From Ford-Canada to Helms-Burton: The Domestic Politics of Canadian-American Disputes over Extraterritorial Sanctions

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> "I think the United States has the right to expect Canada to be deferential. Cuba is disproportionately so much more important to the United States than it is to Canada."
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> Rep. Robert Torricelli (D-N.J.) on Canadian objections to the Helms-Burton Law.[1]

> "This is bullying. But in America, you call it global leadership."
>
> Canadian Foreign Minister Lloyd Axworthy[2]

The recent controversy between the United States and Canada over extraterritorial sanctions has a long pedigree. From the Chinese embargo in the 1950s through the Helms-Burton law in the 1990s, American policy makers have tried to broaden unilateral sanctions by applying them to the foreign subsidiaries of U.S. firms or even to wholly-owned foreign corporations. These efforts have almost always elicited sharp condemnation from U.S. allies, particularly Canada, as violations of international law and infringements on national sovereignty.

Neorealist models predict that the ability of the U.S. to extend its controls to foreign economic activity correlates to its structural position in the world economy. Therefore, one would expect the greatest success in the early post-World War II era when the U.S. approximated an economic hegemon and declining success over time. This study tests the neorealist interpretation against Canadian-American disputes during three periods: (a) the application of the Chinese and Cuban embargoes to the foreign subsidiaries of U.S. firms from 1957 until 1966; (b) Canadian challenges to foreign subsidiary sanctions in the mid-1970s and the subsequent U.S. decision to rein in the

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[1] Boston Globe, June 25, 1995, p. 55.

[2] David E. Sanger, "Talk Multilaterally, Hit Allies With Stick" New York Times July 21, 1996, sec. 4, p. 3.

extraterritorial scope of its Cuban embargo; and (c) the return to extraterritorial sanctions with the passage of the Cuban Democracy Act in 1992 and the Helms-Burton law in 1996.

The findings of this study suggest three weaknesses in the hegemonic interpretation. First, it overstates the ability of the U.S. to enforce its interpretation of international law when it was economically dominant because of the costs and risks of such enforcement measures to other foreign policy goals. Second, it understates the potentially coercive impact of the denial of the U.S. market to U.S. and foreign firms even in the absence of economic hegemony. Finally, it ignores the role of domestic politics, which in this case is a better predictor of outcomes than is the structure of the international system.

Neorealism and Extraterritorial Sanctions

Neorealism views the distribution of power in the international system as the most important determinant of outcomes in world politics.[3] In the field of international political economy, the dominant neorealist model is the theory of hegemonic stability. It predicts that strong international laws and institutions depend upon an economically dominant power that can both enforce and sacrifice for the rules. When the lead state's position of economic preponderance declines, its ability to procure allied cooperation with its preferences proportionately diminishes.[4]

While the model has been used principally to examine trade and monetary relations, it has also been applied to the study of economic sanctions, particularly in cases of "coercive cooperation," that is, when U.S. preferences were not shared by allies.[5] In the early 1950s, Europe and Japan went along with U.S. strategies in CoCom that targeted Soviet economic growth, not just militarily significant technology, even though allies preferred to control only the latter. Some studies have attributed this outcome to allied dependence on U.S. reconstruction aid which Washington linked to their

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[3] Kenneth N. Waltz, Theory of International Politics (Reading, Mass.: Addison-Wesley, 1979).

[4] For a general exposition of the model, see Robert O. Keohane, "The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967-1977," in Ole R. Holsti, Randolph M. Siverson, and Alexander George, eds., Change in the International System (Boulder: Westview, 1980), pp. 131-162.

[5] For an exposition (and critique) of the model, see Lisa Martin, Coercive Cooperation: Explaining Multilateral Economic Sanctions (Princeton, N.J.: Princeton University Press, 1991), pp. 37-38, 86-90. Also see Bruce W. Jentleson, Pipeline Politics: The Complex Political Economy of East-West Energy Trade (Ithaca, N.Y.: Cornell University Press, 1986), p. 40; and Beverly Crawford and Stefanie Lenway, "Decision Modes and International Regime Change: Western Collaboration on East-West Trade," World Politics (April 1985), pp. 380-382.

restrictions on East-West trade, something made explicit by congressional passage of the Battle Act in 1951.[6] As the allies' dependence on the U.S. diminished, they no longer subordinated their own judgments to U.S. economic statecraft. As a result, they began liberalizing export controls by the late 1950s and refused to go along with U.S. economic sanctions, such as the grain embargo following the Soviet invasion of Afghanistan and the pipeline sanctions following the 1981 declaration of martial law in Poland.[7] One former government official implicitly presented a neorealist explanation of the inability of the U.S. to prevent allied non-cooperation: "The problem is that sanctions imply a leverage we don't have any more. In 1946, when half of world trade went through the U.S., we could impose those kinds of controls. Today, when 14% goes through the United States, we can't control it."[8]

As with East-West trade, U.S. attempts to apply extraterritorial sanctions to private actors in Canada represents a comparable effort at coercive cooperation. The controversy surrounding extraterritorial sanctions has its origins in U.S. efforts to broaden unilateral sanctions against regimes whose practices or behavior it deemed beyond the pale of normal diplomatic relations. During the Cold War, the principal targets were China (until normalization in the early 1970s) and Cuba. Since the end of the Cold War, Iran and Libya have been added to a list that still includes Cuba. In each case, the U.S. strategy has been one of economic warfare, denying civilian as well as strategic trade to destabilize those regimes or limit the resources available to them. Canada and other U.S. allies have preferred to limit their controls to items of strategic significance and have encouraged normal civilian trade.

In each of these cases, Washington has attempted to broaden compliance by applying sanctions extraterritorially. One technique, used in the Cuban and Chinese embargoes, is to apply U.S. regulations to the foreign subsidiaries of U.S. firms. The purpose is two-fold: (a) to prevent U.S. firms from escaping accountability to U.S. law by relocating abroad, and (b) to increase the effectiveness of unilateral sanctions by using MNCs as conduits to project U.S. law onto the territory of another state.[9] Another instrument is the secondary boycott, attaching economic penalties to foreign corporations for their dealings with designated targets. During the Cold War, the U.S. blacklisted

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[6] See Gunnar Adler-Karlsson, Western Economic Warfare, 1947-1967: A Case Study of Foreign Economic Policy (Stockholm: Almqvist & Wiksell, 1968), pp. 45-49 and Jentleson, Pipeline Politics, pp. 71-73.

[7] Kenneth A. Oye, "International Systems Structure and American Foreign Policy," in Oye, Robert J. Lieber, and Donald Rothchild, eds., Eagle Defiant: United States Foreign Policy in the 1980s (Boston: Little, Brown, 1983), pp. 23-24.

[8] David E. Sanger, "Diplomacy's Erratic Hit Man: The Dollar," New York Times, May 24, 1998, sec. IV, p. 5.

[9] David Leyton-Brown, "Extraterritoriality in United States Trade Sanctions" in Leyton-Brown, ed., The Utility of International Economic Sanctions (New York: St. Martin's, 1987), p. 255.

ships that called on Cuban ports.[10] More recently, the Helms-Burton law and the Iran-Libya Sanctions Act target non-U.S. firms that do business with Cuba, Iran, and Libya.[11]

The United States and Canada disagree sharply over the consistency of such efforts with traditional international law. The U.S. position relies on two bases of jurisdiction. The *nationality principle* is used to defend foreign subsidiary sanctions because it allows a state to extend its regulations to its citizens wherever they are located.[12] The *effects doctrine*, promulgated by the U.S. courts in 1945 to justify the enforcement of anti-trust against corporate conduct abroad, allows a state to "impose liabilities, even on a person not within its allegiance, for conduct outside its borders that has consequences within its borders that it reprehends."[13] By this reasoning, if a foreign corporation's business with Iran or Cuba were to increase the former's ability to commit acts of terrorism in the U.S. or the latter's ability to deprive a U.S. citizen of confiscated property, the U.S. has the right to assert jurisdiction. Public officials have also denied that its strictures are indeed extraterritorial. Foreign subsidiary sanctions are enforced in the U.S. through the home office. Foreign MNCs are merely denied certain privileges in the U.S. market or, as in the Helms-Burton case, made subject to civil litigation in the U.S. court system. In none of these cases does enforcement take place in another country's territory.[14]

Canada views these policies as violations of its sovereignty. Its case is grounded in the *territorial principle*, which holds that a sovereign state has exclusive jurisdiction over all activity within its territory. This is necessary, according to a former Canadian Ambassador to the U.S., to allow sovereign states to decide for themselves how best to promote their economic, foreign policy, or national security interests "without undue or unwarranted interference."[15] The extension of U.S. law into third countries effectively usurps this fundamental right, even when allies pursue the same policy. For example, a 1977 amendment to the Export Administration Act applied U.S. laws against corporate compliance with the Arab Boycott of Israel to the foreign subsidiaries of U.S. firms. Canada protested the reach of this law even though it enacted similar legislation.[16]

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[10] Morris H. Morley, Imperial State and Revolution: The United States and Cuba, 1952-1986 (Cambridge, England: Cambridge University Press, 1987), p. 210.

[11] see "Proliferation of Sanctions Creates a Tangle of Good Intentions," Congressional Quarterly Weekly Report, September 13, 1997, pp. 2113-2120.

[12] Restatement of the Law (Third): The Foreign Relations Law of the United States, vol. 1 (St. Paul, Minn.: American Law Institute, 1987), pp. 271.

[13] Mark W. Janis, An Introduction to International Law, 2nd edition (Boston: Little, Brown, 1993),, p. 327.

[14] for examples, see above, notes 24, 48, 61, 105, and 136.

[15] Allan E. Gotlieb, "Extraterritoriality: A Canadian Perspective," Northwestern Journal of International Law and Business 5 (1983), p. 455.

[16] A.L.C. de Mestral & T. Gruchalla-Wesierski, Extraterritorial Application of Export Legislation: Canada and the U.S.A. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1990), p. 258.

Ottawa acknowledges the U.S. right to apply its laws to its nationals for acts outside its territory. Foreign subsidiaries, however are not nationals of the home country; rather, they are legal creatures of the host country in which they are incorporated. As one Canadian government commission concluded: "[i]nsofar as subsidiaries become instruments of policy of the home country rather than the host country, the capability of the latter to effect decisions - i.e., its political independence - is directly reduced."[17] It also objects to measures which target Canadian-owned firms, such as Helms-Burton because they “contradict or undermine the laws or clearly enunciated policies of another state exercising concurrent jurisdiction, on a territorial basis, over the same conduct.”[18]

Canada has at times accepted extraterritorial jurisdiction when it is legitimized by a formal agreement. For example, it enforces U.S. export controls on U.S.-origin goods within its territory. Canada’s willingness to apply U.S. law, however, is part of a consensual agreement with the U.S. for which it receives a significant economic benefit - i.e., immunity from U.S. export control regulations. While the policy has at times been a target of Canadian nationalists, it is still consistent with the territorial principle because Ottawa's enforcement of U.S. regulations is the result of a bilateral treaty to which it consented, not unilateral U.S. enforcement.[19]

In sum, U.S. assertions of extraterritorial jurisdiction have relied on Canadian acquiescence to the unilateral exercise of American power, not on mutual agreement. A neorealist model would correlate the success of such influence attempts to the concentration of economic resources in the international system.[20] From this perspective, the U.S. was able to translate its dominant economic position in the 1950s and 1960s into the ability to dissuade allies from blocking corporate compliance with the application of U.S. regulations on their territory.

