"Resumed U.S.-Cuba Trade Relations: It's Easier Than You Probably Think"

Remarks of Robert Muse

Investigation 332-552

United States International Trade Committee Hearing

Overview of Cuban Imports of Goods and Services and Effects of U.S. Restrictions

June 2, 2015

I. Introduction

On January 15th of this year President Obama effected unilateral rule changes that permitted U.S. goods to be exported to Cuba. At the same time, he authorized the importation of goods produced in Cuba.

The President's action required no congressional authorization to re-establish the first commercial imports of Cuban-origin items since John Kennedy imposed a comprehensive trade embargo on Cuba in the early 1960s. Nor was congressional authority required to permit commercial exports to Cuba that, again, with the exception of agricultural commodities, are the first in over fifty years.

There are restrictions. In terms of imports from Cuba, limited amounts of such things as rum and cigars are allowed, but unlimited quantities of items produced by Cuba's emerging private sector may be imported into the U.S.

Commercial sales to Cuba are limited to building materials and equipment for use by the private sector, farm equipment to private farmers, and "tools, equipment, supplies, and instruments for use by private sector entrepreneurs."

The restrictions are policy-based, there is nothing to prevent President Obama or a future president from issuing new regulations tomorrow that would allow the unrestricted sale of U.S.-manufactured products to Cuban government entities and, at the same time, issuing regulations allowing unlimited imports of goods into the U.S. produced by Cuban state enterprises.

But it is reported repeatedly that the president can do very little more to lift the current trade embargo on Cuba and that it is now up to Congress to act. This is not true.

II. The Legal Authority Exists for Resumed U.S.-Cuba Trade Today

a. MFN Treatment of Imports from Cuba

Cuba and the U.S. are founding members of the World Trade Organization (WTO). When the WTO was established in 1995, both the U.S. and Cuba accepted the General Agreement on Tariffs and Trade (GATT) as binding on all members. Article I of the Agreement prohibits signatories from discriminating among signatory nations when extending trade benefits. For example, if a nation grants another nation a lower customs duty rate on a product, it must extend that rate to all WTO members. This means both the U.S. and Cuba must extend Most-Favored-Nation (MFN) treatment to other members' exported products, with the result that Cuban goods must be allowed into the U.S. on terms as favorable as those extended to other WTO members' goods.

However, in 1962, the U.S. invoked the Article XXI exemption of GATT when Kennedy issued Proclamation 3447 to establish the current embargo on Cuba. Under this article any nation can opt out of its obligations under the GATT by claiming such action "necessary for the protection of its essential security interests."

All it will take for MFN status to apply to Cuba-origin products is a presidential rescission of the U.S. invocation of Article XXI.

b. Export Licensing for U.S. Exports to Cuba

The embargo bans U.S. citizens and companies from "engaging in transactions" with the government of Cuba and Cuban nationals or entities. The statute that authorizes the embargo is the Trading with the Enemy Act, which provides the president, in the broadest of terms, with the authority to institute and maintain economic sanctions on countries deemed hostile to the United States. That authority has been delegated to the Treasury Department's Office of Foreign Assets Control (OFAC).

As a practical matter, the embargo is a set of provisions promulgated individually through OFAC rulemakings and other assertions of executive authority. Collectively those rules and executive orders are set out in the Cuban Assets Control Regulations CACR.

The Executive Branch's power to extend, revise and modify the CACR's embargo provisions is unfettered. The first words of the first section of the CACR are: "all...transactions are prohibited except as specifically authorized by the Secretary of the Treasury...by means of regulations, rulings, instructions, licenses or otherwise...."

Given OFAC's express power to modify the embargo through the creation of new regulations (either by rulemaking or the creation of new generally licensed exceptions to the embargo), prohibitions on the importation of Cuban-origin products, for example, may be rescinded in one of two ways: (1) deletion of the current provision prohibiting such imports from the CACR through an OFAC rulemaking, or (2) the promulgation of a general license authorizing such imports. In allowing the importation of products produced "by independent Cuban entrepreneurs," President Obama used the second method.

Similarly, the president possesses the executive authority to wholly rescind restrictions on U.S. exports to Cuba. As noted above, President Kennedy prohibited such exports by issuing Presidential Proclamation 3447. President Barack Obama or a successor is just as free to rescind that proclamation as Kennedy was to make it.