

CHAPTER NINE

INTERNATIONAL LAW & THE EMBARGO

The Principle of Extraterritoriality

Since its enactment in 1992 the CDA has provoked an outpouring of **protests** from various nations around the world, as well as official denouncements by international and regional bodies such as the United Nations and the Organization of American States. The objections of many major U.S. trading partners have been made known through various demarches which criticize the extraterritorial aspects of the CDA, particularly those which place prohibitions of third-country ships from entering the U.S. within a six-month period of having docked in Cuba. These provisions, which seek to coerce and control the trade practices of other nations by penalizing them for continuing to do business with Cuba, are an affront to the sovereign right of each nation to determine its own foreign commerce practices. On October 7, 1992, one day after Congress passed the CDA, the European Community made a formal demarche to the U.S. government, warning that the law would be met with strong **opposition** and **disapproval**. The EC stated:

The European Community and its member states are seriously concerned about the reinforcement by the U.S. Congress of the trade embargo against Cuba. Furthermore, the Act's proposed sanctions for vessels that enter a port in Cuba would be in conflict with longstanding rules on comity and international law, and adversely affect international **shipping** as well as the European Community's trade with the United States. . . . Although the EC is fully supportive of a peaceful transition to democracy in Cuba, it cannot accept that the U.S. unilaterally determines and restricts EC economic and commercial relations with any foreign nation which has not been collectively determined by the United Nations Security Council as a threat to peace or order in the world of nations.'

The Canadian government **made** similar complaints, stating that the extraterritorial aspects of the CDA are an affront to the sovereignty of Canada and other nations which have the right to determine their own policies with regard to Cuba.

When the CDA's extraterritorial provisions went into effect in 1992, it signaled a reversal of the United States' earlier-stated **policy** that it would not seek to penalize third-country trade relations with Cuba. In fact, the inclusion of the third-country penalties once again in the embargo against Cuba specifically contradicted actions taken by the U.S. in 1975 when the government acknowledged the impropriety of such provisions and removed them from earlier laws setting forth the terms of the embargo against Cuba.

In 1962, the Organization of American States adopted stringent resolutions mandating that all member states cut diplomatic ties with Cuba. The OAS also imposed a collective embargo against Cuba at that time. In 1962, the terms of the U.S. embargo against Cuba, the strongest of any of the nations in the hemisphere, included sanctions against other nations which continued to deal with Cuba, similar to those found in the CDA today which prohibit the entry into the U.S. of vessels having visited Cuba.

By 1975, a change in sentiment had taken place within the OAS as various member states asserted their right to determine their own policies with Cuba, and some reestablished relations with the island nation. On July 29, 1975, the OAS adopted a resolution rescinding its mandatory embargo on Cuba. Based on the principle of nonintervention, a fundamental cornerstone of the OAS which is mentioned throughout the organization's Charter, the regional body called on each member state to freely determine its own policies with regard to trade and other relations with Cuba.*

In direct response to the 1975 OAS resolution, the U.S. modified its policies, removing those provisions of U.S. law which sought to penalize or control third countries' relations with Cuba. In a September 1975 official State Department Bulletin, the U.S. announced:

In keeping with the action by the OAS, the United States is modifying the aspects of our Cuban denial policy which affect other countries. Effective today, August 21, 1975, it will be U.S. policy to grant licenses permitting transactions between U.S. Subsidiaries and Cuba for trade in foreign-made goods when those subsidiaries are operating in countries where local law or policy favors trade with Cuba.... In order to conform farther with the OAS action, we are taking appropriate steps so that effective immediately countries which allow their ships or aircraft to carry goods to and from Cuba are not penalized by loss of U.S. bilateral assistance. We are initiating steps to modify regulations which deny bunkering in the United States to third-country ships engaged in the Cuba Trade.³

Echoing this recognition of the inappropriateness of third-country penalties, then Assistant Secretary for Inter-American Affairs, William Rogers, testified before the U.S. Congress as to why the "third-country constraints" were being lifted:

As a logical and practical corollary to the termination of mandatory OAS sanctions, the U.S. government, on August 21 announced modifications of those aspects of our Cuban denial policy which affect other countries.... This was basically a measure to remove a recurrent source of friction between the United States and friendly countries both in this hemisphere and overseas which, for reasons of their own, have engaged in or never ceased to trade with Cuba.'

