

LIFTING THE CUBAN EMBARGO: THE NEW LABORS OF HERCULES?

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Anyone familiar with the history of relations between the United States and Cuba in the last fifty years knows that the United States has in place a strict embargo on trade with, and on economic assistance to, Cuba. Pursuant to this embargo, it is virtually impossible for all but a very narrow category of persons or companies to engage in activities involving Cuba. Clearly, the embargo prohibitions will need to be lifted (or, at least, significantly modified) before the U.S. business community can again have access to the Cuban market. Travel to Cuba is also severely limited, although restrictions on some categories of travel have been recently reduced.

Many people are not aware of the full reach of the embargo and the way in which it excludes Cuba from programs that the United States has instituted or in which it participates, and which provide economic benefits to other Latin American and Caribbean nations. It is also not generally known that, because of the accumulation of increasingly prescriptive laws, lifting the embargo could require multiple actions by the Executive and Congress. Some of these actions are capable of relatively swift implementation, while others would involve a potentially drawn out process.

This paper describes the actions that the U.S. government would need to take to fully lift the Cuban trade

embargo and erase its effects. As will be seen, the U.S. embargo against Cuba has two components: the direct embargo, which includes the measures that prohibit persons under the jurisdiction of the United States from engaging in economic transactions in Cuba; and the indirect embargo, which excludes Cuba from a number of economic assistance and development aid programs sponsored by the United States or in which this country participates. The information contained in the paper is important to individuals and companies that are U.S. nationals, because they are affected directly by the embargo's prohibitions and should be aware of what must happen at a government level before they can lawfully do business in Cuba.¹ The information is also of interest to individuals interested in traveling or otherwise engaging in non-commercial activities in Cuba.

THE DIRECT EMBARGO

The United States has in place a comprehensive embargo against trade and other economic transactions involving Cuba. The embargo is founded on four major statutes, and is implemented by detailed regulations, the Cuban Assets Control Regulations, issued and administered by the U.S. Department of the Treasury.²

1. Persons subject to the U.S. embargo are "persons under the jurisdiction of the United States." 31 C.F.R. §515.201(b). This term includes U.S. citizens or permanent residents wherever located; any person actually within the United States; any corporation organized under the laws of the United States or any state, territory, possession or district of the United States; or any organization that is owned or controlled by any one of the above. 31 C.F.R. §§ 515.329, 515.330.

The Trading with the Enemy Act

The Trading With The Enemy Act of 1917 (the “TWEA”),³ was enacted as the United States entered World War I. Its initial purpose was to give the President authority to prohibit, limit or regulate trade with hostile countries in times of war. The TWEA was subsequently amended in 1933 to grant the President authority to exercise the powers of the Act during periods of national emergency in times of peace.⁴ As amended, the TWEA authorized the President to “investigate, regulate, or prohibit, under such rules and

regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange” and to control, and even prohibit, trade with designated foreign countries or nationals thereof.⁵

The authority of the 1933 amendment to Section 5(b) was invoked in connection with a military emergency, the Korean War, on December 16, 1950. On that date, President Truman issued a Proclamation which took note of “recent events in Korea and elsewhere” and referred to “the increasing menace of the forces of

2. Embargo-related prohibitions against activities relating to Cuba are sprinkled throughout U.S. law. For example, Section 607 of the Consolidated Appropriations Act, 2008 (2007), provides: “None of the funds appropriated or otherwise made available pursuant to this Act shall be obligated or expended to finance directly any assistance or reparations to Cuba, North Korea, Iran, or Syria: Provided, That for purposes of this section, the prohibition on obligations or expenditures shall include direct loans, credits, insurance and guarantees of the Export-Import Bank or its agents.” Similar prohibitions are included in the appropriations bills every year. Provisions such as these will not be discussed here, since they can be removed in due course as the legislation is updated. Such revisions, however, will have to be undertaken, perhaps as part of a comprehensive Federal Government initiative to identify and rid the U.S. statutes of accumulated restrictions on transactions involving Cuba.

3. 40 Stat. 411 (1917), *codified at* 50 U.S.C. Appendix.

4. The legislative history is vague about the purposes behind the 1933 amendment to Section 5(b) of the TWEA. Interpretations of the intent of the legislation have been provided after the fact by courts and legal scholars. In 1971, for example, the U.S. Court of Appeals for the Second Circuit noted:

That policy [behind the TWEA] is to deny hard currency to blocked countries and their nationals. However, as the Secretary points out, the purpose behind the Act is not only that but also to preserve the assets of such countries and their nationals for possible vesting and use in the future settlement of American claims against those governments and their citizens.

Cheng Yih-Chun v. Federal Reserve Bank of New York, 442 F.2d 460, 465 (2d Cir. 1971). In a later case, the U.S. Court of Appeals for the Ninth Circuit articulated the purpose behind Section 5(b) as follows:

The governmental interests which arguably justify the blocking provisions of the TWEA and the Regulations are threefold: (1) to prevent designated countries from acquiring dollars; (2) to provide a fund from which United States citizens could be compensated for injury occasioned them by designated countries; (3) and to use the blocked funds as a negotiating tool with the designated country.

Tran Qui Than v. Regan, 658 F.2d 1296, 1305 (9th Cir. 1981), *cert. denied*, 459 U.S. 1069 (1982). The statements by the courts in these two cases reflect the historical fact that the TWEA has been used as a political, as well as an economic, tool to further the U.S. government’s positions in its dealings with unfriendly nations.

5. As amended in 1933, Section 5(b) of the TWEA read:

During time of war or any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person engaged in any transaction referred to in this subdivision to furnish under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term “person” means an individual, partnership, association, or corporation.

Section 2, Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1.

communist aggression” as requiring the declaration of a state of national emergency.⁶

Immediately following President Truman’s proclamation, the Secretary of the Treasury issued a set of regulations imposing a total embargo on unlicensed financial and commercial transactions between U.S. nationals and the People’s Republic of China and North Korea.⁷ These regulations, known as the Foreign Assets Control Regulations (“FACR”), were published on December 17, 1950 and codified at 31 C.F.R. Part 500.

The FACR were the first detailed regulations promulgated to impose a trade embargo on a foreign country under Section 5(b) of the TWEA. The FACR later served as the model for similar regulations issued in 1963 imposing a trade embargo on Cuba.

There have been a number of challenges to the President’s authority to impose trade embargoes, as well as against the promulgation of specific regulations by the Treasury Department. The U.S. Supreme Court and the lower courts, however, have recognized that Section 5(b) of the TWEA gives the President broad authority to impose comprehensive embargoes on foreign countries, both during peacetime emergencies and in time of war, and have upheld the exercise of that authority.⁸

These broad presidential powers were limited in 1977 by Congress, which amended Section 5(b) of the TWEA to rescind the President’s authority to invoke the existence of a national emergency to impose a trade embargo against a foreign country.⁹ However, at the same time, Congress grandfathered existing exercises of the President’s “national emergency” authority and allowed embargoes then in place—including Cuba’s—to be maintained only as long as the Presi-

6. Proclamation No. 2914, 15 Fed. Reg. 9029 (1950), *reprinted in* 1950 U.S. Code Cong. Service, Vol. 1 at 1557–58. At the time of the Proclamation, Section 5(b) of the TWEA read in relevant part as follows:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through or to any banking institution and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.

President Truman’s proclamation of a national emergency with regard to the worldwide threat of communist aggression was in effect until it was effectively rescinded by the National Emergencies Act, Pub. L. 94–412, September 14, 1976, 90 Stat. 1255, and the War Or National Emergency—Presidential Powers Act, Pub. L. No. 95–223, 91 Stat. 1625 (1977). The 1977 amendment to the TWEA required the President, within two years of enactment of the National Emergencies Act, to extend any national emergencies that he wanted to keep in effect. In order to extend a TWEA emergency further, the President was also required to issue an annual determination that the extension was in the national interest.

7. President Roosevelt had delegated to the Secretary of the Treasury the authority granted to him by the TWEA to the extent of empowering Treasury to issue implementing regulations. Executive Order 9193, 3 C.F.R. 1174, 1175 (1942). Treasury has since remained the Federal agency in charge of implementing trade embargoes.

8. *Regan v. Wald*, 468 U.S. 222, 225–26, 104 S.Ct. 3026, 3029–30 (1984).

9. International Emergency Economic Powers Act (“IEEPA”), Title II, Pub. L. 95–223, §§ 101(a) and 102, 50 U.S.C. §§ 1701–07. The law, however, authorizes the President to exercise essentially the same powers as those granted by Section 5(b), but restricts the exercise of those powers only “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.” 50 U.S.C. § 1701. The President is required, “in every possible instance,” to consult with Congress prior to exercising his IEEPA authority and, once such authorities have been exercised, to report to Congress every six months on the actions taken and any changes in underlying circumstances. 50 U.S.C. § 1703.

dent makes a determination that such authority remains necessary.¹⁰ Continued applicability of this “grandfathering” provision requires annual determinations by the President that the exercise of such authority with respect to each affected country is in the national interest of the United States. Since the imposition of this requirement, all U.S. Presidents have issued annual Determinations that have extended the state of emergency with respect to Cuba and kept the embargo in effect.¹¹ The grandfathering provision has been allowed to lapse with respect to every country to which it had been applied, except Cuba.

The Foreign Assistance Act of 1961

The Foreign Assistance Act of 1961 (“the FAA”), 22 U.S.C. § 2151 *et seq.*, was enacted “to give vigor, purpose, and new direction to the foreign aid program.”¹² Congress viewed the FAA as an integral part of the U.S. foreign policy of promoting the development of the “southern continents.”¹³ Through the FAA, Congress undertook to give continuity and direction to the many aid programs already in existence.¹⁴

At the same time Congress set out to provide coordinated assistance to other nations by enacting the FAA, it also sought to deny assistance to Cuba, and gave the President specific authority to impose a trade embargo against that country. Section 620(a) of the FAA, 22 U.S.C. § 2370(a), which is still part of the FAA, provides:

(1) No assistance shall be furnished under this chapter to the present government of Cuba. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba.

(2) Except as may be deemed necessary by the President in the interest of the United States, no assistance shall be furnished under this chapter to any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation of Cuban sugar into the United States or to receive any other benefits under any law of the United States, until the President determines that such government has taken appropriate steps according to international law standards to return to United States citizens, and to entities not less than 50 per centum beneficially owned by United States citizens, or to provide equitable compensation to such citizens and entities for property taken from such citizens and entities on or after January 1, 1959, by the government of Cuba.

