

ADVANCING SHARED INTERESTS: THE CASE FOR A MARITIME SECURITY AGREEMENT WITH CUBA

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I. Introduction

Cuba's days as a conventional military threat to the United States "have come and gone."¹ Yet, located only ninety miles from Key West, Florida, Cuba's geographic proximity has enabled its internal machinations to rapidly erupt into significant U.S. national security risks.² Cuba has presented a continuous stream of risks since the 1960s, ranging from nuclear war³ and cold war gamesmanship⁴ to mass migration⁵ and human smuggling.⁶

Today's Cuba continues to present a mix of risks to the United States, including illegal migration and human smuggling.⁷ Additionally, and

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¹ General Charles Wilhelm, Speech, in *WORLD POLICY INSTITUTE, NATIONAL SUMMIT ON CUBA 25* (Sept. 17, 2002), <http://www.worldpolicy.org/sites/default/files/2002NationalSummitBook.pdf>.

² See Lana Wylie, *Isolate or Engage? Divergent Approaches to Foreign Policy toward Cuba*, in *FOREIGN POLICY TOWARD CUBA* 4–9 (Michele Zebich-Knos et al. eds., 2005).

³ See, e.g., Anthony Lewis, *President Grave*, *N.Y. TIMES*, Oct. 23, 1962, at A1.

⁴ See, e.g., *Castro's Globetrotting Gurkhas*, *TIME*, Feb. 23, 1976, at 29.

⁵ See, e.g., John M. Crewdson, *Hundreds in Boats, Defying U.S., Sail for Cuba to Pick Up Refugees; Hundreds in Boats, Defying Authorities, Sail to Cuba to Rescue Kin Refugees Let In 'Conditionally'*, *N.Y. TIMES*, Apr. 25, 1980.

⁶ See, e.g., Mimi Whitefield, *Cuba, U.S. Take Aim at People Smuggling*, *MIAMI HERALD* (Dec. 1, 2015), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article47440865.html>.

⁷ MARK P. SULLIVAN, *CONG. RESEARCH SERV., R43926, CUBA: ISSUES FOR THE 114TH CONGRESS 45-47* (2015).

perhaps more concerning, transnational criminal organizations (TCOs) have increasingly moved their operations into the eastern Caribbean.⁸ These TCOs are lethal and highly adaptable, drug-trafficking enterprises that seek to leverage general instability to their advantage.⁹ They are also diversified, participating in a wide range of other criminal activities, including support for terrorism.¹⁰ Until recently, these TCOs specialized in trafficking illicit narcotics—predominantly cocaine—through Central America into Mexico and then the United States.¹¹ Since 2010, however, in response to heightened governmental pressure, the percentage of the total amount of cocaine originating in the Western Hemisphere that flows through the eastern Caribbean has tripled, signaling a broad shift by the TCOs to the east.¹² Unfortunately, violent crime rates have followed

⁸ EXEC. OFFICE OF THE PRESIDENT, OFFICE OF NAT'L DRUG CONTROL POLICY, COCAINE SMUGGLING IN 2013 8–9 (2013) [hereinafter COCAINE SMUGGLING IN 2013]; *U.S.-Caribbean Border: Open Road for Drug Traffickers and Terrorists: Hearing Before the Subcomm. on Oversight, Investigations, and Management of the H. Comm. on Homeland Security*, 112th Cong. 20–29 (2012) [hereinafter *Caribbean Border Hearing*] (statement of Luis G. Fortuno, Governor, Puerto Rico).

⁹ EXEC. OFFICE OF THE PRESIDENT, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME 5 (2011) [hereinafter TOC STRATEGY]. In this strategy, President Obama committed the United States to achieving five policy goals:

[Protecting] Americans and our partners from the harm, violence, and exploitation of transnational criminal networks; [helping] partner countries strengthen governance and transparency, break the corruptive power of transnational criminal networks, and sever state-crime alliances; [breaking] the economic power of transnational criminal networks and [protecting] strategic markets and the U.S. financial system from [transnational organized crime] penetration and abuse; [defeating] transnational criminal networks that pose the greatest threat to national security by targeting their infrastructures, depriving them of their enabling means, and preventing the criminal facilitation of terrorist activities; and [building] international consensus, multilateral cooperation, and public-private partnerships to defeat transnational organized crime.

Id. at 1.

¹⁰ JOHN ROLLINS & LIANA SUN WYLER, CONG. RESEARCH SERV., R41004, TERRORISM AND TRANSNATIONAL CRIME: FOREIGN POLICY ISSUES FOR CONGRESS 7-16 (2013); TOC STRATEGY, *supra* note 9, at 5–8.

¹¹ JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 1–3.

¹² *Confronting Transnational Drug Smuggling: An Assessment of Regional Partnerships: J. Hearing Before the Subcomm. on Coast Guard and Maritime Transp. of the H. Comm. on Transp. and Infrastructure & Subcomm. on the Western Hemisphere of the H. Comm. on Foreign Affairs*, 113th Cong. 44 (2014) [hereinafter *Drug Smuggling Hearing*] (statement of Luis Arreaga, Deputy Asst. Sec'y of State, Bureau of Int'l Narcotics and Law Enforcement Affairs).

suit.¹³ Puerto Rico is now the most violent place in the United States, having a homicide rate four times the national average.¹⁴ The risk for Cuba, and by extension, the United States, is that TCOs will seek to gain a foothold in Cuba for its use as a transshipment point to the United States, as they have in Central America.¹⁵ Cuba's existing smuggling networks, combined with the potential instability caused by its dynamic political, economic, and social landscape, make Cuba a potential target for TCOs seeking new avenues to the United States.

The United States' maritime border defense against these threats is handled principally by the U.S. Coast Guard and various law enforcement agencies, including U.S. Customs and Border Protection. These agencies have adopted a strategy that seek to interdict illegal migrants at sea and quickly return them to their country of departure.¹⁶ The strategy is largely unilateral and reactionary in nature. With only limited cooperation with Cuba, U.S. maritime and air assets continuously patrol the ninety-mile stretch of water between the two countries intending to find, track, and interdict inbound targets in the time it takes for a vessel to depart Cuba and reach the United States.¹⁷ While years of experience have improved this strategy's effectiveness, the Coast Guard estimates that it interdicts only 40 percent of illegal smuggling from Cuba.¹⁸ This success rate was perhaps historically acceptable, but is now concerning given the prospect of TOC in the eastern Caribbean.

Today, the United States government has an opportunity to address the risk of TCOs in Cuba in addition to the more traditional threats of human smuggling and mass migration. Due to recent improvements in

¹³ *Caribbean Border Hearing*, *supra* note 8, at 20–29 (statement of Luis G. Fortuno, Governor, Puerto Rico).

¹⁴ U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, 2014 CRIME IN THE UNITED STATES TABLE 5 (2015). *See also Caribbean Border Hearing*, *supra* note 8, at 20–29 (statement of Luis G. Fortuno, Governor, Puerto Rico).

¹⁵ CLARE RIBANDO SEELKE ET AL., CONG. RESEARCH SERVICE., R41215, LATIN AMERICA AND THE CARIBBEAN: ILLICIT DRUG TRAFFICKING AND U.S. COUNTERDRUG PROGRAMS 1–2 (2011); COCAINE SMUGGLING IN 2013, *supra* note 8, at 10 (2013).

¹⁶ *Office of Law Enforcement*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp> (last visited May 16, 2016).

¹⁷ *See Overview of U.S. Coast Drug and Migrant Interdiction: Hearing Before the Subcomm. on Coast Guard and Maritime Transp. of the H. Comm. on Transp. and Infrastructure*, 111th Cong. 33–40 (2009) (statement of Rear Admiral Wayne E. Justice, U.S. Coast Guard, Assistant Commandant for Capabilities) [hereinafter *Interdiction Hearing*].

¹⁸ *Id.*

U.S.-Cuba relations, the United States is positioned to overhaul its maritime security strategy toward Cuba. In December 2014, President Barack Obama announced a major shift in U.S. policy.¹⁹ Departing from the “outdated” U.S. policy of Cuban isolation nurtured since the 1960s, the President committed to a policy of engagement, and promised to “advance shared interests” in areas such as counter-narcotics, counterterrorism, and migration.²⁰ Since his announcement, the U.S. government has reiterated its desire to cooperate in the realm of maritime security, but has not taken any significant action.²¹ To that end—and as this article argues—the United States should capitalize on this policy shift by seeking a maritime security agreement with Cuba.

Maritime security agreements (MSAs) are a form of agreement that commits two or more nations to a common purpose, and typically avails each party of the others’ capabilities and authorities.²² Common MSA provisions include information-sharing, procedures to effectuate joint operations, and standing permissions to conduct operations in another party’s waters.²³ Maritime security agreements are a key element of the U.S. government’s strategy for countering maritime trafficking threats in the Western Hemisphere.²⁴ The United States has some form of a MSA in place with 43 other countries, including virtually every Central American and Caribbean country—except Cuba.²⁵ The maritime threats associated with Cuba are evolving, and U.S. maritime strategy should evolve to keep pace. The conclusion of a MSA would be an important step toward ensuring the U.S. government can effectively counter future threats to the United States.

¹⁹ President Barack Obama, Statement by the President on Cuba Policy Changes (Dec. 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>.

²⁰ *Id.*

²¹ *Fact Sheet: One-Year Anniversary of the President’s Policy of Engagement with Cuba*, WHITE HOUSE (Dec. 16, 2015), <https://www.whitehouse.gov/the-press-office/2015/12/16/fact-sheet-one-year-anniversary-presidents-policy-engagement-cuba>.

²² In the context of this article, a maritime security agreement (MSA) refers to any form of bilateral or multilateral agreement between nations concluded for the purposes of combatting transnational organized crime (TOC). Also, MSAs are often referred to as “bilats,” “bilaterals,” or “bilateral agreements,” but the terms have the same meaning.

²³ See generally U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS (2012) (For Official Use Only manual that includes text of all MSAs relating to U.S. Coast Guard maritime law enforcement operations) (copy on file with author).

²⁴ *Interdiction Hearing*, *supra* note 17, at 33–40.

²⁵ See generally U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23.

This article will explore the merits of a potential MSA with Cuba. Section I provides an introduction and background. Section II describes current and prospective national security risks posed by Cuba, with a particular emphasis on the potential impact of transnational organized crime (TOC). Section III explains that while broader changes to the maritime security strategy would require congressional action, current U.S. law does not prohibit a MSA with Cuba. Section IV explains how MSAs function and illustrates their effectiveness in the overall counter-narcotics effort in the Western Hemisphere. Section V outlines how and why a MSA with Cuba would more effectively address Cuban-based maritime security threats than the current framework. This section also argues that a MSA would promote a collective response in countering TOC and supports Cuba's recent effort toward compliance with international human rights standards. Section VI concludes by recommending a short- and long-term strategy for pursuing and implementing a MSA with Cuba.

II. The Risk Posed by Cuba to U.S. National Security

A. Traditional Threats: Mass Migration and Human Smuggling

Illegal migration from Cuba to the United States poses a continued and rising threat to the United States. Since 2010, the number of Cuban migrants interdicted by the U.S. Coast Guard between Cuba and Florida has annually increased; in 2015, the Coast Guard interdicted the highest number since 1995.²⁶ Similarly, the number of Cuban migrants arriving by land at the southwestern U.S. border peaked in 2015 at over 43,000.²⁷ Many Cuban migrants arriving at the southwestern U.S. border initially traveled by sea from Cuba into Central America, then accomplished the remaining travel by land.²⁸

Illegal Cuban migration presents two separate threats to the United States. First, Cuba poses a persistent threat of mass migration by sea to

²⁶ U.S. COAST GUARD, *Office of Law Enforcement*, *supra* note 16.

²⁷ *See Potential Terrorist Threats: Border Security Challenges in Latin America and the Caribbean: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on Foreign Affairs*, 114th Cong. 13 (2016) (statement of Alan D. Bersin, U.S. Department of Homeland Security, Assistant Secretary for International Affairs and Chief Diplomatic Officer).

²⁸ RUTH WASEM, CONG. RESEARCH SERV., R40566, CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 11 (2009).

the United States. The most recent mass migrations occurred in 1980 and 1994.²⁹ In 1980, Fidel Castro authorized the departure of any Cuban national from the port of Mariel, Cuba.³⁰ The ensuing mass exodus, termed the *Mariel Boatlift*, resulted in more than 125,000 Cuban nationals departing by sea to seek asylum in the United States.³¹ Similarly, following riots in Havana in 1994, 40,000 Cubans departed for the United States.³² The risk that an internal Cuban disturbance will result in a mass migration remains present today. The U.S. government, for example, feared that President Obama's announcement of the restoration of diplomatic relations with Cuba in 2014 would also spark mass migration.³³ Cuban nationals associated the announcement with a possible end to favorable U.S. immigration policies.³⁴ This, in turn, fostered a belief by many Cubans that they should depart Cuba in order to reach the United States before any changes in law occurred.³⁵ Although President Obama's announcement did not start a mass migration, the threat is ever-present.

The influx of undocumented aliens associated with mass migrations by sea are a threat to U.S. sovereignty.³⁶ They place significant strain on the border control function of the United States,³⁷ requiring the Coast Guard, law enforcement agencies, and the military to divert large numbers of resources to stop the thousands of boats involved.³⁸ Such operations are extremely costly, both in resources expended during the direct response and the follow-on requirement to provide humanitarian assistance to those taking to the sea.³⁹

Second, Cuban migrants utilize criminal smuggling networks as a primary mode of transportation from the northern coast of Cuba to the

²⁹ *Id.* at 1.

³⁰ *Id.*

³¹ *Id.*; see also Vice Admiral Benedict L. Stabile & Robert L. Scheina, *U. S. Coast Guard Operations During the 1980 Cuban Exodus*, U.S. COAST GUARD, http://www.uscg.mil/history/articles/uscg_mariel_history_1980.asp (last visited May 11, 2016).

³² WASEM, *supra* note 28, at 1.

³³ Frances Robles, *In Rickety Boats, Cuban Migrants Again Flee to U.S.*, N.Y. TIMES (Oct. 9, 2014), http://www.nytimes.com/2014/10/10/us/sharp-rise-in-cuban-migration-stirs-worries-of-a-mass-exodus.html?_r=0.

³⁴ See, e.g., Javier de Diego, *More Cubans Head for U.S. after Policy Change Rumors*, CNN (Jan. 5, 2015), <http://www.cnn.com/2015/01/05/americas/cuba-migrants-to-us/>.

³⁵ *Id.*

³⁶ Robert Watts, *Caribbean Maritime Migration: Challenges for the New Millennium*, HOMELAND SECURITY AFFAIRS (Apr. 2008), <https://www.hsaj.org/articles/133>.

³⁷ See Stabile & Scheina, *supra* note 31.

³⁸ *Id.*

³⁹ WASEM, *supra* note 28, at 1.

southeast United States.⁴⁰ These criminal networks are highly sophisticated, utilizing high-speed, multi-engine vessels to increase their chances of success.⁴¹ They bring thousands of illegal aliens to the United States each year, ultimately seeking a percentage of the multimillion-dollar market associated with human smuggling.⁴² As these criminal networks focus on profit margins, the danger of alien smuggling has increased, sometimes resulting in migrant death.⁴³

In summary, the threat of mass migration and illegal smuggling to the United States continues to threaten U.S. national security. Mass migration causes the United States to divert significant resources—quickly becoming very costly—and is disrupting resources from utilization for other interests. Human smuggling, like mass migration, represents a challenge to U.S. sovereignty, enabling thousands of undocumented aliens to enter the United States without proper security screening.

B. Prospective Threats: Transnational Organized Crime in Cuba

Transnational organized crime refers to the activities of organizations that operate transnationally and seek illegal financial gain by utilizing violence, corruption, and intimidation.⁴⁴ Organizations can vary

⁴⁰ *Interdiction Hearing*, *supra* note 17, at 33–40.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Lieutenant Commander Brian W. Robinson, *Smuggled Masses: The Need for A Maritime Alien Smuggling Law Enforcement Act*, ARMY LAW., Aug. 2010, at 20, 21–22. See, e.g., David Goodhue, *Fatal Smuggling Voyage Ended off Key West. Boat Crew Facing Life Sentence for Five Migrants' Death*, KEYS INFO NET (May 29, 2015), <http://www.keysnet.com/2015/05/29/502906/fatal-smuggling-voyage-ended-off.html>.