In 1992 the CDA restored the third-country constraint provisions which had been specifically denounced by the U.S. government in 1975 as unacceptable to other nations and incompatible with the 1975 OAS resolution affirming the right of each member state to freely determine its own policies toward Cuba. The current U.S.-imposed embargo which punishes those who trade with Cuba patently violates the OAS resolution and runs counter to the OAS Charter, which upholds nonintervention as one of the fundamental principles upon which the organization is founded.

In addition to the individual protests of foreign trading partners prompted by the CDA's passage, the law has also brought about formal denouncements from the United Nations. In four consecutive sessions of the United Nations General Assembly, that body has passed resolutions condemning the U.S. embargo against Cuba and calling on the United States to rescind those aspects of its law which are violative of international law principles as well as of the U.N. Charter. In its most recent resolution (passed on November 15, 1995) entitled 'Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba,' the U.N. General Assembly held, inter alia:

Beaffrming, among other principles, the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation, which are also enshrined in many international legal instruments . . .

Concerned about the continued 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, as well as the freedom of trade and navigation...

Concerned that, since the adoption of its resolutions 47/19, 48/16 and 49/95 further measures of that nature aimed at strengthening and extending the economic, commercial and financial embargo against Cuba continue to be promulgated and applied, and concerned also about the adverse effects of such measures on the Cuban people and on Cuban nationals living in other countries...

[The U.N. General Assembly] reiterates its call to all States to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution in conformity with their obligations under the Charter of the United Nations and international law which, inter alia, reaffirm the freedom of trade and navigation...*

Notwithstanding repeated U.N. resolutions calling for the rescinding of practices against Cuba and against nations that trade with Cuba which violate international law, the U.S. has steadfastly maintained and even reinforced its policies.

Human Rights Violations Precipitated by the US. Embargo on Sales of Medicines to Cuba

While the extraterritorial aspects of the CDA have outraged the international community and provoked much opposition, the primary focus of this report is the human **suffering** precipitated by the restrictions on sales of medicines to Cuba. The CDA's provisions, which serve to cut off Cuba's international supply of medicines and medical equipment, violate the acceptable parameters established by customary international law for trade embargoes as well as human rights guarantees enshrined in international human rights agreements to which the U.S. is bound.

Most notably, the CDA violates U.S. obligations as a member of the Organization of American States. In addition to running counter to the terms of the 1975 OAS resolution mentioned above, the restrictions on medicines also serve to violate U.S. duties arising under the OAS Charter and those articulated in the American Declaration of the Rights and Duties of Man (the American Declaration), a key document within the inter-American system that sets forth fundamental human rights obligations of all OAS member states, including the U.S.'

The American Declaration and the OAS Charter are "sources of international obligation for member states of the Organization of American States."⁸ These documents envision a regional, inter-American human rights system protecting all peoples in the Americas from rights violations by their own or another American government. As such, the American Declaration codifies rights and duties which survive border crossings. Both the American Declaration and the American Convention on Human Rights articulate fundamental human rights guarantees which their drafters envisioned as being respected systemwide. Just as the European system of human rights on which it is modeled establishes regional community-wide rights and **obligations, so** does the inter-American system suggest the extraterritoriality of American states' human rights obligations.

With regard to human rights obligations created by instruments such as the American Declaration, the American Convention, and the OAS Charter, it should be noted that the Restatement (Third) of the Foreign Relations Law of the U.S. recognizes their binding nature, stating:

Like multilateral agreements generally, an international human rights agreement creates rights and obligations between each party and every other party. Most multilateral agreements, however, are essentially networks of bilateral agreements, creating obligations between each pair of parties as regards their particular interests *inter se*, e.g., as to trade or communication between them.... Human rights agreements, however, are more genuinely multilateral. The obligations run to all parties equally and do not ordinarily engage the interest of one state more than another; unless otherwise provided, all states parties have the same remedies for violations.*

In asserting the importance of the "international protection of the rights of man," the American Declaration asserts that regional, intergovernmental cooperation is required to protect the 'essential rights' protected by that document. Echoing language in the American Declaration, the OAS Charter also proclaims "the consolidation of this continent [i.e., the Americas] into a system based on respect for the essential rights of man."¹⁰

In examining the specific dictates of the American Declaration which are of relevance in determining the compatibility of the CDA with U.S. human rights obligations, the following should be noted:

Art. I provides: "Every human being has the right to life, liberty and the security of his person."

