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# ACTIONS NEEDED FOR LIFTING THE U.S. TRADE EMBARGO AGAINST CUBA

*MATIAS F. TRAVIESO-DIAZ\**

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\* Partner, Shaw, Pittman, Potts & Trowbridge, Washington, D.C., J.D., Columbia University, 1976.

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## I. OVERVIEW

Anyone familiar with the history of relations between the United States and Cuba in the last thirty years is aware that the United States has in place a strict embargo on trade with, and on economic assistance to, Cuba. Many people are not aware, however, of the full reach of the embargo, and the way it operates to exclude Cuba from programs initiated by the United States which provide economic benefits to other Latin American and Caribbean nations. Also, few people know that, because of the accumulation of increasingly prescriptive laws, lifting the embargo could require multiple actions by both the Executive and Congress. Some of these actions are capable of swift implementation, while others may involve a process that could extend over months or years. The purpose of this paper is to describe the actions that the U.S. government would need to take to lift the Cuban trade embargo. This paper is not intended to express any views on whether the embargo should be lifted or modified under current conditions.

## II. THE DIRECT EMBARGO

### A. *Express Embargo Provisions*

#### 1. Introduction

The United States has in place a comprehensive embargo against trade and other economic transactions involving Cuba. The embargo is expressly founded on three major statutes and is implemented by the Cuban Assets Control Regulations, issued and administered by the U.S. Department of the Treasury [hereinafter Treasury].<sup>1</sup>

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1. Embargo-related prohibitions against activities relating to Cuba are sprinkled throughout the U.S. laws. For example, 18 U.S.C. § 951 requires agents of foreign governments, acting in the United States, to notify the U.S. Attorney General of their agency relationship or face potential criminal sanctions.

2. The Trading with the Enemy Act

The Trading with the Enemy Act of 1917<sup>2</sup> [hereinafter TWEA] was enacted as the United States entered World War I. It was intended to give the President authority to prohibit, limit, or regulate trade with hostile countries in times of war.

Section 5(b) of the TWEA was amended in 1933 to grant the President authority to exercise the powers of the Act during periods of national emergency.<sup>3</sup> As amended, section 5(b) of the TWEA reads:

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Persons engaged in lawful commercial transactions are not subject to this requirement, except that commercial representatives of Cuba and other countries who pose threats to the national security interests are not exempt, and must give notice of their status.

Another example can be found in the Foreign Operations, Export Financing, and Related Programs Appropriation Act of 1994, Pub. L. 103-87, 107 Stat. 931 (1993). Section 507 of this statute, which appropriates funds for a variety of assistance programs covering military, economic, and developmental aid, provides:

[n]one of the funds appropriated or otherwise made available pursuant to this Act shall be obligated or expended to finance directly or indirectly any assistance or reparations to Cuba . . . . Provided, that for purpose 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. 107 Stat. 946.

Provisions such as these will not be addressed in this paper, since they constitute relatively minor impediments to trade that can be removed in due course as the legislation is updated. Such revisions are now underway with respect to Russia and the countries in Eastern Europe, which once were, and in some instances still are, subject to many of the same restrictions that apply to Cuba.

2. Trading with the Enemy Act of 1917, 40 Stat. 411 (1917).

3. Emergency Banking Relief Act of March 9, 1933, ch. 2, § 2, 48 Stat. 1 (1933), 50 U.S.C. app. § 5 (current version codified at 12 U.S.C. § 95a).

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.<sup>4</sup>

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4. *Id.*

The legislative history is vague about the purposes behind the 1933 amendment to Section 5(b) of the TWEA.<sup>5</sup> However, interpretations of the intent of the legislation have been provided by the courts and legal scholars. In 1971, for example, the Second Circuit noted:

[Petitioner contends that the policy behind the TWEA] is to deny hard currency to blocked countries and their nationals. However, as the Secretary [of the Treasury] 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.<sup>6</sup>

In a later case, 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

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5. The 1933 amendment was debated and passed by both houses in a single day, without hearings, and before the bill was even in print. J. B. BINGHAM, *TRADING WITH THE ENEMY: LEGISLATIVE AND EXECUTIVE DOCUMENTS CONCERNING REGULATION OF INTERNATIONAL TRANSACTIONS IN TIME OF DECLARED NATIONAL EMERGENCY* 158 (1976).

6. *Cheng Yih-Chun v. Federal Reserve Bank of New York*, 442 F.2d 460, 465 (2d Cir. 1971).



designated countries; and (3) to use the blocked funds as a negotiating tool with the designated country.<sup>7</sup> (citations omitted).

The statements by the courts in these two cases, and a number of others, reflect the historical fact that the TWEA has been used as a political and economic tool to further the U.S. government's positions in its dealings with unfriendly nations.

The 1933 amendment to section 5(b) was enacted in response to an economic emergency, but its authority was later invoked in connection with the Korean War, a military emergency.<sup>8</sup> On December 16, 1950, President Truman issued a proclamation<sup>9</sup> that took note of "recent events in Korea and elsewhere" and referred to "the increasing menace of the forces of communist aggression" as requiring the declaration of a state of national emergency.<sup>10</sup> During this time, section 5(b) of the TWEA read in

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7. *Tran Qui Than v. Regan*, 658 F.2d 1296, 1305 (9th Cir. 1981), *cert. denied*, 459 U.S. 1069 (1982).

8. Proclamation No. 2914, 15 Fed. Reg. 9029 (1950), *reprinted in* 1950 U.S.C. Cong. Serv., Vol. 1 at 1557-58.

9. *Id.*

10. President Truman's proclamation of a national emergency with regard to the worldwide threat of communist aggression was effectively rescinded by the National Emergencies Act, Pub. L. 94-412, 90 Stat. 1255 (1976). This legislation provided that all outstanding declarations of national emergency would become void in two years, except where the President extended the state of national emergency with respect to a particular country.

Congress expressly provided for the application of the National Emergencies Act in a 1977 amendment to the TWEA. War or National Emergency-Presidential Powers, 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 orders relating to national emergencies that he wanted to keep in effect. In order to further extend laws relating to a TWEA emergency, the President was also required to issue an annual determination that the extension was in the national interest. *See infra*

relevant part:

(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.<sup>11</sup>

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

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notes 16 and 17, and accompanying text.

11. Trading with the Enemy Act of 1917, 40 Stat. 411 §5(b) (1917).

between U.S. nationals, Communist China, and North Korea.<sup>12</sup> These regulations are known as the Foreign Assets Control Regulations [hereinafter FACR].<sup>13</sup>

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 regulations issued in 1963 which imposed a trade embargo on Cuba. When the Treasury issued the Cuban embargo regulations, it invoked section 5(b) of the TWEA as a basis for imposing the embargo.<sup>14</sup>

U.S. courts have upheld the President's exercise of the powers granted by the TWEA, and the promulgation of regulations by the Treasury under the President's delegation of those powers. The U.S. Supreme Court has recognized that Section 5(b) of the TWEA gave the President broad authority to impose comprehensive embargoes on foreign countries, such as Cuba, both during peacetime emergencies and in time of war.<sup>15</sup>

In 1977, Congress limited this broad presidential authority through its amendment of section 5(b) of the TWEA by striking out "during any other period of national emergency declared by the President" in the text preceding subparagraph (a).<sup>16</sup> In doing so, Congress removed the President's ability to invoke the existence of a national emergency and impose a trade embargo against a foreign

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12. President Roosevelt delegated to the Secretary of the Treasury the authority granted to him by the TWEA to the extent of empowering the Treasury to issue implementing regulations. Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1942).

13. Foreign Assets Control Regulations, 31 C.F.R. Pt. 500 (1950).

14. President Kennedy imposed a complete trade embargo on Cuba by means of a Presidential Proclamation on February 3, 1962, invoking his authority under section 620 (a) of the Foreign Assistance Act of 1961. See *infra* note 28, and accompanying text.

15. *Regan v. Wald*, 468 U.S. 222, 225-226 (1984).

16. Pub. L. 95-223, 91 Stat. 1625 (1977).

country pursuant to the TWEA.<sup>17</sup> However, instead of requiring the President to declare a new national emergency in order to continue embargoes such as the one in place against Cuba, Congress grandfathered existing exercises of the President's "national emergency" authority.<sup>18</sup> Continued applicability of this provision requires annual determinations that the exercise of such

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17. In the same bill that amended section 5(b) of the TWEA, Congress enacted new legislation authorizing the President to exercise essentially the same powers as those granted by section 5(b), but restricting 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." International Emergency Economic Powers Act [hereinafter IEEPA], Tit. II, § 202(a), Pub. L. 95-223, 91 Stat. 1626, 50 U.S.C. § 1701(a) (1977). The President is also required "in every possible instance" to consult with Congress prior to exercising his IEEPA authorities, and once such authorities have been exercised, to report to Congress every six months on the actions taken and any changes in underlying circumstances. *Id.* at § 1703.

18. *Id.* at § 101(b), 91 Stat. 1625, 50 U.S.C. app. § 5. Section 101(b) provides:

Notwithstanding the amendment made by subsection (a), the authorities conferred upon the President by section 5(b) of the Trading with the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

authority, with respect to each affected country, is in the national interest of the United States.

The authority under the TWEA to maintain a trade embargo on Cuba is predicated on the annual determination by the President that continued exercise of TWEA authority with respect to Cuba is in the national interest. Presidents Carter, Reagan, Bush, and Clinton have issued annual determinations that extended the state of emergency with respect to Cuba since the imposition of this requirement.<sup>19</sup> The most recent determination, issued by President Clinton, extends the state of emergency until September 14, 1996.<sup>20</sup>

### 3.      The Foreign Assistance Act of 1961

The Foreign Assistance Act of 1961 [hereinafter FAA],<sup>21</sup> was enacted "to give vigor, purpose, and new direction to the foreign aid program."<sup>22</sup> Congress viewed the FAA as an integral part of the U.S. foreign policy of promoting the development of the "southern continents."<sup>23</sup> Through the FAA, Congress undertook to give continuity and direction to the many aid programs already operating in this area.<sup>24</sup>

While Congress was setting 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

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19. 50 U.S.C. app § 5, notes (1995).

20. Presidential Determination No. 95-41, Sept. 8, 1995, 60 Fed. Reg. 47659 (1995).

21. Foreign Assistance Act, 22 U.S.C. § 2151 *et seq.* (1961).

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

23. *Id.* at 2475-76.

24. *Id.* at 2475-78.

impose a trade embargo on Cuba.<sup>25</sup> Section 620(a), which has been part of the FAA since its original enactment, 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.

The legislative history of section 620(a) is sketchy; however, this provision apparently arose from a desire by Congress to respond to Cuba's expropriation of the assets of U.S. citizens.<sup>26</sup>

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25. Foreign Assistance Act, 22 U.S.C. § 2370(a) (1961).

26. President Kennedy's failure to impose sanctions against Cuba fueled Congressional resolve to enact embargo legislation. Moreover, recent events, including Castro's pursuit of the spread of Communism throughout Latin

Remarks about fighting the spread of Communism are also scattered throughout the debate on the FAA, often including references to section 620(a). For example, Senator Kuchel, addressing the worldwide threat of Communism, stated:

Mr. President, the bill is designed also, as I have indicated in reading the language in the first section of the bill, that the aid and assistance from the people of the United States will be confined to free peoples, to those countries which are not Communist dominated nor subject to Communist influence. I ask unanimous consent that the text of the report at page 22 with respect to section 620 be set forth in full at this point in my remarks. [Text of section 620 follows.]

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.<sup>27</sup>

President Kennedy invoked the authority granted to him by the FAA to declare a trade embargo against Cuba in a proclamation which cited the FAA as authority for prohibiting "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

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America, also provided the political climate necessary to include anti-Cuba legislation in the FAA.

27. 107 CONG. REC. S17705-06 (Aug. 31, 1961) (statement of Sen. Kuchel).

Commerce "to continue to carry out the prohibition of all exports from the United States to Cuba."<sup>28</sup>

Section 620(a) of the FAA is still in effect, and provides an alternative source of authority for the Department of the Treasury's regulations implementing the Cuban embargo. In fact, early cases cite the FAA as the statutory authority for the Cuban embargo regulations.<sup>29</sup>

In 1962, Congress reinforced the denial of assistance to Cuba by adding subsection (f) to section 2370 of the FAA, in which it withholds assistance to all communist countries.<sup>30</sup> The new provision states in relevant part:

(1) No assistance shall be furnished under this chapter, (except section 2174(b) of this title) to any Communist country. This restriction may not be waived pursuant to any authority contained in this chapter unless the President finds and promptly reports to Congress that: (a) such assistance is vital to the security of the United States; (b) the recipient country is not controlled by the international Communist conspiracy; and (c) such assistance will

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

29. See *American Documentary Films, Inc. v. Secretary of the Treasury*, 344 F. Supp. 703, 707-8 (S.D.N.Y. 1972); *R.C.W., Supervisor, Inc. v. Cuban Tobacco Company, Inc.*, 220 F. Supp. 453, 463 (S.D.N.Y. 1963).

30. Foreign Assistance Act of 1962, Pub. L. No. 87-565, 76 Stat. 255 (1962) *reprinted in* 1962 U.S.C.C.A.N. 312, 319-20, *as amended* Pub. L. 102-511, 106 Stat. 3355 (1992).



further promote the independence of the recipient country from international communism.<sup>31</sup>

The provision also contains a list of Communist countries to which the Act applies. While the list has been amended over the years (most recently in 1992), Cuba has always been on it.

