NOTES

THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT OF 1996—IMPLICATIONS FOR NAFTA

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I. INTRODUCTION

Since the fall of the Soviet Union and the accompanying end of Soviet subsidization, the Cuban economy has gone from unhealthy to anemic—estimates place it at 40 percent of what it was in the early 1990s.1 Desperate to keep his economy afloat, Fidel Castro has reluctantly opened the door to limited capitalism.2 But much more trade and foreign investment is needed if the starved economy is to survive. Thus, Castro is increasingly inviting the world's businesses to invest in Cuba on his terms. However, Castro's tenacious adversary to the North has seized upon Cuba's state of weakness in an attempt to deal the death knell to the Castro Regime.

Led by Representative Dan Burton, R-Ind., the U.S. House of Representatives voted on September 21, 1995, to adopt the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act"3 by a 294-130 margin.4 Under the sponsorship of Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, R-N.C., the Senate voted to pass a scaled down

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version of the bill the following month.\textsuperscript{5}

One of the Act's most controversial provisions allows both Americans and non-Americans to sue any post-Castro government and any foreign businesses that have utilized nationalized businesses on the island.\textsuperscript{6} Another troubling section of the Act denies a visa to any foreign national that has confiscated property of United States nationals or "trafficked" in such property.\textsuperscript{7}

Not surprisingly, the international community is outraged. The European Union made explicit as early as 1995 that passage of the Act would strain relations with the U.S., and Canada has threatened retaliatory measures.\textsuperscript{8} Even the Clinton Administration initially threatened to veto the Act,\textsuperscript{9} but after Cuba's attack on two unarmed U.S. planes, President Clinton signed the bill into law in March of 1996.\textsuperscript{10} Clinton did, however, suspend until the new year the date upon which lawsuits could be filed against foreign companies\textsuperscript{11}—a suspension which he extended for an additional six months.

\textsuperscript{5} S.381, 104th Cong., 1st Sess. (1995), Pub. L. No. 104-114 (enacted.). The Senate passed LIBERTAD on October 19, 1995, by a 74 to 24 vote. A filibuster and late maneuvering allowed passage only after Senator Helms withdrew the controversial "trafficking provisions" (Title III). \textit{Id.}

\textsuperscript{6} LIBERTAD, \textit{supra} note 1, § 302, 110 Stat. 785, 815 (1996).

\textsuperscript{7} \textit{Id.}, § 401, 110 Stat. 785, 822 (1996). The terms "confiscated" and "confiscation" refer to the seizure by the Cuban Government of ownership or control of property without the property having been returned or adequate compensation provided, or without the claim to the property having been settled, and the failure of the Cuban Government to pay debts resulting from the confiscation of such property. \textit{See id.} § 401(6)(2), 110 Stat. 785, 823 (1996), for a complete definition. A person "traffics" in confiscated property if that person knowingly and intentionally transfers, purchases, invests in, uses, benefits from, etc. \textit{See Pub. L. No. 104-114, 22 U.S.C.S. 6021, at § 401(b)(2) for a complete definition.}


\textsuperscript{11} \textit{Id.} The LIBERTAD Act provides the President with the authority to suspend the effective date of section 302 liability for trafficking in confiscated property if the President determines that the suspension is necessary to the U.S. national interest and will expedite a transition to democracy in Cuba. LIBERTAD, \textit{supra} note 1, § 306(b)(1), 110 Stat. 785, 821 (1996). The Act also provides the President with the authority to renew such additional periods of not more than six months each. \textit{Id.} § 306(b)(2), 110 Stat. 785, 821 (1996).
in January of 1997.\textsuperscript{12} Reasons for opposing the bill include many of the common complaints about anti-Castro legislation. For instance, like the Cuban Democracy Act of 1992,\textsuperscript{13} the LIBERTAD Act involves extraterritorial application of U.S. law because it provides for U.S. control of foreign subsidiaries whose parents are American corporations.\textsuperscript{14} Also, the bill's critics assert that it would conflict with the North American Free Trade Agreement\textsuperscript{15} which was approved by Congress less than two years before the LIBERTAD bill left House committee.\textsuperscript{16}

II. THE LIBERTAD ACT

A. Historical Background

From Spanish colonial times until the present, the history of Cuba has been a turbulent one. Its people have suffered almost continual exploitation, both from within and without. By the 1950s, although Cuba's economy was capitalistic and its economy was strong in comparison to other Latin American countries, little had changed.\textsuperscript{17} Sugar comprised seventy-five percent of exports, making the island vulnerable to the drastic boom and bust cycles of the sugar industry.\textsuperscript{18} This problem was compounded by the fact


\textsuperscript{14} The United States follows the nationality principle of jurisdiction whereby a parent-subsidiary link or a shareholder-corporation link serves as a jurisdictional basis over a U.S. national regardless of where the national may be. In contrast, the European Community operates under a system of restricting its laws to persons, corporations, and products within its borders. Trevor R. Jefferies, Note, \textit{The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?}, 16 HOUS. \textsc{J. INT'L L.} 75 (1993).


\textsuperscript{17} See RAMON EDUARDO RUIZ, CUBA: THE MAKING OF A REVOLUTION 48-51 (1968).

\textsuperscript{18} Id.
that Cuba supplied primarily one market—the United States. Thus, the economy was subject to policy makers in Washington who decided tariffs and quotas for Cuban sugar imports. This dependence, coupled with heavy U.S. ownership of Cuban sugar plantations, made the Cuba of the early to middle twentieth century essentially a U.S. colony.  

The effects of sugar's dominance were devastating: basic foods had to be imported, and the economy could not keep pace with the population.  