Art. VII provides: "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."

Most notably, Art. XI provides: "Every person has the right to the preservation of his health through sanitary and social measure relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."

These articles impose an affirmative duty on the government of each state to ensure these protections to its citizens and residents. Likewise, the Declaration and OAS Charter require that each state must refrain from taking actions which would hinder or prevent other **states** from carrying out these obligations. As is discussed elsewhere in this report, the U.S. restrictions on the sales of medicines to Cuba directly impact the ability of the Cuban population to preserve its health through adequate and proper medical care."

The Humanitarian Exception of All Embargoes

The use of economic embargoes as a political sanction is not new. However, over the course of time, various limitations have come to be recognized by the international community as to what is the proper scope of a permissible embargo. In short, international practice has come to include an exception for medicines, medical supplies and certain basic foodstuffs in any embargo in order to prevent unnecessary suffering among civilian populations.

Humanitarian exceptions permitting the free flow of medicines and food were features of multilateral embargoes imposed against North Korea, Vietnam, South Africa, Chile, El Salvador, the Soviet Union and Haiti. In the recent U.N.-supported embargoes against Iraq and the territories of the former Yugoslavia, the U.N. upheld the principle that food and medicines must be allowed through in order to serve the basic needs of the civilian population. In the case of Iraq, a special Sanctions Committee was established within the U.N. to ensure that shipments of food and

medicines were permitted to get through to Iraqi civilians. In explaining the rationale for allowing these exceptions to the embargo, U.N. Security Council officials stated that it is internationally "unacceptable to cause wide-spread suffering among civilians through impeding the shipment of food and medicines" in order to punish a country's leaders."

In addition to the U.N. General Assembly resolutions denouncing the U.S. embargo against Cuba for its extraterritorial aspects, the United Nations Commission on Human Rights has decried the embargo for its direct impact on the human rights of Cuban citizens who are harmed by its restrictions of food and medicine shipments. In Resolution 1994/47 entitled "Human Rights and Unilateral Coercive Economic Measures," the U.N. Commission on Human Rights particularly singled out the practice of large developed nations such as the U.S. in singling out smaller, less developed nations for unilateral embargoes. The U.N. Commission stated that such unilateral coercive measures against developing countries are in "clear contradiction of international law" **and** that "such unilateral coercive economic measures create obstacles to trade relations among States, adversely affect the socio-humanitarian activities of developing countries, and hinder the full realization of human rights by the people subject to those measures."

It should be noted that the purposeful impeding of food and medicines to civilians in time of war is expressly prohibited under customary international law and is codified in the Geneva Conventions. If international law requires a humanitarian exception for food and medicine even in times of war, then certainly the U.S. cannot take actions to achieve the same result in times of peace. Through the CDA, the U.S. creates a de facto blockade of Cuba which prevents the country's civilian population from obtaining adequate medicines, medical supplies and foodstuffs.

The Geneva Convention,* to which some 165 countries, including the United States, are parties, requires "free passage" of all medical supplies intended for civilians." This duty is placed on states even in times of war. Surely the recognition of the fundamental human right to medicines must be applied with equal diligence and vigor in the arena of international relations and trade sanctions. As is demonstrated elsewhere in this report, the U.S. restrictions on sales by U.S. companies and their subsidiaries of medicines to Cuba and the penalties against third countries who continue to trade with Cuba (including through the sale of medicines) serve to severely restrict the flow of medicines to Cuba's civilian population.

