

# Requirements For Lifting the U.S. Trade Embargo Against Cuba

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## I. Overview

Anyone familiar with the history of relations between the U.S. and Cuba in the last thirty years knows that the U.S. has in place a strict embargo on trade with and economic assistance to Cuba. Many people are not aware, however, of the full reach of the embargo and the way in which it operates to exclude Cuba from programs that the U.S. has instituted or in which it participates, and which provide economic benefits to other Latin American and Caribbean nations. It is also not generally known that lifting the embargo could require multiple actions by the Executive and Congress. Some of these actions are capable of swift implementation, while others may involve a process that could extend for 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. The paper is divided in three parts. Part I presents a summary of the U.S. laws and regulations that impose the embargo, and describes the conditions that must be met before the embargo can be lifted, as well as the actions that the United States would need to take to remove the embargo's prohibitions. Part II identifies the indirect consequences of the embargo in excluding Cuba from a number of U.S. assistance programs for which Cuba would qualify but for the existence of the embargo. This is followed by a brief accounting of the actions that would be necessary to remedy the indirect effects of the embargo. Part III offers some conclusions and recommendations.

This paper is not intended to express any views on whether the embargo should be lifted or modified under current conditions.

## PART I -- THE DIRECT EMBARGO

### A. Express Embargo Provisions

The U.S. 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 detailed regulations, the Cuban Assets Control Regulations, issued and administered by the U.S. Department of the Treasury ("Treasury").

This section describes the genesis, purpose and effect of the main statutes and regulations that impose economic sanctions against Cuba.<sup>[1]</sup>

#### 1. The Trading with the Enemy Act

The Trading With The Enemy Act of 1917 (the "TWEA"), 50 U.S.C. App. [[section]] 1 et seq., was enacted as the U.S. 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.<sup>[2]</sup>

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. Section 2, Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1, 50 U.S.C. App. [[section]] 5, also codified at 12 U.S.C. [[section]]95a. As amended, Section 5(b) of the TWEA read:

During time of war or any other period of national emergency declared by the President, the President

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

The legislative history is again vague about the purposes behind the 1933 amendment to Section 5(b) of the TWEA.<sup>[3]</sup> Interpretations of the intent of the legislation have been provided after the fact by the courts and legal scholars. In 1971, for example, the Second Circuit noted:

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

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

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

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

The 1933 amendment to Section 5(b) was enacted in response to an economic emergency, but its authority was later invoked in connection with a military emergency, the Korean War. On December 16, 1950, President Truman issued Proclamation No. 2914, 15 Fed. Reg. 9029, reprinted in 1950 U.S. Code Cong. Service, Vol. 1 at 1557-58. The Proclamation 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>[4]</sup> At the time, Section 5(b) of the TWEA read in relevant part as follows:

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

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through or to any banking institution and the importing, exporting, hoarding,

melting, or earmarking of gold or silver coin or bullion, currency or securities, and

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

by any person, or with respect to any property, subject to the jurisdiction of the United States.

Immediately following President Truman's proclamation, the Secretary of the Treasury issued a set of regulations imposing a total embargo on unlicensed financial and commercial transactions between U.S. nationals and Communist China and North Korea.<sup>[5]</sup> These regulations, known as the Foreign Assets Control Regulations ("FACR") were published on December 17, 1950 and codified at 31 C.F.R. Part 500.

The FACR were the first detailed regulations promulgated to impose a trade embargo on a foreign country under Section 5(b) of the TWEA. The FACR later served as the model for similar regulations issued in 1963 imposing a trade embargo on Cuba. When Treasury issued the Cuban embargo regulations (further described below), it invoked Section 5(b) of the TWEA as a basis for imposing the trade embargo.<sup>[6]</sup>

U.S. courts have upheld the President's exercise of the powers granted by the TWEA and the promulgation of regulations by 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. Regan v. Wald, 468 U.S. 222, 225-26, 104 S.Ct. 3026, 3029-30 (1984).

This broad presidential authority was limited in 1977 by Congress, which amended 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). Pub. L. 95-223, 91 Stat. 1625. By doing so, Congress removed the President's ability to invoke the existence of a national emergency and impose a trade embargo against a foreign country pursuant to the TWEA.<sup>[7]</sup> However, instead of requiring the President to declare a new national emergency in order to continue embargoes such as that in place against Cuba, Congress grandfathered existing exercises of the President's "national emergency" authority. Pub. L. 95-223, Section 101(b), 91 Stat. 1625, note following 50 U.S.C. App. [[section]] 5.<sup>[8]</sup> Continued applicability of this "grandfathering" provision requires annual determinations by the President that the exercise of such authority with respect to each affected country is in the national interest of the United States.

Thus, 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 and Bush issued annual Determinations that extended the state of emergency with respect to Cuba since the imposition of this requirement. 50 U.S.C. [[section]] 5 App., notes (1993). The most recent Presidential Determination extends the state of emergency until September 14, 1993. Presidential Determination No. 92-45, Aug. 28, 1992, 57 Fed. Reg. 43125, reprinted in 50 U.S.C. [[section]] 5 App., notes (1993). Therefore, President Clinton must issue a Determination by that date that continued exercise of his authority under Section 5(b) of the TWEA with respect to Cuba is in the national interest if the TWEA is to continue to provide authority for the Cuban embargo.

## **2. The Foreign Assistance Act of 1961**

The Foreign Assistance Act of 1961 ("the FAA"), 22 U.S.C. [[section]] 2151 et seq., was enacted "to give vigor, purpose, and new direction to the foreign aid program." S.R. No. 612, 87th Cong., 1st. Sess.