The decline in that predominance in the 1970s led to the “erosion of the U.S. Government's ability to use MNCs to implement policy extraterritorially when American objectives conflicted with those of host states."[21] As a result, allied host countries overtly challenged the legitimacy of extraterritorial sanctions against Cuba and the U.S. was forced to adjust by amending the regulations so as to exempt foreign subsidiaries in 1975.

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[17] Foreign Ownership and the Structure of Canadian Industry, Report of the Task for on the Structure of Canadian Industry (heretofore cited as Watkins Commission Report), January 1968, p. 311.

[18] Douglas Forsythe, “Introductory Note: Foreign Extraterritoriality Measures Act Incorporating - The Amendments Countering the U.S. Helms-Burton Act of October 6, 1996," in International Legal Materials (1997), p. 111.

[19] Watkins Commission Report, pp. 314-316.

[20] For a direct application of the model to extraterritorial sanctions, see Stephen J. Kobrin, "Enforcing Export Embargoes Through Multinational Corporations: Why Doesn't It Work Anymore?" Business in the Contemporary World (Winter 1989), pp. 31-42.

[21] Ibid., p. 31.

When the Reagan administration sought to use revive this practice by applying the pipeline sanctions to U.S. and foreign companies in Europe, its efforts were thwarted by allies who issued blocking orders barring corporate compliance with U.S. law. One scholar concluded from this case that extraterritorial controls are futile because the "international diffusion of power increases the importance of coordination but lessens American leverage to coerce that coordination."[22] A former head of the Justice Department's foreign commerce section concurred:[23]

> We do have different standards from other people, and in the past we have been able to get away with them. But these days, the United States doesn't have the overwhelming clout it used to, and other nations are protecting their economic interests much more aggressively than they used to.

In other words, extraterritorial controls could coerce compliance when the United States was economically dominant, but can no longer do so in the contemporary world economy. From this perspective, congressional attempts to resurrect this practice in the 1990s vis-à-vis Cuba, Iran, or Libya, are premised on an American position in the world that no longer exists and will predictably fail.

Sanctions Ascendant? The Domestic Politics of the Extraterritorial Embargoes against China and Cuba, 1957-1966

From 1957 through 1966, the United States and Canada faced repeated conflicts over application of the Chinese and Cuban embargoes to the Canadian subsidiaries of U.S. firms. In both cases, the U.S. enacted comprehensive embargoes in pursuit of economic warfare - the Foreign Assets Control Regulations (FACRs), issued shortly after China's entry into the Korean War, governed the former, and the Cuban Assets Control Regulations (CACRs), issued on July 8, 1963, governed the latter. Both regulations were issued under the Trading with the Enemy Act (TWEA) and were designed to place foreign subsidiaries within their ambit.[24] Canada, by contrast, imposed less restrictive sanctions. It initially went along with the isolation of China during the Korean War, but in 1957, joined the rest of the U.S. allies in abolishing the China Differential, in effect treating China no differently from the European Soviet bloc.[25] On Cuba, it agreed to ban

[22] Oye, "Internaitonal Systems Structure and American Foreign Policy," p. 24.

[23] quoted in Tamar Lewin, "When Nations' Laws Clash" New York Times, August 17, 1983, p. D1.

[24] Michael P. Malloy, Economic Sanctions and U.S. Trade (Boston: Little, Brown & Co., 1990), chs. 5, 6.

[25] Paul M. Evans, "Caging the Dragon: Post-War Economic Sanctions Toward the People's Republic of China," in Leyton-Brown, ed., The Utility of International Economic Sanctions, pp. 70-77.

the export of strategic goods and prevent the use of its territory as a conduit for embargoed U.S.-origin goods, but otherwise encouraged non-strategic trade.[26] As a result, it viewed the extension of the U.S. embargo to U.S.-controlled firms in Canada as a violation of its right to pursue its own foreign economic policy.

A hegemonic model would predict that the U.S. was able to use its position in the world economy and Canada's dependence on the U.S. to prevail. Indeed, Ottawa did not unambiguously refute U.S. extraterritorial claims.[27] Nonetheless, the outcome was more of a compromise than a Canadian acquiescence to the U.S. position. The U.S. was less inclined to enforce its interpretation of jurisdiction than it was to resolve disputes by discreetly granting exemptions in most cases. The aim was to insulate bilateral relations from domestic politicization. At home, the U.S. feared that reports of allied trade with communist adversaries would trigger a public and congressional furor. This could have resulted in legislation that mandated reprisals against allies and eliminated the executive branch's discretion to balance its embargo policy against other diplomatic interests. In Canada, publicity could have aroused nationalist resentment and made it politically impossible for Ottawa to compromise with U.S. preferences. For the most part, Canada shared these concerns. In theory, it could have used "tactical politicization" - i.e., publicizing the issue in order to inflame domestic opinion so that it would be politically impossible to back down.[28] Such a strategy could also have inflamed domestic opinion in the U.S. and triggered a public or congressional reaction that would have harmed its economic interests. As a result, Canada subordinated a principled defense of sovereignty to a search for compromise solutions.

The Ford-Canada Case and the Eisenhower-Diefenbaker Agreement.

The first overt dispute between Washington and Ottawa was the Ford-Canada case. The controversy began in December 1957, when a Canadian trader charged that Ford-Canada had backed out of a deal to sell 1000 trucks to China on instructions from the American parent because of its liability under TWEA. The charge was heavily publicized in the Canadian press and sparked a nationalist outcry in the House of

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[26] Morris Morley, "The United States and the Global Economic Blockade of Cuba: A Study in Political Pressure on U.S. Allies," Canadian Journal of Political Science (March 1984), p. 29.

[27] Kobrin, "Enforcing Export Embargoes through Multinational Corporations," p. 34.

[28] David Leyton-Brown, "The Multinational Enterprise and Conflict in Canadian-American Relations," International Organization (Autumn 1974), p. 745.

Commons against the infringement of Canadian sovereignty. This pushed Prime Minister Edward Diefenbaker to issue the first public challenge to U.S. claims of jurisdiction.[29]

When the Canadian embassy lodged a protest against what it asserted was an abridgment of its economic sovereignty, U.S. public officials denied its sanctions were extraterritorial. The Director of the Treasury Department's Office of Foreign Assets Control (OFAC), the agency that enforced the sanctions, replied that since U.S. citizens owned sufficient stock to block the sale, it was asserting jurisdiction over the parent corporation, not the subsidiary.[30] The Canadian government rejected this reasoning because the effect of U.S. policy was the imposition of U.S. law on Canadian territory. Canada's political independence was thereby violated because Ottawa favored nonstrategic trade with China. Moreover, since all of Canada's automobile industry at the time was U.S.-controlled, U.S. assertions of jurisdiction effectively denied the China market to Canadian automobile exports.[31]

The differences were ultimately resolved by a joint statement by President Eisenhower and Prime Minister Diefenbaker following their Ottawa summit on July 9, 1958. In what became known as the Eisenhower-Diefenbaker agreement, the United States agreed that the Canadian economy should not be disadvantaged by the application of U.S. economic sanctions. To defuse future conflicts, both countries agreed to a consultation procedure in cases where a subsidiary wanted to pursue a transaction banned by U.S. law. In such cases, Canada would formally approach the United States, which would favorably consider a special exemption for the parent company. The subsidiary could then complete the transaction without subjecting its headquarters to legal liability.[32]

The Eisenhower-Diefenbaker agreement represented a compromise of principle by both the United States and Canada to avoid a diplomatic rift that could have been widened by domestic politics on both sides of the border. The United States chose not to apply diplomatic and economic pressure to enforce its interpretation of international law. The U.S. embassy in Ottawa reported that the issue had become an incendiary one in Canada and was "susceptible to exploitation in Canada by elements unfriendly to the

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[29] David Robert Leyton-Brown, Governments of Developed Countries as Hosts to Multinational Enterprise: The Canadian, British, and French Policy Experience (Ph.D., Harvard University, Department of Government, August, 1973), pp. 94-95.

[30] Washington (Robertson) to Department of External Affairs (DEA), April 2, 1958 (National Archives of Canada (NAC), Record Group (RG) 25, Vol. 7607, File 11280-1-40, pt. 1.1, "U.S. Foreign Assets Control Regulations -- Effect on Exports to Communist Countries or Elsewhere Abroad by Canadian Subsidiaries of U.S. Firms and Other Canadian Business Activities").

[31] Andreas F. Lowenfeld, Trade Controls for Political Ends, 2d ed., (San Francisco, Matthew Bender, 1983), p. 101.

[32] Leyton-Brown, "Extraterritoriality in United States Trade Sanctions," pp. 264-65.

United States."[33] No government in Ottawa was likely to compromise with Washington if confronted publicly. In fact, Dulles even speculated that the Chinese tenders were really "phantom orders" designed to sow discord between the U.S. and its allies.[34] As a result, the U.S. replaced an absolute ban on foreign subsidiary trade with an agreement to license such transactions to defuse political conflict.

A number of officials went further in questioning the utility of maintaining extraterritorial sanctions. One proposal recommended that the Eisenhower-Diefenbaker agreement be generalized to other allies to minimize the risks of future confrontations over this issue.[35] The NSC rejected this option, in part, because it create "an incentive for US corporations to establish in friendly countries new subsidiaries for the expressed purpose of trading with Communist China."[36] Exempting foreign subsidiaries could enrage influential members of Congress who might respond by removing Presidential discretion over trade controls. Even though Eisenhower was sympathetic to the proposed change - he referred to extraterritorial sanctions as "damned silly practices" - he was dissuaded from accepting it.[37] Therefore, while domestic politics in Canada made coercion a prohibitively costly option, domestic politics in the U.S. dictated that the regulations be kept on the books even though they guaranteed the recurrence of jurisdictional disputes with allies.

The outcome was also a compromise of principle for the Canadian government. Diefenbaker publicly declared that the agreement restored Canadian sovereignty over the local subsidiaries in U.S. firms.[38] The accord, however, implicitly accepted the principle of extraterritoriality. There was no general waiver from the FACRs, only an agreement to consult. Ottawa would have to plead its case for an exemption for the parent so that it would not be prosecuted for its subsidiary's trade with China.[39] In addition, the issuance of licenses was not automatic. Dulles informed the Prime Minister that they would be granted only if the export had an "appreciable effect on the Canadian economy" and no Canadian-owned firms could do the job.[40] In other words, the right of subsidiaries to

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[33] Willis C. Armstrong to State, "Canadian Trade with Communist China," April 25, 1958 (U.S. National Archives and Record Service (NARS), Diplomatic Branch, Folder 411.9341/12-2259).

[34] Memorandum of Conversation, "Summary of the January 15, 1959 NSC Meeting," (Declassified Documents Index (DDI) 1990-875), p. 2.

