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U.S. LEGAL REQUIREMENTS AFFECTING TRADE WITH CUBA

*María L. Pagán**

I. OVERVIEW

A broad variety and combination of U.S. laws and regulations affect U.S. trade with Cuba. These measures are best understood as a two-tiered legal structure designed to reach every possible activity and transaction affecting the Cuban economy. The most comprehensive and significant set of legal requirements, those authorizing and implementing the Cuban embargo, comprise the first tier. These requirements include:

1. Section 620(a) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2370(a), authorizing the President to impose a trade embargo against Cuba;
2. Presidential Proclamation No. 3,447, 27 Fed. Reg. 1085 (1962), establishing a comprehensive embargo on Cuba;
3. The Cuban Assets Control Regulations (Regulations), 31 C.F.R. Part 515 (1993), issued by the Office of Foreign Assets Control (OFAC), Department of the Treasury, implementing the embargo and setting forth the most comprehensive regulation of transactions with Cuba and Cuban property;
4. The Cuban Democracy Act of 1992 (CDA), 22 U.S.C. §§ 6001-6010, tightening the embargo, allowing certain activities in support of the Cuban people, and setting forth a framework for reduction of sanctions in response to positive developments; and,
5. Export Administration Regulations regarding trade with Cuba (EAR), contained principally in 15 C.F.R. § 785.1 (1993), issued by the Bureau of Export Administration, Department of Commerce, implementing the embargo on exports.

The second tier contains a number of legal requirements covering a wide array of transactions and activities. Some apply specifically to Cuba, while others apply to Communist countries in general or to countries meeting certain

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statutory criteria. Because of the breadth of the requirements under the embargo legislation and regulations, second tier requirements currently have little or no practical effect. But, if the United States intended to liberalize trade with Cuba, it would need to address second tier as well as first tier requirements.

This paper discusses and summarizes these requirements. Section II summarizes the first tier requirements outlined above and analyzes how these important components of the U.S. trade embargo on Cuba could be removed. Section III summarizes the other legal requirements affecting trade with Cuba. A chart summarizing the major prohibitions on trade with Cuba and how those prohibitions could be removed appears at the end.

II. LEGAL REQUIREMENTS AUTHORIZING AND IMPLEMENTING THE CUBAN EMBARGO

A. *Section 620(a) of the Foreign Assistance Act of 1961*¹

Section 2370(a)(1) of the Foreign Assistance Act of 1961 (FAA) prohibits the furnishing of any foreign assistance by the United States government to the "present government" of Cuba.² As one means of carrying out the prohibition, section 2370(a)(1) authorizes the President to establish a total embargo on trade with Cuba.

Section 2370(a)(2) of the FAA prohibits any assistance to "any government" of Cuba and denies Cuba the right to a sugar quota or benefits under any U.S. law. This prohibition remains until the President determines³ that Cuba has taken appropriate steps under international law standards to return property to U.S. citizens and entities that was taken from them after January 1, 1959, or to provide them with equitable compensation.⁴ The President can make an exception to this prohibition if he deems it to be in the national interest. The Cuban Democracy Act (CDA)⁵ provides that, except for specific activities allowed under it, nothing in the CDA affects the provisions of section 2370(a)(2).⁶

Section 2370(a)(2) makes the Presidential determination regarding expropriated property a precondition for Cuba receiving any assistance or benefit (e.g. preferences) under U.S. law.⁷ Because the language of section 2370(a)(2) is so explicit, any new law attempting to ease relations with Cuba probably either has to comply with this provision or expressly repeal it. Note that while the CDA allows certain transactions with Cuba, they must be for the benefit of the

1. 22 U.S.C. § 2370(a) (1988).

2. 22 U.S.C. § 2370(a)(1) (1988).

3. Section 654 of the Foreign Assistance Act of 1961, as amended, requires that whenever the President is required to make a finding or determination under, inter alia, the Foreign Assistance Act, such finding or determination must be reduced to writing, signed by the President and published in the Federal Register as soon as practicable. 22 U.S.C. § 2414 (1988).

4. 22 U.S.C. § 2370(a)(2) (1988).

5. 22 U.S.C. §§ 6001-10 (Supp. V 1993).

6. 22 U.S.C. § 6008 (Supp. V 1993).

7. 22 U.S.C. § 2370(a)(2) (1988).

Cuban people only.⁸ In addition, the CDA contains safeguards to help ensure that the Cuban government does not benefit from any of the CDA's provisions.

Sections 2370(a)(1) and (a)(2) distinguish between the "present" and "any" government of Cuba.⁹ "Present" government refers to the government in power at the time of enactment of section 2370(a)(1) in 1961 (i.e. the Castro government). Since there has been no change in the government of Cuba, the distinction has so far been irrelevant. The prohibition against any assistance to the "present" (i.e. Castro) government is absolute, while the prohibition on assistance to "any" government contains a national interest exception. This distinction may be relevant if the embargo were to be lifted.

B. *Presidential Proclamation No. 3,447*¹⁰

On February 3, 1962, President Kennedy issued Proclamation No. 3,447,¹¹ instituting the embargo under the authority of section 2370(a) of the FAA. The Proclamation prohibits the importation into the United States of Cuban goods and all goods imported through Cuba. The Secretary of the Treasury is to implement this prohibition and the Secretary of Commerce is to implement the embargo on exports to Cuba. Both Secretaries were also authorized to modify such restrictions as necessary to remain consistent with the effective operation of the embargo.

Proclamation 3447 contain neither time limits, nor conditions for when and how the embargo may be lifted. While the President could assert his foreign affairs powers to lift the embargo, statutory and regulatory restrictions would remain in place.

C. *Cuban Assets Control Regulations*¹²

Authority for the Regulations stems from various sources, namely: 22 U.S.C. § 2370(a); Proclamation No. 3,447; section 5 of the Trading with the Enemy Act (TWEA);¹³ Executive Order 9193 (revoked);¹⁴ Executive Order 9989,¹⁵ regarding jurisdiction over blocked assets; and the CDA.¹⁶

The Regulations, first issued in July 1963, are the main vehicle through which the embargo is implemented and fine tuned. They prohibit an "extraordinarily comprehensive range of financial, commercial and trade transactions and transactions involving property of almost any kind that can be imagined, unless licensed by the Department [of the Treasury]."¹⁷ The crucial provision of the

8. 22 U.S.C. § 2370 (1988).

9. *Id.*

10. 27 Fed. Reg. 1,085 (1962).

11. *Id.*

12. 31 C.F.R. § 515.101-901 (1994).

13. 50 U.S.C. app. § 5 (1988 & Supp. V 1993).

14. Exec. Order No. 9,193, 3 C.F.R., Cum. Supp., 1174-75 (1938-1943).

15. Exec. Order No. 9,989, 3 C.F.R.

16. 22 U.S.C. §§ 6001-10 (Supp. V 1993).

17. Remarks by Dennis M. O'Connell, then Director of OFAC, at a 1985 panel discussion. Sharon A. Dragan, *Are the U.S. Treasury's Assets Control Regulations a Fair and Effective Tool of U.S. Foreign Policy? The Case of Cuba*, 79 AM. SOC'Y INT'L PROC. 169, 175 (1987).

Regulations, prohibiting almost all transactions and authorizing the blocking of Cuban assets in the United States, is derived almost verbatim from section 5(b) of the TWEA.¹⁸

In 1963, section 5(b) of the TWEA authorized the President¹⁹ to impose comprehensive embargoes on foreign countries when there was either a state of war or a national emergency declared by the President. No emergency was ever decreed with respect to Cuba for TWEA purposes.²⁰ Instead, the Regulations were issued using President Truman's 1950 declaration of an emergency with respect to the threat of world communism,²¹ in relation to the Korean conflict.

In 1977, the International Emergency Economic Powers Act (IEEPA)²² amended section 5(b) by limiting the President's power under the TWEA to times of war. IEEPA authorized the President to exercise emergency economic powers during peacetime crises only after following certain procedural and substantive requirements.

IEEPA also provided that any section 5(b) authority being exercised with respect to a country on July 1, 1977, could continue to be exercised.²³ Such authority would terminate unless extended by the President at the end of a two-year period beginning on the date of enactment of the National Emergencies Act of 1976,²⁴ September 14, 1976. The authority could be extended for one-year periods, upon a Presidential determination that such an extension was in the national interest.

Extensions have been consistently renewed since 1978. The latest extension is Presidential Determination No. 94-46,²⁵ signed by President Clinton on September 8, 1994. It extends the exercise of authority with respect to, *inter alia*, the Regulations until September 14, 1995.²⁶

Wilful violations of the Regulations are subject to criminal penalties, including fines and incarceration. Upon conviction, any property concerned in the violation may be forfeited to the United States. In addition, the Secretary of the Treasury is authorized to impose civil penalties for any violations. The Secretary is authorized to require, at his discretion, the forfeiture of any property that is the subject of a violation subject to a civil penalty. These penalties are the same as the penalties provided for under section 16 of the TWEA.²⁷

18. *Id.*

19. All powers conferred on the President by 50 U.S.C. app. § 5(b) were delegated to the Secretary of the Treasury by Memorandum of the President dated February 12, 1942. 7 Fed. Reg. 1,409 (1942).