(1961), reprinted in 1961 U.S.C.C.A.N. 2472, 2473. Congress viewed the FAA as an integral part of the U.S. foreign policy of promoting the development of the "southern continents." *Id.*, at 2475-76. Through the FAA, Congress undertook to give continuity and direction to the many aid programs already operating in this area. *Id.*, at 2475-2478.

At the same time Congress set out to provide assistance to other nations by enacting the FAA, it also sought to deny assistance to Cuba, and gave the President specific authority to impose a trade embargo on Cuba. Section 620(a) of the FAA, 22 U.S.C. [[section]] 2370(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. This provision apparently arose from a desire in Congress to respond to Cuba's expropriation of the assets of U.S. citizens.<sup>[9]</sup> 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 (87th Cong., 1st Sess., 107 Cong. Rec., S17705-06 (August 31, 1961)):

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.

President Kennedy availed himself of the authority granted by the Foreign Assistance Act of 1961 to declare a trade embargo against Cuba. He did this in Proclamation 3447 of February 3, 1962, 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 Commerce "to continue to carry out the prohibition of all exports from the United States to Cuba." Proclamation 3447, 27 Fed. Reg. 1085, 3 C.F.R., 1059-63 Comp., p. 157.<sup>[10]</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. See, American Documentary Films, Inc. v. Secretary of the Treasury, 344 F.Supp. 703, 707-8 (1972); R.C.W., Supervisor, Inc. v. Cuban Tobacco Company, Inc., 220 F.Supp. 453, 463 (1963).

In 1962, Congress reinforced the denial of assistance to Cuba by adding a Sub-section (f) to Section 2370 of the FAA, in which it denies assistance to all communist countries. 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. 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 further promote the independence of the recipient country from international communism.

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

A new Sub-section (h), also added to 22 U.S.C. [[section]] 2370 by the 1962 amendment to the FAA, complements Sub-section (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.

Similarly, Sub-section (e) (22 U.S.C. [[section]] 2370(e)) covers countries that have nationalized or expropriated United States property, reinforces the specific sanctions imposed against Cuba in Sub-section (a), and provides requirements that reproduce essentially those included in Sub-section (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 they remain under Communist rule. There has been no recent indication of a change in this position by Congress.

### **3. The Cuban Democracy Act of 1992**

Last year, Congress enacted legislation intended to promote 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, Pub. L. 102-484, 106 Stat. 2575, 22 U.S.C. [[section]] 6001 et seq. ("the CDA").

The CDA contains a statement of United States policy towards Cuba that announces, among others, policies "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." Section 1703 of the CDA, 22 U.S.C. [[section]] 6002.

In pursuit of these policies, the CDA imposes additional limitations on trade with Cuba, contained in Sections 1704 through 1708. 22 U.S.C. [[section]][[section]] 6003-6007. Section 1704 is directed at countries receiving assistance from the U.S., such as the republics of the former Soviet Union. 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. 22 U.S.C. [[section]]6003.

Section 1705 of the CDA authorizes the donation of food, medicines and medical supplies to nongovernmental organizations or individuals in Cuba, and the export of medicines and medical supplies to Cuba, the latter subject to certain limitations (no export is allowed where there is reasonable expectation that the items will be used for purposes of torture, for the production of biotechnological products, or for re-export), and also subject to verification by the U.S. government that the exported items are to be used for the purposes for which they were intended and only for the use and benefit of the Cuban people. 22 U.S.C. [[section]]6004. 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 (22 U.S.C. [[section]]6005) terminates the ability of foreign subsidiaries of U.S. companies to trade with Cuba. It also prohibits entry into the U.S. 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. 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.

Section 1707, U.S.C. [[section]]6006, allows the provision of food, medicine and medical supplies to Cuba for humanitarian purposes if the President "determines and certifies to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate that the government in power in Cuba --

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

Finally, Section 1708(a) of the CDA, 22 U.S.C. [[section]] 6007(a), 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).

Section 1708(b) further provides that, if the President makes the above determinations, he shall take the following actions "with respect to a Cuban government elected pursuant to elections described in subsection (a)":

(1) To encourage the admission or reentry of such government to international organizations and international financial institutions.

(2) To provide emergency relief during Cuba's transition to a viable economic system.

(3) To take steps to end the United States trade embargo of Cuba.

The conditions listed in Sections 1708(a) and (b) of the CDA appear to 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. [\[11\]](#)

#### 4. Cuban Assets Control Regulations

As indicated earlier, 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 ("OFAC"). Treasury Department Order No. 128 (Rev. 1, Oct. 15, 1962). OFAC has since that time been the office responsible for issuing, interpreting and applying the embargo regulations. See, 31 C.F.R. [\[section\]](#)[\[section\]](#)515.801-515.809.

OFAC published in 1963 a comprehensive set of regulations implementing the Cuban trade embargo. 28 Fed. Reg. 6974, July 9, 1963. The regulations, known as the Cuban Assets Control Regulations ("CACR"), are codified in 31 C.F.R. Part 515, and have been amended a number of times, including very recently. [\[12\]](#)

The CACR have been challenged a number of times, and have been in most instances upheld by the courts. *See, e.g., Regan v. Wald, supra; Miranda v. Secretary of Treasury*, 766 F.2d 1 (1st Cir. 1985); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966). [\[13\]](#)

The CACR parallel the Foreign Assets 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 to dollar financial facilities. S.L. Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 79 Bus. Law. 861, 868 (1964). 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, and telecommunications services and attendant equipment. [\[14\]](#) 31 C.F.R. [\[section\]](#)[\[section\]](#) 515.201, 515.206. Likewise, goods or services of Cuban origin may not be imported directly or through third countries into the United States, except for up to \$100 worth of Cuban merchandise which may be brought into the U.S. by authorized travelers, publications or other informational materials, and paintings, drawings and sculptures less than \$25,000 in value. 31 C.F.R. [\[section\]](#)[\[section\]](#) 515.204, 515.560, 515.570. 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 assets. No payments, transfers, withdrawals, or other dealings may take place with regard to

blocked property unless authorized by Treasury. 31 C.F.R. [[section]] 515.205.

