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Chiquita Goes Bananas: Counter-Terrorism Legislation Threatens U.S. Multinationals

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Cover Page Footnote

International Law; Commercial Law; Law

**CHIQUITA GOES BANANAS:
COUNTER-TERRORISM LEGISLATION
THREATENS U.S. MULTINATIONALS**

I. Introduction	263
II. Background Law	265
III. Las Autodefensas Unidas de Colombia.....	267
IV. Underlying Facts	271
V. Effects of Conviction.....	275
VI. Conclusion.....	278

I. Introduction

On September 17, 2007, Chiquita Brands International, Inc. (“Chiquita”) became the first major U.S. corporation to be charged “with having financial dealings with terrorists.”¹ The world’s largest banana producer² pled guilty to one felony count of engaging in transactions with a Specially-Designated Global Terrorist (SDGT) on March 19, 2007, in the U.S. District Court for the District of Columbia.³ Attempting to protect its employees, property, and a lucrative foreign banana investment, Chiquita admitted to paying a Colombian paramilitary group approximately \$1.7 million in “security” fees between 1997 and 2004 in violation of U.S. counter-terrorism legislation.⁴ Pursuant to a plea bargain with the U.S. Department of Justice (DOJ), the banana giant agreed to pay a \$25 million criminal fine, serve five years of

¹ Laurie P. Cohen, *Chiquita Under the Gun*, WALL ST. J., Aug. 2, 2007, at A1.

² *Id.*

³ Press Release, U.S. Dep’t of Just., Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay \$25 Million Fine (Mar. 19, 2007) http://www.usdoj.gov/opa/pr/2007/March/07_nsd_161.html [hereinafter DOJ Press Release].

⁴ Jordy Yager, *Chiquita Fined for Colombia Payments*, L.A. TIMES, Sept. 18, 2007, at A8; *see also* Factual Proffer at 8, U.S. v. Chiquita Brands Int’l, Inc., No. 07-055 (D.D.C. Mar. 19, 2007) *available at* <http://www.law.du.edu/index.php/corporate-governance/international-corporate-governance/us-v-chiquita-intl-brands> [hereinafter Factual Proffer] (follow “Factual Proffer” hyperlink).

corporate probation, and implement an effective compliance and ethics program to prevent future violations.⁵ As part of the plea agreement, Chiquita also agreed to fully cooperate with federal authorities in their ongoing investigation.⁶

Although Chiquita is the only U.S. corporation to have been prosecuted for such violations, the problems faced by the company are familiar to other American corporations operating abroad. Phoenix-based Freeport-McMoRan, one of the world's largest gold producers, reportedly paid Indonesian military forces nearly \$20 million between 1998 and 2004 to ensure the safety of their employees.⁷ Similarly, both Exxon and the Alabama-based coal-mining company, Drummond Co., were allegedly forced to build vocational schools, pave roads, support clinics, and subcontract projects to guerrilla-owned enterprises between 1990 and 2002 in order to peacefully co-exist with rebel groups and protect their Latin American investments.⁸

Due to the existence and commonality of these problems, Chiquita's conviction raises several important questions. Some experts question whether Chiquita's harsh sentencing will deter corporate self-reporting since "[companies] suffer no worse by waiting to get caught."⁹ Others question the extent to which corporate executives may be held individually liable for approving such payments.¹⁰ Still others wonder how Chiquita's conviction will affect foreign direct investment, especially in countries lacking political stability and security.¹¹ Despite the validity of

⁵ DOJ Press Release, *supra* note 3.

⁶ See Letter from Jeffrey A. Taylor, U.S. Attorney, to Eric H. Holder, Jr., Counsel for Chiquita Brands Int'l, Inc. (Mar. 6, 2007), <http://www.law.du.edu/index.php/corporate-governance/international-corporate-governance/us-v-chiquita-intl-brands> [hereinafter DOJ Plea Agreement] (follow "Plea Agreement" hyperlink).

⁷ See Jane Perlez & Raymond Bonner, *Below a Mountain of Wealth, a River of Waste*, N.Y. TIMES, Dec. 27, 2005, at A1.

⁸ Nazih Richani, *Multinational Corporations, Rentier Capitalism, and the War System in Colombia*, 47 LATIN AM. POL. & SOC'Y 113, 125 (2005).

⁹ See Cohen, *supra* note 1, at A1.

¹⁰ See Juan Forero, *Colombia May Seek Chiquita Extraditions*, WASH. POST, Mar. 21, 2007, at D1 (examining whether individual corporate executives will be extradited to Colombia for approving illegal transactions).

¹¹ Christiana Ochoa, *From Odious Debt to Odious Financing: Avoiding the Externalities of a Functional Odious Debt Doctrine*, 49 HARV. INT'L L.J. 109, 137 (2008).

these questions, the most pressing issue involves balancing economic prosperity and employee safety; specifically, how American multinational corporations are to remain internationally competitive despite tightening U.S. counter-terrorism legislation.

