

September 1984

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### Recommended Citation

Hammock, Marlene (1984) "U.S. Prohibitions on Cuban Trade: Are They Effective?," *Florida Journal of International Law*: Vol. 1: Iss. 1, Article 3.

Available at: <https://scholarship.law.ufl.edu/fjil/vol1/iss1/3>

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## U.S. PROHIBITIONS ON CUBAN TRADE: ARE THEY EFFECTIVE?

### INTRODUCTION

United States foreign policy and a myriad of legal restrictions prevent open trade transactions between U.S. businesses and the Republic of Cuba. Before the 1962 Cuban trade embargo, the United States was Cuba's major trading partner with approximately seventy-five percent of Cuba's imports coming from the United States.<sup>1</sup> Despite Congressional findings encouraging trade with all nations,<sup>2</sup> yearly bills eliminating restrictions on Cuban trade,<sup>3</sup> and the opening of trade relations with other Communist countries, the presidential proclamation closing the Cuban market remains effective for businesses based solely in the United States.

Foreign subsidiaries of U.S. owned or controlled firms were granted licenses to break the embargo barrier, while U.S.-based businesses were excluded from the profitable Cuban market.<sup>4</sup> This inequity, the difficulty in enforcing trade sanctions, and the business community's desire to reopen trade with Cuba, arguably all support the easing of the embargo.

### BACKGROUND

By presidential proclamation on February 6, 1962, John F. Kennedy established a trade embargo between the United States and Cuba.<sup>5</sup> The proclamation prohibited importation of goods originating

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1. L. Theriot, *Cuba Faces the Economic Realities of the 1980's* (Dec. 1981) (available from the Office of East-West Policy and Planning, U.S. Dep't of Commerce). This trade with Cuba provided American business with income of more than \$58 million a year. Zorn, *Bad Tack on Cuba*, N.Y. Times, Feb. 26, 1983, at 19, col. 4.

2. 50 U.S.C. app. § 2401 (1976 & Supp. V 1981). This section states that engagement in international commerce is a fundamental concern of United States policy and notes the importance of exports in strengthening the economy of the United States and fulfilling its foreign policy objectives. Section 2402 purports that it is the policy of the United States to encourage international trade with those countries which have not been determined by the President to be against the national interest. 50 U.S.C. app. § 2402(1) (1976 & Supp. V 1981).

3. Schneyer & Barta, *The Legality of the U.S. Economic Blockade of Cuba Under International Law*, 13 CASE W. RES. J. INT'L L. 451, 454 (1981). See, e.g., H.R. 927, 97th Cong., 1st Sess., 127 CONG. REC. 129 (daily ed. Jan. 19, 1981).

4. See 31 C.F.R. § 515.559 (1982) (granting the issuance of licenses to foreign subsidiaries to trade with Cuba subject to certain limitations).

5. Proclamation No. 3447, 3 C.F.R. 26 (1962), reprinted in 22 U.S.C. app. § 2370 app. at 677 (1976). The proclamation reported the alignment of Cuba with Sino-Soviet Communism to be incompatible with the principles of the Inter-American system. Thus, for the collective self-defense of the hemisphere, an embargo would be imposed to isolate the Cuban government. The Foreign Assistance Act of 1961, cited as authority for the embargo, gave the President sole

from or coming through Cuba, as well as prohibiting exportation of all United States goods to Cuba.<sup>6</sup> Administrative responsibility for implementing these restrictions and establishing exceptions was delegated to the Secretaries of Commerce and Transportation.<sup>7</sup>

### *Commerce Department Controls*

The Department of Commerce has primary control over exportation of U.S. goods to Cuba. The agency has exclusive control over goods and technical data of United States origin, components of United States origin to be incorporated into goods assembled or manufactured abroad, and goods to be produced abroad from technical data of United States origin.<sup>8</sup>

The statutory authority to develop Cuban trade regulations stems from the Export Administration Act of 1969.<sup>9</sup> Pursuant to this Act, the Commerce Department established International Trade Administration Regulations which dictate its handling of exports to all countries.<sup>10</sup> The regulations state three objectives in the control of exports: to protect the domestic economy from excessive drain of materials in short supply, to further the foreign policy of the United States and to meet its international responsibility and to assure national security.<sup>11</sup> The foreign policy rationale justifies the continued control of exports to Cuba.<sup>12</sup>

discretion in imposing the embargo. 22 U.S.C. app. § 2370 (1976). This act stated in part:

"No assistance shall be furnished under this Act 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 on all trade between the United States and Cuba."

*Id.*

6. Proclamation No. 3447, *supra* note 5.

7. *Id.*

8. Address by Stanley L. Sommerfield, Acting Director of the Office of Foreign Assets Control 4 (Apr. 25, 1974) (available from the U.S. Dep't of the Treasury).

9. 50 U.S.C. app. §§ 2401-2413 (1976). The first peacetime Export Control Act initiated by Congress was enacted in 1949 and might have lapsed had it not been for the Korean War in 1951. Since that time the Act has been kept intact by renewals. See Berman & Baison, *United States Export Controls - Past, Present, and Future*, 67 COLUM. L. REV. 791 who argues:

Probably no single piece of legislation gives more power to the President to control American commerce. Subject to only the vaguest standards of 'foreign policy' and 'national security and welfare,' he has authority to cut off the entire export trade of the United States, or any part of it, or to deny 'export privileges' to any or all persons.