U.S. persons may send up to \$300 every three months to the household of a close relative in Cuba and up to \$500, on a one time basis, to enable a close relative to emigrate from Cuba to the United States. Persons in the U.S. may also send up to \$500 to Cuba to pay for travel expenses for any Cuban national who has received an entry visa from the U.S. Department of State. 31 C.F.R. [[section]] 515.563.<sup>[15]</sup> Gifts or parcels may be sent to Cuba, or carried by an authorized traveler, for the use of the recipient or the recipients' immediate family, provided the total value of the items in the parcel does not exceed \$200, only one parcel is sent per month by the same person to the same recipient in Cuba, and only items normally sent as gifts (such as food, medicines, clothing, and toiletries) are included.

The CACR prohibit spending money in connection with tourist, business or recreational trips to Cuba, whether travelers go directly to Cuba from the U.S. or proceed via a third country. The categories of persons who may spend money related to travel to Cuba (after obtaining specific licenses from Treasury) include individuals traveling for clearly defined educational or religious activities, for activities of recognized human rights organizations, for purposes of public performances or exhibitions, for purposes related to the export, import, or transmission of information or informational materials, and for purpose of negotiating contractual arrangements for telecommunications services. Expenditure of money related to travel to Cuba is authorized without a specific license for travel by U.S. government and foreign officials, professional researchers whose research is specifically related to Cuba, members of the news media, and persons traveling to visit close relatives in Cuba. 31 C.F.R. [[section]] 515.560; *see also*, 58 Fed. Reg. 34711 (June 29, 1993).

## **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. 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 through an executive order or a treaty with Cuba. The sanctions imposed by the FAA and the CDA, on the other hand, are directly addressed 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 three statutes to understand how the President and Congress might interact to remove the embargo's prohibitions. Before proceeding with the analysis, however, it is instructive to examine how the U.S. 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 U.S. 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 upon Rhodesia were imposed by Presidents Johnson and Carter pursuant to express authority granted to the

President by a statute, much like President Kennedy did with regard to Cuba under the Foreign Assistance Act of 1961. Finally, sanctions against South Africa were imposed directly by Congress, as was done in the CDA.

*a. China*

As mentioned earlier, the sanctions imposed by President Truman against 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 (45 Fed. Reg. 7224, January 31, 1980) explained:

The Office of Foreign Assets Control is amending [[section]] 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 [[section]] [[section]] 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 U.S. 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 conclude a treaty with Cuba (as was the case in China), or might issue an executive order directing OFAC to take the steps 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, 22 U.S.C. [[section]] 287c, 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. Executive Order No. 11322, 32 Fed. Reg. 33 (1967), reprinted in 1967 U.S.C.A.A.N. 3453-54. In 1968, the President expanded the sanctions to prohibit all trade with Rhodesia, again pursuant to Security Council resolutions. Executive Order No. 11419, 33 Fed. Reg. 10837 (1968), reprinted in 1968 U.S.C.A.A.N. 4711-13.

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.

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 re-imposition 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. [[section]] 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. Executive Order No.12183, 44 Fed. Reg. 74787 (1979), reprinted in 1979 U.S.C.C.A.N. 3375-6.

The Rhodesian example indicates that Congressional action is not needed to end an embargo where the President has been given express authority to impose the embargo in the first place and Congress has neither set conditions for the lifting of the embargo nor reserved any review power over the President's decision. In this situation, all the President needs to do is 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 regulations that instituted the embargo against Cuba.

### *c. South Africa*

The South African embargo was based upon an Act passed by Congress in 1986. 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. [[section]] 5001 et seq. ("the CAAA").

The 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"), 22 U.S.C. [[section]] 5011(a), and imposed --among other sanctions-- explicit prohibitions on the importation from and export to South Africa of certain items. 22 U.S.C. [[section]][[section]] 5051 through 5073. Congress left open the possibility of imposing additional sanctions upon recommendation by the President. 22 U.S.C. [[section]][[section]] 5091(c) and 5094. The sanctions would terminate if the government of South Africa took five measures specified in 22 U.S.C. [[section]] 5061(a).

Alternatively, the President could suspend or modify the sanctions under the conditions specified in 22 U.S.C. [[section]] 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 --

(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 [[section]] 5061(a); or through a determination by the President under [[section]] 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 Executive Order 12769 of July 10, 1991, 56 Fed. Reg. 31855, reprinted in 1991 U.S.C.C.A.N. B50. The Executive Order cited as basis for lifting the sanctions the President's conclusion that the government of South Africa had taken all of the steps specified in section 311(a) of the Act. The Executive Order declared that "title III and sections 501(c) and 504(b) [22 U.S.C. [[section]][[section]] 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>[16]</sup> Thus, the President followed the course of [[section]] 5061(a) and proclaimed that the embargo had ended without referring his decision to Congress.<sup>[17]</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 ordains 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 [[section]] 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 [[section]] 5061(a). Since the CDA does not give the President this option, Congress would need to receive concrete evidence 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.