In Part II, this Note will examine the law prohibiting financial dealings with Specially-Designated Global Terrorists. Part III will discuss the right-wing paramilitary group at issue. Part IV will explore the facts underlying *U.S. v. Chiquita Brands Int'l, Inc.*,¹² and Part V will address the effects of Chiquita's sentencing. Finally, Part VI will conclude that the International Emergency Economic Powers Act unfairly disadvantages American corporations by forcing them to either risk the security of their foreign investments and the safety of their employees or suffer the substantial and unintended economic losses associated with foreign withdrawal.

II. Background Law

The International Emergency Economic Powers Act (IEEPA) was passed in 1977 as part of a congressional reform seeking to "revise and delimit" presidential powers in times of national emergency.¹³ The Act grants the President of the United States the authority to deal with "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."¹⁴ Specifically, the IEEPA confers upon the President the power to "investigate, regulate, or prohibit" a variety

¹² Count One – Engaging in Transactions with a Specially-Designated Global Terrorist, *U.S. v. Chiquita Brands Int'l, Inc.*, No. 07-055 (D.D.C. Mar. 14, 2007), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB217/indictment.pdf> [hereinafter Count One]; see also Government's Sentencing Memorandum, *U.S. v. Chiquita Brands Int'l, Inc.* No. 07-055 (D.D.C. Sept. 11, 2007), available at <http://www.law.du.edu/index.php/corporate-governance/international-corporate-governance/us-v-chiquita-intl-brands> [hereinafter Government's Sentencing Memorandum] (follow "Government Sentencing Memorandum" hyperlink).

¹³ International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (2000); see also S. Rep. No. 95-466, at 4541 (1977) (stating that the IEEP was primarily enacted as a result of "extensive use by Presidents of emergency authority under section 5(b) of the Trading with the Enemy Act of 1917 to regulate both domestic and international economic transactions unrelated to a declared state of emergency").

¹⁴ 50 U.S.C. § 1701(a) (2000).

of foreign transactions during times of declared national emergency.¹⁵ Should the President exercise his authority under the IEEPA, anyone convicted of willfully violating such established regulations or prohibitions may be fined up to \$50,000 and imprisoned for a period of up to ten years.¹⁶

Following the terrorist attacks of September 11, 2001, President George W. Bush issued Executive Order 13224 (the "Order") on September 23, 2001, pursuant to his authority under the IEEPA.¹⁷ The Order, which sought to disrupt terrorist financing, prohibited any United States person from engaging in transactions with any foreign persons determined by the Secretary of State, "to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States."¹⁸ In essence, the Order broadened the government's authority to freeze assets subject to U.S. jurisdiction that are connected to either a designated terrorist organization or an entity found to be associated with them.¹⁹ Once the Secretary of State designates an individual or an entity as a terrorist threat, the Department of the Treasury's Office of Foreign Assets Control (OFAC) identifies the party as a "Specially-Designated Global Terrorist" (SDGT) and publishes the designation in both the Federal Register and on the OFAC website.²⁰ To implement the sanctions imposed by the Order, the Secretary of the Treasury promulgated the Global Terrorism Sanctions Regulations.²¹

¹⁵ 50 U.S.C. § 1702 (2000).

¹⁶ 50 U.S.C. § 1705(b), *but see* 18 U.S.C. § 3571(b)-(d) (2000). Although §1705(b) of the IEEPA only provides for a maximum \$50,000 criminal fine, it also makes possible a prison term of ten years. 18 U.S.C. § 3559(a)(3) classifies any criminal statute which makes possible a prison term of ten to twenty-four years as a Class C felony. The fine for a felony is, for an individual, no more than \$250,000, twice the offender's gain, or twice the victim's loss, and for an organization, no more than \$500,000, twice the offender's gain, or twice the victim's loss.

¹⁷ Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

¹⁸ *Id.* § 1(b).

¹⁹ See Press Release, U.S. Dep't. Treas., Contributions of the Department of the Treasury to the Financial War on Terrorism – Fact Sheet (Sept. 10, 2002), <http://www.treas.gov/press/releases/reports/2002910184556291211.pdf> [hereinafter *DOT Fact Sheet*].

²⁰ See 31 C.F.R. § 594.201 (2005).

²¹ *Id.*

The Secretary of State may also designate a group as a Foreign Terrorist Organization (FTO) pursuant to the Immigration and Nationality Act if it is determined that the group is a “foreign organization” and “engages in terrorist activities, terrorism, or retains the capability and intent” to engage in either.²² To make this designation, the Secretary of State must also determine that the terrorist activity threatens either the security of “United States nationals or the national security of the United States.”²³ If a group is designated as a FTO, then it is unlawful for any person in the United States, or subject to the jurisdiction of the United States, to knowingly provide “material support or resources” to the group.²⁴ Those who violate this prohibition are subject to fine, imprisonment not exceeding fifteen years, or both, and if death of any person results, then “for any term of years or for life.”²⁵

III. Las Autodefensas Unidas de Colombia

For nearly sixty years, paramilitary groups have been operating in Colombia as a “loose connection of irregular combatants.”²⁶ Their violent existence, marked by kidnappings, assassinations, and forced disappearances, began in the 1950s with the aim of protecting agrarian enterprises from extreme left-wing groups.²⁷ Despite disapproving of their violent tactics, the Colombian government passed a law in 1994 permitting the groups to organize into armed “private security services.”²⁸ The government hoped that by legalizing their organization, the paramilitary groups would deescalate the mounting violence instigated by dangerous guerilla insurgents like the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) and the *Ejercito de Liberacion Nacional* (ELN).²⁹ Having been tortured and

²² See 8 U.S.C. § 1189 (1) (a) (2000).

