ARTICLES

TRADING WITH THE ENEMY: OPENING THE DOOR TO U.S. INVESTMENT IN CUBA

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Abstract

U.S. economic sanctions on Cuba have been in place for nearly seven decades. The stated intent of those sanctions—to restore democracy and freedom to Cuba—is still used as a justification for maintaining harsh restrictions, despite the fact that the Castro regime remains in power with widespread Cuban public support. Starving the Cuban people of economic opportunities under the shadow of sanctions has significantly limited entrepreneurship and economic development on the island, despite a highly educated and motivated population. The would-be political reformers and leaders on the island emigrate, thanks to generous U.S. immigration policies toward Cubans, leaving behind the Castro regime and its ardent supporters. Real change on the island will come only if the United States allows Cuba to restart its economic engine and reengage with global markets. Though not a guarantee of political reform, economic development is correlated with demand for political change, giving the economic development approach more potential than failed economic sanctions. In this short paper, I argue that Cuba has survived in spite of the U.S. economic embargo and that dismantling the embargo in favor of open trade policies would improve the likelihood of Cuba becoming a market-friendly communist country like China. I present the avenues available today for trade with Cuba under the shadow of the economic embargo, and I argue that real political change will require a leap of faith by the United States through removal of the embargo and support for Cuba's economic development.

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I. INTRODUCTION

In its heyday, Cuba was the playground for Americans looking for music, dancing, rum, and cigars.[1] In the early twentieth century, Havana was the Las Vegas of the Caribbean, and, during prohibition, the small island served as an outlet for Americans looking to satisfy their cravings for mojitos and daiquiris.[2] Beyond all of that excitement, Cuba also served as an important trade partner to the United States, becoming the primary exporter of sugar to the United States.[3] All of that changed in 1959.

1. Natasha Geiling, *Before the Revolution: Socialites and Celebrities Flocked to Cuba in the 1950s*, SMITHSONIAN MAG. (July 31, 2007), https://www.smithsonianmag.com/history/before-the-revolution-159682020/.

2. The daiquiri was the preferred drink of Ernest Hemingway while in Cuba. Nicole Jankowski, *The Cocktail King of Cuba: The Man who Invented Hemingway's Favorite Daiquiri*, NPR (Apr. 25, 2017, 1:15 PM), https://www.npr.org/sections/thesalt/2017/04/25/525063025/the-cocktail-king-of-cuba-the-man-who-invented-hemingways-favorite-daiquiri.

3. *See, e.g.*, Oscar A. Echevarri¨a, *Cuba and the International Sugar Market*, AM. SOC. OF CIVIL ENG'RS (1995), https://ascecuba.org//c/wp-content/uploads/2014/09/v05-FILE30.pdf.

The Cuban revolution that brought Fidel Castro to power also turned out the lights on the American party on the island. Castro saw the U.S. influence on the island as invasive and contrary to Cuban independence.[4] Some revolutionaries at the time called Cuba "the brothel of the Western hemisphere."[5] The revolution sought to limit this U.S. influence without destroying the deep trade relations that had been established. Unfortunately for Castro, the United States saw the two as going hand-in-hand.[6]

In this Article, I contend that the current U.S. economic embargo on Cuba creates a disincentive for democracy and capitalism on the island. Aggressive trade liberalization between the United States and Cuba, rather than continued embargo, will create the best possible incentive for free market reforms in Cuba and, in the long-run, democratic reform. In the subsequent pages, I will focus on the historic trade relationship between these two neighbors, explaining the reasons for the demise of the once prosperous trade channel and how that paved the way for the turn to closed-market communism. I will then describe the major pieces of U.S. and Cuban legislation that define the trade relationship between the two countries today and the regulations that implement those laws. Finally, I will discuss recent shifts in policy toward Cuba under the Obama and Trump Administrations and how they affect trade and travel opportunities between the countries. I will conclude with remarks about how the embargo on Cuba hurts both countries and negatively impacts potentially lucrative trade relations that underpin political reform.