#### *d. Summary*

The actions taken by the U.S. 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 presents a good example of a self-executing determination, in that Congress authorized the President to act unilaterally. The FAA and the CDA, on the other hand, require 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 straightforward. The simplest 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 could 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, 22 U.S.C. [[section]] 2370(a)(1), authorizes the President to "establish and maintain a total embargo upon all trade between the United States and Cuba." This Section is clearly permissive and leaves the President free to determine whether to "maintain" the embargo, and consequently whether to lift it. The President could remove the embargo, to the extent it is imposed under this provision, by an executive order that rescinds President Kennedy's Proclamation and revokes all subsequent executive orders 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 U.S. 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 U.S. 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>[18]</sup> The FAA leaves it to the President to determine whether the Cuban government has indeed taken such "appropriate steps."<sup>[19]</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, 22 U.S.C. [[section]] 6007(b)(3), directs the President to "take steps to end the United States trade embargo of Cuba" when two conditions have been met: *First*, that the President has made a determination, and reported it to Congress, that the Cuban government has taken the five steps identified in [[section]] 1708(a), including holding free and fair elections conducted under international supervision, permitting opposition parties ample time to organize and campaign for such elections, showing respect for the basic civil liberties and human rights of 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. *Second*, that a Cuban government has been elected as a result of such free and fair elections.

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." Section 1703 of the CDA, 22 U.S.C. [[section]] 6002.

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 certifies to Congress that the government in power in Cuba has made public commitments to holding free and fair elections within six months and to respecting human rights and basic democratic freedoms, and is implementing those commitments; and is not providing weapons or funds to any group in another country that seeks the violent overthrow of the government of that country.

#### *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 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>[20]</sup> This 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 pre-condition to giving economic assistance to Cuba.

#### *e. Summary*

If events in Cuba were to proceed in an orderly manner that met the requirements of Section 1708 of the CDA, the President could simply follow the section's guidelines and lift the embargo sanctions while remaining accountable to Congress. Under this scenario, once the President submitted to Congress the reports required by the CDA, the President could issue an executive order similar to that issued by President Bush to lift the South African embargo. The President would also order all affected executive departments and agencies, including Treasury, State and 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.

If, however, the events in Cuba do not fit the pattern set out in Section 1708 of the CDA, the embargo would remain in place until the conditions in Cuba conformed to the CDA's requirements, or until new legislation was enacted.

## **II. The Indirect Embargo**

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

In the three decades since the triumph of Cuba's revolution, the U.S. has instituted a series of programs designed to assist in the economic development of the less affluent nations in the hemisphere. Together with non-region-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 non-regional programs and preferences; programs with a commercial purpose, as well as humanitarian assistance grants with significant commercial impact; programs run by the U.S. government, as well as those funded by the government but administered by outside organizations; 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 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 U.S. or involving significant U.S. 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.

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.[\[21\]](#)

The main vehicles for this assistance are the Enterprise for the Americas Initiative ("EAI"), the Caribbean Basin Initiative ("CBI"), and a number of other economic aid programs whose applicability is generally not limited to the Americas.[\[22\]](#)

#### **1. The Enterprise for the Americas Initiative**

Announced by President Bush in 1990, the Enterprise for the Americas Initiative aims to bring prosperity throughout the Western Hemisphere by encouraging three "pillars" of economic development -- free

trade, increased U.S. investment in Latin American and Caribbean economies, and reduction of the region's heavy debt burden.<sup>[23]</sup> Some of the EAI's programs have already gone into effect. President Clinton has yet to signal his commitment to the uncompleted elements of the program.

#### *a. Free Trade Agreements*

Starting during the Bush Administration, the U.S. has been conducting negotiations on trade and investment liberalization with many of the Latin American and Caribbean nations.<sup>[24]</sup> As of January 1993, the United States had signed "framework agreements" with 31 countries as the first step towards bilateral and multilateral free trade agreements. These free trade agreements would 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 U.S. An agreement of this nature between the U.S. and Cuba would pave the way towards re-establishing the special relationship that existed between the two countries before the Cuban revolution.

When the Bush Administration negotiated the North American Free Trade Agreement ("NAFTA") with Canada and Mexico, it hoped that NAFTA would serve as the model after which future bilateral and multilateral free trade agreements would be styled.<sup>[25]</sup> If implemented, NAFTA could become the first step towards creating a hemisphere-wide free trade zone. NAFTA has an accession clause that would allow entry by other nations, subject to the agreement of the existing parties. However, no eligibility criteria or application mechanism are described in the agreement.

Congressional friends of the Caribbean nations have introduced H.R. 1403, "The Caribbean Basin Free Trade Agreements Act," a bill that would grant Caribbean products parity of treatment with Mexican goods under NAFTA. This parity would last three years after NAFTA goes into effect, allowing the Caribbean nations time to seek entry into NAFTA or negotiate separate free trade agreements with the United States. Unless a NAFTA parity law is enacted, NAFTA could undermine the trading preferences the Caribbean countries gained under the Caribbean Basin Initiative, discussed below. Legislation such as the NAFTA parity bill could afford Cuba many of the benefits of NAFTA membership before Cuba joins any multilateral trade agreements.

#### *b. Investment Programs*

The EAI utilizes two vehicles for providing seed capital in Latin American and Caribbean nations. The U.S. has pledged to contribute \$500 million to the Multi-lateral Investment Fund ("MIF") established January 11, 1993 for a five-year period of lending. The MIF will stimulate the creation of micro-enterprises, small businesses, and other forms of entrepreneurship, and will be used to encourage the adoption of sound economic policies in Latin America in order to foster private investment in recipient countries. Similarly, the Investment Sector Loan Program has already made loans of over \$1.1 billion to those Latin American and Caribbean governments that have implemented measures to liberalize their economies.<sup>[26]</sup> L. 102-391 of October 6, 1992.