²³ *Id.*

²⁴ 18 U.S.C. § 2339B (2000).

²⁵ *Id.*

²⁶ See Luz E. Nagle, *Colombian Asylum Seekers: What Practitioners Should Know About the Colombian Crisis*, 18 GEO. IMMIGR. L.J. 441, 451-52 (2004).

²⁷ *Id.*

²⁸ Luz E. Nagle, *Survey: Solving Problems Facing International Law Today: Global Terrorism in Our Own Backyard: Colombia's Legal War Against Illegal Armed Groups*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 5, 18 (2005).

²⁹ *Id.* at 17-19.

harassed by left-wing guerillas for years, wealthy landowners gladly employed local militias to protect their interests.³⁰ The law, however, did not have the effect that the government had anticipated, as the new vigilante groups, known as the “*Convivir*,” were soon blamed for peasant murders, political assassinations, and other human rights violations.³¹ By 1997, Colombian officials realized that they had made a mistake by legalizing paramilitary groups.³² In November of that year, the Office of the Superintendent of Private Vigilante and Security Groups admitted that it was “incapable of fulfilling its responsibility to oversee these legal, state-supported paramilitary organizations.”³³ Although the Office subsequently tried to put paramilitary groups out of business, it was too late; local *Convivir* forces had already established themselves and were “versed in the art of propaganda and self-promotion.”³⁴

In April 1997, Carlos Castaño, a well-known Colombian paramilitary leader, organized the *Autodefensas Unidas de Colombia* (Unified Self-Defense Forces of Colombia, or AUC) from these smaller, disjointed local militias.³⁵ The group’s heterogeneous membership has been described as, “a marriage of interests between powerful local warlords, drug barons, organised crime, members of local political and economic elites and counter-insurgent groups.”³⁶ Although considered an “umbrella group,” comprised of independently-operating paramilitary groups, each group shares a common commitment to protecting local economic interests and combating leftist guerrillas.³⁷

³⁰ See Juan Forero, *Ranchers in Colombia Bankroll Own Militia*, N.Y. TIMES, Aug. 8, 2001, at A1.

³¹ See Peter Santina, *Army of Terror: The Legacy of U.S.-Backed Human Rights Abuses in Colombia*, 21 HARV. INT’L REV. 40, 41-42 (1998).

³² Nagle, *supra* note 28, at 19.

³³ Santina, *supra* note 31, at 42.

³⁴ Nagle, *supra* note 28, at 19.

³⁵ Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz*, 28 MICH. J. INT’L L. 49, 56 (2006).

³⁶ Int’l Crisis Group, *Colombia’s New Armed Groups: Latin America Report No. 20* (2007), <http://www.usatoday.com/money/world/international-crisis-group-report.pdf>.

³⁷ See U.S. Sec’y. of State, *Country Reports on Terrorism* (2006), <http://www.state.gov/s/ct/rls/crt/2006> (follow “Chapter 6 – Terrorist Organizations” hyperlink).

Like the groups that formed its membership, the AUC was initially employed by landowners and businessmen, but as the organization grew in power, it began engaging in “illicit activities to fund its operations.”³⁸ In 2000, Castaño admitted that approximately seventy percent of the AUC’s income came from illegal drug trafficking.³⁹ Colombian officials also reported that the AUC stole petrol from a punctured pipeline in 2002 and 2003, which it subsequently sold on the black market for more than \$180 million.⁴⁰ The remainder of the group’s multi-million dollar budget is said to originate from acts of extortion and “contributions” from local “supporters.”⁴¹ Well-financed, the AUC grew from 4,000 lightly armed participants in 1997 to more than 12,000 heavily-equipped soldiers in 2002.⁴² The AUC quickly became such a well-recognized military force that the Colombian army supplied them with both weapons and intelligence, sending them ahead of official forces into rural areas of suspected guerilla activity.⁴³

Despite identifying itself as a “small defense” organization, the AUC “is responsible for some of the worst human rights atrocities

³⁸ Charles P. Trumbull, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT’L L. 283, 336 (2007); see also U.S. Sec’y. of State, *supra* note 37 (reporting that the AUC has “increasingly discarded its counter-guerilla activities, electing instead to involve itself in the illegal drug trade”).

³⁹ *Narco Terrorism: International Drug Trafficking and Terrorism – A Dangerous Mix: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Deborah McCarthy, Deputy Assistant Sec’y. for Int’l. Narcotics and Law Enforcement Affairs), available at <http://www.state.gov/p/inl/rls/rm/21129.htm>.

⁴⁰ Int’l Crisis Group, *supra* note 36, at 4.

⁴¹ See Scott Wilson, *Colombia’s Other Army*, WASH. POST, Mar. 12, 2001, at A1; see also Luz E. Nagle, *Placing Blame where the Blame is Due: The Culpability of Illegal Armed Groups and Narcotics Traffickers in Colombia’s Environmental and Human Rights Catastrophes*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 1, 28-29 (2004).