[35] Foreign Relations of the United States: 1958-60, vol. 4, pp. 719-723. The proposal was developed by free traders, such as Clarence Randall of the Council on Foreign Economic Policy, and supported by a number of officials at the State Department.

[36] "Summary of January 15, 1959 NSC Meeting," p. 3.

[37] Foreign Relations of the United States: 1958-1960, vol. 7, part 1, p. 707; Also see Eisenhower's comments in "Summary of January 15, 1959 NSC Meeting," p. 2.

[38] New York Times, July 12, 1958, p. 1.

[39] Kobrin, "Enforcing Export Controls Through Multinational Corporations," p. 34.

[40] Appendix to "United States Foreign Assets Controls," February 1961 (NAC, RG 25, File 11280-1-40).

trade with China would not be determined solely by the sovereign judgments of the Canadian government; American permission was still necessary.

Moreover, the impetus to challenge the U.S. on this issue came not from the Diefenbaker government, but from the media, interest groups, and opposition parties. Prior to the Ford-Canada case, the Canada's Department of Trade and Commerce (DTC) was aware of numerous cases where subsidiaries had been prevented by their parents from trading with China.[41] Ottawa, however, never pushed the issue. In part, this was because it would lead to "long and difficult negotiations" with Washington. The intensity of anti-communism in U.S. domestic politics also inhibited a strategy of diplomatic pressure. As long as there was no possibility of change in congressional or public attitudes, subsidiaries would be deterred from challenging the U.S. embargo.[42] As a result, DTC concluded that there was little it could do beyond exhortation. It consequently advised Canadian firms "not to misuse opportunities by introducing U.S.-controlled companies when arranging business contracts"[43] - in other words, to work around what was regrettably accepted as a *fait accompli*.

What made the Ford-Canada case different, according to a DTC memorandum, was the "publicity which has been attached to the refusal of the order."[44] In other words, it was domestic politics in Canada that shifted Ottawa's position from private protest to public challenge. The fact that the outcome represented something less than a complete vindication of Canadian sovereignty indicates that the principal objective was not to end U.S. extraterritorial practices. Like their American counterparts, Canadian diplomats saw the accord as a way to insulate diplomatic relations from domestic political fallout on both sides of the border.

Implementation of the Eisenhower-Diefenbaker Accord

The consultation procedure established in the Eisenhower-Diefenbaker accord was relatively successful in defusing potentially disruptive bilateral conflicts over foreign subsidiary sanctions. In most cases, the Canadian embassy persuaded State to prevail on Treasury to issue licenses to the parent corporations. It was less successful in actually

[41] Grey, "United States Control of Commercial Activities of Canadian Companies," Economic Division, April 25, 1958; Harvey, DTC to DEA, April 2, 1958, and Small to Collins, "Canadian Cars to Communist China," January 24, 1958 (all in NAC, RG 25, file 11280-1-40, vol. 1.1).

[42] see Smith to Harvey, February 3, 1954 (NAC, RG 20, File 7637, vol. 2); R.B. Bryce, "U.S. Foreign Assets Controls: Effect on Canadian Assets," Cabinet Conclusions, July 2, 1958 (NAC, RG 2, vol. 1898).

[43] Harvey, "Trade with China," June 25, 1957 (NAC, RG 25, File 11280-1-40, 1.1).

[44] Harvey to Undersecretary of State for External Affairs, April 2, 1958 (NAC, RG 25, File 11280, vol. 1.1).

promoting trade between U.S.-controlled subsidiaries and China. This was due to political risk in the U.S. market, a factor that also influenced some Canadian corporations who were heavily involved in the United States.

In the late 1950s, Canada utilized Eisenhower-Diefenbaker process to obtain licenses for two foreign subsidiary transactions - export of bleached sulphite pulp by Rayonnier and steam locomotives by Fairbanks-Morse.[45] In both cases, the Canadian government successfully argued that the exemptions were consistent with the bilateral understanding - i.e., the exports were 100% Canadian content, they were from industries that had experienced layoffs, and there were no Canadian-controlled firms that could have filled the orders. In the former case, the license was granted quickly.[46] In the latter case, the State Department was initially reluctant to recommend approval because it contended that steam locomotives were crucial to China's industrial growth given its dependence on coal rather than oil.[47] The Canadian government responded that these determinations should be made in Ottawa, not Washington, and if its judgment was overridden, "it would be clear that the United States was trying to impose its own policy on Canadian firms and that the understanding would be valueless."[48] The U.S. ultimately acceded to the Canadian position and the license was granted.

In neither case, however, did the sales materialize. The license exemptions both followed the second Taiwan Straits crisis and the political risks in the U.S. market induced the parent corporations to prevent the subsidiaries from following through on their China sales.[49] In fact, the U.S. parent sacked the Canadian manager of Fairbanks-Morse who had pressured the company to apply for the exemption.[50]

Another controversy emerged in 1961 when Standard Oil of New Jersey instructed its Vancouver subsidiary, Imperial Oil, not to provide bunkering oil to ships carrying wheat to China. The parent had approached OFAC for an exemption and was informed that the regulations covered the bunkering of ships owned or chartered by China. At the Ottawa Summit with President John F. Kennedy, Diefenbaker asserted that the U.S. action was a clear violation of his understanding with Eisenhower given the importance of the grain deal with China and the absence of alternative companies that

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[45] Leyton-Brown, Governments of Developed Countries as Hosts to Multinational Enterprise, pp. 98-100.

[46] Jones (Canadian Embassy, Washington) to English (DTC), "Trade with China - U.S. FAC Exemption for Rayonnier Incorporated," July 30, 1958 (NAC, RG 20, File 7637, vol. 4, "United States Treasury FACRs: Restrictions on Trade with China).

[47] Jones (Canadian Embassy, Washington) to U.S. Area Trade Officer, "U.S. FAC Exemption for Fairbanks Morse & Co." May 6, 1959 (NAC, RG 20, File 7637, vol. 4).

[48] N.A.R. Memorandum for the Prime Minister, "U.S. FACRs - Exemption for Fairbanks, Morse & Company," May 6, 1959 (NAC, RG 25, File 11280-1-40, vol. 1.2).

[49] "United States Foreign Assets Controls," December 19, 1958 (NAC, RG 20, File 7637, vol. 4), appendix, p. 2.

[50] Leyton-Brown, Governments of Developed Countries as Hosts to Multinational Enterprise, p. 100.

could provide the oil. Kennedy replied that if the Canadian government formally requested an exemption, the U.S. would take no action to frustrate the transaction. Diefenbaker responded that this was unacceptable since it would imply consent to extraterritorial application of the FACRs. If word got out, it would be a "politically inflammatory issue" that might stimulate a negative reaction against U.S. investment. Given the sensitivity to Canadian nationalist concerns, the U.S. agreed to waive the regulations without a formal Canadian request.[51]

This willingness to consider Canadian sentiment did not extend to transactions that did not conform to the criteria spelled out by Dulles. For example, after Canada's 1961 grain deal with China, U.S. subsidiaries were informed by Treasury that barter deals with China for the milling of Canadian grain designated for China violated the FACRs.[52] When the State Department was approached by the Canadian embassy, it insisted on evidence to demonstrate the impact of the denial on the Canadian economy and the absence of any other Canadian firms that could perform the job. Since Canadian-owned firms could have filled the orders, State did not intercede with Treasury, as it had in the Imperial Oil case. As a DTC study had predicted, the U.S., even with the consultation process, was still in the "position of judging the merits of a transaction that is permissible under Canadian law."[53]

Yet even when the U.S. waived the restrictions on foreign subsidiary trade with China, most firms were inhibited from pursuing that trade because they perceived the risks in the American market as disproportionate to the advantages of export deals. For example, shortly after the Ford-Canada case, a Canadian subsidiary of Chrysler received a $6 million order from China for 12,000 Dodge passenger cars. The case clearly fell under the guidelines of the Eisenhower-Diefenbaker accord - the recession in Canada forced the firm to lay off 3500 workers at its Windsor plant and no Canadian-owned firm could have filled the order. The parent corporation, however, did not submit an application for exemption because the proposed deal coincided with the Sino-American crisis over the Taiwan Straits.[54] For similar reasons, the subsidiaries of several U.S. firms

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[51] Foreign Relations of the United States, 1961-63, p. 1143-44; On the logic of acquiescence, see Appendix to "Bunkering," February 20, 1961 (DDI R-352B), p. 4.

[52] Department of External Affairs, "FACRs," March 3, 1961 (NAC, RG 25, File 11280-1-40, vol. 2.1).

[53] Department of Trade and Commerce "United States Foreign Assets Control," December 19, 1958 (NAC, RG 20, File 7637, vol. 4), appendix, p. 2.

[54] Thorne, "Export of Chrysler Engines to Communist China," September 8, 1958; Thorne to Hopper, August 29, 1958; "Export of Dodge Passenger Car Engines and Spares to the Chinese Mainland," Minutes of Meeting Held in Mr. English's Office, August 27, 1958 (NAC, RG 20, File 7637, vol. 3).

informed DTC that they were prevented from quoting prices to Chinese buyers by their parent companies.[55]

These risks even influenced some Canadian firms that were heavily dependent on the U.S. market. The most publicized case was Alcan's refusal to consider a $1 million order from China for 2000 tons of aluminum after Canada removed aluminum from the list of strategic commodities that could not be sold to Communist Bloc countries.[56] The sale would have been important for the company. It was producing at 65% of capacity and had just laid off 650 workers. Since it was the only Canadian firm that could have filled the order, the export was effectively lost to Canada.[57] The case was also heavily reported in the Canadian press and triggered an uproar in Parliament with charges that U.S. law had blocked the sale. While Alcan was not a U.S. subsidiary, its President and six of the fifteen members of its board of directors were U.S. citizens. Hence, they were technically within the reach of the FACRs.[58]

It was not U.S. law, however, that deterred the sale. In fact, Treasury had informed the Canadian embassy that it would have exempted the U.S. directors and shareholders from liability.[59] Rather, it was the fear of what might happen to the company's position in the U.S. market, which represented 40% of its sales. As the President of Alcan informed DTC, "if competitors were to learn of a shipment to Communist China, they would publicize it throughout the United States and this would jeopardize [Alcan's] U.S. market which is [its] largest one."[60] He went on to argue that the decision was not politically motivated and was based "entirely on commercial considerations"[61] - considerations heavily influenced by political risk in the U.S. market!

In sum, the consultation procedure succeeded in defusing bilateral conflicts through the waiver of U.S. jurisdiction. It did not, however, promote increased foreign subsidiary trade with China because of corporate fears of alienating the U.S. government and the perceived risks in the American market. This was acknowledged in a 1961 State Department briefing paper which advised President Kennedy that the strategic costs of

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[55] Tedford to Harvey, May 5, 1958; (NAC, RG 20 File 7637, vol. 3); Department of External Affairs, "Foreign Asset Control Regulations," March 3, 1961 (NAC, RG 25, File 11280-1-40, vol. 2.1); Jones, "Discussion of FACs," October 29, 1958 (NAC, RG 20, File 7637, vol. 4).

[56] Toronto Globe & Mail, January 22, 1959, p. 1.