*Id.* at 792.

10. 15 C.F.R. §§ 368-99 (1983). Part 369 specifically covers restrictive trade practices or boycotts. *Id.*

11. 15 C.F.R. § 370.1 (1983).

12. See 15 C.F.R. § 385.1 (1983) (requiring a validated license for the export of United States origin commodities and technical data to Cuba for foreign policy purposes).

In conformity with U.S. foreign policy, the International Trade Administration Regulations categorize foreign countries in seven groups.<sup>13</sup> Cuba is in group "Z", the designation with the most rigid trade restrictions.<sup>14</sup> Prior approval from the Commerce Department must be obtained for a U.S. business or individual to be licensed to export or re-export goods of U.S. origin or U.S. technical data to Cuba.<sup>15</sup> Businesses in the United States may apply for a specific license to conduct direct trade with Cuba, but the general policy is to deny all such requests.<sup>16</sup>

The Department grants exporting licenses only for non-strategic, foreign-made products which contain insubstantial amounts of U.S. origin materials and are exported from a third country.<sup>17</sup> The regulations define insubstantial as twenty percent or less of the value of the product to be exported.<sup>18</sup> If the twenty percent maximum is exceeded, application for an export license is generally rejected.<sup>19</sup> Application for an export license may also be submitted to the Treasury Department, which governs both import and export licensing of U.S. owned or controlled foreign subsidiaries.<sup>20</sup>

### *Treasury Department Controls*

Direct financial transactions between the United States and Cuba and importation of Cuban goods are governed by the Treasury Department's Cuban Assets Control Regulations.<sup>21</sup> Authority for these rules is derived from Proclamation No. 3447 and section 5(b) of the Trading with the Enemy Act of 1917.<sup>22</sup> This Act grants the President or his designee sole authority to regulate or prohibit economic trans-

13. 15 C.F.R. § 370.13 (Supp. I 1983). These groups are labeled "P", "Q", "S", "T", "V", "W", "Y", and "Z". The designation of a country under a particular label will determine the amount of control exercised by the Commerce Department over exports to these countries. For example, the Department will generally approve exports for Country Group P (People's Republic of China) at higher technical levels than for Country Groups "Q" (Romania), "W" (Hungary and Poland) and "Y" (Albania, Bulgaria, Czechoslovakia, Estonia, German Democratic Republic, Laos, Latvia, Lithuania, Outer Mongolia, and Union of Soviet Socialist Republics). 15 C.F.R. § 385.3 (1983).

14. North Korea, Vietnam and Kampuchea are also in Country Group "Z." 15 C.F.R. §§ 301-399 (1983). See also 50 U.S.C. app. §§ 2401-2420 (Supp. IV 1980) (cited as authorization for Commerce's designation of country groups).

15. 15 C.F.R. § 385.1 (1983).

16. *Id.*

17. *Id.*

18. *Id.*

19. Telephone interview with Marshall Thompson, Office of Export Administration (Mar. 2, 1983).

20. 31 C.F.R. § 515.559 (1983).

21. 31 C.F.R. § 515 (1983). Issued on Feb. 6, 1962, this act revoked and replaced the former Cuban Import Regulations. 31 C.F.R. § 515.101 (1983).

22. 50 U.S.C. app. § 5(b) (1976 & Supp. V 1981).

actions during wartime<sup>23</sup> or a presidentially declared national emergency.<sup>24</sup>

The legal justification for President Kennedy's economic restrictions against Cuba lay in the state of national emergency declared by President Harry S. Truman in 1950 because of the Korean conflict.<sup>25</sup> The Cuban trade restrictions continued despite congressional passage of the 1976 National Emergencies Act which cancelled all existing proclamations of national emergencies because an exception was made for emergencies declared under section 5(b) of the Trading with the Enemy Act.<sup>26</sup> Courts have rejected arguments insisting the declared 1950 emergency was no longer viable<sup>27</sup> and that Congress unconstitutionally delegated broad legislative power to the President without accompanying guidelines on the use of this power.<sup>28</sup> Thus the Treasury Department's Cuban trade regulations remain in effect.

The Treasury Department regulates four main areas of business transactions with Cuba. These include purely financial transactions, the importation of Cuban goods, Cuban assets in the United States, and goods produced by foreign firms which are owned or controlled by U.S. firms.<sup>29</sup> The Treasury and Commerce Departments exercise dual control over the exportation of U.S. origin goods to Cuba. To avoid double licensing and bureaucracy, an export validated by the Commerce Department is automatically licensed by the Treasury Department.<sup>30</sup>

23. 50 U.S.C. app. § 5(b)(1)(B) (1976 & Supp. V 1981).

24. *Id.* This WW I regulation, originally developed for use against Germany, was amended in 1933 in response to the economic depression. It expanded presidential regulatory authority to include times of national emergencies. Malloy, *Embargo Programs of the United States Treasury Department*, 20 COLUM. J. TRANSNAT'L L. 485, 489 (1981) [hereinafter cited as *Embargo Programs*].

