

SHINING LIGHT INTO THE HEART OF DARKNESS: An Update on the Cuban Embargo

I. Executive Summary

Sixty years after the imposition of the Cuban Embargo, the orthodoxy and ideology that caused it to persist are no longer relevant from the standpoint of the affected parties. From Cuba's point of view there is little chance that the United States will compromise the sovereignty of Cuba by means of invasion or annexation. Further, given the pressures imposed by globalization, specifically social media, the economic deprivation facing Cubans is a ticking time bomb which will ultimately undo the current regime unless it adapts to the new realities. On the other hand, the United States stands to benefit both economically and diplomatically from an economically resurgent Cuba. The recent loosening of the Cuban Embargo and the parallel establishment of diplomatic relations between Cuba and the United States is but a tentative first step, a shadowy glimmer of light into the heart of darkness. According to conversations the author has had with knowledgeable sources that have traveled to Cuba,

there will be no significant progress in economic relations between the United States and Cuba so long as the Cuban Embargo remains in effect. So, while the Cuban Embargo no longer has a substantive geopolitical underpinning, it remains very much alive. While "Fidel" has only nominally been in power, his influence is still strongly felt and there is no appetite in Cuba to move forward with increased economic ties with the United States until the Cuban Embargo is lifted. Whether this will change given Fidel's death remains to be seen; however, it is inevitable that at some point, in one way or another, economic relations between the United States and Cuba will be normalized. It behooves individuals and businesses to take advantage of the current opportunities presented by the softening of the impact of the Cuban Embargo and the establishment of diplomatic relations between the United States and Cuba to commence lawful activities in Cuba. Those who establish business and social

connections now will be in a position to be the first to take advantage of the economic opportunities in Cuba once the Cuban Embargo is lifted.

II. Historical Background

Any review of the Cuban Embargo imposed upon Cuba by the United States must take note of the ferocity of its persistence over sixty years even after it served no geopolitical purpose or advantage to either side. It is certain that the failings of the Cuban government are legion and inexcusable and that the United States, despite its many flaws, is a bastion of liberty and individual rights. Yet, the standing of the United States as a paragon of liberty has not kept it since imposition of the Cuban Embargo from negotiating or trading with China, Vietnam, Iran and any number of reprehensible or ideologically incompatible regimes. It makes absolutely no sense for the United States to curtail economic activity with Cuba. From Cuba's point of view it is certain that the past behavior of the United States toward it has not been admirable. But is the cost of maintaining its morally based vendetta against the United States really worth the extreme toll it has taken on the country and its citizens? A cynic could surmise that this vendetta is a convenient ruse for keeping the current regime in power.

What then lies within this heart of darkness that is the Cuban Embargo? A brief look at history is instructive. As the Spanish retreated from the Caribbean in the 18th and 19th centuries, Cuba, most especially due to its proximity and ample natural resources, inescapably fell under the political and economic dominance of the United States. In 1820, former President Thomas Jefferson, writing to Secretary of War John C. Calhoun, stated that Cuba was "the most interesting addition which could ever be made to our system of states" (Schlesinger, Arthur, Jr., *The American Empire? Not So Fast*, 22 World Policy Journal, 43, 44 (2005)). Later in a letter to the United States Minister to Spain, Secretary of State John Quincy Adams predicted the ultimate United States annexation of Cuba: "But there are laws of political as well as of physical gravitation; and if an apple severed by the tempest from its native tree cannot choose but fall to



By Moses Luski

the ground, Cuba, forcibly disjoined from its own unnatural connection with Spain, and incapable of self-support, can gravitate only towards the North American Union . . .” (Jane Franklin, *Cuba and the U.S. Empire: A Chronological History*, 3 (NYU Press, 2016)).