Cuba's political situation was no better, as politicians consistently sought power for personal aggrandizement. It was under these conditions that Fidel Castro, gathering support through his promises of free elections and a democratic government, led his revolutionaries into Havana in January of 1959 and completed the overthrow of the Batista regime.

Shortly after seizing power, Castro began to expropriate key industries and to seize foreign-owned properties in the name of economic betterment. American demands for compensation were ignored. Also during the first year of Castro's regime, Castro appointed several communist party members to political office and engaged in economic relations with the Soviet Union. In response, the United States began to decrease Cuba's sugar quota until it was eliminated altogether on July 6, 1960, with the passage of the American Sugar Bill. An economic embargo banning the exportation of American goods to Cuba followed in October.

By early 1962, Castro had expropriated all businesses of any significance and nearly a third of the island's arable land. In all, Castro confiscated $1.8 billion of U.S.-owned property. Furthermore, in that same year Castro openly declared himself a Marxist-Leninist and announced that Cuba would have only one political party and no elections.

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19 Id.
21 Id.
22 Wilkerson, supra note 17.
23 Id.
25 Id. at 193.
In February 1962, President Kennedy declared a complete embargo against the island in an effort to isolate the Castro Regime. The United States was also successful in procuring Cuba's expulsion from the Organization of American States. The rest of the Latin American countries, with the exception of Mexico, followed suit by breaking ties with Cuba.

Conditions between the United States and Cuba have continued to worsen since the 1960s. After Cuba intervened in Angola in the face of U.S. opposition, President Ford proclaimed that any hope of improved relations between Washington and Havana were precluded. The Reagan Administration oversaw the strict enforcement of the travel ban against the island and introduced measures to make Cuba's foreign credit negotiations increasingly difficult. In addition, the Administration pressured both Cuban-Americans and American businesses abroad to refrain from making any shipments to Cuba.

In 1992, the U.S. sought to close the existing gaps in the embargo against the island by passing the Cuban Democracy Act. Its provisions urged other nations to act in accordance with the embargo and allowed the President of the United States to sanction any country providing assistance to Cuba. But Castro's demise has apparently not come soon enough for Washington, for it continues to turn out additional anti-Castro legislation.

B. LIBERTAD Findings and Purposes

Congress included a section of Findings in the LIBERTAD Act to illustrate the alleged need for the legislation. Initial findings describe current

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32 Perez, supra note 30, at 261.
33 Id.
35 Id.
economic\textsuperscript{37} and social\textsuperscript{38} conditions in Cuba, but most of the findings describe the oppressive Castro regime.\textsuperscript{39} Specific findings assert that the Cuban government engages in illegal international narcotics trade,\textsuperscript{40} harbors fugitives from justice in the United States,\textsuperscript{41} supports international terrorism and violence,\textsuperscript{42} and continues to utilize such forms of terror and oppression as torture, political imprisonment, and exile.\textsuperscript{43}

Congressional Findings relating to the Castro regime’s abuse of the Cuban people are numerous. For instance, the Findings section tells of the horror that results from citizens attempting to leave the country. In some cases, the section alleges, the Cuban government has held innocent citizens hostage merely because their family members have left the island without permission.\textsuperscript{44} Even worse, those caught trying to escape are often imprisoned or killed.\textsuperscript{45}

Apparently, international organizations have taken notice of the inhumane conditions in Cuba as well. Congress points out that the United Nations Commission on Human Rights has repeatedly condemned the unacceptable human rights situation in Cuba and has passed Resolutions appointing a Special Rapporteur to the island.\textsuperscript{46} However, the Castro government has made clear its refusal to comply with such United Nations resolutions.\textsuperscript{47}

Subsequent Findings imply that the Act’s provisions are not unprecedented internationally. For example, one Finding explains that the United Nations has determined that massive and systematic violations of human rights may constitute a “threat to peace” and has imposed sanctions against nations due to such human rights violations.\textsuperscript{48} Congress also parallels its actions

\textsuperscript{37} Id. § 2(1).
\textsuperscript{38} Id. § 2(2).
\textsuperscript{39} Id. § 2(4) - s 2(7).
\textsuperscript{40} Id. § 2(13), 110 Stat. 785, 787 (1996).
\textsuperscript{41} Id.
\textsuperscript{42} Id. § 2(14).
\textsuperscript{43} Id. § 2(15).
\textsuperscript{44} Id. § 2(17).
\textsuperscript{45} Id. § 2(18) (referring to the confirmed murder of more than 40 men, women, and children who attempted to leave Cuba on July 13, 1994).
\textsuperscript{46} Id. § 2(20), 110 Stat. 785, 788 (1996).
\textsuperscript{47} Id. § 2(21) (stating that the Cuban government has formally expressed its decision not to “implement so much as one comma” of the United Nations Resolutions appointing the Rapporteur).
\textsuperscript{48} These nations include Rhodesia, South Africa, Iraq, and the former Yugoslavia. Id. § 2(24).
against Cuba with the United Nations Security Council’s resolutions authorizing the use of “all necessary means” to restore Haiti’s democratically elected government.\textsuperscript{49} The Findings note that these resolutions lead to the ousting of the military dictatorship.\textsuperscript{50} Perhaps most significantly, Congress states that for the past 36 years, the Cuban Government has posed and continues to pose a national security threat to the United States.\textsuperscript{51}

The listed purposes of this Act are as follows: to assist the Cuban people in obtaining their freedom and prosperity,\textsuperscript{52} to seek international sanctions against the Castro government,\textsuperscript{53} to provide for the national security of the United States,\textsuperscript{54} to encourage free and democratic elections in Cuba,\textsuperscript{55} to develop a plan to provide assistance to a transition government and later to a democratically elected government in Cuba,\textsuperscript{56} and to protect against confiscatory takings and wrongful trafficking in property seized by the Castro Regime.\textsuperscript{57}