Subsection (h), added as part of the 1962 amendment to the FAA, complements subsection (f) by providing that:

The President shall adopt regulations and establish procedures to insure that United States foreign aid is not used in a manner which, contrary to the best interests of the United States, promotes or assists the foreign aid projects or activities of the Communist-bloc countries.<sup>32</sup>

Similarly, subsection (e),<sup>33</sup> which covers countries that have nationalized or expropriated United States property, reinforces the specific sanctions imposed against Cuba in subsection (a) and provides requirements that reproduce essentially those included in subsection (a)(2).

Taken as a whole, the various provisions in Section 620 of the FAA evidence a strong Congressional resolve to deny any form of U.S. assistance to foreign countries, including Cuba, as long as those countries remain under Communist rule. There has been no recent indication of a change in this position by Congress.

#### 4. The Cuban Democracy Act of 1992

In 1992, Congress enacted legislation intended to promote

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31. *Id.*

32. *Id.*

33. 22 U.S.C. § 2370(e) (1962).

a peaceful transition to democracy in Cuba. This legislation was signed into law by President Bush on October 23, 1992, and is known as the Cuban Democracy Act of 1992 [hereinafter CDA].<sup>34</sup>

The CDA contains a statement of the United States' policy towards Cuba, and announces, for example, its goal "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."<sup>35</sup>

In pursuit of these policies, the CDA imposes additional limitations on trade with Cuba, contained in sections 1704-1708.<sup>36</sup> Section 1704 is directed at countries receiving assistance from the United States such as the republics of the former Soviet Union, and it authorizes the President to impose economic sanctions (in the form of denial of economic assistance and ineligibility for debt reduction or forgiveness) against countries that provide economic assistance to Cuba.<sup>37</sup>

Section 1705 of the CDA authorizes the donation of food, medicines, and medical supplies to nongovernmental organizations or individuals in Cuba, as well as the export of medicines and medical supplies to Cuba, the latter subject to certain limitations.<sup>38</sup> Also subject to verification by the United States government are export items to ensure that they are used for the purposes for which

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34. Cuban Democracy Act, 22 U.S.C. § 6001 *et seq.* (1992).

35. *Id.* § 6002.

36. *Id.* §§ 6003-6007.

37. *Id.* § 6003.

38. No export is allowed where there is reasonable expectation that the items will be used for purposes of torture, or for the production of biotechnological products, or for reexport. *Id.* § 6004.

they were intended, and only for the use and benefit of the Cuban people.<sup>39</sup> This section also permits telecommunications services between the United States and Cuba, subject to certain limitations, and direct mail service to and from Cuba.

Section 1706 terminates the ability of foreign subsidiaries of United States companies to trade with Cuba.<sup>40</sup> This section 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.<sup>41</sup> The section 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.<sup>42</sup>

The CDA institutes what has been recently called a "two-track" policy with regard to Cuba.<sup>43</sup> One track is the continued sanctions against the Cuban government. Another track is the promise of United States help to Cuba once the island has undertaken a transition to democratic rule. This second track of the policy is embodied in Section 1707, which allows for 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 in power in Cuba:

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39. *Id.* § 6004.

40. *Id.* § 6005.

41. *Id.* § 6005(b)(2).

42. *Id.* § 6005(c).

43. Richard Nuccio, one of the key architects of the CDA and currently Special Advisor to the President and the Department of State on Cuba, has recently reaffirmed the Clinton Administration's commitment to the two-track policy set forth in the CDA. See Cynthia Corzo, *Adviser Change--But Not Enough--in Cuba*, MIAMI HERALD, Sept. 9, 1995, at 14-A.

- (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.<sup>44</sup>

Similarly, section 1708(a) of the CDA permits waiver of the sanctions listed in section 1706 should the President determine and report to Congress that the government of 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).<sup>45</sup>

Section 1708(b) further provides for the following actions "with respect to a Cuban government elected pursuant to elections described in subsection (a)":

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44. Cuban Democracy Act, 22 U.S.C. § 6006 (1992).

45. *Id.* at § 6007(a) (1992).

- (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.<sup>46</sup>

The conditions listed in Sections 1708(a) and (b) of the CDA provide specific requirements and timetables for the President's lifting of all or part of the Cuban trade embargo. Those requirements are examined in Section B below.<sup>47</sup>

## 5. Cuban Assets Control Regulations

As noted previously, President Roosevelt delegated to the Secretary of the Treasury the powers granted to him by section 5(b) of the TWEA. The Secretary, in turn, delegated his authority to the Treasury's Office of Foreign Assets Control [hereinafter OFAC].<sup>48</sup> Since that time, OFAC has been responsible for issuing, interpreting, and applying the embargo regulations.<sup>49</sup>

In 1963, OFAC published a comprehensive set of regulations implementing the Cuban trade embargo, known as the

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46. *Id.* at § 6007 (1992).

47. The CDA also identifies the Department of the Treasury as the chief agency given authority to enforce the legislation, and amends the TWEA by empowering the Treasury to impose civil penalties of up to \$50,000 and forfeitures of property for violating the CDA's prohibitions. 22 U.S.C. § 6009 (1992).

48. Treas. Dept. Order No. 128 (Rev. 1), (Oct. 15, 1962).

49. *See* 31 C.F.R. §§ 515.801-515.809.

Cuban Assets Control Regulations.<sup>50</sup> The CACR have been challenged a number of times, and in most instances, have been upheld by the courts.<sup>51</sup> The CACR parallel the Foreign Assets

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50. 28 Fed. Reg. 6974 (codified at 31 C.F.R. § 515) (1963) [hereinafter CACR]. The CACR have been amended a number of times. On June 29, 1993, the OFAC published regulations amending the CACR to incorporate several of the CDA provisions, 58 Fed. Reg. 34709 (1993). The amendments reflect the CDA's prohibition on the issuance of licenses for most trade between third country subsidiaries of U.S. companies, impose a prohibition on the entry into the United States of vessels touching Cuban ports, and add civil penalty authority.

On August 30, 1994, OFAC published additional regulations:

revoking the general authorization permitting cash remittances to Cuba, except to facilitate lawful immigration; revoking general authorizations for persons to engage in travel-related transactions in Cuba for purposes of family visits and professional research; and significantly restricting the general authorization incorporating the authorization contained in the General License GIFT, administered by the Department of Commerce, to limit the permissible contents of gift parcels eligible for exportation to Cuba to medicine, food and strictly humanitarian items.

59 Fed. Reg. 44884 (1994). Some of these measures, however, were recently modified or revoked pursuant to a new Presidential policy, under which licenses for professional research-related travel to Cuba are liberalized, general licenses are established to permit travel to Cuba to visit close relatives in family emergencies, educational exchanges for Cuban and U.S. scholars are authorized, specific licenses for the establishment of news bureaus in the U.S. and Cuba may be granted, and licenses are allowed for activities of human rights organizations to provide aid to dissident individuals and organizations in Cuba. 60 Fed. Reg. 54194 (1995).

51. See, e.g., *Regan v. Wald*, 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. 1966), *cert. denied*, 385 U.S. 898 (1966). In recent cases, the Treasury's authority to issue additions or modifications to the CACR have been upheld under the statutory authority of the TWEA, not the FAA. See *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),

Control Regulations on which they are modeled. In essence, they prohibit all unlicensed financial and commercial transactions by Americans with Cuba or its citizens. 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 dollar financial facilities.<sup>52</sup> A brief summary of the CACR provisions follows.

The regulations prohibit the export to Cuba, either directly or through third countries, of any U.S. products, technology or services, except for publications and other informational materials,

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*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). In a leading Supreme Court case construing the CACR, Treasury relied solely upon TWEA authority for defending the regulations at issue. *Regan v. Wald*, *supra* note 15, at 3029. In its brief in *Wald*, the Government explained the advantages of TWEA authority:

The Cuban Assets Control Regulations also are issued under the authority of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a), which authorizes the President to establish and maintain a total embargo on all trade between the United States and Cuba. However, TWEA authority is of primary importance because it provides for various enforcement tools, such as subpoena power, mandatory record keeping, and criminal penalties, and permits the blocking or "freezing" of assets and control of certain financial transactions unrelated to trade that might not be reached under the Foreign Assistance Act of 1961. *Regan v. Wald*, 104 S. Ct. 3026, Pet.'s Brief at n.8 (1984).

The *Wald* Court also observed that "the Foreign Assistance Act does not provide criminal penalties for violations of the regulations promulgated under it. TWEA does so provide." *Regan v. Wald*, *supra* note 15, at 3029.

52. S. L. Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 79 Bus. L. 861, 868 (1964).

and telecommunications services and attendant equipment.<sup>53</sup> Likewise, goods or services of Cuban origin may not be imported directly or through third countries into the United States, except for up to one hundred dollars worth of Cuban merchandise which may be brought into the United States by authorized travelers, publications or other informational materials, and paintings, drawings, and sculptures less than \$25,000 in value.<sup>54</sup> The CACR also 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 complete prohibition against transfers or transactions of any kind involving blocked

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53. 31 C.F.R. §§ 515.201, 515.206 (1963). On July 22, 1993, the U.S. Department of State wrote a letter to the Chairman of the Federal Communications Commission announcing a new, liberalized telecommunications policy towards Cuba. The new policy is intended to implement the telecommunications provisions of Section 1705(e) of the Cuban Democracy Act, 22 U.S.C. § 6004(e) (1992), which authorize "telecommunications facilities in such quantity and of such quality as may be necessary to provide efficient and adequate telecommunication services between the United States and Cuba." Letter from *United States Department of State, Bureau of International Communication and Information Policy*, to James H. Quello, *Chairman, Federal Communications Commission* 1 (July 22, 1993). The policy provides for open competition among all telecommunication carriers, and the licensing of all proposals for new telecommunications services that meet the guidelines for approval set forth in the letter. *Id.* The Treasury has licensed several U.S. carriers to remit to Cuba the full share of Cuba's earnings from telecommunication services provided by the company, and thereby provide telephone communications to Cuba. *Cuba, U.S. Firms Working to Restore Direct Phone Communications*, REUTERS, November 20, 1994. Cuba's share of past earnings from telecommunication services between the United States and Cuba, which are held in blocked U.S. accounts, are not being released.

54. 31 C.F.R. §§ 515.204, 515.560, 515.570 (1963).



assets. No payments, transfers, withdrawals, or other dealings may take place with regard to blocked property unless authorized by the Treasury.<sup>55</sup>

The CACR place strict limits on the remittance of money to Cuba. Remittances by U.S. persons to close relatives<sup>56</sup> in Cuba, or to facilitate non-permanent travel by Cuban nationals to the United States, are prohibited without a specific license.<sup>57</sup> Such licenses are issued on a case-by-case basis, and only in circumstances of "extreme humanitarian need," such as terminal illness or other severe medical emergency.<sup>58</sup> An exception exists for remittances of up to \$500 on a one-time basis from U.S. residents to Cuban nationals to facilitate their emigration to the United States.<sup>59</sup> The exception only applies, however, after the Cuban national has received a visa or other permission from the State Department or United States immigration authorities to enter the United States.<sup>60</sup> Gift parcels for individuals or religious, charitable, or educational organizations in Cuba may be sent or carried by an authorized traveler, for the use of the recipient, or the recipients' immediate family. These parcels may be sent provided that the total value of the items in the parcel does not exceed two hundred dollars, only one parcel is sent per month by the same person to the same

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55. 31 C.F.R. § 515.205 (1963).

56. The term "close relative" is defined as "spouse, child, grandchild, parent, grandparent, great grandparent, uncle, aunt, brother, sister, nephew, niece, first cousin, or spouse, widow, or widower of any of the foregoing. The term close relative also means mother-in-law, father-in-law, daughter-in-law, son-in-law, sister-in-law, or brother-in-law." 31 C.F.R. § 515.560(b)(1).

57. 31 C.F.R. §§ 515.563(a), 515.564(c).

58. *Id.*

59. 31 C.F.R. § 515.564(c).

60. *Id.*

recipient in Cuba, and only items normally sent as gifts (such as food, medicine, clothing, and toiletries) are included.

The CACR also prohibit spending money in connection with most types of travel to Cuba, including:

recreational travel; tourist travel; travel in pursuit of a hobby; general study hours; general orientation visits; student class field trips; youth camps; research for personal satisfaction only; [and] travel by fish or bird-watching groups or similar affinity groups . . . .<sup>61</sup>

Transactions related to travel for “professional research and similar activities” are only permitted by specific license, and are only applicable to full-time professionals or graduate students who travel to Cuba to do work in their professional area.<sup>62</sup> Specific licenses are also required for spending money related to travel to Cuba for humanitarian reasons (if a compelling need is demonstrated), free-lance journalism, clearly defined educational activities, religious activities, activities of recognized human rights organizations, purposes related to telecommunications activities, or purposes related to the export, import or transmission of information or information materials.<sup>63</sup> Expenditure of money related to travel to Cuba is authorized without a specific license for travel by United States and foreign government officials, members of the news media, and, once a year, by people travelling to visit

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61. 31 C.F.R. § 515.416(b).

62. 31 C.F.R. § 515.416(a)(1)-(2), as amended 60 Fed. Reg. 54194, 54195 (1995).