25. Proclamation No. 2914, 3 C.F.R. § 99 (1950), reprinted in 50 U.S.C. app. at 1935 (1976). Because this proclamation was still in effect at the time of the declaration of the Cuban embargo, it was unnecessary for the President to declare a national emergency existed as to Cuba.

26. 50 U.S.C. § 1651(a)(1) (1976). See also 50 U.S.C. app. § 5 (1976 & Supp. V 1981) (denoting the nonapplicability of the National Emergencies Act to the powers conferred by this section).

27. *American Documentary Film, Inc. v. Secretary of the Treasury of United States*, 344 F. Supp. 703, 708 (S.D.N.Y. 1972) (acknowledging Presidential authority to regulate financial transactions with Cuba under 50 U.S.C. app. § 5(b) (1982) and 22 U.S.C. § 2370(a) (1982)). See also *Welch v. Kennedy*, 319 F. Supp. 945, 947 (D.D.C. 1970) (rejecting contention that Trading with the Enemy Act could no longer be effectively invoked).

28. *Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs*, 459 F.2d 676, 679-81 (3d Cir. 1972) (asserting the legality of congressional delegation of broad discretionary powers to the President in dealing with foreign relation matters).

29. Sommerfield, *supra* note 8, at 4.

30. *Id.* The procedure to obtain the required dual licensing without having to go through both the Treasury and Commerce Department consists of first obtaining a general license from the Commerce Department alone. This license guarantees automatic Treasury licensing of the

A businessman,<sup>31</sup> subject to United States jurisdiction who desires to import Cuban goods, must apply for a Treasury Department license.<sup>32</sup> Licenses are rarely granted,<sup>33</sup> but they are issued for the purchase and importation of books, films, records, and similar materials used in research or education.<sup>34</sup> News material for U.S. media organizations may also be purchased from Cuba,<sup>35</sup> as well as samples of Cuban commodities used for legitimate research purposes.<sup>36</sup> Persons traveling to Cuba may purchase and import Cuban origin goods not exceeding one hundred dollars in value.<sup>37</sup> However, these special license situations provide no opportunity to carry on profitable trade relations with Cuba. The opportunities appear greater for those businesses with foreign subsidiaries or affiliates because of an exception to the regulations allowing the issuance of licenses to such companies.

## TRANSACTIONS BY AMERICAN OWNED OR CONTROLLED FOREIGN FIRMS

### *Historical Analysis*

Foreign affiliates and subsidiaries of U.S. corporations are exempt from the Cuban Assets Control Regulations. The exemption grew out of foreign policy problems in the enforcement of similar embargo-related regulations<sup>38</sup> aimed at North Korea, North Vietnam, and the People's Republic of China.<sup>39</sup> The application of U.S. law in the host

transaction. *Id.*

31. See 31 C.F.R. § 515.308 (1983). Person is defined as: an individual, partnership, association, corporation or other organization. *Id.*

32. 31 C.F.R. § 515.204(a) (1983). Cuban goods include any goods made or derived from articles manufactured, produced or grown in Cuba. *Id.* See generally 31 C.F.R. § 515.801 (1982) (setting forth licensing procedures).

33. 31 C.F.R. § 515.543 (1983). Cuban origin goods may be imported if satisfactory documentation proves they were located outside Cuba prior to July 8, 1963 and there has since been no Cuban interest in them. *Id.*

34. 31 C.F.R. § 515.545 (1983). These items must be for specific programs of those universities, libraries, research or scientific institutions which have been approved by the Librarian of Congress or the National Science Foundation.

35. 31 C.F.R. § 515.546 (1982).

36. 31 C.F.R. § 515.547 (1982).

37. 31 C.F.R. § 515.560(a)(3)(c)(3) (1982). Publications are not included in the \$100 limit however the authorization to import goods up to \$100 in value may be used only once in every six consecutive months. The goods imported within the price limit and any publications imported may not be resold.

38. These regulations include those promulgated under the Trading With the Enemy Act, 50 U.S.C. § 1651 (1976) and the Foreign Assets Control Regulations, 31 C.F.R. § 500.541 (1975). But for the exception for foreign affiliates and subsidiaries, the Cuban Asset Control Regulations follow the Foreign Assets Control Regulations which are the oldest Treasury trade restrictions still in effect. See Malloy, *supra* note 24, at 496; Sommerfield, *supra* note 8.

39. See 15 C.F.R. § 370.13 (1982). The People's Republic of China has been dropped from the list of those countries upon which an almost total trade embargo exists. Kampuchea has been added to the list.

country was severely criticized by the governments of those countries. To avoid aggravating relations with host nations favoring Cuban trade, foreign subsidiaries in those countries were exempted from the embargo regulations.<sup>40</sup> Section 515.541 of the Cuban Assets Control Regulations provided "all transactions (not involving U.S. origin goods, credit or dollars) incidental to the conduct of business activities abroad engaged in by any non-banking association, corporation or other organization, which is organized and doing business under the laws of any foreign country in the authorized trade territory are hereby authorized."<sup>41</sup> However, this apparent weakening of the embargo restrictions was not effective.