20. Dragan, *supra* note 17, at 169.

21. Proclamation No. 2,914, 3 C.F.R. § 71 (1950).

22. 50 U.S.C. §§ 1701-06 (1988).

23. In *Regan v. Wald*, the Supreme Court held that the Regulations were properly issued under the President's TWEA authority, were being exercised with respect to Cuba on July 1, 1977, and were therefore grandfathered under IEEPA, along with any subsequent modifications. *Regan v. Wald*, 468 U.S. 222, 227 n.1 (1984). The Court also explained that, despite the fact that section 620(a) of the Foreign Assistance Act provides alternative authority for the Regulations, the Government relied on section 5(b) because of its broader scope and the availability of criminal penalties under section 16 of the TWEA. *Id.*

24. 22 U.S.C. §§ 1601-04 (repealed 1954).

25. Determination No. 94-46 59, Fed. Reg. 47,229 (1994).

26. *Id.*

27. 50 U.S.C. app. § 16 (1988 & Supp. V 1993). See also 31 C.F.R. § 515.701 (1993).

In response to recent events in Cuba, and pursuant to a Presidential announcement on August 20, 1994, the Office of Foreign Assets Control at the Department of the Treasury amended the Regulations to further limit the ability of the Cuban government to accumulate foreign exchange.²⁸ The following summary of the major provisions of the Regulations incorporates these changes.²⁹

1. General Prohibition under TWEA

Section 515.201 of the Regulations reproduces section 5(b) of the TWEA almost verbatim.³⁰ It contains a general prohibition on transactions with Cuba and Cuban nationals, and transactions involving any property in which Cuba or a Cuban national has any interest, unless the transaction is licensed under the Regulations.³¹ The Regulations apply to property and persons subject to the jurisdiction of the United States; these terms are broadly defined.³²

2. Prohibition on Imports and Related Transactions

Section 515.204 of the Regulations implements the prohibition on imports from Cuba mandated by Proclamation 3447.³³ It prohibits any person subject to the jurisdiction of the United States from engaging in any transaction with respect to merchandise found outside the United States that: (1) is of Cuban origin; (2) has ever been in or transported through Cuba; or (3) is made or derived, in whole or in part, of any article which is the growth, produce or manufacture of Cuba.³⁴ The import prohibition applies to importing merchandise into the United States, as well as to dealings outside the United States, if the person is subject to jurisdiction.³⁵

Despite this general prohibition, the Regulations authorize certain imports and import-related transactions. These exceptions include:

1. Specific licenses may be issued for importation from Cuba of goods that are bona fide gifts if the goods are of small value and there is no reason to believe that there is any direct or indirect financial or commercial benefit from the transaction to Cuba or to a Cuban national.³⁶
2. Except for alcohol and tobacco, there is a general license for goods brought into the United States as passengers' baggage by non-U.S. citizens or residents as long

28. 59 Fed. Reg. 44,884 (1994) (to be codified at 40 C.F.R. pt. 515).

29. Due to the comprehensive nature of the Regulations this summary does not cover all topics addressed by them. Readers are encouraged to consult the Regulations themselves in case of any specific questions and are reminded that the Office of Foreign Assets Control (OFAC), U.S. Department of the Treasury, implements the Regulations.

30. 31 C.F.R. § 515.201 (1994).

31. *Id.* There are two types of licenses, general and specific. General licenses are provisions contained in the Regulations allowing certain types of transactions, without the need for prior approval. Specific licenses are issued by OFAC on a case-by-case basis.

32. See 31 C.F.R. § 515.313 (1994) (property subject to the jurisdiction of the United States); 31 C.F.R. § 515.329 (1994) (persons subject to the jurisdiction of the United States).

33. 27 Fed. Reg. 1,085 (1962).

34. 31 C.F.R. § 515.536(c) (1994) (requiring certification that imports of nickel-bearing products into the United States are not of Cuban origin and do not contain Cuban nickel).

35. 31 C.F.R. § 515.410 (1993).

36. 31 C.F.R. § 515.544 (1994).

as the goods are not in commercial quantities and are not for resale.³⁷ Only those persons traveling under a general or specific travel license are allowed to import alcohol and tobacco for personal consumption. These licensees may also bring in goods valued at no more than \$100, for personal consumption, in any six month period.³⁸

3. There is a general license for the importation of finished paintings and drawings created by Cuban nationals. For paintings or drawings with a foreign market value of \$10,000 or more, the importer must make certain declarations with the OFAC.³⁹

3. Prohibition on Vessels Trading with Cuba

Pursuant to section 1706(b) of the CDA,⁴⁰ section 515.207 of the Regulations prohibits a vessel from entering a U.S. port if within the previous 180 days the vessel has engaged in any kind of trade or transaction in Cuba, or if it is carrying goods or passengers to or from Cuba, or goods in which Cuba or a Cuban national has any interest.⁴¹ Section 515.571 of the Regulations contains a general license for certain transactions by vessels related to otherwise licensed activities.⁴²

4. Exportation of Goods and Services to Cuba

Section 515.533 of the Regulations authorizes all transactions incident to the exportation of goods and merchandise to Cuba as long as the exports are: (1) licensed by the Department of Commerce; (2) not paid from a blocked account; and (3) do not involve property in which a Cuban national has an interest.⁴³ This section was amended pursuant to President Clinton's announcement on August 20, 1994, to prohibit the exportation of gift parcels under General License GIFT,⁴⁴ except for medicine, food, and strictly humanitarian items.⁴⁵ Department of Commerce regulations on exports to Cuba are discussed below.

5. Informational Materials Exception

Section 5(b)(4) of the TWEA prohibits the President from regulating the importation and exportation of informational materials. Section 515.206 of the Regulations implements this prohibition.⁴⁶ Materials must be fully in existence and in their final form to be covered by this general license.

"Informational materials" includes only tangible items such as publications, films, posters, records, photographs and microfilm. Intangible items, such as telecommunications transmissions, are not included; nor are items controlled under section 5 of the Export Administration Act of 1979 (relating to national security controls), items subject to prohibitions under Chapter 37 of title 18 of the U.S. Code (Espionage and Censorship), transactions incident to the

37. 31 C.F.R. § 515.540 (1994).

38. 31 C.F.R. § 515.560(c)(3) (1994).

39. 31 C.F.R. § 515.570 (1994).

40. 22 U.S.C. § 6005(b) (Supp. V 1993).

41. 31 C.F.R. § 515.207 (1994).

42. 31 C.F.R. § 515.571 (1994).

43. 31 C.F.R. § 515.533 (1994).

44. 15 C.F.R. § 771.18 (1994).

45. 59 Fed. Reg. 44,884 (1994) (to be codified at 31 C.F.R. pt. 515).

46. 31 C.F.R. § 515.206 (1994).

transmission of restricted technical data as defined in 15 C.F.R. § 779, or goods used in the transmission of any data.⁴⁷

6. Travel to and from Cuba and Related Transactions

The main purpose behind the travel restrictions is to prevent the expenditure of U.S. currency in Cuba that might benefit the Cuban government. In *Regan v. Wald*, the Court upheld the prohibition on travel to Cuba as a permissible use of the authority granted to the President by section 5(b) of the TWEA.⁴⁸

Travel regulations were also amended pursuant to President Clinton's August 20 announcement.⁴⁹ The amended regulations severely limit the ability of persons to travel to Cuba to visit close relatives or gather information. Outlined below are the major provisions related to travel.

a. Persons Authorized to Travel

Under newly revised section 515.560(a), there is a general license for travel to Cuba only for: (1) officials of the U.S. Government, a foreign government, or an intergovernmental organization of which the United States is a member, if such officials are traveling on official business; and (2) "journalists regularly employed in that capacity by a news reporting organization."⁵⁰ Previously, persons visiting close relatives, or engaged in research and information gathering, could travel to Cuba under a general license.

Under revised section 515.560(b), travel transactions by close relatives of Cuban nationals may be authorized only on a case-by-case basis by specific license and only under circumstances of "extreme hardship" to the person or close relative.⁵¹ In addition, specific licenses must be obtained for travel to engage in professional research and similar activities, as defined in revised section 515.416.⁵²

Specific licenses may still be issued for persons traveling for humanitarian, religious, or similar reasons, or for purposes related to the exportation, importation or transmission of information or informational materials. Tourist travel remains specifically prohibited. Business travel, which was specifically prohibited before, is not mentioned in the revised regulations. Presumably, it remains prohibited since it is not otherwise authorized.

b. Transactions Incident to Travel by Authorized Persons

The following rules apply to transactions involving persons licensed to travel to Cuba:

1. All transportation-related transactions incident to the travel are authorized, with a \$500 annual limit on fees payable to the Cuban government for travel-related expenses.