⁴² Int’l Crisis Group, *supra* note 36, at 3-5; see also Kim Cragin & Bruce Hoffman, *Arms Trafficking and Colombia*, NAT’L DEF. RESEARCH INST. 30 (2003), http://rand.org/pubs/monograph_reports/MR1468/MR1468.pdf, (reporting that “the AUC spends approximately \$1,500 per person per year on war materials”); see generally HUMAN RIGHTS WATCH, YOU’LL LEARN NOT TO CRY: CHILD COMBATANTS IN COLOMBIA (2003), <http://www.hrw.org/reports/2003/colombia0903/colombia0903.pdf> (reporting that an increasingly large percentage of the AUC’s forces are comprised of women and children under the age of fifteen).

⁴³ Nagle, *supra* note 28, at 19.

in Colombia.”⁴⁴ Some sources even estimate that the AUC has participated in seventy percent of all Colombian human rights violations.⁴⁵ These violations have been primarily attributed to the AUC’s indiscriminate combat tactics.⁴⁶ In addition to directly attacking the leftist guerrillas, the AUC targets civilian populations which they view as sympathetic to the insurgency movement.⁴⁷ To spread terror among these populations and discourage civilian support of left-wing groups, the AUC “systematically engage[s] in death threats, summary executions, massacres, torture, and . . . forced disappearance[s].”⁴⁸ Such tactics have been largely responsible for the massive number of internally displaced people in Colombia.⁴⁹ To date, the AUC has killed more civilians than the main guerrilla army it was originally founded to combat, and is considered by some as Colombia’s “prime terrorist group.”⁵⁰ Because of its long and documented history as a human rights violator, the extreme paramilitary group has since been designated as a terrorist organization by both the

⁴⁴ Trumbull, *supra* note 38, at 336; *see generally* U.N. High Comm’r. for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, U.N. Doc. E/CN.4/2005/10, available at http://www.hchr.org.co/documentoseinformes/informes/altocomisionado/Informe2004_eng.pdf (describing U.N. findings on AUC paramilitary activity in Colombia).

⁴⁵ Jorge L. Esquirol, *Can International Law Help? An Analysis of the Colombian Peace Process*, 16 CONN. J. INT’L L. 23, 34 (2000).

⁴⁶ *See* Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT’L L. REV. 1, 18-19 (1999); *see also* John C. Dugas, *Colombia in POLITICS OF LATIN AMERICA: THE POWER GAME* 497, 512 (Harry E. Vanden & Gary Prevost, eds., 2006).

⁴⁷ Carrillo-Suarez, *supra* note 46, at 17-18.

⁴⁸ *See id.*; *see also* Press Release, U.S. Drug Enforcement Agency, *Colombian Terrorists Arrested in Cocaine-for-Weapons Deal*, (2002), <http://www.usdoj.gov/dea/pubs/pressrel/pr110602.html> (reporting that, “according to the Colombian National Police (CNP) the AUC conducted 804 assassinations, 203 kidnappings, and 75 massacres with 507 victims” in 2001).

⁴⁹ Jose E. Arvelo, Note, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 GEO. J. INT’L L. 411, 425 (2006); *see also* U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES*, (2002), <http://www.state.gov/g/drl/rls/hrrtp/2001/wha/8326.htm> (reporting that in 2001 “violence and instability in rural areas displaced between 275,000 and 347,000 civilians”).

⁵⁰ Wilson, *supra* note 41, at A1; Daniel Kovalik, *War and Human Rights Abuses: Colombia and Corporate Support for Anti-Union Suppression*, 2 SEATTLE J. FOR SOC. JUST. 393, 395 (2004).

United States and the European Union.⁵¹

IV. Underlying Facts

Until June 2004, Chiquita conducted business in the Republic of Colombia primarily through a wholly-owned subsidiary, C.I. Bananos de Exportación, S.A. (“Banadex”).⁵² The subsidiary, which operated in the Urabá and Santa Marta regions, quickly became Chiquita’s most profitable banana producer.⁵³ In 1997, Carlos Castaño, the leader of the AUC, threatened Banadex officials with an “unspoken but clear message” that failure to make “security” payments to the AUC would result in physical harm to the company’s personnel and property.⁵⁴ To protect their employees and economic investment, Chiquita senior executives and high ranking officers reviewed and approved the payments.⁵⁵ Initially, the payments were made to the AUC through the *Convivir*, private security companies licensed by the government, which also operate as fronts to collect money for the AUC’s illegal activities.⁵⁶ Chiquita made these payments monthly based on a formula tied to banana production.⁵⁷ Although the payments were recorded in the corporate books and records as “security payments” or “security services,” no actual services or equipment

⁵¹ Office of the Coordinator for Counterterrorism; Designation of a Foreign Terrorist Organization, 66 Fed. Reg. 47,054 (Sept. 10, 2001) [hereinafter Designation of AUC as FTO] (designating the AUC as a Foreign Terrorist Organization); *see also* Office of the Coordinator for Counterterrorism; Designation of a Foreign Terrorist Organization, 68 Fed. Reg. 53,420 (Sept. 10, 2003) (redesignating the AUC as a Foreign Terrorist Organization after further administrative review); Blocked Persons, Specially Designated Nationals, Terrorists, Global Terrorists, Foreign Terrorist Organization, and Narcotics Traffickers, 71 Fed. Reg. 39,773 (July 13, 2006) (listing the AUC as a Specially-Designated Global Terrorist); The Counsel of the European Union, Council Common Position 2006/380/CFSP, 114 O.J. (L. 25, 29) 29 May 2006 (placing the AUC in a group of terrorist organizations that include Hamas, Hizbul Mujahideen, and the Irish Republican Army), *available at* <http://eur-lex.europa.eu/JOMonth.do?year=2006&month=5> (follow “L144” hyperlink, then follow “25” hyperlink).

