NORMALIZING WITH CUBA

-- SPEAKING NOTES --

Presentation to Global Business Dialogue
Colloquium on
"Cuba, the United States, and the Road Back to MFN"

Washington, DC

John R. Magnus
TRADEWINS LLC
September 10, 2015

TRADE**WINS** LLC

1133 New Hampshire Ave.
NW, 11th Floor

Washington, DC 20036

(202) 744-0368

www.tradewinsllc.net

September 10, 2015

NORMALIZING WITH CUBA

-- SPEAKING NOTES --

Good morning. I'm glad to be here, honored to be among these panelists, and grateful to Judge for including me.

The views I will express are personal ones, and I'll start by associating myself with the consensus you are hearing today: that it is high time to adjust U.S. policy toward Cuba, and not just by converting interest sections into Embassies.

My main job this morning is to talk about **how** to normalize, with a focus on trade rather than on travel. You could think of this as the plumbing – not glamorous, but important. What would need to be done at the statutory level, and how would administrative processes in the trade field need to change to include Cuba after so long excluding Cuba?

I will at the end have something brief to say on trademarks, and there I will disclose a client interest.

I. Changes Needed at Statutory Level

In preparation for this event I consulted numerous Cuba reform bills introduced during the past several congresses. These come in many variations, but there is a category my colleague Sheridan McKinney and I refer to as "root and branch" bills – *i.e.*, bills that seek to purge the embargo comprehensively. An interesting company of legislators have introduced or co-sponsored such bills.

If you look through enough of these "root and branch" bills, a pattern emerges – indicating a rough consensus on what has to happen at the statutory level, in order for commerce and economic relations to resume. With apologies to those in the audience who may have already taken and passed the graduate level course, I will share with you now the results of that distillation. What do we need to do legislatively?

- We need to repeal Section 620(a) of the **Foreign Assistance Act of 1961**. This one is older and less well-known than other Cuba embargo building blocks, and it has a charming directness:

> SEC. 620. PROHIBITIONS AGAINST FURNISHING ASSISTANCE.—(a)(1) 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 upon all trade between the United States and Cuba. (2) Except as may be deemed necessary by the President in the interest of

TRADE**WINS** LLC

1133 New Hampshire Ave. NW, 11th Floor

Washington, DC 20036

(202) 744-0368

www.tradewinsllc.net

> the United States, no assistance shall be furnished under this Act to any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation of Cuban sugar into the United States or to receive any other benefit under any law of the United States, until the President determines that such government has taken appropriate steps according to international law standards to return to United States citizens, and to entities not less than 50 per centum beneficially owned by United States citizens, or to provide equitable compensation to such citizens and entities for property taken from such citizens and entities on or after January 1, 1959, by the Government of Cuba.

- We also need to repeal the **Cuban Democracy Act of 1992**. Among other things, Section 6005 of the CDA ("Sanctions") statutorily precluded the issuance of licenses for various kind of transactions that could previously be licensed. The CDA also tightened restrictions on supplying medicines and telecommunication services, and contained several provisions aimed at coercing third countries into aligning with the United States' policy toward Cuba.

- Likewise, we need to repeal the **Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996**, often referred to as "Helms-Burton." This item entails several conforming amendments, including changes to some additional sections (498A and 498B) of the Foreign Assistance Act of 1961, as well as repeal of sections 514 and 515 of the **International Claims Settlement Act of 1949**.

- Several changes are needed to the **Trade Sanctions Reform and Export Enhancement Act of 2000**.[1] We need to amend section 906(a) (removing Cuba from the 1-year license rule for state sponsors of terrorism); amend section 908(a) (removing Cuba from restrictions on U.S. government financing); and repeal sections 908(b) (on financing agriculture sales to Cuba), 909 (on imports from Cuba), and 910 (on Cuba travel-related transactions).

- Within the **Internal Revenue Code of 1986**, we need to amend section 901(j)(2) to restore the foreign tax credit with respect to Cuba.

- Within the **Food Security Act of 1985**, we need to repeal section 902(c) so that Cuba can be included in quota allocations under our Sugar Program.