⁴⁴ National Security Staff, *Strategy to Combat Transnational Organized Crime*, WHITE HOUSE (July 25, 2011), http://r.search.yahoo.com/_ylt=A0LEV7hVTWBXoX4ApoUnnIIQ;_ylu=X3oDMTBybGY3bmvBGNvbG8DYmYxBHBvcwMyBHZ0aWQDBHNlYwNzcg/RV=2/RE=1465957846/RO=10/RU=https%3a%2f%2fwww.whitehouse.gov%2fsites%2fdefault%2ffiles%2fStrategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf/RK=0/RS=w_0ha4WGrhz0LHQ0DUvw7.IkGg-. The introduction to the strategy states,

Transnational organized crime refers to those self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/or violence, or while protecting their illegal activities through a transnational organizational structure and the exploitation of transnational commerce or communication

considerably in structure, criminal focus, and location of their operations. Some, like the Sinaloa cartel, a powerful drug trafficking organization based out of Mexico, generally limit their operations to criminal activities.⁴⁵ Others, such as the Revolutionary Armed Forces of Colombia (FARC) and Hezbollah, merge traditional criminal activities with terrorism.⁴⁶

Transnational organized crime is considered a top security risk to U.S. interests, and the President has called on “all elements of national power” to confront it.⁴⁷ It “poses a significant and growing threat to national and international security, with dire implications for public safety, public health, democratic institutions, and economic stability across the globe.”⁴⁸ Transnational crime organizations are beginning to diversify their operations, conducting cybercrime and weapons trafficking, and increasingly linking their operations to designated terrorist groups.⁴⁹

The next two sub-sections of this article describe the potential for TCOs to gain a foothold in Cuba and the resulting risk that such an outcome would pose to the United States.

1. Transnational Organized Crime in the Western Hemisphere

Transnational organized crime in the Western Hemisphere has historically been dominated by illicit drug-trafficking; specifically, the production and distribution of cocaine into the United States.⁵⁰ As explained below, the history of cocaine trafficking is instructive today and

mechanisms. There is no single structure under which transnational organized criminals operate; they vary from hierarchies to clans, networks, and cells, and may evolve to other structures. The crimes they commit also vary.

Id.

⁴⁵ JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 14 (2015). The Sinaloa cartel principally traffics cocaine and other illegal drugs into the United States, is known to operate in at least 50 countries worldwide, and earns an estimated \$3 billion annually. *Id.*

⁴⁶ JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 19–20.

⁴⁷ TOC STRATEGY, *supra* note 9, at 1.

⁴⁸ *Id.* at 5.

⁴⁹ JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 7–16; TOC STRATEGY, *supra* note 9, at 1.

⁵⁰ CLARE RIBANDO SEELKE ET AL., *supra* note 15, at 1–2.

suggests that TCOs specializing in it are capable of leveraging virtually any weakness to their advantage.

In the 1980s, virtually all of the world's coca leaf and refined cocaine were produced in Bolivia and Peru.⁵¹ Colombian cartels then imported, further refined, and packaged the product for distribution.⁵² The U.S. government responded by leading large-scale eradication efforts in Bolivia and Peru, which in turn shifted production to Colombia.⁵³ The shift of production to Colombia effectively consolidated the power of the major Colombian cartels, giving them control of all aspects of the cocaine trade, from coca leaf production to cocaine distribution.⁵⁴ Similar to the prior efforts in Bolivia and Peru, the Colombian government, in conjunction with the United States, responded with an "all-out war" against the Colombian cartels.⁵⁵ As a result, the cocaine industry adjusted again.⁵⁶ This time it shifted internally, however, with the power moving away from the cartels to paramilitary groups.⁵⁷ By the late 1990s, groups such as the FARC had effectively replaced the major cartels as the world's primary cocaine producers and distributors.⁵⁸

As pressure between rival paramilitary groups and the government continued and intensified within Colombia into the early 2000s, the next shift in power was northward toward Mexico.⁵⁹ Gradually, the Mexican drug cartels became the principal TCOs in the Latin American drug trade, with production remaining in the source countries of Colombia, Bolivia, and Peru.⁶⁰ More recently, the region has witnessed an adjustment toward other countries in Central America—primarily Honduras and Guatemala.⁶¹ While these countries had historically played a role in the cocaine trade as transit countries, Mexican cartels were now basing their

⁵¹ Bruce Bagley, *The Evolution of Drug Trafficking in Latin America*, 71 SOCIOLOGIA: PROBLEMS Y PRACTICAS 102 (2013); Paul Gootenberg, *Cocaine's Long March North, 1900–2010*, 54 LATIN AM. POLITICS AND SOC'Y 166, 169 (2012).

⁵² Gootenberg, *supra* note 51, at 169–70.

⁵³ Bagley, *supra* note 51, at 102; Gootenberg, *supra* note 51, at 169–70.

⁵⁴ *Supra* note 53 and accompanying sources.

⁵⁵ Bagley, *supra* note 51, at 102.

⁵⁶ *Id.* at 103; SEELKE ET AL., *supra* note 15, at 5.

⁵⁷ *Supra* note 56 and accompanying sources.

⁵⁸ *Id.*

⁵⁹ Bagley, *supra* note 51, at 102; Gootenberg, *supra* note 51, at 170.

⁶⁰ Bagley, *supra* note 51, at 102; SEELKE ET AL., *supra* note 15, at 4–5.

⁶¹ WILSON CTR., *THE CRIMINAL DIASPORA: THE SPREAD OF TRANSNATIONAL ORGANIZED CRIME AND HOW TO CONTAIN ITS EXPANSION* 10 (Juan Carlos Garzon & Eric L. Olson eds.) (2013); Bagley, *supra* note 51, at 102.

operations in the countries themselves, after having successfully leveraged governmental weakness to their advantage.⁶²

This decades-old pattern of TCOs moving their operations from areas of relatively high competition and pressure into areas characterized by reduced pressure has been termed the “balloon effect.”⁶³ As pressure is applied in one area, cocaine production and distribution simply move to another. Violence has been a consistent and lethal consequence of the balloon effect.⁶⁴ Where the TCOs move, violence follows.⁶⁵ At the height of the Colombian cartels’ power, Colombia’s drug-fueled violence made it one of the most dangerous places in the world.⁶⁶ By 2008, the influence of drug trafficking dealt Mexico the same fate.⁶⁷ Today, Central America finds itself in the same position.⁶⁸

Like the power shifts in drug trafficking, the balloon effect is similarly evident in the smuggling routes used to transport cocaine from the source countries into the United States. In the early 1980s, cocaine arrived in the United States predominantly by air and sea routes from source countries into the Caribbean, and then into South Florida.⁶⁹ In response to heavy law enforcement presence along those routes, smuggling shifted to Central American routes.⁷⁰ Since then, the majority of trafficked cocaine has been smuggled by land and sea from the source countries, through Central America into Mexico, then over the southwestern U.S. border.⁷¹ The vast majority of cocaine is still moving along these Central American routes.⁷² Over the last several years, however, the balloon effect has again altered smuggling routes, this time eastward. For the first time in decades there has been a rapid increase in the amount of cocaine moving along the old eastern Caribbean routes, into Puerto Rico.⁷³ This eastward movement brings with it an associated risk of TOC in Cuba.

⁶² THE CRIMINAL DIASPORA, *supra* note 61, at 4, 6–7; Bagley, *supra* note 51, at 102

⁶³ THE CRIMINAL DIASPORA, *supra* note 61, at 11; SEELKE ET AL., *supra* note 15, at 26.

⁶⁴ Bagley, *supra* note 51, at 107; SEELKE ET AL., *supra* note 15, at 6–8.

⁶⁵ See Bagley, *supra* note 51, at 103–07.

⁶⁶ *Id.* at 102.

⁶⁷ BEITTEL, *supra* note 45, at 1.

⁶⁸ SEELKE ET AL., *supra* note 15, at 10.

⁶⁹ *Id.* at 2.

⁷⁰ Bagley, *supra* note 51, at 106.

⁷¹ SEELKE ET AL., *supra* note 15, at 2.

⁷² COCAINE SMUGGLING IN 2013, *supra* note 8, at 8–9.

⁷³ THE CRIMINAL DIASPORA, *supra* note 61, at 4; see also *Drug Trafficking in the Caribbean: Full Circle*, ECONOMIST (May 24, 2014), <http://www.economist.com/news/americas/21602680-old-route-regains-popularity-drugs-gangs-full-circle>.

2. *Risk of Transnational Organized Crime in Cuba*

The risk for Cuba—and consequently for U.S. national security—is that it will fall victim to this recent spread of transnational drug trafficking back into the eastern Caribbean. As it stands today, Cuba is not a drug trafficking threat to the United States.⁷⁴ Traffickers have largely avoided the island due to strict criminal sentencing, an intensive security presence, and strong interdiction efforts.⁷⁵

Cuba, however, still presumably represents a future target for TCOs. Transnational criminal organizations have recently shifted an increasing percentage of their drug trafficking operations into the eastern Caribbean.⁷⁶ They are reviving dormant smuggling routes by moving drugs from source countries into Puerto Rico and the U.S. Virgin Islands (USVI).⁷⁷ From Puerto Rico and the USVI, the drugs are then smuggled into various cities along the east coast of the continental United States.⁷⁸ Between 2011 and 2013, the relative percentage of the total amount of cocaine flowing to the United States through the eastern Caribbean has tripled.⁷⁹ As is the case in Central America, the rapid increase in drug trafficking has been accompanied by significantly higher levels of violence.⁸⁰ Puerto Rico's murder rate currently stands at over four times the U.S. national average.⁸¹ In 2012, Puerto Rico's homicide rate per 100,000 was higher than Mexico's,⁸² and an estimated eighty percent of murders were linked to illegal drug trafficking.⁸³

⁷⁴ U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, 2015 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 146 (2015), <http://www.state.gov/documents/organization/239560.pdf>.

⁷⁵ *Id.*

⁷⁶ COCAINE SMUGGLING IN 2013, *supra* note 8, at 8–9; *Caribbean Border Hearing*, *supra* note 8, at 20–29 (Luis G. Fortuno, Governor, Puerto Rico).

⁷⁷ *See supra* note 76 and accompanying sources.

⁷⁸ *Caribbean Border Hearing*, *supra* note 8, at 20–29 (Luis G. Fortuno, Governor, Puerto Rico).

⁷⁹ *Drug Smuggling Hearing*, *supra* note 12, at 44 (statement of Deputy Asst. Sec'y Arreaga) (“In 2011, cocaine transiting the Caribbean to the [United States] totaled approximately five percent, which increased to nine percent by 2012. By the end of 2013, cocaine flowing within the Western Hemisphere Transit zone increased to [sixteen] percent of the 646 metric tons total flow.”); COCAINE SMUGGLING IN 2013, *supra* note 8, at 4–5.

⁸⁰ *See SEELKE ET AL.*, *supra* note 15, at 6.

⁸¹ U.S. DEP'T OF JUSTICE, *supra* note 14.

⁸² UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL STUDY ON HOMICIDE 2013 22–24 (2014).

⁸³ *Caribbean Border Hearing*, *supra* note 8, at 20–29 (Luis G. Fortuno, Governor, Puerto Rico).

By establishing a foothold in Cuba, TCOs would streamline the eastern Caribbean smuggling route. Currently, to move drugs through the eastern Caribbean route, TCOs utilize a circuitous route from the source countries east, then north into Puerto Rico or the USVI.⁸⁴ This transit can be accomplished by land, sea, or a combination of both, and can be accomplished in one or multiple legs. For example, drugs could be moved by land from source countries into the northern coast of Venezuela and then by boat up the island chains of the French West Indies, USVI, and British Virgin Islands.⁸⁵ Once the drugs reach Puerto Rico or the USVI, they are transported west into the continental United States.⁸⁶

With a presence in Cuba, TCOs could eliminate this circuitous route by transporting drugs directly into Cuba. From Cuba, drugs are only 90 miles from their U.S. destination, and TCOs could leverage the robust smuggling networks that already exist between Florida and Cuba to complete their transit.

The principal argument against Cuba becoming a haven for TCOs is its success in countering them through a strong security presence.⁸⁷ Unfortunately for Cuba, however, TCOs have been successfully increasing the amount of cocaine moving through the eastern Caribbean, even amidst a heavy counter-narcotics security presence.⁸⁸ The U.S. government has launched several large-scale, joint initiatives to address the increase in eastern Caribbean drug flows, but the volume and associated violence continue to rise in the region.⁸⁹ If this is an indicator, strong security alone is insufficient to stop TCOs committed to moving into a particular area.

Transnational criminal organization's future in Cuba will also likely depend on whether instability accompanies the eventual succession of the Castro-led government. A defining characteristic of today's TCOs is their

⁸⁴ See *Caribbean Border Hearing*, *supra* note 8, at 10–13 (statement of John P. de Jongh, Jr., Governor, United States Virgin Islands); *Caribbean Border Hearing*, *supra* note 8, at 20–29 (Luis G. Fortuno, Governor, Puerto Rico).

⁸⁵ *Id.* See also *Drug Smuggling Hearing*, *supra* note 12, at 23 (statement of General John Kelly, Commander, U.S. Southern Command) [hereinafter General Kelly].

⁸⁶ *Id.*

⁸⁷ U.S. DEP'T OF STATE, *supra* note 74, at 146.

⁸⁸ MARK P. SULLIVAN, CONG. RESEARCH SERVICE., R43882, LATIN AMERICA AND THE CARIBBEAN: KEY ISSUES FOR THE 114TH CONGRESS 27 (2016); see also EXEC. OFFICE OF THE WHITE HOUSE, CARIBBEAN BORDER COUNTERNARCOTICS STRATEGY 8–9 (2015) [hereinafter COUNTERNARCOTICS STRATEGY].

⁸⁹ See COUNTERNARCOTICS STRATEGY, *supra* note 88, at 3–6, 8–9.

push to leverage instability, especially in fragile states.⁹⁰ TCOs based in Mexico have, for example, preyed upon governmental weakness and the accompanying susceptibility to corruption in Honduras and Guatemala.⁹¹ They have effectively penetrated both governments by utilizing their immense financial resources to leverage these weaknesses.⁹² The Mexican-based TCOs outspend any efforts to oppose them by bribing key government officials. In Guatemala, officials who refuse to take bribes face a threat of death.⁹³ As a result, “the Honduran and Guatemalan governments have seemingly lost control over large swaths of their territory,” enabling TCOs to operate with impunity.⁹⁴

The current situation in Honduras and Guatemala is perhaps the hemisphere’s worst-case scenario in terms of the correlation between TOC and overall instability. In Cuba, impending changes in the political, economic, and social environment also suggest potential for instability.⁹⁵ Politically, Cuba is undergoing its most significant change since 1961.⁹⁶ Fidel Castro handed control of the government to his brother Raul Castro in 2006, who, in turn, has begun to implement a succession plan⁹⁷ following his intent to step down in 2018.⁹⁸ If realized, this change would mark the first non-Castro leadership of the country in more than 50 years.⁹⁹ While the immediate succeeding Cuban government will likely remain under the influence of the Castro brothers,¹⁰⁰ the anticipated turnover invites questions about how effectively a non-Castro led government will maintain internal control in the medium- and long-term.¹⁰¹ Any

⁹⁰ TOC STRATEGY, *supra* note 7, at 5.

⁹¹ Steven S. Dudley, *Drug Trafficking Organizations in Central America: Transportistas, Mexican Cartels and Maras*, in WILSON CTR., SHARED RESPONSIBILITY: U.S. MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME 76–79 (Eric L. Olson et al eds.) (2010); Hal Brands, *Crime, Irregular Warfare, and Institutional Failure in Latin America: Guatemala as a Case Study*, 34:1 STUDIES IN CONFLICT & TERRORISM 228, 230–33 (2011).

⁹² Dudley, *supra* note 91, at 76–79.

⁹³ Brands, *supra* note 91, at 233.

⁹⁴ Dudley, *supra* note 91, at 76–79.

⁹⁵ SULLIVAN, CUBA, *supra* note 7, at 51.

⁹⁶ SULLIVAN, LATIN AMERICA *supra* note 88, at 5–6.

⁹⁷ See Eusebio Mujal-Leon, *Survival, Adaptation and Uncertainty: The Case for Cuba*, 65 J. OF INT’L AFFAIRS 149, 159–65 (2011).

⁹⁸ Damien Cave, *Raúl Castro Says His New 5-Year Term as Cuba’s President Will Be His Last*, N.Y. TIMES (Feb. 24, 2013), <http://www.nytimes.com/2013/02/25/world/americas/raul-castro-to-step-down-as-cubas-president-in-2018.html>.

⁹⁹ *Id.*

¹⁰⁰ See Mujal-Leon, *supra* note 97, at 159–65.

