can Helms-Burton be Challenged under WTO?," *Stetson Law Review*, Vol. XXVII, 1998).
- 39 Paolo Spadoni, *Failed Sanctions: Why the U.S. Embargo Against Cuba Could Never Work* (Gainesville, FL: University Press of Florida, 2010), 110-111.
- 40 "The Heads of State or Government approved a Special Declaration on the need to put an end to the economic, commercial and financial blockade imposed by the United States against Cuba and, among other matters, 'express their concern over the continuation of that long standing unilateral policy with extra-territorial effects, even after being systematically rejected by the majority of States.'" "Follow-up report on the application of the Helms Burton Law, 2009-2010," *Sistema Económico Latinoamericano y del Caribe*, 2010, 12.
- 41 "The Heads of State and Government of the Union of South American Nations (UNASUR and the African Union), meeting in Margarita Island, the Bolivarian Republic of Venezuela, issued a communiqué of solidarity with Cuba against the economic, commercial and financial blockade imposed by the government of the United States of America, including the Helms-Burton Act. In the statement, they reiterated 'the most energetic rejection..., of the blockade..., as well as of the application of laws and measures contrary to international law, such as the Helms-Burton Act.'" "Follow-up report on the application of the Helms Burton Law, 2009-2010," *Sistema Económico Latinoamericano y del Caribe*, (2010), 12
- 42 "The Heads of State or Government of ALBA member countries reiterated that, 'the U.S. economic, commercial and financial blockade against the Republic of Cuba should end unconditionally, unilaterally and immediately.'" "Follow-up report on the application of the Helms Burton Law, 2009-2010," *Sistema Económico Latinoamericano y del Caribe*, (2010), 12.
- 43 "The Heads of State or Government of the countries of Latin America and the Caribbean... adopted a Declaration about the need to put an end to the economic, commercial and financial blockade imposed by the United States against Cuba, reiterating 'the most energetic rejection of the application of laws and measures contrary to the international law such, as the Helms-Burton Act.'" "Follow-up report on the application of the Helms Burton Law, 2009-2010," *Sistema Económico Latinoamericano y del Caribe*, 2010, 13.
- 44 "The Heads of State and Government of both regions agreed to the following: 'We firmly reject all coercive measures of unilateral nature with extra-territorial effect that are contrary to the international law and the generally accepted rules of free trade. We coincide that this type of practice represents a serious threat for multilateralism. In this context, and in reference to Resolution A/RES/64/6 of the General Assembly, we reaffirm our well-known positions on the application of the extra-territorial provisions of the Helms-Burton Act.'" "Follow-up report on the application of the Helms Burton Law, 2009-2010," *Sistema Económico Latinoamericano y del Caribe* (2010), 13.
- 45 "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba." A/RES/47/19, November 24, 1992, 1.
- 46 The total membership of the United Nations at that time was 184 states. "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba," A/RES/48/16, 3 November 1993,
- 47 Jeremy Sharp, "U.S. Foreign Aid to Israel," Congressional Research Service, September 16, 2010.
- 48 "Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba," Report of the Secretary-General, A/65/83 (2010), 19.

49 Ibid. 15.

50 Ibid. 60.

51 Ibid. 60.

52 United Nations Charter, Chapter VII

**APPENDIX**

*UN General Assembly Votes on Cuba Embargo-Related Resolutions,  
1992-2011*

Year	Votes in favor	Abstentions	Votes opposed
1992	59	71	3
1993	88	57	4
1994	101	48	2
1995	117	38	3
1996	137	25	3
1997	143	17	3
1998	157	12	2
1999	155	8	2
2000	167	4	3
2001	167	3	3
2002	173	4	3
2003	179	3	3
2004	179	1	4
2005	182	1	4
2006	183	1	4
2007	184	1	4
2008	185	2	3
2009	187	2	3
2010	187	3	2
2011	186	3	2