There was no legislative need for this statute. The general authority of the TWEA would have been sufficient to support the imposition of a trade embargo against Cuba, much in the same manner as the North Korean and Chinese embargoes were imposed. However, enactment of Section 620(a) arose from a desire in Congress to provide an explicit *political* response to Cuba’s expropriation of the assets of U.S. citizens that started in 1959. Moreover, contemporaneous events, including Cuba’s pursuit of the spread of Commu-

10. The IEEPA’s grandfathering clause provides: “Notwithstanding the termination of the authorities described in section 101(b) of this Act, any such authorities, which are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any interest, may continue to be exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.” 50 U.S.C. § 1706(a)(2).

11. The most recent Presidential Determination, issued by President George W. Bush, extends the state of emergency with respect to Cuba until September 14, 2009. Presidential Determination No. 2008–27, September 12, 2008, 73 Fed. Reg. 54055 (2008).

12. S.REP. No. 612, 87th Cong., 1st. Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 2472, 2473.

13. *Id.* at 2475–76.

14. *Id.* at 2475–2478.

nism throughout Latin America, provided impetus for the inclusion of anti-Cuba legislation in the FAA.¹⁵

President Kennedy invoked the authority granted by the Foreign Assistance Act of 1961 to declare a trade embargo against Cuba in a Proclamation that cited the FAA as authority, prohibited “the importation into the United States of all goods of Cuban origin and all goods imported from and through Cuba,” and directed the Secretary of Commerce “to continue to carry out the prohibition of all exports from the United States to Cuba.”¹⁶ Section 620(a) of the FAA provides an alternative source of authority for the regulations implementing the Cuban embargo. In fact, early court cases cite the FAA as the statutory authority for the Cuban embargo regulations.¹⁷

The provisions in Section 620(a) of the FAA evidenced a strong Congressional resolve to deny any form of U.S. assistance to Cuba as long as it remains under communist rule. There has been no indication of a change in this position by Congress; to the contrary, additional legislative action to date has been mainly in the direction of further tightening the embargo and imposing stricter, more specific conditions that a Cuban government must meet before the embargo is lifted and economic aid is made available to Cuba.

The Cuban Democracy Act of 1992

Following the disintegration of the Soviet Union, Congress enacted legislation intended to help bring about a transition to democracy in Cuba. This legislation was signed into law by President George H. Bush on October 23, 1992, and is known as the Cuban Democracy Act of 1992 (“the CDA”).¹⁸

Like the FAA, the CDA was unneeded legislation. It is an unabashedly political statute that contains a statement of U.S. policy towards Cuba and announces, among other goals “to seek a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people” and “to maintain sanctions on the Castro regime so long as it continues to refuse to move toward democratization and greater respect for human rights.”¹⁹

In pursuit of these political objectives, the CDA imposes additional limitations on trade with Cuba.²⁰ Some of the restrictions are directed at countries receiving assistance from the United States, such as the republics of the former Soviet Union; the President is authorized to impose sanctions (in the form of denial of economic assistance and ineligibility for debt reduction or forgiveness) against countries that provide economic assistance to Cuba.²¹ Other restrictions are lev-

15. Remarks about fighting the spread of Communism are scattered throughout the debate on the FAA. For example, Senator Kuchel, addressing the worldwide threat of Communism, stated:

Thus the language of the report prevents any assistance under this act to the present government of Cuba. It provides, in the words which the Senate previously approved that, unless the President determines a country is not dominated or controlled by international communism, no assistance of any kind shall be furnished to the government of any such country.

107 Cong. Rec. S17705–06 (August 31, 1961).

16. Proclamation 3447, 27 Fed. Reg. 1085 (1962), 3 C.F.R., 1059–63 Comp. at 157. Previously, authorization had been suspended for most industrial export licenses to Cuba. 43 DEPT. STATE BULL. 715 (1960). President Eisenhower had also reduced the quota of Cuban sugar in the U.S. market to zero. Proclamation No. 3383, effective December 21, 1960, 25 Fed. Reg. 13131. Additional trade restrictions were imposed by other laws enacted in the 1960–1962 period. Therefore, by the time President Kennedy proclaimed a total trade embargo, trade between the United States and Cuba was already essentially cut off.

17. See, *American Documentary Films, Inc. v. Secretary of the Treasury*, 344 F.Supp. 703, 707–8 (1972); *R.C.W., Supervisor, Inc. v. Cuban Tobacco Company, Inc.*, 220 F.Supp. 453, 463 (1963). Subsequent cases, however, have relied mainly on the TWEA to defend actions taken under the embargo regulations because of the greater enforcement powers the TWEA provides.

18. Pub. L. 102–484, 106 Stat. 2575, 22 U.S.C. §§ 6001–08.

19. Section 1703 of the CDA, 22 U.S.C. § 6002.

20. These limitations are contained in Sections 1704 through 1708 of the CDA, 22 U.S.C. §§ 6003–6007.

21. Section 1704 of the CDA, 22 U.S.C. § 6003.

eled against U.S. companies and their subsidiaries abroad, for the CDA prohibits foreign subsidiaries of U.S. companies from trading with Cuba.²² The CDA also prohibits entry into the United States to vessels that have entered Cuba to engage in trade in goods or services within the preceding 180 days, and bans altogether the entry of vessels carrying Cuban goods or passengers.²³ It also instructs the President to establish strict limits on remittances to Cuba for the purpose of financing the travel of Cubans to the United States.²⁴

The CDA exemplifies what was at the time called a “two-track” U.S. policy with regard to Cuba. One track was the continuation of strict economic sanctions against the Cuban government; another, the promise of U.S. help to Cuba once the island has undertaken a transition to democratic rule. This second track of the policy is embodied in Section 1707 of the CDA, which allows the provision of food, medicine and medical supplies to Cuba for humanitarian purposes if the President “determines and certifies to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate” that the government then in power in Cuba—

- (1) has made a public commitment to hold free and fair elections for a new government within 6 months and is proceeding to implement that decision;
- (2) has made a public commitment to respect, and is respecting, internationally recognized human rights and basic democratic freedoms; and
- (3) is not providing weapons or funds to any group, in any other country, that seeks the violent overthrow of the government of that country.²⁵

22. Section 1706 of the CDA, 22 U.S.C. § 6005.

23. *Id.*

24. *Id.* Not all sections of the CDA imposed restrictions on trade with or assistance to Cuba. Section 1705 authorizes the donation of food, medicines and medical supplies to non-governmental organizations or individuals in Cuba, and the sale of medicines and medical supplies to Cuba. The sale of medicines to Cuba is also permitted, but is subject to limitations (no export is allowed where there is reasonable expectation that the items will be used for purposes of torture, for the production of biotechnology products, or for re-export); it is also subject to on-the-ground verification by the U.S. government that the exported items are to be used for the purposes for which they were intended and only for the use and benefit of the Cuban people. 22 U.S.C. § 6004(d). Section 1705 also permits telecommunications services between the United States and Cuba subject to certain limitations, and direct mail service to and from Cuba.

25. 22 U.S.C. § 6006.

26. 22 U.S.C. § 6007(a).

27. Section 1708(b) of the CDA, 22 U.S.C. § 6007(b).

Likewise, Section 1708(a) of the CDA permits waiver of the sanctions it imposes against Cuba should the President determine and report to Congress that Cuba:

- (1) has held free and fair elections conducted under internationally recognized observers;
- (2) has permitted opposition parties ample time to organize and campaign for such elections, and has permitted full access to the media to all candidates in the elections;
- (3) is showing respect for the basic civil liberties and human rights of the citizens of Cuba;
- (4) is moving toward establishing a free market economic system; and
- (5) has committed itself to constitutional change that would ensure regular free and fair elections that meet the requirements of paragraph (2).²⁶

The CDA further provides that, if the President makes the above determinations, he shall take the following actions “with respect to a Cuban government elected pursuant to elections described in subsection (a):”

- (1) To encourage the admission or reentry of such government to international organizations and international financial institutions.
- (2) To provide emergency relief during Cuba’s transition to a viable economic system.
- (3) To take steps to end the United States trade embargo of Cuba.²⁷

The conditions set in the CDA go beyond the requirements in the Foreign Assistance Act of 1961 and impose further, specific requirements and timetables for the President’s lifting of all or portions of the Cuban trade embargo.

The LIBERTAD Act

On March 12, 1996, President Clinton signed into law the “Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995” (the “LIBERTAD Act” or “Helms-Burton Law”).²⁸ The LIBERTAD Act is a statute intended to tighten further the embargo by discouraging investment by nationals of third countries in Cuba; encourage Cuba’s transition to democracy through internationally supervised, free and fair elections; define a plan for the United States to assist transition and democratic governments in Cuba; and protect U.S. nationals’ property rights abroad.²⁹ The LIBERTAD Act is the most recent legislative initiative taken by the U.S. government to precipitate a political transition in Cuba.³⁰

Title I of the LIBERTAD Act³¹ contains a variety of measures to strengthen the embargo, such as withholding payments to international organizations in amounts equal to any loans or other assistance they provide to the Cuban Government.³² A very important provision in Title I relating to the trade embargo against Cuba is Section 102(h), which codifies the embargo regulations as they existed on March 1, 1996:

The economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under part 515 of title 31, Code of Federal Regulations, shall be in effect on March 12, 1996, and shall remain in effect, subject to section 6064 of this title.³³

By virtue of this provision, the detailed regulations developed by the Department of the Treasury and in ef-

fect on March 12, 1996 have acquired the force of law and can only be rescinded by legislation.

Another provision in Title I would seek to end “indirect financing of Cuba” by prohibiting any U.S. person or U.S. company from extending any loan, credit or other financing for any transaction involving property confiscated by the Cuban Government from a U.S. national who holds a claim for such confiscation.³⁴

Title II of the LIBERTAD Act delineates a program under which the United States will lift the trade embargo and provide economic assistance to Cuba at such a time as the President determines that a transition government or a democratically elected government is in power in Cuba.³⁵ As will be further discussed below, the conditions imposed for those actions under the LIBERTAD Act are more numerous, and the definitions of qualifying “transition” and “democratic” governments in Cuba more restrictive, than those under the Cuban Democracy Act.

Title III of the LIBERTAD Act contains provisions intended to internationalize the embargo by discouraging investors from third countries who may be considering doing business in Cuba.³⁶ Title III grants U.S. nationals whose property was confiscated by the Cuban government the right to bring actions for money damages in U.S. federal district courts against foreign nationals or foreign governments that “traffic” in the confiscated property. Liability in those suits would result from a determination that the foreign investor is “trafficking” in “confiscated property” which is subject

28. As of early 1996, the then proposed Helms-Burton Law was stalled in Congress and had slim chances of passing and virtually no chances of overriding an announced presidential veto. However, on February 24, 1996 Cuban MIGs downed two unarmed planes piloted by Cuban Americans, causing the deaths of four of them. This incident changed the political climate in the United States overnight. The pending bill was passed within a matter of days, and was signed by the President into law despite the serious reservations he had previously expressed about it. It also signaled the end of the “two-track” policy that had been pursued by the U.S. government since 1992.