63. 31 C.F.R. § 515.560(b), as amended 60 Fed. Reg. 54194, 54196 (1995); OFAC, WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO, Aug. 26, 1994.

close relatives in Cuba in circumstances of extreme humanitarian need.<sup>64</sup>

## 6. The LIBERTAD Act

On February 9, 1995 Sen. Jesse Helms (R-NC), Chairman of the Senate Foreign Relations Committee, introduced a bill known as the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995" [hereinafter LIBERTAD Act], S. 381, intended to further tighten the embargo by discouraging investment by nationals of third countries in Cuba, encouraging Cuba's transition to democracy through internationally supervised, free and fair elections, defining a plan for the United States to assist transition and democratic governments in Cuba, and protect U.S. nationals' property rights abroad.<sup>65</sup> A week later, similar legislation with the same name was introduced in the House as H.R. 927 by Rep. Dan Burton (R-IN), Chairman of the Western Hemisphere Subcommittee of the House Foreign Affairs Committee.<sup>66</sup> Both versions of the LIBERTAD Act have been modified several times since their introduction. The discussion in this paper is based on the versions that were available as of January 1996: the version of H.R. 927 that was passed by the House on September 21, 1995<sup>67</sup> [hereinafter H.R. 927]; and the version of S. 381 that passed the Senate as an amendment to H.R. 927 in the nature of a substitute<sup>68</sup> [hereinafter S. Amdt. No. 2936].

Title I of the LIBERTAD Act contains a variety of measures to strengthen the embargo, ranging from upgraded television

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64. 31 C.F.R. § 515.560(a), as amended 60 Fed. Reg. 54194, 54196 (1995).

65. S. 381, 104th Cong., 1st Sess. (1995).

66. H.R. 927, 104th Cong., 1st Sess. (1995).

67. 141 Cong. Rec., H8994 *et seq.*, September 14, 1995.

68. 141 Cong. Rec., S15249 *et seq.*, October 17, 1995.

broadcasting to Cuba, to reductions in aid to countries of the former Soviet Union if they pay money to Cuba for the use of intelligence gathering facilities in the island. Among other initiatives, one provision in Title I would institute civil penalties of up to \$50,000 for violations of the TWEA, plus forfeiture of any property involved in the violation.<sup>69</sup>

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.<sup>70</sup> The LIBERTAD Act would 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.<sup>71</sup> The reports would also need to include "a determination as to whether or not any of the facilities described in paragraph 3 are the subject of a claim against Cuba by a United States national."<sup>72</sup> If the activities of a particular foreign investor with regard to Cuba are publicized, it is likely that the company or individual will be included in the reports from the Executive to Congress, which would make the investor vulnerable to retaliatory actions by the United States government or private parties.

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

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69. H.R. 927, § 102(d); S. Amdt. No. 2936, § 103(d).

70. H.R. 927, § 103(a); S. Amdt. No. 2936, § 104(A).

71. H.R. 927, § 108(b)(3); S. Amdt. No. 2936, § 109(b)(3).

72. H.R. 927, § 108(b)(4); S. Amdt. No. 2936, § 109 (b)(4).

government is in power in Cuba.<sup>73</sup> As will be further discussed below, the conditions imposed for those actions under the LIBERTAD Act have become more numerous, and the definitions of qualifying "transition" and "democratic" governments in Cuba more restrictive, than under the Cuban Democracy Act.

Title III of the House version of the LIBERTAD Act contains other provisions intended to internationalize the embargo by discouraging investors from third countries from engaging in business within Cuba.<sup>74</sup> One provision grants a right to U.S. nationals, whose property was confiscated by the Cuban government, to bring an action for money damages in United States federal district court against foreign nationals or foreign governments that "traffic" in the confiscated property. Recovery of damages in such civil suits would result from a determination that the foreign investor is "trafficking" in "confiscated property" which is subject to a "claim" that is "owned" by a "United States person."<sup>75</sup>

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73. H.R. 927, § 202(a)(1); S. Amdt. 2936, § 202(a)(1).

74. S. 381 contained a Title III which was analogous to its counterpart in H.R. 927. However, Title III was dropped from S. Amdt. 2936 after efforts to defeat a filibuster by opponents of Title III failed. See Christopher Marquis, *A Clinton Victory on Cuba Bill – Republicans Soften Sanctions, for Now*, MIAMI HERALD, Oct. 19, 1995, at 1A. Senate proponents of Title III, including Senate Majority Leader Robert Dole (R-KS), have vowed to attempt to reincorporate Title III in the conference committee that must reconcile the versions of the bill passed by both houses. *Id.*

75. H.R. 927, §§ 302-304. H.R. 927 defines "confiscated" as follows:

The term "confiscated" refers to the nationalization, expropriation, or other seizure by the Cuban government of ownership or control of property, on or after January 1, 1959--(i) without the property having been returned or adequate and effective compensation provided; or (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and (iii) the repudiation by the

Title III declares that foreign nationals or foreign governments that traffic in confiscated United States 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 [hereinafter FCSC], plus

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Cuban government of, the default by the Cuban government on, or the failure by the Cuban government to pay, on or after January 1, 1959 - (i) a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban government; (ii) a debt which is a charge on property nationalized, expropriated or otherwise taken by the Cuban government; or (iii) a debt which was incurred by the Cuban government in satisfaction or settlement of a confiscated property claim. H.R. 927, § 4(3)(A).

"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. *Id.*, § 4(10).

The term "property" is said to include, "any property (including patents, copyrights, trademarks and any other forms of intellectual property), whether real, personal or mixed, and any present, future or contingent right, security, or other interest therein, including any leasehold interest." *Id.*, § 4(9).

interest;<sup>76</sup> (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).<sup>77</sup> 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 has received notice of the U.S. national's claim to ownership of the property, and has been provided with a copy of the provisions in the LIBERTAD Act affording this remedy.<sup>78</sup> The Act, however, allows a six-month grace period from the enactment of the legislation to parties engaged in "trafficking" in expropriated properties in Cuba to terminate their activities without incurring any liability.<sup>79</sup>

In addition to making third country investors in Cuba potentially subject to civil liability to U.S. property owners, Title IV of H.R. 927 imposes a broadly-worded immigration exclusion against foreigners involved in transactions concerning properties

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76. 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 (amended in 1994). The Cuban Claims Program was active between 1966 and 1972; during that time, the FCSC certified 5,911 expropriation claims by U.S. citizens and companies, with an aggregate amount of \$1.8 billion in 1960 dollars, not counting interest. FOREIGN CLAIMS SETTLEMENT COMM'N, FINAL REPORT OF THE CUBAN CLAIMS PROGRAM, at 412 (1972). See generally, Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217 (1995).

77. *Id.* § 302(a)(1). Recovery under either option includes also "reasonable costs and attorneys fees." *Id.*

78. *Id.* § 302(a)(3).

79. *Id.* § 302(a)(1).

confiscated by Cuba from U.S. nationals.<sup>80</sup> Section 401(a) of H.R. 927 states 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).<sup>81</sup>

This provision is broader in reach than those in Title III, which only proscribe "trafficking," and could turn into violators many individuals having only incidental contacts with the property. The immigration exclusion would go into effect upon enactment of the LIBERTAD Act, and would be subject to a "national interest exception" pursuant to which the Secretary of State could exempt application of the ban on a case-by-case basis where the national interest of the United States so warranted.<sup>82</sup>

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80. S. 381 also used to contain an analogous set of immigration provisions to those found in Title IV of H.R. 927. However, the immigration provisions in S. 381 were deleted.

81. H.R. 927, § 401(a).

82. *Id.* § 401(c).



The outlook of the LIBERTAD Act was uncertain as of this writing, as it is clear that the Clinton Administration and Congress differ on what the proper U.S. policy toward Cuba should be; those differences are evidenced in their respective positions on the LIBERTAD Act. While efforts are being made in Congress to strengthen the embargo on Cuba via passage of the LIBERTAD Act (including Title III), the State Department has recommended that the President veto the bill if sent to him in the version adopted by the House.<sup>83</sup> Equally symbolic of the Executive and Legislative Branch's divergent views on Cuban policy has been the Administration's easing of sanctions imposed on Cuba in August 1994 in response to the refugee crisis.<sup>84</sup> It is unclear whether the Republicans have enough votes in the Senate to defeat a "filibuster" by the Democrats against any version of the LIBERTAD Act that resembles H.R. 927, let alone override a veto by the President. It is possible, however, that the President will sign a modified version of the bill that, in his view, is a substantial improvement over H.R. 927, or that Congress will pass the conference committee version of the legislation by such a large majority that it will force the President to sign the bill or have its veto overridden.

## **B. *Conditions and Means for Removing the Express Embargo Prohibitions***

### **1. Introduction**

As discussed in Section A, the U.S. trade embargo against Cuba is based on three major statutes (plus the LIBERTAD Act, if

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83. September 20, 1995 Statement of Administration Policy; letter dated September 20, 1995 from U.S. Secretary of State Warren Christopher to House Speaker Newt Gingrich. *See also* Steven Greenhouse, *Bill to Ease Cuba Suits Faces a Veto by Clinton*, N.Y. TIMES, Aug. 20, 1995, at A4.

84. On October 6, 1995 in a foreign policy speech, the President announced moves to loosen some of the embargo restrictions on travel and other contacts with Cuba. *See* note 50, *supra*.

enacted). The multiple statutory authority for the sanctions may require a diversity of procedures for lifting them. Thus, because the TWEA grants the President direct authority to impose sanctions upon foreign countries, it follows that an embargo issued under the TWEA could be lifted through unilateral Presidential action, such as an executive order or a treaty with Cuba. The sanctions imposed by the FAA, the CDA, and the proposed LIBERTAD Act, on the other hand, are explicitly defined in the statutes, and could require action by both the President and Congress. For example, in order to lift the sanctions listed in Section 1706 of the CDA, the President would have to follow the guidelines in Section 1708 of the statute, including making a report to Congress of his findings.

This section reviews the various statutes to understand how the President and Congress might interact to remove the embargo's prohibitions. Before proceeding with the analysis, however, it is helpful to examine how the United States government has handled the lifting of similar embargoes against other countries in the past.

## 2. Analogies to Other Countries

The United States has imposed, and later lifted, sanctions on several foreign countries whose policies were antagonistic to the interests of the United States. Because the Cuban sanctions arise out of three sources of statutory authority, this section describes the process followed to lift embargoes imposed under laws that resembled each type of legislation.

China provides an example of an embargo that arose solely out of TWEA authority. Sanctions on Rhodesia were imposed by Presidents Johnson and Carter, pursuant to express statutory authority granted to the President, much like President Kennedy did with regard to Cuba under the FAA. Finally, sanctions against South Africa were imposed directly by Congress, as was done in the CDA and in the proposed LIBERTAD Act.

## a. China

As mentioned earlier, the sanctions imposed by President Truman against Communist China in 1950 were based on TWEA authority. The Office of Foreign Assets Control of the Department of the Treasury administered the embargo on trade with China through the regulations in 31 C.F.R. Part 500. OFAC ultimately lifted the trade sanctions against China in accordance with a treaty signed between the United States and China. An announcement in the Federal Register<sup>85</sup> explained:

The Office of Foreign Assets Control is amending § 500.201(d) of the Foreign Assets Control Regulations by the deletion of "China" from the Schedule of "designated countries," except for the limited purposes of the new Part II of the Schedule. In keeping with the amendment, the Office is amending §§ 500.204, 500.328, 500.557, 500.558, and 500.559 to delete references to China or nationals thereof. The purpose of the amendment is to implement the Agreement Concerning the Settlement of Claims entered into between the United States and the People's Republic of China on May 11, 1979, as amended by an exchange of notes on September 28, 1979, to provide for the unblocking on January 31, 1980 of assets blocked because of an interest therein of the People's Republic of China or its nationals.

If United States actions with respect to Cuba were to follow the Chinese pattern, OFAC would most likely abolish the CACR in response to some form of Presidential mandate. The President might enter into a treaty with Cuba (as was the case in China), or might issue an executive order directing OFAC to take the steps

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85. 45 Fed. Reg. 7224 (1980).

necessary to remove the embargo prohibitions. In any case, China's example makes it clear that Congressional action or approval is not required in order for the Executive to lift the trade embargo against Cuba to the extent it rests on the authority of the TWEA.

b. Rhodesia

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<sup>86</sup> gives the President the authority to impose economic sanctions against a foreign country if necessary to give effect to resolutions of the 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.<sup>87</sup> In 1968, the President expanded the sanctions to prohibit all trade with Rhodesia, again pursuant to Security Council resolutions.<sup>88</sup>

In 1971, however, Congress amended the Strategic and Critical Materials Stock Piling Act to allow the importation of commodities determined to be strategic and critical to the United States. This amendment created exceptions to the Rhodesian embargo for strategic materials, including chrome.

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86. 22 U.S.C. § 287c (1945).

87. Exec. Order No. 11,322, 32 Fed. Reg. 33 (1967), *reprinted in* 1967 U.S.C.A.A.N. 3453-54.

88. Exec. Order No. 11,419, 33 Fed. Reg. 10837 (1968), *reprinted in* 1968 U.S.C.A.A.N. 4711-13.

Several years later, realizing the adverse impact on U.S. foreign policy of continuing to import strategic materials from Rhodesia, Congress acted to reimpose a comprehensive trade embargo against that country. In order to abolish the exceptions and ban the importation of chrome and other strategic materials, Congress had to pass legislation to allow the reimposition of a total embargo. Congress therefore enacted Pub. L. 95-12, 91 Stat. 22 (1977), which added the following sentence to 22 U.S.C. § 287c giving the President the power to fully implement the Security Council's mandate:

Any Executive order which is issued under this subsection and which applies measures against Southern Rhodesia pursuant to any United Nations Security Council Resolution may be enforced, notwithstanding the provisions of any other law.