\textbf{C. LIBERTAD Provisions}

Section 102 provides for the enforcement of the pre-existing economic embargo of Cuba. First, Congress urges the President of the United States to encourage other countries to respect the economic embargo of Cuba\textsuperscript{58} and to impose sanctions consistent with the Cuban Democracy Act of 1992 against all nations not doing so.\textsuperscript{59} The Act also strengthens provisions of the Trading With the Enemy Act dealing with civil fines for non-complying individuals and confiscation of articles involved in violations.\textsuperscript{60}

Section 110(b) of the Act reaffirms that the United States’ membership in the North American Free Trade Agreement in no way alters United States

\begin{footnotes}
\textsuperscript{49} Id. § 2(26).
\textsuperscript{50} Id.
\textsuperscript{51} Id. § 2(28), 110 Stat. 785, 788 (1996).
\textsuperscript{52} Id. § 3(1).
\textsuperscript{53} Id. § 3(2).
\textsuperscript{54} Id. § 3(3).
\textsuperscript{55} Id. § 3(4), 110 Stat. 785, 789 (1996).
\textsuperscript{56} Id. § 3(5).
\textsuperscript{57} Id. § 3(6).
\textsuperscript{58} Id. § 102(a)(1), 110 Stat. 785, 792 (1996).
\textsuperscript{59} Id. § 102(a)(2).
\textsuperscript{60} Id. § 102(d)(1), 110 Stat. 785, 792-793 (1996).
\end{footnotes}
sanctions against Cuba. Special attention is given to the NAFTA provision allowing the United States to ensure that Cuban products or goods made from Cuban materials do not enter the United States through Canada or Mexico and that products from the United States do not end up in Cuba via these countries.

Title II of LIBERTAD shifts focus from Cuba’s government to its people by setting forth plans to assist the Cuban people when the Castro government is replaced by a transition government or a democratically elected government. After the establishment of such a government, the President may take steps to end the economic embargo of Cuba, to provide various forms of assistance to Cuba, and to seek the agreement of other countries, international institutions, and multilateral organizations to provide additional assistance to the island.

Section 302 is one of the more controversial provisions of the Act. This section establishes liability for trafficking in property confiscated from United States nationals by the Castro Regime. Any person, agency, or instrumentality of a foreign state who performs such trafficking shall be liable for monetary damages to any United States national who owns the claim to such property.

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61 This section of the LIBERTAD Act points out that the statement of administrative action accompanying NAFTA states that “The NAFTA rules of origin will not in any way diminish the Cuban sanctions program. . . . Nothing in the NAFTA would operate to override this prohibition.” Id. § 110(b),(b)(1), 110 Stat. 785, 800 (1996).

62 Id. § 110(b)(2), referring to Art. 309(3) of NAFTA.

63 Id. § 204(a), 110 Stat. 785, 810 (1996).

64 Id. § 202(b)(2), 110 Stat. 785, 806 (1996).

65 Id. § 202(e), 110 Stat. 785, 807 (1996).

66 A person “traffics” in confiscated property if that person knowingly and intentionally (i) sells, distributes, . . . or otherwise disposes of, . . . or holds an interest in confiscated property, (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, (iii) or causes, directs, participates in, or profits from trafficking by another person, . . . Id. § 4(13), 110 Stat. 785, 790-791 (1996).

67 Id. § 302(a)(1), 110 Stat. 785, 815 (1996). The amount for which the trafficker shall be liable to the claimant of the confiscated property is an amount equal to the sum of:

- The amount which is the greater of (I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest; (II) the amount determined under section 303(a)(2), plus interest; or (III) the fair market value of that property, calculated as being the then current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and (ii) court costs and reasonable attorneys fees.

Id. § 302(a)(1)(i).
Equally as controversial is Section 401 which excludes from the United States any aliens who have confiscated property from United States nationals or have trafficked in such property.\textsuperscript{68} This exclusion extends to corporate officers, principals, or shareholders with a controlling interest of an entity which has been involved in such confiscation or trafficking.\textsuperscript{69} Additionally, this provision applies to spouses, minor children, or agents of an individual excludable under this Title.\textsuperscript{70}

**III. NAFTA**

**A. NAFTA Historical Background**

Since World War II, the United States has principally relied on multilateral agreements such as the General Agreement on Tariffs and Trade\textsuperscript{71} to open foreign markets.\textsuperscript{72} But later, the United States began to focus on bilateral free trade agreements.\textsuperscript{73} For instance, while proceeding under the Uruguay Round of GATT, the United States became involved in the U.S.-Canada Free Trade Agreement.\textsuperscript{74} However, the GATT negotiations reached an impasse in 1990 when the European Community and the U.S. were unable to reach an agreement over agricultural subsidies.\textsuperscript{75}

Given the impasse in the GATT negotiations, the United States began to consider trade expansion outside Europe. Thus, the United States was receptive to Mexican President Carlos Salinas' request for United States-Mexico bilateral negotiations for a free trade agreement, and in June of 1990 President Bush and President Carlos Salinas finally announced their intent

\textsuperscript{68} Id., § 401, 110 Stat. 785, 822 (1996). See supra note 7 for definitions of "trafficking" and "confiscated property" as used in this section.

\textsuperscript{69} Id. § 401(a)(3).

\textsuperscript{70} Id. § 401(a)(4).


\textsuperscript{74} Id.

to pursue such an agreement. In February 1991, President Bush added Canada as a party to the free trade negotiations, but passage of a final agreement between the three countries was no easy task.