It should come as no surprise, then, that during the 19th and 20th centuries, regardless of the status of Cuban sovereignty, the United States dominated the economy of Cuba, and, in essence, Cuba was a protectorate of the United States and at times actually a legal protectorate. By the 1950s, Cuba was controlled by a dictator friendly toward the United States, Fulgencio Batista. Unfortunately, Batista’s behaviors became so unacceptable that the United States tacitly supported the emergence of Fidel Castro, who it was thought would be a more socially benevolent dictator. Needless to say, the emergence of Castro did not quite work out the way the United States had planned. In the blink of an eye the United States was faced with a repressive Stalinist state ninety miles from its borders which early on posed an existential threat to the mainland due to the presence of Soviet nuclear missiles. Quite a turn of events!

The darkness that is inherent in the heart of the Cuban Embargo then is the unyielding determination by the United States to get rid of the Castro regime which had betrayed the United States and made Cuba into a Soviet forward base and the unstinting determination of the Castro regime to stand up to the United States at all costs. From the viewpoint of the United States, Castro’s adoption of a Marxist/Leninist form of government was an unforgivable



act of betrayal and defiance which made Castro into an irredeemable pariah. From the standpoint of the Castro regime, the domination of the United States over Cuba had to end, even if that meant the economic self-destruction of Cuba. There are many other subplots within this impasse, not the least of which was the suppression of individual liberty in Cuba; another subplot being the use of the existence of the Cuban Embargo as a propaganda tool by both sides.

III. Basic Framework of the Cuban Embargo

While there have been layers upon layers of legislation and regulation enacted since the early 1960s that have formed what is known as the “Cuban Embargo,” the specifics of the Cuban Embargo are mostly found in the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR). Passed in 1963 under the authority of both the Trading with the Enemy Act and the Foreign Assistance Act, the CACR provides detailed regulations controlling all trade

and commerce with Cuba. Over time, amendments to the CACR have been made and, most recently, amendments made in 2015 and 2016 under President Obama’s encouragement have liberalized relations between the two countries. Similarly, the EAR provides the framework for the regulation of all exports from the United States. Under the EAR, all items subject to its regulation must receive a license from the Bureau of Industry and Security prior to exportation, unless authorized by a specific license exception. While recent amendments to the CACR have allowed for some increased travel and commercial activities, the EAR still largely restricts all exports from the United States to Cuba.

IV. Recent Amendments to the Cuban Assets Control Regulations (CACR)

Since President Obama’s announcement of a resumption of diplomatic relations between the United States and Cuba in 2014, the CACR has been amended four times and interactions between the two

countries have increased significantly. First, in January of 2015, the CACR was amended to relax restrictions on travel, financial services, remittances, and general support for the Cuban people.¹ Ultimately, the January 2015 amendments to the CACR were the beginning of an effort to liberalize social, political, and economic relations between the countries and have since been followed by three subsequent amendments that have followed this liberalizing trend. In September 2015, the Department of the Treasury and the Department of Commerce issued additional regulations to the CACR that affected three main areas: physical presence and operations in Cuba, remittances, and legal services.² In January and March 2016, the CACR was further liberalized through amendments regarding the financing of exports, the financial services industries, and travel between the two countries.³

A. Restrictions on Travel and the Purchase/Sale of Cultural Commodities.

Prior to the January 2015 amendments, travel was only authorized to Cuba under a specific license for one of 12 purposes.⁴ Post-amendments, an individual is no longer required to apply for a specific license for one of the 12 purposes and instead may travel under a general license to Cuba for one of the purposes. Travel for any other purpose still requires the issuance of a specific license by the Office of Foreign Asset Control (OFAC). In addition to expanded travel purposes, travel agents and airlines may now provide services without seeking a license from the OFAC. The 2016 amendments also significantly expanded the abilities of individuals to travel to Cuba by

increasing the number of authorized purposes for travel and the range of transactions available to individuals during authorized travel.