¹⁰¹ See *id.*

diminished capacity to maintain control presents TCOs with opportunities to seek influence through corruption.

Cuba is also characterized by economic uncertainty. President Castro has focused on a series of reforms intended to galvanize the nation's economy,¹⁰² and his concern for Cuba's economy is well-placed.¹⁰³ Cuba is still largely reliant on subsidized Venezuelan imports for the vast majority of its energy use.¹⁰⁴ With Venezuela's economy in shambles, Cuba's ties to Venezuela represent significant economic liability that threatens the overall stability of the Cuban government.¹⁰⁵ In Central America, such economic instability is strongly correlated with the influence of TCOs.¹⁰⁶ For example, the "chief enabler of continuing insecurity in Guatemala is the fundamental debility of the state."¹⁰⁷ Poor economic performance invites corruption, which in turn enables TCO growth. Additionally, a weaker economy degrades Cuba's ability to continue funding the intensive security activities that are historically associated with preventing TOC in the country.

Socially, Cuba's future will likely be defined by increasing off-island contact. This off-island influence will come in many forms. President Obama has decreased restrictions for U.S. citizens seeking to travel to Cuba,¹⁰⁸ and tourism has become a major segment of the Cuban economy.¹⁰⁹ Finally, President Castro's major economic reforms include tax incentives designed to attract direct foreign investment.¹¹⁰ Like its political and economic environments, Cuba's social sphere will be characterized by significant change, as the Cuban populace is increasingly exposed to various off-island influences. This increased access to Cuba

¹⁰² *Id.* at 159–65.

¹⁰³ See SULLIVAN, LATIN AMERICA, *supra* note 88, at 10.

¹⁰⁴ Danielle Renwick & Brianna Lee, *Venezuela's Economic Fractures*, COUNCIL ON FOREIGN RELATIONS (Dec. 26, 2014), <http://www.cfr.org/economics/venezuelas-economic-fractures/p32853>.

¹⁰⁵ See, e.g., Michael McCarthy, *6 Things You Need to Know about Venezuela's Political and Economic Crisis*, WASH. POST (May 18, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/18/6-things-you-need-to-know-about-venezuelas-political-and-economic-crisis/>; Moisés Naím & Francisco Toro, *Venezuela is Falling Apart*, ATLANTIC (May 12, 2016), <http://www.theatlantic.com/international/archive/2016/05/venezuela-is-falling-apart/481755/>.

¹⁰⁶ See, e.g., Brands, *supra* note 91, at 233, 238.

¹⁰⁷ *Id.* at 238.

¹⁰⁸ SULLIVAN, LATIN AMERICA, *supra* note 88, at 24.

¹⁰⁹ *Id.* at 10.

¹¹⁰ *Id.* at 23.

provides TCOs a previously unrealized opportunity to exert influence over government officials and citizens. The low average income of Cuba's populace enables TCOs to offer enticing monetary incentives for Cuban citizens willing to become involved in their criminal enterprises.¹¹¹

The future influence of TOC in Cuba is unclear. The best-case scenario would likely involve the Cuban government continuing to exert the required level of pressure to keep TCOs out of the country. This, in turn, would decrease the prospective threat of TOC to the United States. In the worst-case, TCOs would successfully infiltrate and establish control in a similar manner to Honduras or Guatemala, giving them direct access to the United States through well-established smuggling routes. The apparent commitment of TCOs to expanding their eastern Caribbean smuggling operations, coupled with Cuba's proximity to the United States, suggest that TOC's future in Cuba likely lies somewhere in the middle. While Cuba is not currently considered a drug-trafficking threat,¹¹² "[t]he drug threat from Cuba seems destined to increase . . ."¹¹³ Transnational criminal organizations have already forced their way into Puerto Rico, despite a robust multi-agency prevention effort. Additionally, forecasted political, economic, and social changes in Cuba are likely to create some level of general instability. Such instability would, in turn, invite TOC influence, as has occurred in Central America.

3. *Links Between Transnational Organized Crime and Terrorism*

Drug- and alien-smuggling networks pose a collateral, national security risk for the United States "that terrorist organizations could seek to leverage [smuggling] routes to move operatives with intent to cause grave harm to [U.S.] citizens or even quite easily bring weapons of mass destruction into the United States."¹¹⁴ The threat of radical Islamic terrorist organizations using Cuban smuggling networks as a gateway to the United States has not yet been realized.¹¹⁵ There is, however, an

¹¹¹ *Id.* at 12.

¹¹² U.S. DEP'T OF STATE, *supra* note 74, at 146.

¹¹³ *National Security Implications of U.S. Policy Toward Cuba: Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform*, 111th Cong. 31 (2009) (statement of Rensselaer Lee, Foreign Policy Research Institute).

¹¹⁴ *Drug Smuggling Hearing*, *supra* note 12, at 51 (statement of General Kelly).

¹¹⁵ U.S. DEPT. OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2014 256-57 (2015).

established and growing nexus between TCOs and foreign terrorist organizations (FTOs). Increasingly, FTOs are turning to criminal activities, such as drug trafficking, to fund their endeavors.¹¹⁶ In 2010, the Department of Justice reported that 29 of the top 63 international drug trafficking enterprises were associated with terrorist organizations,¹¹⁷ and this nexus between TOC and terrorism has been assessed as a significant threat to overall U.S. national security.¹¹⁸

This nexus is concerning, given the ease with which smuggling organizations currently penetrate the U.S. border. The commander of U.S. Southern Command recently remarked, “This network . . . is so efficient that if a terrorist, or almost anyone, wants to get into our country, they just pay the fare.”¹¹⁹ The obvious concern is that the well-established migrant smuggling routes from Cuba could be leveraged by terrorist organizations to move people and material into the United States. The Coast Guard estimates that it stops only about 40 percent of the smuggling traffic from Cuba into South Florida, presenting TOC entities with a relatively high chance of gaining access to the United States by sea.¹²⁰

III. U.S. Policy Toward Cuba: Limited Authority for Increased National Security Engagement

Beginning in the early 1960s, the United States instituted—and currently maintains—a strategy aimed at forcing democracy upon Cuba.¹²¹ As this section of the article describes, the legal framework underpinning this strategy has grown progressively stronger over time, moving from the realm of administrative to statutory control.¹²² Two mainstays of U.S. strategy, the economic embargo and Cuba’s ineligibility for foreign assistance, require Congressional action before any significant

¹¹⁶ JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 3–4.

¹¹⁷ TOC STRATEGY, *supra* note 9, at 6.

¹¹⁸ JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 2–3.

¹¹⁹ *Hearing to Receive Testimony on U.S. Northern Command and U.S. Southern Command in Review of the Defense Authorization Request for Fiscal Year 2016 and the Future Years Defense Program: Hearing Before the S. Committee on Armed Services*, 114th Cong. 23 (2015) (statement of General Kelly).

¹²⁰ *Interdiction Hearing*, *supra* note 17.

¹²¹ *Charting a New Course on Cuba*, WHITE HOUSE, <https://www.whitehouse.gov/issues/foreign-policy/cuba> (last visited May 11, 2016).

¹²² See SULLIVAN, CUBA, *supra* note 7, at 18–19.

modification to them may occur.¹²³ In terms of national security, this inflexible strategy, designed for the geopolitical realities of the 1960s, has limited the scope of actions available to the U.S. national security community to effectively confront today's threats.¹²⁴

There is still space within this rigid framework for effective action in the realm of national security. The current legal and regulatory framework with Cuba is comprehensive with respect to U.S. commercial and private entities.¹²⁵ With very few exceptions, they are absolutely prohibited from providing or receiving any economic benefit to or from Cuba.¹²⁶ Notably, however, the framework does not prohibit intergovernmental engagement, unless such engagement involves the provision of prohibited aid to Cuba.¹²⁷ Because a MSA with Cuba would not involve prohibited aid, the otherwise comprehensive framework would not prohibit international engagement with Cuba through a MSA.

A. Isolation Through the Economic Embargo

The most expansive element of the U.S. policy towards Cuba is the economic embargo.¹²⁸ The economic embargo against Cuba originated in the 1960s under the Eisenhower administration and until the 1990s, existed within the executive branch's regulatory control.¹²⁹ From 1960 to 1963, the president, through the Commerce Department and its successor agency, the Treasury Department, imposed three successive sets of

¹²³ See Cuban Democracy Act (CDA), 22 U.S.C. § 6001 (1992); Cuban Liberty and Democratic Solidarity Act (LIBERTAD Act) of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996).

¹²⁴ See Hal Klepak, *Cuba–U.S. Cooperation in the Defense and Security Fields*, in *DEBATING U.S.—CUBAN RELATIONS* 79 (Jorge I. Domínguez et al. eds., 2012).

¹²⁵ Cuban Asset Control Regulations, 31 C.F.R. §§ 515.101-515.206 (2014).

¹²⁶ *Id.*

¹²⁷ See DIANNE E. RENNACK & MARK P. SULLIVAN, CONG. RESEARCH SERV., R43888, CUBA SANCTIONS: LEGISLATIVE RESTRICTIONS LIMITING THE NORMALIZATION OF RELATIONS 3 (2015).

¹²⁸ Foreign Assistance Act of 1961 (FAA), Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at 22 U.S.C. § 2151). The term “embargo” was first used in the Foreign Assistance Act (FAA), which authorized the president to impose a “total embargo upon all trade between the United States and Cuba.” *Id.*

¹²⁹ SULLIVAN, CUBA, *supra* note 7, at 18–19. These regulations were initially authorized pursuant to the FAA and the Trading with the Enemy Act. *Id.* (citing 27 Fed. Reg. 1085 (1962) and 27 Fed. Reg. 2765-2766 (1962)).

comprehensive regulations that effectively prohibited trade with Cuba.¹³⁰ The final set, the Cuban Asset Control Regulations (CACR), which remain in effect today, generally prohibit trade between persons and entities of the United States and Cuba, requiring any such trade to be accomplished only after obtaining a license from the Treasury Department.¹³¹ The CACR also ban most travel to Cuba and prohibit virtually all financial transactions between Cuba, or its nationals and persons, subject to the jurisdiction of the United States.¹³²

This economic embargo against Cuba was administered through the CACR until 1992, when Congress began codifying the embargo with a body of increasingly restrictive legislation.¹³³ Of these, the Cuban Democracy Act of 1992 (CDA) and Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD Act) are the most consequential.¹³⁴ Among certain of its provisions, the CDA prohibits U.S. foreign subsidiaries from engaging in trade with Cuba and conditions the lifting of the embargo on Cuba adopting a democratic government.¹³⁵

The LIBERTAD Act codified the embargo by requiring full enforcement of the CACR.¹³⁶ Notably, the LIBERTAD Act also strengthened the pre-conditions necessary for the president to suspend the embargo and sanctioned the trafficking in U.S. property confiscated by the

¹³⁰ See Miscellaneous Amendments, 25 Fed. Reg. 10,006 (Oct. 20, 1960); Pres. Proclamation No. 3447, 27 Fed. Reg. 1085 (1962), reprinted in 22 U.S.C. § 2370 note; Cuban Import Regulations, 27 Fed. Reg. 1116 (Feb. 7, 1962).

¹³¹ Cuban Assets Control Regulations (CACR), 28 Fed. Reg. 6974 (July 9, 1963).

¹³² *Id.*

¹³³ See Foreign Assistance Act of 1961 (FAA), Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at 22 U.S.C. § 2151); Cuban Import Regulations, 27 Fed. Reg. 1116 (Feb. 7, 1962); Cuban Assets Control Regulations, 28 Fed. Reg. 6,974 (July 9, 1963); Cuban Democracy Act (CDA), 22 U.S.C. § 6001 (1992); Cuban Liberty and Democratic Solidarity Act (LIBERTAD Act) of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996); Trade Sanctions Reform and Export Enhancement Act of 2000 (P.L. 106-387, Title IX). In addition to these regulations and statutes, other existing U.S. legislation restricts the conduct of U.S. entities with respect to Cuba to some degree. See DIANNE E. RENNACK & MARK P. SULLIVAN, *supra* note 127, at 3–14. This other legislation, not directly addressed in this article, does not impact the ability of the United States to seek a MSA with Cuba.

Id.

¹³⁴ See SULLIVAN, CUBA, *supra* note 7, at 18–19; Alberto R. Coll, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. INT'L L. & FOREIGN AFF. 199, 203–24 (2007); Andrew Mihalik, *The Cuban Embargo: A Ship Weathering the Storm of Globalization and International Trade*, CURRENTS: INT'L TRADE L.J., 98–100 (2003).

¹³⁵ 22 U.S.C. § 6007 (2014).

¹³⁶ 22 U.S.C. § 6032(c) (2014).

Cuban government.¹³⁷ Today, by law, United States' entities are prohibited from virtually any trade with Cuba, until Cuba achieves the pre-conditions laid out in the LIBERTAD Act.¹³⁸ These include Cuba holding free elections, respecting human rights, and adopting a free-market system.¹³⁹

In terms of a potential MSA with Cuba, the key feature of the embargo is what it does *not* prohibit. The laws related to the economic embargo are focused on prohibiting financial transactions between Cuba and private and commercial entities associated with the United States.¹⁴⁰ In this realm, they are comprehensive: U.S. private and commercial entities are prohibited from providing to or receiving any economic benefit from Cuba.¹⁴¹ They do not, however, limit or constrain the United States government from engaging with the Cuban government, when that engagement does not involve the provision of any economic benefit to Cuba.¹⁴² Thus, as the next section illustrates, the U.S. government is prohibited from providing most forms of direct international aid to Cuba, because this aid represents a direct economic benefit. Instruments such as a MSA, however, are permissible because they do not require the provision of any economic benefit.

B. Isolation through Prohibitions on the Provision of U.S. Aid

In addition to the core elements of the CACR, CDA, and LIBERTAD Act, Congress has attempted to intensify Cuba's isolation by significantly limiting the types of international aid that may be directed to Cuba. The Foreign Assistance Act of 1961 (FAA) prohibits the U.S. government from providing aid to Cuba in two ways. First, section 2370(a)(1) of the FAA prohibits the U.S. government from providing any aid to Cuba otherwise authorized by the FAA.¹⁴³ This provision is not discretionary and represents an absolute limitation on the president's authority to

¹³⁷ *Id.* § 6064.

¹³⁸ *Id.* Several changes were made to the CACR in January 2015 to conform with President Obama's intent to normalize relations with Cuba. *See* 80 Fed. Reg. 2286-2302, Jan. 16, 2015. These changes eased restrictions in certain areas such as travel. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See generally* 31 C.F.R. §§ 515.101–515.901 (2014).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 22 U.S.C. § 2370(a)(1) (2014) (“No assistance shall be furnished under this chapter to the present government of Cuba.”).

provide direct economic aid to Cuba.¹⁴⁴ Thus, Cuba, unlike most other countries with which the United States has a MSA, is prohibited from receiving aid authorized by the FAA related to international narcotics control, foreign military sales, international military training, etc.¹⁴⁵ These restrictions essentially prevent the United States from fighting the spread of TOC into Cuba through international anti-drug assistance programs.¹⁴⁶ Whereas the United States is authorized by statute to transfer nonlethal equipment to Colombia to reduce illicit drug trafficking,¹⁴⁷ for instance, or utilize appropriated funds to train Guatemalan forces in at-sea law enforcement,¹⁴⁸ these options are illegal with respect to Cuba.¹⁴⁹

Notably, section 2370(a)(1) prohibits only those forms of aid specified in the FAA.¹⁵⁰ It does not constrain the actions of the U.S. government in areas outside of the FAA. Since engagement with Cuba, and more specifically a MSA with Cuba, is not characterized in the FAA as a form of assistance that may be provided to a foreign government, section 2370(a)(1) does not preclude the pursuit of a MSA with Cuba.

The second provision of the FAA that limits the provision of aid to Cuba is section 2370(a)(2), which prevents Cuba from receiving “any other benefit under any law of the United States.”¹⁵¹ While “any other benefit” is not defined within the statute, this provision of the FAA is expressly discretionary.¹⁵² It specifically permits the president to waive

¹⁴⁴ DIANNE E. RENNACK & MARK P. SULLIVAN, *supra* note 127, at 3.

¹⁴⁵ 22 U.S.C. § 2370(a)(1).

¹⁴⁶ CLARE RIBANDO SEELKE ET AL., *supra* note 15, at 9–11. Since the 1970s, the United States has directed significant funding to various Latin American countries to assist in the overall counter-drug effort through various anti-drug assistance programs. *Id.* These programs, such as “Plan Colombia” in Colombia and the “Merida Initiative” in Mexico, typically focus on crop eradication, interdiction, and training a foreign government’s military and law enforcement. *Id.*

¹⁴⁷ 22 U.S.C. § 2291-5 (2014).