The primary obstacles to Congressional support for NAFTA concerned labor and the environment. But President Bush eased tensions and won over support in Congress by issuing his "Action Plan" in which he promised to maintain close bipartisan cooperation throughout the negotiations, to ensure assistance to dislocated workers, to expand bilateral labor cooperation with Mexico, and to develop a program of U.S.-Mexico environmental cooperation. The Bush Administration went on to complete NAFTA negotiations before the 1992 presidential election.

However, labor and environmental concerns remained strong throughout the election, and newly-elected President Bill Clinton sought ratification of the bill only after securing supplemental agreements in these areas. Still, passage of the bill remained an uphill battle for the President as labor and environmental groups persuaded a significant number of democrats to oppose NAFTA’s passage. In the end, these factions were defeated. Through effective use of the newly-elected president’s political momentum and the media, President Clinton swayed the intensely divisive Congressional debate in his favor and secured NAFTA’s passage in November of 1993.

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79 H.R. COMM. ON WAYS AND MEANS, 102D CONG., 1ST SESS., EXCHANGE OF LETTERS ON ISSUES CONCERNING THE NEGOTIATIONS OF A NORTH AMERICAN FREE TRADE AGREEMENT 1-3 (COMM. PRINt 1991).
80 Id. at 2.
81 Id.
82 Id.
B. NAFTA Provisions


NAFTA is a very extensive agreement. Not including the two supplemental agreements, the Act itself is made up of over two thousand pages, eight parts, twenty-two chapters, and many indices. Part One, the General Part, begins with NAFTA's objectives. Among these are the liberalization of trade in goods and services, removal of barriers to investment, protection of intellectual property rights, and the establishment of a framework for further trilateral, regional, and multilateral cooperation to expand and enhance the Agreement. Chapter Two of Part One provides the Act's general definitions.

Part Two, Trade in Goods, provides that each party to the Agreement shall confer national treatment to the goods of another party in accordance with Article III of GATT. This part also contains annexes, including one on Trade and Investment in the Automobile Sector, and one on Textiles and Apparel Goods. Also within Part Two are chapters dealing with Rules of Origin, Customs Procedures, Energy and Basic Petrochemicals, Agriculture and Sanitary and Phytosanitary Measures, and Emergency Action.

The following part, Technical Barriers to Trade, provides standards-related measures. Government Procurement is covered by Part Four, while Part Five governs investment, services, and related matters. Part Six

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85 NAFTA, supra note 15, ch. 1, art. 102, 32 I.L.M. at 297.
86 Id.
87 Id. ch. 2, 32 I.L.M. at 298.
88 Id. ch. 3, 32 I.L.M. at 299.
89 Id. ch. 3, annex 300-A, 32 I.L.M. at 320.
90 Id. ch. 3, annex 300-B, 32 I.L.M. at 327.
91 Id. ch. 4, 32 I.L.M. at 349.
92 Id. ch. 5, 32 I.L.M. at 358.
93 Id. ch. 6, 32 I.L.M. at 364.
94 Id. ch. 7, 32 I.L.M. at 368.
95 Id. ch. 8, 32 I.L.M. at 383.
96 Id. ch. 9, 32 I.L.M. at 386.
97 Id. 32 I.L.M. at 613.
98 Id. 32 I.L.M. at 639.
covers intellectual property,99 and Part Seven governs administrative and institutional provisions,100 including dispute settlement procedures.101

2. Free Flow of Business Travelers

In order to facilitate trade and investment,102 the Agreement includes a chapter providing for free flow of business.103 Under Chapter Sixteen, each government must allow business travelers who are citizens of other NAFTA member countries to enter their respective countries.104 To ensure that the purpose of this provision will not be frustrated, each party is further required to limit any fees for processing applications for temporary entry to the approximate cost of services rendered.105 However, an exception is made for entries involving labor disputes:106 Article 1603(2) allows a country to deny the entry of a business traveler if such entry might adversely affect either the settlement of a labor dispute that is in progress at the intended place of employment107 or the employment of any person involved in such a dispute.108

If a country chooses to invoke the 1603(2) exception,109 it must inform the business person in writing of the reasons for the refusal110 as well as promptly notify in writing the country whose citizen was denied entry.111

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99 Id. ch. 17, 32 I.L.M. at 670.
100 Id. 32 I.L.M. at 681.
101 Id. ch. 20, sec. B, 32 I.L.M. at 693.
102 Art. 1602 provides that each party “shall expeditiously apply, . . . (the measures of Article 1601), so as to avoid unduly impairing or delaying trade in goods and services or conduct of investment activities under this Agreement.” Id. ch. 16, art. 1602(1), 32 I.L.M. at 664.
103 Id. ch. 16, 32 I.L.M. at 664.
104 Id., art. 1603(1), 32 I.L.M. at 665. This article maintains that “each party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to health and safety and national security, in accordance with this chapter, including the provisions of Annex 1603.” Id.
105 Id. art. 1603(4), 32 I.L.M. at 665.
106 Id. art. 1603(2), 32 I.L.M. at 664.
107 Id. art. 1603(2)(a), 32 I.L.M. at 665.
108 Id. art. 1603(2)(b), 32 I.L.M. at 665.
109 Id.
110 Id. art. 1603(3)(a), 32 I.L.M. at 665.
111 Id. art. 1603(3)(b), 32 I.L.M. at 665.
The latter notification must also explain why the business traveler was not permitted entry. 112

To ensure that the objectives of chapter Sixteen are met, the parties can take the extra step of creating a "Temporary Entry Working Group" comprised of representatives from each party. 113 This group is to meet at least once yearly to consider the implementation and functioning of business-traveler entry provisions 114 and to further develop measures facilitating such entry. 115