⁵² Count One, *supra* note 12, at 1-2.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 5.

⁵⁵ Edward Iwata & Donna Leinwand, *Chiquita Agrees to Fine for Paying Terrorists: Settlement in Colombia Case Awaits Judge’s OK*, USA TODAY, Mar. 15, 2007, at B1.

⁵⁶ Factual Proffer, *supra* note 4, at 5.

⁵⁷ Government’s Sentencing Memorandum, *supra* note 12, at 5.

were provided.⁵⁸

On October 31, 2001, the AUC was identified as a SDGT pursuant to Executive Order 13224.⁵⁹ Although it is unclear at what point Chiquita became aware of the AUC's designation as a SDGT, the company was aware of the paramilitary group's designation as a Foreign Terrorist Organization.⁶⁰ Despite this knowledge, Chiquita continued making the payments.⁶¹

As a result of stringent European banana quotas and mounting corporate debt, Chiquita filed for Chapter 11 protection on November 28, 2001.⁶² After undergoing a corporate restructuring and emerging from bankruptcy, the company seated a new Board of Directors and Audit Committee.⁶³ Although the payment's form changed under Chiquita's new management, the payments continued.⁶⁴ Between approximately September 10, 2001, and February 4, 2004, Chiquita made fifty payments to the right-wing paramilitary group, totaling more than \$825,000.⁶⁵ These payments ranged from as little as \$3,595 to as much as \$56,292.⁶⁶ During this time, Chiquita earned more than \$49.4 million from its Colombian banana investments.⁶⁷

As payments to the AUC continued and profits from their Colombian subsidiary poured in, so did warnings from Chiquita's

⁵⁸ Count One, *supra* note 12, at 6.

⁵⁹ Press Release, U.S. Dep't of Treas., Office of Foreign Assets Control, Terrorism: What You Need to Know About U.S. Sanctions 81 (Feb. 21, 2008), <http://www.ustreas.gov/offices/enforcement/ofac/programs/terror/terror.pdf>.

⁶⁰ Factual Proffer, *supra* note 4, at 7-8 (detailing that the AUC's designation as a Foreign Terrorist Organization on Sept. 10, 2001 was well publicized, appearing in *The Wall Street Journal*, *The New York Times*, *The Cincinnati Post*, and via an internet-based, password protected, subscription news service which Chiquita paid to receive and which was viewed by an employee of the company); *see also* Designation of AUC as FTO, *supra* note 51.

⁶¹ Factual Proffer, *supra* note 4, at 7-8.

⁶² Associated Press, *Chiquita Files for Chapter 11 Protection*, N.Y. TIMES, Nov. 29, 2001, at C4.

⁶³ Count One, *supra* note 12, at 6.

⁶⁴ Factual Proffer, *supra* note 4, at 6 (explaining that payments made by Chiquita's new management were no longer made indirectly to the *Convivir*, but instead directly to the AUC via cash payments).

⁶⁵ *Id.* at 8.

⁶⁶ Count One, *supra* note 12, at 8-9.

⁶⁷ DOJ Plea Agreement, *supra* note 6, at 2.

outside legal counsel. When questioned as to the legitimacy of the payments, Chiquita's lawyers repeatedly advised the company to stop making the payments because they were illegal.⁶⁸ Notwithstanding such warnings, the company continued to make the payments.⁶⁹

Chiquita quickly tired of shouldering what they deemed an "excruciating moral dilemma."⁷⁰ Fearful that local Cincinnati reporters would uncover their illicit activities, Chiquita's Board of Directors decided to disclose their actions to the DOJ.⁷¹ By the time Chiquita senior executives met with DOJ officials on April 24, 2003, the company had made over ninety payments to the AUC totaling nearly \$1.4 million.⁷² Although DOJ officials acknowledged that the issue of continued payments was "complicated," they made it clear that the payments were illegal and could not continue.⁷³ Despite the persistent advice of its outside counsel, the DOJ's statements, and the Board's involvement in the matter, "Chiquita continued to pay the AUC throughout 2003 and early 2004."⁷⁴ These subsequent payments

⁶⁸ Government's Sentencing Memorandum, *supra* note 12, at 9 (stating that on February 21, 2003, outside counsel advised Chiquita that they, "Must stop payments"; on February 26, 2003, counsel advised the company that, "Bottom Line: CANNOT MAKE THE PAYMENT"; again on March 11, 2003, counsel advised, "[T]he company should not continue to make Santa Marta payments, given the AUC's designation as a foreign terrorist organization.").

⁶⁹ *Id.* at 10.

⁷⁰ Sue Reisinger, *Blood Money Paid by Chiquita Shows Company's Hard Choices*, IN HOUSE COUNSEL, Nov. 26, 2007, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1195639472310>.

