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A SYNOPSIS AND ANALYSIS OF U.S. LAWS RELATING TO THE ECONOMIC EMBARGO ON CUBA

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I. INTRODUCTION

Recently, the Castro regime has watched helplessly as its former Communist role models and benefactors, stretching from the Siberian peninsula to the Central American isthmus, have chosen the path of democratic pluralism and market capitalism--albeit with varying degrees of success. As a result of this democratic transformation, world attention has begun to focus on Cuba, an island that (i) has lost its geopolitical importance as a Soviet pawn due to the demise of the Soviet Union and end of the Cold War; (ii) is beset by a vast array of rationing and shortages, which have become even more acute as the subsidies from the former Soviet bloc disappear; (iii) has seen internal dissident and human rights groups finally begin to emerge; (iv) has record numbers of "balseros" (rafters) fleeing across the shark-infested waters of the Florida Straits to freedom in Miami; (v) has witnessed a significant number of high-profile defections by diplomats, military officers and entertainment celebrities; and is evidencing signs of disaffection in the ranks of its ruling elite.

Meanwhile, the Clinton Administration, with strong prodding from the increasingly active and effective Cuban exile community, has maintained the United States' nearly three decade-old embargo against Cuba. Although some criticize the U.S. embargo as a stifling and anachronistic policy which allows Castro to portray himself as a victim of imperialist bullying, many others fault the embargo for not being air-tight enough to be effective in terminating Castro's strangle hold on the island. Former Panamanian dictator, Manuel Noriega, assisted the Cuban

government in successfully circumventing the embargo. Supporters of the embargo welcomed the dramatic removal of Noriega by American military forces in December, 1989. Noriega's fall was a major setback to the Castro regime's ability to generate hard currency. The passage of the Cuban Democracy Act of 1992 is yet another blow. Comprised of a comprehensive package of "carrots" and "sticks," this legislation seeks to further isolate the Castro regime by (i) discouraging foreign subsidiaries of U.S. companies from continuing to do business with Cuba and (ii) discouraging foreign nations from providing aid to Cuba. Yet, the Act simultaneously offers the Cuban people a series of commercial, diplomatic and foreign assistance incentives to install a new government committed to democracy and human rights. At this critical juncture in U.S.-Cuba relations, it is important to have some understanding of the U.S. laws which give rise to the embargo.

II. TRADING WITH THE ENEMY ACT

The Trading with the Enemy Act of 1917 ("TWEA")¹ originated as an emergency response to America's entry into World War I against the Central Powers. Under the TWEA, the U.S. President is empowered to regulate or prohibit all commercial transactions with a foreign nation during war time or national emergency.² In late 1950, President Truman issued Proclamation No. 2914, which declared the required state of national emergency in response to communist aggression against South Korea.³ President Kennedy subsequently extended this state of national emergency to Cuba in 1962, during the period between the failed

1. Trading with the Enemy Act of 1917, 50 U.S.C. app. §§1-39, 41-44 (1917) (amended by Pub. L. 103-236, tit. V, § 525(b)(1), 108 Stat. 474 (1994)).

2. 50 U.S.C. app. § 5(b).

3. Proclamation No. 2914, 15 Fed. Reg. 9029 (1950), *repealed* by Pub. L. 94-412 (90 Stat. 1255, 50 U.S.C. § 1601).

Bay of Pigs operation and the Cuban Missile Crisis.⁴ Pursuant to the TWEA, President Kennedy initiated the current embargo by banning virtually all trade and commerce with the Castro regime.⁵

The TWEA and the Foreign Assistance Act of 1961⁶ are the two major federal statutes which authorize the U.S. embargo against Cuba. The Office of Foreign Assets Control is an agency of the Department of the Treasury and is the principal organ of the U.S. government responsible for monitoring and enforcing the embargo against Cuba. The Director of the Office of Foreign Assets Control has authority for all matters regarding the embargo.⁷ This office has promulgated the Cuban Assets Control Regulations⁸ which specify the types of prohibited imports and exports to and from Cuba. Presently, the regulations require persons subject to U.S. jurisdiction to be licensed to engage in transactions or travel to or within Cuba. Specifically, U.S. citizens traveling to or within Cuba need a license from the Department of the Treasury in order to buy goods or services such as meals, hotel rooms, airline tickets or tour packages.