3. Dispute Resolution

Though the Agreement places great emphasis on guaranteeing the free flow of business travelers, it only allows a party complaining of a violation of Article 1603 to utilize the general dispute settlement proceedings under Article 2007 in certain circumstances. 116 The alleged violation must involve a pattern of practice, 117 and the business person must have exhausted all administrative remedies involving the matter. 118

According to Article 2004, any disputes arising between two or three NAFTA governments with respect to the interpretation or application of NAFTA shall be resolved according to Chapter Twenty. 119 This chapter establishes the Free Trade Commission to be comprised by ministers or cabinet-level officials of each country as the central institution of NAFTA, 120 as well as the Secretariat to provide administrative assistance to dispute settlement panels and other bodies. 121

112 Id.
113 Id. art. 1605(1), 32 I.L.M. at 665.
114 Id. art. 1605(3)(a), 32 I.L.M. at 665.
115 Id. art. 1605(3)(b), 32 I.L.M. at 665.
116 Id. art. 1606(1), 32 I.L.M. at 665.
117 Id. art. 1606(1)(a), 32 I.L.M. at 665.
118 Id. art. 1606(1)(b), 32 I.L.M. at 665. The remedies referred to are deemed exhausted if the competent authority does not issue a final determination of the matter within one year of the institution of an administrative proceeding, and such failure is not attributable to delay caused by the involved business person. Id. art. 1606(2), 32 I.L.M. at 665.
119 Id. art. 2004, 32 I.L.M. at 694.
120 Id. art. 2001, 32 I.L.M. The Commission shall (a) supervise the implementation of NAFTA, (b) oversee its further elaboration, (c) resolve disputes regarding interpretation or application, (d) supervise the work of all committees and working groups established by NAFTA, and (e) consider any other which may affect NAFTA’s operation.
121 Id. art. 2002, 32 I.L.M. at 693.
The actual dispute resolution functions are rather complex. Generally, a complaining party may decide whether to pursue a dispute settlement in either a NAFTA or a GATT forum, subject to certain limitations.\textsuperscript{122} If a party believes that any actual or proposed measure may affect that government's rights under NAFTA,\textsuperscript{123} it may request consultations with the governments concerned.\textsuperscript{124} If the disputing governments cannot reach an agreement within thirty days\textsuperscript{125} of the request for consultations, any country that took part in the consultations may request a meeting of the Commission,\textsuperscript{126} which will convene within ten days of receipt of the request and endeavor to resolve the dispute quickly.\textsuperscript{127} If the Commission has not resolved the matter within thirty days or some other agreed-upon period, any party may request the establishment of an arbitral panel.\textsuperscript{128} Unless agreed otherwise, this panel must issue its initial report within ninety days of the selection of the last panelist.\textsuperscript{129} Finally, the panel shall, unless otherwise agreed, issue to the parties a final report no longer than thirty days after issuing its initial report.\textsuperscript{130}

\textsuperscript{122} Article 2005 provides that disputes regarding any matter arising under NAFTA or GATT may be settled in either forum at the complaining party's discretion. \textit{Id.} art. 2005(1), 32 I.L.M. at 694. However, before the complaining party initiates the proceeding, it must notify the two other governments. If the parties cannot agree on the appropriate forum, the dispute will be settled under NAFTA. \textit{Id.} art. 2005(2), 32 I.L.M. at 694. Also, if the responding party claims that the action relates to the environment, health, safety, conservation, or is subject to an environmental or conservation agreement under Article 104, the dispute must be settled under NAFTA. \textit{Id.} art. 2005(3) \& (4), 32 I.L.M. at 694.

\textsuperscript{123} This Article applies to a complaint by one country that another country has acted or is proposing to act in a manner that is or would be inconsistent with the Agreement or cause the impairment of benefits that the complaining government reasonably expected from NAFTA. \textit{Id.} art. 2004, 32 I.L.M. at 694.

\textsuperscript{124} \textit{Id.} art. 2006, 32 I.L.M. at 694.

\textsuperscript{125} Id., art. 2007(1)(a), 32 I.L.M. at 695. Article 2007(1) provides three exceptions to the normal thirty day period in which the parties may resolve the matter: the parties have forty-five days to resolve the matter if any other party subsequently requested or participated in consultations on the matter, \textit{id.}, art. 2007(1)(b), or fifteen days in matters concerning perishable agricultural goods, \textit{id.}, art. 2007(1)(c), or any other period that they may agree on.

\textsuperscript{126} \textit{Id.} art. 2007, 32 I.L.M. at 695.

\textsuperscript{127} \textit{Id.}, art. 2007(4), 32 I.L.M. at 695.

\textsuperscript{128} \textit{Id.}, art. 2008(1), 32 I.L.M. at 695.

\textsuperscript{129} \textit{Id.}, art. 2016, 32 I.L.M. at 697.

\textsuperscript{130} \textit{Id.}, art. 2017, 32 I.L.M. at 697.
Upon receipt of the final report, the disputing parties must attempt to resolve the dispute in general accordance with the final report. If the final report reveals that the panel has found that a measure is inconsistent with or impairs the Agreement, and the parties still have been unable to resolve the matter within thirty days of receipt of the final report, the complaining party may suspend from the adverse party NAFTA benefits of equivalent effect to those which were or may be impaired as a result of the disputed measure. However, no party may create by domestic law a right of action to challenge another government's measures.