[57] Kobrin, "Enforcing Export Controls Through Multinational Corporations," p. 34.

[58] Isaiah A. Litvak, Christopher D. Maule and Richard D. Robinson, Dual Loyalty: Canadian-U.S. Business Arrangements (Toronto and New York: McGraw-Hill, 1971), p. 25.

[59] Harvey, "Refusal of Alcan to Supply Aluminum to China," January 28, 1959 (NAC, RG 20, File 7637, vol. 4), p. 1.

[60] Jones, "FAC - Trade with China - Aluminum for Communist China," November 26, 1958 (NAC, RG 20, File 7637, vol. 4).

[61] Harvey, "Refusal of Alcan to Supply Aluminum to China," (n. 53), p. 2.

deferring to Canadian economic nationalism through the waiver process were minimal because "no business has resulted from this relaxation over the past three years."[62]

The Cuban Embargo

A similar pattern emerged vis-à-vis the Cuban embargo. The U.S. imposed a comprehensive embargo and was successful in getting its Latin American allies to implement comparable measures through the Organization of American States (OAS). It could not, however, secure parallel cooperation from Canada and other Western allies, who agreed only to a strategic embargo and encouraged nonstrategic trade. This posed a dilemma for the Johnson administration which, in early 1964, placed a high priority on tightening the Cuban embargo. According to one State Department official, "persuasion alone will not be an effective means of denying Castro access to free world markets" and there was a need to "devise more effective means to deny Castro access to items produced in the Free World which his economy desperately needs."[63] Extraterritorial sanctions were seen as an important part of this strategy. Prior to the Cuban revolution, Cuba's economy was heavily dependent on trade and investment with U.S. firms. Extending regulations to U.S.-owned firms located anywhere was crucial in denying the Cuban economy access to spare parts for U.S.-made equipment.

Nonetheless, the CACRs, unlike the FACRs, did not formally cover foreign subsidiaries. Under the regulations, subsidiaries were technically free to trade nonstrategic goods as long as there was no U.S.-origin content and the parent corporation was not involved in the transaction.[64] The exemption was designed to assuage third country resentment over the infringement of sovereignty. Nonetheless, the U.S. still intended to place foreign subsidiaries within the ambit of its sanctions, but in a way that was less overtly offensive to allied sensibilities. In practice, policy makers used two devices to assert de facto control over foreign subsidiaries. First, "moral suasion" was applied to the home office to pressure the U.S. parent to police the behavior of the affiliates. The appeal was at times cast in terms of corporate patriotism, but also contained implied threats of adverse publicity or difficulties in securing government contracts.[65] Second, while the subsidiaries were exempted from legal

[62] "Addendum to "China Policy," (John F. Kennedy Library, Personal Office Files, Canada, Security, JFK Trip to Ottawa 5/61B," p. 4.

[63] Thomas C. Mann, "Memo Re: Cuba," February 7, 1964 (DDI 1996-101), p. 1.

[64] Malloy, Economic Sanctions and U.S. Trade, p. 509.

[65] Lowenfeld, Trade Controls for Political Ends, p. 102.

liability, U.S. citizens who served as directors, officers or managers, were not.[66] Treasury interpreted the regulations to require these U.S. citizens take whatever steps were available to block any Cuban sale or face criminal penalties. It reasoned that this would remove the objections of allies like Canada, who "might have some basis for contending that we ought not to control entities incorporated under Canadian law . . . [but not] to our control over U.S. citizens."[67]

This distinction, however, was not accepted by the Canadian government. Ottawa had agreed to ban the export strategic goods to Cuba and the transshipment of U.S.-origin items.[68] That consent did not extend to nonstrategic Canadian goods. In fact, the Canadian government expected all Canadian firms, including foreign subsidiaries, to "maximize development of market opportunities in [Cuba]."[69] From a commercial perspective, exempting foreign subsidiary trade with Cuba was attractive for precisely the reason the U.S. wanted to prevent it: "we hold a particular advantage in supplying commodities with United States specifications required because the major part of the economy is still operating on United States or United States-style equipment."[70] Canada's initial reading of the CACRs indicated that the U.S. would not interfere with the pursuit of these economic interests.

As a result, Canada's aim of increasing Cuban opportunities for all Canadian-based firms ran up against Treasury's construction of its authority, leading to a pattern of conflict resolution similar to that for the Chinese embargo. In 1964, there were at least six cases in which OFAC refused to license deals between Canadian-incorporated subsidiaries and Cuba, either by pressuring the home office or informing U.S. citizens in management positions of their liability under TWEA.[71] Canada protested these denials informing State that Treasury's actions "largely nullify the exemption for U.S. subsidiaries which is otherwise provided in the CACRs."[72] In each case, State was

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[66] Mestral and Gruchalla-Wesierski, Extraterritorial Application of Export Legislation, p. 213.

[67] Charles A. Sullivan (Treasury) to G. Griffith Johnson (State), December 29, 1964 (Lyndon Baines Johnson Presidential Library, National Security Files, National Security Action Memoranda, NSAM 326).

[68] Morley, Imperial State and Revolution, p. 191.

[69] Annex, "Flour for Cuba," attached to Memorandum to the Minister, "Prevention of Canadian Flour Companies Trading with Cuba," July 13, 1966 (Department of External Affairs (DEA), File 37-16-1-CUBA, vol. 3).

[70] D.W. Fulford (Charge D'Affaires, Havana) to Undersecretary of State for External Affairs, March 18, 1964 (DEA, File 37-16-1-CUBA, vol. 1), p. 2.

[71] Details on the cases can be found in "Application of CACRs to Canadian Companies," July 14, 1964 and Smith to Shulthe, September 14, 1964 (both in NAC, RG 20, File 7-544-2, vol. 1); R.H. Wygant (Arlington-Funk) to J.A. Roberts, Deputy Minister of Trade and Commerce, June 25, 1964 (NAC, RG 20, File 7637-3, part 1), Sullivan to Johnson (n. 61), and Mestral and Gruchalla-Wesierski, Extraterritorial Application of Export Legislation, p. 163.

[72] "Application of CACRs to Canadian Companies" (n. 65), p. 1.

persuaded to prevail upon Treasury to grant the exemption for "overriding foreign policy reasons."[73]

The one case where the State Department refused to intercede was a 1966 Canadian wheat deal with the Soviet Union, a substantial portion of which was diverted to Cuba. The State Department saw this as overstepping the bounds of allied trade with Cuba and used the threat of liability under the CACRs to dissuade three U.S.-controlled firms from milling Canadian wheat destined to Cuba.[74] There were also domestic political considerations behind taking a harder line in the grain case. The Johnson administration had been attacked for its passivity vis-à-vis a similar deal in 1964 not only by Republicans, but by Democratic allies, such as Senator Paul Douglas (D-Ill.), who accused the Canadians of "trading on our indulgences."[75] As a result, the State Department publicly denounced the transaction and U.S. subsidiaries refused to accept a Russian invitation to bid on milling contracts. The Canadian government protested this action, asserting that "[a]ny directive from abroad which might interfere with the normal exercise of commercial judgment by Canadian companies would be in conflict with . . . good corporate citizenship."[76] No business was lost to Canada, however, as Canadian-owned companies were able to fill the orders.

As in the case of the FACRs, the outcome of these disputes represented a compromise with principle for both sides to protect bilateral relations from domestic politics. Ottawa's ideal solution was an unconditional exemption for U.S. directors and managers of Canadian subsidiaries. It was not willing to force the issue through "tactical politicization." Canadian diplomats did at times point to nationalist sensibilities in bargaining with the U.S., as in the Imperial Oil case.[77] Cuba, however, was as potentially explosive in the U.S. as sovereignty was in Canada. As one DEA memorandum noted, "Cuba is an emotional issue which has aroused very strong feelings in the United States, and this factor has a bearing on our policy regarding Cuba."[78] Canadian diplomats, therefore, preferred to keep consultations private and confidential -

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[73] "Memorandum for the Minister, "Prevention of Canadian Flour Companies Trading with Cuba," July 13, 1966 (DEA, File 37-16-1-CUBA, vol. 4), pp. 1-2.

[74] Morley, Imperial State and Revolution, p. 220.

[75] New York Times, September 1, 1964, p. 1.

[76] J.G.H. Halstead, Memorandum for the Minister, "Trade with Cuba - CACRs," January 14, 1975 (DEA, File 37-16-1-CUBA, vol. 11) - hereafter cited as Halstead Memorandum.

[77] Canadian Cabinet Ministers warned their U.S. counterparts that they were "sitting on top of a volcano" and that "the U.S. should avoid any type of action that could trigger the Canadian reaction he [Prime Minister Diefenbaker] had outlined." See Draft of Minutes, Joint Canadian-United States Committee on Trade and Economic Affairs, March 13-14, 1961, Washington D.C. (NAC, File 11280-1-40, pt. 2.2).

[78] Department of External Affairs, "Canadian Policy on Cuba," March 23, 1966 (DEA, File 37-16-1-CUBA, vol. 3).

even if that meant compromise - in order to insulate other aspects of Canadian-American relations from domestic political controversy.

The same was true on the U.S. side as State pressed Treasury to grant exemptions in most cases where Canada made a representation. It did not want to abandon the policy because that could encourage U.S. firms to move abroad and would be seen by the rest of the world as a lessening of hostility toward Castro.[79] At the same time, it was reluctant to use serious economic pressure because a public dispute could inflame Canadian and U.S. opinion in ways that might complicate diplomatic relations. On the Canadian side, this could arouse nationalist sentiment in ways that would make a compromise more difficult. It could also contribute to a less hospitable climate for U.S. investment by confirming the view of economic nationalists that those firms work for U.S. political rather than Canadian economic interests.[80] Discretion was also necessary on the U.S. side because openly airing U.S. differences with Canada would create public expectations that were unlikely to be met given the constraints under which Washington and Ottawa were operating. This could only inflame public and congressional opinion in ways that might lead to legislated sanctions that eliminated diplomatic flexibility.[81] Therefore, despite the fact that extraterritorial sanctions were diplomatic irritants, the U.S. wanted to keep them on the books for their deterrent effect, both on foreign subsidiary trade and on congressional activism. But once they triggered strong diplomatic protests, the strategy was to insulate bilateral relations from nationalist discord, not to enforce U.S. interpretations of international law.

Sanctions Entangled: Limiting the Reach of the Cuban Embargo, 1974-75

[79] Lowenfeld, Trade Controls for Political Ends, p. 103.

[80] One State Department memorandum noted that "the internal Canadian political situation . . . restricts our response to general expressions of concern about the Cuban threat in the hemisphere." See "Canadian Trade with Cuba," Briefing Paper for Visit of Canadian Prime Minister Pearson, January 21-22, 1964," January 17, 1964 (DDI 1995-71), p. 2.

[81] Congress actually introduced legislation that would have mandated aid cutoffs to all countries that failed to stop their ships from calling on Cuban ports. See Congressional Record: House , May 25, 1965, pp. 11534-35.