Subsection (e) of section 515.541 was interpreted as exempting only foreign affiliates and not persons subject to U.S. jurisdiction. Such persons included U.S. citizens who were officers, directors, or principal managerial personnel of the foreign-based firms. The Treasury Department imposed a duty on those United States citizens to prevent their firms from engaging in prohibited transactions with Cuba. This regulation might be violated even if they personally did not actively engage in Cuban trade.<sup>42</sup> Moreover, those unsuccessful in keeping their controlled foreign affiliates from such trade were subject to criminal liability under the Trading with the Enemy Act.<sup>43</sup> The Department defined "controlled foreign affiliates" as any firms in which the U.S. companies had an opportunity to set policy. A management contract, exclusive sales agreement, or fifty-one percent stock ownership (twenty percent if the remainder was widely distributed) all gave rise to such opportunity.<sup>44</sup>

Although legally able to trade with Cuba, uncontrolled foreign affiliates refrained because of a moral suasive policy aimed at the parent firm. The U.S. government would inform the parent firm "it is not in the national interest, and it is contrary to the foreign policy of the United States, for any American firm to allow a foreign affiliate to trade with Cuba, regardless of whether it is legal or not."<sup>45</sup> In ad-

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40. Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 19 BUS. LAW., July 1964, 861, 868. It appeared at the time that foreign subsidiary trade with Cuba would be minimal as the parent firms voluntarily acted to ensure the restriction of Cuban trade. Thus, there existed no need to regulate the foreign subsidiaries and perhaps exacerbate foreign policy problems. *Id.*

41. 31 C.F.R. § 515.541 (1975).

42. Sommerfield, *supra* note 8.

43. 31 C.F.R. § 515.412 (1975). The maximum penalty for violation of the act was ten years in prison or \$10,000 in fines, or both.

44. Sommerfield, *supra* note 8.

45. *Id.* In using the term "foreign policy" the government meant the policy stated in the Trading with the Enemy Act, 50 U.S.C. app. § 5 (1982). If the transaction, which the United States was attempting to have voluntarily dismissed, appeared to still be reaching completion,

dition the United States threatened to generate adverse publicity and withhold government contracts from parent companies unable to dissuade subsidiaries from trading with Cuba.<sup>46</sup> These informal means of persuasion were successful,<sup>47</sup> yet did little to promote favorable relations with host nations who saw these actions as an intrusion on their own sovereignty.

### *U.S. Controlled Canadian Subsidiaries*

The greatest outcry against the extra-territorial application of U.S. law came from Canada which traded with Cuba prior to the United States embargo and continued to do so afterwards. In March 1974 the Canadian firm MLW-Worthington negotiated with Cuba for the sale of thirty locomotives worth \$15 to \$18 million.<sup>48</sup> Fifty-two percent of MLW-Worthington's stock was owned by Studebaker-Worthington, Inc. of New York. This sale was expected to create an estimated 1.5 million work hours for the Canadian plant and its suppliers.<sup>49</sup> Consequently the Canadian government opposed the parent company's need for Treasury Department approval and the resulting delay in completing the sale. The Canadian directors denounced the Trading with the Enemy Act's long-arm effect as an infringement on Canadian sovereignty. With the Canadian government's support and without U.S. approval,<sup>50</sup> Canadian directors of MLW-Worthington completed the contract with Cuba. The two American directors of the Canadian firm opposed the plan to avoid the criminal penalties of the Trading with the Enemy Act. Surprisingly, the U.S. government remained silent throughout the contract negotiation and no action was taken against the parent company or the two American directors. Eventually a waiver was granted, apparently to create a favorable image for U.S. multinational corporations.<sup>51</sup> The U.S. government's ac-

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the parent firm was requested to contact the State Department who would re-emphasize the Government's displeasure with Cuban trade.

46. See Corcoran, *The Trading with the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174, 181 (1968) (informal pressure used on United States parent companies located in Canada to prevent trade with countries subject to a United States embargo). Cf. *Firms Allowed Trade During Embargo*, Kan. City Star, Sept. 27, 1981, at 1, col. 1 (moral suasion program successfully used in 1980 to informally convince United States parent firms to stop their foreign subsidiaries from trading with Iran during the proclaimed embargo).

47. Sommerfield, *supra* note 8.

48. There exists some discrepancy as to the exact amount the contract to sell locomotives to Cuba represented. A \$15 million figure was reported in the New York Times. N.Y. Times, Mar. 19, 1974, at 47, col. 4. In contrast, the Wall Street Journal denoted the contract to be worth \$18 million. Wall St. J., Mar. 7, 1974, at 6, col. 4.

49. N.Y. Times, Mar. 19, 1974, at 47, col. 4.

50. *Id.*

51. *Canada's Changing Posture Toward Multinational Corporations: An Attempt to Harmonize Nationalism with Continued Industrial Growth*, 7 INT'L L. & POL. 257, 277 (1974).

quiescence was also due to a similar situation occurring simultaneously in Argentina.