A. *Brief History of U.S.-Cuba Commercial and Political Relations*

Located only 90 miles off the Florida coast, Cuba has had a long and mostly friendly relationship with the United States. Colonized by Spain in 1762, Cuba remained a Spanish colony until the Spanish-American War in 1898.[7] Prior to that war, native Cubans fought for independence from the Spanish numerous times. But Cubans did not have the support they needed to rebel against colonization successfully until the United States built up investments on the island, mostly in sugar, tobacco, and mining.

The uprising in Cuba against Spanish occupiers grew more intense toward the end of the nineteenth century. Fearing threats against U.S.

4. *See, e.g.*, Hugh Thomas, *The U.S. and Castro, 1959-1962*, 29 AM. HERITAGE, no. 6, Oct.-Nov. 1978.

5. *Pre-Castro Cuba*, PBS.ORG (2005), http://www.pbs.org/wgbh/americanexperience/features/comandante-pre-castro-cuba/.

6. *See* Thomas, *supra* note 4.

7. *See, e.g.*, Matthew Lange, James Mahoney & Matthias vom Hau, *Colonialism and Development: A Comparative Analysis of Spanish and British Colonies*, 111 Am. J. Soc., 1412, 1425 (2006).

citizens living in Cuba, the U.S. Navy sent the U.S.S. Maine to Havana in January 1898.[8] The following month, an explosion sunk the battleship and killed 268 crewmembers.[9] Sufficiently agitated by this moment, President McKinley signed a joint resolution authorizing U.S. military intervention in Cuba to suppress the civil war raging there in April 1898.[10] Swift military involvement led the Spanish to surrender in July 1898.[11]

The Treaty of Paris was signed between the United States and Spain in December 1898, relinquishing control of Cuba to the United States.[12] The United States maintained control over Cuba until 1901 when the U.S. Congress included the Platt Amendment in an Army Appropriations Bill.[13] The amendment stipulated that the United States would maintain independence from Cuba but retain the right to intervene if necessary to preserve life or property.[14] U.S. forces were

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8. *See* Paul Ryer, *The Maine, the Romney and the Threads of Conspiracy in Cuba*, 7 INT'L J. CUBAN STUD. 200, 205 (2015).

9. *Id.*

10. *See, e.g.*, Andrew Glass, *William McKinley Asks Congress to Approve Sending Troops to Cuba, Apr. 11, 1898*, POLITICO (Apr. 11, 2016, 12:02 AM), https://www.politico.com/story/2016/04/this-day-in-politics-april-11-1898-221724.

11. *See, e.g.*, David Trask, *The World of 1898: The Spanish-American War*, LIBR. CONGRESS, https://www.loc.gov/rr/hispanic/1898/trask.html (last visited May 21, 2018).

12. Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

13. *See generally* DAVID F. HEALY, THE UNITED STATES IN CUBA 1898-1902: GENERALS, POLITICIANS, AND THE SEARCH FOR POLICY 116-78 (1963).

14. *See id.* at 163. The U.S. version of the Platt Amendment says:

The President of the United states is hereby authorised to "leave the government and control of the island of Cuba to its people" so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

1. That the government of Cuba shall never enter into treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.
   (A) That said government shall not assume or contract any public debt, to pay the interest upon which, and to make any reasonable sinking fund provision for the ultimate discharge of which the ordinary revenues of the island, after defraying the current expenses of government, shall be inadequate.
   (B) That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed by the government of Cuba.

withdrawn from Cuba in 1902 pursuant to that amendment.[15]

Following the withdrawal, the United States and Cuba entered into the 1903 Treaty of Relations, which effectively reaffirmed the right of the United States to intervene in Cuban affairs should the need arise and established U.S. control over Guantanamo Bay, Cuba.[16] The Platt Amendment's need provision was subsequently invoked on four separate occasions in the early 1900s.[17] However, rising nationalism on the island and distaste for foreign influence over Cuban policy led President Roosevelt to repeal the Amendment in 1934.[18]

U.S. investment in Cuba contributed to the growth of the island economy as the two countries became strategic business partners. The two countries signed the Convention of Commercial Reciprocity between the United States and the Republic of Cuba in December 1902, solidifying duty-free entry of most goods in both countries and expanding the list of goods that would enter at reduced duty rates.[19] Trade included sugar and other crops, metals, and investment in real property. Interestingly, tobacco exports from the United States to Cuba were specifically excluded from any preferential treatment.[20] The

(C) That all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

(D) That the government of Cuba will execute, and, as far as necessary, extend, the plans already devised or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

(E) That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustments by treaty.