Both of these EAI programs are administered by the Inter-American Development Bank.

#### *c. Official Debt Reduction*

The United States has reduced the debt obligations of seven countries by \$875 million under the EAI. (See 22 U.S.C. [[section]]2430c.) Foreign governments incurred this official debt to the United States through non-concessional loans by the Commodity Credit Corporation ("CCC") and the Export-Import Bank ("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.

## **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 ("CBI I"), as amended and supplemented in 1990 ("CBI II").<sup>[27]</sup> On a smaller geographic scale than the EAI, 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. 19 U.S.C. [[section]]2702(b). Over two dozen countries reap CBI benefits. While CBI I was set to expire in 1995, CBI II made permanent the initiative's programs and preferences.

### *a. Duty-free entry into the U.S. of eligible products from CBI countries*

Under Harmonized Trade Schedule Item 9802, a wide variety of products from CBI-designated 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 made with components from non-CBI countries has been transformed sufficiently to receive duty-free treatment. 19 U.S.C. [[section]][[section]]2701, 2703; 19 C.F.R. [[section]]10.

### *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>[28]</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 ("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.

### *d. Section 936 Funds and Other Tax Incentives*

One positive development in the Caribbean Basin Initiative has been the unexpected level of investment activity undertaken under the auspices of the Internal Revenue Code Section 936 tax incentive program. "Section 936 Funds" are created by the deposit in Puerto Rican banks of the profits of U.S. corporate subsidiaries operating in Puerto Rico. 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.

Since 1987, these funds have also been available for investment in active business assets and development projects in eligible CBI-beneficiary countries. 26 U.S.C. [[section]]936(d)(4). As of mid-1992, \$620 million in Section 936 Funds had been disbursed for 33 projects in CBI countries, and the total could amount to \$1.5 billion by the end of this year. Since the program's inception, Section 936 Funds have accounted for an average of 22% of total loan financing in these countries, and now provide a greater share of loans to eligible countries than direct lending from the Inter-American Development Bank.

Although the Section 936 Funds have become a valuable development tool in the Caribbean Basin, the tax incentive program is under attack. President Clinton is proposing to reform the plan to produce more revenue, while some members of Congress wish to end the plan altogether because of the benefits that corporations reap from this tax shelter. If Section 936 Funds continue to be available at the time the trade embargo is lifted, and assuming Cuba qualified for CBI benefits, such funds would provide an important means of channeling private investment into Cuba.

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. [[section]]274(h)(6). 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. 26 U.S.C. [[section]][[section]]921-927.

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

In 1986, the U.S. Trade Representative's office waived for CBI countries certain restrictions on U.S. government procurement of foreign products.[\[29\]](#) 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 also lowered its own restrictions on government procurement of U.S. products. 19 U.S.C. [[section]]2511. 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. 19 U.S.C. [[section]]1677(7)(C)(iv)(II). 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.

### **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 U.S. attention 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 ("USAID") conducts a vast array of development projects and assistance programs from its field missions around the world.<sup>[30]</sup> USAID has drawn criticism for being wasteful and over-bureaucratic. Perhaps as a result, Congressional funding for USAID development projects has been curtailed in recent years.

USAID administers three basic categories of non-emergency assistance.<sup>[31]</sup> The first, Economic Support Funds ("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.

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. 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.

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

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

In addition, DA funds are used for a broad category of Private Sector Development projects. Coordinated

by USAID's Bureau for Private Enterprise and the Office of Trade and Investment, these projects include:

- privatization financing for U.S. businesses
- providing capital for private sector development banks and credit facilities to small- and medium-size businesses and micro-enterprises
- the Business and Development Network of regional offices providing business information and services
- training programs in investment, management and marketing for nationals of beneficiary countries
- helping beneficiary countries establish export and investment promotion offices
- the Private Sector Revolving Fund: loans, credit guarantees and training for projects with substantial developmental impact
- financial support for joint ventures in energy development
- the Forfeit Guarantee Program, rendering financing assistance to U.S. companies wishing to export to AID-assisted developing countries
- the Franchise Guarantee Program, providing loans to indigenous entrepreneurs to become franchisees of U.S. corporations.

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 ("OPIC") is a self-financing federal corporation with the mission of assisting U.S. investors in developing countries and emerging economies. 22 U.S.C. [[section]]2191. 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 \$500,000 to \$6 million, while loan guarantees can reach \$50 million. The loans are made at interest rates generally comparable to commercial rates, but loan terms vary according to a project's 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 (1-800-USA-TRADE), 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 ("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 U.S. Foreign Commercial Service has officers in overseas posts scouting commercial opportunities for U.S. investors and traders.

The Generalized System of Preferences ("GSP"), administered by the Commerce Department, permits developing countries duty-free entry to the U.S. market on eligible products. 19 U.S.C. [[section]] [[section]]2461, 2462; 15 C.F.R. [[section]]2000. GSP expired on July 4, 1993, but President Clinton is requesting Congress to renew the program.

### 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.[\[32\]](#)

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 U.S. goods and services to creditworthy foreign buyers. 12U.S.C. [[section]]635; 12 C.F.R. [[section]]411. 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 ("SBA") is an independent federal agency charged with counseling, aiding and protecting U.S. businesses that meet its size requirements. 15 U.S.C. [[section]]636. The SBA's Office of International Trade provides information and services to small businesses on exports and

investments abroad. Among the services provided is access to the Export Legal Assistance Network, a nationwide group of international trade attorneys who provide initial consultations to small businesses. The SBA also has its own International Trade Loan program, guaranteeing 85% of loans up to \$1 million.