On February 25, 1974, Argentine executives of two U.S. automobile subsidiaries in Argentina traveled to Cuba to negotiate the sale of 44,000 vehicles worth approximately \$150 million.<sup>52</sup> The Argentine government of Juan D. Peron insisted that any adverse action to the sale by the United States would be interpreted as an infringement of the country's sovereignty. As in the Canadian situation, the United States again relented. But this time the U.S. granted a special license in the "interest of good relations with Argentina."<sup>53</sup> The United States' actions were influenced by President Peron's threats to nationalize the subsidiary plants and order the contract fulfilled.<sup>54</sup> As a result, Chrysler Argentina closed a \$24 million contract with Cuba for the sale of 9,000 Dodge automobiles over a three year period. Ford Argentina followed with a \$30 million order for 3,000 Ford Falcons and 1,500 heavy trucks to be delivered during the same period.<sup>55</sup> A definite break in the Cuban embargo appeared to be emerging, at least for multinational companies.

After the Argentine experience, the United States attempted to establish a strict policy on subsidiary trading with Cuba. In December 1974, the Canadian Cole division of a U.S. corporation, Litton Industries, proposed to sell \$500,000 in office furniture to Cuba. All directors of the Cole division were U.S. citizens.<sup>56</sup> After an informal inquiry the Treasury Department informed the parent company that any application would be denied as a violation of the Trading with the Enemy Act.<sup>57</sup> Thus, the U.S. parent company cancelled the sale.

Alastiar Gillespie, the Canadian Minister of Industry, Trade and Commerce, believed if Litton had not raised the issue, the U.S. government would have ignored the sale. Describing Cuba as an important and developing market for Canada, the Trade Minister called the United States' action "corporate colonialism."<sup>58</sup> He added that Canadian companies which export should be governed by Canadian law only.<sup>59</sup>

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The Canadian government applied for a waiver of the act and received no reply from the State Department for weeks. During this time Canadian indignation against United States control over Canadian commercial transactions grew.

52. N.Y. Times, Feb. 26, 1974, at 6, col. 4.

53. N.Y. Times, Dec. 27, 1974, at 30, col. 2.

54. *Id.*

55. Bus. Latin Am., May 13, 1974, at 145, col. 1. General Motors Argentina was still negotiating with Cuba at this time.

56. Wall St. J., Dec. 26, 1974, at 5, col. 1.

57. N.Y. Times, Dec. 24, 1974, at 3, col. 7.

58. Wall St. J., *supra* note 55.

59. N.Y. Times, Dec. 29, 1974, § 4, at 3, col. 4. The United States position was also at-

Two months later, following pressure from the Canadian government, the United States allowed the transaction to be completed while denying any policy change on the Cuban trade embargo.<sup>60</sup> This marked the second time, however, that the U.S. authorized Canadian subsidiary trade with Cuba despite the prohibitions of the Trading with the Enemy Act and the Cuban Assets Control Regulations.

Although a special license was granted to Canadian Cole, the Canadian government was outraged by United States intrusion into what it considered Canadian affairs and took action to counter the Trading with the Enemy Act.<sup>61</sup> The resulting Canada Business Corporations Act required all companies under its authority to have a majority of Canadian citizens as directors, and an amended Combines Investigation Act allowed the government to limit or nullify foreign actions the government deemed would adversely affect Canada's foreign trade.<sup>62</sup> The Canadian legislation demonstrated it could effectively nullify United States policy on foreign subsidiary trading.

### *Present Subsidiary Regulations*

An opportunity arose on July 29, 1975 for the United States to alter its policy on foreign subsidiary trading. On that date, the Organization of American States (OAS) voted to remove economic and political sanctions against Cuba and allow each member country to define its own economic and diplomatic relations with Cuba.<sup>63</sup> On August 21 the State Department announced that the United States, as a member of the OAS, would modify its Cuban policy as it affected other countries.<sup>64</sup>

On October 8, 1975, the Treasury Department amended the Cuban Assets Control Regulations to reflect a new policy favoring cer-

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tacked on the homefront in a New York Times editorial suggesting the United States re-evaluate the "Litton affair." The opposition to the office furniture sale was viewed as nonsensical in light of the government's previous acquiescence to the Argentine sales to Cuba. Suggested also was that many Canadians suspected the opposition may not have been grounded in Cuban trade policy but rather in a reaction to Canada's decision to decrease oil exports to the United States. N.Y. Times, Dec. 27, 1974, at 30, col. 2.

60. N.Y. Times, Feb. 15, 1975, at 11, col. 5. See also Wall St. J., Feb. 18, 1975, at 32, col. 4 (notes that the sale apparently went through without the United States government sending its word of approval to Canada).

61. Note, *Legal Empediments to Normalization of Trade with Cuba*, 8 LAW & POL'Y INT'L BUS. 1007, 1018. See also *Canada's Changing Posture Toward Multinational Corporations: An Attempt to Harmonize Nationalism with Continued Industrial Growth*, 7 INT'L L. & POL. 257, 300-02 (1974).

62. *Id.* at 1018.