(F) That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

An Act Making Appropriation for the Support of the Army for the Fiscal Year Ending June 13, 1902, ch. 803, pts. I-VII, 31 Stat. 895, 897-98 (1901).

15. *See, e.g.*, RICHARD GOTT, CUBA: A NEW HISTORY 110-12 (2005).

16. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418.

17. GOTT, *supra* note 15, at 117-18.

18. *Milestones: 1921-1936 - Good Neighbor Policy, 1933*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1921-1936/good-neighbor (last visited Apr. 17, 2018).

19. *See, e.g.*, Mary Speck, *Prosperity, Progress, and Wealth: Cuban Enterprise during the Early Republic, 1902–1927*, 36 CUBAN STUD. 50, 68-70 (2005); *see* The Convention of Commercial Reciprocity between the United States and the Republic of Cuba, U.S.-Cuba, Dec. 11, 1902, 33 Stat. 2136 [hereinafter 1902 Commercial Treaty].

20. *See* 1902 Commercial Treaty, *supra* note 19, art. VI.

significant level of U.S. involvement in the Cuban economy came to be seen as pseudo-control over the island. "Cuba had become a colony in all but name."[21]

Several failed democracies operated in Cuba through the first quarter of the twentieth century, followed by conservative dictatorships supported by the United States beginning in 1935.[22] Fulgencio Batista, who had led the Cuban army and maintained proxy control over the government during these dictatorships, placed himself in charge of the island in 1940.[23] This move was supported by the United States in order to maintain an alliance with Cuba in the lead-up to World War II and subsequently to ensure the protection of U.S. business assets on the island.[24] "In the last six of the twenty-five years of the Batista dictatorship, U.S. control of the economy became absolute."[25] The stage had been set for revolution and a renewed fight for independence.

B. *The Revolution and its Effect on Commercial Relations*

The Cuban economy continued to grow alongside the growing global economy. Cuba was one of the twenty-three founding members of the General Agreement on Tariffs and Trade ("GATT") in 1948, as well as a founding member of the World Trade Organization in 1995.[26] However, this growth and involvement in global trade was severely interrupted in 1959 by Fidel Castro's liberal revolution. Batista was losing support by the end of the 1950s as his strong-arm tactics were disliked by Cuban exiles in the United States and his control over the army was weakening.[27] Ultimately, due to some confusion over communication from the U.S. Ambassador to Cuba, Batista felt that he lost support of the United States in fighting a rebel uprising led by Castro.[28] He fled

21. Joseph C. Sweeney, *Stein Center Colloquium on Legal Issues Surrounding Guantanamo Bay*, 30 FORDHAM INT'L L.J. 673, 685 (2006) (citing GOTT, *supra* note 15, at 129).

22. *See id.* at 688-91.

23. *See id.* at 692-94.

24. *See, e.g.*, *id.* at 694-95; THOMAS G. PATERSON, CONTESTING CASTRO 16-18 (1995).

25. Sweeney, *supra* note 21, at 696.

26. *See Cuba and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/cuba_e.htm (last visited Apr. 17, 2018).

27. *See, e.g.*, *Biography of Fulgencio Batista: Rise of a Dictator*, THOUGHTCO. (Mar. 6, 2017), https://www.thoughtco.com/biography-of-fulgencio-batista-2136360.

28. *See, e.g.*, Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AM. BUS. L.J. 293, 318 (2017).

the island for Portugal and died in exile in 1973.[29]

When Castro seized power in 1959, he took several actions that quickly unraveled Cuba's friendly relationship with the United States. In 1960, he had the members of the Batista regime executed.[30] Shortly thereafter, he began nationalizing farmland, including sugar plantations, many of which were owned by U.S. investors.[31] President Dwight D. Eisenhower greatly disliked Castro for ousting the U.S.-supported dictator and for taking steps to seize control over U.S. assets on the island and asked Congress to terminate economic aid to Cuba in retaliation.[32]

Castro reacted to U.S. sanctions by nationalizing all U.S. property on the island.[33] Eisenhower then terminated all economic and diplomatic relations with Cuba in 1961.[34] In response, Castro said: "[t]he U.S. need not worry that a strategic embargo will damage private industry in Cuba . . . . It no longer exists."[35] President John F. Kennedy issued the first executive economic embargo on Cuba shortly after taking office in 1962.[36] These economic embargoes have remained in effect since that time, leading an entire generation to be born under an economic embargo that stands in stark contrast to the close economic relationship between these two countries decades earlier.