29. Cuba Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104–114, 109 Stat. 785, 22 U.S.C. §§ 6021–91.

30. The Executive Branch has taken a variety of actions over the years, most notably in 2004, to further tighten the embargo.

31. 22 U.S.C. §§ 6021–46.

32. 22 U.S.C. § 6034(b). This provision is further discussed in Section III.E below.

33. Section 102(h) of the LIBERTAD Act, 22 U.S.C. § 6032(h).

34. 22 U.S.C. § 6033(a). The LIBERTAD Act also require the President to submit annual reports to Congress detailing the assistance received by Cuba from the governments of other countries, and a description of the joint ventures completed or in contemplation between Cuba and foreign investors. 22 U.S.C. § 6038.

35. 22 U.S.C. §§ 6061–67.

36. 22 U.S.C. §§ 6081–85.

to a “claim” that is “owned” by a “United States person.”³⁷

Title III declares that foreign nationals or foreign governments that traffic in confiscated U.S. property “shall be liable to the United States national who owns the claim to the confiscated property for money damages” in an amount which would be the greater of: (1) the amount, if any, of the claim certified to the claimant by the Foreign Claims Settlement Commission of the United States (“FCSC”), plus interest;³⁸ or (2) the amount determined by a special master appointed by the court (including the FCSC); or (3) the fair market value of the property (defined as the property’s current value, or the value of the property when confiscated plus interest at statutory rates, whichever is greater).³⁹ A U.S. national suing under this provision can recover three times the amount of damages specified under the above options if the person or government trafficking in the confiscated property had received notice of the U.S. national’s claim to ownership of the property and

had been provided with a copy of the provisions in the LIBERTAD Act affording this remedy.⁴⁰

Suits under Title III of the LIBERTAD Act are currently being held in abeyance under authority granted to the President by 22 U.S.C. § 6085(b)(1), which allows the President to suspend the right to bring an action under Title III for six month periods by determining and reporting in writing to the appropriate congressional committees that such suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba. Such determinations have been made by the President every six months since the statute was enacted.

Cuban Assets Control Regulations

As stated earlier, the President has delegated to the Secretary of the Treasury the embargo powers granted to him by Section 5(b) of the TWEA. The Secretary has in turn assigned responsibility for the exercise of this authority to the Treasury’s Office of Foreign Assets Control (“OFAC”).⁴¹ OFAC is the office responsible for issuing, interpreting and applying the regula-

37. All these terms are defined in 22 U.S.C. § 6023. In particular, “trafficking” in confiscated property is said to occur when a person or entity “knowingly and intentionally” does one of the following:

- (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses or otherwise acquires or holds an interest in confiscated property,
- (ii) engages in a commercial activity using or otherwise benefiting from a confiscated property, or
- (iii) causes, directs, influences, approves, participates in or profits from trafficking as described in clauses (i) and (ii) by another person, or otherwise engages in trafficking (as described in clauses (i) and (ii) through another without the authorization of the United States national who holds a claim to the property.

22 U.S.C. § 6023 (13).

38. In 1964, Congress amended the Foreign Claims Settlement Act to establish a Cuban Claims Program, under which the FCSC was given the authority to determine and certify the validity and amount of claims by U.S. nationals against the Cuban government for the uncompensated taking of their property in the early 1960s. 22 U.S.C. § 1643. The issues involved in the resolution of confiscation claims against Cuba have been discussed in many publications. See, e.g., Matias F. Travieso-Diaz, *Alternative Remedies In A Negotiated Settlement Of The U.S. Nationals’ Expropriation Claims Against Cuba*, 17 U. Pa. J. Int’l. Bus. L.659 (1996); Laws and Legal System, Chapter 4.

39. 22 U.S.C. § 6082(a)(1). Recovery under either option includes also “reasonable costs and attorneys fees.” *Id.*

40. 22 U.S.C. § 6082 (a)(3). In addition to making third country investors in Cuba potentially subject to civil liability to U.S. property owners, the LIBERTAD Act imposes a broadly worded immigration exclusion against foreigners involved in transactions concerning properties confiscated by Cuba from U.S. nationals. Title IV of the legislation directs that the U.S. Departments of State and Justice shall exclude from the United States any alien who (1) has confiscated, or has directed or overseen the confiscation of, property the claim to which is owned by a United States person, or converts or has converted for personal gain confiscated property, the claim to which is owned by a United States national; (2) traffics in confiscated property, the claim to which is owned by a United States national; (3) is a corporate officer, principal or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, the claim to which is owned by a United States person, or (4) is a spouse, minor child or agent of a person excludable under paragraph (1), (2) or (3). 22 U.S.C. § 6091. The Title IV exclusion has only been applied a handful of times to officials of Canadian, Mexican and Israeli companies.

41. Treasury Department Order No. 128 (Rev. 1, Oct. 15, 1962).

tions that implement the various trade embargoes imposed by the United States.⁴²

OFAC published in 1963 a comprehensive set of regulations implementing the Cuban trade embargo.⁴³ These regulations have been amended a number of times, most recently in March 2009.⁴⁴ The CACR have been challenged in the courts, and have been uniformly upheld.⁴⁵ Most significant to the subject of this paper, the CACR, as they existed on March 12, 1996, have become codified by virtue of Section 102(h) of the LIBERTAD Act, 22 U.S.C. § 6032(h), and those among the CACR that were in effect on that date cannot be changed save by Congressional action.⁴⁶

The CACR prohibit all unlicensed financial and commercial transactions by Americans with Cuba or its citizens.⁴⁷ They serve the functions of isolating Cuba; protecting Cubans from having their assets in the United States confiscated by Cuban authorities; preserving Cuban assets for future disposition; and denying Cuba access to dollar earnings, and to dollar financial facilities.⁴⁸ The regulations prohibit the export to Cuba—either directly or through third countries—of any U.S. products, technology or services except for certain goods licensed for export or re-export by the U.S. Department of Commerce (such as medicine and

42. The CDA also identifies the Department of the Treasury (and consequently OFAC) as the chief agency given authority to enforce the legislation, and amends the TWEA by empowering Treasury to impose civil penalties of up to \$50,000 and forfeitures of property for violating the CDA's prohibitions. Section 1710 of the CDA, 50 USC Appendix § 16.

43. 28 Fed. Reg. 6974, July 9, 1963. The regulations, known as the Cuban Assets Control Regulations ("CACR"), are codified in 31 C.F.R. Part 515. Pursuant to the CDA's authority, on June 29, 1993, OFAC published regulations amending the CACR to incorporate several of the CDA provisions. 58 Fed. Reg. 34709 (1993). The amendments reflected the CDA's prohibition on the issuance of licenses for most trade between third country subsidiaries of U.S. companies, imposed a prohibition on the entry into the United States of vessels touching Cuban ports, and added civil penalty authority.

44. In 2004, the CACR regulations were modified to implement a change in policy by the George W. Bush administration that curtailed travel to Cuba to visit close relatives, remittances to Cuba, and educational and other professional travel. 69 Fed. Reg. 33768 (June 16, 2004). Those changes were reversed in part in March 2009 by a Congressional directive that none of the funds made available in the Omnibus Appropriations Act, 2009, may be used to administer, implement, or enforce the June 16, 2004 amendments with respect to family travel. The Department of the Treasury has proceeded to issue a general license authorizing persons subject to the jurisdiction of the United States to travel to Cuba to visit an expanded category of family members who are nationals of Cuba, defined as "close relatives," once every 12 months for an unlimited length of stay and at the same expenditure limits as all other authorized travel to Cuba. This general license thus reinstates the authorization for family travel to Cuba that existed prior to the June 16, 2004 amendments. See Office of Foreign Assets Control, Guidance on Implementation of Cuba Travel and Trade-Related Provisions of The Omnibus Appropriations Act, 2009, *available online at* http://www.treas.gov/offices/enforcement/ofac/programs/cuba/omni_guide.pdf

45. See, e.g., *Regan v. Wald*, 468 U.S. 222, 104 S.Ct. 3026 (1984); *Miranda v. Secretary of Treasury*, 766 F.2d 1 (1st Cir. 1985); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966). In recent cases, Treasury's authority to issue additions or modifications to the CACR have been upheld on the strength of the statutory authority of the TWEA. See, *Regan v. Wald*, 104 S.Ct. at 3029; *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 867 (D.C. Cir. 1984); *De Cuellar v. Brady*, 881 F.2d 1561, 1562 (11th Cir. 1989), *cert. denied*, 498 U.S. 895 (1990). See also, *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991); *Capital Cities/ABC, Inc. v. Brady*, 740 F.Supp. 1007, 1008 (S.D.N.Y. 1990); *Cernuda v. Heavy*, 720 F.Supp. 1544, 1546-47 (S.D.Fla. 1989).

46. The CACR were amended in July 1996 to incorporate certain provisions of the LIBERTAD Act dealing with new prohibitions on bank financing and imposing new civil penalties on infractors. 61 F.R. 37385 (July 18, 1996). Presumably, these CACR also have the force of law since they implement the statute.

47. A summary overview of the CACR prohibitions is available online at <http://www.ustreas.gov/offices/enforcement/ofac/programs/cuba/cuba.shtml>

48. S.L. Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 79 BUS. LAW. 861, 868 (1964). The CACR do not ban altogether commercial transactions with Cuba, but require the issuance of "specific licenses" by OFAC approving such transactions. Applications for such specific license are granted only in rare cases.

medical supplies, food, and agricultural commodities), publications and other informational materials, and telecommunications services and attendant equipment.⁴⁹ Likewise, goods or services of Cuban origin may not be imported directly or through third countries into the United States, except for publications or other informational materials.⁵⁰ The CACR prohibit buying from or selling to Cuban nationals whether they are physically located in Cuba or doing business elsewhere on behalf of Cuba. The prohibition also extends to individuals or organizations anywhere in the world who act on behalf of Cuba.