By far the biggest impact on United States–Cuba relations, the 2015 and 2016 amendments to the CACR allowed for increased travel opportunities and cultural exchange between the two countries. Prior to the amendments, travel was permitted to Cuba only under a specific license issued by the OFAC. There were limited reasons to obtain a specific license and the OFAC was reluctant to grant them. Post-amendments, individuals may travel to Cuba under one of 12 general licenses or alternately apply to the OFAC for a specific license for travelling for another purpose. The shift from specific to general license has allowed for much easier travel because the OFAC generally approves all travel under a general license, while requiring a much stricter review process for specific licenses.

One of the most important new general licenses issued is that for travel for the express purpose of exporting, importing and transmitting informational materials. Informational materials are defined as “publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, CDs, CD-Roms, artworks, news wire feeds and other informational materials.” However, all informational materials must be originals and not reproductions. Additionally, they may not be commissioned or alterations of originals. Prior to the recent amendments to the CACR, travel for the express purpose of exchanging informational materials was prohibited and monetary restrictions on items transported

to or from Cuba were in place. Now, travel may be made for the express purpose of purchasing / selling informational materials and all payment restrictions have been removed. Thus, there are now significant opportunities for cultural exchange between the two countries.

B. Restrictions on the Provision of Financial Services.

In regard to financial services, the January 2015 amendments to the CACR allow the financial services industry to participate in two new areas in Cuba. First, they allow United States financial institutions to issue and process debit and credit card transactions related to travel to Cuba. Second, financial institutions may now open and maintain accounts with Cuban banks to facilitate the processing of authorized transactions. These amendments will allow for the United States and Cuban nationals to participate more easily and efficiently in commercial activity between the two countries. The 2016 amendments also allow the United States financial system greater access to Cuba and Cuban nationals. These amendments provide three gains for the United States financial system: (1) United States banking institutions are now able to process U-turn transactions in which Cuba or a Cuban national has an interest;⁵ (2) United States banking institutions are now able to process United States dollar monetary instruments, including cash and travelers’ checks, presented indirectly by Cuban financial institutions; and, (3) United States banking institutions are now able to open and maintain bank accounts in the United States for Cuban nationals in Cuba to receive payments in the United States for authorized or exempt transactions and to remit such payments back to Cuba.

These amendments, combined with the 2015 amendments, further facilitate economic relations between the two countries and allow for easier payment for goods and services.

C. Restrictions on Importation/Exportation of Commodities.

The January 2015 amendments to CACR authorized exports and re-exports (these are items that are allowed to be exported under a general license or specific license issued by the Office of Foreign Asset Control) to Cuba to provide support for the Cuban people in three areas: improving living conditions and supporting independent economic activity, strengthening civil society, and improving communications. In order to accomplish these goals, the amendments allow for the export of certain materials to private corporations and individuals, as long as they are not supported by the Cuban government. Under the January 2016 amendments, financing restrictions on authorized exports and re-exports, other than agricultural commodities and agricultural items, were removed. Previously, all authorized exports and re-exports to Cuba must have been paid for in cash in advance or through third-country financing. These amendments now allow for payment of authorized exports by payment of cash in advance, sales on an open account, and financing by third-country financial institutions or United States financial institutions. However, all payment for exports of agricultural commodities and agricultural items are still restricted to cash-in-advance or third-country financing. These payment restrictions severely limit the ability of United States businesses to compete against other countries for agricultural sales to Cuba, as exporters in those countries are able to leverage their sales to Cuba

by extending credit and favorable payment terms, while United States exporters are prohibited from doing so. It is also important to note that while authorized exports may be made and financed in an increasingly liberalized manner, all exports and re-exports of items for use by any Cuban organization that primarily generates revenue for the Cuban state is still subject to a general policy of denial.

While the recent amendments to the CACR have increased travel and cultural exchange opportunities, the EAR still largely restricts commercial activity between the two countries. First, only accompanied baggage merchandise, certain goods produced by independent Cuban entrepreneurs, Cuban-origin software, and informational materials from Cuba may be imported into the United States. Second, the export or re-export of all items subject to the EAR to Cuba is not permitted without a license or applicable license exception. However, the following items are subject to a general policy of approval for export under an EAR license: items for safety of civil aviation, items for safety of commercial aviation, certain telecommunications and agricultural items, items to human rights organizations or individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba, and items for use by United States news bureaus. While these limited exceptions have opened up some commercial relations between the two countries, commercial activity is still severely restricted and all U.S investment in Cuba is prohibited, unless provided for in a specific license.