¹⁴⁸ *Id.* § 2347 (2014).

¹⁴⁹ *Id.* § 2370(a)(1) (2014). The FAA’s limitations do not restrict all forms of aid. The CDA and LIBERTAD Act both authorize limited authority to provide assistance “notwithstanding any other provision of law.” *See* 22 U.S.C. § 6004(a) and 22 U.S.C. § 6039(a). This aid, however, managed by the U.S. Department of State and U.S. Agency for International Development, must be utilized consistent with its enabling legislation. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-285, CUBA DEMOCRACY ASSISTANCE: USAID’S PROGRAM IS IMPROVED, BUT STATE COULD BETTER MONITOR ITS IMPLEMENTING PARTNER 18 (2013).

¹⁵⁰ 22 U.S.C. § 2370(a)(1) (2014).

¹⁵¹ *Id.* § 2370(a)(2) (2014).

¹⁵² *See* DIANNE E. RENNACK & MARK P. SULLIVAN, *supra* note 127, at 3.

the limitation when he or she deems it necessary in the interests of the United States.¹⁵³ While a MSA with Cuba could arguably be viewed as a benefit to Cuba, section 2370(a)(2)'s implicit discretion would still permit the president to pursue the MSA, assuming he or she determines the action to be in the interests of the United States.¹⁵⁴ President Obama has already stated that engagement with Cuba in areas such as immigration, drug trafficking, and counterterrorism are beneficial to the interests of the United States.¹⁵⁵ Thus, to the extent section 2370(a)(2) of the FAA may represent a limitation to concluding a MSA with Cuba, President Obama has ostensibly signaled his intent to waive that limitation.¹⁵⁶

As explained above, the strategy of isolation adopted in the 1960s with respect to Cuba largely remains in effect today. While the strategy is comprehensive in its restrictions on commercial and private entities and the provision of direct U.S. government aid to Cuba, it does not prohibit intergovernmental engagement. Thus, a potential MSA with Cuba would be authorized, as long as its terms did not commit the United States to any of the transactions prohibited by current legislation. The remainder of the article describes the utilization of MSAs in current maritime interdiction operations and how an MSA could effectively advance the shared maritime security interests of the United States and Cuba.

IV. Maritime Security Agreements: A Model of Success in Maritime Interdiction Operations

The Coast Guard and other U.S. federal agencies depend heavily on MSAs with other nations in the overall national strategy to combat international drug smuggling and TOC. These MSAs, a form of international agreement, typically involve the United States and other nations committing to combating illicit narcotics trafficking and working collaboratively to that end. As this section describes, a MSA with Cuba is achievable based on the existing relationship between the Cuban and U.S. governments and standing authority for the executive branch to conclude such an agreement.

¹⁵³ *Id.*; 22 U.S.C. § 2370(a)(2) (2014) (“Except as may be deemed necessary by the President in the interest of the United States, no assistance shall be furnished under this chapter to any government of Cuba . . .”).

¹⁵⁴ *Supra* note 153 and accompanying sources.

¹⁵⁵ *Charting a New Course on Cuba*, *supra* note 121.

¹⁵⁶ *See id.*

A. The Role of Maritime Security Agreements in Maritime Interdiction Operations

The Coast Guard is the lead federal agency for maritime drug interdiction and maritime TOC.¹⁵⁷ To accomplish this mission, the Coast Guard maintains a constant presence throughout the “transit zone,” the seven million square-mile area around Central and South America and the Caribbean, where TCOs are transporting the vast majority of the world’s cocaine.¹⁵⁸ The goal of Coast Guard operations in the transit zone is to stop drug smuggling vessels as close to their source countries as possible.¹⁵⁹

For decades, however, international drug smugglers have frustrated this goal by transiting the sovereign waters of foreign nations.¹⁶⁰ Their rationale is simple. Under international law, the United States, like any other nation, has jurisdiction over only those vessels located in its own waters, i.e. coastal state jurisdiction,¹⁶¹ and vessels registered or flagged in the United States, i.e. flag state jurisdiction.¹⁶² The corollary is that the United States does not have jurisdiction over vessels flagged in foreign countries and over those found in foreign waters.¹⁶³ Further, absent consent, the United States is generally prohibited from both entering another nation’s sovereign waters to conduct law enforcement and boarding a vessel flagged in a foreign nation.¹⁶⁴ For example, if a U.S. Coast Guard cutter observed a Honduran registered vessel on the high seas or in Panamanian waters and suspected it of drug smuggling, the cutter would be prohibited from boarding that vessel, absent consent from Honduras or Panama, respectively.

¹⁵⁷ *Drug Smuggling Hearing*, *supra* note 12, at 8–10 (Summary of Subject Matter); *Id.* at 23 (statement of Admiral Robert J. Papp, Commandant, U.S. Coast Guard) [hereinafter statement of ADM Papp].

¹⁵⁸ *Id.* at 8–10 (Summary of Subject Matter).

¹⁵⁹ *Id.*

¹⁶⁰ Lieutenant Commander Wes Hester, *Hemispheric Framework for Counter Narcotics Operations*, 3:4 INTERAGENCY J. 39, 42 (2012), <http://thesimonscenter.org/wp-content/uploads/2012/12/IAJ-3-4-pg39-48.pdf>; Lieutenant James E. Kramek, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 U. MIAMI INTER-AM. L. REV. 121, 127 (2000).

¹⁶¹ United Nations Convention on the Law of the Sea (UNCLOS) arts. 2, 25, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁶² *Id.* arts. 89, 92.

¹⁶³ *Id.*

¹⁶⁴ James Kraska, *Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure*, 16 OCEAN & COASTAL L. J. 1, 11 (2010).

In the realm of counter-narcotics, the notion of consent is an important element in the collective effort. Under Article 17 of the 1988 United Nations (UN) Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention), a principal authority through which MSAs are concluded, parties are encouraged to enter agreements to facilitate the consent necessary to conduct counter-narcotics operations on their behalf.¹⁶⁵ Maritime security agreements on illicit trafficking represent the implementation of this Article 17 obligation and are the primary mechanism by which the U.S. government and foreign governments facilitate this consent.

Referring to the previous examples, Honduras could consent to the U.S. Coast Guard boarding its vessel on the high seas, pursuant to the provisions of the current Honduras-United States agreement,¹⁶⁶ or Panama could consent to the Coast Guard boarding the Honduran vessel in its waters, pursuant to the Panama-United States agreement.¹⁶⁷ Further, if the Coast Guard found that the vessel was smuggling drugs, after being granted consent to board, U.S. domestic law permits either Honduras, in the first example, or Panama, in the second, to waive criminal jurisdiction to the United States over the vessel and its crewmembers.¹⁶⁸ Thus, assuming the proper consent at each appropriate stage, the Coast Guard may feasibly operate in any of the waters within the transit zone, board any vessel, and facilitate the prosecution of any individual found to be smuggling drugs in the U.S. courts. Maritime security agreements are the vehicles that enable this consent.

¹⁶⁵ Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 17, Dec. 19, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 497 [hereinafter 1988 Convention] (“The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.”). The United States ratified on Apr. 16, 1980; Cuba ratified on Apr. 26, 1976. *Id.*

¹⁶⁶ Implementing Agreement Between the Government of the United States of America and the Government of the Republic of Honduras Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, art. V, Jan. 30, 2001, T.I.A.S. 13088.

¹⁶⁷ Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of the Republic of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, art. VI, Feb. 5, 2002, T.I.A.S. 02-205.1.

¹⁶⁸ See 46 U.S.C. § 70502(c)(1)(c) (2014); *but see* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248 (11th Cir. 2012) (holding the Maritime Drug Law Enforcement Act is unconstitutional as applied to the defendants, who were charged with conspiracy to possess cocaine and possession of cocaine with intent to distribute in Panamanian waters).

Today, the Coast Guard is the executive agent for the United States in forty-three MSAs with other states relating to maritime law enforcement.¹⁶⁹ The majority of these agreements were negotiated specifically to cover counter-narcotics operations, but more recently, they have been drafted to encompass both counter narcotics and human smuggling.¹⁷⁰

Each MSA is negotiated individually, thus offering varying levels of cooperation and a great degree of flexibility. This flexibility has allowed the United States to negotiate agreements with countries such as the Bahamas,¹⁷¹ with which the United States enjoys strong relations, and Venezuela,¹⁷² with which relations are more strained.¹⁷³ Some MSAs are restrictive, providing only a framework for obtaining permission for U.S. action against a foreign-flagged vessel, or entry into a coastal state's waters.¹⁷⁴ Some are permissive, giving the United States standing permission to enter a foreign nation's territorial seas to take action on behalf of that nation.¹⁷⁵ A future MSA with Cuba could include any sub-

¹⁶⁹ See U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23; see also U.S. STATE DEP'T, OFFICE OF THE LEGAL ADVISOR, TREATY AFFAIRS, TREATIES IN FORCE: A LIST OF TREATIES OF THE UNITED STATES AND OTHER AGREEMENTS IN FORCE ON JANUARY 1, 2013 (Jan. 1, 2013).

¹⁷⁰ *Id.*

¹⁷¹ Agreement Between the Government of the United States of America and the Government of the Commonwealth of the Bahamas Concerning Cooperation in Maritime Law Enforcement, July 29, 2004, T.I.A.S. 04-629 [hereinafter Bahamas MSA].

¹⁷² Agreement Between the Government of the United States of America and the Government of the Republic of Venezuela to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea, Nov. 9, 1991, T.I.A.S. 11827 [hereinafter Venezuela MSA].

¹⁷³ U.S. DEP'T OF STATE, BUREAU OF WESTERN HEMISPHERE AFFAIRS, U.S. RELATIONS WITH VENEZUELA (Jul. 20, 2015), <http://www.state.gov/r/pa/ei/bgn/35766.htm>.

¹⁷⁴ See, e.g., Agreement Between the Government of the United States of America and the Government of the Republic of Colombia to Suppress Illicit Traffic by Sea art. 7 (Feb. 20, 1997) [hereinafter Colombia MSA].

Whenever law enforcement officials of one Party find a vessel meeting the conditions under paragraph 6 claiming registration in the other Party, competent authority of the former Party may request the competent authority of the other Party to verify the vessel's registry, an in case it is confirmed, its authorization to board and search the vessel.

Id.

¹⁷⁵ See, e.g., Bahamas MSA, *supra* note 171, art. 9.1 ("This Agreement authorizes the law enforcement officials of one Party ('the first Party') to board suspect vessels located seaward of either Party's territorial sea claiming nationality in the other Party . . .").

set of the provisions currently utilized in existing agreements.¹⁷⁶ Additionally, this flexibility would enable the United States and Cuban governments to tailor these provisions to meet their specific needs. For example, most MSAs define what conduct is permissible within and outside of each party's territorial sea.¹⁷⁷ The United States disputes Cuba's calculation of its territorial sea, which creates a difference in interpretation about the delimitation of where U.S. Coast Guard vessels can operate without the permission of the Cuban government.¹⁷⁸ Since 1977, both governments have operated under a negotiated agreement that redrew the boundary in a mutually acceptable manner.¹⁷⁹ The definition of "territorial sea" would need to be addressed in any prospective MSA with Cuba, and the flexibility of a MSA would permit the U.S. and Cuban governments to either incorporate their long-standing agreement or negotiate a new one. Ultimately, this flexibility is one of the reasons MSAs have become critical in the U.S. government's overall response to illicit trafficking, and one of the reasons, as the next section illustrates, they have been so effective.

B. The Effectiveness of Maritime Security Agreements in Maritime Interdiction Operations

Maritime security agreements utilized by the Coast Guard, in conjunction with the U.S. State Department, are a key element in maritime interdiction operations.¹⁸⁰ Their principal benefits are two-fold. First,

¹⁷⁶ See U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23. The provisions of various MSAs include: shipboarding, i.e. procedures by which one nation may board vessels flagged in the other; entry into territorial seas, i.e. procedures by which one nation may enter the territorial waters of the other to investigate vessels reasonably suspected of illicit trafficking or to chase such vessels after they have entered the territorial seas; overflight, i.e. procedures by which one nation may obtain permission to operate aircraft over the waters and territories of the other; shiprider programs, i.e. programs by which nation A physically places its officers on board the vessels of nation B, who may authorize nation B to take law enforcement action on behalf of nation A; technical assistance, i.e. procedures by which either nation can request law enforcement assistance from the other; and maritime interdiction support, i.e. procedures by which either nation can request primarily logistical assistance in a case, such as expedited access to a dockside facility for fueling or an intrusive search. *Id.*

¹⁷⁷ Bahamas MSA, *supra* note 171, arts. 6, 9.

¹⁷⁸ U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, LIMITS IN THE SEAS NO. 110: MARITIME BOUNDARY CUBA-UNITED STATES 3 (1990).

¹⁷⁹ *Id.*

¹⁸⁰ *Drug Smuggling Hearing*, *supra* note 12, at 44 (statement of Deputy Asst. Sec'y Arreaga).

these agreements permit the U.S. government to attack the problem near its source.¹⁸¹ Rather than waiting for drug shipments to reach U.S. waters, where they have already been cut and diluted for sale, the Coast Guard and other agencies can concentrate their efforts in the transit zone, where the cocaine is pure and packaged in bulk.¹⁸² The ability to strike at the source is the most effective way to attack the problem.¹⁸³

Second, these agreements significantly enhance the “cycle of success.”¹⁸⁴ The “cycle of success” refers to the continuous process of feeding intelligence gleaned from each interdiction into current operations and into longer-term investigations of the TCOs controlling drug movements.¹⁸⁵ With each interdiction in the transit zone, the interagency¹⁸⁶ is able to “gather valuable information about the sophisticated criminal enterprises that move these drugs.”¹⁸⁷ The ability to leverage the cycle of success into prosecutions of higher-level TOC leaders has been as successful as the transit zone operations themselves: “more than half the designated priority drug targets extradited to the United States from South America over the last ten years are directly

¹⁸¹ *Id.* at 8 (statement of ADM Papp).

[The transit zone] is where we get the very best value for the taxpayer’s dollar. It is also where we have our first best chance to address this problem: close to the source, and far from our shores, where the drugs are pure and uncut, where they are in their most vulnerable bulk form, and before they are divided into increasingly smaller loads, making them exponentially harder and more expensive to detect and interdict.

Id.

¹⁸² *Id.*

¹⁸³ *Id.*

Over the last five years, Coast Guard ships and law enforcement detachments operating in the offshore regions have removed more than 500 metric tons of cocaine with a wholesale value of nearly \$17 billion. This is more than two times the amount of cocaine and twice the purity seized by all other U.S. federal, state, and local law enforcement agencies combined.

Id.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ “The interagency” refers to the collection of U.S. government agencies that participate in maritime interdiction operations.

¹⁸⁷ *Drug Smuggling Hearing, supra* note 12, at 8 (“By understanding the criminal networks, [the interagency is] better prepared to combat other illicit enterprises, including human traffickers and international terrorists.”).

linked to Coast Guard interdictions.”¹⁸⁸ The widespread use of MSAs in the overall counter-trafficking effort, and their associated success, indicate the future potential for a MSA with Cuba. The question, addressed in the next section, is whether a MSA with Cuba is feasible.

C. A Maritime Security Agreement with Cuba Is Achievable

1. *A Maritime Security Agreement Would Build upon Existing Cooperation in Maritime Operations*

A MSA with Cuba could likely be negotiated quickly and efficiently, based on the relationship between the U.S. Coast Guard and U.S. State Department and the Cuban government. The Coast Guard has interacted with the Cuban government on a working basis since 1980.¹⁸⁹ Since that time, the Coast Guard has utilized a formal line of communication with the Cuban Border Guard for passing operational information.¹⁹⁰ This communication line, called the *Telex* system, was established “to facilitate the transmittal of preapproved messages containing non-sensitive, real-time, tactical search and rescue information and suspicious aircraft and vessel movements.”¹⁹¹ The relationship grew stronger in 1994, when the United States entered into a migration agreement with Cuba, in which Cuba agreed to accept migrants interdicted by the United States at sea.¹⁹² Since then, Coast Guard ships have been entering ports in Cuba weekly to physically repatriate Cuban migrants found at sea.¹⁹³

In 2004, a permanent party Coast Guard officer was stationed as a drug interdiction specialist in the U.S. Interests Section of Cuba.¹⁹⁴ Since that

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 26.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See WASEM, *supra* note 28, at 2–3.

¹⁹³ See e.g., Joey Flechas, *U.S. Coast Guard Repatriates 169 Cuban Migrants*, MIAMI HERALD (Jan. 14, 2016), <http://www.miamiherald.com/news/nation-world/world/Americas/cuba/article54789885.html>.