The following is an outline of the most significant provisions of the rather voluminous TWEA:

4. Presidential Proclamation No. 3447, 27 Fed. Reg. 1085 (1962). *See infra* note 22.

5. Foreign Assistance Act of 1961, 22 U.S.C. § 2370 *et seq.* (1961) (amended). Authorizes the President to suspend all trade benefits and foreign assistance to Cuba, until Cuba demonstrates significant progress in instituting democratic reforms and compensates U.S. citizens whose properties were confiscated.

6. 31 C.F.R. § 515.807 (1994).

7. *Id.*

8. 31 C.F.R. pt. 515.

- (a) Section 1 - creates swift, summary, wartime procedures specifically to effectuate seizure of the property of enemy countries and their citizens in the U.S. by legal force;⁹
- (b) Section 3 - proscribes most import and export transactions;¹⁰
- (c) Sections 5 and 6 - authorizes an Alien Property Custodian entrusted with the custody and administration of enemy assets in the United States, in order to deprive the enemy of the use of potentially valuable property during wartime; protect the claims of U.S. creditors and preserve such assets for possible use in future settlements of American claims against enemy countries;¹¹
- (d) Section 10 - permits the payment of fees and preservation of licenses, in connection with certain intellectual property rights owned by enemies of the United States;¹²
- (e) Section 16 - establishes fines of up to \$50,000.00, prison terms of up to ten years and the mandated forfeiture of property for violators of the TWEA;¹³ and
- (f) Section 32 - establishes procedures for former enemies of the United States to recover frozen assets.¹⁴

9. 50 U.S.C. app. § 1.

10. *Id.* § 3.

11. *Id.* §§ 5, 6.

12. *Id.* § 10.

13. *Id.* § 16.

14. *Id.* § 32.

The U.S. government has always sought to apply the TWEA as broadly as possible in its efforts to prevent trade with Cuba. This broad approach is evidenced by *Walsh v. Brady*. In that case, the Court upheld the government's refusal to allow importation of posters if such importation required travel to Cuba.¹⁵ However, although the court in *United States v. Ortiz de Zevallos* rejected the government's contention that the TWEA prohibited the export transaction, the court in *United States v. Macko* upheld the TWEA prohibition.¹⁶ The U.S. Congress has delegated extraordinary powers to the President under the TWEA, which are accompanied by wide discretion in the use or suspension of such powers. The President is empowered to issue a presidential proclamation announcing his determination that a former enemy country's acts are now compatible with the safety of the United States (such as if Cuba moves toward a democratic system) and the successful prosecution of the "war," thereby suspending the prohibitions of the TWEA.¹⁷

Additionally, the Executive Branch can control subsequent commerce with former enemy countries or their citizens through conditions on, and revocations of, licenses for commerce with these countries. Those licenses are issued, limited or revoked by the Office of Foreign Assets Control. The Director of the Office of Foreign Assets Control has the power to modify or lift the Cuban Assets Control Regulations.¹⁸

15. *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991).

16. *United States v. Ortiz de Zevallos*, 748 F.Supp. 1569 (S.D. Fla. 1990) modified by *United States v. Macko*, 994 F.2d 1526 (11th Cir. 1993).

17. 50 U.S.C. app. § 5(a).

18. 31 C.F.R. §§ 515.805 - 515.807.

III. FOREIGN ASSISTANCE ACT OF 1961

The Foreign Assistance Act of 1961 ("FAA")¹⁹ established as U.S. policy that no assistance be rendered to the present government of Cuba.²⁰ As a means of carrying out this policy, the FAA authorized the President to establish and maintain a total embargo on all trade between the United States and Cuba.²¹ However, the FAA grants the President the discretion to furnish assistance to Cuba when he deems it to be in the interest of the United States.²²

Congress passed the FAA in response to the Cuban government's confiscation, without compensation, of the properties of U.S. citizens in Cuba. The FAA justifiably requires the return of U.S. citizens'²³ confiscated property or equitable compensation²⁴ as a condition precedent for U.S. aid to Cuba.