D. Restrictions on Establishing and Maintaining a Physical Presence in Cuba.

Pursuant to the September 2015 amendments, individuals subject to United States jurisdiction can now establish and maintain a physical presence in Cuba for an authorized purpose. This purpose includes maintaining a location for the exportation of certain authorized goods, for news-gathering, for entities conducting educational, religious, or charitable activities, and several other purposes.⁶

E. Restrictions on Donative Remittances.

The limit on remittances, previously set at \$500 per quarter, was raised to \$2,000 per quarter under the January 2015 amendments. Under the September 2015 amendments individuals are now able to make donative remittances in an unlimited amount to Cuban nationals other than remittances to the Cuban government or Cuban officials, which are still prohibited. Previously, the limit on donative remittances was set at \$2,000 per quarter. As well as removing the limit on donative remittances that may be sent to Cuba, the \$10,000 limit on authorized remittances that individuals may carry to Cuba was removed entirely.⁷

F. Restrictions on United States Attorney's Provision of Legal Services.

Finally, the September 2015 amendments expanded the ability of United States individuals to provide and receive payment for providing legal services to Cuban nationals.⁸ These amendments broadly allowed the provision of legal services for one of five authorized purposes and established the manner in which

individuals may be compensated for providing these services.

Although the recent amendments to the CACR have liberated relations between the two countries, they did not provide much change to the provision of legal services. OFAC's existing general license authorizing the provision of one or more of five categories of legal services to Cuban nationals remains in place. These categories largely revolve around the provision of legal services to a Cuban national involved in the United States legal system and do not allow legal services to Cubans involving Cuban state issues. However, the amendments to the CACR did make one important change in legal services. The recent amendments now allow United States Attorneys to receive payment for legal services directly from Cuban sources, which was previously prohibited. Additionally, a new general license created by the amendments will authorize persons subject to United States jurisdiction to receive, and make payments for, certain legal services provided by Cuban nationals. These two amendments will facilitate the provision of legal services which is a fundamental building block to establishment of normalized relations.

V. Cuban Expropriations of Property

There have been no recent changes to the United States' policy toward Cuba on the expropriation of United States nationals' property. A full lifting of the Embargo is still tied to the compensation by Cuba of all United States expropriated property.

VI. Presidential Authority under The Trading with the Enemy Act (TWEA)

The Trading with the Enemy Act (TWEA) was originally legislated in 1917 against Germany during World War I. The TWEA gives the President the power to oversee or restrict any and all trade and travel between the United States and its enemies in times of war or perceived national security threat. The TWEA has to be renewed annually by the sitting President and Cuba remains the only country to which the TWEA still applies.

The TWEA gives the President the power to oversee or restrict any and all trade and travel between the United States and the country it is used against and to determine how forcefully those measures should be implemented. The TWEA grants considerable flexibility to the President and since the historic December 2014 announcement by Presidents Obama and Castro announcing a new course in relations between the United States and Cuba, President Obama has used his presidential authority to weaken the Embargo and travel restrictions, made possible only under the provisions of the TWEA.

In 1977, Section 5(b) of the TWEA was amended to limit the President's power to times of war, but at the same time the International Emergency Economic Powers Act (IEEPA) was enacted to cover the President's exercise of emergency economic powers in response to peacetime crises (§203 of the IEEPA granted essentially the same authorities to the President as those in § 5(b) of the TWEA). However, rather than requiring the President to declare a new national emergency in order to continue existing economic embargoes, such as that against Cuba, Congress enacted a grandfather clause providing that notwithstanding the amendment to the TWEA, the "authorities conferred

upon the President" by § 5(b), 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."