In the mid-1970s, the Canadian government unequivocally repudiated U.S. claims of extraterritorial jurisdiction and was more willing to use tactical politicization to challenge U.S. practices. Despite the fact that the U.S. wanted to retain the foreign subsidiary sanctions as a bargaining chip in prospective negotiations with Cuba, it ultimately concluded that the costs in terms of chronic conflicts with allies exceeded the benefits. In September 1975, it removed foreign subsidiary sanctions from the CACRs.

The principal reason for the more aggressive and successful challenge to U.S. policy had less to do with the decline of American economic preponderance than it did with the decline of anti-communism as a frame of reference in U.S. domestic politics. In prior decades, there were limits as to how far allies and corporations were willing to go in pursuing their economic interests because they feared congressional reprisals or adverse repercussions in the U.S. market. This was no longer the case in the climate of détente following the Vietnam War. Public opinion polls showed a significant majority favored a more open policy with Cuba.[82] Prominent members of Congress from both parties endorsed the normalization of trade and diplomatic relations and introduced legislation to that effect.[83] Not only did this remove many of the inhibitions facing allies and corporations; it prodded the State Department to rein in the controversial foreign subsidiary sanctions in order to prevent Congress from removing the embargo program altogether. Whereas in the past, the State Department felt a need to keep extraterritorial disputes discreet for fear that Congress would mandate a punitive policy, by the 1970s, the concern was that repeated disputes with allies might prompt Congress to remove the sanctions beyond what the administration was willing to accept.

The MLW and Litton Disputes

In the mid-1970s, there were two public conflicts between the U.S. and Canada over foreign subsidiary sanctions. The first took place in early 1974 when MLW Worthington, a 52%-owned subsidiary of Studebaker Corporation of New Jersey, agreed to sell 30 diesel locomotives to Cuba for $18 million. The parent corporation applied for an exemption from OFAC because of its controlling share of the company and the fact that two of the nine directors of the subsidiary were U.S. citizens.[84] After a lengthy delay, Ottawa sent a formal protest to the State Department, asserting that it had assisted

[82] A 1973 Harris Poll found that the public favored normalization by a margin of 51% to 33%. See Harris Survey Yearbook of Public Opinion, 1973 (New York: Louis Harris Associates, Inc., 1976), p. 259.
[83] Congressional Quarterly Weekly Report, May 17, 1975, pp. 1013-1015.
[84] Kobrin, "Enforcing Export Embargoes Through Multinational Corporations," p. 35.

in the negotiation and financing of a transaction by a corporation organized under Canadian law.[85]

Unlike comparable cases from the 1960s, State did not intercede with Treasury to grant relief to the parent corporation and the U.S. directors. The principal reason for this was that the U.S. was exploring the possibility of an opening with Cuba. It wanted to use the offer to remove extraterritorial sanctions in exchange for some comparable Cuban concession. If host governments were to able to assert their sovereign powers to block foreign subsidiary controls, that bargaining chip would be removed.[86] Moreover, earlier that year, the U.S. backed down from preventing the Argentinean subsidiaries of the U.S. automakers from exporting to Cuba. It tried to argue that the exemption was response to a unique circumstance, not a precedent.[87] That assertion would lose credibility if it were forced to acquiesce again in a highly visible case.

Ottawa decided to confront Washington on this issue, particularly after it was reported in the Canadian press and debated in the House of Commons. Government ministers demanded that the sale take place. That position was backed up by the implied threat of ending federal orders from and subsidies to MLW and other U.S.-controlled firms because their susceptibility to U.S. directives called into question their corporate good citizenship.[88] This threatened a key aim of U.S. economic diplomacy toward Canada - i.e., the principle of "national treatment," in which U.S. firms in Canada are entitled to all the opportunities available to Canadian firms.

On March 8, MLW voted to proceed with the sale. The two U.S. directors voted against the deal to shield themselves from possible prosecution under TWEA. The Chairman of MLW publicly claimed that a waiver from Washington was wholly unnecessary because, “the U.S. government isn’t in a position to approve or disapprove the sale.”[89] Despite the clear challenge to U.S. policy, the U.S. chose to ignore the transaction rather than precipitate a confrontation with Canada.

The second dispute began in December 1974 when Cole, a Canadian subsidiary of Litton Industries, agreed to sell $500,000 in office furniture to Cuba. The parent corporation ordered the subsidiary to cancel the sale after it made a preliminary inquiry to OFAC, which indicated that the license application would be turned down.[90] Litton was

[85] International Canada, March 1974, p. 46.
[86] See Peter Kornbluh & James G. Blight, “Dialogue with Castro: A Hidden History,” New York Review of Books, October 6, 1994, pp. 45-49.
[87] Arthur W. Rovine, Digest of U.S. Practice in International Law, 1974, (Department of State Publication 8809, July 1975), p. 604.
[88] Business International, May 10, 1974, p. 151.
[89] Wall Street Journal, March 11, 1974, p. 6.
[90] Kobrin, “Enforcing Export Embargoes Through Multinational Corporations,” p. 36.

motivated by political risk in the United States as the transaction was a very small part of its $3 billion in annual sales, including substantial defense contracts with the U.S. federal government. The subsidiary, however was clearly interested in the sale, which it saw as the beginning of an economic relationship.[91]

These calculations of political risk changed after the issue was made public. The Minister of Industry Trade and Commerce declared that the parent company ought not to have interfered and denounced U.S. policy as “commercial colonialism” and “intolerable interference in our internal affairs.”[92] The case also triggered the passage of the Combines Investigation Act, which made it illegal for Canadian-incorporated firms to comply with foreign laws or directives that adversely affect the Canadian economy.[93] On February 13, 1975, the State Department announced that the exemption to Litton would be granted, citing the need for flexibility to avoid conflict with allies. It continued to deny that this indicated any change in the embargo policy.[94]

The Removal of Extraterritorial Sanctions

Why did the U.S. reconcile itself to this overt challenge to its embargo policy? The Litton case did coincide with a high-level NSC review of the Cuban denial program. The purpose of that review was to frame a response to increasing Latin American defections from the OAS embargo. Kissinger concluded that the erosion of the multilateral embargo ended the justification for extending U.S. law into third countries. Continuing the policy only increased diplomatic friction and delegitimized U.S. investments abroad by projecting an image that they would act as instruments of U.S. foreign policy at the expense of the host country's economic interests. The latter issue was particularly salient in U.S.-Canadian relations because extraterritorial disputes were "tailor-made for Canadian nationalists who want to place greater restrictions on foreign investments.”[95] William D. Rogers, Undersecretary of State for Inter-American Affairs, concluded that the law should be changed because it "generates a reaction in Canada out of all proportion to its possible effect on Cuba or our Cuban policy."[96]

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[91] William Borders, "U.S. Subsidiary in Canada Forced to Drop Cuba Deal," New York Times, December 24, 1974, p. 3; Globe and Mail, December 25, 1974.

[92] International Canada, December 1974, p. 230-231.

[93] Leyton-Brown, "Extraterritoriality in Canadian-American Relations," p. 191.

[94] New York Times, February 15, 1975, p. 11.

[95] Porter (American Embassy, Ottawa) to State, December 27, 1974, p. 3 (document obtained from the Department of State through the Freedom of Information Act (DOS/FOIA)).

[96] Rogers to Kissinger, "Cuba Policy: License Applications for U.S. Subsidiaries in Canada," January 17, 1975 (DOS/FOIA).

Nonetheless, Kissinger still wanted to maintain the initiative in changing policy. At the time, the U.S. was exploring the possibility of a détente with Cuba through secret negotiations. Removing the extraterritorial sanctions was to be used as a "gesture of good will" which would, in Kissinger's words, "put the onus on [Castro] to take the next conciliatory gesture toward us."[97] There was, however, a need to move on this issue quickly out of concern that other actors might reverse the policy on their own. First, the U.S. recognized that more conflicts over foreign subsidiary sanctions were on the horizon and the U.S. would have no choice but to issue exemptions. Consequently, State recommended "acting before individual exemptions thoroughly erode the current policy." That way, the U.S. could "control the timing of the OAS consideration of the Cuban problem so as to be able to shape the process by which it is resolved."[98]

Second, there was concern that the policy might be reversed legislatively, removing a bargaining chip vis-à-vis Castro and dealing the administration a humiliating defeat. State recognized that support for sanctions "has markedly declined in the Congress and among the American public" because of "a widespread perception that Castroism is no longer an external threat and that the policy of isolation cannot be sustained in a world of détente."[99] In contrast to previous decades, the fear was that repeated disputes with allies would lead Congress to eliminate the sanctions altogether, preventing the executive branch from fine-tuning them to a new international environment. As Rogers concluded, "If the Executive does not take the initiative, Congress, which as already grabbed it, will keep it."[100]

The solution was for the U.S. to support the OAS decision in San Jose on July 29 to end the multilateral sanctions and support the right of each member state to adopt diplomatic or economic relations with Cuba "in accordance with its national policy and interests."[101] On August 21, the State Department announced the end of foreign subsidiary sanctions, "grant[ing] licenses permitting transactions . . . in foreign made goods when those subsidiaries operate in countries where local law favors trade with Cuba."[102] On October 8, 1975, Treasury revised the regulations to exempt foreign subsidiaries. The new regulations were not a complete abdication of jurisdiction. The parent corporation had to apply for a license and approval would only be granted if

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[97] Kornbluh & Blight, "Dialogue with Castro," p. 48.

[98] "Background - Cuba Policy," February 7, 1975 (Ford Library, Kissinger/Scowcroft Files, Latin America-Cuba), p. 5; "Cuba Policy," Briefing Paper, August 15, 1974 (Ford Library, Kissinger/Scowcroft Files, Latin America-General), p. 3.

[99] "Background - Cuba Policy," pp. 1-2.

[100] Kornbluh & Blight, "Dialogue with Castro," p. 47n15.

[101] International Legal Materials, 1975, p. 1354.

[102] Department of State Bulletin, September 15, 1975, p. 404.

certain conditions were met - i.e., the goods must be nonstrategic, the U.S. content must be less than 20%, and the subsidiary must be acting independently of the parent company. This last point was on occasion used by the Treasury to deny licenses for certain Cuban transactions.[103]

Nonetheless, from 1975 until 1992, foreign subsidiary trade with Cuba was relatively unencumbered by the embargo regulations, even during the Reagan administration's efforts to ratchet up economic pressure on Castro. From 1981 through 1991, OFAC approved 2549 license applications - 95% of the total submitted - for $3.765 billion in two way trade.[104] Policy makers concluded that the diplomatic fallout from repeated confrontations outweighed any added coercive benefit from targeting this trade and there was not yet domestic constituency strong enough to alter that calculation.

Sanctions Resurgent? The Return of Extraterritorial Sanctions in the 1990s

The 1990s has witnessed an expansion of U.S. extraterritorial sanctions. This trend has been resisted by the executive branch because past confrontations convinced policy makers that the diplomatic costs of such efforts were likely to exceed the coercive gains. Rather, the initiative has come from Congress, many of whose members expressed frustration and anger at allies who were seen as taking a free ride on U.S. restrictions. Proponents of tougher sanctions dismissed prudential arguments against extraterritoriality put forward by administration officials as little more than obsequiousness toward allies who should be deferential to U.S. leadership.