63. Wall St. J., Aug. 22, 1975, at 4, col. 2.

64. *Id.*

tain trade transactions by controlled foreign subsidiaries.<sup>65</sup> Section 515.541, which permitted foreign subsidiaries to trade with Cuba but not persons subject to the jurisdiction of the United States, was revoked. The new section 515.559 prohibited persons "within the United States" from engaging or participating in a licensed transaction with Cuba or Cuban nationals.<sup>66</sup> The change in terminology apparently allows U.S. citizens who are not residents to conduct business with Cuba. The U.S. parent firm and its resident officers or employees may not, however, finance, arrange, participate in or assist negotiations for business between its affiliates and Cuba.<sup>67</sup>

These changes continue to partially dictate which subsidiaries may trade. But, as a matter of course, trading is permitted for subsidiaries in countries favoring Cuban trade.<sup>68</sup> The goods exported must still be non-strategic,<sup>69</sup> without U.S. origin parts and components,<sup>70</sup> and involve no U.S. dollar amounts.<sup>71</sup> Despite these restrictions, American firms eagerly responded.<sup>72</sup>

By the end of 1976, applications more than doubled from the previous year from parent companies seeking licenses permitting their foreign affiliates to trade with Cuba.<sup>73</sup> Only ten such applications were denied by the Treasury Department, demonstrating the new policy of favoring Cuba-U.S. foreign subsidiary trade.<sup>74</sup> Conducting

65. 40 Fed. Reg. 47,108 (1975) (amended and codified at 31 C.F.R. § 515.559 (1982)). This amendment stated in part: Specific licenses will be issued in appropriate cases for certain categories of transactions between U.S. owned or controlled firms in third countries and Cuba, where local law requires, or policy in the third country favors, trade with Cuba.

66. 31 C.F.R. § 515.559 (1982).

67. *Id.* The extent to which the change in wording in section 515.559 altered the policy is questionable. Michael P. Malloy, former attorney-advisor for the Office of Foreign Assets Control of the Treasury Department, contends what has occurred is firms previously exempted from the prohibitions by a general license, must now apply for a specific license. The significance is not in the terminology used, but rather in the governmental change of attitude to the amendment's application. Malloy, *supra* note 24, at 510.

68. 31 C.F.R. § 515.559(a) (1982).

69. 31 C.F.R. § 515.559(a)(1)(i) (1982). See 15 C.F.R. § 399 (1982) (identifying strategic goods by code letter A on the Commodity Control List).

70. 31 C.F.R. § 515.559(a)(1)(iii) (1982). Goods containing United States origin parts and components may be exported to Cuba if such inclusion has been authorized by the Commerce Department. *Id.* Similarly, United States origin spares may be re-exported to Cuba in connection with a licensed transaction if it has been authorized by the Commerce Department. 31 C.F.R. § 515.559(a)(iv) (1982).

71. 31 C.F.R. § 515.559(a)(1)(v) (1982).

72. Wall St. J., Aug. 22, 1975, at 4, col. 2. Several American companies announced plans to review their policies in light of the new regulations. One company, Rohn and Haas Company, which had sold agricultural chemicals to Cuba before the embargo, made plans to send representatives to discuss what products could be sold by its Latin American subsidiaries.

73. Summary of Licensing Actions for U.S. Subsidiary Trade with Cuba: C.Y. 1975-1982 (1983) (available from the Office of Foreign Assets Control, Department of the Treasury). In 1975 101 applications were filed compared to 218 in 1976.

74. *Id.*

more than \$100 million worth of business with Cuba, U.S. firms' Canadian subsidiaries traded more than all other licensed subsidiaries in twenty-two countries.<sup>75</sup> Cuba clearly represented a profitable market in 1976, when the total amount of licensed trade with the country approached \$200 million.<sup>76</sup>

Cuba remains a favorable market for U.S. owned foreign subsidiaries,<sup>77</sup> despite its fluctuating ability to buy goods.<sup>78</sup> Between 1980 and 1982 the Treasury Department denied only four of the 549 trade applications.<sup>79</sup> The value of subsidiary Cuban trade during this period averaged more than \$248 million a year.<sup>80</sup> Since 1975, trade by American owned or controlled foreign subsidiaries totals more than \$1 billion.<sup>81</sup> As these multinational corporations profit from their subsidiary's Cuban trade, businesses based solely in the United States are growing dissatisfied.

#### VIABILITY OF THE EMBARGO IN THE 1980s

Before the U.S. began licensing American subsidiaries abroad, it recognized the dilemma such a policy would create. The acting Director for the Office of Foreign Assets Control of the Treasury Department asserted two reasons for its pre-1975 moral suasive policy. The Director noted the contradiction in allowing the exportation of goods by multinational firms while prohibiting the exportation of the same goods by solely American based firms. This unequal treatment would weaken embargo policies and restrict American employment opportunities, yet promote U.S. capital support of foreign labor in the production of goods destined for embargoed countries.<sup>82</sup>

These rationales remain viable today, despite the need to exempt from the embargo foreign subsidiaries of American firms to foster favorable relations with countries friendly with the United States.