4. Exceptions

Chapter Twenty-one contains exceptions to the Agreement's provisions. The first exceptions refer to "general exceptions" set out in GATT dealing with health and the environment. Perhaps most relevant is the national security exception, which provides that a government may act in a manner which would otherwise be inconsistent with the Agreement to protect its national security interests. The Agreement provides only limited guidelines for this provision, as the exception is generally self-
judging in nature; however, each government expects that its provisions will be applied by the others in good faith.\footnote{138}

IV. ANALYSIS

A. Business Travelers

The LIBERTAD Act seeks to assist the Cuban people in obtaining their freedom\footnote{139} and provides for assistance to a democratic post-Castro government.\footnote{140} Apparently, the Act’s supporters hope that a tighter embargo will lead to such a transition of the Cuban government. But these same individuals also realize that no embargo can completely choke off Cuba so long as other nations continue to trade with the island. Thus, the drafters of the LIBERTAD Act hope to discourage not only American citizens but also non-U.S. citizens from trading with or investing in Cuba.

The Act presents a foreign company or citizen considering dealing with Cuba with a choice: avoid dealings involving confiscated property or be denied entry into the United States\footnote{141} and become subject to potential liability to the claimant of such property.\footnote{142} But the means Congress has chosen to deter non-citizens from dealing with Cuba indicate that Congress has also made a choice: it has chosen to conflict with provisions of NAFTA in its quest for an admittedly powerful tool of deterrence.

In order to remove barriers to trade and to facilitate business transactions between the U.S., Canada, and Mexico, NAFTA provides for the free flow of business travelers between member countries.\footnote{143} Given limited exceptions,\footnote{144} no party shall deny a business traveler from a NAFTA country entrance into its respective country.\footnote{145} The resulting conflict is obvious: any Mexican or Canadian corporate officer, principal, or controlling

\footnote{139}{\textit{LIBERTAD}}, supra note 1, § 3(1), 110 Stat. 785, 788 (1996).
\footnote{140}{\textit{Id.}} § 3(4), 110 Stat. 785, 789 (1996).
\footnote{141}{\textit{See id.}} § 401(a), 110 Stat. 785, 822 (1996).
\footnote{143}{\textit{NAFTA}}, supra note 15, art. 1601, 32 I.L.M. at 664.
\footnote{144}{\textit{E.g.}}, id. art. 1603(2), 32 I.L.M. at 665. provides an exception if the entry of the business traveler might adversely affect the settlement of a labor dispute in progress at the intended place of employment.
\footnote{145}{\textit{Id.}} art. 1603(1), 32 I.L.M. at 665.
shareholder of an entity which has trafficked in confiscated U.S. property in Cuba, or a spouse, minor child, or agent of such individual, will be denied a visa to enter the United States—a right explicitly guaranteed by NAFTA.147

B. National Security Exception

The conflict between the NAFTA temporary entry provision148 and LIBERTAD’s section denying entry visas becomes readily apparent by a simple reading of the agreements. Thus, the question becomes whether an exception exists which can somehow justify this conflict. The applicable GATT exceptions dealing with health and the environment are certainly not helpful, but perhaps the NAFTA national security exception is relevant. After all, the Findings of the LIBERTAD Act purport that the Castro government threatens international peace and security by engaging in acts of armed subversion and terrorism, that its massive and systematic human rights violations may constitute a threat to peace, and that “for the past 36 years, the Cuban government has posed and continues to pose a national security threat to the United States.”

There is no question that Congress has a great and encompassing role in providing for the national security. Some of these powers are clear and direct. For instance, the plain letter of the Constitution gives Congress the power to declare war. But Congress also has power to provide for the national security by less direct policy making. Also, the Supreme Court

146 LIBERTAD, supra note 1, § 401(a), 110 Stat. 785, 822 (1996).
147 NAFTA, supra note 15, art. 1603, 32 I.L.M. at 665.
148 Id. art. 1603(1), 32 I.L.M. at 665.
149 LIBERTAD supra note 1, § 401(a), 110 Stat. 785, 822 (1996).
150 GATT, supra note 71, art. XX.
151 NAFTA, supra note 15, art. 2102, 32 I.L.M. at 699.
152 LIBERTAD, supra note 1, art. 2(14), 110 Stat. 785, 787 (1996).
154 Id. § 2(28).
155 U.S. CONST. art. I, § 8, cl. 11.
156 The Constitution provides Congress with many indirect means of providing for the national security. E.g., U.S. Const. art. I, § 8, cl. 3 (giving Congress the power to regulate foreign commerce); id., art. I, § 8, cl. 4 (giving Congress the power to set rules for nationalization); id., art. I, § 8, cl. 10 (granting Congress the power to define and punish felonies on the high seas and offenses against the law of nations); id., art. I, § 8, cl. 18 (giving Congress the power to make all laws necessary and proper to execute other
has repeatedly affirmed Congress' great latitude in establishing national security policy.\textsuperscript{157}

But what constitutes a "national security exception?" This term is ambiguous and has yet to be clearly defined.\textsuperscript{158} The Supreme Court provided some guidance when it declared that the term, as use in the Veteran's Preference Act, was only intended to encompass government activity involving direct protection of the country from internal subversion or external aggression.\textsuperscript{159} Under such a definition, no action to protect national security from Cuba would be in order as Cuba presumably poses no actual threat of foreign aggression. But the Court's definition may be limited to the Act which it was then reviewing. Others define national security as a prophylactic concept concerned with preventing potential dangers.\textsuperscript{160} Under the latter definition, Congressional action would probably be justifiable on the argument that the Castro regime continues to create at least some potential danger to the United States and the free world in general.

Unfortunately, the text of NAFTA does not conclusively define "national security." The applicable article is relatively short and is not conclusive: it states that nothing in the Agreement shall require a party to disclose information essential to national security,\textsuperscript{161} nor prevent a party from protecting its national security interests through actions relating to traffic in arms or other military goods and services.\textsuperscript{162} Nor shall any part of NAFTA be construed to prevent actions taken in times of war or other international emergency,\textsuperscript{163} actions relating to policies or agreements on non-proliferation of nuclear weapons,\textsuperscript{164} or to prevent any party from


\textsuperscript{158} See generally Minn, supra note 156, at 219.