The CACR impose a total freeze on Cuban assets, both government and private, and on financial dealings with Cuba. All property of Cuba and Cuban nationals in the possession of U.S. persons is “blocked.” Blocking imposes a prohibition against transfers or transactions of any kind involving blocked assets. No payments, transfers, withdrawals, or other dealings may take place with regard to blocked property unless authorized by Treasury.⁵¹

The CACR also prohibit spending money in connection with most types of travel to Cuba, whether for pleasure or for business.⁵² Travel-related transactions directly incident to professional research by full-time professionals who travel to Cuba to conduct profes-

sional research in their professional areas are authorized, provided that the research is of a noncommercial, academic nature; the research comprises a full work schedule in Cuba; and the research has a substantial likelihood of public dissemination.⁵³ Expenditure of money related to travel to Cuba is authorized without a specific license for travel by U.S. and foreign government officials and by members of the news media.⁵⁴

On March 11, 2009, President Obama signed into law the Omnibus Appropriations Act, 2009.⁵⁵ The Appropriations bill directs that none of the funds made available through the bill, may be used to administer, implement, or enforce the modifications that had been made on June 16, 2004 to sections 515.560 and 515.561 of Title 31, Code of Federal Regulations, related to travel to visit relatives in Cuba.⁵⁶ Another provision in the Omnibus Appropriations Act, 2009, directs Treasury to promulgate regulations authorizing, by general license, travel-related transactions for travel to, from, or within Cuba for the marketing and sale of agricultural and medical goods.⁵⁷ Congress also has directed that none of the funds made available in the Act may be used to administer, implement, or enforce the February 25, 2005 amendment to 31 C.F.R. § 515.533, which had clarified the agency’s view that the term “cash in advance” should be given its ordinary commercial meaning, which requires payment to be

49. Under the Trade Sanctions and Export Enhancement Act of 2000 (Title IX of P.L. 106–387, 114 Stat. 1549A-67), the Commerce Department authorizes the sale and export or re-export of medicine and medical supplies, food and agricultural commodities to Cuba. Those interested in engaging in such exports or reexports must first obtain authorization from the Commerce Department’s Bureau of Export Administration. All licensed sales may be financed by cash-in-advance or by third-country banks. 15 C.F.R. § 740.18.

50. 31 C.F.R. §§ 515.204, 515.560, 515.570. The regulations used to allow travelers to Cuba to bring into the United States up to \$100 worth of Cuban goods for their personal use. That allowance was rescinded in 2004 when the CACR were amended to implement a tightening of the embargo restrictions by the Bush administration. 69 Fed. Reg. 33768, 33771 (June 16, 2004); 31 C.F.R. § 515.560(a)(3).

51. 31 C.F.R. § 515.205.

52. 31 C.F.R. § 515.415(a).

53. 31 C.F.R. § 515.564(a)(1). Also authorized is travel by full-time professionals to attend professional meetings or conferences in Cuba organized by an international professional organization, institution, or association that is not headquartered in the United States unless that organization, institution, or association has been specifically licensed to sponsor the meeting in Cuba, and the purpose of the meeting or conference is not the promotion of tourism in Cuba or other commercial activities involving Cuba or fostering production of any biotechnological products. 31 C.F.R. § 515.564(a)(2). Other types of travel incident to research or professional meetings in Cuba require a specific license. 31 C.F.R. § 515.564(b).

54. 31 C.F.R. §§ 515.562 and 515.563.

55. Omnibus Appropriations Act, 2009, H.R. 1105, Pub. L. 111–8.

56. *Id.*, § 621.

57. *Id.*, § 620.

received by the seller or the seller's agent in advance, prior to shipment of goods from the port at which they are loaded.⁵⁸

These directives have been fully implemented via new OFAC regulations announced in September 2009.⁵⁹ The new regulations establish a general license authorizing, in 31 C.F.R. § 515.561(a)(1), travel-related transactions and additional transactions that are directly incident to visiting a close relative who is a national of Cuba.⁶⁰ The new regulations also amend 31 C.F.R. § 515.560(c)(2) by removing the \$50 per day limit on living expenses in Cuba, as well as the \$50 per trip limit on transportation-related expenses within Cuba, that formerly applied to licensed family visits. New section 515.560(c)(2) authorizes all transactions ordinarily incident to travel anywhere in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there, that do not exceed the "maximum per diem rate," as established by the Department of State for Havana, Cuba, in effect at the time travel to Cuba takes place.

Remittances from persons subject to the jurisdiction of the United States to nationals of Cuba were limited to "immediate family" of the remitter and capped at \$300 per recipient household in any consecutive three-month period, regardless of the number of members of the remitter's immediate family comprising that household; remittances were also allowed to facilitate immigration travel to the United States. Otherwise, remittances were prohibited without a specific license, to be issued on a case-by-case basis, but only in circumstances of "extreme humanitarian need," such as terminal illness or other severe medical emergency.⁶¹

OFAC amended 31 C.F.R. § 515.570(a) to remove all limitations on the amount and frequency with which persons subject to the jurisdiction of the United States may make remittances to nationals of Cuba and to expand the category of permitted recipients to "close relatives," as defined in new section 515.339. OFAC also amended 31 C.F.R. § 515.560 (c)(4)(i) to increase from \$300 to \$3,000 the total amount of family remittances an authorized traveler may carry to Cuba, and modified 31 C.F.R. § 515.560 to increase from \$300 to \$3,000 the amount of funds received as remittances that a national of Cuba departing the United States may carry. With respect to persons in Cuba seeking to emigrate to the United States, OFAC amended its regulations in 31 C.F.R. § 515.570(b) to authorize two separate one-time emigration-related remittances, and to increase the value limit of each of these remittances from \$500 to \$1,000.

Another change in the embargo regulations announced in September 2009 is in the area of telecommunications. While transactions with Cuba relating to telecommunications were first liberalized under the CDA in 1992, the new OFAC regulations provide that certain telecommunications services, contracts, related payments, and travel-related transactions are authorized by general licenses, that is, without requiring permission via license by OFAC. Thus, 31 C.F.R. § 515.542 (b) is being amended to authorize all transactions, including but not limited to payments, incident to the provision of telecommunications services between the United States and Cuba, the provision of satellite radio or satellite television services to Cuba, or the entry into and performance under roaming service agreements with telecommunications services providers in Cuba, by a telecommunications services provider

58. *Id.*, § 622.

59. See Update to Cuban Assets Control Regulations, <http://www.treas.gov/offices/enforcement/ofac/actions/>.

60. The term "close relative" is defined in new section 31 C.F.R. § 515.339 as any individual related to a person by blood, marriage, or adoption who is no more than three generations removed from that person or from a common ancestor with that person. The new regulations also authorize persons who share a common dwelling as a family with a licensed family traveler to accompany the licensed traveler on a family visit.

61. 31 C.F.R. § 515.570(d)(3). Specific licenses may also be issued on a case-by-case basis authorizing remittances to "to non-governmental organizations and individuals, to independent non-governmental entities in Cuba, including but not limited to pro-democracy groups, civil society groups, and religious organizations, and to members of such groups or organizations." 31 C.F.R. § 515.570(d)(1).

that is a person subject to U.S. jurisdiction. Former 31 C.F.R. § 515.542 (c), which set forth a case-by-case licensing policy for payments to Cuba for authorized telecommunications services, is removed. Moreover, a new paragraph (c) of section 515.542 authorizes all persons subject to U.S. jurisdiction to enter into, and make payments under, contracts with non-Cuban telecommunications services providers, or particular individuals in Cuba, for services provided to particular individuals in Cuba, such as a contract for cellular telephone service for a phone owned and used by a particular individual in Cuba. The authorization in new paragraph (c) includes, but is not limited to, payment for activation, installation, usage (monthly, pre-paid, intermittent, or other), roaming, maintenance, and termination fees.

Newly added paragraph (d)(1) of section 515.542 contains a general license authorizing transactions incident to the establishment of facilities to provide telecommunications services linking the United States and Cuba, including but not limited to fiber-optic cable and satellite telecommunications facilities. Newly added paragraph (d)(2) provides a statement of specific licensing policy with respect to transactions incident to the establishment of facilities to provide telecommunications services linking third countries and Cuba, including but not limited to fiber-optic cable and satellite facilities, provided that such facilities are necessary to provide efficient and adequate telecommunications services between the United States and Cuba.

Travel-related transactions incident to these new authorizations in section 515.542 are addressed by amendments to 31 C.F.R. §§ 515.564 and 515.533. New paragraph (a)(3) of section 515.564 provides a general license authorizing, with certain conditions, the travel-related transactions set forth in section 515.560(c) and additional transactions that are directly incident to participation in professional meetings for the commercial marketing of, sales negotiation for, or performance under contracts for the provision of the telecommunications services, or the establishment of facilities to provide telecommunications services, authorized by the general licenses in section 515.542. With respect to those commercial telecommunications transactions that will require Commerce-authorized

exports of telecommunications-related items, new paragraph (f) of section 515.533 provides a general license authorizing, with certain conditions, the travel-related transactions set forth in section 515.560(c) and additional transactions that are directly incident to the commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of telecommunications-related items that have been authorized for commercial export or re-export to Cuba by the Department of Commerce.

Finally, the regulations regarding the sale of medicines and agricultural products to Cuba have also been modified. OFAC has issued a general license authorizing, subject to certain requirements, travel-related transactions incident to agricultural and medical sales to Cuba. The regulations now provide that: “The travel-related transactions set forth in § 515.560(c) and additional transactions that are directly incident to the commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of agricultural commodities, medicine, or medical devices that appear consistent with the export or re-export licensing policy of the Department of Commerce are authorized, provided that: (1) the traveler is regularly employed by a producer or distributor of the agricultural commodities, medicine, or medical devices or by an entity duly appointed to represent such a producer or distributor; (2) the traveler’s schedule of activities does not include free time, travel, or recreation in excess of that consistent with a full work schedule; and (3) the traveler submits to OFAC at least 14 days in advance of each departure to Cuba a written report identifying both the traveler and the producer or distributor and describing the purpose and scope of such travel. Within 14 days of return from Cuba, the traveler shall submit a written report describing the business activities conducted, the persons with whom the traveler met in the course of such activities, and the expenses incurred.”

The 2009 relaxations to the trade embargo against Cuba are relatively insignificant. Their importance, however, rests on two factors: (1) they mark the first time since the embargo was modified in 2000 to allow the sale of agricultural products to Cuba under restrictive conditions;⁶² and (2) despite their relative lack of significance, they were the subject of a fierce battle in

Congress that required the White House to provide assurances to some members of Congress that the government would interpret the law with respect to travel to promote agricultural sales so that it “would be limited to only a narrow class of businesses,” and would be applied so strictly as to render them ineffective.⁶³ The difficulties encountered in implementing even such a limited modification of the embargo raises the question of what will be necessary in order for a more significant lifting of the sanctions to take place.

REMOVING THE DIRECT EMBARGO PROHIBITIONS

As discussed above, the U.S. trade embargo against Cuba is based on four statutes (plus the CACR in place as of March 1996). The multiple statutory authority for the sanctions may require a diversity of procedures for lifting them. This section reviews the statutes to determine how the President and Congress might interact to remove the embargo’s prohibitions.