The two measures that have caused the greatest acrimony in U.S.-Canadian relations are the Cuban Democracy Act (CDA), which reimposes the Cuban embargo on foreign subsidiaries, and the Helms-Burton law, which targets non-U.S. firms who sign joint ventures with the Cuban government. A hegemonic decline model would predict that both are likely to fail. Nonetheless, the CDA has virtually eliminated foreign subsidiary trade with Cuba and Helms-Burton has had a chilling effect on many prospective investors. The central reason why the U.S. have been more successful in the 1990s than in the 1970s is the change in the domestic politics of the Cuban issue. This makes credible the likelihood of costs for engaging in proscribed behavior - i.e., the virtual certainty of enforcement against violations by foreign subsidiaries, and the risk of

[103] Mestral and Gruchalla-Wesierski, Extraterritorial Application of Export Legislation, p. 168.

[104] see U.S. Congress, House, Committee on Foreign Affairs, Cuba and the United States: Thirty Years of Hostility and Beyond, Hearings, August 2, 1989, pp. 125-126; Kam S. Wong, "The Cuban Democracy Act of 1992: The Extraterritorial Scope of Section 1706(a)" University of Pennsylvania Journal of International Business Law (Winter 1994), p. 677.

costly and indeterminate litigation in the U.S. courts for MNCs contemplating joint ventures.

The Cuban Democracy Act

The Cuban Democracy Act (CDA), signed by President Bush on October 23, 1992, reimposed the Cuban embargo on foreign subsidiaries. The impetus behind this effort came from the Cuban-American National Foundation (CANF), the leading Cuban-American pressure group, and a congressional coalition of conservative Republicans, the Florida delegation, and some Democrats, most notably Rep. Robert Torricelli (D-N.J.). What triggered this coalition was the increase in foreign subsidiary trade with Cuba from an average of $259 million in the 1980s to $705 million in 1990 and $718 million in 1991 following the disappearance of the Soviet subsidy. Most of the increase consisted of hard currency trade for consumable goods by the European and Canadian subsidiaries of U.S. grain companies.[105] To sanctions proponents, U.S. MNCs were prolonging the life of Castro's regime.

The device advanced to end this relationship the Mack Amendment, which sought to remove the 1975 exemption for foreign subsidiaries. Over the next three years, it was appended to several pieces of unrelated foreign relations bills. Finally, in 1992, it became part of the Cuban Democracy Act, a bill sponsored by Rep. Torricelli.[106]

The Bush administration initially opposed the Mack Amendment and actually vetoed a 1990 export administration bill that contained it. In line with the policies of its predecessors, it believed that extraterritorial sanctions were futile and would lead to unproductive disputes with allies. Administration officials testified that the 1975 exemption was not a loophole, but a conscious decision to avoid confrontations with allies comparable the Cuban episodes in the mid-1970s and the pipeline sanctions in the early 1980s.[107] Its elimination would place U.S. firms in a kind of “Catch-22.” President Bush noted this explicitly in his memorandum of disapproval following his veto: “Extraterritorial application of U.S. law . . . could force foreign subsidiaries of U.S. firms to choose between violating U.S. or host country law.”[108]

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[105] Business Latin America, November 11, 1991, p. 363 and October 26, 1992, p. 366.

[106] Jason Bell, "Cuban Democracy Act," Inter-American Law Review 25:1 (1993), pp. 93-96.

[107] For references to those precedents, see the testimony of Robert Gelbard and Christopher Hankin in U.S. Congress, House, Consideration of the Cuban Democracy Act of 1992, Hearings and Markup, pp. 402-404.

[108] Public Papers of the President of the United States: George Bush, 1990, p. 1620; The “Catch-22” metaphor was used by Lawrence Eagleburger and cited in 137 Congressional Record: House, October 31, 1991, p. 8712.

This logic was unpersuasive to congressional advocates of sanctions. First, they denied that the measure was extraterritorial. Even though it attaches a legal consequence to behavior outside the U.S., enforcement takes place against the home office, not in another jurisdiction.[109] Moreover, Rep. Torricelli spoke for most of the supporters of the CDA when he challenged the administration's argument regarding the need to take into consideration allied concerns about sovereignty: "to defer to those judgments to Ottawa, London, or Paris, would be to abrogate a principal responsibility of this administration . . . an obligation to the Untied States to give some deference to us in the region."[110]

While the administration remained concerned about its diplomatic repercussions, domestic factors would lead it to embrace the CDA. In the spring of 1992, many Democrats, including their presumptive presidential nominee, Bill Clinton, endorsed the CDA as a means of winning Cuban-American votes and political contributions.[111] As a result, the administration dropped its opposition and instructed the State Department to negotiate a compromise with Congress and the CANF.[112] It did succeed limiting the Mack Amendment to prospective contracts, averting the almost certain political fallout from mandating the abrogation of contracts legally entered into on foreign soil.[113] In one crucial way, however, the CDA was more severe than the pre-1975 regulations. The Mack Amendment removed administrative discretion over issuing licenses, eliminating what had in the past been an important "safety valve" in defusing bilateral conflicts.[114] While this seemed likely to exacerbate conflicts with allies, electoral considerations forced the administration's hand. As one former political appointee at State explained it, "the worst that the Canadians and the British could do to President Bush in 1992 paled in comparison to what Florida voters could do."[115]

Canada joined almost all of America's closest allies and trading partners in condemning the CDA as an infringement of its economic sovereignty. The Canadian Attorney General also issued a blocking order under the Foreign Extraterritorial Measures Act (FEMA), making it illegal for Canadian-based subsidiaries to comply with the CDA and requiring them to report all directives from the U.S. government or the home office.[116]

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[109] see the remarks of Rep. Torricelli in U.S. Congress, Consideration of the Cuban Democracy Act, p. 403.
[110] Ibid., pp. 402, 403.
[111] Wall Street Journal, August 3, 1992, p. 20.
[112] Congressional Quarterly Weekly Report, May 9, 1992, p. 1261.
[113] Congressional Quarterly Weekly Report, May 23, 1992, p. 1462.
[114] U.S. Congress, Cuban Democracy Act of 1992, p. 3.
[115] Confidential Interview
[116] Selma Lussenberg, "The Collision of Canadian and U.S. Sovereignty in the Area of Export Controls," Canada-United States Law Journal (1994), pp. 147-149. FEMA was passed by the Canadian Parliament in 1984 in response to U.S. extraterritorial enforcement of anti-trust (the Uranium Cartel case) and export controls (the pipeline sanctions).

In theory, the passage of the CDA and the issuance of the blocking orders created an irreconcilable conflict of laws and set the stage for another major confrontation over extraterritorial sanctions. Despite predictions made in 1992, there have been no serious disputes comparable to the Ford-Canada case. The principal reason for this is the adoption of conflict avoidance strategies by both private and public actors. On the corporate side, the foreign subsidiaries of U.S. firms have discreetly terminated their Cuban relationships. An OFAC study reported that licensed trade had dropped to $1.6 million after the passage of the CDA, all from pre-existing contracts.[117] While the possibility remains that companies may continue to engage in unlicensed trade, most of the evidence indicates that this has also ceased. As of this writing there have been no cases of subsidiaries appealing to the Canadian government for diplomatic protection against U.S. controls.[118]

Corporate acquiescence to extraterritorial controls stands in contrast to the 1970s when MLW and Cole sided with Canada in pushing for Cuban trade. One reason was that in the 1990s, economic opportunities in Cuba are bleaker than in the 1970s, when Cuba earned export windfall because of a steep rise in the price of sugar and the USSR was willing to guarantee Cuba's obligations. More important, however, was the change in the domestic situation in the United States. Unlike the 1970s, Ottawa could no longer persuade Washington to issue a license because of the removal of the exemption procedure. Moreover, unlicensed trade would impose serious risks on the parent and lead to certain punishment if discovered. As one international lawyer noted, since the CDA had a strong constituency, "It would be politically hazardous for any administrative agency to disregard the embargo's prescriptions."[119]

Second, the Canada government was less aggressive in moving beyond principled opposition to the enforcement of its preferences. It did investigate several companies that had ceased their Cuban trade after passage of the CDA. Most of these investigations were triggered by complaints from local companies that U.S.-owned firms had refused to bid on Cuban-related contracts.[120] As of this writing, there have been no prosecutions. Canadian officials have explained this outcome in terms of the limits (and intentions) of the law. Under FEMA, a mere correlation between passage of the CDA and termination

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[117] See testimony of OFAC Director Newcomb in U.S. Congress, Joint Hearing Before the Subcommittees on Economic Policy, Trade, and Environment, Western Hemisphere Affairs, and International Operations, U.S. Policy and the Future of Cuba: The Cuban Democracy Act and U.S. Travel to Cuba, November 18, 1993, pp. 21-23.

[118] see Cuba Report, April 1993, p. 4; interview, Justice Canada.

[119] John L. Ellicott, "Sovereignty and the Regulation of International Business in the Export-Control Area," Canada-United States Law Journal 20 (1994), p. 138.

[120] Cuba Business, November 1992, p. 1; Toronto Star, Sept. 3, 1994; This was confirmed by interviews at Justice Canada and the Department of Foreign Affairs and International Trade.

of subsidiary trade with Cuba is a necessary but insufficient condition for triggering the law. Prosecution requires the production of a directive either from the parent or a U.S. government agency. Such evidence is only likely to be forthcoming if the subsidiary itself wants to trade with Cuba and is blocked by the parent or OFAC. In other words, the law is less a means of vindicating economic sovereignty than of providing a service to subsidiaries who are interested in Cuban trade but have been prevented from pursuing it by the home office or the U.S. Treasury Department.[121] Given the certainty of enforcement in the U.S. and the understandable reluctance of subsidiaries to put their home offices at risk, it has been a service without any takers.

Ottawa was also less aggressive in challenging the embargo than in the 1970s. In the 1990s, the CDA engaged matters of principle, not significant economic interests, given Cuba's economic troubles and the availability of Canadian firms that could replace their U.S. counterparts. Moreover, Canada recognized that there were more important issues on the diplomatic agenda, such as the passage of NAFTA and controversies over softwood lumber and acid rain. Given the intensity of congressional sentiment over Cuba, a policy of objecting in principle but avoiding enforcement actions that might bring a case to a confrontation better served Ottawa's ability to promote a broad range of bilateral interests.

Washington shared this conflict-avoidance strategy. Even though the law was more restrictive than the original CACRs, the executive branch used what discretion existed in the regulations to defuse potential conflicts. First, the one major concession the State Department was able to obtain from Congress was an exemption for pre-existing contracts. Since Canadian officials asserted that forced contractual abrogation would almost certainly trigger the blocking legislation, the exemption was interpreted generously to avoid a conflict of laws.[122] Second, Washington was willing to interpret the scope of the regulations narrowly, issuing licenses in areas not expressly forbidden by the regulations. The exact language of the CDA bars foreign subsidiaries from trading in goods and commodities. This has allowed Treasury to exempt those transactions that do not narrowly fit that definition in order to avert potential crises.[123]

Finally, while Treasury acknowledged that the law required enforcement even in cases of foreign sovereign compulsion, it still has some discretion on the size of the penalty. That would hinge on the degree of influence the parent corporation has over the

[121] Interviews at Justice Canada and the Department of Foreign Affairs and International Trade.