¹⁹⁴ See Randy Beardsworth, *U.S.–Cuba Functional Relationship: A Security Imperative*, in 9 WAYS FOR [U.S.] TO TALK TO CUBA AND CUBA TO TALK TO [U.S.] 95–96 (Sarah Stephens et al. eds., 2009). The “U.S. Interest Section” in Havana was the headquarters for the U.S. State Department diplomatic presence in Cuba. *Id.* When normal diplomatic relations between the United States and Cuba were restored in 2015, it was reopened as the U.S. Embassy. See U.S. DEP’T OF STATE, http://havana.usembassy.gov/about_the_usint.html (last visited May 12, 2016).

time, this officer—the only permanent party U.S. military member stationed in Cuba since 1961—has served as the liaison between the United States and Cuban Coast Guards, facilitating repatriations and information exchange on mutually beneficial topics such as smuggling and search and rescue.¹⁹⁵

Most recently, the relationship between the Coast Guard, in conjunction with the U.S. State Department, and the Cuban government enabled negotiation of the Operational Procedures Between the United States Coast Guard and the Aeronautical and Maritime Search and Rescue System of the Republic of Cuba (Procedures).¹⁹⁶ These non-binding Procedures, effective as of June 30, 2014, specify operational and communications procedures for search and rescue cases occurring in the Cuban area of responsibility, and designate the protocols by which Cuba may request assistance from the U.S. Coast Guard for cases occurring within Cuban waters.¹⁹⁷ These Procedures are important in the historical development of U.S.–Cuban relations in maritime cooperation.

In addition to the Procedures, the Cuban government appears ready for a MSA with the U.S. government specific to TOC. Cuba has, to date, negotiated 36 counter-drug MSAs with other nations and an additional 27 MSAs related to law enforcement.¹⁹⁸ With respect to the U.S. government specifically, the Cuban government has presumably been interested in a counter-narcotics agreement since 2003, when it forwarded a draft agreement to the U.S. State Department.¹⁹⁹ In summary, through their long-standing cooperation and the recent formalization of a non-binding search and rescue agreement, both governments have manifested a willingness to continue strengthening their cooperation in maritime operations.

¹⁹⁵ See Beardsworth, *supra* note 194, at 95–96.

¹⁹⁶ U.S. DEP'T. OF STATE, DIPLOMATIC NOTE 181/27, OPERATIONAL PROCEDURES BETWEEN THE UNITED STATES COAST GUARD AND THE AERONAUTICAL AND MARITIME SEARCH AND RESCUE SYSTEM OF THE REPUBLIC OF THE CUBA (2014) (copy on file with author).

¹⁹⁷ *Id.*

¹⁹⁸ BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 74, at 146.

¹⁹⁹ *Id.*

2. *A Maritime Security Agreement Should Be Concluded as an Executive Agreement*

In the United States, there is a distinction made between treaties and “other international agreements.”²⁰⁰ While both are binding, treaties refer to that subset of international agreements brought into force with the advice and consent of the Senate, while “other international agreements” are those concluded pursuant to other constitutional bases.²⁰¹ These “other constitutional bases” include preexisting treaties, legislation, and the constitutional authority of the President.²⁰² Preexisting treaties are authoritative when they require parties to enter other, more specific, agreements to carry out their provisions.²⁰³ International agreements may also be authorized by legislation, such as statutes delegating such authority to the President.²⁰⁴ Finally, international agreements may be concluded pursuant to the President’s various constitutional authorities, including those as Commander-in-Chief.²⁰⁵ The vast majority of “other international agreements,” hereinafter referred to as executive agreements, are unilaterally negotiated and concluded by the executive branch, without the formal advice and consent of the Senate.²⁰⁶

In all cases, unless first prompted by Congress, the U.S. State Department decides whether a proposed international agreement should be concluded as a treaty or executive agreement.²⁰⁷ This decision is made by applying a standard set of criteria, contained in the State Department’s regulations for concluding international agreements, called the Circular 175 Procedure.²⁰⁸ The Circular 175 Procedure also specifies that Congress should be consulted when there are lingering questions about whether an international agreement should be concluded as a treaty or other international agreement.²⁰⁹

²⁰⁰ See U.S. DEP’T OF STATE, 11 FOREIGN AFFAIRS MANUAL 720 (2006) [hereinafter 11 FAM § 720] (commonly known as the *Circular 175 Procedure*).

²⁰¹ *Id.* § 723.2-2.

²⁰² *Id.*

²⁰³ *Id.* § 723.2-2(A).

²⁰⁴ *Id.* § 723.2-2(B).

²⁰⁵ *Id.* § 723-2-2(C).

²⁰⁶ Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L. J. 140, 145 (2009).

²⁰⁷ 11 FAM § 720, *supra* note 200, § 724.

²⁰⁸ *Id.* § 723.3.

²⁰⁹ *Id.*

Forty-three of the United States' MSAs on illicit maritime trafficking that are currently in force were concluded as executive agreements.²¹⁰ For those dealing exclusively with illicit narcotics trafficking, their primary authority derives from the 1988 Convention, a preexisting treaty that was concluded with consent of the Senate.²¹¹ Article 17 of the 1988 Convention requires that "the Parties cooperate to the fullest extent possible to suppress illicit traffic by sea . . . [and] shall consider entering into bilateral and regional agreements to carry out . . . the provisions of [Article 17]."²¹² Pursuant to this international obligation, Congress provided the president standing authority "to conclude agreements, including reciprocal maritime agreements, with other countries" to control illicit drug trafficking.²¹³

For those MSAs dealing with alien smuggling, authority derives primarily from the U.N. Protocol Against the Smuggling of Migrants by Land, Sea, and Air (Smuggling Protocol), also a preexisting treaty concluded with consent of the Senate.²¹⁴ Article 17 of the Smuggling Protocol requires its parties "to consider the conclusion of bilateral agreements" to counter human smuggling.²¹⁵

For Cuba, the conclusion is the same. A future MSA should be negotiated as an executive agreement, pursuant to the same authorities, with due regard for the sensitive nature of U.S.–Cuban relations. The principal authorities for a MSA with Cuba are identical. Both the United States and Cuba ratified the 1988 Convention²¹⁶ and Smuggling Protocol,²¹⁷ giving rise to a shared set of responsibilities concerning narcotics trafficking and maritime alien smuggling.²¹⁸ Additionally, although not cited in any U.S.–Cuban agreement since the 1950s, the United States and Cuba entered the Convention between the United States of America and the Republic of Cuba for the Suppression of Smuggling

²¹⁰ U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23; *see also* Hathaway, *supra* note 206, at 151.

²¹¹ 1988 Convention, *supra* note 165, art. 17.

²¹² *Id.*

²¹³ 22 U.S.C. 2291(a)(2) (2014).

²¹⁴ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, U.N. GAOR, 55th Sess., Annex III (Nov. 15, 2001) [hereinafter Smuggling Protocol] (The United States ratified on Nov. 3, 2005. Cuba ratified on Jun. 20, 2015).

²¹⁵ *Id.* art. 17.

²¹⁶ 1988 Convention, *supra* note 165.

²¹⁷ Smuggling Protocol, *supra* note 214.

²¹⁸ 1988 Convention, *supra* note 165, art. 17; Smuggling Protocol, *supra* note 214, art. 17.

Operations between Their Respective Territories (Smuggling Treaty) in 1926.²¹⁹ This Smuggling Treaty, still in force and presumptively binding under its own terms, commits the United States and Cuban governments “to aid each other mutually” in discovering and punishing the maritime smuggling of illicit drugs and humans.²²⁰ To this end, the Smuggling Treaty commits both governments to using “all means possible” to prevent the illegal smuggling of narcotics and aliens into the territory of the other.²²¹ Thus, viewed in light of the Smuggling Treaty of 1926, a MSA with Cuba is not a novel approach, but a return to a preexisting state of cooperation between the two governments.

The negotiation of a MSA with Cuba is achievable. Maritime security agreements are a routine yet key element in overall maritime interdiction operations, and the U.S. government has significant experience in concluding and managing them. A MSA with Cuba should leverage this experience and be concluded pursuant to the same authorities as the other MSAs already in place.

V. A Maritime Security Agreement with Cuba Would Directly Address U.S. National Security Objectives

President Obama’s 2011 Strategy to Combat Transnational Organized Crime (TOC Strategy) is designed to reduce TOC by “[building], [balancing], and [integrating] the tools of American power to combat transnational organized crime and related threats to national security—and to urge our foreign partners to do the same.”²²² To accomplish this goal, it directs the U.S. government to pursue six priority actions, which include: enhancing information sharing; strengthening interdiction, investigations, and prosecutions; disrupting drug trafficking; and building international cooperation and partnerships.²²³ A MSA with Cuba would directly serve these particular priority actions and ultimately enable the U.S. government to better address the threats described in section II. Additionally, a MSA would have the collateral effect of supporting the Cuban government’s

²¹⁹ Convention between the United States of America and the Republic of Cuba for the Suppression of Smuggling Operations Between their Respective Territories, June 28, 1926, 44 Stat. 2402 [hereinafter Smuggling Treaty].

²²⁰ *Id.* art. 1.

²²¹ *Id.* art. 2.

²²² TOC STRATEGY, *supra* note 9.

²²³ *Id.* at 15–28.

recent improvements in complying with international human rights standards.

A. A Maritime Security Agreement Would Enhance Information Sharing, Maritime Interdiction Operations, and the Disruption of Drug Trafficking

The conclusion of a MSA with Cuba would serve several of the U.S. government's policy actions in the counter-TOC strategy. First, a MSA would enhance information-sharing capabilities. A current lack of extensive information sharing has, in part, forced the U.S. government into a reactionary posture with respect to Cuban-based maritime threats.²²⁴ While the Coast Guard and Cuban Border Guard maintain a formal means of communicating suspicious vessel movements,²²⁵ the extent of information sharing is significantly lower in comparison to the U.S. government's interactions with other governments in the Caribbean region.²²⁶ In other areas of the transit zone, for example, virtually every case begins with actionable intelligence provided by a foreign government, or generated by U.S. law enforcement officials working abroad.²²⁷ This actionable intelligence is then leveraged by reconnaissance aircraft, which, through MSAs, are able to track departing vessels suspected of narcotics trafficking and then coordinate interdiction with U.S. assets in the area.²²⁸ In this way, the U.S. government takes a proactive approach, utilizing intelligence to effectively position interdiction assets, often before smuggling vessels depart.

By comparison, Cuban-based threats are handled differently. Instead of a proactive approach, the U.S. government's intelligence capabilities are limited to what patrol aircraft can spot during routine flights, and what the Cuban Border Guard communicates to the Coast Guard through the

²²⁴ See U.S. COAST GUARD, *Coast Guard Repatriates Over 200 Cuban Migrants*, SEVENTH DISTRICT PUBLIC AFFAIRS (Jan. 8, 2016), <http://www.d7.uscgnews.com/go/doc/4007/2772886/> ("The Coast Guard and partner agencies aggressively patrol the Florida Straits and the Caribbean Sea to detect and deter illegal and unsafe maritime migration."), CARL MEACHAM, *CHANGING CUBA POLICY: IN THE UNITED STATES NATIONAL INTEREST*, S. PRT. 111-5 (2009) (noting minimal levels of communication between the U.S. and Cuban governments).

²²⁵ *Drug Smuggling Hearing*, *supra* note 12, at 26 (statement of ADM Papp).

²²⁶ *Interdiction Hearing*, *supra* note 17, at 33–40); *see also*, *Drug Smuggling Hearing*, *supra* note 12, at 26 (statement of ADM Papp).

²²⁷ *See supra* note 226 and accompanying sources.

²²⁸ *Id.*

Telex system.²²⁹ While this system is critical to current operations, the information provided is limited to “the transmittal of preapproved messages containing non-sensitive, real-time, tactical search and rescue information, and suspicious aircraft and vessel movements.”²³⁰ Without a MSA in place—or any other outlet for law enforcement information-exchange—the Coast Guard must translate these *Telex* communications and then attempt to coordinate an interdiction, all in the time it takes for a high-powered speedboat to move ninety miles from Cuba to the Florida Keys. A MSA would provide a vehicle to expand communications, enable the two governments to build on the successful use of the *Telex* system, and move toward the proactive approach utilized in other areas of the transit zone.

Second, a MSA would enhance the U.S. government’s ability to conduct maritime interdiction operations, including drug trafficking interdiction operations. As described in section IV.A, the ability to operate in Cuba’s waters or to take action against Cuban-flagged vessels requires permission of the Cuban government.²³¹ Without a MSA, there is no mechanism for the Coast Guard to request this permission. Consequently, suspicious vessels that are located inside Cuban territorial waters are not subject to U.S. interdiction efforts. These vessels can use Cuba’s territorial waters as a shield by delaying their departure until their route to the United States is clear. Additionally, if they are detected after leaving Cuba’s territorial seas, they can simply turn around and re-enter, disrupting the attempt to interdict them. The conclusion of a MSA with Cuba addresses the limitations of this current framework. Provisions that specify procedures for effectuating joint operations and requesting permission to conduct operations in the other party’s waters could eliminate the use of Cuba’s territorial seas as a shield.

A MSA alone will not necessarily forge a relationship that parallels those the United States has with long-time partners like Colombia. Such an agreement, however, would provide a significantly more flexible framework that advances the stated policy objectives of the TOC strategy.

²²⁹ *Id.*

²³⁰ *Drug Smuggling Hearing*, *supra* note 12, at 26.

²³¹ *See* Kraska, *supra* note 164, at 11.

B. A Maritime Security Agreement with Cuba Would Promote a Collective Response in Countering Transnational Organized Crime

The international community has long recognized the need for global cooperation in countering TOC.²³² To that end, the primary treaties drafted to counter TOC encourage a collective response aimed at preventing TCOs from leveraging weakness to their advantage.²³³

The need for global cooperation derives from the TCOs' ability to operate across borders and exploit areas characterized by reduced governance and weakness.²³⁴ Their constant search for new exploitation opportunities necessitates a collective response to countering them, wherever they operate.²³⁵ As stated in U.S. policy, the goal is to have "flexible networks of law enforcement and diplomatic partners" that are able to adapt to the rapidly changing dynamics of TOC.²³⁶ Under the collective framework, nations must "look beyond [their own] borders to protect their sovereignty."²³⁷

Several counter-TOC legal instruments implement this collective response framework and have been ratified by both the United States and Cuba. They are the 1988 Convention;²³⁸ the UN Convention against Transnational Organized Crime (TOC Convention);²³⁹ its Smuggling Protocol;²⁴⁰ and the Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol).²⁴¹ Each

²³² See 1988 convention, *supra* note 165, introduction.

²³³ *Id.*; U.N. Convention Against Transnational Organized Crime art. 1, Jan. 8, 2001, U.N. GAOR, 55th sess., Supp. No. 49, U.N. Doc. A/45/49 [hereinafter TOC Convention] (The TOC Convention was ratified by the United States on Nov. 3, 2005. Cuba ratified on Feb. 9, 2007.); Smuggling Protocol, *supra* note 214; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 25, U.N. GAOR, 55th Sess., Annex II (Nov. 15, 2001) [hereinafter Trafficking Protocol] (The Trafficking Protocol was ratified by the United States on Nov. 3, 2005. Cuba ratified on Jun. 20, 2013).

²³⁴ *Id.*

²³⁵ U.N. OFFICE ON DRUGS AND CRIME, *Introduction to THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT*, U.N. Sales No. E.10.IV.6 (2010).

²³⁶ TOC STRATEGY, *supra* note 9 at, 26–27.

²³⁷ U.N. OFFICE ON DRUGS AND CRIME, *supra* note 235.

²³⁸ 1988 Convention, *supra* note 165.

²³⁹ TOC Convention, *supra* note 233.

²⁴⁰ Smuggling Protocol, *supra* note 214.