The actions taken by the United States in the past to remove trade embargoes against foreign countries appear to show that, unless such lifting is specifically limited by the legislation, Presidential decisions and determinations are sufficient authority to lift trade embargoes. On that basis, removing the TWEA as a source of the Cuban trade embargo would be straightforward. The simplest procedure would be for the President to abstain from issuing the required annual Determination that exercise of the TWEA authority with respect to Cuba is in the national interest of the United States. An alternative, but perhaps more controversial, course of action would be for the President to issue an executive order expressly ending the state of

emergency with regard to Cuba. The same document could repeal other elements of the embargo, such as some of the CACR issued after March 1996. Alternatively, the Treasury Department could take administrative action to rescind the post-1996 CACR.⁶⁴

In the case of the Foreign Assistance Act, Section 620(a)(1) of the FAA, 22 U.S.C. § 2370(a)(1), authorizes the President to “establish and maintain a total embargo upon all trade between the United States and Cuba.” This section is clearly permissive and leaves the President free to determine whether to “maintain” the embargo, and consequently whether to lift it. The President could remove the embargo, to the extent it is imposed under this provision, by an executive order that rescinds President Kennedy’s Proclamation and revokes all subsequent executive orders and regulations thereunder implementing aspects of the embargo. The President could also take this action unilaterally, without reference to any external events.

The FAA, however, goes beyond authorizing the imposition of a trade embargo. Section 620(a)(1) states unambiguously that “[n]o assistance shall be furnished under this chapter to the present government of Cuba.” Moreover, Section 620(a)(2) of the FAA decrees that no assistance, sugar quota or “other benefits under any law of the United States shall be furnished to Cuba unless the President (a) determines that providing such assistance or benefits is necessary in the interest of the United States,” or (b) the President determines that the Cuban government has taken appropriate steps under international law standards” to provide compensation or restitution to U.S. citizens whose property was expropriated by the Castro gov-

62. The authorization to sell agricultural products to Cuba was hotly debated and only approved after a compromise was reached that prohibited sales on credit, and barred financing by U.S. banks. The law also tightened travel restrictions to the island. Eric Pianin and Dan Morgan, *Deal Reached to Allow Food Sales to Cuba*, WASHINGTON POST, October 6, 2000 at A1.

63. Lesley Clark and Frances Robles, *Senators reassured about Cuba policy; spending bill vote expected*, MIAMI HERALD, Mar. 10, 2009, available online at <http://www.miamiherald.com/news/americas/story/942403.html>. Ultimately, however, OFAC issued a general license authorizing, subject to certain requirements, travel-related transactions incident to agricultural and medical sales to Cuba. 31 C.F.R. § 515.533(e); Karen de Young, *U.S. Lifts Almost All Curbs on Family Visits to Cuba*, WASHINGTON POST, Sep. 4, 2009, available online at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/03/AR2009090303810.html>

64. This was the process followed by the Carter Administration to remove the sanctions imposed by President Truman against the People’s Republic of China in 1950, which were based on TWEA authority. The Office of Foreign Assets Control of the Department of the Treasury, which administered the embargo on trade with China through the FACR, lifted the trade sanctions against China in accordance with a treaty signed between the United States and China. 45 Fed. Reg. 7224, January 31, 1980.

ernment. These two sections of the FAA mean that, in order for the U.S. government to make all its assistance programs available to Cuba, (1) the Cuban government would have to change, and (2) a subsequent government would need to have taken “appropriate steps” to resolve the expropriation claims of U.S. nationals.⁶⁵ The FAA leaves it to the President to determine whether the Cuban government has indeed taken such “appropriate steps.”⁶⁶ The President could, alternatively, declare that providing assistance or other beneficial aid or trade concessions to Cuba is “necessary in the interest of the United States.” In either case, the President would have to issue a formal determination to that effect, e.g., a proclamation or an executive order.⁶⁷

The CDA, on the other hand, sets very specific conditions for the lifting of the U.S. trade embargo against

Cuba. Section 1708(b)(3) of the CDA⁶⁸ directs the President to “take steps to end the United States trade embargo of Cuba” when two conditions have been met. The first condition is that the President make a determination, and report it to Congress, that the Cuban government has carried out five actions identified in Section 1708(a), including holding free and fair elections conducted under international supervision, permitting opposition parties ample time to organize and campaign for such elections, showing respect for the basic civil liberties and human rights of Cubans, moving toward establishing a free-market economic system, and committing itself to constitutional change that would ensure regular free and fair elections. The second condition is that a new Cuban government be elected as a result of such elections.

65. The total ban on assistance to Cuba contained in Section 620(a)(2) of the FAA has been modified in part by several provisions in the CDA. Section 1705 of the CDA, 22 U.S.C. § 6004, specifically states, “[t]he provisions of this section apply notwithstanding any other provision of law, including section 620(a) of the Foreign Assistance Act of 1961....” This assertion overrides Sub-section (a), as well Sub-sections (e), (f) and (h) of Section 620 of the FAA, with respect to food donations and the provision of telecommunication services. Also, Section 1707 of the CDA, 22 U.S.C. § 6006, effectively overrides all the provisions of Section 620 of the FAA with regard to providing food, medicine, and medical supplies for humanitarian purposes to Cuba once there is a government in the island that meets the requirements of Section 1707 of the CDA. Section 1707 does not mention the payment of compensation for nationalized or expropriated property as a prerequisite for providing such aid to Cuba, but the LIBERTAD Act does.

66. Because the definition of “appropriate steps” is tied to “international law standards,” the determination whether the steps are appropriate is an objective one, and would be amenable to review by a court, assuming it finds the Executive determination reviewable.

67. The Rhodesian sanctions present an example of a non-TWEA embargo based upon a specific Congressional grant of authority to the President. Section 5 of The United Nations Participation Act of 1945, 22 U.S.C. § 287c, gives the President the authority to impose economic sanctions against a foreign country if necessary to give effect to resolutions of the United Nations (“U.N.”) Security Council. This general grant of authority to the President is similar to that in the TWEA, in that both statutes allow the President to impose sanctions without further enabling legislation. Citing the U.N. Participation Act of 1945 as authority, President Johnson imposed a limited embargo against Rhodesia in 1967 to implement measures adopted by the U.N. Security Council. Executive Order No. 11322, 32 Fed. Reg. 33 (1967), *reprinted in* 1967 U.S.C.A.A.N. 3453–54. Years later, Congress enacted legislation empowering the President to impose a comprehensive trade embargo against that country. Pub. L. 95–12, 91 Stat. 22 (1977). The President did so. President Carter ultimately lifted the Rhodesian embargo by another executive order, in which he revoked all previous executive orders imposing the embargo and directed the relevant executive agencies to take the steps necessary to rescind the trade sanctions. Executive Order No. 12183, 44 Fed. Reg. 74787 (1979), *reprinted in* 1979 U.S.C.C.A.N. 3375–6. The Rhodesian example indicates that Congressional action is not needed to end an embargo where the President has been given express authority to impose the embargo in the first place and Congress has neither set conditions for the lifting of the embargo nor reserved any review power over the President’s decision. Thus, if the Cuban trade embargo were to be acted upon in accordance with the Rhodesian example, the President would simply need to issue an executive order revoking all previous executive orders and regulations that instituted the embargo against Cuba. However, other laws (the CDA and the LIBERTAD Act) preclude such a simple solution.

68. 22 U.S.C. § 6007(b)(3).

Section 1708(b)(3) appears to set specific requirements for lifting the embargo, thus the President is left with no flexibility to react to events in Cuba.⁶⁹ If the enumerated conditions need to be met, the lifting of the embargo may take place months—if not years—after a political change starts in Cuba.⁷⁰

The LIBERTAD Act states that “[u]pon submitting a determination to the appropriate Congressional committees under [22 U.S.C. § 6063(c)(1)] that a transition government of Cuba is in power, the President, after consultation with the Congress, is authorized to take steps to suspend the economic embargo of Cuba to the extent that such action contributes to a stable foundation for a democratically elected government in Cuba.”⁷¹ Subsequently, “[u]pon submitting a determination to the appropriate Congressional committees under [22 U.S.C. § 6063(c)(1)] that a democratically

elected government of Cuba is in power, the President shall take steps to terminate the economic embargo of Cuba.”⁷² The suspension of the embargo can be overruled through a joint resolution of Congress disapproving of the President’s action.⁷³

The provisions of the LIBERTAD Act impose additional restrictions on the ability to modify or lift the embargo, for the President would need to make the determinations called for in the Act that a “transition government” and a “democratically elected government” are in place before he could proceed to suspend or lift the embargo, and such an action in the President’s part could be overridden by Congress.

Finally, the codification of the CACR provisions in effect as of March 1996 cannot be reversed by the President, but can only be rescinded by specific Congressional action.

69. In this regard, the CDA is in some ways analogous to the legislation that established the South African Trade Embargo, the Comprehensive Anti-Apartheid Act of 1986 (“the CAAA”), Pub. L. 99–440, 100 Stat. 1087, *as amended by* Pub. L. 99–631, 100 Stat. 3515, 22 U.S.C. § 5001 *et seq.*, *repealed by* Pub.L. 103–149, 107 Stat. 1503 (November 23, 1993). In the CAAA, Congress imposed—among other sanctions—explicit prohibitions on the importation from and export to South Africa of certain items. 22 U.S.C. §§ 5011(a), 5051 through 5073. The sanctions would terminate if the government of South Africa implemented five measures specified in the law. 22 U.S.C. § 5061(b). Alternatively, the President could suspend or modify the sanctions under specified conditions. *Id.* Thus, in the CAAA Congress set two different procedures under which the sanctions against South Africa could be lifted: automatically, if South Africa took all the measures specified by the law; or through a determination by the President that the enumerated conditions were met. The President’s determination was subject to nullification if Congress disagreed with it. President George H. Bush lifted the South African embargo through an Executive Order issued in 1991. Executive Order 12769 of July 10, 1991, 56 Fed. Reg. 31855, *reprinted in* 1991 U.S.C.C.A.N. B50. The Executive Order cited as basis for lifting the sanctions the President’s conclusion that the government of South Africa had taken the steps specified by Congress. Thus, the President followed the course made available to him by the CAAA and proclaimed that the embargo had ended without referring his decision to Congress. Congress took no action to countermand the President’s action. The CDA is analogous to the CAAA in that it requires a degree of interaction between the President and Congress. Section 1708 of the CDA directs that the President officially report to Congress that the five conditions for waiver of the sanctions against Cuba have been met before the sanctions can be lifted. This report is analogous to that required by the CAAA. The reporting requirement did not need to be satisfied in the case of South Africa, however, because the President exercised the option of declaring that the South African government had satisfied each of the five conditions listed in §5061(a). Since the CDA does not give the President this option, the President would need to represent to Congress that the CDA’s requirements have been satisfied.