47. 31 C.F.R. §§ 515.206, 515.332 (1994).

48. The Court also made reference to the President's inherent authority in the area of foreign policy. *Regan v. Wald*, 468 U.S. 222, 243 (1984).

49. 31 C.F.R. § 771.18 (1994).

50. 59 Fed. Reg. 44,885 (1994).

51. 31 C.F.R. § 515.560(a) (1994).

52. 31 C.F.R. § 515.416 (1994).

2. Incidentals to travel (e.g. living expenses, and goods for personal consumption) must not exceed \$100 a day.
3. There is a \$100 per person limit on goods purchased in Cuba and brought back to the United States for personal use. This authorization may be used once every six months. This is in addition to the \$100 per day allowed for expenses and consumption while in Cuba. Informational materials are exempted.
4. Transactions incident to processing checks, travelers checks, etc., are allowed.
5. Credit and debit cards cannot be used in Cuba. (Charge card companies subject to U.S. jurisdiction are prohibited from transacting any business in Cuba).
6. Persons authorized to travel to Cuba are prohibited from making any investments in Cuba or transferring any property to Cuba.

c. Transactions Incident to Travel by Cuban Nationals

In general, any transaction incident to travel by Cuban nationals is prohibited, with certain exceptions. The restrictions apply whether or not money is paid. This prohibition does not apply to transactions related to Cuban nationals holding an unexpired immigrant or non-immigrant U.S. visa or returning residents of the United States.⁵³

Remittances to close relatives who are Cuban nationals for the purpose of enabling the payee to emigrate from Cuba to the United States remain authorized (under a general license) under the newly revised Regulations. Remittances cannot exceed a total of \$500 to any one payee, cannot be made from a blocked account, and may only be transferred once the relative has received a valid immigration visa from the U.S. State Department.⁵⁴ Revised section 515.564(c) specifies that remittances to Cuban nationals for non-immigrant travel purposes may be authorized only under a specific license under circumstances of extreme humanitarian need, including terminal illness or severe medical emergency.⁵⁵

d. Fully-hosted Travel

There is a general license for fully sponsored or hosted travel to Cuba, provided that no person subject to U.S. jurisdiction makes any payment, transfers any property or provides any service to Cuba or a Cuban national. Under the newly revised Regulations, travelers may not use charter flights between the United States and Cuba.⁵⁶

e. Travel and Carrier Service Providers and Family Remittance Forwarders

These service providers must obtain prior authorization from OFAC. Authorization will be issued only upon the applicant's written affirmation and demonstration that it does not participate in the discriminatory practices of the Cuban government against U.S. residents and citizens (e.g. charging discriminatory rates for air travel).⁵⁷

53. 31 C.F.R. §§ 515.415, 515.564 (1994).

54. 31 C.F.R. §§ 515.563(a)(2), 515.564(c) (1994). *See also* 59 Fed. Reg. 44,886 (1994).

55. 59 Fed. Reg. 44,886 (1994).

56. 31 C.F.R. § 515.560(g) (1994), *amended by* 59 Fed. Reg. 44,885 (1994).

57. 31 C.F.R. § 515.566 (1994), *amended by* 59 Fed. Reg. 44,886 (1994).

7. Trade with Cuba by U.S.-Owned or Controlled Foreign Firms

Section 1706(a) of the CDA⁵⁸ closed what was perceived as a loophole in the Cuban embargo, which allowed certain transactions by foreign subsidiaries of U.S. firms. The CDA states that "no licenses may be issued for any transaction described in section 515.559" of the Regulations.⁵⁹

Section 515.559⁶⁰ was added to the Regulations in 1975 to bring U.S. law in accord with the policy of the Organization of American States, which had recently lifted its ban on trade with Cuba. Section 515.559 liberalized previous restrictions on foreign subsidiary trade with Cuba by authorizing export to Cuba non-strategic foreign goods containing insubstantial amounts of materials originating in the United States, where the local law of the subsidiary favored or required trade with Cuba.

As revised under the CDA, section 515.559 authorizes specific licenses to be issued for transactions between U.S.-owned or controlled firms in third countries and Cuba for the trade of commodities between the "authorized trade zone" (the "free world") and Cuba, only if the transactions meet specific requirements.⁶¹ Licenses are basically limited to: (1) the exportation of medicine or medical supplies, if it is reasonably likely that they will not be used for torture, the production of biotechnology, or for re-export; (2) the exportation of telecommunications equipment, when the equipment is necessary for efficient and adequate telecommunications service between Cuba and the United States; and (3) the importation of Cuban origin goods into countries in the authorized trade zone. It is unclear whether this CDA provision raises the prohibition on foreign subsidiary trade from a regulatory provision to a statutory level.

The European Parliament adopted a resolution in September of 1993, urging the European Community and its member governments to ignore these rules.⁶² The United Kingdom and Canada have adopted measures preventing locally based firms from yielding to these rules.⁶³

8. Family Remittances to Cuba

The Regulations previously provided general authorization for the support of close relatives in Cuba, with a \$300 limit per three month period. Pursuant to President Clinton's announcement on August 20, 1994, the Regulations have been revised to allow such remittances only through specific licenses and only in circumstances of demonstrated extreme humanitarian need.⁶⁴ As discussed previously, remittances for the purpose of emigrating are allowed.

58. 22 U.S.C. § 6005(a) (Supp. V 1993).

59. *Id.*

60. 40 Fed. Reg. 47,108 (1975).

61. 31 C.F.R. § 515.559 (1994).

62. *EC Parliament Calls on ED Members to Ignore U.S. Law Extending Cuba Embargo*, 10 Int'l Trade Rep. (BNA) No. 37, 1573-74 (Sept. 22, 1993).

63. *Id.* at 1574.

64. 59 Fed. Reg. 44,886 (1994).

9. Telecommunications

The CDA authorized telecommunications service between Cuba and the United States, and provided for the licensing of payments to the Cuban government incident to such service. OFAC amended the Regulations to allow for the licensing of payments to Cuba for telecommunications services, provided they are licensed by the Federal Communications Commission (FCC), and consistent with policy guidelines concerning such services.⁶⁵

On July 22, 1993, the State Department, in a letter to the FCC, announced the general policy guidelines for implementing the telecommunications provisions of the CDA. The guidelines emphasize that any telecommunications activities must be carried out in keeping with the spirit of the CDA and must not result in any excessive accumulation of U.S. currency by the Cuban government. The FCC published the letter in the Federal Register on September 1, 1993, providing:⁶⁶

1. Specific transactions related to blocked accounts are allowed, *e.g.*, debiting of regular bank service charges, and payment of taxes from blocked accounts.⁶⁷
2. Letters patent, trademark registration certificates or copyright registrations may be applied for and received for intellectual property in which a Cuban national has an interest.⁶⁸
3. Unblocking of U.S. assets of certain Cuban corporations is allowed subject to specific rules.⁶⁹

D. Cuban Democracy Act of 1992⁷⁰

1. Congressional Policy

The CDA contains a Congressional finding that the Castro government continues to disregard human rights, continues to support subversive activities around the world, has decreased the well-being of the Cuban people, and shows no signs of change despite the collapse of Communism around the world. The CDA purports to encourage a "peaceful transition to democracy and [the] resumption of economic growth in Cuba" through the dual strategy of tightening sanctions against the Cuban government while increasing support for the Cuban people.⁷¹

2. International Cooperation

One of the ways in which the CDA attempts to increase pressure on Cuba is through seeking international cooperation in promoting change in Cuba. The CDA exhorts the President to "encourage" the governments of countries that trade with Cuba to restrict their trade and credit relations.⁷²

65. 58 Fed. Reg. 45,060 (1993).

66. 58 Fed. Reg. 46,193 (1993).

67. See 31 C.F.R. §§ 515.508-.510, 515.514-.515, 515.519, 515.531-.532 (1994).

68. 31 C.F.R. § 515.527 (1994).

69. 31 C.F.R. §§ 515.555, 515.567 (1994).

70. 22 U.S.C. §§ 6001-10 (Supp. V 1993).

71. 22 U.S.C. §§ 6001, 6002 (Supp. V 1993).

72. 22 U.S.C. § 6003(a) (Supp. V 1993).

Furthermore, the CDA authorizes the President to apply sanctions against any country that provides assistance to Cuba, including loans, leases, or credit at non-market rates. Sanctions allowed are: (1) ineligibility of the government for assistance under the Foreign Assistance Act, or assistance or sale under the Arms Export Control Act; and (2) ineligibility for forgiveness or reduction of any debt owed to the U.S. Government.⁷³ This authority, and any sanctions imposed, would cease to apply upon a Presidential determination that Cuba has met certain requirements regarding movement toward democracy, set out under 22 U.S.C. § 6007(a) and discussed below.