A comprehensive embargo with no exceptions was then put in place immediately. 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.<sup>89</sup>

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. In this situation, the President only needs to issue an executive order revoking the previous orders implementing the embargo. Thus, if the Cuban trade embargo were to be acted upon in accordance with the Rhodesian example, the President would need to issue an executive order revoking all previous executive orders and

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89. Exec. Order No. 12,183, 44 Fed. Reg. 74787 (1979), *reprinted in* 1979 U.S.C.C.A.N. 3375-6.

regulations that instituted the embargo against Cuba. This would be the situation with respect to the trade embargo authorized by the FAA.

c. South Africa

The South African embargo was based upon an Act passed by Congress in 1986.<sup>90</sup> The Comprehensive Anti-Apartheid Act of 1986 [hereinafter CAAA] set forth definite United States policy goals towards South Africa (*i.e.*, "to bring about reforms in [the South African] system of government that will lead to the establishment of a nonracial democracy"),<sup>91</sup> and imposed, among other sanctions, explicit prohibitions on the importation from, and export to, South Africa of certain items.<sup>92</sup> Congress left open the possibility of imposing additional sanctions upon recommendation by the President.<sup>93</sup> The sanctions would end if the government of South Africa took five measures specified in 22 U.S.C. § 5061(a). Alternatively, the President could suspend or modify the sanctions under the conditions specified in 22 U.S.C. § 5061(b):

The President may suspend or modify any of the measures required by this subchapter or section 5091(c) of this title or section 5094(b) of this title thirty days after he determines, and so reports to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate, that the government of South Africa has:

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90. Comprehensive Anti-Apartheid Act of 1986, Pub. L. 99-440, 100 Stat. 1087, *as amended by* Pub. L. 99-631, 100 Stat. 3515, 22 U.S.C. § 5001 *et seq* (1986), *repealed by* Pub. L. 103-149, 107 Stat. 1503 (Nov. 23, 1993).

91. 22 U.S.C. § 5011(a) (1986).

92. 22 U.S.C. §§ 5051-5073 (1986).

93. 22 U.S.C. §§ 5091(c), 5094 (1986).

- (1) taken the action described in paragraph (1) of subsection (a) of this section,
- (2) taken three of the four actions listed in paragraphs (2) through (5) of subsection (a) of this section, and
- (3) made substantial progress toward dismantling the system of apartheid and establishing a nonracial democracy, unless the Congress enacts within such 30-day period, in accordance with Section 5112 of this title, a joint resolution disapproving the determination of the President under this subsection.

The above provisions set two different procedures under which the sanctions against South Africa could be lifted: automatically, if South Africa took all the measures specified in § 5061(a); or through a determination by the President under § 5061(b) that certain of the enumerated conditions were met, this determination being subject to nullification if Congress disagreed with it.

President Bush lifted the South African embargo through an Executive Order in 1991.<sup>94</sup> The Executive Order cited as a basis for lifting the sanctions the President's conclusion that the government of South Africa had taken all of the steps specified in section 311(a) of the Act. The Executive Order declared "title III and sections 501(c) and 504(b) [22 U.S.C. §§ 5051-5073, 5091(c) and 5094(b)] of the Act have terminated" and directed all affected executive departments and agencies to take the steps necessary to terminate the sanctions.<sup>95</sup> Thus, the President followed the course

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94. Exec. Order 12,769, 56 Fed. Reg. 31855, *reprinted in* 1991 U.S.C.C.A.N. B50.

95. The Executive Order also declared that it revoked the previous executive orders declaring a state of national emergency with respect to South Africa, although these orders had already lapsed because the President failed to renew them as required by the IEEPA.

of § 5061(a), and proclaimed that the embargo had ended without referring his decision to Congress.<sup>96</sup>

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 is to officially report to Congress that the five conditions for waiver of the sanctions against Cuba have been met. This report is analogous to that required by § 5061(b) of 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, Congress would need to receive notice from the President that the CDA's requirements have been satisfied.

Another difference between the CAAA and the CDA is that the CAAA expressly provided an opportunity for Congress to countermand the President if Congress disagreed with the President's determination. No such provision is included in the CDA.

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96. In an article shortly before the sanctions were officially lifted, Presidential Spokeswoman Margaret Tutwiler was quoted as saying, "[no] report or notification of Congress is required by the law. Sanctions would be terminated immediately upon issuance of the executive order." Alan Elsner, *U.S. to Lift South Africa Economic Sanctions*, THE REUTERS BUS. REP., July 9, 1991. Nonetheless, the White House did prepare a fact sheet outlining the steps taken by the South African Government to meet the five conditions spelled out in Section 5061(a). White House Fact Sheet, *Justification for Conclusion That the South African Government has Met the Conditions for Sanctions Lifting*, FED. NEWS SERVICE, July 10, 1991.

Prior to the President's determination, the Department of State had been making annual reports to Congress regarding steps taken by the South African Government to meet the five conditions required by the CAAA. When the Department of State concluded that the five requirements for termination set in 22 U.S.C. § 5061(a) had been met, it so informed the President, and he proceeded to lift the sanctions.



d. Summary

The actions taken by the United States to remove trade embargoes against foreign countries appear to show that, unless expressly limited by Congress, Presidential decisions and determinations are self-executing. South Africa represents a good example of a self-executing determination, in that Congress authorized the President to act unilaterally. The CDA, on the other hand, requires a higher level of interaction between the President and Congress.

3. The Trading with the Enemy Act

Removing the TWEA as a source of the Cuban trade embargo would be simple. The most straightforward procedure would be for the President to abstain from issuing the annual Determination required by the IEEPA that exercise of the TWEA with respect to Cuba is in the national interest of the United States. A more likely course of action, however, 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 the CACR. This was the course followed for Rhodesia.

The President has the power to take these actions at any time, irrespective of any developments (or the absence thereof) in Cuba.

4. The Foreign Assistance Act

Section 620(a)(1) of the FAA<sup>97</sup> 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

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97. 22 U.S.C. § 2370(a)(1) (1994).

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 implementing aspects of the embargo. Again, the President could take this action unilaterally and 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." Therefore, unless provided for in other laws, the United States government cannot grant economic assistance to Cuba as long as the Castro regime remains in power.

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 government.

These two sections of the FAA, read together, mean that, in order for the United States government to be able to provide economic assistance 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 compensation and restitution claims of U.S. citizens.<sup>98</sup> The FAA leaves it to the

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98. 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. As discussed above, 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 subsection (a), as well as subsections (e), (f) and (h) of section 620 of the FAA. 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

President to determine whether the Cuban government has indeed taken such "appropriate steps."<sup>99</sup> 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 Executive Order.

## 5. The Cuban Democracy Act

### a. Total Lifting of the Embargo

The CDA sets very specific conditions for the lifting of the U.S. trade embargo against Cuba. Section 1708(b)(3) of the CDA<sup>100</sup> directs the President to "take steps to end the United States trade embargo of Cuba" when two conditions have been met. First, the President must determine and report to Congress that the Cuban government has carried out the five actions identified in § 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 the citizens of Cuba, 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 free and fair elections.

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Cuba once there is a Cuban government 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 aid to Cuba.

99. 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 the courts.

100. 22 U.S.C. § 6007(b)(3) (1992).

Section 1708(b)(3) could be interpreted as establishing the circumstances under which the President must lift the trade embargo, while still permitting him to do so under other, perhaps less restrictive, conditions. However, such a reading would be contrary to the policies expressed in the CDA, which include seeking "a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions . . . to maintain sanctions on the Castro regime so long as it continues to refuse to move toward democratization and greater respect for human rights," and "to encourage free and fair elections to determine Cuba's political future."<sup>101</sup>

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

#### b. Partial Lifting of the Embargo

Section 1707 of the CDA allows partial lifting of the trade embargo to allow shipment of food, medicines and medical supplies to Cuba if the President determines and notifies 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, 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.

#### c. Removal of Other CDA Sanctions

The President, for the most part, retains the power to lift most of the specific sanctions imposed by the CDA in one simple

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101. *Id.* § 6002.

step. Only a few freestanding provisions would require statutory change.

Section 1708(a) of the CDA indicates that the President "may" waive the sanctions in section 1706 if the five enumerated conditions in section 1708(a) are satisfied. This language appears permissive, not prescriptive.

Section 1705 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.

#### d. Economic Assistance

Section 1708(b)(2) of the CDA directs the President, once he has made the determinations set forth in Section 1708(a), to provide emergency relief during Cuba's transition to a viable economy.<sup>102</sup> This

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102. The CDA does not define what type of emergency relief should be given to Cuba once the conditions set forth in Section 1708(a) are satisfied. This gap is covered in both the LIBERTAD Act, H.R. 927, 104th Cong., 1st Sess. (1995), and in a proposed bill introduced in the 104th Congress by Rep. Robert Menendez (D-NJ). The Free and Independent Cuba Assistance Act, H.R. 611, 104th Cong., 1st Sess. (1995), upon which Title II of the LIBERTAD Act is based, would require the President to develop a plan for providing economic assistance to a Cuban transition government, and later to a democratic government. The President must report to Congress within 180 days of enactment of the legislation on the details of the plan. The bill would provide aid to a transition government in Cuba analogous to that specified in Section 1707 of the CDA, with the addition of assistance to meet emergency energy needs, and help in preparing the Cuban military forces to adjust to a new role in civilian life.

The bill defines a democratic government as one that: results from free and fair elections conducted under internationally recognized observers; has

section also makes no reference to the requirement in Section 620(a)(2) on payment of compensation to U.S. citizens for the Cuban government's expropriations of the early 1960s as a precondition to giving economic assistance to Cuba.

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permitted opposition parties ample time to organize for such elections and permitted all candidates full access to the media; shows respect for civil liberties and human rights; has made demonstrable progress in establishing an independent judiciary; is moving towards establishing a market-oriented economic system; and has made or is committed to making constitutional changes that would ensure regular free and fair elections. Such a government would be eligible for a wide range of economic assistance programs from the U.S. government, to include: aid under the Foreign Assistance Act of 1961 and the Agricultural Trade Development and Assistance Act of 1954; finances, guarantees, and other forms of assistance provided by the Export-Import Bank of the United States; financial support for investment projects by the Overseas Private Investment Corporation; assistance by the Trade and Development Agency; availability of Peace Corps programs; relief of Cuba's external debt; and "other appropriate assistance" to carry out the purposes of the legislation.

The plan to be developed by the President must include a strategy for distributing economic assistance, and is to authorize assistance to be provided through U.S., international and Cuban nongovernmental organizations. The President is called upon to take the necessary steps to obtain the agreement of other countries and of international financial institutions to provide assistance to Cuba, and work with such countries and organizations to coordinate the various assistance programs. The President will determine whether to designate Cuba as a beneficiary country under the Caribbean Basin Initiative and, upon enactment of free trade agreements between the U.S. and other countries in the Western Hemisphere, enter into a framework agreement for trade and economic assistance with a transition government in Cuba, potentially leading to the conclusion of a free trade agreement between the two countries.

The bill also directs that, upon submitting a determination to Congress that a democratic government is in power in Cuba, the President "shall terminate the embargo on trade with Cuba." Because of the requirements set in the definition of a democratic government, lifting of the embargo would take place quite some time after the start of the transition. This is the same problem posed by the CDA and, even more so, by the House version of the LIBERTAD Act.

## e. Effect of the LIBERTAD Act

The proposed LIBERTAD Act states that "[u]pon submitting a determination to the appropriate Congressional committees under Section 203(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."<sup>103</sup> Subsequently, "[u]pon submitting a determination to the appropriate Congressional committees under Section 203(c)(3) that a democratically elected government of Cuba is in power, the President shall take steps to terminate the economic embargo of Cuba."<sup>104</sup> The President's suspension of the embargo is subject to being countermanded by Congress through a joint resolution of Congress disapproving of the President's action.<sup>105</sup>

The provisions of the LIBERTAD Act, if turned into law, would impose significant additional restrictions on any modifications or lifting of the embargo. The President would need to make the determinations called for in the Act, specifically that a "transition government" and a "democratically elected government" are in place (these terms are differently defined at the present time in the House and Senate versions of the bill) before he could proceed to suspend or lift the embargo.<sup>106</sup>

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103. H.R. 927, 104th Cong., 1st Sess. § 204(a) (1995).

104. *Id.* § 204(c).

105. *Id.* § 204(e)(2).

106. H.R. 927 sets over a dozen specific conditions (ranging from ceasing interference with Radio or Television Marti broadcasts to allowing the establishment of independent trade unions and returning to the U.S. "all persons sought by the United States Department of Justice for crimes committed in the United States") that a government in Cuba must satisfy before it can be defined as a "transition government" and qualify for emergency aid. *Id.* § 205(a). By

## f. Summary

The accumulated embargo legislation has created a situation such that Cuba's transition government must proceed in a very specific manner that meets the requirements of Section 1708 of the CDA and Sections 205 and 206 of the proposed LIBERTAD Act in order for the President to be able to lift the embargo sanctions. Assuming the conditions set forth in those laws are met, once the President submits to Congress the reports required by the legislation, he can issue an executive order similar to that issued by President Bush to lift the South African embargo. The President will also be able at that time to order all affected executive departments and agencies, including Treasury, State and

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contrast, under S. Amdt. No. 2936, a transition government must take only four actions before aid can be given to it: (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, and (4) exclude Fidel or Raul Castro from any role in government. *Id.* (Some of the House requirements are identified in the Senate bill as circumstances that the President "shall take into account" in determining whether a transition government is in power in Cuba.) On the other hand, both the House and Senate versions would provide some flexibility to the President to temporarily suspend portions of the embargo against a transitional Cuban government if he determines that such action would contribute "to a stable foundation for a democratically elected government in Cuba."