70. Section 1707 of the CDA, 22 U.S.C. § 6006, allows partial lifting of the trade embargo to allow shipment of food, medicines and medical supplies to Cuba if the President determines and certifies to Congress that the government in power in Cuba has made public commitments to holding free and fair elections within six months and to respecting human rights and basic democratic freedoms, and is implementing those commitments, and is not providing weapons or funds to any group in another country that seeks the violent overthrow of the government of that country. However, Section 1705 of the CDA, 22 U.S.C. § 6004, imposes certain limitations on the donations of food, exports of medicines and medical supplies, and provision of telecommunications services to Cuba. Section 1705(a) declares that the provisions of the section apply “notwithstanding any other provision of law,” including the TWEA and the FAA. Moreover Congress, perhaps inadvertently, never applied Section 1708 to the provisions of Section 1705. Therefore, even a President who made the findings set forth in Section 1708 would be unable to change the stipulations of Section 1705 on his own, and would have to rely on Congressional action to repeal the restrictions.

71. LIBERTAD Act, § 204(a), 22 U.S.C. § 6064(a).

72. *Id.*, § 204(c), 22 U.S.C. § 6064(c).

73. *Id.*, § 204(e), 22 U.S.C. § 6064(e).

In summary, the accumulated embargo legislation has created a situation where Cuba's transition government must proceed in a very specific manner that meets the requirements of the CDA and the LIBERTAD Act in order for the embargo sanctions to be lifted. Assuming the conditions set forth in those statutes are met, once the President submits to Congress the reports required by these laws, he can issue an executive order to lift the embargo. The President will also be able at that time to order all affected executive departments and agencies, including Treasury, State and Commerce, to implement the termination of the sanctions now currently in effect against Cuba and against other countries providing assistance to the Cuban government.

If, however, the events in Cuba do not fit the pattern set out in the CDA and the LIBERTAD Act, the embargo will remain in place until the conditions in Cuba conform to the requirements in those laws, or until new legislation is enacted. Any effort by the President to expedite the process (e.g., by failing to renew the applicability of the TWEA) can be countermanded by Congress, particularly if it is unclear as to in what direction the Cuban government is going.

Also, as the example of the measures implemented in October 2000 and March 2009 shows, any new legislation that relaxes (instead of tightening) the embargo may be the subject of significant political debate and may falter unless there is an indisputable movement towards the re-establishment of democratic rule in the island.

THE INDIRECT EMBARGO

In the half a century since the triumph of Cuba's Revolution, the United States has instituted (and later scaled back or discontinued) a series of programs designed to assist in the economic development of the less affluent nations of the Western Hemisphere. Together with non-region-specific aid programs administered by various agencies of the Federal Government, these measures have offered varying degrees of support for the economic growth of Latin American and Caribbean countries.

The assistance programs have taken a variety of forms. They have included regional and non-regional programs and preferences; programs with a commercial purpose, as well as humanitarian assistance grants with significant commercial impact; programs run by the U.S. government, as well as those funded by the government but administered by outside organizations; and programs assisting Latin American and Caribbean countries directly, or having a positive effect on the economies of those countries through the actions of a U.S. program beneficiary. Cuba has been excluded from all these programs as a result of the U.S. trade embargo legislation, particularly the FAA, which deprives Cuba of access to trade assistance programs sponsored by the United States or involving significant U.S. participation. In addition, Cuba has been excluded from any form of direct aid from the United States, other than the humanitarian assistance provided by private charitable organizations and individual donors.

This section describes briefly the economic assistance programs or activities that are currently unavailable for Cuba, but could be applied upon the lifting of the embargo. Economic assistance programs can only be described in general terms because the scope of the assistance programs sponsored by the U.S. government, and the existence of the programs themselves, depends on policy and budgetary considerations that change with economic conditions and the vagaries of the political process. Therefore, some of the programs described in this section may not be in effect, or may exist in significantly modified form, when Cuba becomes eligible for U.S. assistance.

Direct Economic Aid to Cuba

Title II of the LIBERTAD Act delineates a program under which the United States would provide economic assistance to Cuba "at such a time as the President determines that a transition government or a democratically elected government" is in power in Cuba.⁷⁴ The Act does not, however, authorize any specific aid to Cuba, but makes any such assistance in the future "subject to an authorization of appropriations and subject to the availability of appropriations."⁷⁵

74. LIBERTAD Act § 202(a)(1), 22 U.S.C. § 6062(a)(1).

Thus, the level of aid would depend on what other competing priorities exist at the time Congress considers an aid package for Cuba.

The conditions for the United States giving aid to Cuba in the LIBERTAD Act include nearly a dozen requirements that a Cuban transition government must meet before it becomes eligible to receive aid from the United States. A transition government must: (1) legalize all political activity; (2) release all political prisoners and allow for investigations of Cuban prisons by appropriate international human rights organizations; (3) abolish the Department of State Security, Committees for the Defense of the Revolution and Rapid Response Brigades; (4) commit to holding free and fair elections; (5) cease any interference with Radio or Television Marti broadcasts; (6) make public commitments to and make demonstrable progress in establishing an independent judiciary; (7) make public commitments to and make demonstrable progress in respecting internationally recognized human rights and basic freedoms as set forth in the Universal Declaration of Human Rights; (8) make public commitments to and make demonstrable progress in allowing the establishment of independent trade unions as set forth in Conventions 87 and 98; (9) make public commitments to and make demonstrable progress in allowing the establishment of independent social, economic, and political associations; (10) do not include Fidel Castro or Raúl Castro; and (11) give adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people.⁷⁶ In addition, in determining whether a transition government is in power in Cuba, the President must take into account the extent to which the Cuban government: (1) is demonstrably in transition from a communist totalitarian dictatorship to representative democracy; (2) has made public commitments to, and is making demonstrable progress in— (A) effectively guaranteeing the rights of free speech and freedom of the press, including granting permits to privately owned media and telecommunications companies to operate in Cu-

ba; (B) permitting the reinstatement of citizenship to Cuban-born persons returning to Cuba; (C) assuring the right to private property; and (D) taking appropriate steps to return to United States citizens (and entities which are 50 percent or more beneficially owned by United States citizens) property taken by the Cuban Government from such citizens and entities on or after January 1, 1959, or to provide equitable compensation to such citizens and entities for such property; (3) has extradited or otherwise rendered to the United States all persons sought by the United States Department of Justice for crimes committed in the United States; and (4) has permitted the deployment throughout Cuba of independent and unfettered international human rights monitors.⁷⁷

Requirements for assistance to a democratically elected Cuban government include that the government:

- (1) results from free and fair elections—
 - (A) conducted under the supervision of internationally recognized observers; and
 - (B) in which—
 - (i) opposition parties were permitted ample time to organize and campaign for such elections; and
 - (ii) all candidates were permitted full access to the media;
- (2) is showing respect for the basic civil liberties and human rights of the citizens of Cuba;
- (3) is substantially moving toward a market-oriented economic system based on the right to own and enjoy property;
- (4) is committed to making constitutional changes that would ensure regular free and fair elections and the full enjoyment of basic civil liberties and human rights by the citizens of Cuba;
- (5) has made demonstrable progress in establishing an independent judiciary; and
- (6) has made demonstrable progress in returning to United States citizens (and entities which are 50 percent or more beneficially owned by United States citizens) property taken by the Cuban Government from such citizens and entities on or after January 1,

75. *Id.*

76. LIBERTAD Act § 205(a), 22 U.S.C. § 6065(a).

77. *Id.*, § 205(b), 22 U.S.C. § 6065(b).

1959, or providing full compensation for such property in accordance with international law standards and practice.⁷⁸

There are major differences between a “transition government” and a “democratically elected government” in terms of aid eligibility. Aid to a transition government (subject to the authorization and availability of appropriations) is generally limited to food, medicine, medical supplies and equipment, and emergency energy supplies, plus assistance in preparing the Cuban military forces to adjust to an appropriate role in democracy.⁷⁹ Other types of assistance to a transition government would require that the President certify to Congress that such assistance “is essential to the successful completion of the transition to democracy.”⁸⁰

Assistance to a democratically elected government would include, on the other hand, assistance under the Foreign Assistance Act of 1961; assistance under the Agricultural Trade Development and Assistance Act of 1954; financing, guarantees, and other forms of assistance provided by the Export-Import Bank of the United States; financial support as provided by the Overseas Private Investment Corporation (“OPIC”); assistance provided by the Trade and Development Agency; Peace Corps programs; and “other appropriate assistance.”⁸¹

The LIBERTAD Act directs the President to transmit to Congress a report describing a plan for carrying out the assistance programs defined in the Act.⁸² The Act

further directs that the President shall take the necessary steps to seek and obtain the agreement of other countries and of international financial institutions and multilateral organizations to provide assistance to a transition government and to a democratically elected government in Cuba, and work with other countries and multilateral organizations to coordinate all assistance programs.⁸³ Moreover, the Act requires that, upon making a determination that a democratically elected government is in power in Cuba, the President submit a report to Congress discussing, among others: the possibility of granting Cuba most-favored-nation trade treatment; designating Cuba as a beneficiary under the Caribbean Basin Initiative;⁸⁴ and conducting negotiations towards the accession of Cuba to the North American Free Trade Agreement.⁸⁵

Even though not all-encompassing and non-binding (since it is subject to appropriations and the availability of appropriated funds), Title II of the Act exemplifies the type of legislation that would be needed to speed the process of providing direct aid to Cuba and bringing Cuba within the coverage of the then existing U.S. economic assistance programs. Whatever aid is given under Title II is, however, subject to so many political conditions and requirements that it may be a long time before a transition government in Cuba qualifies for such aid as may be available. Indeed, for such aid to be effective in alleviating the hardships that will likely be experienced in a political and economic

78. LIBERTAD Act, § 206, 22 U.S.C. § 6066.

79. *Id.*, § 202(b)(2)(A)(i), 22 U.S.C. § 6062(b)(2)(A)(i).

80. *Id.*, § 202(b)(2)(A)(ii), 22 U.S.C. § 6062(b)(2)(A)(ii).

81. *Id.*, § 202(b)(2)(B), 22 U.S.C. § 6062(b)(2)(B).

82. *Id.*, § 202(a)(1), 22 U.S.C. § 6062(a)(1).

83. *Id.*, § 202(e), 22 U.S.C. § 6062(e).

84. The Caribbean Basin Initiative (CBI) is a U.S. program that came into effect in 1984. It was aimed to provide tariff and trade benefits to many Caribbean Basin countries. The “Caribbean Basin Economic Recovery Expansion Act” of 1990, known as “CBI II”, made the CBI permanent. However, once the United States entered into the NAFTA trade pact in 1994 with Mexico it became easier for Mexico to export its products to the United States, and the CBI countries lost their trade advantage relative Mexico. The CBI remains in place but its effectiveness is debatable. See <http://www.ustr.gov/trade-topics/trade-development/preference-programs/caribbean-basin-initiative-cbi>.