- To get at the roots of the embargo, Congress needs to amend the **Trading With the Enemy Act** – clarifying that TWEA Section 5(b) authorities cannot be exercised with respect to Cuba. Similarly, a full-scale Cuba reform package must address the **Export Administration Act of 1979** (as continued by the Executive Branch using **International Emergency Economic Powers**

TRADE**WINS** LLC

1133 New Hampshire Ave. NW, 11th Floor

Washington, DC 20036

(202) 744-0368

www.tradewinsllc.net

[1] The TSREEA was enacted as Title IX of a much larger bill. Trade geeks reading it in original context may be amused to see what immediately follows: Title X of the bill is the Continued Dumping/Subsidy Offset Act, affectionately known within the tribe as the "Byrd Amendment."

Act authority) – directing the removal of all special export restraints now in force with respect to Cuba, and clarifying that normal export controls can be imposed per sections 5, 6(j), 6(l), and 6(m).

- And most reformers consider that normalizing with Cuba requires repealing **Section 211** of the **Department of Commerce and Related Agencies Appropriations Act of 1999**. Section 211 deals with transactions and payments connected to confiscated intellectual property. There is a different proposal, editing out Section 211's Cuba-specific references, that has been put forward as a sufficient response to the adverse ruling adopted some years ago by the WTO Dispute Settlement Body on Section 211. But authors of "root and branch" bills seem to agree that really normalizing with Cuba requires going beyond the minimum steps necessary to make Section 211 WTO-compatible.

Overall, although any count has some ambiguities, that looks like roughly 8 repeals and maybe a dozen more amendments. Short work for a legislature brimming with enlightened statesmanship and bipartisan good will! They can get it done on a Tuesday between breakfast and lunch.

Or maybe not. And given how dense the thicket of legal restrictions is, just at the statutory level, it is difficult to guess what the result would be if Congress completed some of these assignments but not others. Probably it would be like untying most of a knot.

And mind you, completing the entire list would merely restore the possibility of lawful commerce. It would not accord to Cuba "normal" trading partner status, much less the preferential status enjoyed by Cuba's Caribbean neighbors.

II. "Normal Trade" Status and Other Trade Arcania

So what about trading normally with Cuba? That is, after all, referenced in the title of today's event.

The first point here is that upon becoming lawful, U.S. imports from Cuba will be subject to "Column 2" duty rates. These are the Smoot Hawley tariffs, which have remained in our law and in the tariff schedule even though no one remembers the last time there were goods for those duty rates to apply to. (Imports that would theoretically face Column 2 rates have been blocked outright by sanctions.) There's a clever joke in this, if I could figure out how to tell it. The <u>worst</u> tariff treatment that we give to the goods of any country that we actually trade with is "most favored nation" treatment – if you're looking at the tariff schedule, it's "Column 1 General." But now, for the first time in decades, there is something even worse, something that makes MFN treatment actually look … favorable. Cuban goods that may lawfully enter the United States today – such as items purchased from private entrepreneurs – are dutiable at Column 2/Smoot Hawley rates. Don't expect a lot of volume!

TRADE**WINS** LLC

1133 New Hampshire Ave. NW, 11th Floor

Washington, DC 20036

(202) 744-0368

www.tradewinsllc.net

This is, of course, no way to normalize. If we want commerce to resume, we will have to get Cuba at least into Column 1 General – the same treatment we give to China, to Brazil and India, and for the moment at least to Japan and the EU. Perhaps that normal treatment will, in Cuba's case, have to be achieved manually (through annual decisions) for a period of time – a process associated with another great trade/legislative duo, Messrs. Jackson and Vanik.

But if we are willing to trade normally with Cuba, then it stands to reason that we might be prepared to promise to trade normally with Cuba – that is, to revoke the "non-application" statement that currently makes WTO rules inapplicable to the Cuba-U.S. relationship. And with that step, we will be looking at something trade wonks know as Permanent Normal Trade Relations or "PNTR."

Many do not consider even that to be sufficiently ambitious. They believe that for the economic relationship to really blossom, Cuba will need to obtain preferential status, either through membership in the Caribbean Basin Initiative or some equivalent. Some are ready to jump straight to a free trade agreement.

My sense is that some time will have to pass before anything like that becomes plausible. We will have to enjoy trading normally for a while, and see that doing so does not tilt the world off its axis. And even under plain vanilla MFN … er, NTR … terms, there is plenty of scope for bilateral commerce to get moving at a good clip.