²⁴¹ Trafficking Protocol, *supra* note 233.

requires its signatories to cooperate with other signatories to best effectuate the goals of each treaty.²⁴²

A MSA with Cuba promotes the concept of global cooperation endorsed and required by each of the above-mentioned treaties. As it stands, the U.S. and Cuban governments' counter-TOC efforts are each largely unilateral in nature. With the exception of limited information sharing, the two governments do not present a collective response to TOC in the eastern Caribbean, either through practice or a MSA. As a result, the principle of the collective response to TOC imposed by the counter-TOC treaties is not present in the border region between the United States and Cuba. This absence, in turn, creates opportunities for TCOs. For example, TCOs are already exploiting the U.S. and Cuban governments' lack of coordination by transiting in the eastern portions of Cuba's territorial waters to evade law enforcement.²⁴³

²⁴² The first of these legal instruments, the 1988 Convention, represents a formal acknowledgment of the collective international responsibility to stem the flow of illegal drugs. 1988 Convention, *supra* note 165. Within it, signatories pledge "to co-operate to the fullest extent possible to suppress illicit traffic by sea." *Id.* art. 17. To that end, under the 1988 Convention's Article 17 procedures, the parties are obligated to "consider entering into bilateral or regional or arrangements to carry out" the requirements of the Convention. *Id.* The second legal instrument, the TOC Convention, provides a broad framework for combatting TOC. TOC Convention, *supra* note 233. The broad framework highlights the importance of international cooperation. *Id.* arts. 5–17. While the TOC Convention does not obligate members to conclude MSAs, it supports broad, collective engagement. *Id.* arts. 18–30. The final two legal instruments, the Trafficking and Smuggling Protocols, focus on human trafficking and smuggling, two sub-sets of TOC, and provide specific obligations in those areas. *See* Trafficking Protocol, *supra* note 233; Smuggling Protocol, *supra* note 214. In terms of global cooperation, the Trafficking Protocol requires signatories to cooperate in the prevention of trafficking by adopting MSAs, sharing information, and providing inter-governmental training. *See* Trafficking Protocol, *supra* note 233, arts. 9–10. Similarly, the Smuggling Protocol contains broad global cooperation provisions. Smuggling Protocol, *supra* note 214, art. 7. These include obligations to cooperate in the prevention of smuggling by adopting MSAs, share information, conduct training programs, and provide technical assistance to countries recognized as migrant smuggling source countries. *Id.* arts. 10, 14, 17.

²⁴³ *See Drug Smuggling Hearing*, *supra* note 12, at 26 (statement of ADM Papp). In particular, TCOs are smuggling narcotics from Jamaica, around the eastern tip of Cuba, and then north into the United States. *Id.* Because the United States does not have the authority to operate in Cuban waters or the means to request such authority through a MSA, smuggling vessels are able to transit around Cuba's eastern tip and north into the Bahamas, while remaining in Cuba's territorial waters for the majority of the voyage. *See id.* With a MSA, U.S. Coast Guard vessels would have the means to patrol that area and then request permission to enter Cuban waters to interdict the vessel. *Id.*

The positive impact of a prospective MSA between the Cuban and U.S. governments is difficult to estimate. By comparison, however, the principle of global cooperation effectuated by MSAs has generated success between the United States and other partners in similar situations. For instance, in the border region between the Dominican Republic and Puerto Rico,²⁴⁴ the U.S. Coast Guard partially credits the conclusion of a MSA with the Dominican Republic in a seventy-percent reduction in the illegal migration of Dominican nationals in the years following the MSA's conclusion.²⁴⁵

The United States committed to the principle of global cooperation when it ratified the various counter-TOC treaties. These treaties call for a collective response to the threat of TOC.²⁴⁶ By seeking a MSA with Cuba, the United States would fulfill its international obligations and bring the collective response framework to the maritime border region with Cuba.

C. A Maritime Security Agreement with Cuba Would Enhance Cuba's Human Rights Compliance

The conclusion of a MSA with Cuba would likely have the collateral effect of supporting Cuba's adherence to international human rights standards. The TOC Convention and its protocols are largely human rights based.²⁴⁷ Concerning human trafficking specifically, UN Secretary General Anan's foreword to the TOC Convention characterizes the trafficking of women and children "as one of the most egregious violations of human rights that the UN now confronts."²⁴⁸

²⁴⁴ The Dominican Republic and Puerto Rico are separated by a body of water called the Mona Passage. See *Interdiction Hearing*, *supra* note 17, at 33–40. The distance between the Dominican Republic and Puerto Rico, i.e., sixty miles, in the Mona Passage is similar to the distance between Cuba and southern Florida in the Florida Straits, i.e., ninety miles. *Id.*

²⁴⁵ *Interdiction Hearing*, *supra* note 17, at 33–40.

²⁴⁶ 1988 Convention, *supra* note 165; Smuggling Protocol, *supra* note 214; TOC Convention, *supra* note 233; Trafficking Protocol, *supra* note 233.

²⁴⁷ TOC Convention, *supra* note 233 (stating the TOC Convention was developed, in part, to "defend human rights and defeat the forces of crime, corruption and trafficking").

²⁴⁸ *Id.*

The primary human rights concerns associated with Cuba relate to repression,²⁴⁹ but Cuba is also viewed as a haven for human trafficking.²⁵⁰ The U.S. State Department currently classifies Cuba as a “source country” for adults and children subjected to sex trafficking, forced labor, and prostitution.²⁵¹ Cuba’s trafficking concerns are primarily internal, but there is an associated concern with Cubans being smuggled into other countries where they are then exploited through prostitution and forced labor.²⁵² The large number of individuals smuggled out of Cuba by sea suggests a connection between Cuba’s human trafficking and human smuggling.²⁵³ The specific correlation between Cuba’s human smuggling and trafficking industries is unknown, but the correlation between smuggling and trafficking throughout Latin America and the Caribbean is known to be high.²⁵⁴ Transnational criminal organizations are known to

²⁴⁹ As the State Department noted in 2014, Cuba’s primary human rights abuses center on various forms of repression by the government. *See* U.S. DEP’T OF STATE, CUBA 2014 HUMAN RIGHTS REPORT 1 (2014), <http://www.state.gov/documents/organization/236892.pdf> (“Cuba’s principal human rights abuses included those involving the abridgement of the ability of citizens to change the government and the use of government threats, extrajudicial physical assault, intimidation, violent government organized counter protests against peaceful dissent, and harassment and detentions to prevent free expression and peaceful assembly.”).

²⁵⁰ U.S. DEP’T OF STATE, 2014 TRAFFICKING IN PERSONS REPORT 135 (2015), <http://www.state.gov/documents/organization/243558.pdf>.

²⁵¹ *Id.*

²⁵² *See* U.S. DEP’T OF STATE, 2008 TRAFFICKING IN PERSONS REPORT 102 (2008), <http://www.state.gov/documents/organization/105656.pdf>; U.S. DEP’T OF STATE, 2009 TRAFFICKING IN PERSONS REPORT 116 (2009), <http://www.state.gov/documents/organization/123361.pdf>; U.S. DEP’T OF STATE, 2012 TRAFFICKING IN PERSONS REPORT 133 (2012), <http://www.state.gov/documents/organization/192594.pdf>; U.S. DEP’T OF STATE, 2013 TRAFFICKING IN PERSONS REPORT 144 (2013), <http://www.state.gov/documents/organization/210738.pdf>.

²⁵³ *See, e.g.*, 2008 TRAFFICKING REPORT, *supra* note 252, at 102.

Limited sex trafficking of Cuban women to Mexico, The Bahamas, and Western Europe has been reported. Some Cuban nationals willingly migrate to the United States, but are subsequently exploited for forced labor by their smugglers. Cuba also is a transit point for the smuggling of migrants from China, Sri Lanka, Bangladesh, Lebanon, and other nations to the United States and Canada. Some of these migrants may be trafficking victims, who are subject to forced labor, sexual exploitation, and abuse.

Id.

²⁵⁴ *See* Ray Walser et al., *The Human Tragedy of Illegal Immigration: Greater Efforts Needed to Combat Smuggling and Violence*, HERITAGE FOUND. (June 22, 2011), <http://www.heritage.org/research/reports/2011/06/the-human-tragedy-of-illegal-immigration-greater-efforts-needed-to-combat-smuggling-and-violence> (describing the risk of migrants being sexually assaulted and sold into human trafficking).

frequently traffic undocumented migrants as a means of generating revenue.²⁵⁵ The human rights concern for Cuba is that its robust smuggling industry is funneling migrants into the human trafficking industry, or that a connection between the two industries could develop.

A MSA with Cuba would help to address the correlation between maritime smuggling and human trafficking in the same way that it addresses drug smuggling. It would enable a more proactive framework to stop human smuggling vessels that are potentially feeding the human trafficking industry. A MSA would also bring the collective response framework into the border area between the two countries, an area that has traditionally been policed through unilateral efforts by the Cuban and U.S. governments.

Furthermore, Cuba has recently made modest improvements in its efforts regarding human trafficking, and a MSA with Cuba supports those efforts. In 2015, for the first time since the U.S. State Department began ranking countries on their response to human trafficking, Cuba was moved from Tier 3, which reflects those governments “that do not fully comply with the [Trafficking Victims Protection Act’s, or TVPA’s] minimum standards and are not making significant efforts to do so,” to Tier 2, which reflects those governments “that do not fully comply with the TVPA’s minimum standards but are making significant efforts to bring themselves into compliance with those standards.”²⁵⁶ Since the policy of the U.S. government is to support Cuba’s human rights compliance,²⁵⁷ these improvements should be commended and rewarded. A MSA that enhances the collective ability to disrupt human trafficking further supports Cuba’s efforts.

The conclusion of a MSA with Cuba both brings the collective response framework to bear on human trafficking and supports Cuba’s recent efforts to comply with human rights standards.

²⁵⁵ *Id.*

²⁵⁶ U.S. DEP’T OF STATE, 2015 TRAFFICKING IN PERSONS REPORT 47 (2015), <http://www.state.gov/documents/organization/245365.pdf>.

²⁵⁷ The President is authorized to terminate the economic embargo after making a finding that there is a democratically elected government in power. 22 U.S.C. § 6064(c) (2014). The definition of a democratically elected government is defined, in part, as one that “is showing respect for the basic civil liberties and human rights of the citizens of Cuba.” 22 U.S.C. § 6066(2) (2014).

VI. The Path to a Maritime Security Agreement with Cuba: Recommended Short- and Long-Term Actions

The United States should seek a MSA with Cuba. Cuba poses national security threats to the United States, including the traditional threats of maritime smuggling and mass migration, and also the prospective threats posed by TOC, including narcotics trafficking and terrorism. The TOC balloon-effect has repeatedly demonstrated its durability in the transit zone. When efforts to combat TOC in one area intensify, the targeted trafficking activities simply move elsewhere. Transnational criminal organizations have recently shifted their trafficking activities to the eastern Caribbean, and there is a very real possibility that they will seek to establish a foothold in Cuba.

Since the 1980s, the U.S. government and the international community have used MSAs as a key component to countering TCOs.²⁵⁸ These agreements have successfully permitted the United States and its partner-nations to target the origins of the threat, where the gains are the greatest. A MSA with Cuba could be negotiated quickly and efficiently based on the long-term relationship between the U.S. and Cuban governments. Such an agreement with Cuba would advance the national security objectives of the TOC Strategy, promote the collective response framework imposed by the various counter-TOC legal instruments, and enhance Cuba's human rights compliance.

The following section recommends a strategy for negotiating a MSA with Cuba. Given the current legislative framework, any negotiation would require both short- and long-term action. In the short-term, the United States should seek a MSA modeled after others in the transit zone that provides an achievable and effective maritime strategy. In the long-term, the United States would need to consider a reconfiguration of its immigration framework with respect to Cuba in order to realize the full impact of such an agreement.

A. Short-Term Actions: The U.S. Government Should Seek a Maritime Security Agreement with Cuba

In the short-term, the United States should seek a MSA that both functions within the current limits of domestic legal policy and is

²⁵⁸ See *supra* section IV.A, B (discussing the history of MSA use in countering TCOs).

sufficiently flexible to evolve along with potential changes in the United States' relations with Cuba. The MSA recommended by this article²⁵⁹ provides broad authority to take action against the full range of current and prospective maritime threats associated with Cuba.

1. Authority

The proposed MSA derives its authority primarily from the international law previously described in section V, namely the 1988 Convention, TOC Convention, Smuggling Protocol, and Trafficking Protocol. In comparison to the sources of authority cited in other MSAs currently in place between the United States and other nations, the inclusion of all of these authorities represents a novel approach. For instance, of the forty-three agreements, forty-one cite only the 1988 Convention, and only two cite one of the other authorities.²⁶⁰ There is a geographic rationale behind these limits. The MSAs with nations that pose an illicit narcotics threat to the United States, but that are geographically distant, are limited in scope to provisions aimed at stopping illicit narcotics trafficking.²⁶¹ For instance, the likelihood of Colombian nationals migrating illegally to the United States by sea is remote. In contrast, MSAs with nations that are geographically close in proximity provide a broader range of authorities to take action against a broader range of conduct.²⁶² In these agreements, provisions are included to effect cooperation on smuggling and illegal immigration, in addition to narcotics trafficking.²⁶³

Because Cuba poses a broad range of known and prospective maritime threats, the proposed agreement includes authorities permitting action against vessels reasonably suspected of narcotics trafficking, migrant smuggling, the unsafe transport of migrants, and trafficking in persons. This concept of enabling cooperative action against these threats by the two governments is not a novel one. The 1926 Smuggling Treaty, which is still in force, commits the U.S. and Cuban governments to collectively address these threats.²⁶⁴ The conclusion of a MSA is merely a return to this preexisting state of cooperation.

²⁵⁹ See *infra* App. A.

²⁶⁰ See U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23.

²⁶¹ See, e.g., Colombia MSA, *supra* note 174.

²⁶² See, e.g., Bahamas MSA, *supra* note 175.

²⁶³ *Id.*

²⁶⁴ Smuggling Treaty, *supra* note 219, arts. 1–2.

2. *Suggested Provisions of the Proposed Maritime Security Agreement*

The proposed agreement includes each of the standard provisions described in Section IV. These include ship-boarding; entry into territorial seas; overflight; ship-rider authority; technical assistance; and maritime interdiction support. This range of authority is extremely broad, permitting U.S. Coast Guard ships to enter the sovereign waters of Cuba to target a suspect vessel and vice versa. Given the current state of relations between the two countries, this degree of cooperation is probably unlikely. The proposed MSA's check on its own scope is this: the enactment of any of these provisions require prior authorization of the opposing party. In this way, both the United States and Cuba can control when and where they permit a sovereign incursion. This method of premising action on prior authorization should foster a gradual building of mutual trust. Minor sovereign incursions, such as Cuba permitting the United States to interdict a suspected drug trafficking vessel just inside its territorial seas, would foreseeably pave the way for more intrusive actions, such as the two countries conducting joint operations in each other's waters.

In summary, the U.S. government should seek the proposed MSA in the short-term. It is largely modeled after previously negotiated MSAs with other nations, based on the same authorities and containing the same provisions. Such MSAs have been widely used and have historically been successful in countering the same threats currently associated with Cuba. The proposed MSA, however, is also sufficiently flexible to reflect the developing state of relations between the two governments.

A. Long-Term Actions: The Impact of Current U.S. Immigration Policy for Cubans

In the long-term, the complete realization of the benefits of a MSA with Cuba would likely require changes to the current immigration framework for Cuban nationals. Like the economic embargo, U.S. immigration policy regarding Cuban nationals is rooted in isolationist policy from the 1960s.²⁶⁵ This view has resulted in an immigration framework for Cuban nationals that differs significantly from the one

²⁶⁵ Lorena G. Barberia, *U.S. Immigration Policies Toward Cuba*, in *DEBATING U.S.—CUBAN RELATIONS* 183 (Jorge I. Domínguez et al. eds., 2012).

utilized for every other sub-set of immigrants.²⁶⁶ Additionally, it creates several national security issues that warrant reconsideration of the Cuban Adjustment Act.

1. Immigration Framework for non-Cuban Aliens

Under current policy, aliens²⁶⁷ that are not Cuban (non-Cuban aliens) seeking to enter the United States must apply at a designated port of entry, such as an airport.²⁶⁸ Upon arrival, every alien is inspected by an authorized immigration officer²⁶⁹ and must prove his or her eligibility for admission to the satisfaction of the immigration officer.²⁷⁰ Aliens must show that they are not inadmissible for any of the designated reasons specified under the immigration laws²⁷¹ and must also possess required border entry documents.²⁷² Aliens attempting to enter the United States at a place other than a port of entry, or who enter without inspection and are later discovered, are presumptively inadmissible.²⁷³

Unless successfully applying for asylum or being afforded other process under the Immigration and Nationality Act (INA), aliens deemed inadmissible after inspection are eventually returned to their country of origin, whether voluntarily,²⁷⁴ through expedited removal,²⁷⁵ or after being charged administratively and referred to an immigration judge for removal proceedings.²⁷⁶

2. Immigration Framework for Cuban Aliens

For Cuban aliens attempting to enter the United States, the immigration framework differs significantly at both the legal and administrative level. The first major distinction between overall U.S.

²⁶⁶ See WASEM, *supra* note 28, at 1–5.