France is the only country that maintains an assistance program with Cuba, but it does not receive any U.S. aid or have a debt reduction program. The European Community and Spain have made loans for humanitarian assistance, which are presumably allowed.⁷⁴ In early 1993, Russia announced a \$380 million credit to Cuba to complete projects started by the Soviet Union. The United States is monitoring the agreement to ensure that it is on market terms.⁷⁵

3. Support for the Cuban People

The CDA promotes U.S. support of the Cuban people by requiring that the following transactions be allowed, despite other provisions of law:⁷⁶

1. donations of food to nongovernmental organizations (NGOs) or individuals in Cuba;
2. exports, through specific license, of medicines or medical supplies or equipment to Cuba, except if it is likely they will be used for torture, re-export or the production of biotechnology, or if the U.S. government is unable to verify their intended use (donations of medicines to NGOs in Cuba for humanitarian purposes not being subject to the verification requirement);
3. telecommunications services between the United States and Cuba, along with such telecommunications facilities necessary to provide efficient and adequate service, and payments to the government of Cuba for amounts due as a result of the provision of such services (in a manner consistent with the public interest and, as long as, no payments are made from blocked accounts);
4. whatever actions are necessary for the U.S. Postal Service to provide postal service between the United States and Cuba;⁷⁷ and
5. assistance by the U.S. government, through NGOs, for the support of individuals and organizations to promote nonviolent democratic change in Cuba.⁷⁸

73. 22 U.S.C. § 6003(b) (Supp. V 1993).

74. See *The Cuban Democracy Act: One Year Later, Before the House Committee on Foreign Affairs*, 103d Cong., 1st Sess. (1993) (statement of Alexander Watson, Asst. Sec. of State for Inter-American Affairs given Nov. 18, 1993). Also, loans for humanitarian assistance are arguably consistent with the spirit of the CDA and not inconsistent with the definition of "assistance to Cuba," which is "assistance to or for the benefit of the Government of Cuba." 22 U.S.C. § 6003(b)(2) (Supp. V 1993).

75. Foreign Operations, Export Financing and Related Programs Appropriations Act of 1994, Pub. L. 103-87, 107 Stat. 931 (1993) (Section 576 of the Act). The Act required the President to certify, by April 1, 1994, and before funds appropriated for assistance to Russia could be expended, that the Government of Russia has not provided assistance to Cuba. This function was delegated to the Secretary of State. 59 Fed. Reg. 17,223 (1994). The Secretary of State certified that Russia had not provided assistance to Cuba. 59 Fed. Reg. 17,410 (1994).

76. 22 U.S.C. § 6004(a) (Supp. V 1993).

77. 22 U.S.C. § 6004(b)-(f) (Supp. V 1993).

78. 22 U.S.C. § 6004(g) (Supp. V 1993).

4. Tightening the Embargo

Section 1706 of the CDA⁷⁹ tightens the embargo by disallowing trade by foreign subsidiaries of U.S. firms and by prohibiting vessels engaging in trade with Cuba from entering the United States. These provisions are discussed above in sections II.C.7. and II.C.3., respectively. The CDA also prohibits the use of general licensed "*Ship Stores*"⁸⁰ to export commodities to vessels carrying goods or passengers to and from Cuba, or carrying goods in which Cuba or a Cuban national has an interest.⁸¹ The Department of Commerce, Bureau of Export Administration, is still working on implementing this provision. In addition, the CDA requires the President to establish strict limits on remittances to Cuba by U.S. persons for the purpose of financing travel by Cubans to the United States, to ensure that such remittances are not a means for the Cuban government to obtain U.S. currency.⁸²

5. Policy Toward Post-Communist Cuba

The CDA provides a framework for U.S. policy toward a post-communist Cuban government by proposing the gradual reduction of sanctions by the President in response to positive developments towards democracy. At the primary level, food, medicine and medical supplies for humanitarian purposes should be made available to Cuba under the Foreign Assistance Act of 1961 (FAA) and the Agricultural Trade Development and Assistance Act of 1954 (ATDAA).⁸³ The aid is available only if the President determines and certifies to Congress that the Cuban government: (1) has made a public commitment to hold elections within six months; (2) is respecting internationally recognized human rights; and (3) is not assisting insurgents in any country.⁸⁴

The President may waive the requirements of 22 U.S.C. § 6005, if he determines and reports to Congress that Cuba: (1) has held free elections; (2) has allowed opposition parties to organize; (3) is showing respect for basic civil liberties and human rights; (4) is moving toward an open market; and (5) has committed itself to constitutional change that would guarantee regular free and fair elections.⁸⁵ Although the President is not required to waive sanctions, if he does so under the CDA framework he is required to take the following actions with respect to an elected Cuban government: (1) encourage its reentry to international organizations; (2) provide emergency relief during its transition to a viable economic system; and (3) take steps to end the embargo.⁸⁶

79. 22 U.S.C. § 6005 (Supp. V 1993).

80. 15 C.F.R. § 771.9 (1994).

81. 22 U.S.C. § 6005(b)(3) (Supp. V 1993).

82. 22 U.S.C. § 6005(c) (Supp. V 1993).

83. 22 U.S.C. § 6006 (Supp. V 1993).

84. *Id.*

85. 22 U.S.C. § 6007 (Supp. V 1993).

86. 22 U.S.C. § 6007(b) (Supp. V 1993).

6. Existing Claims Not Affected

As previously noted, the CDA⁸⁷ preserves the provisions of 22 U.S.C. § 2370(a)(2) which state that Cuba may not benefit under any U.S. law until the President determines it has taken appropriate steps under international law to return expropriated property or to provide equitable compensation. The framework regarding U.S. policy to a post-communist Cuba must be read in conjunction with this requirement.

7. Penalties

Violations of the CDA are punishable under section 16 of the TWEA.⁸⁸ The CDA amended section 16 to allow the use of civil monetary penalties and civil forfeitures for violations of the Regulations, in addition to the criminal penalties already provided under the TWEA.

8. Effect of CDA on Regulations and Embargo

There is a question whether the enactment of the CDA "codified" the embargo or prescribed statutory requirements for its lifting (through its framework for U.S. policy toward post-communist Cuba). A fair reading of the CDA reveals that it does neither.

The CDA does not expressly codify the regulations implementing the embargo. Although enactment of the CDA required conforming adjustments to the Regulations, and the Export Administration Regulations, discussed below, the Regulations have preexisting and additional sources of authority. Significantly, the Office of Foreign Assets Control has relied on the broad authority of the TWEA to issue and amend the Regulations restricting all forms of transactions with Cuba and Cuban nationals. In the absence of this authority, most, if not all, of the Regulations would fail. The CDA by itself would not provide any authority for the Regulations.

The provisions tightening the embargo arguably codify the embargo at least to that extent. But such provisions, as implemented in the Regulations, would have to derive enough authority from the CDA in order to withstand a repeal or removal of the other authorities. Even if this could be argued for each such provision, it would make little sense to retain the prohibitions of the CDA-implemented Regulations if the rest of the Regulations were repealed. In addition, the language of the CDA provisions makes it unlikely that such would be the result. The Secretary of the Treasury could always issue licenses for the entry of vessels into U.S. ports proscribed by the CDA.⁸⁹ The prohibition on foreign subsidiary trade depends on the premise that it is illegal to engage in transactions with Cuban nationals. If this were no longer the case, with respect to the TWEA and the Embargo Proclamation, the prohibition in the CDA would have no meaning.

The framework outlined in the CDA for the gradual lifting of sanctions in response to positive developments in Cuba does not constrain the President's

87. 22 U.S.C. § 6008 (Supp. V 1993).

88. 22 U.S.C. § 6009(d) (Supp. V 1993).

89. 22 U.S.C. § 6005(b)(1), (2) (Supp. V 1993).

alternatives for lifting the embargo. The language used in the CDA is discretionary. The framework suggests one way in which the transition to normalized trade relations could occur. It would be hard to argue that the Congress could so constrain the President's foreign policy powers.

*E. Export Administration Regulations (EAR)*⁹⁰

The embargo proclamation directed the Secretary of Commerce to continue prohibitions on exports to Cuba, under the general authority of the Export Control Act of 1949, as amended,⁹¹ and authorized the Secretary to modify such prohibitions consistent with the embargo policy.

1. Export Administration Act of 1979

Export Administration regulations in relation to embargoed countries are promulgated under the authority of section 6 of the Export Administration Act of 1979, as amended,⁹² and the TWEA, as amended by the IEEPA.⁹³

Section 6 of the Export Administration Act⁹⁴ authorizes the President to control exports as necessary to further the foreign policy goals of the United States. The authorities granted are to be exercised by the Secretary of Commerce, and implemented by means of export licenses. In Cuba's case, the foreign policy goal is the maintenance of the embargo, as directed in Proclamation No. 3,447.⁹⁵

In addition, section 6(j)⁹⁶ requires a validated license for the export of goods or technology to a country if the Secretary of State has determined that the government of such country has repeatedly provided support for acts of international terrorism. The Secretary of State first designated Cuba as a country which supports international terrorism for purposes of this provision on March 1, 1982. The latest "terrorism list" was published on October 8, 1993.⁹⁷

This determination may not be rescinded unless the President submits to Congress: (1) a report certifying that there has been a fundamental change in such a country's government and that it will no longer support terrorism; or (2) a report certifying that the government has not provided support for terrorism during the preceding six-month period and has provided assurances that it will not provide such support in the future.