85. *Id.*, § 202(h)(1), 22 U.S.C. § 6062(h)(1).

transition in Cuba, such aid would need to be granted with a minimum of political conditions and red tape.⁸⁶

Country-Specific Aid by Federal Agencies

By virtue of geography and history, the development needs of the Latin American and Caribbean nations have received varying degrees of U.S. attention in the last fifty years. Currently, the U.S. economic assistance programs focus largely on the Middle East, and little attention is being afforded to Latin America.⁸⁷ Should that situation change, the general and region-specific tools of U.S. trade promotion and development policy towards the Third World could be utilized by Cuba if the U.S. trade embargo were to end.

The U.S. economic assistance programs and preferences have developed over a long period of time and are not under a unified command. The discussion here will group the most important of these programs under each agency charged with administering them.

U.S. Agency for International Development. As the mainstay of U.S. foreign assistance administration, the U.S. Agency for International Development (“USAID”) conducts an array of development projects and assistance programs from its field missions around the world.⁸⁸ USAID, however, has drawn criticism for being wasteful and over-bureaucratic; Congressional funding for USAID development projects has been curtailed steadily over time.

Moreover, in the last decade USAID has provided little in the way of assistance to the countries of Latin America and the Caribbean. Due to this reduction in funding, its role in the region has been greatly reduced.⁸⁹

The types of relevant USAID economic assistance have not changed in recent years. One form, called Development Assistance (“DA”), funds discrete development projects with U.S. and local partners. Examples of uses of DA include:

- pre-feasibility and feasibility studies in commercially-oriented energy development and research, in coordination with the Department of Energy and the Trade and Development Agency
- agricultural research and land productivity projects
- science and technology development programs
- housing guaranty programs
- infrastructure development of roads, irrigation, port facilities and free trade zone facilities
- engineering, construction and telecommunications projects
- environmental protection programs.

In addition, DA funds are used for a broad category of Private Sector Development projects. Coordinated by USAID’s Bureau for Private Enterprise and the Office of Trade and Investment, these projects include, among others:

86. While the LIBERTAD Act was being considered by Congress, the Clinton Administration was in the process of developing an action plan for giving assistance to Cuba with few requirements when a transition to democracy started to occur. The United States would assist Cuba in the areas of humanitarian aid, political reform, economic reform, and infrastructure rebuilding. Help would generally come on a multilateral basis with the involvement of international institutions, such as the World Bank, the International Monetary Fund, the Inter-American Development Bank, and the United Nations, as well as foreign countries interested in aiding Cuba. The United States would provide insurance protection for U.S. investors via the Overseas Private Investment Corporation, and project lending through the Export-Import Bank. Richard Nuccio, *U.S. Assistance to the Economic Reconstruction of a Transitional and Democratic Cuba*, Address to the Shaw, Pittman, Potts & Trowbridge Workshop on “Foreign Investment in Cuba: Past, Present, and Future” (January 26, 1996) (On file with author). The Administration’s plan never materialized and the LIBERTAD Act was passed in the form then pending before the House of Representatives following the February 24, 1996 downing of civilian planes by Cuba.

87. Venezuela’s President Hugo Chávez has frequently boasted that Venezuela’s aid to Latin American countries exceeds that provided by the United States. *See, e.g.*, Natalie Obiko Pearson, Chávez: Venezuela Aiding Latin America, ASSOCIATED PRESS, *available online at* <http://www.mylot.com/w/newsarticle/103520.aspx>.

88. Authority for USAID programs is codified throughout Chapter 32 (“Foreign Assistance”) of Title 22 of the United States Code.

89. It is telling that the USAID latest Annual Performance Report (for FY 2008) does not mention Latin America once. Where particular countries in the region are mentioned, it is in the context of discrete initiatives, such as drug interdiction (Colombia) or the fight against HIV (Haiti). No economic development assistance program is described either for the region or for the countries therein. USAID, Fiscal Year 2008 Annual Performance Report, *available online at* <http://www.usaid.gov/policy/budget/apr08/>

- privatization projects involving U.S. businesses
- establishment of private sector development banks and credit facilities for small- and medium-size businesses and micro-enterprises
- establishment of export and investment promotion offices by beneficiary countries
- loans, credit guarantees and training for projects with substantial developmental impact
- financial support for joint ventures in energy development
- financing assistance to U.S. companies wishing to export to developing countries.

The United States continues to provide DA throughout the world. However, of over \$21 billion given in 2007, Latin America and the Caribbean received only \$869 million.⁹⁰

Overseas Private Investment Corporation. The Overseas Private Investment Corporation (“OPIC”) is a self-financing federal corporation with the mission of assisting U.S. investors in developing countries and emerging economies.⁹¹ OPIC’s programs are available in over 140 countries throughout the world. OPIC’s assistance takes three principal forms: (i) project financing, in which OPIC makes available development funds for direct loans and loan guarantees to U.S. investors in commercial projects overseas;⁹² (ii) investment insurance issued by OPIC protects U.S. investments overseas against three types of political risks: currency inconvertibility, expropriation and political violence; and (iii) investor services, including advisory services and databases, investment missions, seminars and conferences.

U.S. Department of Commerce. The Commerce Department plays an active role in supporting development abroad through its numerous programs of general trade promotion. Commerce is the hub of an inter-agency task force, the Trade Promotion Coordinating Committee, which links most of the federal government’s export promotion programs.⁹³ This task force has a hotline for businesses needing trade information and counseling, and publishes a directory of U.S. government resources for exporters.

Another Commerce Department office, the International Trade Administration, organizes trade missions to foreign countries focusing on particular U.S. industry or service sectors, and missions to introduce U.S. companies to foreign markets, and also arranges for U.S. participation in foreign trade fairs and exhibitions. The Commerce Department’s Foreign Commercial Service has officers in overseas posts scouting commercial opportunities for U.S. investors and traders.

Export-Import Bank. The Export-Import Bank of the United States is an independent federal agency that facilitates the export financing of U.S. goods and services to creditworthy foreign buyers.⁹⁴ Eximbank’s Export Credit Insurance program protects U.S. exporters against buyer default, thus allowing the exporter to offer more attractive credit terms. The Eximbank Loan Program offers loan guarantees for U.S. exporters, direct loans to foreign purchasers, and intermediary loans to lenders who then make loans to foreign purchasers. The Working Capital Guarantee Program

90. The vast majority of that aid (\$562 million) went to Colombia. See <http://www.globalissues.org/article/35/us-and-foreign-aid-assistance>.

91. 22 U.S.C. § 2191. See <http://www.opic.gov/about/index.asp>.

92. In 2008, OPIC provided \$2,521,836,000 in project financing and \$855,630,000 in investment insurance for projects in Latin America. OVERSEAS PRIVATE INVESTMENT CORPORATION, *2008 ANNUAL REPORT 26 (2008)*, available online at http://www.opic.gov/pdf/annualreport_2008.pdf. The loans are made at interest rates that vary according to a project’s assessed financial and political risk, and which depend also on the rates in long-term capital markets in the United States

93. See <http://www.gao.gov/new.items/d06660t.pdf>.

94. 12 U.S.C. § 635; 12 C.F.R. § 411.

helps potential exporters obtain critical pre-export financing from commercial lenders, providing repayment protection for private sector loans to foreign purchasers of U.S. goods. Eximbank provides special programs for small exporting businesses, including enhanced protection for short-term sales.⁹⁵

In summary, a variety of government-sponsored investment and economic development programs could be utilized to stimulate economic recovery and development Cuba. Participation in these programs is currently foreclosed by the embargo.

Free Trade Agreements

Starting during the George H. Bush Administration, the United States has been conducting negotiations on trade and investment liberalization with many nations, including those in Latin American and the Caribbean. The United States is currently a party to many bilateral and multi-lateral trade agreements. Countries with which the United States has active bilateral trade agreements include: Australia, Bahrain, Chile, Israel, Jordan, Morocco, Peru, Oman, and Singapore. The active multi-lateral trade agreements that the United States has signed include the North American Free-Trade Agreement (“NAFTA”) (with Canada and Mexico) and the Central America-Dominican Republic Free Trade Agreement (“CAFTA-DR”) (with

the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and Costa Rica). U.S. trade agreements with Panama, Korea, and Colombia are pending congressional approval. The United States is also in negotiations on trade agreements with Malaysia, Thailand, the United Arab Emirates, and the Southern African Customs Union (SACU) which includes Botswana, Lesotho, Namibia, South Africa, and Swaziland.⁹⁶

Agreements such as NAFTA and CAFTA-DR offer Latin American and Caribbean countries reductions in tariffs and elimination of non-tariff trade barriers to the export of their products to the United States, as well as increased investment, imports and technology transfers from the United States. An agreement of this nature between the United States and Cuba would pave the way towards re-establishing the special relationship that existed between the two countries before the Cuban Revolution.

Multi-National Organization Assistance

Assistance by multilateral organizations funded in part by the United States, such as the United Nations, the World Bank and the International Monetary Fund (IMF), is not currently available to Cuba because U.S. legislation prohibits the use of funds contributed by the United States to international organizations for

95. Other agencies providing programs that could benefit U.S. investors going into Cuba include the Department of Agriculture, which provides assistance to the developing world is the Agricultural Trade Development Act of 1954. The Food Aid Program established by this statute and administered by the Department of Agriculture in coordination with USAID provides concessional loans to purchase U.S. agricultural products to meet the needs of developing countries. (The Agricultural Trade Development Act of 1954 is codified at 7 U.S.C. § 1691 *et seq.*, and the International Development and Food Acts are codified throughout 22 U.S.C. Chapter 32.) Also, the Agriculture Department’s Trade Assistance and Promotion Office, and the Office of International Cooperation and Development, offer information, databases, services and trade missions to U.S. and foreign agricultural producers. The U.S. Foreign Agricultural Service maintains 16 missions abroad, which scout agricultural export opportunities for U.S. farmers. The Small Business Administration (“SBA”) is an independent federal agency charged with counseling, aiding and protecting U.S. businesses that meet its size requirements. 15 U.S.C. § 636. The SBA’s Office of International Trade provides information and services to small businesses on exports and investments abroad. Among the services provided is access to the Export Legal Assistance Network, a nationwide group of international trade attorneys who provide initial consultations to small businesses. The SBA also has its own International Trade Loan program, guaranteeing 85% of loans up to \$1 million. Another independent federal agency, the U.S. Trade and Development Agency (“TDA”), is also charged with some of the functions assigned to the SBA. 22 U.S.C. § 2421. The TDA hosts foreign officials and businessmen to the United States on reverse trade missions and provides grants for feasibility studies, consulting and project planning for major projects in developing countries. The projects involve high-priority sectors such as agribusiness, energy, telecommunication and transportation. TDA’s grants for these projects range between \$150,000 and \$750,000. TDA also offers Technical Assistance Grants to involve U.S. technical experts in development projects underway. The Bureau of International Labor Affairs of the U.S. Department of Labor offers a variety of labor force development and training programs upon the request of foreign governments. Labor Department personnel, funded by USAID or the World Bank, conduct these training programs in the host country to develop small business entrepreneurial skills, increase labor and management productivity, and improve labor-management relations in the workplace.