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 ("TDA"), is also charged with some of the functions described above. 22 U.S.C. [[section]]2421. The TDA hosts foreign officials and businessmen to the United States on reverse trade missions and provides grants for feasibility studies, consulting and project planning for major projects in developing countries. The projects involve high-priority sectors such as agribusiness, energy, telecommunication and transportation. TDA's grants for these projects range between \$150,000 and \$750,000. TDA also offers Technical Assistance Grants to involve U.S. technical experts in development projects underway.

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. 22 U.S.C. [[section]]2501 and 22 C.F.R. Chapter III. 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.

j. U.S. Information Agency

The U. S. Information Agency ("USIA") directs a host of programs from its overseas missions to spread American ideals of liberty, democracy and free enterprise. 22 U.S.C. [[section]]1461 and 22 C.F.R. Chapter V. 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 ("IAF") is another independent federal agency, which provides grants to local self-help and development organizations throughout Latin America. 22 U.S.C. [[section]]290; 22 C.F.R. [[section]][[section]]1001-07. 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**

Once 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.[\[33\]](#) This section summarizes the actions needed under present 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. [\[\[section\]\]](#) 2430b. To be eligible, a Latin American or Caribbean country must have a government that is democratically elected, does not provide support to acts of international terrorism, cooperates on international narcotics control matters, does not engage in systematic human rights abuses, and is making strides towards economic liberalization. 22 U.S.C. [\[\[section\]\]](#) 2430b(a). 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. 22 U.S.C. [\[\[section\]\]](#) 2430b(b).

Becoming EAI-eligible would allow Cuba to reduce, pursuant to 22 U.S.C. [\[\[section\]\]](#) 2430c, any official debt to the United States government that has remained outstanding since the two countries severed relations. But participation in EAI's two other "pillars" -- investment funding and trade liberalization -- would require further steps.[\[34\]](#)

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 world communist movement. 19 U.S.C. [\[\[section\]\]](#)1351. Second, under the Trade Act of 1974, 19 U.S.C. [\[\[section\]\]](#)2431 et seq., the President would not be able to extend non-discriminatory trade treatment to Cuba without submitting a report to Congress that Cuba's emigration restrictions no longer exist. 19 U.S.C. [\[\[section\]\]](#)2432(b). 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. 19 U.S.C. [\[\[section\]\]](#)[\[\[section\]\]](#) 2434 and 2435(b).

## 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 a beneficiary country, because "the President shall consider only" a specific list of 27 Caribbean Basin countries-- not including Cuba. 19 U.S.C. [\[\[section\]\]](#) 2702(b). 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. [\[\[section\]\]](#)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.

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. 19 U.S.C. [[section]]2702(b).

Designation as a CBI beneficiary would immediately gain Cuba duty-free entry of designated products into the U.S. market. Cuba would also stand to gain automatically if Congress passed the bill now pending to grant CBI countries' products parity of treatment with Mexican products under an enacted North American Free Trade Agreement. (H.R. 1403, The Caribbean Basin Trade Agreement Act.) Special treatment for Cuban products in enforcement of countervailing duty and anti-dumping laws would also go immediately into effect. 19 U.S.C. [[section]]1677(7)(C)(iv)(II). The U.S. Trade Representative could act under Executive Order No.12260, 48 Fed. Reg. 1653, to add Cuba to the list of CBI countries for which U.S. government procurement restrictions were waived in 1986. 51 Fed. Reg. 6964, February 27, 1986.

Access to hundreds of millions of dollars in "936 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. 26 U.S.C. [[section]] 936(d)(4). Likewise, Cuba would not benefit from the CBI Convention Tourism Tax Credit until the tax agreement is signed. 26 U.S.C. [[section]]274(h)(6). Negotiation of tax treaties between the U.S. and foreign countries is often a protracted process.

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. 22 U.S.C. [[section]] 2191 et. seq. 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 U.S. would need to enter into such an agreement.

### 5. Generalized System of Preferences

The Generalized System of Preferences for developing countries, 19 U.S.C. [[section]]2461 et seq., does not specifically identify Cuba as a country 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." 19 U.S.C. [[section]]2462(b)(1). 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. 19 U.S.C. [[section]]2462(b)(2)-(7). 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, 7 U.S.C. [[section]] 1691 et seq., 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. 7 U.S.C. [[section]]1703(d). Food aid under the International Development and Food Acts, codified in 22 U.S.C. Chapter 32, falls under the anti-Cuba restrictions of the Foreign Assistance Act of 1961 and would be available if the FAA's prohibitions were lifted.

## 7. Export-Import Bank

Cuba is presently excluded by name from those countries wherein Export-Import Bank guarantees, insurance or credit may be used. Only a Presidential determination that Cuba has ceased to be Marxist-Leninist, or that an Eximbank transaction involving Cuba is in the national interest, can lift the prohibition. 12 U.S.C. [[section]] 635(b).

## 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 (22 U.S.C. [[section]]2421), the U.S. Peace Corps (22 U.S.C. [[section]]2501 et seq.), the Inter-American Foundation (22 U.S.C. [[section]]290), the Small Business Administration (15 U.S.C. [[section]] 636) and the U.S. Information Agency (22 U.S.C. [[section]] 1461).