Section 5 of the Export Administration Act⁹⁸ authorizes the President to control exports for national security reasons. Among other things, the President is required to restrict exports to those countries included in the list of Communist countries pursuant to 22 U.S.C. § 2370(f), which includes Cuba.⁹⁹ The

90. 15 C.F.R. §§ 768-99 (1993).

91. This act was replaced by the Export Administration Act of 1979. 22 U.S.C. § 6004 (Supp. V 1993).

92. 50 U.S.C. app. §§ 2401-20 (1988).

93. 15 C.F.R. § 785.1(a) (1994).

94. 50 U.S.C. app. § 2405 (1988).

95. 27 Fed. Reg. 1,085 (1962).

96. 50 U.S.C. app. § 2405(j) (1988).

97. 58 Fed. Reg. 52,523 (1993).

98. 50 U.S.C. app. § 2404 (1988).

99. 50 U.S.C. app. § 2404(b)(1) (1988).

President may add or delete countries from this list, for export control purposes, if he determines it is in the national interest. Section 2404(b)(1) lists several factors that the President must take into account.¹⁰⁰

The authority of the Export Administration Act expired June 30, 1994.¹⁰¹ President Clinton invoked the IEEPA to continue indefinitely the provisions of the Export Administration Act and all rules and regulations issued pursuant to it.¹⁰²

2. Export Administration Regulations

Part 785 of the EAR (Special Country Policies and Provisions) contains export regulations for specific country groups. Section 785.1 contains provisions for Country Group Z, the embargoed countries, which includes Cuba.¹⁰³

Section 785.1(a) requires a validated license for the export or re-export of commodities originating in the United States and technical data to countries in Country Group Z. But there is a general license for the exportation of the following items:

1. technical data generally available to the public and educational materials;
2. certain types of baggage and certain types of vessels and aircraft;
3. foreign origin items in transit through the United States;
4. shipments for U.S. Government personnel and agencies; and
5. gift parcels of non-military commodities not exceeding \$200.

The Bureau of Export Administration's general policy in relation to Cuba is to deny all requests for validated (specific) licenses, except on a case-by-case basis for:

1. non-commercial humanitarian exports;
2. exports of medicine and medical items satisfying the requirements of the CDA; and
3. re-exports to Cuba of parts originating in the United States, components and materials that are insubstantial portions of non-strategic foreign-made products, provided that the exporter is not a U.S.-owned or controlled subsidiary in a third country.

Section 785.1(b) notes that Cuba has been designated by the Secretary of State as a country that supports international terrorism. Section 785.1(c) deals with exports to Cuba by firms in third world countries of goods containing materials originating in the United States. This provision is currently under

100. This function was delegated to the Secretary of Commerce. Exec. Order No. 12,214, 45 Fed. Reg. 29,783 (1980).

101. The Act was authorized until June 30, 1994. Export Administration Act. Pub. L. 103-10, 107 Stat. 40, (*reprinted in* 50 U.S.C. § 2417, 2419 (Supp. V 1993)). The Act was extended indefinitely awaiting its reauthorization. Exec. Order No. 12,923 (1994), 59 Fed. Reg. 34,551 (1994). This executive order was subsequently revoked. Exec. Order No. 12,924 (1994), 59 Fed. Reg. 43,437 (1994).

102. Exec. Order No. 12,924 (1994), 59 Fed. Reg. 43,437 (1994).

103. Vietnam was removed from Country Group Z on February 10, 1994, pursuant to President Clinton's termination of the embargo against Vietnam. 59 Fed. Reg. 6,524 (1994). Other than Cuba, the only country remaining in this group is North Korea. 15 C.F.R. § 770, Supp. No. 1 (1994) (Country Group list).

revision in order to conform with the CDA's restriction on transactions by foreign subsidiaries.¹⁰⁴

General exceptions appear in 15 C.F.R. part 771 (General "T" Licenses),¹⁰⁵ part 779 (Technical Data),¹⁰⁶ and in ECCN OA98 on the Commodity Control List.¹⁰⁷ Licenses for humanitarian assistance to Cuba are also available.¹⁰⁸ Pursuant to President Clinton's statement of August 20, 1994, the Bureau of Export Administration amended the General License GIFT¹⁰⁹ to limit general license eligibility for gift parcels to Cuba for food, medicine, and strictly humanitarian items.¹¹⁰

F. Lifting the Embargo

Although export and other restrictions had been in place for some time, the President proclaimed the embargo on Cuba under the authority of 22 U.S.C. § 2370(a).¹¹¹ Under this authority, he directed the Secretaries of the Treasury and Commerce to issue regulations implementing the embargo. Since § 2370(a)(1) merely "authorized" the President to impose a trade embargo, he could use his foreign affairs powers to revoke the embargo proclamation and therefore lift most of the trade restrictions.

OFAC's Regulations implementing the embargo are issued under the authority of the Embargo Proclamation as well as the authority of section 5 of the TWEA, as amended by the IEEPA. As discussed in section II.C. above, IEEPA requires that the Regulations be extended by the President every year or otherwise they will be terminated automatically. Therefore, the authority for the Regulations could be allowed to expire. Current authority for these Regulations will expire September 14, 1995. In addition, section 5 of the TWEA provides the President with broad discretionary authority that he may use to restrict or repeal the Regulations at any time. Throughout the years the Regulations have been revised, sometimes drastically, under the foreign affairs authority of the President. The Embargo Proclamation authorizes the Secretaries of Commerce and Treasury to modify the regulations "as [they] determine to be consistent with the operation of the embargo."¹¹² If the embargo were to be lifted, they could modify the regulations consistent with the new policy.

Revoking the embargo would not completely remove restrictions on exports to Cuba. Cuba is subject to export restrictions for reasons apart from the Cuban trade embargo. Cuba is a country supporting international terrorism for purposes

104. Other sections of the EAR dealing with Cuba or Country Group Z are: § 770.9 (transshipments); § 774 (re-exports); § 775 (necessary documentation); § 776 (special commodities); and § 778 (proliferation controls).

105. 15 C.F.R. §§ 771.1-.28 (1994).

106. 15 C.F.R. §§ 779.1-.10 (1994).

107. 15 C.F.R. § 799.1 (1994) (Commodity Control list). The list contains all items subject to Bureau of Export Administration controls for national security, foreign policy, short supply and proliferation reasons. *Id.* Most items listed require validated licenses for export to Country Group Z. *Id.* ECCN (Export Control Classification Number) OA98 I contains a general exception for informational materials. *Id.*

108. 15 C.F.R. § 773.5 (1994).

109. 15 C.F.R. § 771.18 (1994).

110. 59 Fed. Reg. 44,887 (1994).

111. See Proclamation No. 3,447, 27 Fed. Reg. 1,085 (1962).

112. *Id.*

of the export restrictions of 50 U.S.C. app. § 2405(j).¹¹³ To be removed from the terrorism list, the President would have to certify to Congress that Cuba no longer supports international terrorism.

In addition, Cuba is a communist country listed in 22 U.S.C. § 2370(f)¹¹⁴ for purposes of the restrictions imposed under 50 U.S.C. app. § 2404(b)(1).¹¹⁵ The President is authorized to remove countries from this list, for export control purposes, if he determines it is in the national interest. In addition, 22 U.S.C. § 2370(f) provides for Presidential waivers.

If the trade embargo were lifted, Cuba would still be prohibited from receiving foreign assistance or any benefit under any U.S. law under 22 U.S.C. § 2370(a)(2), until the President determined that Cuba had taken appropriate steps under international law to return or compensate for property expropriated from U.S. citizens. The President may make an exception to this prohibition if he deems it in the national interest.¹¹⁶

If the embargo were lifted while the Castro government was still in power, it could not receive U.S. foreign assistance because of the absolute prohibition contained in 22 U.S.C. § 2370(a)(1) on such assistance to the "present" government of Cuba, (i.e. the Castro government).¹¹⁷ One could argue that, despite the section 2370(a)(1) prohibition,¹¹⁸ the provisions of 22 U.S.C. § 2370(a)(2) apply to a reformed Castro government as well as "any" other government.¹¹⁹ The success of such an argument is questionable given the absolute language of section 2370(a)(1). The Castro government could sidestep this prohibition (and indeed achieve the lifting of the embargo) if it complied with the framework set out in the CDA. As will be discussed below, there are other restrictions on foreign assistance.

As noted above, removing these obstacles to trade would leave in place other legal requirements that restrict or affect trade with Cuba. Although currently of little practical consequence, these restrictions would acquire new life under such changed circumstances.

113. 50 U.S.C. app. § 2370(j) (1988).

114. 22 U.S.C. § 2370(f) (1988).

115. 50 U.S.C. app. § 2404(b)(1) (1988).