⁷¹ Factual Proffer, *supra* note 4, at 12.

⁷² Government's Sentencing Memorandum, *supra* note 12, at 2-6 (noting that although Chiquita was only charged for making payments to the AUC between 2001 and 2004, Chiquita began paying the AUC as early as 1997).

⁷³ Count One, *supra* note 12, at 13.

⁷⁴ DOJ Press Release, *supra* note 3 (reporting that after discussing the situation with the DOJ, outside counsel advised Chiquita in writing that: "[Department of Justice] officials have been unwilling to give assurances or guarantees of non-prosecution; in fact, officials have repeatedly stated that they view the circumstances presented as a technical violation and cannot endorse current or future payments"); Government's Sentencing Memorandum, *supra* note 12, at 10-11 (cautioning that claims of duress would not insulate Chiquita from criminal liability because Banadex had a legal option to withdraw from Colombia); Count One, *supra* note 12, at 15 (explaining that after Chiquita officials fully disclosed the extent of the payment to the full Board of Directors,

totaled more than \$300,000.⁷⁵

On January 12, 2004, Chiquita named Fernando Aguirre as its new President and Chief Executive Officer.⁷⁶ Within one month of assuming his new position, the former Proctor & Gamble executive decided that the illegal payments had to stop.⁷⁷ Chiquita issued its last payment to the AUC on January 29, 2004.⁷⁸ When addressing senior officers regarding Chiquita's future in Colombia, Aguirre stated that, "[a]t the end of the day, if extortion is the modus operandi in Colombia or any other country, we will withdraw from doing business in such a country."⁷⁹

Although Chiquita ultimately settled with the DOJ for \$25 million, the company could have been fined as much as \$98.8 million pursuant to 18 U.S.C. § 3571.⁸⁰ Under the statute, an offender may be fined up to twice his pecuniary gain for crimes that carry a ten year prison sentence, as IEEPA violations do.⁸¹ By Chiquita's estimates, the company made \$49.4 million in profits from its Colombian banana-producing operations between September 10, 2001 and January 2004.⁸² Neither Chiquita nor the DOJ have produced an explanation as to why Chiquita escaped the maximum criminal penalty, but the Government's Sentencing Memorandum suggests that the DOJ was influenced by the company's motivations to "protect its Colombian employees" and their disinterest in actually furthering terrorist activities.⁸³

Chiquita's plea agreement with the DOJ has not marked the end of the company's Colombia-related legal problems. On November 14, 2007, the families of Colombian citizens killed by

a member of the Board stated, "I reiterate my strong opinion – stronger now – to sell our operations in Colombia.").

⁷⁵ DOJ Press Release, *supra* note 3.

⁷⁶ *Chiquita Brands International Names Fernando Aguirre President and Chief Financial Officer*, PR NEWswire, Jan. 12, 2004, <http://www.prnewswire.co.uk/cgi/news/release?id=115048>.

⁷⁷ Government's Sentencing Memorandum, *supra* note 12, at 12.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ DOJ Plea Agreement, *supra* note 6, at 2; *see* 18 U.S.C. §3571(b)-(d) (2000).

⁸¹ *See* 50. U.S.C. §1705(b) (2000) (stating that any natural person who violates the IEEPA may be imprisoned for up to ten years).

⁸² *See* 18 U.S.C. §3571(b)-(d) (2000); DOJ Plea Agreement, *supra* note 6, at 2.

⁸³ Government's Sentencing Memorandum, *supra* note 12, at 13-16.

the AUC at a time in which the organization received payments from Chiquita filed suit against the company in a Federal District Court in Manhattan.⁸⁴ The families seek \$7.86 billion in damages, alleging that Chiquita abetted terrorism and crimes against humanity.⁸⁵

V. Effects of Conviction

Despite their reputation as an assorted band of lawless rebels, the AUC is a de facto government. In 2002, the group controlled municipalities in twenty-seven of Colombia's thirty-two departments.⁸⁶ To ensure their control over these regions, the AUC has cooperated extensively with the Colombian military,⁸⁷ attained several high-ranking political positions,⁸⁸ and utilized millions of dollars worth of public resources.⁸⁹ Since the Colombian government has all but abandoned these rural areas due to guerilla and paramilitary activity, the AUC essentially governs the banana-producing regions of Urabá, Chocó, and Santa Marta.⁹⁰ As a result, when the United States prohibited U.S. companies via the IEEPA from dealing with the AUC, the United States, for all intents and purposes, levied a unilateral economic sanction against all of Colombia.

⁸⁴ See Associated Press, *Victims of Colombian Conflict Sue Chiquita Brands*, N.Y. TIMES, Nov. 15, 2007, available at <http://www.nytimes.com/2007/11/15/business/world-Business/15chiquita.html>.

⁸⁵ *Id.*

⁸⁶ INT'L CRISIS GROUP, COLOMBIA: NEGOTIATING WITH THE PARAMILITARIES, LATIN AMERICAN REPORT NO. 5 (2003), <http://www.crisisgroup.org/home/index.cfm?l=1&id=2302>; see also Int'l Crisis Group, *supra* note 36, at 4 (reporting that by 2007, the AUC controlled between 4 and 6 million hectares of arable Colombian land).