Requirements for assistance to a democratically elected Cuban government under the Senate version of the LIBERTAD Act are made non-binding by only directing that the President "take into account" a list of circumstances when making his determination whether the Cuban government qualifies for such aid. *Id.* § 206. By contrast, the House version defines seven requirements that must be met before aid can be granted to a democratically-elected Cuban government, including that Cuba have 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, 1959, or provided full compensation for such property in accordance with international law standards and practice." *Id.*



Commerce, to implement the termination of the sanctions listed in Section 1706 and the sanctions against other countries implemented under Section 1704 of the CDA, and any additional sanctions imposed pursuant to the LIBERTAD Act.

If, however, the events in Cuba did not fit the pattern set out in Section 1708 of the CDA and in the proposed LIBERTAD Act, the embargo would remain in place until the conditions in Cuba conformed to the statutory requirements, or until new legislation was enacted. Individuals in the United States who have an interest in helping Cuba make a successful transition to democracy would then have the opportunity -- indeed, the need -- to exert political muscle to remove the obstacles set by an unduly prescriptive legislation then in place. The United States government's ability to assist Cuba as warranted by the circumstances would thereby be restored.

### III. THE INDIRECT EMBARGO

#### A. *U.S. Economic Assistance Programs from which Cuba is Excluded as a Result of the Embargo*

In the three and a half decades since the triumph of Cuba's revolution, the United States has instituted a series of programs designed to assist in the economic development of the less affluent nations in the hemisphere. Together with nonregion specific aid programs administered by various agencies of the federal government, these measures offer varied, and at times duplicative, support for the economic growth of friendly Latin American and Caribbean countries.

The assistance programs take a variety of forms. They include regional and nonregional programs and preferences; programs with a commercial purpose, as well as humanitarian assistance grants with significant commercial impact; programs run by the United States government, as well as those funded by the government but administered by outside organizations; programs assisting Latin American and Caribbean countries directly, and

others 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 of 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 United States participation. The purpose of this section is to summarize the programs or activities that are currently unavailable to Cuba, but could be used to help in the country's reconstruction upon the lifting of the embargo. It should be noted, however, that the scope of the assistance programs sponsored by the United States government, and the existence of the programs themselves, depend on policy and budgetary considerations that change with 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.

The discussion that follows will examine the following types of assistance:

Direct assistance funds for foreign governments; trade preferences for imports into the United States; tax incentives for U.S. businesses to promote trade and investment in the region; training and technical assistance for U.S. and Latin American and Caribbean businesses; information, consulting services, trade missions and research grants for the promotion of trade and investment by U.S. and Latin American and Caribbean private enterprise; financing of trade and investment through grants, loans, loan guarantees and trade credits; and forgiveness of foreign debt to the United States.<sup>107</sup>

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107. This paper will not address military, anti-narcotics and economic policy assistance programs, humanitarian aid programs, or most assistance provided by

The main vehicles for this assistance are the Enterprise for the Americas Initiative [hereinafter EAI], the Caribbean Basin Initiative [hereinafter CBI], and a number of other economic aid programs whose applicability is generally not limited to the Americas.<sup>108</sup>

1. The Enterprise for the Americas Initiative
  - a. Brief Historical Overview of U.S. Programs to Foster Growth in Latin America

Since Cuba's Revolution in 1959, a number of economic assistance programs have been sponsored by the United States to promote economic growth and improve living standards in Latin America. The Alliance For Progress, started by President John F.

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multi-lateral organizations funded in part by the U.S., such as the United Nations, the World Bank and the International Monetary Fund. U.S. legislation prohibits the use of funds contributed by the U.S. to international organizations for programs involving Cuba. 22 U.S.C. § 2227(a) (1994). *See also* note 1.

108. U.S. assistance programs provide help in areas beyond direct economic aid. For example, the U.S. Commerce Department's Latin American/Caribbean Business Development Center [hereinafter LA/CBDC] issues a bulletin and various other publications that provide information to U.S. and Latin American businessmen on the benefits of the CBI, the EAI, non-regional federal government programs, and multi-lateral lending organizations. The center also helps those seeking investment and trading partners by providing the following services: business referral, matchmaking, workshops, symposia, conferences, business missions to the region and reverse trade missions for Latin American and Caribbean producers in the United States. The LA/CBDC works closely with the U.S. Agency for International Development's Bureau for Latin America and the Caribbean, Office of Trade and Investment.

As another example, the CBI Agribusiness Information Center of the U.S. Department of Agriculture is a clearinghouse of information on agricultural trade leads, technical and scientific expertise, marketing, and investment. The Center also publishes information on federal agricultural programs and regulations.

Kennedy in 1961, was the first of these programs. Established shortly after the Cuban revolution, Kennedy's initiative was aimed at encouraging Latin American governments to advance reform in the areas of civil and human rights in return for U.S. economic assistance.<sup>109</sup> As the 1960s wore on, military governments friendly to the United States or, at minimum, anti-Communist, began to dominate Latin America, and U.S. interest and support for Latin American development waned. In 1979, however, when Marxist revolutions erupted in Nicaragua and in the Caribbean nation of Grenada, the United States took a renewed interest in encouraging Latin American economic development.

In 1983, the CBI was established to allow countries in the Caribbean and Central America greater access to U.S. markets.<sup>110</sup> Seven years later, President Bush announced a policy to encourage development in Latin American countries that were in the process of reforming their economies following a decade of very slow growth. Called the Enterprise for the Americas Initiative, the policy was created to "encourage and support improvement in the lives of the people of Latin America and the Caribbean through

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109. It was believed by the Kennedy Administration that through the promotion of economic growth and reform in the areas of human and civil rights in Latin America, another "Cuba" could be avoided. During the 10 years between 1961 and 1970, U.S. assistance to Latin America averaged \$1.1 billion per year. COLE BLASIER, *THE HOVERING GIANT: U.S. RESPONSE TO REVOLUTIONARY CHANGE IN LATIN AMERICA 1910-1985*, 249-250 (rev. ed. 1985). *See also* HAROLD MOLINEU, *U.S. POLICY TOWARD LATIN AMERICA: FROM REGIONALISM TO GLOBALISM*, 140-141 (2d. ed. 1990).

110. The CBI, with its emphasis on free trade and the development of private enterprise, represents a different economic philosophy than the Alliance for Progress which provided U.S. loans and grants to Latin American governments for promotion of social programs. MOLINEU, *supra* note 109, at 123-125, 141.

market-oriented reforms and economic growth."<sup>111</sup> These goals were to be achieved under the "three pillars" of the EAI: trade, investment, and debt reduction.<sup>112</sup>

Despite a change in presidential administrations in 1992, the principles of the EAI have continued to be U.S. policy, and aspects of the EAI continue to be implemented, especially in the area of trade; however, the name has virtually ceased to be used by the White House, government agencies and the press. The signing of NAFTA and GATT, and the goals outlined at the December 1994 Summit of the Americas are the most prominent recent attempts by the United States to lower barriers to trade between countries in the Americas and thus give effect to one of the main objectives of the EAI.<sup>113</sup>

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111. 22 U.S.C. § 2430 (1992).

112. OFFICE OF THE PRESIDENT OF THE UNITED STATES, EXECUTIVE SUMMARY, ENTERPRISE FOR THE AMERICAS INITIATIVE: A VISION FOR ECONOMIC GROWTH IN THE WESTERN HEMISPHERE, (February 1992).

113. The North American Free Trade Agreement, enacted on December 8, 1993 [hereinafter NAFTA], established a free trade area between Mexico, the United States, and Canada by reducing tariff barriers, establishing standards for certain products, and providing a mechanism for dispute resolution. 19 U.S.C. §§ 3301-3473. In its first year, 1994, NAFTA had a dramatic effect on trade among Canada, the United States, and Mexico as trade grew by over \$50 billion, a 17% increase. U.S. DEP'T OF COMMERCE, DOC. NO. 4003, NAFTA: FIRST YEAR SNAPSHOT 1 (Feb. 17, 1995).

Although not region-specific like NAFTA, the General Agreement on Tariffs and Trade [hereinafter GATT], signed by President Clinton on December 8, 1994, is consistent with EAI objectives by reducing tariff barriers between signatory countries to promote free trade and, like NAFTA, provides for a dispute resolution mechanism through the World Trade Organization. Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4809.

At the Summit of the Americas held in Miami on December 9-11, 1994, the United States and 33 other Western Hemispheric countries pledged to create a Free Trade Area of the Americas [hereinafter FTAA] that would extend from Canada to Argentina. Andres Oppenheimer and Christopher Marquis, *Summit's Peak: Free Trade Zone, Alaska to Argentina*, MIAMI HERALD, Dec. 11, 1994,

## b. Free Trade Agreements

The United States initiated negotiations on trade and investment liberalization with many of the Latin American and Caribbean nations during the Bush Administration.<sup>114</sup> The United States has since been actively pursuing a policy of opening foreign markets to U.S. goods through the promise of bilateral and multilateral trade agreements. Agreements such as NAFTA and the Caribbean Basin Initiative 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.

NAFTA is not the only, or even the first, multilateral trade group in the Western Hemisphere; organizations such as MERCOSUR, the Andean Group and CARICOM were established prior to the date NAFTA went into effect.<sup>115</sup> Linking all of the

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at 1A. A meeting was held in Denver on July 1-2, 1995 by the trade ministers of all 34 countries to lay out a plan for the FTAA by the year 2005. *The Americas Drift Towards Free Trade*, ECONOMIST, July 8, 1995, at 35. An FTAA with both Cuba and the U.S. as members is currently impossible given Cuba's economic and political conditions and present U.S. policy. Cuban participation would be feasible if the U.S. embargo were lifted and Cuba met all the entry requirements to the FTAA.

114. Authority to negotiate trade agreements is described in 19 U.S.C. §§ 1351, 1821 (1988).

115. In addition to NAFTA, there are five other *multilateral* trade organizations currently in existence in the western hemisphere: the Latin American Integration Association [hereinafter ALADI], the Andean Group [hereinafter GRAN], the Caribbean Common Market [hereinafter CARICOM], and the Southern Cone Common Market [hereinafter MERCOSUR]. Intra-regional trade for the aforementioned organizations grew at a rate of between 8.7% for CARICOM

different groups was one of the major topics discussed at the Summit of the Americas in December 1994, resulting in a pledge to merge all of these regional trading blocs into one large free-trade zone encompassing almost the entire hemisphere by 2005.<sup>116</sup> In the meantime, Canada, the United States, and Mexico are considering the membership of Chile in the NAFTA under an accession clause that allows entry by other nations, subject to the agreement of the existing parties. However, no eligibility criteria or application mechanisms are described in the NAFTA agreement, and the negotiations for the extension of NAFTA to Chile are being hampered by U.S. Congressional opposition.<sup>117</sup>

In the 104th Congress, supporters of Caribbean interests introduced the "Caribbean Basin Trade Security Act," a bill that would grant Caribbean products parity of treatment with Mexican goods under NAFTA. This parity would last up to ten years after enactment, allowing the Caribbean nations a transitional period to

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members to a high of 25.3% for Andean Group members from 1990 to 1994. *Economic Integration in the Americas*, INTER-AMERICAN DEVELOPMENT BANK PERIODIC NOTE, July 1995, at 2. Membership in such an organization, contingent on entry requirements, would greatly improve Cuba's access to foreign markets and stimulate important sectors of its economy, most notably sugar, tobacco and other agricultural products.

116. *Summit's Peak*, *supra* note 113, at 1A.

117. Progress in Chile's accession to NAFTA has been delayed by differences between President Clinton and the U.S. Congress over granting of Fast-Track negotiating authority. *International Trade, Chile Accession to NAFTA Moving Ahead, Despite no Fast-Track, Officials Say*, THE BUREAU OF NATIONAL AFFAIRS DAILY REPORT FOR EXECUTIVES, Sept. 29, 1995, at 189A. The future of Chilean membership may also depend on how long the fear of emerging market investment in Latin America as a consequence of Mexico's financial crisis in January 1995, lingers in NAFTA's member states. *Latin America Savours the Tequila Aftertaste*, ECONOMIST, May 20, 1995, at 41. In addition, there has been speculation that Chile's lax environmental laws, and poor enforcement of those in place, will make it difficult for Chile to enter NAFTA in its current form. *Chile's Lack of Environmental Laws May Thwart Its Early Entry Into NAFTA*, BNA INTERNATIONAL TRADE DAILY, Oct. 3, 1995.

seek entry into NAFTA or negotiate separate free trade agreements with the United States. Unless a NAFTA parity law is enacted, NAFTA could undermine any trading preferences the Caribbean countries might gain under the Caribbean Basin Initiative or other similar laws directed at stimulating economic development in the Caribbean. Legislation such as the NAFTA parity bill could afford Cuba many of the benefits of NAFTA membership before Cuba joins any multilateral trade agreements.<sup>118</sup>

### c. Investment Programs

The EAI established two vehicles for providing seed capital in Latin American and Caribbean nations, overseen by the Inter-American Development Bank's Multilateral Investment Fund [hereinafter MIF] and Investment Sector Loan Program. The MIF was established to stimulate the creation of micro-enterprises, small businesses, and other forms of entrepreneurship, and to encourage the adoption of sound economic policies in Latin America in order to foster private investment in recipient countries.<sup>119</sup> Similarly, the

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118. Caribbean Basin Trade Security Act, H.R. 553, 104th Cong., 1st Sess. (1995). Opposition from the textile industry, fearing increased competition, has stalled the bill in the House Ways and Means Committee. It is generally believed that the legislation will remain stalled in the Ways and Means Committee in 1996, a Presidential election year. Scott West, *Caribbean-Trade: Region Tries to Recoup After Parity Blow*, Inter Press Service, Sept. 18, 1995, available in LEXIS, Nexis Library, INPRES File. See also *Prospects For Parity Legislation This Year Dim In House, Aide Says*, THE BUREAU OF NATIONAL AFFAIRS INTERNATIONAL TRADE REPORTER, Sept. 20, 1995.