116. 22 U.S.C. § 2370(a)(2) (1988).

117. 22 U.S.C. § 2370(a)(1) (1988).

118. *Id.*

119. 22 U.S.C. § 2370(a)(2) (1988).

III. OTHER LEGAL REQUIREMENTS AFFECTING TRADE WITH CUBA

A. *Other Prohibitions on Foreign Assistance*

1. Sections 620 and 620A of the Foreign Assistance Act of 1961¹²⁰

a. Communist Countries

Section 2370(f)(1) prohibits any assistance under the Foreign Assistance Act (except under § 2174(b))¹²¹ to any "Communist country".¹²² The provision lists those Communist countries subject to this provision, and specifically includes Cuba.

Countries may be exempted from application of this provision in two ways:

- 1) The President can waive its application by finding and reporting to Congress that: (a) assistance would be vital for national security, (b) the country is not controlled by the international Communist conspiracy, and (c) assistance would promote the independence of the country from international Communism.¹²³
- 2) The President can remove a country from the list, for purposes of this section and other provisions referencing this section,¹²⁴ if he determines and reports to Congress that such action is in the national interest. One of the factors that the President is to consider is evidence that a country is fostering the establishment of a genuinely democratic system, with respect for human rights.¹²⁵

Section 2370(h) requires the President to adopt regulations and establish procedures to insure that U.S. foreign aid is not used to promote or assist the foreign aid projects or activities of any country that is a Communist country for purposes of subsection (f).¹²⁶

b. Absence of Diplomatic Relations

Section 2370(t) prohibits assistance under the Foreign Assistance Act, or any other act, as well as sales under the Agricultural Trade Development and Assistance Act,¹²⁷ to any country with which the United States has no diplomatic relations.¹²⁸ This section does not provide for any waivers or exceptions to the prohibition. The United States broke diplomatic relations with Cuba on January 3, 1961. Although the United States and Cuba each have interest

120. 22 U.S.C. §§ 2370-71 (1988).

121. Section 2174(b) authorizes the President to furnish assistance to hospital centers for medical education and research outside the United States, founded or sponsored by U.S. citizens, and to schools and libraries outside the United States, founded or sponsored by U.S. citizens, and serving as study centers for ideas and practices of the United States. 22 U.S.C. § 2174(b) (1988).

122. 22 U.S.C. § 2370(f)(1) (1988).

123. *Id.*

124. 22 U.S.C. § 2370(f) (1988) (cross-referenced in 22 U.S.C. § 2370(h) (1988) and 50 U.S.C. app. § 2404(b)(1) (1988)).

125. 22 U.S.C. § 2370(f)(2) (1988).

126. Act for Reform in Emerging New Democracies and Support and Help for Improved Partnership with Russia, Ukraine, and Other New Independent States, Pub. L. No. 103-199, § 705, 107 Stat. 2317, 2328 (1994).

127. 7 U.S.C. §§ 1691-1736 (1988).

128. 22 U.S.C. § 2370(t) (1988).

sections in the Swiss embassies in each country's capital, they have not reestablished diplomatic relations.

c. Countries Supporting International Terrorism

Section 2371 prohibits assistance under the Foreign Assistance Act, the Agricultural Trade Development and Assistance Act, the Peace Corps Act, and the Export-Import Bank Act, to any country if the Secretary of State determines that it supports international terrorism.¹²⁹ The President can waive this prohibition for national security or humanitarian reasons. However, humanitarian reasons may not be used for assistance under subchapter II of Chapter 32 (which includes OPIC), the Export-Import Bank Act, or 22 U.S.C. § 2780 (prohibiting the sale of munitions or the granting of credits or assistance for their purchase).¹³⁰

The Secretary of State first determined that Cuba is a country that supports international terrorism in March of 1982. The latest "terrorism list" was published on October 8, 1993. It still includes Cuba. The "terrorism list" for purposes of this section is the same as that for section 6(j) of the Export Administration Act.¹³¹

d. Indebtedness to U.S. Citizens

Section 2370(c) of the FAA prohibits assistance to any country that is indebted to U.S. citizens for goods and services provided or ordered, provided that the President does not find such action contrary to the national security.

2. Export-Import Bank Act of 1945¹³²

The Export-Import Bank cannot guarantee, insure, extend or participate in the extension of credit in connection with the purchase or lease of any product by a "Marxist-Leninist country" or by another country when a Marxist-Leninist country will benefit.¹³³ A "Marxist-Leninist country" is defined as one that maintains a centrally-planned economy based on principles of Marxism-Leninism or is economically or militarily dependent on any other such country.¹³⁴ The Export-Import Bank Act contains a list of countries deemed to be Marxist-Leninist countries.¹³⁵ Cuba is one of the nine countries still deemed to be Marxist-Leninist countries.¹³⁶

The President is authorized to determine whether a country is no longer a Marxist-Leninist country.¹³⁷ The President may also make a determination that

129. 22 U.S.C. § 2371 (1988).

130. *Id.*

131. 50 U.S.C. app. § 2405(j) (1988).

132. 12 U.S.C. § 635 (1988).

133. 12 U.S.C. § 635(b)(2) (1988).

134. 12 U.S.C. § 635(b)(2)(B)(i) (1988).

135. 12 U.S.C. § 635(b)(2)(B)(ii) (1988).

136. The definition and list of countries were last amended to reflect the changes in the former Soviet Union and Eastern Europe. Export Enhancement Act of 1992, Pub. L. 102-429, 106 Stat. 2186 (1992).

137. 12 U.S.C. § 635(b)(2)(C) (1988).

a transaction is in the national interest. He must notify Congress of any such determination.¹³⁸

3. Section 527 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Helms Amendment)¹³⁹

The Helms Amendment sets up a framework for withholding U.S. bilateral and multilateral aid to countries which have expropriated the property of U.S. persons and failed to take specific actions within a specified time frame. It combines and supersedes the law formerly embodied in the Hickenlooper Amendment¹⁴⁰ and the Gonzalez Amendment.¹⁴¹

The Amendment applies to countries that: (1) on or after January 1, 1956, have expropriated property of or nullified contracts with any U.S. person;¹⁴² and (2) have not taken one of the following actions:

- (a) returned the property;
- (b) provided adequate and effective compensation in convertible currency or other mutually acceptable compensation equivalent to the full value thereof, as required by international law;
- (c) offered a domestic procedure providing prompt, adequate and effective compensation in accordance with international law; or
- (d) submitted the dispute to arbitration under the rules of the Convention for the Settlement of Investment Disputes (ICSID rules) or other mutually agreeable binding international arbitration procedure;¹⁴³ and

(3) these actions must be taken within the latest of the following time frames:

- (a) 3 years after the date the claim was filed;
- (b) if the triggering action occurred under a totalitarian or authoritarian government, 3 years after the date of installation of a democratically elected government; or
- (c) 90 days after the date of enactment of Pub. L. 103-236.¹⁴⁴

With respect to such countries, the Helms Amendment: (1) prohibits the provision of any funds made available under the Foreign Relations Authorization Act,¹⁴⁵ the Foreign Assistance Act of 1961,¹⁴⁶ or the Arms Export Control Act;¹⁴⁷ and (2) requires the President to instruct the U.S. Executive Directors of each multilateral development bank and international financial institution to vote against any loan or use of funds for its benefit, unless such assistance is specifically for programs that serve basic human needs.¹⁴⁸

138. 12 U.S.C. § 635(b)(2)(D) (1988).

139. 22 U.S.C. § 2370(a) (1988).

140. 22 U.S.C. § 2370(e) (1988).

141. 22 U.S.C. § 283(r) (1988).

142. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, §527(a)(1), 108 Stat. 382, 475 (1994).

143. *Id.*

144. *Id.* § 527(c).

145. *Id.*

146. 22 U.S.C. §§ 2151-2429 (1988).

147. 22 U.S.C. §§ 2751-96 (1988).

148. The Conference Committee defined basic human need loans as those which provide basic education, basic sanitation, basic shelter, primary health care, clean drinking water and sanitation, and sufficient food and nutrition for a healthy and productive life. H.R. Conf. Rep. No. 482, 103d Cong., 2d Sess., 241 (1994). *See*

Sanctions terminate upon a written presidential certification to Congress that a country's government has taken one of the prescribed remedial actions.¹⁴⁹ The President may waive the imposition of sanctions on a country, on an annual basis, if he determines and notifies Congress that doing so is in the national interest.¹⁵⁰

No later than ninety days after the date of enactment (i.e. July 29, 1994), and annually thereafter, the Secretary of State must provide a report to Congress containing a list of countries with outstanding expropriation claims, the status of such claims, and each project a U.S. Executive Director has voted against under this provision.¹⁵¹ The State Department has already submitted two reports to Congress. The reports mention that 5,911 claims against Cuba were certified by the Foreign Claims Settlement Commission under the Cuban Claims Act.¹⁵²

It is unclear how the Helms Amendment applies to current authoritarian or totalitarian government that have expropriated U.S. property. Under a literal interpretation, it would only apply to the democratically elected government following an expropriating authoritarian or totalitarian government. It is doubtful that this was the intent of the drafters. For now, the denial of funds to Cuba is achieved under the provisions of section 620 (a) of the Foreign Assistance Act of 1961.¹⁵³ Negative votes in the various international financial institutions would happen anyway because of policy considerations.