## 9. The Free and Independent Cuba Assistance Act of 1993

As discussed earlier (see n.20, supra), a bill recently introduced in Congress would, in one leap, direct the President to accomplish most of the actions identified in the above discussion as necessary to involve Cuba in U.S. preferences and assistance programs after the trade embargo is lifted. The Free and Independent Cuba Assistance Act of 1993 (H.R. 2758) ("the Act") aims to coordinate the delivery of emergency assistance to a "transition" Cuban government, i.e., one making significant progress towards democracy and economic liberalization. Programs available to a transition government would be in the nature of emergency and humanitarian assistance programs, including U.S. support for multilateral assistance.

The Act would deliver a wide range of benefits once Cuba reached democracy. At that point, the Act would call for the President to consider Cuba for designation as a CBI beneficiary, and would amend the Caribbean Basin Economic Recovery Act's list of eligible countries to include Cuba-- giving the President the authority to hasten Cuba's designation.

Once a democratic government was installed in Cuba, the Act would also have the United States provide Economic Support Funds, Development Assistance programs, food aid, Export-Import Bank financing and insurance, finance support from the Overseas Private Investment Corporation, Trade and Development Agency assistance, Peace Corps programs, and relief of Cuba's external debt. The Act also would direct the President to negotiate a free trade agreement with Cuba.

Even though not all-encompassing, the Act exemplifies the type of comprehensive 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.

### **III. 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 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 [[section]] 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 courts.

One consequence of the CDA's 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 [[section]] 1708(a) of the CDA, the President may not be able to lift the embargo for a significant period of time while events unfold in 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 Constitutional grant of power to the President 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 U.S., 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 U.S. 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 recently been modified by the CDA. Section 1705 of the CDA authorizes private donations of food, medicines and medical supplies to Cuban nationals 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. While the President has to make a series of determinations in order to provide aid to Cuba under [[section]][[section]] 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 open to question the continuing vitality of the claims resolution requirement in the FAA.

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 U.S. participates. There is, however, a bill now pending in Congress (H.R. 2758) that would direct the President to take steps to bring a democratic Cuba within the coverage of most 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 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 starting in Cuba already.

# Footnotes

## Requirements For Lifting the U.S. Trade Embargo Against Cuba

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[1] Embargo-related prohibitions against activities relating to Cuba are sprinkled throughout the U.S. laws. For example, Section 951 of Title 18 of the United States Code 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. 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 International Security and Development Cooperation Act of 1980, Pub.L. 96-533, 94 Stat. 3131 (1980). This statute, which encompasses a variety of assistance programs covering military, economic and developmental aid, provides in Section 717 that "[n]one of the funds authorized to be appropriated by this Act may be used to provide assistance to the Governments of Cuba, Vietnam, or Cambodia." 94 Stat. 3162.

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] When Congress enacted the TWEA in 1917, it did not include in the legislation a statement of purpose or policy of the type contained in many laws today. As a result, Congress, the Courts and legal scholars have construed the TWEA in many different ways, in applying the statute to a variety of situations.

The voluminous legislative history of the TWEA includes little discussion of the purposes behind the law. One Senate Report, however, contains the following brief description:

The purpose of this bill is to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit under careful safeguards and restrictions, certain kinds of business to be carried on. It also provides for the care and administration of the property and property rights of enemies and their allies in this country pending the war.

S.R. No. 113, 65th Cong., 1st Sess. (1917), reprinted in J. B. Bingham, *Trading With the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency*, 158 (November 1976.)

[3] 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*, supra n.2.

[4] President Truman's proclamation of a national emergency with regard to the worldwide threat of communist aggression was in effect until it was superseded by the National Emergencies Act, Pub. L. 94-412, September 14, 1976, 90 Stat. 1255. 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 superseded the application of the National Emergencies Act to the TWEA 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 national emergencies that he wanted to keep in effect. In order to extend a TWEA emergency further, the President was also required to issue an annual determination that the extension was in the national interest. See nn.7 and 8, *infra*, and accompanying text.

[5] President Roosevelt delegated to the Secretary of the Treasury the authority granted to him by the TWEA to the extent of empowering Treasury to issue implementing regulations. Executive Order 9193, 3 C.F.R. 1174, 1175 (1942).

[6] President Kennedy imposed a complete trade embargo on Cuba by means of a Presidential Proclamation on February 3, 1962. In his proclamation (further discussed below), the President did not invoke his authority under Section 5(b) of the TWEA, but that under Section 620 (a) of the Foreign Assistance Act of 1961.

[7] In the same bill that amended Section 5(b) of the TWEA, Congress enacted new legislation that authorized the President to exercise essentially the same powers as those granted by Section 5(b), but restricted 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." Section 202(a), International Emergency Economic Powers Act ("IEEPA"), Title II, Pub. L. 95-223, 91 Stat. 1626, 50 U.S.C. [[section]] 1701(a). 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. 50 U.S.C. [[section]] 1703.

[8] Section 101(b) of Pub. L. 95-223 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.

[9] There was some impatience in Congress in 1961 about President Kennedy's failure to impose sanctions against Cuba. This dissatisfaction fueled the Congressional resolve to enact embargo legislation. Moreover, recent events, including Castro's pursuit of the spread of Communism throughout Latin America, provided the political climate necessary to include anti-Cuba legislation in the FAA.

[10] In 1960, authorization was suspended for most industrial export licenses to Cuba. 43 Dept. State Bull. 715 (1960). That same year, the President reduced the quota of Cuban sugar in the U.S. market to zero. Proclamation No. 3383, effective December 21, 1960, 25 Fed. Reg. 13131. Additional trade restrictions were imposed by other laws enacted in the 1960-1962 period. Therefore, by the time President Kennedy proclaimed a total trade embargo, trade between the

U.S. and Cuba was already essentially cut off.