[122] Ellicott, "Sovereignty and the Regulation of International Business," p. 138; Interviews at Justice Canada and the State Department's Office of Economic Sanctions Policy.

[123] Interview, Office of Foreign Assets Control; For cases, see Ellicott, "Sovereignty and the Regulation of International Business," pp. 143-144.

subsidiary and its willingness to use it. A possible illustration is the Walmart controversy. In early 1997, a customer complained to a local television station that Walmart's Winnipeg outlet was selling Cuban-made pajamas. Walmart-Canada was then instructed by the home office in Arkansas to remove the offending pajamas from all its 136 stores after consultation with OFAC on the applicability of the CDA.[124] However, the decision - including the consultation with the home office - was reported in the Canadian press at a time of strong Canadian anger over the passage of the Helms-Burton law. As a result, Ottawa informed Walmart-Canada that its actions violated FEMA. The Canadian affiliate then defied the instructions of the home office and restocked its stores with the Cuban pajamas to avoid violating Canadian law. Some legal analysts have speculated that the split between the subsidiary and the parent - each conforming to the law of the country in which it is located - was a means of averting legal liability in both countries.[125] Treasury officials, however, contend that the law makes the parent liable for the actions of its subsidiary even if it lacks effective control. While the case is still pending, the size of the civil penalty imposed on Walmart will probably depend on a "good faith effort" to exercise whatever control is feasible.[126]

With the exception of the Walmart case, the CDA has been successful in inducing subsidiary compliance with its regulations. It has not been able to translate that success into the imposition of added economic costs on Cuba Virtually all of the Cuban trade captured in the widened sanctions net took place in hard currency for readily available goods. If Cuba has hard currency, it can buy anywhere. If the most of the sanctioned trade is in agricultural goods and light manufactures, there are numerous foreign suppliers that can replace U.S. subsidiaries. As a result, foreign subsidiary sanctions only worked to the benefit of wholly foreign-owned competitors.[127] While the U.S. may have been able to extend its regulations to U.S. firms in third countries, it was not able to translate that influence into the imposition of significant added costs on Cuba's economy.

The Helms-Burton Law

A second and more ambitious effort at extraterritorial sanctions against Cuba is the Cuban Liberty and Solidarity Act, more commonly known as the Helms-Burton law. These sanctions target foreign MNCs with no connection to the United States. The technique employed by Helms-Burton is a novel one. Rather than impose a direct

[124] Washington Post, March 14, 1997, p. A29.
[125] New York Times, March 14, 1997, p. D4.
[126] Interview, Office of Foreign Assets Control.
[127] see Business Latin America, August 22, 1994, p. 2.

secondary boycott, it tries to achieve the same effect by empowering U.S. citizens to sue investors who benefit from properties that were confiscated from them after the Cuban Revolution.

The central target of the Helms-Burton law is the growing number of joint ventures between non-U.S. MNCs and Cuban state-owned enterprises. These emerged out of Cuba's decision to liberalize its foreign investment laws in order to earn desperately needed hard currency after the loss of its Soviet subsidy. As a result, the early 1990s saw an expansion of joint ventures in oil exploration, mining, biotechnology, pharmaceuticals, and tourism.[128] The most significant (and controversial) of these was with Canada's Sherritt-Gordon. In 1991, Sherritt established a joint venture in Cuba which gave it the right to mine, refine, and market cobalt and nickel from Moa Bay, a property that was owned by the U.S. firm, Freeport McMoran, prior to the Cuban revolution. Sherritt agreed to invest $12 billion over a five-year period to modernize operations and sold Cuba a stake in its Alberta refinery in exchange for access to Cuban ores.[129]

For the purpose of deterring joint ventures, the most punitive provisions of Helms-Burton are Titles III and IV. The former creates a new private right of action which empowers U.S. citizens, including naturalized Cuban-Americans, to sue foreign corporations for triple damages if they are "trafficking" in properties confiscated after the Cuban revolution. The term "trafficking" is consciously borrowed from the narcotics field to stigmatize what foreign businesses see as normal investment opportunities.[130] It is defined broadly to encompass virtually any commercial or financial activity with those properties.[131] The latter mandates visa denials to any person who continues to "traffic" in confiscated property after the enactment of the bill. This ban applies to corporate officers, shareholders with controlling interests, spouses, and minor children.[132]

The ostensible purpose of Title III is to remedy the injury imposed on U.S. property owners by Castro's confiscations.[133] The underlying aim of the bill - explicitly acknowledged by its authors - is to multilateralize economic warfare by pressuring

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[128] Anna Szterenfeld, "Foreign Investment Increases, Economic Reform Underway," New York Law Journal, February 20, 1996, p. 53.

[129] New York Times, April 9, 1992, p.

[130] Rep. Ileanna Ros-Lehtinen (R-Fla), a strong sanctions proponent, referred to this practice as "fencing stolen property." See U.S. Congress, House, Committee on International Relations, Cuban Liberty and Democratic Solidarity Act of 1995, Hearings and Markup, June 30 and July 11, 1995, p. 58.

[131] Andreas F. Lowenfeld, "The Cuban Liberty and Solidarity (Libertad) Act," American Journal of International Law (July 1996), p. 426.

[132] Mark P. Sullivan, "Cuba: Issues for Congress," Congressional Reference Service, Issue Brief, June 25, 1997, pp. 7-8.

[133] U.S. Congress, House, Committee on International Relations, The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Report 104-468, March 11, 1996, pp. 57-58.

foreign firms to abide by the U.S. embargo.[134] What is novel about the approach is the means. Unlike a direct secondary boycott, enforcement takes place not through government regulation, but by enabling citizens to file lawsuits. The actual wording of the legislation is designed to serve the latter rather than the former purpose. Some legal critics of the bill note that the term “trafficking” is defined so broadly as to encompass just about any economic activity. Such language is likely to encourage a large number of claims, many of dubious merits, and allow the courts to decide the scope of the law. This may be a liability from the vantage point of creating predictable expectations for claimants and investors. To sanctions proponents, it is an asset, creating greater uncertainty for prospective investors. As Senator Helms’ spokesman noted: “how will investors know what to expect? They will face a legal minefield. If they misstep, they could blow up.”[135]

As in the case of the CDA, the executive branch initially opposed Helms-Burton. Not only would it strain relations with allies; it would also run afoul of international laws and institutions the U.S. had sought to promote. First, officials warned that Title III could be interpreted as a secondary boycott, a practice the U.S. had opposed as illegal when employed by the Arab League against Israel. Second, traditional international law holds that a state is liable only for confiscating the property of foreign nationals, not its own citizens. Therefore, extending the right to sue to naturalized Cuban-Americans who were Cuban citizens at the time created an international remedy for actions that did not violate international law. This could set a precedent for reciprocal actions by others since similar devices could be used to make claims against U.S. firms that invest in former communist countries, such as Vietnam or the former German Democratic Republic.[136] Finally, these actions could be challenged as contrary to international trade agreements, such as NAFTA and the World Trade Organization (WTO). This could weaken the credibility of U.S. leadership in promoting international trade rules through the WTO. As noted by one former Commerce Department official: “A fundamental goal of United States policy is to expand the scope of national economic practices that are subject to the WTO and regional trade agreements . . . Helms-Burton undermines America’s ability to negotiate rules for trade that assure its exports and MNCs freer and fairer treatment

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[134] Rep. Burton stated, "if you choose to do business in Cuba . . . you can forget about doing business in the United States." Globe and Mail, June 15, 1995, p. B1.

[135] Statement of Marc Thiessen, cited in Globe and Mail, March 7, 1996

[136] U.S. Congress, House, Cuban Liberty and Democratic Solidarity Act of 1995, pp. 17-19.

abroad because it calls into question United States resolve to live by rules it prescribes for others."[137]

Sanctions proponents dismissed these arguments. First, they rejected the international law critique by denying that the sanctions were extraterritorial. Even if the end result was to force upon foreign firms a choice between Cuba and the U.S., enforcement would take place exclusively in the U.S. to remedy a specific wrong perpetrated against U.S. citizens.[138] Second, they criticized administration arguments as overly indulgent of allied sensitivities. Senator Helms discounted the costs of the bill by drawing an analogy with the CDA and an EU warning of its "grave and dangerous effect" on bilateral trade: "Once other nations understood that we are serious . . . they respected our decision. The CDA did not hurt our trade relations with Europe."[139] Moreover, the bill's supporters believed that the administration got its priorities reversed when it emphasized the need to consider allied sensitivities. As Rep. Torricelli declared: "I think the United States has a right to expect Canada to be deferential. Cuba is disproportionately so much more important to the United States than it is to Canada."[140]

On March 12, 1996, the Clinton administration withdrew its objections and signed the bill. The catalyst for its reversal was the downing by a Cuban MiG-29 of two unarmed Cessna aircraft, leafleting the island for the Cuban exile group, Brothers to the Rescue. The final bill removed some of the most legally indefensible aspects of the original bill, such as a secondary boycott on Cuban sugar. The administration was also able to obtain a provision that allows the President to delay implementation of the right to sue under Title III every six months for reasons either of national interest or expediting democracy in Cuba.[141] Yet, the administration had to accept a number of significant limits on its discretion. First, the Cuban embargo was no longer based on an executive order that the President could flexibly adapt as circumstances change. Second, the President could only suspend the right to sue under Title III, not the accumulation of liability. Finally, there was no waiver provision for Title IV's visa denials to "traffickers" in confiscated property.[142]

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[137] Peter Morici, "The United States, World Trade, and the Helms-Burton Act," Current History (February 1997), p. 89.

[138] See the testimony of Monroe Leigh in U.S. Congress, Senate, Committee on Foreign Relations, Libertad Act: Implementation and International Law, July 30, 1996.

[139] U.S. Congress, Senate, Committee on Foreign Relations, Cuban Liberty and Democratic Solidarity Act, Hearings, May 22, 1995, p. 38; The State Department conceded that the effect of allied blocking orders was "minimal" and that there was "little or no adverse effect" on US-European trade. (p. 159).

[140] cited in Boston Globe, June 25, 1995, p. 55.

[141] Lowenfeld, "The Cuban Liberty and Solidarity (Libertad) Act," p. 426.

[142] Ibid., p. 422.

As in the case of the CDA, the international response to Helms-Burton was near-universal condemnation. Canada joined that consensus, expressing concern over "the longer-term implications of . . . resorting to this type of legislation to try and force other nations to act according to U.S. objectives."[143] In order to neutralize Helms-Burton, it issued a blocking order under FEMA. The directive denies any legal validity to Helms-Burton by refusing to recognize any verdict, empowering the Canadian courts to block the production of records associated with any lawsuit, and requiring Canadian firms to report any directives associated with extraterritorial laws to the Attorney General of Canada. It also contains a "clawback" provision permitting Canadian firms to recover any losses incurred by U.S. litigation.[144] This device is designed to discourage potential claimants by diminishing the prospects of a settlement, thereby bolstering the confidence of Canadian firms to pursue Cuban investments as normal business opportunities.