First things first, though. Congress needs to make commerce with Cuba lawful before anyone can do anything to make it catch fire.

If any of these things happen, other changes will have to occur within our administrative trade machinery. A few examples:

- The Office of the USTR compiles a list of significant foreign trade barriers every year – the National Trade Estimate. There has never been any reason to include Cuba in that exercise. Now there will be. (I'd like to be a fly on the wall as decisions on the first Cuba chapter of the NTE are debated in the Winder Building and inter-agency!) Likewise with other annual processes like Special 301.

- The International Trade Commission will have – in fact already has – more reason to look at Cuba, in its investigative and economic effects modeling work. Speaking of the ITC, Section 337 claims targeting items imported from Cuba can also, perhaps, be anticipated … alleging intellectual property infringement or other "unfair methods of competition."

- Eventually, someone is bound to file a dumping or subsidy complaint against Cuban-made goods, presenting the Commerce Department with some analytical challenges. (Is Cuba a non-market economy? Can its government bestow measurable subsidies?)

TRADE**WINS** LLC

1133 New Hampshire Ave. NW, 11th Floor

Washington, DC 20036

(202) 744-0368

www.tradewinsllc.net

All the joys and tender mercies of a normal trading relationship. It may not sound like something to look forward to, but it surely is.

Of course there are some sectors that will need extra-careful attention, and will present special challenges, as normalization is negotiated. Sugar leaps to mind, as do some categories of energy trade and seasonal agriculture trade. And then there are sectors where confiscated (or purportedly confiscated) trademarks loom large. I will close with 2 minutes on that touchy subject.

III. The Particular Problem of Trademarks, Including Cigar Marks

Trademarks are a special category within the universe of expropriation claims. There are several reasons for this, but perhaps the most obvious is the extent to which their value may have changed over half a century – more, sometimes vastly more, than with physical assets.

I do consulting work here in DC for a company that holds the U.S. rights to several of the most significant Cuban-heritage cigar brands. This business was chosen and joined by exiles who, in the United States, took forward the brands and cigar-making traditions that they and their families had developed in Cuba before the revolution.

The Cuban government considers that, through nationalization, it became the sole owner of these brands and trademarks on a worldwide basis. U.S. courts have held otherwise, finding the purported takings to have been ineffective. Ownership of the marks did not transfer; it continued to reside with the individuals and families, many of whom had left Cuba, re-settled in the United States, and re-built their businesses with production bases in the Dominican Republic and elsewhere.

Now some courts elsewhere in the world consider the takings announced by Cuba's government to have succeeded. This has created an odd situation with important brands that are "bifurcated" – owned by one company in jurisdiction A and licensed by the Cuban government to another company in jurisdiction B. Competing commercial entities using the same brands, trade dress, *etc.* in different places: this is one example of the distortions that have built up during the long period of the embargo. It is not, I submit, a situation where policymakers can now simply throw a door open and say, "okay, trade."

This is one part of the trademark conundrum. Another part, which the National Foreign Trade Council has worked hard to highlight, involves Cuba's own IP system and the security of the many U.S. marks registered there. Much of what one hears, in rooms like this and at events like this, suggests that the appropriate policy stance for the U.S. government on "intellectual property relations" with Cuba is blindingly obvious and simple. I think it is … not so simple.

TRADE**WINS** LLC

1133 New Hampshire Ave. NW, 11th Floor

Washington, DC 20036

(202) 744-0368

www.tradewinsllc.net

Really the whole topic of confiscations and compensation claims is not simple. Current U.S. law puts those issues at the front of the queue, demanding that they be resolved satisfactorily before other elements of normalization can occur. What we have discovered is that waiting for that, means waiting eternally. It perpetuates an embargo that doesn't serve us well and has failed to advance its own stated objectives.

So I do not advocate keeping the "claims" issue in its current bottleneck status. At the same time, if trade and investment are going to resume before the claims are sorted out or while they are being sorted out, policymakers are going to have to apply a certain amount of care and creativity to sectors like the cigar sector.

* * *

I'll stop there, with thanks for your attention, and I look forward to your questions.

TRADE**WINS** LLC

1133 New Hampshire Ave.
NW, 11th Floor

Washington, DC 20036

(202) 744-0368

www.tradewinsllc.net