96. See <http://export.gov/fta/>

programs involving Cuba.⁹⁷ In addition, the LIBERTAD Act requires the cognizant U.S. agencies to oppose the admission of Cuba as a member of international financial institutions (defined to include the International Monetary Fund, the World Bank, the International Finance Corporation, the Multilateral Investment Guaranty Agency, and the Inter-American Development Bank) until the President submits a determination that a democratically elected government in Cuba is in power.⁹⁸ If any international financial institution approves a loan or other assistance to the Cuban Government over the opposition of the United States, the Secretary of the Treasury is to withhold from payment to such institution an amount equal to the amount of the loan or other assistance.⁹⁹

REMOVING THE INDIRECT CONSEQUENCES OF THE EMBARGO

Even after the trade embargo against Cuba is lifted, further steps will be needed to involve Cuba in the above-described U.S. assistance programs and preferences. This section summarizes the actions needed under present law to permit Cuban participation in some of these programs.

U.S. Agency for International Development Programs

Were the embargo to be lifted, USAID would need to establish a field mission in Cuba and set in motion its project review procedures. Most importantly, Congress would need to appropriate the funds for USAID programs in Cuba. The Development Assistance and other aid programs run by the U.S. Agency for International Development would then become available.

Overseas Private Investment Corporation

The authorizing act for the Overseas Private Investment Corporation does not specifically restrict fund-

ing projects in Cuba.¹⁰⁰ However, to be eligible for OPIC political risk insurance, an investment must be in a country that has signed a commercial agreement with the United States. Cuba and the United States would need to enter into such an agreement.

Other Programs

Food aid under the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. § 1691 *et seq.*, will become available to Cuba if the President determines that Cuba is a “friendly” country, and not one under the control of a foreign government running a world communist movement.¹⁰¹ Food aid under the International Development and Food Acts, codified in 22 U.S.C. Chapter 32, falls under the anti-Cuba restrictions of the Foreign Assistance Act of 1961 and would be available if the FAA’s prohibitions were lifted.

Cuba is presently excluded by name from those countries wherein Export-Import Bank guarantees, insurance or credit may be used. Only a Presidential determination that Cuba has ceased to be a communist country, or that an Eximbank transaction involving Cuba is in the national interest, can lift the prohibition.¹⁰²

In order for free trade agreements to be negotiated between Cuba and the United States, the President would have to make a number of determinations and notifications to Congress. For example, under the Foreign Trade Agreement Act, the President would have to proclaim that Cuba is no longer dominated or controlled by the world communist movement.¹⁰³ Alternatively, the President could extend nondiscriminatory treatment by entering into a bilateral commercial agreement with Cuba, determining that such agree-

97. Pub. L. 99–83, Section 403, 99 Stat. 219 (August 8, 1985), 22 U.S.C. § 2227(a).

98. LIBERTAD Act, Sections 104(a) and (c), 22 U.S.C. §§ 6034(a), (c).

99. *Id.*, Section 104(b).

100. 22 U.S.C. § 2191 *et seq.*

101. 7 U.S.C. § 1703(d).

102. 12 U.S.C. § 635(b).

103. 19 U.S.C. §1351.

ment is in the national interest, and properly notifying Congress.¹⁰⁴

Participation in economic assistance programs sponsored by multi-national institutions would require, *first*, that the prohibitions in the LIBERTAD Act be removed, and *second*, that Cuba apply to rejoin the IMF, the World Bank, the Inter-American Development Bank, and other multi-national agencies. Regaining membership in those institutions would require, in addition to the United States dropping its opposition, that Cuba satisfy eligibility requirements for each institution. Negotiations leading to Cuba's rejoining the institutions could take a significant amount of time.¹⁰⁵

A PROCESS FOR LIFTING THE EMBARGO

The decision whether the U.S. embargo against Cuba should be lifted is complex and highly political. Barring a change in the composition and political outlook of the current Cuban leadership, a full lifting of the embargo is not likely to occur in the foreseeable future. President Obama and key members of his administration have made it clear (both during the Presidential campaign and thereafter) that they favor leaving the embargo largely in place, and there is no detectable mood in Congress for removing the embargo sanctions except in the area of personal travel.¹⁰⁶

Circumstances may change, however. Cuba's economy is currently anchored on two pillars: tourism and the extraction of minerals, mainly nickel. In 2008, the economy suffered a worsening of the terms of exchange for its most important commodities—the price of oil and imported food went up, while the price of nickel went down.¹⁰⁷ Also during that year, three

hurricanes battered the island and broke historical records in terms of damages caused.¹⁰⁸

The worldwide economic downturn could also have a negative impact on tourism, which today is the main source of hard currency for the country. Cuba has said it received \$2.7 billion from tourism in 2008,¹⁰⁹ but is anticipated to lose a significant portion of this amount (\$300 million), as well as other foreign sources of income, in 2009 as a result of the world-wide economic crisis.¹¹⁰

Conceivably, a prolonged series of economic reverses such as those experienced in 2008 and 2009 could force Cuba to re-evaluate its relations with the United States, which until 1959 was by far Cuba's main trading partner. However, it is unlikely that economic distress alone would be sufficient to cause a major policy change in Cuba. The country was able to weather a very severe economic crisis in 1990–95 (the aftermath of the dissolution of the Soviet Block) without making any political concessions. There is no reason to assume, therefore, that deteriorating economic conditions will bring about the transition to a free-market economy or the institution of democratic reforms.

A more probable scenario for change is one in which Raúl Castro dies, retires or is removed from power and is succeeded by new leaders who undertake to shift away from a rigorous Socialist style of government and set out to institute political and economic reforms. (However, there is no current indication that Raúl Castro will soon leave power or that if he did his successors would change the government's current policies.) If the Cuban government started to institute significant economic and political reforms, the business

104. 19 U.S.C. §§ 2434 and 2435(b).

105. For example, Cuba has a massive foreign debt problem, which would have to be addressed as part of any effort to gain admittance into multi-lateral lending institutions such as the IMF. *See, e.g., Cuba, in Liquidity Crunch, Rolls over Euro Bonds*, REUTERS, June 9, 2009.

106. Matthew Borghese, *Obama Promises To Maintain Cuban Embargo* (May 23, 2008), available online at <http://www.allheadline-news.com/articles/7011045005>; *Biden says U.S. does not plan to lift Cuba Embargo*, REUTERS, Mar. 26, 2009; Shailagh Murray and Karen DeYoung, *Momentum Grows for Relaxing Cuba Policy*, WASHINGTON POST (Mar. 30, 2009) at A1; Matthew Lee, *Obama to Ease Cuban Travel Ban, not Ease Embargo*, ASSOCIATED PRESS (April 5, 2009).

107. Frances Robles and Wilfredo Cancio Isla, *Purge Aims to halt Cuba's Economic Free Fall*, MIAMI HERALD, March 8, 2009.

108. *Id.*

109. *Cuba Tourism Reached Record Levels in 2008*, ASSOCIATED PRESS, January 13, 2009.

110. *See, e.g., Cuba Foreign Income Could be Slashed by \$1 billion*, REUTERS, May 26, 2009.

community might urge the President and Congress to lift or scale down the sanctions and follow the same path with Cuba as it has done with other Socialist countries, such as Vietnam.

Whatever the motivating factor, once the decision is made by at least one of the branches of government that the embargo should be lifted or modified, there are several actions that must be taken. First, the rest of the government has to support the proposed action. Second, all the statutory bases for the embargo must be removed or amended, including the Trading with the Enemy Act, the Foreign Assistance Act, the Cuban Democracy Act, and the LIBERTAD Act. Third, the CACR need to be modified or rescinded.

The President has a degree of legal authority to lift the embargo—at least to the extent that it is founded upon the TWEA and the FAA. Under those statutes, the President could lift the embargo unilaterally, at any time, and without any preconditions, and would not be required to consult Congress in order to do so. Political considerations would probably dictate that the President work with Congress and take public opinion into account before taking such an action.

The CDA and the LIBERTAD Act present a more difficult situation. The CDA has expanded the embargo in some respects (e.g., by prohibiting trade with Cuba by third-country subsidiaries of U.S. corporations). The statute has also defined a set of events in Cuba (specified in § 1708(a)) as preconditions to the President's ability to take steps to lift the embargo. The President must make a determination that those conditions have been satisfied, and must report his determination to Congress, before he can act on the embargo. At that point, Congress can override the lifting of the embargo if it disagrees with the President. Presumably, the President's determination could also be challenged in the courts. The LIBERTAD Act sets additional conditions for suspending, and eventually lifting, the embargo, most troublesome being the thorny issue of resolving the expropriation claims by U.S. nationals against Cuba.

One consequence of the imposition of an extensive, definite set of conditions before the President is able to modify or lift the embargo is the loss of U.S. government flexibility to deal with developments in Cuba.

Unless Cuba's transition to democracy proceeds in an orderly fashion that satisfies all requirements in the CDA and the LIBERTAD Act, the embargo may not be lifted for a significant period of time while events unfold in the island. Again, under such circumstances interested parties, including the business community could, and probably should, be prepared to press Congress for the quick enactment of legislation that would remove the existing legislative overkill and enable the President to lift or modify the embargo.

In addition to eliminating the embargo, the existing prohibitions against U.S. economic aid to Cuba would need to be dropped. Under the CDA and the LIBERTAD Act, no U.S. aid can be given to a future government in Cuba until the President deems that giving such aid is in the national interest of the United States, a "transition" government is in power, and Cuba has taken appropriate steps under international law standards to provide restitution or compensation to U.S. citizens whose property was confiscated by the Castro government. When appropriate, the need for such determinations would need to be rescinded or the determinations made.

Another action that must be accomplished, and which again the business community and other interested parties may need to press for, is the passage of legislation to incorporate a post-embargo Cuba into the various economic aid programs sponsored by the U.S. government or in which the U.S. participates. The LIBERTAD Act directs the President to take steps to bring a democratic Cuba within the coverage of some U.S. sponsored economic aid programs. The reach of that legislation, however, is incomplete and in some areas obsolete, and needs to be supplemented by specific legislation that covers the various aid programs in effect at the time the embargo is lifted, so that the U.S. government agencies will be prepared to take expeditious action to admit Cuba into the programs.

Finally, the Federal government should establish an advisory group to help identify the problems that will be posed by Cuba's transition to a free-market democratic society, develop a unified strategy to assist Cuba in resolving those problems, and draft the necessary implementing laws and regulations. Those interested in a smooth transition process should be represented and heavily involved in these efforts.