Lastly, it should be noted that the 1962 multilateral embargo against Cuba, mandated by the OAS at the height of tensions with that nation, allowed for the sale of medicines to Cuba, noting that such a "humanitarian exception" is mandated by international law and practice. Indeed, the OAS's Inter-American Commission on Human Rights, in a February, 1995, letter to the United States with regard to its embargo on the sale of medicines to Cuba, stated

[The Inter-American Commission on Human Rights] requests that the United States of America faithfully observe the traditional exemption from an embargo under customary international law, of medicine, medical supplies and basic food items, for humanitarian reasons.

The Commission further stated:

[I]t is aware that the Cuban Democracy Act contains such exemptions; however, the Inter-American Commission Human Rights has been informed that the bureaucratic and other requirements which have to be met in relation to those exemptions [i.e. on-site verification] render them virtually unattainable. Accordingly, the Inter-American Commission on Human Rights requests that the United States of America put in place mechanisms

to ensure that the necessary steps are taken for exemption from the trade embargo in respect of medicine, medical supplies and basic food items, capable of effective and speedy implementation.”

As it has ignored the resolutions of the U.N. General Assembly and the U.N. Commission on Human Rights calling for an end to the embargo against Cuba, so also has the U.S. ignored the pleas of the Organization of American States. The U.S. embargo on medicines remains in place unabated.

NOTES

¹ European Community Press Release (Oct. 8, 1995), *reprinted in* Michael Krinsky *et al.*, United States Economic Measures Against Cuba: Proceedings in the United Nations and International Law Issues 194 (1993).

² See Final Act, Sixteenth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, July 29, 1975, OEA/Ser.FfiI.Doc.9/75, Rev. 2 (1975).

³ Dep't St. Bull., Sept. 15, 1975, at 494, *reprinted in* Krinsky *et al.*, *supra* note 94, at 214.

⁴ *U.S. Trade Embargo of Cuba: Hearings Before the Subcomm. on Int'l Trade & Corn. & Int'l Organizations of House Comm. on Int'l Rel., 94th Cong.*, 1st Sess. 366 (1975), *quoted in* Krinsky *et al.*, *supra* note 94, at 216.

⁵ These numbers refer to the three previous resolutions passed by the U.N. General Assembly calling for the elimination of policies against Cuba which violate these principles.

⁶ **G.A. Res.**, U.N. GAOR, U.N. Doc. A/RES/50/10 (1995).

⁷ The Declaration can be found in its entirety in Basic Documents Pertaining to Human Rights in the Inter-American System, General Secretariat of the Organization of American States, OEA/ser.L./V./II.82 (1992).

⁸ Case 10.573, Inter-Am. C.H.R. 31, OEA/ser. I/RJ, doc. -rev. (1993).

⁹ Restatement (Third) of the Foreign Relations Law of the United States, § 701 cmt. 3. (emphasis added).

¹⁰ Charter of the Organization of American States, May 2, 1948, U.S.T. 2, Doc. 2394, T.I.A.S. no. 2361(1948); U.S.T. 21, Doc. 607, T.I.A.S. no. 6947 (as *amended* 1970) (at introductory text). See also art. 29 of the Charter which reaffirms a hemispheric approach to human rights ("The Member States, inspired by the principles of inter-American solidarity and co-operation, pledge themselves to a united effort to ensure social justice in the Hemisphere and dynamic and balanced economic development for their peoples.").

¹¹ A petition charging that the CDA violates U.S. obligations under the American Declaration and OAS Charter is currently pending before the OAS Inter-American Commission on Human Rights. A copy of the petition can be obtained from the Center for Constitutional Rights, 666 Broadway, Seventh Floor, New York, New York 10012.

¹² *United Nations Eases Rules on Food and Fuel for Iraqis*, *N.Y. Times*, Mar. 23, 1991.

¹³ Geneva Convention, No. IV, Aug. 12, 1949. Int'l Comm. of the Red Cross.

¹⁴ Convention Relative to the Protection of Civilian Persons in Time of War. Geneva Convention, No. IV, art. XXIII.

¹⁵ A copy of the letter notifying the petitioners in the action of the sending of this letter to the U.S. Department of State is included in the appendix at XXX.¹⁶