19. Foreign Assistance Act of 1961, 22 U.S.C. § 2370 (1988), *amended by* 22 U.S.C. § 2370(f)(1), (h) (Supp. V. 1994).

20. 22 U.S.C. § 2370(a)(1).

21. *Id.* President Kennedy, referring to the authority vested in him under the FAA, implemented the current embargo on trade between the U.S. and Cuba via Proclamation 3447, dated February 6, 1962, (Embargo on all Trade with Cuba, 27 Fed. Reg. 1085 (1962)). The proclamation prohibited the importation into the U.S. of all goods of Cuban origin, as well as the export of U.S. goods to Cuba. The proclamation further directed the Secretary of the Treasury, for imports, and the Secretary of Commerce, for exports, to carry out the embargo and promulgate any necessary rules and regulations. *See also* Export Control Act of 1949, 50 U.S.C. app. §§ 2021-2032 (1949) (current version at 22 U.S.C. app. §§ 2401-2413 (1988)).

22. 22 U.S.C. § 2370(a)(2).

23. This provision includes corporations or other entities at least 50% beneficially owned by U.S. citizens. *Id.*

24. This "condition precedent" can of course be waived by the President if he determines that assistance to Cuba is in the interests of the United States. *Id.*

This applies to property confiscated after January 1, 1959.

The FAA prohibits any U.S. foreign assistance to any communist country.²⁵ The FAA further directs the President to adopt regulations and establish procedures to ensure that U.S. foreign aid is not used in a manner which is contrary to the best interests of the United States, or promotes or assists the foreign aid projects or activities of communist bloc countries.²⁶

IV. OTHER LAWS

Prior to the enactment of the Cuban Democracy Act, the TWEA and the FAA represented the primary statutory authority relative to the embargo, with the Cuban Assets Control Regulations being the primary administrative authority. However, numerous other statutes and regulations make reference to, or affect relations with, Cuba and its nationals. Of course, each of these collateral statutes and regulations focus only on the specific areas of the law for which they were respectively promulgated and/or implemented. Nevertheless, a review of the laws and regulations giving effect to the embargo would not be complete without reference to at least the more significant provisions. Further, in looking forward to the eventual removal of the embargo, attention will need to be given to revising each of the collateral statutes and regulations in accordance with direct modifications to the primary statutes and regulations. The following is a synopsis of some of the U.S. laws and regulations which have collateral, rather than primary, relation to the economic embargo on Cuba.

25. 22 U.S.C. § 2370(f)(1). A list of Communist countries is contained within the statute.

26. *Id.* § 2370(h).

A. 8 U.S.C. § 1255 - Adjustment of Status from Non-Immigrant to Permanent Resident

The Attorney General, at his discretion or through regulations prescribed by him, may adjust the status of an alien who was inspected and admitted or paroled into the United States if (1) the alien makes application for adjustment; and (2) the alien is eligible to receive an immigration visa; and (3) an immigrant visa is immediately available to the alien when the application is filed.²⁷ The statute allows citizens of Cuba inspected and admitted or paroled into the United States subsequent to January 1, 1959, and who are physically present in the United States for one year, to have their status changed to permanent resident upon discretion of the Attorney General.²⁸

By virtue of the authority and discretion granted to the Attorney General by Congress in this statute, the executive branch maintains a great deal of control over the immigration aspects of relations with Cuba. The special considerations given to Cuban nationals, however, are mandated by Congress, and any significant revisions would need to be accomplished by the legislative branch.

B. 8 C.F.R. § 239.2 - Designation of Ports of Entry for Aliens

All flights originating in Cuba may land only at Ft. Lauderdale/Hollywood Airport, unless advance permission to land elsewhere is obtained from the District Director of the Immigration

27. 8 U.S.C. § 1255(a) (1988).