By re-signing the TWEA and extending the Embargo for another year, President Obama was able to maintain and accelerate the normalization process with Cuba. The President's re-signing of the TWEA guarantees he is able to sustain his authority to weaken the Embargo and travel restrictions for another year. If he had not re-signed the TWEA, then all of the legislation that covers the Embargo and travel restrictions would devolve completely under the control of Congress, where President Clinton placed it in 1996 when he re-signed the Helms-Burton Act.

The Helms-Burton Act was enacted in response to a 1996 incident in which the Cuban air force shot down two civilian planes belonging to the Miami-based anti-Castro initiative, Brothers to the Rescue. Congress passed the Helms-Burton Act in an attempt to place a stranglehold on Cuba's economy in order to facilitate its long-term goal of expelling Castro from office. The Act codified the economic sanctions against Cuba and established a framework for ending the economic embargo of Cuba.⁹ The Helms-Burton Act mandates that the Embargo will remain in effect until two events occur. First, the President must determine with the approval of Congress that Cuba is moving toward a free and democratically elected government. The applicable section reads:

Upon submitting a determination to the appropriate congressional committees under section 203(c) (1) that a transition government in Cuba is in power, the President,

after consultation with the Congress, is authorized to take steps to suspend the economic embargo of Cuba and to suspend the right of action created in section 302 with respect to actions thereafter filed against the Cuban Government, to the extent that such steps contribute to a stable foundation for a democratically elected government in Cuba.¹⁰

For purposes of this section, the “economic embargo of Cuba” is defined to include all restrictions on trade, travel, and transactions involving property in which Cuba or a Cuban national has an interest found under provision of law.¹¹ Second, there must be a procedure in place for the settlement of all claims with regard to the Cuban expropriation of United States nationals’ and businesses’ property.¹² Congressional legislation does not provide any flexibility to alter or diminish the embargo without further legislative action. The provisions in the Helms-Burton Act will remain in effect until repealed by Congress. However, the vast majority of the restrictions on Cuba are found in the TWEA, which only the President can alter. Thus, the President can significantly relax or tighten relations between Cuba and the United States without Congressional action. If the anti-Cuba legislation in Congress is repealed, the President will no longer need to re-sign the TWEA to maintain control over the specifics of the Embargo.

In a sense, the Helms-Burton Act serves as a check against Presidential authority under the TWEA by stating the sense of Congress as to the conditions that must exist for the Cuban Embargo to lift. Yet, rather than repealing the TWEA and directly codifying the provisions of the Cuban

Embargo, Congress let the TWEA stand, thus preserving the considerable power of the President to regulate the Cuban Embargo, provided he renews the TWEA annually. It’s a curious standoff that essentially acts as an indirect check on Presidential authority, which leaves the author with these questions: What if the President were to repeal the entire Cuban Embargo, but continue to renew the TWEA? Presumably the Cuban Embargo would disappear, to the outrage of Congress. What if a future president, after the aforementioned hypothetical repeal of the Cuban Embargo regulations promulgated under the TWEA let the TWEA lapse? The Cuban Embargo as it existed in 1996 would automatically be recodified under the provisions of the Helms-Burton Act. While legally plausible, neither of these actions would seem to be politically plausible. The “bi-polar” nature of the interplay between TWEA and the Helms-Burton Act reflects the implacable emotion and hostility that darkens relations between the United States and Cuba and prevents the two countries from dealing with each other in terms of rational self interest as most countries do.

VII. Conclusion

The Cuban Embargo is like a permanent eclipse which has darkened relations between the United States and Cuba for sixty plus years. As a result, two generations of Americans and Cubans have been profoundly affected by this lack of contact. The recent actions of President Obama are a shining and welcome light into this darkness. Realistically, though, it will take at least one generation for relations between the two countries to normalize.