Given the conflicting domestic and international pressures over an issue not central to his priorities, President Clinton sought a compromise to defuse the issue. On July 16, 1996, he allowed Title III to go into effect, but suspended the right to sue for six months citing the portion of the legislation that allows a waiver if it would expedite the promotion of democracy in Cuba. Undersecretary of Commerce, Stuart Eizenstat, was dispatched to allied capitals to use the six-month deadline as leverage to build tougher multilateral policies toward Cuba. After an initially chilly reception, he was able to obtain nonbinding commitments to attach human rights criteria to economic and diplomatic relations. This was enough for President Clinton to promise continued waivers through his administration.[145] There was, however, no discretion over Title IV. As a result, visa denials were issued to nine officials of Sherritt-Gordon, as well as executives from four other MNCs.[146]

Even though the suspension of the right to sue has so far prevented the initiation of litigation, Helms-Burton has had much of the dissuasive impact on new investments that its authors had anticipated. The law magnifies the risks facing any Cuban venture by raising the prospect of an expensive entanglement in the litigious U.S. legal system. As a result, the introduction of Helms-Burton in 1995 and its passage in 1996 have induced a degree of corporate retrenchment - to a minimal degree for existing investors and to a more significant degree for prospective investors.

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[143] Forsythe, "Introductory Note," p. 111.
[144] International Legal Materials (1997), pp. 117-124.
[145] Sullivan, "Cuba," pp. 8-9.
[146] Ibid., pp. 9-10.

The Helms-Burton law did persuade a few firms to terminate their Cuban operations. Even though the right to sue was suspended, Title III did go into effect. That meant that liability would begin to accrue if companies did not divest themselves of their Cuban properties within three months of the enactment of the bill. The State Department announced that four companies availed themselves of this option - two Spanish hotel chains, a Mexican cement company, and Redpath Sugar, a Canadian subsidiary of the U.K. firm Tate & Lyle, which terminated its annual purchase of 100,000 tons of Cuban sugar.[147] In the Redpath case, the Canadian Justice Department investigated the subsidiary for a possible violation of FEMA, but no action was taken.[148] This demonstrates the limitations of blocking orders when risk-averse companies choose to forego Cuban trade because of the risk of entanglement in U.S. regulations.

Most firms, however, calculated that the risks of litigation were less than the costs of abandoning capital already sunk into their Cuban projects. In some cases, this was because the companies had few assets in the U.S. or were confident that claims would not be made. Even where those conditions were absent, the profitability of many Cuban ventures made staying a risk worth taking.[149] This was most clearly evident for Sherritt-Gordon despite the fact that it was singled out by sanctions proponents, its officials were the first denied entry to the U.S. under Title IV, and it faced a credible threat of litigation from the former U.S. owner. Given the crucial role Cuban ores have played in revitalizing Sherritt's Canadian refineries, it calculated that the risks were heavily outweighed by the benefits. As a result, it continued its investment in Cuba, contributing to a doubling of nickel output from 1994 to 1996. And to defy the U.S. embargo, it held its 1996 annual board meeting in Havana.[150]

Helms-Burton has been more successful in deterring prospective investments. This began after the introduction of the bill following the Republican congressional sweep in 1994. As a result, the number of new joint ventures dropped from 74 in 1994 to 31 in 1995 as risk-averse firms sought to protect themselves against worst-case scenarios. Even though that number rebounded to 42 in 1996, there has been a marked disappearance of many of the larger firms whose stakes in the U.S. make them vulnerable to litigation.[151] Nor have the clawback provisions of their home country laws assuaged these risks. Even if they were able to recover everything lost to claimants in the U.S.,

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[147] Gareth Jenkins, "Implications for Trade and Investment of the Cuban Liberty and Solidarity (Libertad) Act," Annex to Cuba Business (July/August 1996), p. 2.

[148] Ottawa Citizen, March 9, 1996, p. E1.

[149] Jenkins, "Implications for Trade and Investment," p. 8.

[150] Economist Intelligence Unit, Cuba, Dominican Republic, Haiti, Puerto Rico, 1996:3, pp. 14-15 and 1997:1, p. 21; Cuban Business, November 1996, p. 3.

[151] Jenkins, "Implications for Trade and Investment," p. 2.

this would represent a significant diversion of resources to time-consuming litigation away from more lucrative endeavors - and only if the claimants have attachable assets in Canada.

The salience of these risks has been compounded by the impact of U.S. law on the ability of new investors to obtaining financing and political risk insurance. First, Canada's *Financial Post* reported that Canadian banks cut back on loans to Cuban operations after the introduction of Helms-Burton, and many abruptly terminated them after the bill's passage.[152] All had substantial assets in the United States which, given the ambiguous definition of the term "trafficking," could be vulnerable to lawsuits. Second, political risk insurers, such as Lloyds of London, would only provide coverage for Cuban ventures if the investor certifies that it has no connection with property claims in the U.S. - a guarantee that is difficult to prove. All the risk associated with Helms-Burton consequently falls entirely on the investor.[153] Despite opposition from their home governments, non-U.S. banks and insurers adhered to the prescriptions of U.S. law. As one international banking executive put it, "We have to operate within the legal framework however much we disapprove of it."[154]

In sum, Helms-Burton has deterred many Canadian and other non-U.S. firms from establishing joint ventures with Cuba despite the decline of American hegemony and near-universal opposition to the policy. Most of those firms are active in the U.S. and, hence, vulnerable to entrapment in the U.S. legal system. What makes this vulnerability a credible risk to MNCs is U.S. domestic politics - i.e., the strength of the Cuban-American lobby and its allies in Congress. While the administration has relieved them of that immediate concern, its pledge to waive Title III can only hold until the end of its term or the next Cuban-American crisis. Since domestic politics makes Helms-Burton a credible threat, investors, creditors, and insurers have factored it into their economic calculations however much they or their governments object.

Conclusion

Extraterritorial sanctions are a form of "coercive cooperation," in that success involves extending U.S. regulations to private actors in third countries that oppose U.S. policy. Neorealism correlates the success of such influence attempts to the centralization of economic resources in a dominant state. This study, however, found that the ability to

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[152] see Financial Post, March 24, 1995, p. 9 and June 29, 1996, p. 1; also see Stephen H. Marcus, "Limiting the Legal Risks of the Helms-Burton Act," Canadian Banker (July/August 1996), pp. 9-10.

[153] Business Insurance, August 19, 1996.

[154] cited in Financial Times, July 24, 1996, p.

Washington to influence firms on Canadian territory was influenced more by domestic politics than by the structural position of the United States in the world economy. These findings support three challenges to hegemonic decline explanations of U.S. foreign economic policy.

First, neorealism has been criticized for using a "power as resources" model, assuming that concentrated resources automatically translate into economic leverage in a variety of issue areas.[155] Yet states may be reluctant to exercise this leverage because of the costs of such exertions on other goals. These costs often dissuaded U.S. policy makers from enforcement because its sanctions were only one part of an architecture of interests and institutions they sought to promote after the Second World War. For example, Michael Mastanduno found that even at the height of U.S. power, Washington was unwilling to push Western Europe as far as it wanted in the direction of economic warfare because of the costs of such exertions on the cohesiveness of the Atlantic alliance.[156] Similarly, successive administrations were reluctant to enforce their interpretations of jurisdiction after Canadian protests because of the risks such actions posed bilateral cooperation and national treatment for U.S. investors.

Second, the findings support those critics of the hegemonic model who contend that it overstates the decline of U.S. economic leverage even if the U.S. no longer occupies the same position in the world economy that it did in the early Cold War era. Bruce Russett, for example, questioned whether the U.S. has lost what he calls "structural power" - i.e., "the ability to define the context within which others must make decisions."[157] The record of the CDA and Helms-Burton indicates that the U.S. retains this capability vis-à-vis overseas corporate activity. The U.S. is still the largest and most open economy in the world. The threat to denying access to it or penalizing behavior within it has been a significant deterrent to foreign subsidiaries and many non-U.S. MNCs.

Finally, domestic politics was the strongest determinant of corporate compliance with U.S. policy because of its impact on the credibility of reprisals. Administration policy may have been a credible deterrent to unlicensed trade. Its conflict-avoidance approach to bilateral conflicts made it less so when the Canadian government interceded. It was only when there was intense congressional, interest group, or public support for the

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[155]see David A. Baldwin, "Power Analysis and World Politics: New Trends versus Old Tendencies," World Politics, 31 (January 1979), p. 193; and Robert O. Keohane, "Theories of World Politics: Structural Realism and Beyond," in Keohane, ed., Neorealism and Its Critics (New York: Columbia University Press, 1986), p. 167.

[156] Michael Mastanduno, "Trade as a Strategic Weapon: American and Alliance Export Control Policy in the Early Postwar Period," International Organization 42:1 (Winter 1988), pp. 148-49.

[157] Bruce Russett, "The Mysterious Case of Vanishing Hegemony or Is Mark Twain Really Dead?," International Organization (Spring 1985), p. 211.

sanctions that the risks to private actors deterred them from seeking Canadian assistance or taking advantage of legally permissible trade with China and Cuba.

The key role played by domestic politics was evident in all three periods. In the early days of the Chinese and Cuban embargoes, the U.S. sought compromise rather than enforcement because of the fear that the latter would generate public antagonism in both countries and poison bilateral relations. Despite the issuance of exemptions in almost every case, very little trade materialized, not so much because of the threat of official retaliation as from the political risks in the U.S. market due to the intensity of anti-communist sentiment. By the mid-1970s, the Canadian government and foreign subsidiaries were more aggressive in challenging extraterritorial sanctions because changes in the domestic political landscape decreased the credibility of congressional reprisals or losses in the U.S. market. In contrast to the earlier period, domestic pressures induced the executive branch to rein in the scope of its regulations because of the fear that Congress would use the repeated conflicts with allies as a justification for removing the embargo.

The extraterritorial sanctions of the 1990s have had a deterrent impact on private actors in Canada not because of a strong executive branch commitment; the Bush and Clinton administrations were as wary of their consequences as were their predecessors. Rather, it was because the interest group and congressional constituency behind the sanctions has made credible the imposition of costs - i.e., criminal and/or civil penalties for the home office if its subsidiary trades with Cuba, and the likelihood of indeterminate litigation as long as Helms-Burton remains on the books. This is not to argue that these exertions are not costly to the United States. Extraterritorial sanctions against Cuba, as well as Iran and Libya, have created strains with allies, jeopardized cooperation in areas where there is more of a consensus, weakened the credibility of U.S. leadership in the WTO, and set dangerous precedents that could be used against the United States. Economically, they have harmed U.S.-based MNCs by placing them in untenable conflicts of jurisdiction, tarnishing their image as "good corporate citizens" in the host country, and undercut their reliability as business partners. The fact that these costs are not immediately visible does not make them any less real. The executive branch, for the most part, recognizes this. Congressional supporters of sanctions and their domestic constituencies do not. As long as the latter are powerful enough to legislate their preferences, extraterritorial sanctions can pose credible risks to business ties between pariah states and any multinationals actively involved in the United States.