\textsuperscript{159} Cole v. Young, 351 U.S. 536, 544 (1956).


\textsuperscript{161} NAFTA, supra note 15, art. 2102(1)(a), 32 I.L.M. at 700.

\textsuperscript{162} Id., art. 2102(1)(b)(i), 32 I.L.M. at 700.

\textsuperscript{163} Id., art. 2102(1)(b)(ii), 32 I.L.M. at 700.

\textsuperscript{164} Id., art. 2102(1)(b)(iii), 32 I.L.M. at 700.
complying with obligations under the United Nations Charter for the maintenance of international peace and security.\textsuperscript{165} It is unclear, however, whether any of these sections apply.

Indeed, most of the provided national security exceptions seem inapplicable. The denial of entry visas is not designed to prevent disclosure of confidential information or arms traffic, nor is the exception applicable due to times of war. But perhaps the current situation in Cuba represents an “emergency in international relations.” Advocates of the Act would likely claim that such an emergency exists,\textsuperscript{166} but it is unlikely that United States' trading partners would agree. The Castro government has been in power for over thirty-five years, and although it has undoubtedly been involved in revolutionary activities in other parts of the world during that time,\textsuperscript{167} such activities are nearly, if not completely, over. Furthermore, as Cuba's outdated communist economy continues to weaken, the Castro government will be in less and less of a position to invest its limited resources in conflicts beyond its borders.

Perhaps the exception applies because the LIBERTAD Act was created in pursuance of obligations for the maintenance of peace and security under the United Nations Charter. It is true that the United Nations Commission on Human Rights has repeatedly reported on the unacceptable human rights condition in Cuba and has appointed a Special Rapporteur to Cuba\textsuperscript{168} whom the Castro government refused to accept.\textsuperscript{169} It is also true that the United Nations has determined that massive and systematic violations of human rights may constitute a “threat to peace” under Article 39\textsuperscript{170} and has imposed sanctions on other countries for such violations.\textsuperscript{171} However, the United Nations has not placed economic sanctions on Cuba, nor has it resolved that conditions in Cuba constitute a “threat to peace.” Thus, if

\textsuperscript{165} Id. art. 2102(1)(c), 32 I.L.M. at 700.
\textsuperscript{166} E.g., LIBERTAD, supra note 1, § 2(14)-(28), 110 Stat. 785, 787-788 (1996) (stating that the Castro regime continues to be a threat to world peace).
\textsuperscript{167} E.g., Quirk, supra note 31.
\textsuperscript{168} E.g., LIBERTAD, supra note 1, § 2(20), (22), 110 Stat. 785, 788 (1996).
\textsuperscript{169} E.g., id. § 2(21) (noting that the Cuban government has formally expressed its decision not to “implement so much as one comma” of the United Nations Resolutions appointing the Rapporteur).
\textsuperscript{170} U.N. CHARTER, art. 39, para. 21.
\textsuperscript{171} E.g., LIBERTAD, supra note 1, § 2(24) (noting that the United Nations has imposed sanctions for the violation of human rights on Rhodesia, South Africa, Iraq, and the former Yugoslavia).
Congress purports to be acting in accordance with U.N. Charter obligations regarding the maintenance of international peace and security, it must be said that it is acting on its own initiative and under its own extension of general United Nation Charter obligations.

C. Dispute Resolution

The United States' trading partners have already followed through on threats to oppose LIBERTAD section 401 (denial of entry visas to traffickers in confiscated goods) by pursuing the matter before world trade bodies.\(^\text{172}\) Notwithstanding possible available remedies under GATT, Canada and Mexico will have viable remedies to pursue under NAFTA.\(^\text{173}\) However, before having access to Article 2007 general dispute settlement proceedings for the failure to grant temporary entry for business travelers, the Agreement provides two special hurdles: the matter must involve a pattern of practice,\(^\text{174}\) and the business person must have exhausted all available administrative remedies regarding the matter.\(^\text{175}\) As stated previously, these remedies will be deemed exhausted if no final determination has been issued by the competent authority within one year of the institution of the administrative proceeding.\(^\text{176}\)

Regarding the conflict resulting from the LIBERTAD Section 401 visa denial provision, these hurdles should not prevent the matter from coming under general dispute settlement proceedings. Due to the permanent nature of Section 401, the refusals of entry visas will certainly amount to a "pattern of practice" and thereby satisfy the first requirement. As to the exhaustion of available administrative remedies, it is unlikely that any administrative authority will be able to settle the matter: assuming that the "competent


\(^{174}\) Id. art. 1606(1)(a), 32 I.L.M. at 665.

\(^{175}\) Id. art. 1606(1)(b), 32 I.L.M. at 665.

\(^{176}\) Id., art. 1606(2), 32 I.L.M. at 665. Also, the failure to issue a determination cannot be attributable to delay caused by the business person. Id.
authority” involved will be the Temporary Entry Working Group, whose job it is to implement and administer temporary entry provisions, any determination of the Group will be inadequate to repeal or prevent the implementation of a provision of an act of Congress. Thus, the requirements would probably not prevent the alleged violation from reaching Article 2007 general dispute resolution, and their only practical effect would be to delay the Article 2007 settlement proceedings for up to one year.