²⁶⁷ 8 U.S.C. 1101(a)(3) (2014) (“The term “alien” means any person not a citizen or national of the United States.”).

²⁶⁸ 8 C.F.R. § 235.1 (2015).

²⁶⁹ 8 U.S.C. § 1225(a) (2015).

²⁷⁰ 8 C.F.R. § 235.1 (2015).

²⁷¹ 8 U.S.C. § 1182 (2014).

²⁷² *Id.* § 1182(a)(7)(B) (2015).

²⁷³ 8 C.F.R. § 235.1(f)(2) (2015).

²⁷⁴ 8 U.S.C. § 1225(a)(4) (2014); 8 C.F.R. § 235.4 (2015).

²⁷⁵ 8 C.F.R. § 235.3 (2015).

²⁷⁶ 8 U.S.C. § 1229a (2014).

immigration policy and Cuban immigration policy is statutory in nature. Congress passed the Cuban Adjustment Act of 1966²⁷⁷ (CAA) based on the assumption that accepting Cuban emigrants would weaken the revolutionary government in Cuba.²⁷⁸ At the time, the CAA represented the confirmation of the long-standing practice of accepting Cuban aliens as refugees from communism,²⁷⁹ and notably, it gave the Attorney General the authority to grant lawful permanent resident status to any Cuban refugee after one year of physical presence in the United States.²⁸⁰ This authority—still utilized today and not available for any other group of immigrants—provides Cubans with a strong incentive to seek refuge in the United States and provides an expedited path to U.S. citizenship.²⁸¹ Like the economic embargo, the CAA may only be repealed when Cuba establishes a democratic government.²⁸²

The second major distinction between overall U.S. immigration policy and Cuban immigration policy stems from the application of the Immigration and Nationality Act, the CAA, and the Migrant Accords. The Migrant Accords are the result of two sets of negotiations between the U.S. and Cuban governments on Cuban migration. In the first, concluded in 1994, the two governments agreed that Cuban migrants rescued at sea would not be permitted to enter the United States.²⁸³ In the second,

²⁷⁷ See Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (2000)) [hereinafter CAA].

²⁷⁸ Barberia, *supra* note 265, at 183.

²⁷⁹ *Id.*

²⁸⁰ See CAA, *supra* note 297.

²⁸¹ Barberia, *supra* note 265, at 183.

²⁸² Omnibus Consolidated Appropriations Act of 1997, PL 104-208, Sept. 30, 1996, 110 Stat 3009 (“Public Law 89-732 is repealed effective only upon a determination by the President under section 203(c)(3) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Public Law 104-114) that a democratically elected government in Cuba is in power.”).

²⁸³ See Joint Communiqué of the Government of the United States of America and the Government of the Republic of Cuba, Sept. 9, 1994, 35 I.L.M. 327 [hereinafter Joint Communiqué].

[M]igrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States. Further the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways. . . . The United States and the Republic of Cuba agreed that the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994 will continue to be arranged in diplomatic channels.

concluded in 1995, the governments agreed that Cuban migrants intercepted at sea would be returned to Cuba.²⁸⁴ The Migrant Accords are still applicable and represent the current means by which the United States repatriates Cuban migrants when they are found at sea.

Regarding the INA, the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) concluded, in a series of legal opinions issued between 1993 and 1996, that aliens not touching dry land in the United States are not entitled to proceedings under the INA.²⁸⁵ Thus, Cuban aliens, like any other sub-set of aliens, who are interdicted at sea, are not entitled to the process requirements of the INA and may be immediately repatriated back to Cuba through the terms of the Migrant Accords.²⁸⁶ Additionally, Cuban aliens, like any other sub-set of aliens, who touch dry soil in the United States are entitled to the process requirements under the INA.²⁸⁷

Regarding the CAA, despite the mutual understanding reflected in the Migrant Accords that “the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular

Id. at 329.

²⁸⁴ Joint Statement of the Government of the United States and the Government of the Republic of Cuba Regarding Migrant Accords, 35 I.L.M. 327, 328 [hereinafter Joint Statement].

²⁸⁵ See Memorandum from Walter Dellinger, Assistant Attorney Gen., to Attorney Gen., subject: Immigration Consequences of Undocumented Aliens’ Arrival in United States Territorial Waters (Oct. 13, 1993); Memorandum from Walter Dellinger, Assistant Attorney Gen., to T. Alexander Aleinikoff, Gen. Counsel, Immigration & Naturalization Serv., subject: Whether the Interdiction of Undocumented Aliens Within United States Territorial Waters Constitutes an “Arrest” under Section 287(a)(2) of the Immigration and Nationality Act (Apr. 22, 1994); Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney Gen., to Attorney Gen., subject: Rights of Aliens Found in U.S. Internal Waters (Nov. 21, 1996) [hereinafter OLC Opinions]. These opinions, commonly known as the “feet wet/dry policy,” are frequently mischaracterized. *Id.* In truth, the policy reflects the Department of Justice’s opinion that any undocumented alien, regardless of nationality, who touches dry soil within the United States is entitled to the process requirements of the Immigration and Nationality Act, while those interdicted at sea do not. *Id.* See also Memorandum from Doris Meissner to all [Immigration and Nationality Service] officers, subject: Clarification of Eligibility for Permanent Residence Under the Cuban Adjustment Act (Apr. 26, 1999) [hereinafter Memorandum from Doris Meissner] (clarifying that Cubans, along with their spouses and children, who arrive at a location in the United States other than designated ports of entry, are eligible for parole, as well as eventual adjustment of status to that of permanent resident);

²⁸⁶ See *id.*; Joint Statement, *supra* note 284, at 328.

²⁸⁷ See OLC Opinions, *supra* note 285.

ways,”²⁸⁸ eligibility under the CAA has always been “construed liberally.”²⁸⁹ Cubans found in the United States are eligible to apply for adjustment to lawful permanent residence under the CAA, regardless of whether they entered the United States at a designated port of entry, with the proper visa and entry documentation, or not.²⁹⁰ Thus, unlike other aliens, Cubans are not automatically deemed inadmissible by avoiding the requirement to apply for legal admission at a port-of-entry and may, instead, enter illegally and then still successfully apply to adjust their status.²⁹¹

Thus, the interplay between the INA, CAA, and Migrant Accords has given rise to a system where Cuban migrants found at sea are repatriated to Cuba through the Migrant Accords, without any further process under the INA. Those that touch dry land, however, regardless of where or how, are permitted to adjust their status under the INA. This differs significantly from the general immigration framework where aliens arriving to places other than a port-of-entry are considered presumptively inadmissible and removed.

The third and final distinction between overall U.S. immigration policy and Cuban immigration policy is not necessarily unique to Cuba. In reality, regardless of internal policy, the ability of the United States to remove or repatriate a person to Cuba is based entirely on Cuba’s willingness to accept that individual.²⁹² Thus, the understanding reflected in the Migrant Accords that “the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways”²⁹³ is ineffective without a corresponding willingness by Cuba to permit the return of such individuals. Cuba represents one of those nations that either significantly delays or outright refuses to accept

²⁸⁸ Joint Communique, *supra* note 283, at 329.

²⁸⁹ See *Matter of Mesa*, 12 I. & N. Dec. 432, 435 (BIA 1967).

²⁹⁰ See Memorandum from Doris Meissner, *supra* note 285.

²⁹¹ See 8 U.S.C. § 1182(a)(6)(A)(i) (2014).

²⁹² See *Keep Our Communities Safe Act: Hearing Before the Subcomm. on Immigration Policy & Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 27 (2011) (statement of Gary Mead, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement) [hereinafter Statement of Associate Director Mead] (discussing certain nations that refuse to accept their citizens under an order of removal).

²⁹³ Joint Communique, *supra* note 283, at 329.

the return of nationals ordered removed by the United States.²⁹⁴ This reality is reflected in the statistics. Of the 165,613 total number of Cuban nationals arriving to the United States between 2005 and 2013,²⁹⁵ 95,872 were deemed inadmissible under the INA,²⁹⁶ but only 1409 Cuban nationals were physically deported from the United States to Cuba.²⁹⁷ While the Cuban government's rationale for not accepting Cuban nationals who have been ordered removed is unclear, it may be linked to the existence of the CAA, which is perceived by the Cuban government to encourage illegal emigration.²⁹⁸

3. National Security Implications of the Current Immigration Framework vis a vis Cubans

The current immigration framework with respect to Cubans inadvertently presents two potential national security concerns. First, the CAA and favorable immigration policy for Cubans is frequently said to promote the illegal migration of Cubans to the United States.²⁹⁹ Although inadvertent, the overall policy incentivizes illegal immigration by Cuban nationals who realize that they will be eligible to adjust their status under the CAA, regardless of *how* they arrive on dry land in the United States. Furthermore, they understand that, even if ordered removed by the

²⁹⁴ See WASEM, *supra* note 28, at 2; see also Statement of Associate Director Mead, *supra* note 290 (“Cuba lacks formal relations with the United States and accepts only aliens from a very short list related to the Mariel boatlift.”).

²⁹⁵ DEP’T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2013 YEARBOOK OF IMMIGRATION STATISTICS 67 (2014) (The total number of arriving Cuban nationals was taken from Table 26.).

²⁹⁶ *Id.* at 98 (The total number of Cuban nationals deemed inadmissible was taken from Table 37.).

²⁹⁷ *Id.* at 107 (2014) (The total number of Cuban nationals deported to Cuba was taken from Table 41.).

²⁹⁸ MINISTRY OF FOREIGN AFFAIRS OF CUBA, CUBAN DELEGATION STATEMENT ON THE HAVANA MIGRATION TALKS WITH THE UNITED STATES (Jan. 12, 2011), <http://anterior.cubaminrex.cu/English/Statements/Articulos/StatementsMINREX/2011/PRESS.html>.

The Cuban delegation reaffirmed once again that migrant smuggling will not disappear nor could a legal, safe and orderly migration be achieved between our two countries as long as the *Cuban Adjustment Act* and the wet foot/dry foot policy—which encourage illegal departure of Cubans to the United States—remain in place.

Id.

²⁹⁹ WASEM, *supra* note 28, at 20.

immigration system, there is no corresponding ability to physically remove them back to Cuba. Given a continuous stream of Cuban nationals seeking to enter the United States, there is a collateral incentive for alien smugglers to maintain the smuggling networks from Cuba into the United States.³⁰⁰ The concern is that while these networks are currently utilized to smuggle aliens, they could easily be leveraged to smuggle drugs or terrorists.³⁰¹ Additionally, the smuggling networks will persist at least as long as the incentives created by the favorable immigration policy persist.

Second, the inability of the United States to send Cuban nationals back to Cuba disrupts the “cycle of success,” where interdictions result in prosecutions, which in turn results in actionable intelligence.³⁰² If a Cuban is interdicted on the water for smuggling aliens, U.S. law enforcement officers face a choice: if the Cuban smuggler has never touched U.S. soil and the officers bring the smuggler into the United States, the smuggler, under the CAA and U.S. policy, will remain in the United States.³⁰³ While the officers can arrest the smuggler, there is currently no mechanism by which to deport the smuggler back to Cuba after the criminal process concludes. This inability to deport creates pressure to repatriate the smuggler after he is stopped on the water, rather than bring him or her into the United States for prosecution, where favorable immigration benefits will likely accrue. This disrupts the cycle by necessitating a decision between criminal prosecutions or enabling permanent admission into the United States.³⁰⁴

In the long-term, the U.S. government should consider the apparent conflict between the national security concerns associated with the current immigration policy for Cubans and the counter-TOC purpose of a MSA. The conflict is, the immigration policy ultimately promotes the same types of threats that a MSA with Cuba would be designed to counter. While a complete analysis of this conflict is outside the scope of this article, the effectiveness of a MSA would appear to be diminished if U.S. immigration

³⁰⁰ Donald L. Brown, *Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States*, 33 U. MIAMI INTER-AM. L. REV. 273 (2002).

³⁰¹ *Drug Smuggling Hearing*, *supra* note 12, at 51 (statement of General Kelly).

³⁰² *Id.* at 8 (statement of ADM Papp).

³⁰³ See Memorandum from Doris Meissner, *supra* note 285.

³⁰⁴ The situation is the same when U.S. law enforcement officers want to bring a Cuban national into the United States as a witness. While the officers might be able to utilize the witness at trial, he or she is afforded the same path to citizenship as any other Cuban national who touches dry land in the United States. See OLC Opinions, *supra* note 285.

policy is simultaneously incentivizing the continued existence of the maritime smuggling industry.

VII. Conclusion

When President Obama announced the normalization of relations with Cuba in 2014, he committed the United States to a policy of engagement and promised to “advance shared interests.”³⁰⁵ This policy of engagement represents the first opportunity to formulate a collective maritime security framework between the U.S. and Cuban governments since the 1960s, and should not be wasted.

Today’s Cuba presents a broad spectrum of national security risks for the United States, including the known threats of alien smuggling and mass migration, and the prospective threats of TOC and TOC-financed terrorism. Transnational criminal organizations are increasingly moving drug-smuggling operations into the eastern Caribbean. They have already infiltrated Puerto Rico and the USVI, despite a robust security response, prompting the question of whether they will seek a foothold in Cuba. While the answer to this question is unknown, forecasted changes in Cuba’s political, economic, and social environment suggest some future degree of instability is likely. Unfortunately for Cuba, and by extension the United States, TCOs have sought, found, and exploited instability and weakness since at least the 1980s. Where the TCOs move, violence follows.

The opportunities to engage Cuba in the realm of maritime security are limited but significant. Notably, the U.S. legal framework does not prohibit a MSA with Cuba, and the United States should capitalize on this opportunity. Maritime security agreements are a critical element in current maritime interdiction operations and have a proven record of success. By working collectively with foreign nations, MSAs enable a proactive approach in which maritime threats can be countered wherever they are located. The U.S. government has concluded a MSA with virtually every country in the Western Hemisphere, in recognition of the principle that a collective response network is necessary for countering such a dynamic threat as TOC. A MSA with Cuba would bring this collective response framework to the maritime border between Cuba and the United States, would directly serve the principal policy objectives contained in the TOC

³⁰⁵ President Barack Obama, *supra* note 19.

Strategy, and have the collateral impact of supporting Cuba's recent efforts to comply with human rights standards. Moreover, such a MSA could be concluded quickly, based on the long-standing cooperation in maritime operations between the U.S. and Cuban governments. The downside is minimal—if Cuba remains free of TOC, the conclusion of a MSA would provide a means to counter the current threats associated with Cuba and provide a platform for future engagement should TCOs become an actual threat.

Cuba's range of threats to the United States demand an updated maritime security strategy in the form of a MSA. The Coast Guard and other agencies' continued reliance on a reactive, unilateral posture that permits only limited information sharing should be viewed as untenable. Such a posture may have been appropriate in the past, but is inappropriate for the rapidly evolving threat of TOC. The U.S. government should capitalize on President Obama's commitment to engagement and seek a MSA with Cuba, before the TOC threat in Cuba emerges—ninety miles south of Florida.

Appendix A: Proposed Maritime Security Agreement:
United States and Cuba

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF CUBA CONCERNING COOPERATION IN MARITIME LAW ENFORCEMENT

The Government of the United States of America and the Government of the Republic of Cuba (hereinafter, “the Parties”);

BEARING IN MIND the complex nature of the problems of transnational organized crime, illicit trafficking in narcotics and psychotropic substances by sea and air; the unsafe transport and smuggling of migrants; and trafficking in persons.

RECALLING the International Convention for the Safety of Life at Sea, 1974, with annex (hereinafter, “the SOLAS Convention”) and the 1982 United Nations Convention on the Law of the Sea (hereinafter, “the 1982 Law of the Sea Convention”);

HAVING REGARD to the urgent need for international cooperation in suppressing transnational organized crime, as reflected in the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on November 15, 2000;

HAVING FURTHER REGARD to the urgent need for international cooperation in suppressing illicit trafficking in narcotics and psychotropic substances, which is recognized in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol, in the 1971 Convention on Psychotropic Substances, in the 1982 Law of the Sea Convention, and in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, “the 1988 Convention”);

HAVING FURTHER REGARD to the urgent need for international cooperation in preventing trafficking in persons, as reflected in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, signed at Palermo, December 12-15, 2000 (hereinafter, “the Trafficking Protocol”).