28. Immigration and Nationality Act, Pub. L. No.89-732, § 245 n. 2, 80 Stat. 1161 (1966), *as amended by* Pub. L. 94-571, § 8, 90 Stat. 2706 (1976); Pub. L. 96-212 § 203(I) tit. II, 94 Stat. 108 (1990). *See also* Chen v. Foley, 385 F.2d 929 (6th Cir. 1976); *Massignani v. Immigration and Naturalization Service*, 438 F.2d 1279 (7th Cir. 1971) (although the Attorney General has wide discretion in applying this statute, judicial review is authorized).

and Naturalization Service (the "INS") in Miami.²⁹

C. *12 U.S.C. § 635 - Export-Import Bank Act of 1986*

This statute prohibits transactions by the Export-Import Bank of the United States of America ("Eximbank") which extend guarantees, insurance or credit to certain enumerated countries unless the President determines that such transactions are (1) in the national interest or (2) that the country has ceased to be Marxist-Leninist.³⁰ Without this determination, any dealings between the importing country and Eximbank are expressly prohibited.³¹ Cuba is specifically enumerated on the list of countries with which such transactions are prohibited absent the above-referenced findings by the President.³²

The statute defines a Marxist-Leninist country as any country which (1) maintains a centrally planned economy based on the principles of Marxist-Leninism or (2) is economically or militarily dependent on the Soviet Union or any other Marxist-

29. Designation of Ports of Entry for Aliens, 8 C.F.R. § 239.2 (1994). The regulation could, therefore, be appropriately modified to reflect current practice. This provides an example of the need for a periodic review of the statutes and regulations related to the embargo of Cuba as circumstances evolve and change is inevitable. *See Bland v. U.S.*, 299 F.2d 105, 107 (5th Cir. 1962) (charging pilots with bringing Cuban aliens into the U.S. without receipt of proper authority from immigration officials).

30. Export-Import Bank Act of 1986, 12 U.S.C.S. § 635(b)(2)(B)(ii) (1989) (amended 1992). Separate determinations are required for each portion of the value of a transaction in excess of \$50,000,000 in increments of \$50,000,000. *Id.*

31. 12 U.S.C.S. § 635(b)(2)(c).

32. *Id.* § 635(b)(2)(B)(ii).

Leninist country.³³

As the President actually is granted authority to make the referenced determinations, the executive branch would be able to avoid the restriction without legislative action.

**D. 19 U.S.C. § 1351 - Foreign Trade Agreement Act;
Cuban Products**

By the terms of the *Foreign Trade Agreement Act* and otherwise, the President is empowered to enter into trade agreements with foreign countries.³⁴ Section 1351(b) memorializes the preferential customs treatment and rate decreases for Cuba. However, the Cuban Assets Control Regulations, discussed in Section II above, prohibit trade with Cuba. This thereby essentially preempts the Foreign Trade Agreement Act as it relates to Cuba.

E. 19 U.S.C. § 2431 - Trade Act of 1974

The President must deny nondiscriminatory treatment to products of countries which were not eligible for favorable rates under the January 3, 1975 Tariff Schedule,³⁵ except as described below.

1. 19 U.S.C. § 2432 - Trade Act of 1974

This provision prohibits certain countries from receiving

33. *Id.* § 635(b)(2)(B)(i). Due to the demise of the Soviet Union and the refusal of successor nations to aid Cuba, it appears that the second part of this definition no longer applies to Cuba.

34. Tariff Act of 1930, 19 U.S.C. § 1351(a)(1)(A) (1988).

35. Trade Act of 1974, Pub. L. 93-618, tit. IV, § 401, 88 Stat. 2056 (1975) (codified at 19 U.S.C. § 2431 (1988)).

nondiscriminatory trade treatment if they restrict emigration.³⁶ The prohibition may be lifted if the President notifies Congress that such emigration restrictions no longer exist.³⁷ The provision may be waived by the President for successive 12 month periods if the waiver will promote free emigration.³⁸

**2. 19 U.S.C. §§ 2434, 2435 & 2437 -
Trade Act of 1974**

The President is authorized to extend³⁹ or withdraw⁴⁰ non-discriminatory treatment to a foreign country which has entered into a bilateral commercial agreement with the United States. The President may extend such benefits, in renewable three year increments, to the products of countries heretofore denied such treatment if the President determines that such agreement is in the national interest.⁴¹ When the President extends nondiscriminatory treatment to such a country by means of a presidential proclamation, he must forward to the House of Representatives and to the Senate notice of the proclamation, the agreement proposed, and the President's reasoning for issuing the proclamation.⁴² The President must also report on the country's emigration policies.⁴³

36. 19 U.S.C. § 2432(a) (1988).