II. The Effect of the Economic Embargo on Trade

The economic embargo imposed in 1962 has had devastating effects on the Cuban economy. Trade between the United States and Cuba came to a standstill, and further restrictions added later prohibited companies in other countries from trading with Cuba as well, accelerating Cuba's economic decline.[37] Reliable data on Cuban economic

29. Lawrence Van Gelder, *Batista, Ex-Cuban Dictator, Dies in Spain*, N.Y. Times (Aug. 9, 1973), https://www.nytimes.com/1973/08/07/archives/batista-excuban-dictator-dies-in-spain-unending-exile-succession-of.html.

30. Fandl, *supra* note 28, at 318.

31. *Id.*

32. *See id.*

33. *Id.* at 319; *see* L. No. 851 (Cuba, 1960) (authorizing the nationalization of corporations in which Americans were controlling shareholders); *see also* Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 376 (S.D.N.Y. 1961).

34. Fandl, *supra* note 28, at 319.

35. Merrill Fabry, *The U.S. Trade Embargo on Cuba Just Hit 55 Years*, Time Mag. (Oct. 19, 2015), http://time.com/4076438/us-cuba-embargo-1960/.

36. U.S. Dep't of Treas. Cuban Assets Control Regulations (CACR), 31 C.F.R. § 515 (1994) (went into effect on July 8, 1963).

37. *See, e.g.*, Antonio Jorge, The U.S. Embargo and the Failure of the Cuban Economy 28 (2000) (unpublished manuscript) (on file with author).

FIGURE 1: PPP GDP Per Capita (constant 1990 US Dollars ($)).[38]

growth before the embargo and during its early years are difficult to come by. However, some scholars have used proxy measures to estimate economic performance during this period. One such proxy uses gross domestic product ("GDP") and purchasing power parity ("PPP") to compare Cuban growth to the rest of Latin America (see Figure 1, above).

Much of Cuba's GDP during the pre-Castro period was based on exports of sugar. Cuba was a principal exporter of sugar to the United States. In fact, sugar exports made up 89% of total Cuban exports in 1950.[39] The United States imported substantial quantities of sugar from Cuba prior to the embargo, with Cuban sugar comprising 49% of total sugar consumed in the United States in 1928.[40]

38. Adapted from Felipe Garcia Ribeiro, Guilherme Stein & Thomas A. Kang, *The Cuban Experiment: Measuring the Role of the 1959 Revolution on Economic Performance using Synthetic Control*, at 4 (May 21, 2013), https://economics.ca//2013/papers/SG0030-1.pdf.

39. SUSAN SCHROEDER, CUBA: A HANDBOOK OF HISTORICAL STATISTICS 414 (1982) (charting sugar as a share of yearly total export value).

40. Alan Dye & Richard Sicotte, *The U.S. Sugar Program and the Cuban Revolution*, 64 J. ECON. HIST. 673, 680 (2004) (providing statistics on U.S. sugar imports from Cuba and other exporters prior to the economic embargo).

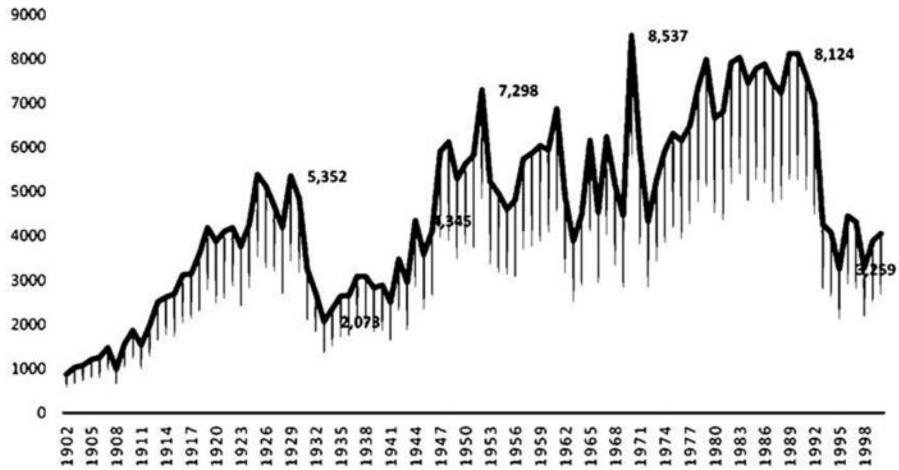

FIGURE 2: Cuban Sugar Production (1902-2000).[41]