119. In 1994 the MIF authorized 29 projects for a total of \$64 million. INTER-AMERICAN DEVELOPMENT BANK, 1994 ANNUAL REPORT 34 (1995). Original authority for the investment funds is codified in 22 U.S.C. § 2430 (f)-(g). Congress appropriated funds in Pub. L. 102-391 of October 6, 1992. The U.S. has fallen behind in its contribution to the MIF, having provided only \$90 million in FY 1993 and \$75 million in FY 1994. UNIVERSITY OF NEW MEXICO, CHRONICLE OF LATIN AMERICAN ECONOMIC AFFAIRS (Oct. 7, 1993). Foreshadowing decreased MIF financing, total U.S. contributions for programs



Investment Sector Loan Program makes loans to Latin American and Caribbean governments that have implemented measures to liberalize their economies.<sup>120</sup>

d.      Official Debt Reduction

The United States has reduced the debt obligations of seven countries by \$875 million under the EAI.<sup>121</sup> Foreign governments incurred this official debt to the United States through non-concessional loans by the Commodity Credit Corporation [hereinafter CCC] and the Export-Import Bank [hereinafter Eximbank], and concessional loans by the Agency for International Development and the Department of Agriculture's food-aid program. The EAI calls for the unilateral U.S. reduction of concessional debt, as well as the use of debt-for-nature, debt-for-development and debt-for-equity swaps to cancel debts. In these swaps, the debtor nation is granted debt relief in return for agreeing to commit local currency to projects bettering the environment, social welfare and the economy. The U.S. Treasury's Office of Debt Policy oversees reduction of concessional debt, while the Eximbank and the CCC handle their debt swaps themselves.

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of the IDB fell from \$76 million in 1994 to \$50 million in 1995 and are further expected to fall to \$47 million in 1996. CONTRIBUTION TO THE INTER-AMERICAN DEVELOPMENT BANK, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1996, APP., 77 (1995).

120. As of September 1995, the Inter-American Development Bank had made loans of over \$1.1 billion under the Investment Sector Loan Program, and was considering four additional loans worth \$240 million dollars. INTER-AMERICAN DEVELOPMENT BANK, PROJECTS IN THE PIPELINE BY SECTOR: PLANNING & REFORM, IDB PROJECTS, 27, 29-30 (Aug./Sep. 1995).

121. See 22 U.S.C. § 2430(c) (1994).

While the debt reduction component of the EAI remains nominally in effect, it has been effectively eliminated by Congress through failure to appropriate funds for it starting in FY 1994.

## 2. The Caribbean Basin Initiative

The Caribbean Basin Initiative consists of a multitude of programs contained in the Caribbean Basin Economic Recovery Act of 1983 [hereinafter CBI I], as amended and supplemented in 1990 [hereinafter CBI II].<sup>122</sup> The CBI aims to foster development by providing greater access to the U.S. market for many goods of designated countries, stimulating U.S. investment in their economies and encouraging liberalization.

Conditions for CBI qualification are set so as to promote U.S. trade, foster anti-narcotics efforts, and advance U.S. foreign policy objectives.<sup>123</sup> Over two dozen countries reap CBI benefits. While CBI I expired in 1995, CBI II made permanent the initiative's programs and preferences.

### a. Duty-free Entry into the United States of Eligible Products from CBI Countries

One of the main benefits conferred on Caribbean countries by the CBI is the duty-free entry into the United States of eligible products from CBI members. Under Harmonized Trade Schedule Item 9802, a wide variety of products from CBI countries receive duty-free entry into the U.S. market, including most agricultural and manufactured goods. Products excluded from duty-free treatment but assembled in CBI countries from American components receive reduced tariffs. Duty-free entry of sugar and beef into the quota-regulated U.S. market is covered by special rules. Detailed regulations address the question whether a product

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122. The core of the CBI is codified in 19 U.S.C. §§ 2701- 2706 (1988).

123. *Id.* § 2702(b).

made with components from non-CBI countries has been transformed sufficiently to receive duty-free treatment.<sup>124</sup>

b.      Guaranteed Access Levels for Apparel

For access to the protected U.S. textile and apparel market, the CBI offers designated countries the opportunity to negotiate Guaranteed Access Levels for textile and apparel products made of U.S. formed and cut fabric.<sup>125</sup> This program provides incentive to U.S. manufacturers to locate part of their operations in CBI countries by combining the reduced costs of production in the low-wage Caribbean economies with a relatively high level of access to the U.S. market.

c.      Bilateral Investment Treaties

As a precursor to the free trade agreements pursued under the EAI, the CBI encouraged the negotiation of Bilateral Investment Treaties [hereinafter BITs] with Caribbean governments. BITs establish certain basic economic rights for U.S. investors in the signatory country, such as protection against uncompensated expropriation, and rights of profit repatriation. While ostensibly two-way guarantees of investment rights, BITs are essentially economic self-help measures for emerging economies, and typically contain liberalizing reforms and incentives for attracting U.S. direct investment.

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124. *Id.* §§ 2701, 2703.

125. Authority to enter into such trade agreements with other countries is granted in § 1821. *Id.*

d. The Puerto Rican Caribbean Development Program

One program of the Caribbean Basin Initiative that has been particularly successful in providing development assistance has been the Puerto Rican Caribbean Development Program [hereinafter PRCDP]. The PRCDP has been instrumental in promoting trade and investment throughout the Caribbean through four main components: "Section 936 Funds," Production Sharing, Financing Mechanisms, and Technical Assistance and Collaboration.

i. Section 936 Funds

Of the four components of the PRCDP, Section 936 funds have provided the largest amount of capital to finance projects to CBI beneficiary countries. Under the auspices of the Internal Revenue Code Section 936 tax incentive program, Section 936 Funds are created by the deposit of profits of U.S. corporate subsidiaries operating in Puerto Rico in Puerto Rican banks. The U.S. subsidiaries are exempt from corporate income tax under Section 936, and accept a lower rate of return on their earnings--in turn allowing local financial institutions to lend 936 Funds out at reduced rates. Borrowers of Section 936 Funds for projects in Puerto Rico may thus save up to 20% on their finance costs.<sup>126</sup> Since 1987, Section 936 funds have also been available for investment in active business assets and development projects in eligible CBI-beneficiary countries.<sup>127</sup>

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126. Of the more than \$2 billion invested by the Caribbean Development Program, over \$1.2 billion has come from Section 936 Funds since 1987. To be eligible for such loans a country must not only be a CBI beneficiary but a signatory of a Tax Information Exchange Agreement (TIEA) with the United States. BUREAU OF CARIBBEAN BASIN AFFAIRS, DEP'T OF STATE OF PUERTO RICO, STATISTICAL AND GRAPHIC SUMMARY: CARIBBEAN DEVELOPMENT PROGRAM 1-4 (Mar. 1995) [hereinafter CARIBBEAN DEVELOPMENT PROGRAM].

127. 26 U.S.C. § 936(d)(4) (1994).

Although the Section 936 Funds have become a valuable development tool in the Caribbean Basin, the tax incentive program is under intense attack. Many members of Congress wish to end the plan altogether because of the benefits that corporations reap from this tax shelter.<sup>128</sup> If Section 936 or equivalent program funds were available at the time the trade embargo was lifted, and assuming Cuba qualified for CBI benefits, such funds would provide an important means of channeling private investment into Cuba.<sup>129</sup>

## ii.      Production Sharing Operations

Through Production Sharing Operations, the Caribbean Development Program allows firms to take advantage of low wages in CBI beneficiary countries while maintaining technological and capital intensive operations in Puerto Rico. Through this production dichotomy, sixty-four projects have created 14,500 direct jobs in the region and over 1,800 jobs in Puerto Rico.<sup>130</sup>

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128. Section 936 was amended in 1993 to place limits on the exemptions available thereunder. Pub. L. No. 103-66, § 13227(a)-(b), 107 Stat. 489, 490 (codified as amended at Title 13 U.S.C. (1993)). There is legislation pending before the 104th Congress that would eliminate Section 936 tax benefits. Tax Fairness for Farmers, Ranchers, and Small Business Act, H.R. 1748, 104th Cong., 1st. Sess. § 121(B)(a) (1995).

129. The Internal Revenue Code contains two additional sources of tax incentives for U.S. enterprises wishing to become involved in CBI countries. The CBI Convention Tourism Tax Credit provides a simplified deduction on U.S. taxes for companies that hold business conventions in eligible CBI countries. 26 U.S.C. § 274(h)(6) (1994). Also, classification of a company as a "foreign sales corporation" enables a U.S. exporter to receive a U.S. tax credit when it establishes a specialized sales subsidiary in a CBI country. *Id.* §§ 921-927.

130. CARIBBEAN DEVELOPMENT PROGRAM, *supra* note 126, at 3.

iii. Caribbean Basin Projects Financing Authority

In addition to financing through Section 936 Funds, the PRCDP has created the Caribbean Basin Projects Financing Authority [hereinafter CARIFA] and promoted the establishment of the Caribbean Basin Partners for Progress [hereinafter CBPP] to increase the availability of low cost loans to Caribbean investment projects. CARIFA was created as an instrument of the Puerto Rican government to provide financing through the issuance of industrial revenue bonds to finance both large and small projects in CBI eligible countries. The CBPP, however, is a private partnership comprised of 28 companies operating in Puerto Rico which commit their own resources to a special Section 936 Fund for small business loans.<sup>131</sup>

iv. Technical Assistance Programs

The fourth area in which the PRCDP operates is in the field of Technical Assistance and Collaboration. To further these ends five Point Four Technical Seminars have been held to share information on industrial, trade, finance, and service sector development, regional economic integration, and hemispheric free trade. In addition, training in the areas of industrial promotion and support has been provided by Puerto Rico's Economic Development Administration and scholarships to Caribbean students have been granted.<sup>132</sup>

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131. *Id.* at 3-4. Since 1991, CARIFA has provided \$650 million in financing for twelve projects. *Id.* at 4. On a smaller scale, the CBPP has lent only \$28 million for 52 small-scale projects that have created 5,500 jobs. *CBI Lending Creates Over 5,500 Jobs In the Caribbean Region*, AP Worldstream, Jan. 10, 1995, available in LEXIS, NEXIS Library, AP File.

132. CARIBBEAN DEVELOPMENT PROGRAM, *supra* note 126, at 4.

## e.      U.S. Government Procurement of CBI-Country Goods

In 1986, the U.S. Trade Representative's office waived certain restrictions on U.S. government procurement of foreign products for CBI countries.<sup>133</sup> Under the Trade Agreements Act of 1979, bids for U.S. government procurement contracts could not be made by the seller of a foreign product unless the country of origin had lowered its own restrictions on government procurement of U.S. products.<sup>134</sup> The U.S. Trade Representative's action waived this reciprocity requirement for CBI countries, thus enhancing the ability of Caribbean countries to market their products to the U.S. government, the largest single purchaser of goods and services in the United States.

## f.      Special Treatment in Enforcement of U.S. Trade Laws

A subtle preference is given to CBI countries under a new trade law enforcement provision enacted in CBI II. In an investigation to determine if foreign trade practices violate anti-dumping and countervailing duty laws, imports from two or more countries are usually aggregated to determine if material injury to a U.S. industry has occurred. Under CBI II, imports from CBI countries will no longer be aggregated with those of non-CBI countries.<sup>135</sup> The possibility of small CBI countries being penalized by countervailing duties principally brought on by the actions of large, non-CBI countries is thus reduced.

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133. 51 Fed. Reg. 6,964 (1986) (implementing Exec. Order. No. 12,260 of Dec. 31, 1980).

134. 19 U.S.C. § 2511 (1995).

135. *Id.* § 1677(7)(c)(iv)(II).

3. Other Economic Assistance Programs by Agency

By virtue of geography and recent history, the development needs of the Latin American and Caribbean nations have received special attention from the United States in the last decades. In addition to the programs specially devoted to the region, the general tools of U.S. trade promotion and development policy towards the Third World remain at the disposal of Latin American and Caribbean countries and could be utilized by Cuba if the U.S. trade embargo were to end.

These 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 or organization charged with administering them.

a. U.S. Agency for International Development

As the mainstay of U.S. foreign assistance administration, the U.S. Agency for International Development [hereinafter USAID] conducts a vast array of development projects and assistance programs from its field missions around the world.<sup>136</sup> USAID has drawn criticism for being wasteful and over-bureaucratic. Perhaps as a result of this criticism, Congressional funding for USAID development projects has been curtailed in recent years.<sup>137</sup>

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136. Authority for USAID programs is codified throughout Chapter 32 of Title 22 of the United States Code, particularly in 22 U.S.C. §§ 2151 and 2346 (1994).