37. *Id.* § 2432(b).

38. *Id.* § 2432(c).

39. *Id.* § 2434(a).

40. *Id.* § 2435(c).

41. *Id.* § 2435(a).

42. *Id.* § 2437(a).

43. *Id.*

3. 19 U.S.C. § 2461 *et seq.* - Trade Act of 1974

The President is authorized to grant duty free treatment to developing countries provided that Congress is notified of his intent and reasons.⁴⁴ The President may not grant such treatment to a communist country unless (1) its products receive most favored nation treatment, (2) it is a member of GATT, and (3) it is not dominated or controlled by international communism.⁴⁵

The Trade Act of 1974 establishes the Generalized System of Preferences which seeks to promote a stable political and economic climate in the Caribbean region, to encourage the development of the countries in that region, and provide for the security and economic interests of the United States.⁴⁶

F. 19 U.S.C. § 2701 - *Caribbean Basin Economic Recovery Act*

This statute authorizes the President to grant duty-free status to the products of certain Caribbean countries, expressly excluding Cuba.⁴⁷ The President is, however, permitted to grant such status to excluded countries upon making the determination that the action is in the national, economic or security interest of the United States.⁴⁸ The President's determination in this regard is subject to reporting requirements as well as trade considerations and pre-

44. Trade Act of 1974, Pub. L. 93-618, tit. V, §§ 501, 502, 88 Stat. 2066-2069 (1975) (codified at 19 U.S.C. §§ 2461, 2462(a) (1988)).

45. 19 U.S.C. § 2462(b)(1).

46. Generalized Systems of Preferences Renewal Act of 1984, Pub.L. No. 98-573, tit. V § 501(b), 98 Stat. 3018 (1984) (codified at 19 U.S.C § 2461 (1988)).

47. 19 U.S.C. §§ 2701, 2702(b).

48. *Id.* § 2702(b)(2).

conditions.⁴⁹ Moreover, in order to grant such status the President must establish, *inter alia*, (i) that the subject country is not "communist," and (ii) has not nationalized, expropriated or otherwise seized property owned by U.S. citizens (unless the President determines that the matter is being effectively addressed in accordance with the statute).⁵⁰

G. 22 U.S.C. § 2227 - Security and Development Act of 1985

Any indirect aid to Cuba through the United States' proportionate share of the assistance programs of various international organizations is expressly prohibited.⁵¹ An act of Congress would be required in order to lift this prohibition.

V. PROCEDURES REQUIRED TO LIFT EMBARGO

One of the following procedures is required in order to lift the embargo:

A. A proclamation must be issued by the President lifting the embargo;⁵² or

B. A modification or revocation of the Cuban Assets Control Regulations must be made by the Director of the Office of Foreign Assets Control, Department of the Treasury;⁵³ or

C. Congress must modify or repeal the Foreign

49. *Id.* § 2702(c).

50. *Id.* § 2702(b)(2).

51. International Security and Cooperation Development Act of 1985, 22 U.S.C. § 2227(a) (1988).

52. *See* Proclamation No. 3447, 27 Fed. Reg. 1085.

53. *See* 31 CFR 515.805-515.807.

Assistance Act of 1961 regarding prohibition of furnishing assistance to the government of Cuba.⁵⁴

VI. CONDITIONS PRECEDENT TO LIFTING EMBARGO

The following outlines the conditions required *under current law* to completely lift the embargo.

- A. Executive Branch: None.
- B. Congressional Branch:

1. The following measures need to be taken before allowing U.S. assistance to Cuba.

a. Cuban government must "take appropriate steps according to international law standards to return to U.S. citizens...or to provide equitable compensation to such citizens and entities for property taken...on or after January 1, 1959 by the Government of Cuba."⁵⁵

b. Cuba must be removed from the list of "communist countries"⁵⁶, or such assistance to Cuban Government must be:

- "(1) vital to the security of the United States;
- (2) the [Cuban government] would not be controlled by the international communist conspiracy; and
- (3) such assistance will further

54. 22 U.S.C. § 2370.