HAVING FURTHER REGARD to the urgent need for international cooperation in suppressing the smuggling of migrants by sea, as reflected in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, signed at Palermo, December 12-15, 2000 (hereinafter, “the Smuggling Protocol”) and in United Nations General Assembly Resolution 48/102, adopted December 20, 1993; and in suppressing the unsafe transport of migrants, as reflected in International Maritime Organization (IMO) Circular MSC/Circ.896, December 16, 1998; in IMO Resolutions A.867(20), adopted November 27, 1997, and A.773(18), adopted November 4, 1993;

ACKNOWLEDGING the international obligations of the Parties under the 1963 Vienna Convention on Consular Relations, and noting the principle of non-refoulement contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (hereinafter, “the Refugee Convention and Protocol”) and in the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;

RECALLING that Article 17 of the 1988 Convention and Article 17 of the Smuggling Protocol provides, inter alia, that the Parties shall cooperate to the fullest extent possible to suppress illicit traffic by sea in conformity with the international law of the sea and shall consider entering into bilateral and regional agreements to carry out, or to enhance the effectiveness of, the provisions of Article 17;

FURTHER RECALLING that paragraph 9 of IMO Circular MSC/Circ. 896 and Article 17 of the Smuggling Protocol call on Parties to consider the conclusion of bilateral agreements, or operational arrangements or understandings, aimed at establishing the most appropriate and effective measures respectively to prevent and combat unsafe transport of migrants, and to prevent and combat smuggling of migrants;

RECALLING ALSO that the Joint Communiqué of the Government of the United States of America and the Government of the Republic of Cuba of Sept. 4, 1994 provides that the United States of America and Republic of Cuba are committed to directing Cuban migration into safe, legal, and orderly channels;

DESIRING to promote greater cooperation between them to combat transnational organized crime; illicit trafficking in narcotics and

psychotropic substances by sea and air; the unsafe transport and smuggling of migrants; and trafficking in persons; and

BASED ON the principles of international law, respect for the sovereign equality of States and in full respect of the principle of the right of freedom of navigation consistent with the 1982 Law of the Sea Convention

Have agreed as follows:

Article 1
Purpose and Scope

The Parties shall cooperate to the fullest extent possible in combatting the illicit trafficking of narcotic drugs and psychotropic substances by sea and air, the unsafe transport and smuggling of migrants, and the trafficking in persons, consistent with domestic and international law related thereto. This shall include the sharing of information between the Parties concerning specific instances of illicit trafficking by sea and air, the unsafe transport of migrants, the smuggling of migrants, and the trafficking of persons.

Article 2
Definitions

For the purposes of this Agreement, unless the context otherwise requires:

1. "Illicit activities" include illicit traffic, the unsafe transport of migrants, migrant smuggling, and trafficking in persons.
2. "Illicit traffic" has the same meaning as in Article 1(m) of the 1988 Convention and includes illicit traffic by air.
3. "Unsafe transport of migrants" means, with regard to transport by sea, the carriage of migrants on board a vessel that is:
 - a. obviously operating in conditions which violate fundamental principles of safety of life at sea, including but not limited to those of the SOLAS Convention, or
 - b. not properly manned, equipped or licensed for carrying passengers on international voyages, and that thereby constitutes a serious danger

for the lives or the health of the persons on board, including the conditions for embarkation and disembarkation.

4. “Smuggling of migrants” has the same meaning as in Article 3(a) of the Smuggling Protocol.
5. “Trafficking in persons” has the same meaning as in Article 3(a) of the Trafficking Protocol.
6. “Migrant” means a person attempting to enter illegally, or being transported for the purpose of entering illegally, into the territory of a Party of which the person is not a national or permanent resident.
7. “Territorial sea” is defined consistent with Section 2 of the 1982 Law of the Sea Convention.
8. “International waters” means all parts of the sea not included in the territorial sea and internal waters of a State.
9. “International airspace” means the airspace situated over international waters.
10. “Law enforcement authorities” means:
 - a. For the Government of the Republic of Cuba, the Tropas Guarda Fronteras and
 - b. For the Government of the United States of America, the United States Coast Guard.
11. “Law enforcement officials” means:
 - a. For the Government of the Republic of Cuba, uniformed members of the Tropas Guarda Fronteras; and
 - b. For the Government of the United States of America, uniformed members of the United States Coast Guard.
12. “Law enforcement vessels” means vessels, clearly marked and identifiable as being on government non-commercial service and authorized to that effect, including any boat or aircraft embarked on such vessels, of the United States Coast Guard, Tropas Guarda Fronteras, and

other vessels of the Parties as may be agreed upon, on which law enforcement officials of either or both Parties are embarked.

13. “Law enforcement aircraft” means aircraft of the Parties, clearly marked and identifiable as being on government non-commercial service and authorized to that effect on which law enforcement or other officials of either or both Parties are embarked, engaged in law enforcement operations or operations in support of law enforcement activities.

14. “Suspect vessel” means a vessel used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is engaged in illicit activities.

15. “Suspect aircraft” means an aircraft used for commercial or private purposes in respect of which there are reasonable grounds to suspect that it is engaged in illicit activities.

16. “Vessel” means any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

17. “Shiprider” means a law enforcement official of one Party authorized to embark on a law enforcement vessel or aircraft of the other Party.

Article 3

General Principles

1. Operations to suppress illicit activities, in the territorial sea or airspace of a Party are the responsibility of, and subject to the authority of, that Party.

2. Except as authorized by this Agreement, nothing in this Agreement shall be construed as authorizing a law enforcement vessel or law enforcement aircraft of one Party to unilaterally patrol within the territorial sea or airspace of the other Party.

3. Neither Party shall conduct operations to suppress illicit activities in the territorial sea and airspace of the other Party without its permission as provided in this Agreement.

Article 4

Cases of Suspect Vessels and Aircraft

Law enforcement operations to suppress illicit activities, pursuant to this Agreement, shall be carried out only against suspect vessels and suspect aircraft.

Article 5

Operations in International Waters

1. Whenever the law enforcement officials of one Party (the “first Party”) encounter a suspect vessel, flying the flag of, or claiming to be registered in, the other Party, located seaward of any nation’s territorial sea, and have reasonable grounds to suspect that the vessel is engaged in an illicit activity, the first Party may request, in accordance with Article 10 of this Agreement, the Party which is the claimed flag State to verify the claim of registry and if verified, to authorize the boarding and search of the suspect vessel, cargo and persons found on board by the law enforcement officials of the first Party. Any such request shall be supported by the basis on which it is claimed that the reasonable grounds for suspicion exist.
2. Where permission to board and search the vessel is granted and evidence is found of an illicit activity, the flag State shall be promptly informed of the results of the search, including the names and claimed nationality, if any, of the persons on board, and requested to give directions as to the disposition of the vessel, cargo and persons on board. Such requests shall be answered expeditiously. Pending receipt of such instructions, the vessel, cargo and persons on board may be detained.
3. Boardings and searches conducted pursuant to this Agreement shall be carried out by law enforcement officials from law enforcement vessels.
4. When conducting a boarding and search, law enforcement officials shall take due account of the need not to endanger the safety of life at sea, the security of the suspect vessel and its cargo, or to prejudice the commercial and legal interests of the flag State or any other interested State. Such officials shall also bear in mind the need to observe norms of courtesy, respect and consideration for the persons on board the suspect vessel.
5. Where a vessel of one Party is detained seaward of any State’s territorial sea, that Party shall have the right to exercise jurisdiction over the vessel, its cargo and persons on board, but that Party may, subject to its laws,

waive its right to exercise jurisdiction and authorize the other Party to enforce its laws against the vessel, its cargo and persons on board. Nothing in this Agreement shall be construed as a waiver by a Party of its right to exercise jurisdiction over its nationals.

Article 6

Operations in and over the Territorial sea of a Party

1. When there are reasonable grounds to suspect that a vessel or aircraft is engaged in an illicit activity, a Party (the “first Party”), in accordance with Article 10 of this Agreement, may make a request to the other Party for permission for its law enforcement vessel to follow the suspect vessel or aircraft into the other Party’s territorial sea or airspace or to enter the other Party’s territorial sea in order to maintain contact with the vessel or aircraft, and to investigate, board and search the vessel. Any such request shall be supported by the basis on which it is claimed and that there are reasonable grounds for the alleged suspicion.

3. The Requested Party shall decide expeditiously whether to grant the permission sought and in granting such permission may give such directions and attach any conditions it considers appropriate to such permission.

4. All boardings and searches of suspect vessels shall be conducted in accordance with the laws of the Requested Party.

5. Where, as a result of a boarding and search under this Article, evidence is found of illicit activities, the Requested Party shall be promptly informed of the results of the search, and the suspect vessel, cargo and persons on board shall be detained. Following such boarding and search, all law enforcement action shall be under the control and direction of the law enforcement officials of, and conducted in accordance with, the laws of the Requested Party.

7. Nothing in this Article authorizes the boarding and search, or detention, of a vessel flying the flag of the Party within whose territorial sea the vessel is located.

8. Nothing in this Article shall be construed to permit a law enforcement vessel of one Party to unilaterally patrol within the territorial sea of the other Party.

Article 7

Other Boardings Under International Law

Except as expressly provided herein, this Agreement does not apply to or limit boardings of vessels, conducted in accordance with customary international law, including vessels without nationality and vessels assimilated to vessels without nationality, by officials of either Party.

Article 8

Aircraft Support for Suppression of Illicit Activities

1. When there are reasonable grounds to suspect that a vessel or aircraft is engaged in an illicit activity and that vessel or aircraft is located in or over, or is entering the territorial sea or airspace of one Party (the "First Party"), the law enforcement officials of the other Party ("the Second Party") shall provide such information regarding the suspect vessel or aircraft to the person designated by the law enforcement authority of the First Party, and pursuant to the procedures detailed in Article 10, a request may be made by the Second Party for its aircraft to:

- a. overfly the territory and territorial sea of the Second Party in pursuit of the suspect vessel or aircraft fleeing into or located within its territorial sea and airspace; and
- b. maneuver to maintain visual and electronic contact with the suspect vessel or aircraft; and
- c. subject to the laws of each Party, with due regard for its laws and regulations for the flight and maneuver of aircraft, relay orders from its law enforcement authorities to suspect aircraft to land in the territory of the second Party.

2. With regard to the overflight requested in paragraph (a) above, the procedures to be observed shall involve a notification to the law enforcement authority and the appropriate civil aviation authorities, and compliance with all air navigation and flight safety directions of the Party within whose airspace the overflight is taking place.

3. Where the request relates to maneuvering the aircraft to maintain contact with the suspect aircraft or vessel as provided for in paragraph (b) above, the procedures to be observed shall involve:

- a. the express approval of the law enforcement authority of the requested Party; and
 - b. notification to, and compliance with, all air navigation and air safety directions of the Party within whose airspace the maneuvering is taking place.
4. The Party conducting such overflight and maneuvering shall also maintain contact with the designated law enforcement officials of the other Party and shall keep them informed of such actions so as to enable them to take such action as may be appropriate.
 5. When maneuvering to maintain contact with a suspect aircraft, the Parties shall not endanger the lives of persons on board or the safety of civil aircraft.
 6. Nothing in this Agreement shall authorize activities in relation to aircraft engaged in legitimate scheduled or charter operations for the carriage of passengers, baggage or cargo.
 7. Nothing in this Agreement shall be construed to authorize aircraft of either Party to enter the airspace of any third State.
 8. Nothing in this Article shall be construed to permit an aircraft of one Party to unilaterally patrol within the airspace of the other Party.

Article 9

Shiprider Program

1. The law enforcement authority of one Party (“the First Party”) may, in appropriate circumstances, designate shipriders who, on behalf of the First Party’s government, and in accordance with the First Party’s law, shall be empowered to grant the law enforcement vessels and aircraft of the other Party (“the Second Party”) on which they are embarked, authority to:
 - a. enter the First Party’s territory, waters, and airspace to assist law enforcement officials of the Second Party to board and search suspect vessels, and if evidence is found of violations of the First Party’s law, to assist the shiprider in carrying out the disposition instructions of the First Party’s law enforcement authorities in respect of the vessel, cargo, and persons on board.

b. assist the shiprider in boarding and searching suspect vessels flagged in the First Party located seaward of any nation's territorial sea and within 200 nautical miles from the baselines from which the territorial sea of the First Party is measured, and if evidence of violations of the First Party's law is found, to assist the shiprider in carrying out the disposition instructions of the First Party's law enforcement authorities in respect of the vessel, cargo, and persons on board.

2. Law enforcement officials of one Party may assist shipriders of the other Party conducting operations pursuant to this Article only if expressly requested to do so by the shiprider, and only within the limits of such request and in the manner requested. Such request may only be made, agreed to, and acted upon in accordance with the laws and policies of both Parties.

Article 10

Procedures for Requesting Authorization to Board and Search Suspect Vessels

1. Requests for verification of registration of vessels claiming registration of one of the Parties; requests for permission to follow a suspect vessel or aircraft into the other Party's territorial sea or airspace or to enter the other Party's territorial sea in order to maintain contact with the vessel or aircraft; and requests for authorization to board and search such vessels, shall be processed by and between the law enforcement authorities of the Parties.

2. Each request shall be conveyed orally and confirmed in writing, and shall contain, if possible, the name of the vessel, registration number, homeport, basis for suspicion, and any other identifying information. If there is no response from the flag State within three (4) hours of its receipt of the confirmation in writing, the requesting Party shall be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in illicit traffic.

Article 11

Other Assistance

1. Each Party, after authorization by its law enforcement authority, may permit, on the occasions and for the time necessary for the proper performance of the operations required under this Agreement, law enforcement aircraft operated by the other Party to land and temporarily remain at international airports in accordance with international norms and to the extent permitted by domestic law for the purposes of resupplying fuel and provisions, medical assistance, minor repairs, weather, and other logistics and related purposes.
2. The law enforcement authority of one Party (the “first Party”) may request, and the law enforcement authority of the other Party may authorize, law enforcement officials of the other Party to provide technical assistance to law enforcement officials of the first Party for the investigation, boarding, and search of suspect vessels located in the territory or territorial sea of the first Party.
3. Nothing in this Agreement precludes a Party from otherwise expressly authorizing other assistance in suppressing illicit activities.

Article 12

Suspect Vessels and Aircraft

1. Operations to suppress illicit activities pursuant to this Agreement shall be carried out only against suspect vessels and aircraft.

Article 13

Exchange of Information and Notification on the Results of Enforcement Action

1. The law enforcement authorities of both Parties shall, where practicable, exchange operational information on the detection and location of suspect vessels or aircraft and to make best efforts to communicate with each other.
2. Each Party shall, on a periodic basis and consistent with its laws, inform the other Party on the stage which has been reached of all investigations, prosecutions and judicial proceedings resulting from enforcement action taken pursuant to this Agreement where evidence of illicit activities was

found. In addition, the Parties shall provide each other information on the results of such prosecutions and judicial proceedings.

Article 14

Use of Force

1. All use of force by a Party pursuant to this Agreement shall be in strict accordance with applicable laws and policies of the respective Party and shall in all cases be the minimum reasonably necessary and proportionate under the circumstances, except that neither Party shall use force against civil aircraft in flight.
2. The boarding and search teams may carry standard small arms.
3. All use of force by a Party within the territorial sea of Cuba or the United States pursuant to this Agreement shall be in strict accordance with the laws and policies of the Party within whose territorial sea the force is used.
4. Authorizations to board, search and detain vessels and persons on board include the authority to use force in accordance with this Article to compel compliance.
5. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by the law enforcement or other officials of the Parties.

Article 15

Dissemination

To facilitate implementation of this Agreement, each Party shall ensure that the other Party is fully informed of its respective applicable laws and policies, particularly those pertaining to the use of force. Each Party shall ensure that all of its law enforcement officials are knowledgeable concerning the applicable laws and policies of both Parties.

Article 16

Asset Sharing

Assets seized in consequence of any operation undertaken in the territory or territorial sea of a Party pursuant to this Agreement shall be disposed of in accordance with the laws of that Party. Assets seized in consequence of any operation undertaken seaward of the territorial sea of either Party pursuant to this Agreement shall be disposed of in accordance with the

laws of the seizing Party. To the extent permitted by its laws and upon such terms as it deems appropriate, the seizing Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party.

Article 17

Settlement of Disputes

In case a question arises in connection with interpretation or implementation of this Agreement, either Party may request consultations between the Parties to resolve the matter. If any loss or injury is suffered as a result of any action taken by the law enforcement or other officials of one Party in contravention of this Agreement, or any improper or unreasonable action is taken by a Party pursuant thereto, the Parties shall, without prejudice to any other legal rights which may be available to the Parties or to any persons or entities affected by any such action, consult at the request of either Party to resolve the matter and decide any questions relating to compensation.

Article 18

Consultations and Review

The Parties shall, on a periodic basis, consult with a view to enhancing the effectiveness of this Agreement.