Postscript: The Trump Effect

The best way to handicap the effect of Donald J. Trump’s surprise election as President is to paraphrase a famous Churchill dictum: “I cannot forecast to you the actions of President Trump. It is a riddle wrapped in a mystery, inside an enigma; but perhaps there is a key. That key is Trump’s self-interest as a business man.” As reported by the BBC, during the campaign Mr. Trump famously zigzagged around the issue of Cuba relations. Early in the campaign during a CNN televised debate he stated “Fifty years is enough time, folks.” Later in the campaign when Florida hung in the balance, he promised to roll back the Obama détente. Ultimately, as reported by the BBC, “63% of Cuban-Americans in Miami want to see the Embargo lifted.” Given Mr. Trump’s business background and the strong public support behind the lifting of the Embargo, it is reasonable to calculate that the relaxation of the Embargo will continue to move forward, albeit at a slower pace.

President-elect Trump’s recent pronouncements after Castro’s death that the United States would reverse course on its Cuba policy unless its demands were met is consistent with the foregoing analysis. Trump’s statements seem to be more about striking a negotiating posture than announcing a substantive shift in policy.

VIII. Acknowledgment

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IX. Table of Authorities

Statutes & Regulations

Helms-Burton Act, Pub.L. 104-114, 110 Stat. 785, 22 U.S.C. §§ 6021-6091 (1996)

Helms-Burton Act, 22 U.S.C. § 6064(a) (1996)

Helms-Burton Act, 22 U.S.C. § 6023(7) (A) (1996)

Helms-Burton Act, 22 U.S.C. § 6067(d) (1996)

31 CFR § 515.573 2015

31 CFR § 515.570 2015

31 CFR § 515.512 2015

Press Releases

U.S. Department of the Treasury, Press Center, FACT SHEET: *Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions*, (Jan. 15, 2015) <https://www.treasury.gov/press-center/press-release/Pages/j19740.aspx>

U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations*, (Sept. 18, 2015) <https://www.treasury.gov/press-center/press-release/Pages/j10169.aspx>

U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations*, (Jan. 27, 2016) <https://www.treasury.gov/press-center/press-releases/Pages/jl0328.aspx>

U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Significant Amendments to the Cuba Sanctions Regulations Ahead of President Obama's Historic Trip to Cuba*, (Mar. 15, 2016) <https://www.treasury.gov/press-center/press-releases/Pages/jl0379.aspx>

X. Footnotes:

¹ U.S. Department of the Treasury, Press Center, FACT SHEET: *Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions*, (Jan. 15, 2015) <https://www.treasury.gov/press-center/press-release/Pages/j19740.aspx>.

² U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations*, (Sept. 18, 2015) <https://www.treasury.gov/press-center/press-release/Pages/j10169.aspx>.

³ U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations*, (Jan. 27, 2016); U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Significant Amendments to the Cuba Sanctions Regulations Ahead of President Obama's Historic Trip to Cuba*, (Mar. 15, 2016).

⁴ These categories are: family visits; official business of the United States government, foreign governments, and certain intergovernmental organizations; journalistic

activity; professional research and professional meetings; educational activities; religious activities; public performances, clinics, workshops, athletic and other competitions; support for the Cuban people; humanitarian projects; activities of private foundations or research or educational institutes; exportation, importation, or **transmission of information or informational materials**; and certain authorized export transactions.

⁵ A “U-turn” transaction between the United States and Cuba occurs where a United States financial institution processes certain funds transfers for the direct or indirect benefit of Cuban banks, other persons in Cuba or the Government of Cuba, provided such payments were initiated offshore by a non-Cuban, non-United States financial institution and only passed through the United States financial system en route to another offshore, non-Cuban, non-United States financial institution.

⁶ 31 CFR § 515.573.

⁷ 31 CFR § 515.570

⁸ 31 CFR § 515.512

⁹ Pub. L. 104-114 (1996); 22 U.S.C. §§ 6021-6091.

¹⁰ 22 U.S.C. § 6064(a).

For additional information, contact Moses Luski at mluski@slk-law.com or 1-800-797-9646, ext. 2161.