137. The Foreign Relations Revitalization Act of 1995 would abolish USAID and transfer its functions to the Department of State. S. 908, 104th Cong., 1st Sess. §§ 1401-1412 (1995).



USAID administers three basic categories of non-emergency assistance.<sup>138</sup> The first, Economic Support Funds [hereinafter ESF], are disbursed as ongoing "program assistance" to foreign governments, and serve economic and political foreign policy interests of the United States, in some cases related to military base rights or access rights agreements. ESF assistance may finance a country's balance of payments, fund specific government spending programs, or otherwise assist in economic stabilization. Central American countries are among the major ESF donees. Where possible, USAID uses ESF assistance in conjunction with Commodity Import Programs, in which USAID helps recipient countries purchase of U.S. goods needed in their economies.<sup>139</sup>

The second variety of USAID funding, Special Assistance Initiatives, are short-term, government-to-government injections of aid, often into a multilateral pool. The Philippines and the former communist countries of Eastern Europe are current Special Assistance Initiative aid recipients.<sup>140</sup> USAID also administers a special fund arising out of the Central American peace process: the Central American Reconciliation Assistance, Demobilization and Transition Fund. A similar special fund could be established to assist Cuba.

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138. This paper will not address USAID's role in advising developing countries on economic policy and developing structural adjustment programs, nor USAID spending for education, health, population planning and emergency humanitarian relief. Many of these programs could and probably would need to be made available to Cuba during the early phases of its transition to a free-market society, to alleviate potentially catastrophic economic conditions warranting significant emergency aid.

139. ESF payments to Latin America and the Caribbean amounted to almost \$173 million in 1994. Estimated amounts for 1995 and 1996 are \$190.3 million and \$117.8 million, respectively. U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, CONGRESSIONAL PRESENTATION SUMMARY TABLES FISCAL YEAR 1996 22, 28, 35 (1995).

140. Special Assistance Initiative Payments by USAID are estimated as \$1.07 billion in 1995 and \$1.26 billion in 1996. *Id.* at 22, 35.

The third and most heterogeneous type of USAID assistance, called Development Assistance [hereinafter DA], funds discrete development projects with U.S. and local partners. Examples of uses of DA include:

- (1) 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;
- (2) agricultural research and land productivity projects;
- (3) science and technology development programs;
- (4) housing guaranty programs;
- (5) capital Projects Fund for infrastructure development of roads, irrigation, port facilities and free zone facilities;
- (6) engineering, construction, and telecommunications projects; and
- (7) 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:

- (1) privatization financing for U.S. businesses;
- (2) providing capital for private sector development banks and credit facilities to small- and medium-size businesses and micro-enterprises;
- (3) the Business and Development Network of regional offices providing business information and services;
- (4) training programs in investment, management and marketing for nationals of beneficiary countries;
- (5) helping beneficiary countries establish export and investment promotion offices;
- (6) the Private Sector Revolving Fund: offering loans, credit guarantees and training for projects with substantial developmental impact;

(7) financial support for joint ventures in energy development;

(8) the Forfeit Guarantee Program, rendering financing assistance to U.S. companies wishing to export to AID-assisted developing countries; and

(9) the Franchise Guarantee Program, providing loans to indigenous entrepreneurs to become franchisees of U.S. corporations.<sup>141</sup>

Through the Bureau for Private Enterprise and the Office of Trade and Investment, USAID forges partnerships between U.S. businesses and trade associations and the governments and private sectors of beneficiary countries. USAID sponsors the International Executive Service Corps of retired U.S. business executives, who provide technical assistance to businesses and organizations in the developing world. U.S. business is kept abreast of sales opportunities arising from USAID-related projects by a computerized data base, the Procurement Information Access System.

b.      Overseas Private Investment Corporation

The Overseas Private Investment Corporation [hereinafter OPIC] is a self-financing federal corporation with the mission of assisting U.S. investors in developing countries and emerging economies.<sup>142</sup> OPIC's programs are available in over 140 countries throughout the world. OPIC's assistance takes three principal forms. Project financing makes available OPIC development funds for direct loans and loan guarantees to U.S. investors in commercial projects overseas. Direct loans range from \$2 million to \$30

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141. USAID allocated over \$267 million in DA funds to Latin America and the Caribbean in 1994. Projected Direct Assistance payments to the region are expected to be over \$383 million in 1995 and \$385 in 1996. *Id.* at 22, 28, 35.

142. 22 U.S.C. § 2191 (1994).

million, while loan guarantees can reach \$200 million.<sup>143</sup> The loans are made at interest rates generally comparable to commercial rates, but loan terms vary according to a project's assessed financial and political risk. Investment insurance issued by OPIC protects U.S. investments overseas against three types of political risks: currency inconvertibility, expropriation and political violence. Finally, investor services provided by OPIC include advisory services and databases, investment missions, seminars and conferences. OPIC staffs its various programs with regional specialists, including specialists in Latin America.

c. U.S. Department of Commerce

The Commerce Department plays an active role in supporting development in Latin America 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. This task force has a hotline for businesses needing trade information and counseling and publishes a directory of U.S. government resources for exporters. Among these resources is the National Trade Data Bank, a CD-ROM database on export and trade opportunities. Similarly, Commerce's Office of Export Trading Company Affairs publishes the "Export Yellow Pages."

The International Trade Administration [hereinafter ITA] at the Commerce Department 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. ITA also arranges for U.S. participation in foreign trade fairs and exhibitions. The Commerce Department's Foreign Commercial

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143. OVERSEAS PRIVATE INVESTMENT CORP., 1994 ANNUAL REPORT 5 (1995). In 1994, OPIC financed \$324 million in projects and insured investments for over \$560 million in Latin America. *Id.* at 20-21.

Service has officers in overseas posts scouting commercial opportunities for U.S. investors and traders.

The Generalized System of Preferences [hereinafter GSP], administered by the Commerce Department, permits developing countries duty-free entry to the U.S. market on eligible products.<sup>144</sup> GSP expired on July 31, 1995, but Congress is considering extending it until December 1997.<sup>145</sup>

d.      Department of Agriculture

A major form of U.S. foreign 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.<sup>146</sup>

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.

e.      Export-Import Bank

The Export-Import Bank of the United States is an independent federal agency that facilitates the export financing of

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144. 19 U.S.C. §§ 2461, 2462 (1994); 15 C.F.R. § 2000 (1994).

145. *Key House Committee Endorses Five Year Extension of Super 301*, THE BUREAU OF NATIONAL AFFAIRS INTERNATIONAL TRADE REPORTER 1561 (Sept. 20, 1995).

146. The Agricultural Trade Development Act of 1954 is codified at 7 U.S.C. § 1691 (1994). The International Development and Food Acts are codified throughout 22 U.S.C. (1994).

U.S. goods and services to credit worthy foreign buyers.<sup>147</sup> In 1991, Eximbank programs financed over \$1 billion in imports of U.S. products to CBI countries. 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 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.

f. Small Business Administration

The Small Business Administration [hereinafter SBA] is an independent federal agency charged with counseling, aiding and protecting U.S. businesses that meet its size requirements.<sup>148</sup> 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.

g. U.S. Trade and Development Agency

In addition to the trade and development programs already mentioned, another independent federal agency, the U.S. Trade and Development Agency [hereinafter TDA], is also charged with some

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147. 12 U.S.C. § 635 (1994); 12 C.F.R. § 411 (1994).

148. 15 U.S.C. § 636 (1994).

of the functions described above.<sup>149</sup> The TDA hosts foreign officials and businessmen in 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, telecommunications 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.

h.      U.S. Department of Labor

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.

i.      Peace Corps

The Peace Corps sends volunteers to developing countries to initiate local self-help and development projects involving agriculture, rural infrastructure, small business, health, education and other developmental concerns.<sup>150</sup> Peace Corps volunteers have access to small amounts of seed money to initiate their projects, but otherwise must help their local contacts apply to traditional U.S. and multilateral assistance agencies for funding.

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149. 22 U.S.C. § 2421 (1994).

150. 22 U.S.C. § 2501 (1994).

j. U.S. Information Agency

The U.S. Information Agency [hereinafter USIA] directs a host of programs from its overseas missions to spread American ideals of liberty, democracy and free enterprise.<sup>151</sup> In addition, USIA sponsors the International Visitors Program, which brings foreign individuals or groups to the United States for month-long visits. Visitors, who are usually foreign government and business leaders, tour U.S. cities and meet their U.S. counterparts.

k. Inter-American Foundation

The Inter-American Foundation [hereinafter IAF] is an independent federal agency, which provides grants to local self-help and development organizations throughout Latin America.<sup>152</sup> Established in 1969 as an experimental system of foreign-assistance delivery, the IAF approves approximately \$25 million in direct grants each year to a wide variety of grassroots groups and non-governmental organizations, cooperatives and micro-enterprises.

**B. *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, which the rest of Latin America and the Caribbean has enjoyed for many years.<sup>153</sup> This section summarizes the actions needed under present and proposed

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151. 22 U.S.C. § 1461 (1994).

152. *Id.* § 290; 22 C.F.R. §§ 1001-07 (1995).

153. In addition to lifting the ban on assistance to Cuba contained in the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151-2430 (1994), the above referenced Section 403 of the Security and Development Act of 1985, *Id.* § 2227(a), would have to be repealed, for it prohibits the use of the United States' share of multilateral assistance programs for aid to Cuba. *Id.* § 2227(a).



law to permit Cuban participation in the main programs and preferences.

1.      The Enterprise for the Americas Initiative

General eligibility requirements for the benefits of the Enterprise for the Americas Initiative are set out in 22 U.S.C. § 2430(b). To be eligible, a Latin American or Caribbean country must have a government that is democratically elected, does not support acts of international terrorism, cooperates in international narcotics control matters, does not engage in systematic human rights abuses, and is making strides towards economic liberalization.<sup>154</sup> Determination of a country's eligibility for EAI benefits is left to the President, who need only notify Congress in advance of his intention to designate a country as eligible.<sup>155</sup>

Becoming EAI-eligible would allow Cuba to reduce, pursuant to 22 U.S.C. § 2430(c), any official debt to the United States government that has remained outstanding since the two countries severed relations (provided that the debt reduction program within the EAI was again functional and was applied to Cuba). Participation in EAI's two other pillars, investment funding and trade liberalization, would require further steps.<sup>156</sup>

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. First, under the Foreign Trade Agreement Act, the President would have to proclaim that Cuba is no longer dominated or controlled by the

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154. *Id.* § 2430b(a).

155. *Id.* § 2430b(b).

156. The Inter-American Development Bank (IDB) administers the EAI's Investment Sector Loan Program and the Multi-lateral Investment Fund. *See supra* notes 119, 120, and accompanying text. Cuba would also need to apply for and receive membership in the IDB, a process that could take a substantial amount of time.

world communist movement.<sup>157</sup> Alternatively, the President could extend nondiscriminatory treatment by entering into a bilateral commercial agreement with Cuba, determining that such agreement is in the national interest, and properly notifying Congress.<sup>158</sup>

## 2. The Caribbean Basin Initiative

The extension to Cuba of the most important programs and preferences of the Caribbean Basin Initiative will hinge on Cuba's designation as a CBI "beneficiary country." Under present law, Cuba cannot be designated as a beneficiary country because "the President shall consider only" a specific list of twenty-seven Caribbean Basin countries, not including Cuba.<sup>159</sup> Congress would have to amend the Caribbean Basin Economic Recovery Act to insert Cuba into the list of eligible designees. Even then, Cuba must overcome several prohibitions and preconditions. Under 19 U.S.C. § 2702(b) paragraphs (1)-(7), the President shall not designate a country a CBI beneficiary:

- (1) If it is a communist country;
- (2) if it has nationalized, expropriated or seized U.S. property, or unduly infringed other property rights of U.S. citizens;
- (3) if it has not respected arbitration awards to U.S. parties;
- (4) if it affords preferential treatment to the products of another developed country which adversely affects U.S. commerce;
- (5) if its government violates U.S. copyrights;
- (6) unless it has agreed to extradite U.S. citizens; and
- (7) unless it is taking steps to afford internationally recognized worker rights.

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157. 19 U.S.C. § 1351 (1988).

158. *Id.* §§ 2434, 2435(b).

159. *Id.* § 2702(b).

However, the President can bypass the criteria of paragraphs (1), (2), (3), (5), and (7) to designate one of the eligible countries as a beneficiary if he "determines such designation will be in the national economic or security interest of the United States," and reports the rationale for such determination to Congress.<sup>160</sup>

Designation as a CBI beneficiary would immediately provide Cuba duty-free entry of designated products into the U.S. market. Cuba would also stand to gain automatically if Congress passed a bill granting CBI countries' products parity of treatment with Mexican products under the enacted North American Free Trade Agreement.<sup>161</sup> Special treatment for Cuban products in enforcement of countervailing duty and anti-dumping laws would also go into effect immediately.<sup>162</sup> The U.S. Trade Representative could act under Executive Order No. 12260<sup>163</sup> to add Cuba to the list of CBI countries for which U.S. government procurement restrictions were waived in 1986.<sup>164</sup>

Access to hundreds of millions of dollars in funds under Internal Revenue Code Section 936 would have to await the signing of a Tax Information Exchange Agreement between the United States and Cuba.<sup>165</sup> Likewise, Cuba would not benefit from the CBI Convention Tourism Tax Credit until the tax agreement is signed.<sup>166</sup> Negotiation of tax treaties between the United States and foreign countries is often a protracted process.

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160. *Id.* § 2702(b).

161. *See supra* note 113.