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75. Value of Licensed United States Subsidiary Trade with Cuba: C.Y. 1975-1982 (1983) (available from the Office of Foreign Assets Control, Department of the Treasury).

76. *Id.*

77. Total U.S. Dollar Value by Country of Licensed U.S. Subsidiary Trade with Cuba: F.Y. 1980-1982 (1983) (available from the Office of Foreign Assets Control, Department of the Treasury). In the 1980 fiscal year trade by these foreign subsidiaries had a value of over \$290 million. Total trade through the fiscal year of 1982 equaled approximately \$745 million. Canada continued to lead the market with a total trade value of over \$333 million for the fiscal years 1980-1982.

78. Theriot, *supra* note 1.

79. Summary of licensing actions Involving U.S. Subsidiary Trade with Cuba: F.Y. 1980-1982 (1983) (available from the Office of Foreign Assets Control, Department of the Treasury).

80. Total U.S. Dollar Value by Country of Licensed U.S. Subsidiary Trade with Cuba: F.Y. 1980-1982, *supra* note 77.

81. Summary of Licensing Actions for U.S. Subsidiary Trade with Cuba: C.Y. 1975-1982, *supra* note 73.

82. Sommerfield, *supra* note 8.

However, a recognition of this need does not automatically preclude a solution for firms based solely in the United States.

### *Enforcement Problems*

All U.S. companies face a total embargo on goods containing more than twenty percent U.S. origin parts or components exported to Cuba, yet in trade situations some goods inevitably seep through this barrier. Speculations vary on how this occurs. Some U.S. made goods are believed to have entered Cuba through foreign dealers.<sup>83</sup> American companies find it nearly impossible to trace their products after sale to foreign distributors.<sup>84</sup> This factor and the transactions' illegal nature make it difficult to determine the amount of U.S. goods finding their way to Cuba. A leading proponent of trade with Cuba believes that Cubans can get American products anywhere.<sup>85</sup> A State Department spokesperson conceded that after twenty years of evading the embargo, Cubans are quite good at it.<sup>86</sup> Concrete examples have arisen during the past few years.

Ricardo Escartin, former first secretary of the Cuban interest section, was expelled from Washington, D.C. on February 11, 1981.<sup>87</sup> The government charged Escartin with being an intelligence agent and enticing U.S. business persons to violate the trade embargo.<sup>88</sup> No U.S. companies or individuals were identified. The State Department suggested, however, that indictments could be forthcoming because some businesses allegedly collaborated in the illegal trade.<sup>89</sup> Concern was expressed that both the illegal exportation of U.S. goods and importation of Cuban goods appeared to be increasing.<sup>90</sup>

Additional expulsions followed in 1982. Two Cuban diplomats were expelled from the country in July for allegedly buying high

83. Wall St. J., Aug. 22, 1975, at 4, col. 2.

84. Wall St. J., July 17, 1975, at 1, col. 6.

85. Miami Herald, Sept. 5, 1978, at 4F, col. 3. American entrepreneur K. Jones contended that the embargo was an ineffective way to put pressure on Cuba, as the country had learned to survive without any direct trade with the United States.

86. *Id.* Commerce and State Department officials familiar with the intrusion on the Cuban embargo note the resulting illegal business does not have a great impact on the viability of the Cuban economy due to the small value involved. Miami Herald, Sept. 5, 1978, at 4F, col. 2.

87. Latin Am. Weekly Rep., Feb. 20, 1981, at 11, col. 2. The interest sections, although not embassies, were established under the Carter administration as a means through which the United States and Cuba could communicate. The Cuban interest section is housed in the Czechoslovakian embassy in Washington, D.C. Wall St. J., Feb. 12, 1981, at 6, col. 2.

88. Wall St. J., Feb. 12, 1981, at 6, col. 3. *See also* Miami Herald, *supra* note 85. The procedure used to circumvent the embargo allegedly centered around the establishment of dummy corporations in other Latin American countries to provide trade channels for United States exports.

89. Wall St. J., *supra* note 88.

90. *Id.*

technology equipment by mail from a U.S. company.<sup>91</sup> Six weeks later a third Cuban diplomat was ordered out of the U.S. for illegally buying approximately six thousand pieces of electronics equipment for export to Cuba.<sup>92</sup>

Not only do Cuban nationals evade the embargo impositions, but evidence demonstrates U.S. firms or individuals are directly exporting goods to Cuba. According to U.S. trade data, \$119,000 in U.S. exports found a way into Cuba in 1980. Exports valued at \$49,000 passed directly through the Miami International Airport, the majority of these goods being medicines and pharmaceuticals.<sup>93</sup> Cuba also directly imported from the U.S. tires worth \$5,000, batteries worth \$4,000, typewriters worth \$3,000 and centrifugal pumps worth \$3,000.<sup>94</sup> The Cuban market continues to be a desirable source of trade despite the the embargo restrictions.