[11] 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 Treasury to impose civil penalties of up to \$50,000 and forfeitures of property for violating the CDA's prohibitions. Section 1710, 22 U.S.C. [[section]]6009.

[12]. On June 29, 1993, 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 U.S. of vessels touching Cuban ports, and add civil penalty authority.

[13]. In recent cases, 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, *Regan v. Wald*, supra, 104 S.Ct. at 3029; *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 867 (D.C. Cir. 1984); *De Cuellar v. Brady*, 881 F.2d 1561, 1562 (11th Cir. 1989), cert. denied, 498 U.S. 895 (1990). See also, *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991); *Capital Cities/ABC, Inc. v. Brady*, 740 F.Supp. 1007, 1008 (S.D.N.Y. 1990); *Cernuda v. Heavy*, 720 F.Supp. 1544, 1546-47 (S.D.Fla. 1989). 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, 104 S.Ct. at 3029. In its Brief in *Wald*, the Government explained the advantages of TWEA authority (Brief for Petitioners, n.8):

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 recordkeeping, 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.

The Court in *Wald* also observed that, "the Foreign Assistance Act does not provide criminal penalties for violations of the regulations promulgated under it. TWEA does so provide." *Wald*, supra, 104 S.Ct. at 3029.

[14] 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. [[section]] 6004(e), 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." 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. Treasury will license each company whose proposal is approved to remit to Cuba the full share of Cuba's earnings from telecommunication services provided by the company. Cuba's share of past earnings from telecommunication services between the United States and Cuba, which are held in blocked U.S. accounts, will not be released.

[15] Section 1706(c) of the CDA ordains that the President "shall establish strict limits on remittances to Cuba by United States persons for the purpose of financing the travel of Cubans to the United States, in order to ensure that such remittances reflect only the reasonable costs associated with such travel, and are not used by the Government of Cuba as a means of gaining access to United States currency." Implementation of this provision could result in further restrictions on the remittances for travel expenses to the U.S. by Cuban nationals.

[16] 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.

[17] 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 Reuter Business Report, 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, Federal 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 State concluded that the five requirements for termination set in 22 U.S.C. [[section]]5061(a) had been met, it so informed the President, and he proceeded to lift the sanctions.

[18] 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. [[section]]6004, specifically states, "[t]he provisions of this section apply notwithstanding any other provision of law, including section 620(a) of the Foreign Assistance Act of 1961...." This assertion overrides Sub-section (a), as well Sub-sections (e), (f) and (h) of Section 620 of the FAA. Also, Section 1707 of the CDA, 22 U.S.C. [[section]] 6006, effectively overrides all the provisions of Section 620 of the FAA with regard to providing food, medicine, and medical supplies for humanitarian purposes to Cuba once there is a government in the island that meets the requirements of Section 1707 of the CDA. Section 1707 does not mention the payment of compensation for nationalized or expropriated property as a prerequisite for providing aid to Cuba.

[19] 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.

[20] 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 a proposed bill introduced on July 27, 1993 by Rep. Robert Menendez (D-NJ). The bill ("The Free and Independent Cuba Assistance Act of 1993," H.R. 2758) would provide assistance to a transition government in Cuba.

The Menendez bill requires 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 a democracy and civilian life."

The Menendez bill defines a democratic government as one that: results from free and fair elections conducted under internationally recognized observers; has permitted opposition parties ample time to organize for such elections and permitted full access to the media to all candidates; 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.

[21] This paper will not address military, anti-narcotics and economic policy assistance programs, humanitarian aid programs, or most assistance provided by multi-lateral organizations funded in part by the U.S., such as the World Bank and the International Monetary Fund.

[22] 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 (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.

[23] Important elements of the EAI are codified in 22 U.S.C. [[section]]2430.

[24] Authority to negotiate trade agreements is described in 19 U.S.C. [[section]][[section]]1351 and 1821.

[25] President Clinton has yet to submit NAFTA to Congress, partly because of the U.S. insistence that Mexico agree to collateral agreements raising Mexican labor and environmental standards.

[26] Original authority for the investment funds is codified in 22 U.S.C. [[section]][[section]]2430 (f) and (g). Congress appropriated funds in Pub.L. 102-391 of October 6, 1992.

[27] The core of the CBI is codified in 19 U.S.C. [[section]][[section]]2701 to 2706.

[28] Authority to enter into such trade agreements with other countries is granted in 19 U.S.C. [[section]]1821.

[29] 51 Fed.Reg. 6964, February27, 1986, implementing E. O. No. 12260 of December31, 1980.

[30] Authority for USAID programs is codified throughout Chapter 32 of Title22 of the United States Code, particularly in 22 U.S.C. [[section]][[section]]2151 and 2346.

[31] 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 should be made available to Cuba during the early phases of its transition to a free-market society, to alleviate what is likely to constitute an

economic catastrophe warranting significant emergency aid.

[32] The Agricultural Trade Development Act of 1954 is codified at 7 U.S.C. [[section]]1691 etseq. The International Development and Food Acts are codified throughout 22 U.S.C. Chapter 32.

[33] In addition to lifting the ban on assistance to Cuba contained in the Foreign Assistance Act of 1961, the Security and Development Act of 1985, 22 U.S.C. [[section]] 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.

[34] The Inter-American Development Bank ("IDB"), a multi-lateral lending organization, administers the EAI's Investment Sector Loan Program and the Multi-lateral Investment Fund. Cuba would also need to apply for and receive membership in the IDB-- a process that could take a substantial amount of time