162. 19 U.S.C. § 1677(7)(C)(iv)(II) (1994).

163. PURPA Notice, 48 Fed. Reg. 1,653 (1983).

164. Executive Order Notice, 51 Fed. Reg. 6,964 (1986).

165. 26 U.S.C. § 936(d)(4) (1994).

166. *Id.* § 274(h)(6).

Negotiation of Guaranteed Access Levels for U.S. formed and cut textiles and apparel completed in Cuba would be subject to the same restrictions on U.S.-Cuban trade agreements noted in the EAI discussion above.

3. U.S. Agency for International Development Programs

The Economic Support Funds, Special Assistance Initiatives and Development Assistance programs run by the U.S. Agency for International Development are now unavailable to Cuba because of the trade embargo statutes, particularly the Foreign Assistance Act of 1961 which, as discussed above, prohibits U.S. assistance to Cuba, most communist countries, and countries that have unjustly expropriated U.S. property. 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.

4. Overseas Private Investment Corporation

The authorizing act for the Overseas Private Investment Corporation does not specifically restrict funding projects in Cuba.<sup>167</sup> 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.

5. Generalized System of Preferences

The Generalized System of Preferences for developing countries<sup>168</sup> does not specifically identify Cuba as a country

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167. 22 U.S.C. §§ 2191-2200 (1994).

168. 19 U.S.C. §§ 2461-2466 (1988).

excluded from duty-free treatment. However, it does provide that the President shall not designate a country to be a GSP beneficiary if it is a communist country, unless it is already receiving nondiscriminatory treatment, is a member of GATT and the IMF, and is not controlled by "international communism."<sup>169</sup> Additionally, the President cannot designate a country to be a GSP beneficiary if the country has expropriated U.S. property or infringed U.S. property rights without making good-faith efforts to redress the owners.<sup>170</sup> Most of the latter set of restrictions can be waived if the President determines the GSP designation will be in the national economic interest, and so reports to Congress.

## 6.      Agricultural Trade Development and Assistance

Food aid under the Agricultural Trade Development and Assistance Act of 1954<sup>171</sup> will become available to Cuba so long as the President determines Cuba to be a "friendly" country, and not one under the control of a foreign government running a world communist movement.<sup>172</sup> Food aid under the International Development and Food Acts<sup>173</sup> falls under the anti-Cuba restrictions of the Foreign Assistance Act of 1961 and would be available if the FAA's prohibitions were lifted.

## 7.      Export-Import Bank

Cuba is presently excluded by name from those countries wherein Export-Import Bank guarantees, insurance or credit may be

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169. *Id.* § 2462(b)(1).

170. *Id.* § 2462(b)(2)-(7).

171. 7 U.S.C. §§ 1691-1738 (1994).

172. *Id.* § 1703(d).

173. 22 U.S.C. §§ 2151-2430 (1994).

used. Only a Presidential determination that Cuba has ceased to be Marxist-Leninist, or that an Eximbank transaction involving Cuba is in the national interest, can lift the prohibition.<sup>174</sup>

8. U.S. Assistance Programs Without Specific Restrictions

Beyond the general ban imposed by the embargo, there appear to be no specific restrictions relating to Cuba on the activities of the following agencies: the U.S. Trade and Development Agency,<sup>175</sup> the U.S. Peace Corps,<sup>176</sup> the Inter-American Foundation,<sup>177</sup> the Small Business Administration<sup>178</sup> and the U.S. Information Agency.<sup>179</sup>

9. Potential Effect of the LIBERTAD Act

Title II of the proposed 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.<sup>180</sup> The level of assistance to Cuba in the LIBERTAD Act has been greatly modified since the bill's initial introduction, and is currently quite different in the House and

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174. 12 U.S.C. § 635(b) (1994).

175. 22 U.S.C. § 2421 (1994).

176. *Id.* § 2501 *et seq.*

177. *Id.* § 290.

178. 15 U.S.C. § 636 (1994).

179. 22 U.S.C. § 1461 (1994).

180. H.R. 927, 104th Cong., 1st Sess. § 202(a)(1) (1995).

Senate versions of the Act. The most significant difference is that the House bill as enacted does not authorize any specific assistance to Cuba, but makes any such assistance in the future "subject to an authorization of appropriations and subject to the availability of appropriations."<sup>181</sup> The Senate version of the bill contains no such limitations.

Another important difference between both versions of the bill is that the Senate version seeks to address some of the concerns raised by the Clinton Administration over perceived encroachment by Congress of the President's constitutional authority to conduct foreign policy. The House version, however, leaves these contentious provisions essentially intact. A telling example of the differences between the Senate and House versions of the Act in terms of deference to the President is found in the provisions dealing with the lifting of the restrictions on travel and remittances to Cuba that President Clinton imposed by Executive Order in August 1994.<sup>182</sup> The Senate draft does not prohibit lifting of these restrictions even if the current Cuban government remains in power, but expresses that "it is the sense of Congress that the President should" require certain actions by Cuba before reinstatement of general licenses for family remittances to Cuba and family related travel.<sup>183</sup> By contrast, the House version directs: "Only after a transition government in Cuba is in power, [such] remittances . . . as well as freedom to travel . . . shall be permitted."<sup>184</sup>

The conditions for the United States giving aid to Cuba also

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181. *Id.* §§ 202(a)(2), 202(b)(2)(A), 202(b)(2)(B), 203(c)(1).

182. *See supra* note 50.

183. H.R. 927, 104th Cong., 1st Sess. § 2111 (1995) (S. Amdt. 2936).

184. H.R. 927, 104th Cong., 1st Sess., § 202(b)(2)(A)(iii) (1995). As discussed in Section II.B.6, the conditions for the U.S. giving aid to Cuba also reflect the different degrees of deference given to the President by the House and Senate versions of the Act.

reflect the different degrees of deference given to the President by the House and Senate versions of the Act. Under the Senate draft, a transition government must take four actions before aid can be given to it: (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, and (4) commit to holding free and fair elections.

The LIBERTAD Act requires the President to develop a plan for assistance to Cuba when a transition government is in power, and when a democratically elected government is in power.<sup>185</sup> Aid to a transition government under the House version 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.<sup>186</sup> 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."<sup>187</sup> The Senate version, on the other hand, would provide to Cuba under a transition government "such food, medicine, medical supplies and equipment, and other assistance as may be necessary to meet the basic human needs of the Cuban people."<sup>188</sup> The President, moreover, "should take such other steps as will encourage renewed investment in Cuba to contribute to a stable foundation for a democratically elected government in Cuba."<sup>189</sup>

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185. *Id.* § 202(b)(1).

186. *Id.* § 202(b)(2)(A)(i).

187. *Id.* § 202(b)(2)(A)(ii).

188. *Id.* § 202(b)(2)(A)(i) (S. Amdt. 2936).

189. *Id.* § 202(b)(2)(A)(iii).



Assistance to a democratically elected government would include, in the House version: assistance under the Foreign Assistance Act of 1961; assistance under the Agricultural Trade Development and Assistance Act of 1952; financing, guarantees, and other forms of assistance provided by the Export-Import Bank of the United States; financial support as provided by OPIC; assistance provided by the Trade and Development Agency; Peace Corps programs; and "other appropriate assistance."<sup>190</sup> The Senate version of the LIBERTAD Act would not include aid under the Foreign Assistance Act of 1961 or the Agricultural Trade Development and Assistance Act of 1952, but would provide "international narcotics control assistance."<sup>191</sup>

Both versions of the LIBERTAD Act direct 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.<sup>192</sup> Moreover, the Act directs the President to transmit to Congress, within 180 days of its enactment, a report describing a plan for carrying out the assistance programs defined in the Act.<sup>193</sup> In addition, 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 GSP program or under the

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190. *Id.* § 202(b)(2)(B).

191. *Id.* § 202(b)(2)(B) (S. Amdt. 2936).

192. *Id.* § 202(e).

193. *Id.* § 202(g).

Caribbean Basin Initiative; and conducting negotiations towards the accession of Cuba to NAFTA.<sup>194</sup>

Even though not all-encompassing, Title II of the LIBERTAD Act exemplifies the type of enabling legislation that would be needed to speed the process of bringing Cuba within the coverage of the main U.S. trade and economic assistance programs, provided such aid could be granted with a minimum of political conditions and red tape.<sup>195</sup>

#### IV. CONCLUSIONS AND RECOMMENDATIONS

The U.S. trade embargo against Cuba rests on three statutory sources: the Trading with the Enemy Act, the Foreign Assistance Act, and the Cuban Democracy Act. The President has the legal authority to remove the embargo, to the extent that it is

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194. *Id.* § 202(h)(1).

195. The LIBERTAD Act is not the only proposed bill that defines what type of emergency relief should be given to Cuba once the conditions set forth in Section 1708(a) are satisfied. *Id.* Such definition is also found in the "Free and Independent Cuba Assistance Act," H.R. 611, 104th Cong., 1st Sess. (1995), upon which Title II of the LIBERTAD Act is based. *See supra* note 102.

In a recent speech, the Special Adviser to the President and the Secretary of State for Cuba, Richard Nuccio, outlined what future U.S. assistance to a transitional and democratic Cuba might consist of, given the current prospect for further reductions in U.S. foreign assistance programs. According to Nuccio, the United States could assist Cuba on a multilateral basis with both international institutions, such as the World Bank and the United Nations, and foreign countries interested in aiding Cuba. Assistance would come in the areas of humanitarian aid, political reform, and economic reform. Furthermore, foreign investment, with insurance for U.S. investors provided by the Overseas Private Investment Corporation, lending by international financial institutions, and joint ventures between the Cuban government and foreign or domestic investors would be used to improve Cuba's decayed infrastructure. Richard Nuccio, Address at the *Shaw, Pittman, Potts & Trowbridge* Workshop on Foreign Investment in Cuba: Past, Present, and Future, on U.S. Assistance to the Economic Reconstruction of a Transitional and Democratic Cuba 7 (Jan. 26, 1996). (Transcript available in Shaw, Pittman, Potts & Trowbridge Library).

founded upon the TWEA and the FAA. Under those two 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, of course, would probably dictate that the President work closely with Congress before taking any such action.

The CDA presents a more complex 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 (*e.g.*, the accession to power in Cuba of a government elected through free and fair elections conducted under internationally recognized observers), 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 United States federal courts. The proposed LIBERTAD Act imposes an additional set of conditions for suspending, and eventually lifting, the embargo.

One consequence of the imposition of a definite set of conditions before the President is able to 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 § 1708(a) of the CDA and the LIBERTAD Act (if enacted), the President may not be able to lift the embargo for a significant period of time while events unfold on the island. More likely than not, the transition in Cuba will not follow the clean pattern predicted in the CDA, and additional legislation will be needed to enable the President to remove all or part of the embargo before the CDA's conditions are fulfilled. Alternatively, Congress could enact legislation now that clarifies that the President retains the authority, normally vested in the

President's office by the Constitution to conduct foreign affairs, to decide on the timing and conditions for lifting the embargo.

Aside from these statutory issues, the President can rescind at will most of the embargo regulations issued by various government agencies under the President's delegated authority. In particular, he is empowered to revoke the Cuban Assets Control Regulations, which were issued under his TWEA authority. The only exceptions to this Presidential power are those regulations issued to implement direct provisions in a statute, such as the new trade restrictions imposed by Section 1706 of the CDA.

In addition to authorizing the imposition of a trade embargo, the FAA has cut off all U.S. economic aid to the present government of Cuba. Moreover, 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, or until he determines that 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. The FAA's prohibition of giving aid to Cuba is directly or indirectly responsible for Cuba's exclusion from numerous economic assistance programs that the United States has developed in the last thirty years, both for the benefit of countries in Latin America and the Caribbean and to assist friendly nations worldwide.

The FAA's total ban on aid to Cuba has been modified by the CDA. Section 1705 of the CDA authorizes private donations of food, medicines and medical supplies to Cuban nationals living under the current Cuban regime, provided certain conditions are met. Section 1707 allows the U.S. government to provide food, medicines and medical supplies to a transition government in Cuba, and Section 1708 authorizes the President to provide unspecified emergency relief to a Cuban government elected in free and fair elections. (The proposed LIBERTAD Act provides additional definition of the types of aid that could be made available to Cuba.) While the President has to make a series of determinations in order to provide aid to Cuba under §§ 1707 and 1708, he does not have

to determine that Cuba has taken appropriate steps to resolve the U.S. citizen property claims. The CDA's failure to reassert this condition leaves the continuing vitality of the claims resolution requirement in the FAA open to question.

Missing from the CDA and other U.S. laws relating to Cuba are any provisions to incorporate Cuba, once the embargo is lifted, into the various economic aid programs sponsored by the U.S. government or in which the United States participates. Title II of the proposed LIBERTAD Act directs the President to take steps to bring a democratic Cuba within the coverage of some U.S. sponsored economic aid programs. This bill, or another like it, needs to be enacted before the Cuban transition begins so that the U.S. government agencies will be prepared to take expeditious action to admit Cuba into all applicable assistance programs. Such action will need to include in certain cases the enactment of additional, agency-specific legislation.

Many other U.S. statutes contain provisions that impede trade with, or assistance to Cuba. A systematic search for those provisions should be undertaken now so they can be identified and removed either by Executive action or by legislation when conditions in Cuba warrant it.

Finally, the Federal government should establish, perhaps under the overall leadership of the Department of State, an interagency task force to 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. This task force is needed now, because its scope of work is significant and there are indications that the transition process is taking place, albeit slowly, in Cuba already.