55. *Id.* § 2370(a).

56. *Id.* § 2370(f).

promote the independence of [Cuba] from international communism."⁵⁷

2. The Cuban Government must satisfy the U.S. President that "appropriate steps are being taken" to remedy the following:

a. any nationalization, expropriation or seizure of U.S. owned property;

b. repudiation or nullification of contracts with U.S. citizens and entities;

c. imposition of discriminatory taxes or other mechanisms which might have had effect of nationalizing, expropriating, or otherwise seizing U.S. property.⁵⁸

3. The Cuban Government would be required to pay off any and all debt owed to the U.S. government, or a determination must be made by the President that, notwithstanding such debt, assistance to Cuba is in the national interest.⁵⁹

4. Restoration of U.S. - Cuba diplomatic relations.⁶⁰

57. *Id.*

58. *Id.* § 2370(e).

59. *Id.* § 2370(q).

60. *Id.* § 2370(t).

VII. CUBAN DEMOCRACY ACT OF 1992

The Cuban Democracy Act of 1992 [hereinafter CDA], also known as the Torricelli Bill,⁶¹ was the first major shift in U.S. policy toward Cuba in thirty years.⁶² The CDA states that it should be the policy of the United States to seek a peaceful transition to democracy and economic prosperity in Cuba. As discussed earlier, the CDA attempts to achieve this goal through the combined application of sanctions and incentives.

The sanctions contained in the CDA include a statement of U.S. policy requiring the President to encourage major Cuban trading partners to restrict their dealings with the Cuban Government in a manner consistent with the purposes of the CDA.⁶³ The sanctions also provide that any country that gives "assistance" to Cuba is not eligible (1) to receive U.S. aid under the Foreign Assistance Act of 1961 or the Arms Export Control Act and (2) to enter into any programs for debt reduction or forgiveness.⁶⁴ The CDA defines "assistance" as business dealings on terms more favorable than those generally available in the market, but does not include donations of food or medicine.⁶⁵ Another provision of the CDA prohibits any vessel which enters Cuba to engage in trade from loading or unloading any freight in

61. 138 CONG. REC. H10284 (daily ed. Oct. 1, 1992) (the Cuban Democracy Act is commonly known as the Torricelli Bill).

62. The provisions of the Cuban Democracy Act [hereinafter CDA], 22 U.S.C. §§6001-6010 (1988), apply notwithstanding any other provision of law, including the Foreign Assistance Act of 1961, 22 U.S.C. § 2370, and the Trading with the Enemy Act, 12 U.S.C. § 95(a), 50 U.S.C. app. § 5(b). *See* 22 U.S.C. § 6004(a) (1988).

63. 22 U.S.C. § 6004(a).

64. *Id.* § 6003(a).

65. *Id.* § 6003(b)(1).

the U.S. for 180 days thereafter.⁶⁶

The CDA lists certain factors to be considered by the President in deciding whether to lift the embargo: (1) a public commitment to hold free and fair elections within 6 months and implementing that decision; (2) a public commitment to respect internationally recognized human rights and basic democratic freedoms; and (3) non-provision of weapons or funds to any group seeking the violent overthrow of the government of another country.⁶⁷

Lastly, the CDA states that it will be U.S. policy with respect to a duly elected Cuban government to: (1) encourage the admission or re-entry of such government to international organizations and international financial institutions; (2) provide emergency relief; and (3) take steps to end the U.S. trade embargo of Cuba.⁶⁸

VIII. CONCLUSION

It is safe to say that the provisions of the CDA will serve as a guide and will be the primary vehicle through which the current economic embargo of Cuba will be lifted. Political support for the CDA is strong enough to safely predict that the only way the embargo will be lifted is for Cuba to take the first step. The incentives are now in place to encourage a Cuban government to meet the criteria set forth in section seven⁶⁹ of the CDA. It is doubtful this will occur while the current leadership of Cuba is in power.

66. *Id.* § 6003(b)(2).

67. *Id.* § 6005(b)(1).

68. *Id.* § 6006.

69. *Id.* § 6007(b).