4. Resumption of Foreign Assistance

All the legal provisions listed above contain waivers or exceptions to the prohibition on foreign assistance. However, this does not include the provision prohibiting such assistance to countries with which the United States has no diplomatic relations.

B. Denial of Most Favored Nation Treatment

1. Title IV of the Trade Act of 1974, The Jackson-Vanik Amendment¹⁵⁴

Title IV of the Trade Act of 1974 conditioned normal trade relations with Communist/non-market countries on free emigration policies and entry into trade agreements with the United States. Section 401 of the Trade Act of 1974 required the President to continue denying most favored nation (MFN) treatment to those countries not receiving such treatment on January 3, 1975.¹⁵⁵ The

also Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 527(a),(b), 108 Stat. 382, 476 (1994).

149. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 527(e), 108 Stat. 382, 476 (1994).

150. *Id.* § 527(g).

151. *Id.* § 527(f).

152. 19 U.S.C. § 2431 (1988).

153. *See supra* part II.1.

154. 19 U.S.C. §§ 2431-41 (1988).

155. 19 U.S.C. § 2431 (1988).

Senate Report on the bill¹⁵⁶ stated that this section retained the requirement of section 231(a) of the Trade Expansion Act of 1962 that nondiscriminatory treatment be denied to products from all communist countries except Poland and Yugoslavia. The Report listed those countries ineligible for MFN treatment and it specifically included Cuba. Cuba remains on the list.

Section 402 of the Trade Act of 1974 denies MFN treatment and eligibility for credits and investment guarantees under U.S. programs to non-market economy countries if the President determines that they deny, or seriously restrict, their citizens' right to emigrate. The President is also prohibited from concluding any commercial agreements with such countries.¹⁵⁷

These prohibitions apply unless the President:

- 1) finds the country in compliance with section 2432 (i.e. the country allows the free and open emigration of its people) and submits a report to that effect to Congress; or
- 2) waives the requirements of section 2432 by an Executive Order finding that such waiver will substantially promote the objectives of the law and that he has received assurances that the country's emigration practices will lead to open emigration.

In addition, the President must enter into a trade agreement with the country before the country can receive MFN treatment. The agreement must contain provisions regarding national security exceptions, safeguard arrangements, intellectual and industrial property protection, dispute settlement, trade promotion, consultations, and reciprocity.¹⁵⁸

Cuban products are specifically denied MFN treatment under the Tariff Classification Act of 1962. A waiver or Presidential determination of non-applicability under Jackson-Vanik, and the entry into force of a trade agreement between the United States and Cuba meeting Jackson-Vanik requirements, would still leave that prohibition in place.

2. Section 401 of the Tariff Classification Act of 1962¹⁵⁹

Section 401 of the Tariff Classification Act of 1962 declared Cuba a nation dominated by the world Communist movement as defined in section 5 of the Trade Agreements Extension Act of 1951.¹⁶⁰ As of May 24, 1962, Cuban products are denied the benefits of concessions contained in any trade agreement entered into under the authority of section 350 of the Tariff Act of 1930,¹⁶¹ until such date as the President determines that Cuba is no longer dominated by the foreign government or foreign organization controlling the world Communist movement.

The Tariff Classification Act also enacted the new Tariff Schedules of the United States. For the first time, it included a list of the countries not receiving

156. S. Rep. No. 1298, 93d Cong., 2d Sess. (1974).

157. 19 U.S.C. § 2432 (1988 & Supp. V 1993).

158. 19 U.S.C. § 2435 (1988 & Supp. V (1993)).

159. 19 U.S.C. § 1351 (1988).

160. 19 U.S.C. § 1801 (1988).

161. 19 U.S.C. § 1351 (1988).

MFN tariff treatment and for which column 2 tariff rates apply.¹⁶² The list included Cuba, by virtue of section 401 of the Tariff Classification Act. Under the Harmonized Tariff Schedule, General Note 3(b) lists the countries to which column 2 rates apply.¹⁶³ Cuba is still on the list.

3. Granting of MFN Treatment

In order for Cuba to receive MFN treatment, there would have to be a Presidential determination or waiver under Jackson-Vanik (followed by the entry into force of a trade agreement meeting the requirements of 19 U.S.C. § 2435). In addition there must be a Presidential determination under the Tariff Classification Act that Cuba is no longer dominated by the world Communist movement.

C. *Provision of Information to Cuba*

1. Radio Broadcasting to Cuba Act¹⁶⁴

This act requires the United States Information Agency (USIA), as part of its Voice of America program, to provide for the open communication of information and ideas through the use of radio broadcasting to Cuba. USIA is authorized to enter into contracts with private shortwave stations, other government agencies, and other private entities, as necessary.

2. Television Broadcasting to Cuba Act¹⁶⁵

The Act requires the USIA to provide for the open communication of information and ideas through the use of television broadcasting to Cuba. Broadcasting must conform to USIA/VOA standards.¹⁶⁶

The Federal Communications Commission is directed to assign a suitable frequency for such broadcasting, as long as it does not interfere with domestic broadcasting. As with radio broadcasting, USIA may enter into such contracts and agreements as necessary to carry out this program.¹⁶⁷

No funds appropriated under this Act were to be expended until the President determined that broadcast to Cuba was feasible and would not cause objectionable interference with domestic licensees. President Bush made that determination on August 26, 1990.¹⁶⁸

162. An Act to Amend the Tariff Act of 1930 and Certain Related Laws to Provide for the Restatement of the Tariff Classification Provisions, and for Other Purposes, Pub. L. No. 87-456, 46 Stat. 590, 672, 19 U.S.C. § 1202 (1962).

163. A current version of the Harmonized Tariff Schedule is published periodically by the United States International Trade Commission and is available for sale by the Superintendent of Documents, U.S. Govt. Printing Office, Washington, D.C., 20402. 19 U.S.C. § 1202 (1988).

164. 22 U.S.C. § 1465 (1988).

165. 22 U.S.C. § 1465aa-ff (1988).

166. *Id.*

167. *Id.*

168. Determination No. 90-35, 55 Fed. Reg. 38,659 (1990).

D. Disqualification for Trade Preferences

*1. Generalized System of Preferences*¹⁶⁹

The Generalized System of Preferences (GSP) statute authorizes the President to extend duty-free treatment to eligible products from any country that has been designated as a beneficiary developing country under the statute. The President is prohibited from designating as a beneficiary any country that meets any of eight mandatory criteria.¹⁷⁰ Cuba meets at least two of the criteria: (1) it is a Communist country not currently receiving MFN treatment from the United States;¹⁷¹ and (2) it has expropriated property of U.S. citizens and has failed to make prompt and adequate restitution.¹⁷² Disqualification because of the expropriation criteria is inapplicable if the President determines that designation would be in the national economic interest of the United States. The prohibition against communist countries cannot be waived.

*2. Caribbean Basin Economic Recovery Act (Caribbean Basin Initiative)*¹⁷³

The Caribbean Basin Initiative (CBI) authorizes the President to grant duty-free treatment to eligible articles from beneficiary countries. Beneficiary countries are listed and include countries in the Caribbean and Central America.¹⁷⁴

The President may not designate as a beneficiary, any country that is: (1) a Communist country; or (2) has expropriated U.S. property unless prompt, adequate and effective compensation has been provided, good faith negotiations are in progress, or the dispute is under arbitration. Cuba meets both of these criteria. A country may still be designated as a beneficiary if the President determines such designation is in the national economic interest of the United States and so reports to Congress.

E. Miscellaneous

*1. Internal Revenue Code, Foreign Tax Credit*¹⁷⁵

United States citizens and corporations are allowed credits for income taxes paid to foreign countries. However, credits are not allowed if those taxes were paid to a country with which the United States has broken diplomatic relations

169. 19 U.S.C. §§ 2461-65 (1988).

170. 19 U.S.C. § 2462(b) (1988).

171. See 19 U.S.C. § 2462(b)(1) (1988).

172. See 19 U.S.C. § 2462(b)(4)(A), (D)(i) (1988).

173. An Act to Promote Economic Revitalization and Facilitate Expansion of Economic Opportunities in the Caribbean Basin Region, to Provide for Back-up Withholding of Tax from Interest and Dividends, and for other Purposes, Title II, Caribbean Basin Initiative, 97 Stat. 384, 19 U.S.C. §§ 2701-2707 (1988).

174. 19 U.S.C. § 2702(b) (1988).

175. 26 U.S.C. § 901 (1988)

or which the Secretary of State has designated as supporting international terrorism.¹⁷⁶ Cuba meets both of these criteria.