⁸⁷ See ANGEL RABASA & PETER CHALK, COLOMBIAN LABYRINTH: THE SYNERGY OF DRUGS AND INSURGENCY AND ITS IMPLICATIONS FOR REGIONAL STABILITY 57 (2001); see also Paul Richter & Greg Miller, *Colombia Army Chief Linked to Outlaw Militias*, L.A. TIMES, Mar. 25, 2007, at A1.

⁸⁸ See Juan Forero, *Paramilitary Scandal Takes Colombian Elite by Surprise*, WASH. POST, Feb. 22, 2007, at A10.

⁸⁹ See Int'l Crisis Group, *supra* note 36, at 4 (explaining that the AUC plundered both municipal budgets and the Colombian health care system for more than \$100 million).

⁹⁰ Daniel Suman, *Globalization and the Pan-American Highway: Concerns for the Panama-Colombia Border Region of Darein-Choco and its Peoples*, 38 U. MIAMI INTER-AM. L. REV. 549, 567-70 (2006).

Unfortunately, even the most optimistic studies suggest that such unilateral sanctions are ineffective, whether used to achieve political objectives or deter certain behaviors.⁹¹ According to several sources, these sanctions have been responsible for the creation of pervasive nationalism,⁹² the harming of innocent civilian populations,⁹³ and are detrimental to American competitiveness.⁹⁴ The negative consequences which befall American multinational corporations upon the imposition of such sanctions are primarily the result of a phenomenon known as “business capture.”⁹⁵ As U.S. businesses withdraw from foreign countries pursuant to sanctioned mandates, they create a void in the market which is subsequently filled by foreign competitors.⁹⁶ Because “substitutes and alternative sources of supply are often

⁹¹ See GARY C. HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 158-60 (3d ed. 2007) (studying U.S. unilateral sanctions between 1914 and 1990 and concluding that they achieved their intended political purpose only one third of the time); *but see* Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L SECURITY 90, 92-95 (1997) (accusing Hufbauer's study of being overly optimistic and flawed).

⁹² Pape, *supra* note 91, at 93; see ZACHARY A. SELDEN, *ECONOMIC SANCTIONS AS INSTRUMENTS OF AMERICAN FOREIGN POLICY* 4 (1999) (explaining a phenomenon known as “rally around the flag” in which economic sanctions provide a common external enemy which unites the population of the target country and increases the popularity of the current leadership); see also Peter Margulies, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT'L L. REV. 65, 83 (2007) (stating that economic sanctions create a general resentment of globalization which may dangerously unite otherwise disorganized groups).

⁹³ See U.N. Comm'n on Human Rights, Sub-Comm. on the Promotion and Protection of Human Rights, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, Working Paper for the Commissioner on Human Rights*, U.N. Doc. E/CN.4/Sub.2/2000/33 (June 21, 2000) (prepared by Marc Bossuyt) (“[I]t is usually the people who suffer, not the political elites whose behavior triggered the sanctions in the first place”); see also Pape, *supra* note 91, at 110 (reporting that as many as 567,000 Iraqi children may have died since the end of the Persian Gulf War because of economic sanctions).

⁹⁴ Harry Wolff, *Unilateral Economic Sanctions: Necessary Foreign Policy Tool or Ineffective Hindrance on American Businesses?*, 6 HOUS. BUS. & TAX L.J. 329, 331 (2006).

⁹⁵ Gary C. Hufbauer et al., *U.S. Economic Sanctions: Their Impact on Trade, Jobs, and Wages* (Inst. for Int'l Econ., Working Paper, 1997), <http://petersoninstitute.org/publications/wp/wp.cfm?ResearchID=149>.

⁹⁶ Wolff, *supra* note 94, at 331; see e.g. Hufbauer, *supra* note 91 (utilizing a positive residuals statistical analysis to demonstrate that U.S. unilateral sanctions on both Cuba and China have been filled by European competitors).

readily available on the world market,” the United States rarely possesses the requisite control over the supply of a particular good to single-handedly impose a significant embargo.⁹⁷

If the United States is going to use the IEEPA to impose unilateral economic sanctions on de facto governments like the AUC, then America’s economy will suffer the same negative consequences it has previously suffered under other unilateral sanctions. For example, in 1995 American export revenues were between \$15 and \$19 billion lower than they would have been in the absence of U.S. unilateral sanctions.⁹⁸ That same year, experts estimate that such sanctions resulted in the loss of 200,000 export-related jobs and a decrease of nearly \$1 billion in American wage revenue.⁹⁹

The non-quantifiable consequences of unilateral economic sanctions may be even more significant. After conducting a survey of more than 100 multinational corporations in 1998, the U.S. International Trade Commission found that such sanctions have a “chilling effect” on long-term commercial relationships, as some foreign partners grow increasingly reluctant to do business with U.S. companies out of concern about future U.S. sanctions.¹⁰⁰ In a similar study conducted by the Institute for International Economics, respondents expressed their hesitation to invest in foreign markets which had not yet been the target of U.S. sanctions, stating that “the risk of future sanctions to be high enough that the contingent liabilities were unacceptable.”¹⁰¹ Simply put, “nearly all unilateral sanctions fail nearly all of the time.”¹⁰²

Although the U.S. government claims that Executive Order

⁹⁷ SELDEN, *supra* note 92, at 4.