### *Business Interest in the Cuban Market*

The business community's reaction to foreign subsidiaries' licensed trade with Cuba demonstrates U.S. interest in the Cuban market. A thaw in United States-Cuba relations, illustrated by the opening of interest sections and the lifting of the travel ban,<sup>95</sup> fueled speculation that the embargo would soon end. In 1977 fifty businessmen representing forty-eight companies flew to Cuba for a trade meeting. They returned to the United States confident of obtaining sizable orders if the embargo ended. The possibility of beginning trade with Cuba created much interest, despite the country's well-known hard currency shortage.<sup>96</sup> A New York businessman questioned the business sense of the embargo against Cuba when the U.S. permitted trade with other communist countries.<sup>97</sup>

The United States allows American businesses to trade with two Communist superpowers, the Soviet Union and the People's Republic of China, yet prohibits trade with the island nation of Cuba. The anomaly is hard to justify to those businesses eager to expand their

91. Wall St. J., July 7, 1982, at 1, col. 3.

92. Wall St. J., Aug. 20, 1982, at 1, col. 3.

93. Follow up to 1981 Miami World Trade Report by Kenneth P. Lipner, Ph.D., Department of Economics, Florida International University (1982). Various trade data was compiled in the report for the purpose of gaining a better understanding of world trade in Miami. Over 1.5 million pieces of information were categorized, including the 220 billion dollars of total 1980 U.S. exports. 4,620 different export categories were noted, as well as 161 countries of destination, including Cuba.

94. *Id.*

95. This was accomplished by allowing the former trade ban to expire.

96. Wall St. J., Apr. 22, 1977, at 10, col. 2.

97. N.Y. Times, Jan. 30, 1978, § IV, at 1, col. 1.

trade. Wayne S. Smith, Chief of the U.S. interest section in Havana from 1979 to 1982, notes that the initially hostile attitude towards Cuba has changed little since it developed in the United States twenty years ago. "When it comes to Cuba," he stated, "the United States seems locked in a time warp."<sup>98</sup>

### *Present Administration's Policy on U.S.-Cuba Trade*

U.S. President Ronald Reagan, while campaigning in 1976, said action must be taken if the United States is to protect Latin America from export of Castro's brand of revolution.<sup>99</sup> The actions he proposed included calling on the Organization of American States to reimpose the embargo, prohibiting trade by U.S. firm's subsidiaries and reimposing the twenty-five mile travel ban on Cuban United Nations delegates.<sup>100</sup> Presently, the Reagan administration's stern policy towards Cuba shows its anger over Cuba's support of revolution and continued ties to the Soviet Union. The administration has tightened the economic embargo by reimposing the 1963 travel restrictions,<sup>101</sup> refusing visas to Cuban officials,<sup>102</sup> declining to talk to Cuban officials about the return of criminals sent to the U.S. during the 1980 Mariel boat-lift,<sup>103</sup> and threatening not only to support U.S. allies in El Salvador, but to meet the problem of foreign arms "at its source."<sup>104</sup>

This hard line, rigid posture has historically failed to achieve U.S. policy objectives, yet the Reagan Administration seems determined to follow the same course. The former chief of the U.S. interests section in Havana described this Cuban policy "as hackneyed as it has been unsuccessful, and evokes a painful sense of *deja vu*."<sup>105</sup> Consequently, the one approach that has never been tried in the last twenty years—a policy of relaxing tensions and encouraging direct trade—likely will not be tried in the near future.

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98. Smith, *Dateline Havana: Myopic Diplomacy*, 48 FOREIGN POL'Y 157, 157. Smith contends United States policies toward Cuba have not only failed to reduce Soviet influence in the area but have ironically had the opposite effect. The solution, he argues, is for the United States to deal with Cuba in the same realistic and cautious manner as it deals with the Soviet Union and other adversaries. *Id.* at 174.

99. N.Y. Times, Mar. 7, 1976, at 40, col. 1.

100. *Id.*

101. 31 C.F.R. § 515.560 (1982).

102. Fagen, *The Real Clear and Present Danger*, 11 CARIBBEAN REV. 18, 52 (1982).

103. Smith, *supra* note 98, at 160.

104. Rogers & Meyers, *The Reagan Administration and Latin America*, 11 CARIBBEAN REV. 14, 16 (1982). Because of this statement, it was reported that Cuban forces were placed on alert in preparation for an actual invasion by United States forces. *Id.* at 16. *See also* Smith, *supra* note 98, at 164.

105. Smith, *supra* note 98, at 157.

### CONCLUSION

Cuba by necessity will continue to rely heavily on Soviet economic support, while the absence of direct trade between Cuba and the United States will leave the latter without any economic influence on Cuba. United States' sanction of multinational corporations' trade with Cuba has quelled foreign host nations' concern for their sovereignty rights and provided a profitable market for those American firms with foreign subsidiaries. However, the 1962 trade restrictions imposed to combat and dissuade a communist government have developed into an embargo directed instead against those businesses located solely in the United States.

The present tightening of the embargo will likely prove ineffective in influencing Cuban policy, since Cuba has little to lose. Cuba has survived twenty-two years without U.S. aid or direct trade. It is insipient to think Cuba will not continue to survive. Instead of promoting the original foreign policy purposes for instigating the embargo, these trade restrictions have pushed Cuba into the economic arms of the Soviet Union and out of the reach of businesses based solely in the United States.

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