2. Registration of Foreign Agents¹⁷⁷

Any person engaged in legal commercial transactions will be considered a foreign agent if he or she operates in the United States subject to the control of a foreign government or official and is an agent of Cuba. Foreign agents must notify the Attorney General of their presence in the United States.¹⁷⁸

This section was amended by section 202 of the Friendship Act¹⁷⁹ to delete the Soviet Union and other Eastern bloc countries. The only country remaining on the list of countries subject to the provision is Cuba.

3. Regulations Regarding Flights to and From Cuba¹⁸⁰

Subpart O of the Customs Service Air Commerce Regulations deals with travel to and from Cuba. Entry and departure are limited to the Miami International Airport.

4. Cuban Claims Act¹⁸¹

The Cuban Claims Act provided for a statutory period in which U.S. nationals, whose property had been expropriated by Cuba after January 1, 1959, could file claims with the Foreign Claims Settlement Commission of the United States. The Commission had to complete its affairs by July 6, 1972.¹⁸²

The Commission's function was to determine the validity and amount of the claims. It issued certificates valued at an estimated \$2 billion at the time it concluded its affairs (now estimated at about \$6 billion with interest).¹⁸³ The

176. *Id.*

177. 18 U.S.C. § 951 (1994).

178. *Id.*

179. 22 U.S.C. §§ 5801-74 (1988 & Supp. V 1993).

180. 19 C.F.R. § 122.151-.158 (1994). On May 1, 1980, the Customs Service issued emergency interim regulations, effective April 29, 1980, regarding flights to and from Cuba. Customs stated such regulations were imperative because of the "situation involving aliens attempting to reach the United States from Cuba." The regulations designated Fort Lauderdale-Hollywood International Airport as the point of entry for flights from Cuba. Entry and Clearance of Aircraft Proceeding Between the United States and Cuba to Fort Lauderdale-Hollywood International Airport, 45 Fed. Reg. 29,247 (1980) (to be codified at 19 C.F.R. § 6 (1988)).

Final regulations were issued on November 3, 1980. Entry and Clearance of Aircraft Proceeding Between the United States and Cuba, 45 Fed. Reg. 72,646-47 (1980) (to be codified at 19 C.F.R. § 6 (1988)).

On June 30, 1987, Customs amended the regulations by substituting Miami International Airport as the point of entry. Air Commerce; Customs Regulations Amendments Relating to Entry and Clearance of Aircraft Arriving From or Departing for Cuba, 52 Fed. Reg. 24,291-92 (1987) (to be codified at 19 C.F.R. § 6 (1988)).

On March 22, 1988, as part of a general revision of Customs Regulations, the regulations regarding flights to and from Cuba became Subpart O of the newly created Part 122, setting forth all air commerce regulations administered by Customs. Air Commerce Regulations, 53 Fed. Reg. 9,285, 9,312-13 (1988), 19 C.F.R. § 122.151-.158 (1994).

181. 22 U.S.C. § 1643 (1988).

182. *Id.*

183. Judge Edward D. Re, former Chairman of the Foreign Claims Settlement Commission, address at "The Evolving Cuban Marketplace" Symposium (May 5, 1994).

Commission's determination is final for purposes of distributing money if a diplomatic settlement is ever reached.¹⁸⁴

It is doubtful that any government of Cuba would be able to satisfy these claims in the near future. Although these claims are not a barrier to trade *per se*, they become a barrier given the conditions placed by 22 U.S.C. § 2370(a)(2), regarding the return or compensation for expropriated property.

IV. CONCLUSION

At the time this paper is being prepared for printing, there is renewed public debate about the U.S. trade embargo on Cuba. Partly prompting this debate is the introduction by Senator Helms and Congressman Burton of bills seeking to strengthen the embargo and specify the terms of U.S. policy toward a post-Castro Cuba.¹⁸⁵ Although the goal of this paper is merely to catalog, without passing judgment, the many statutory and regulatory requirements affecting, and at present prohibiting, trade with Cuba, several observations seem appropriate.

As evidenced by the many requirements summarized in this paper, and the breadth of the Cuban Assets Control Regulations alone, current U.S. laws reach every significant aspect of trade relations between Cuba and persons subject to the jurisdiction of the United States. Any further tightening of the embargo can only come through increased enforcement of current laws and through the regulation of activities that are secondary or only tangentially related to U.S. trade with Cuba, as proposed in the pending legislation.¹⁸⁶ After over thirty years of a total embargo, it would be proper for proponents of such measures to identify and weigh the probability of success and the domestic political gains against the costs of effective implementation.

Trying to reach secondary activities, such as monitoring whether U.S. persons provide financing to foreigners dealing in expropriated property, will be hard to implement, and will doubtlessly require increased funding and personnel resources. However, this is not just a budgetary issue. Our trading partners already complain about the extraterritorial reach of our prohibition on exports of foreign subsidiaries of U.S. firms to Cuba.¹⁸⁷ Proposals such as the one requiring sanctions against countries trading with Cuba, will probably require expenditure of precious international political capital.

Finally, the various layers of laws and regulations accumulated over three decades have created a complex web of requirements whose interrelation and practical implications are less than crystal clear. The legal and practical implications of an additional layer of requirements should be carefully considered

184. *Banco Nacional de Cuba v. Chase Manhattan*, 505 F. Supp. 412, 449-50 (1980). Claimants may also try to recover losses in unrelated proceedings. Recovered amounts are deducted from the amount certified by the Commission. *Id.*

185. S. 381, 104th Cong., 1st Sess. (1995) and H.R. 927, 104th Cong., 1st Sess. (1995). both bills are entitled the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995."

186. For example, both bills would prohibit U.S. persons from financing any foreign person that deals in any way in property confiscated by the Cuban government, the claim to which is owned by a U.S. citizen. S. 381, § 103; H.R. 927, § 103. In addition, both bills would prohibit the entry of sugar, syrups, and molasses that are the product of a country that imports such products from Cuba. S. 381, § 109; H.R. 927, § 108.

187. See *supra* part II.3.G.

in this light. In particular, the imposition of detailed requirements for the easing and eventual lifting of the embargo, as the Helms and Burton bills propose, may unnecessarily hamstring the ability of the U.S. government to deal with the rapidly changing circumstances that will surely accompany a post-communist or post-Castro Cuba. Such a detailed set of requirements may be more appropriate for a diplomatic dialogue.

SUMMARY OF LEGAL REQUIREMENTS AFFECTING TRADE WITH CUBA AND ACTIONS NEEDED TO REMOVE THEM

PROHIBITION	LEGAL REQUIREMENT	ACTION TO REMOVE
1. Embargo on Trade	a. Pres. Proclamation No. 3447 b. Cuban Assets Control Regulations (under TWEA)	a. Repeal under foreign affairs powers of President. b. (i) Any action possible under broad discretion granted to President under TWEA, or (ii) Let authority expire. (iii) Modify under President's foreign affairs powers.
2. Export Controls	a. Pres. Proclamation No. 3447 b. Export Administration Act of 1979 (i) 50 U.S.C. app. § 2405 (foreign policy controls) (ii) 50 U.S.C. app. § 2405(j) (terrorism list) (iii) 50 U.S.C. app. § 2404 (national security controls — communist countries)	a. Repeal under President's foreign affairs powers, or modify export controls under authority of Proclamation itself. b. (i) Foreign policy imperative to exercise controls depends on policy re embargo. (ii) Presidential certification that Cuba no longer supports international terrorism. (iii) President may delete country from list of communist countries if in national interest.
3. MFN Tariff Treatment	a. Jackson-Vanik b. Section 401 of Tariff Classification Act of 1962	a. Pres. finds Cuba in compliance, or waives requirement, <i>and</i> enters into trade agreement. b. Pres. determination that Cuba no longer dominated by world communist movement.
4. Benefits under US Law	a. 22 U.S.C. § 2370(a)(2)	a. Pres. determination that Cuba has taken appropriate steps regarding expropriated property or if in national interest. Possible that this may not apply to Castro government.
5. Foreign Assistance	a. 22 U.S.C. § 2370(a)(1) — absolute prohibition for Castro government b. 22 U.S.C. § 2370(a)(2) c. 22 U.S.C. § 2370(c) (indebtedness to US citizens) d. 22 U.S.C. § 2370(f) (communist countries) e. 22 U.S.C. § 2370(t) (absence	a. If Castro government — need to repeal. If not — no action required. b. Same as 4.a. above. c. Pres. waiver if in national interest. d. Pres. waiver after findings or if he determines it is in the national interest.

of diplomatic relations)

f. 22 U.S.C. § 2371 (countries supporting international terrorism)

g. Export-Import prohibition on "Marxist-Leninist countries"

h. Helms Amendment

e. NO WAIVER OR EXCEPTION. Must reestablish diplomatic relations.

f. Pres. waiver for national security or humanitarian reasons.

g. Pres. determination country is no longer Marxist-Leninist or national interest determination.

h. 3 year grace for post-communist governments or Pres. waiver if in national interest.