⁹⁸ Jeffrey J. Schott, *U.S. Economic Sanctions: Good Intentions, Bad Execution*, Statement Before the Comm. on Int’l Rel. of the U.S. H. of Rep. (June 3, 1998), available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=314>.

⁹⁹ *Id.*

¹⁰⁰ Robert A. Rogowsky, Testimony Before the Subcomm. on Trade of the U.S. H. Comm. on Ways and Means (May 27, 1999), available at <http://waysandmeans.house.gov/Legacy/trade/106cong/5-27-99/5-27rogo.htm>.

¹⁰¹ DAVID J. RICHARDSON, *SIZING UP U.S. EXPORT DISINCENTIVES* 57 (1993).

¹⁰² Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 459 (2006).

13224 has successfully disrupted terrorist financing,¹⁰³ it has conducted no parallel study examining the effects that the Order has had on the American economy. The U.S. Department of the Treasury asserts that one year after President Bush issued the Order, the U.S., working through the United Nations and other multilateral institutions, had frozen more than \$34 million in terrorist assets located in the U.S.¹⁰⁴ This statistic is impressive, but when compared to the long-term negative consequences that the U.S. economy will suffer as a result of imposing unilateral economic sanctions on de facto governments, these numbers seem less significant. Chiquita alone was penalized \$25 million,¹⁰⁵ and the banana company only represents a small fraction of U.S. corporations operating in unstable foreign environments. Entity-specific sanctions do not allow companies to remain competitive by simply avoiding pre-identified terrorist groups. On the contrary, as Chiquita's conviction demonstrates, they force U.S. multinationals to either risk the security of their investments and the safety of their employees or refrain from operating in these countries altogether.¹⁰⁶ Even those most vehemently opposed to Chiquita's actions admit that U.S. corporations "could not operate in these areas without paying the AUC."¹⁰⁷

VI. Conclusion

This Note addresses the facts and circumstances which resulted in Chiquita Brands International, Inc. becoming the first major U.S. corporation to be convicted of financial dealings with a SDGT. Executive Order 13224, which prohibits any American person from participating in such transactions, derives its authority

¹⁰³ See Press Release, U.S. Dept. Treas., Contributions of the Department of the Treasury to the Financial War on Terrorism – Fact Sheet 15 (Sept. 10, 2002), <http://www.treas.gov/press/releases/reports/2002910184556291211.pdf>.

¹⁰⁴ *Id.* at 8; see also Press Release, U.S. Dept. Treas., Progress in the War on Terrorist Financing (Sept. 11, 2003), <http://www.treas.gov/press/releases/reports/js721.pdf>.

¹⁰⁵ DOJ Press Release, *supra* note 3.

¹⁰⁶ See Government's Sentencing Memorandum, *supra* note 12, at 16-17 (admitting that under the circumstances, Chiquita could have done little besides withdraw from Colombia and abandon its most-lucrative banana operation).

¹⁰⁷ David J. Lynch, *Murder and Payoffs Taint Business in Colombia*, USA TODAY, Oct. 30, 2007, at B1.

from the International Emergency Economic Powers Act.¹⁰⁸ Although the Act has historically been used to impose unilateral economic sanctions on foreign countries, the Act is increasingly being used to disrupt terrorist financing.¹⁰⁹ Since a number of designated terrorist organizations operate as de facto governments, providing security services, regulating trade, and dominating local politics, prohibiting American corporations from dealing with them is equivalent to levying a unilateral economic sanction against the countries in which they operate. Not only have studies demonstrated that such sanctions are ineffective in achieving their desired political goals, but they have also been shown to harm American competitiveness.¹¹⁰

Chiquita's recent conviction undoubtedly demonstrates that "funding a terrorist organization can never be treated as a cost of doing business."¹¹¹ Unfortunately, it does not answer the question of how American corporations are to remain competitive despite tightening U.S. counter-terrorism legislation. Although the DOJ suggests that corporations like Chiquita may withdraw from countries in which their interests are put at risk by terrorist groups,¹¹² scholars predict that if all similarly-situated multinational corporations were to abandon their foreign operations "the price would be the collapse of the U.S. economy and the end of the U.S. as a superpower."¹¹³ Since foreign withdrawal is not a realistic economic option, and since U.S. counter-terrorism legislation prevents American companies from meeting the demands of de facto governments, the IEEPA unfairly disadvantages U.S. multinational corporations by forcing them to risk the security of their foreign investment and the safety of their employees.

K. CURRY GASKINS

¹⁰⁸ See Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups through Federal Statutory and Common-law Suits*, 38 VAND. J. TRANSNAT'L L. 679, 728-30 (2005).

¹⁰⁹ See *id.*

¹¹⁰ RICHARD SPEIER ET AL., NONPROLIFERATION SANCTIONS 7 (2001).

¹¹¹ DOJ Press Release, *supra* note 3.

¹¹² Government's Sentencing Memorandum, *supra* note 12, at 16-17.

¹¹³ Rick Hampson, *Many Accept Risks of Working Overseas*, USA TODAY, June 21, 2004, at A13.