Because Section 401 of the LIBERTAD Act is allegedly inconsistent with NAFTA or causes impairment of NAFTA benefits, Canada or Mexico would have the right to take the matter to general dispute resolution. Thus, the complaining party could request consultations with the United States, which if unsuccessful could be followed by a meeting of the Commission. If this likewise failed to resolve the dispute, Canada or Mexico could request the establishment of an arbitral panel to issue an initial report followed by a final report after which the disputing parties would have their last chance to settle the matter. If the final report states that the LIBERTAD Act’s measures are inconsistent with NAFTA, yet the parties are still unable to resolve the matter, the complaining party would be allowed to suspend from the United States NAFTA benefits equivalent to the benefits lost due to the United States’ refusal to issue the relevant entry visas.

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177 The Temporary Entry Working Group is created by Article 1605. Id. at art. 1605, 32 I.L.M. at 665.
178 Id.
179 The Temporary Entry Working Group shall be comprised of representatives from each member country, including immigration officials. Art. 1605(1). Id. art. 1605(1), 32 I.L.M. at 665.
180 See id. art. 1606(2), 32 I.L.M. at 665 (providing that “the remedies referred to in paragraph (1)(b) shall be deemed to be exhausted if a final determination in the matter has not been issued by the competent authority within one year of the institution of an administrative proceeding, and the failure to issue a determination is not attributable to delay caused by the business person).
181 See supra note 116.
182 Id. art. 2004, 32 I.L.M. at 694.
183 See supra note 117 and accompanying text.
184 See supra notes 125-127 and accompanying text.
186 Id. art. 2016, 32 I.L.M. at 697.
187 Id. art. 2017, 32 I.L.M. at 697.
188 Id. art. 2018, 32 I.L.M. at 697.
189 Id. art. 2019, 32 I.L.M. at 697.
Exactly how and to what extent a complaining party may retaliate is not certain. The Agreement allows the suspension of benefits "of equivalent effect" until an agreement is reached. It further provides that the suspended benefits should be in the same trade sector(s) affected by the matter at issue unless this is impractical or ineffective. Also, a disputant may request review of suspension of benefits which are "manifestly excessive," but exactly how a complaining party will retaliate cannot be predicted. Obviously, retaliations will depend on the nature and the extent of the dispute. But because the complaining party may choose, subject to the aforementioned limitations, in what manner and for how long it will retaliate, predicting retaliatory measures will always involve some speculation.

If Canada or Mexico does retaliate with trade sanctions, this action could jeopardize millions of dollars in U.S. exports. In 1991, the United States exported $33.28 billion worth of goods to Mexico and $85.1 billion to Canada. The percentage of these figures that could be lost from retaliatory sanctions is uncertain, but given the possibility of a relatively small trade dispute giving rise to lost business deals, retaliation to retaliation, poor governmental relations, and consumer backlash, substantial harm to the United States could result should Mexico or Canada suspend trade benefits in retaliation for the LIBERTAD Act's conflicts with NAFTA.

V. CONCLUSION

With the passage of NAFTA came the world's largest free-trade area: the Agreement created a market of over 370 million consumers and $6.5 trillion in goods and services yearly and these figures are only initial estimates. Trade between member nations grew dramatically under previous agree-

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190 Id., art. 2019(1), 32 I.L.M. at 697.
191 Id., art. 2019(2)(a), 32 I.L.M. at 697.
193 Id. art. 2019(3), 32 I.L.M. at 697; see also id. art. 2019 (4), 32 I.L.M. at 698 (providing that panel reviewing whether suspended benefits are manifestly excessive must proceed under Model Rules of Procedure and is subject to 60 day review limit).
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ments: under the Canada-U.S. Free Trade Agreement, U.S. exports to Canada increased by $12.9 billion between 1988 and 1992, and U.S. exports to Mexico grew by more than $24 billion from 1986 to 1992 following Mexico's market-opening initiatives of 1986. But these figures are encouraging to the United States in more than dollar figures. According to the U.S. Department of Commerce, for each $1 billion increase in exports, 20,000 U.S. jobs are created. Thus, the U.S. has an incredible amount to gain from NAFTA.

Likewise, the U.S. has much to lose from violating NAFTA. Nonetheless, the LIBERTAD Act does just that. Section 401 of the Act denies United States entry visas to aliens who have confiscated property of United States nationals or who have trafficked in such property. But NAFTA, which Congress approved not three years earlier, guarantees a right of entry into the U.S. to these same business travelers from NAFTA nations.

Perhaps the United States can justify its action under NAFTA's national security exception which provides that nothing in the Agreement shall be construed to prevent a member nation from taking steps to protect its national interest. But it is unlikely that this exception will justify the denial of visas because the current situation in Cuba does not seem to amount to a matter affecting national security as defined by the NAFTA text establishing the exception. Furthermore, even if Congress considers the Cuban situation a matter of national security as provided by NAFTA article 1603, it is unlikely that Mexico or Canada will concur in any such judgment. Thus, unless changes are made, it can be expected that Mexico or Canada will ultimately be allowed to suspend from the United States NAFTA benefits equivalent to the benefits lost due to the United States' refusal to issue entry visas to Mexican or Canadian business travelers.

198 Id.
199 Id.
201 Id.
202 NAFTA, supra note 15, art. 1603, 32 I.L.M. at 665.
203 NAFTA, supra note 15, art. 2101, 32 I.L.M. at 699.
204 See supra notes 151-7 and accompanying text.
205 NAFTA, supra note 15, art. 2019, 32 I.L.M. at 697.
While Congress sees the LIBERTAD Act as a means to quicken the demise of the Castro government, tightening the embargo is not worth jeopardizing our relationship with our principal trading partners. Castro’s government is weakening every year, and its collapse is inevitable with or without the LIBERTAD Act. The ends that Congress seeks by this bill are admirable, but the means it has chosen to reach those ends are unacceptable.