During the Batista regime, just before the Cuban Revolution, Cuba traded almost exclusively with non-communist countries.[42] The United States received 71% of Cuban exports and sold 64% of Cuba's imports.[43] Foreign direct investment in Cuba totaled $2 billion, with U.S. citizens owning 30% of sugar plantations and major interests in public utilities and mines.[44] Once Castro took power, the United States imposed a political embargo on the island, limiting U.S. exports to food and medicines, and terminated diplomatic relations the following year.[45] At the time, Castro was attempting to diversify the Cuban economy and reverse the stagnant growth that it had experienced in years prior.[46]

Many similarly situated Latin American countries in the 1950s were struggling to jumpstart their economies following years of war and weak demand for foreign exports.[47] Many countries in the region were

41. Based on the production figures from Oscar Zanetti, ESPLENDOR Y DECADENCIA DEL AZÚCAR EN LAS ANTILLAS (2015).

42. Andrew Zimbalist, *The Prospects for U.S.-Cuba Trade*, 20 CHALLENGE 51, 51 (1978).

43. *Id.*

44. *Id.*

45. *Id.*; *see* The US Foreign Assistance Act of 1961, Pub. L. 87-195 (1961).

46. *See* Kosmas Tsokhas, *The Political Economy of Cuban Dependence on the Soviet Union*, 9 THEORY & SOC'Y 319, 321 (1980) (describing Cuba's attempt to diversify its economy).

47. *See, e.g.*, Ffrench-Davies, Munoz, Palmer, *The Latin American Economies 1950-1990,* LONDON SCH. ECON. MASTERS PUB. ADMIN., https://lsempa.wordpress.com/2011/05/14/the-latin-american-economies-1950-1990/ (last visited Apr. 20, 2018).

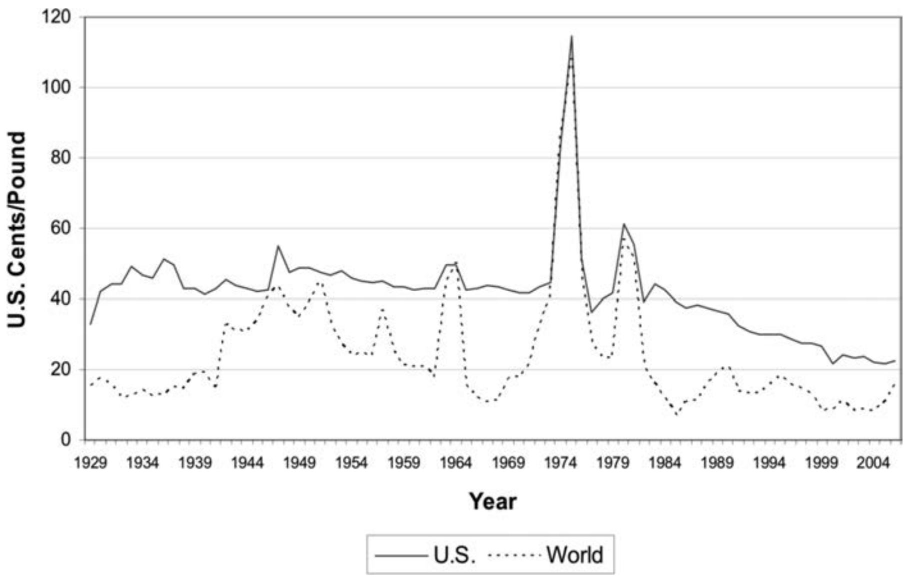

FIGURE 3: World Sugar Prices (1920-2004).[51]

experimenting with import substitution industrialization (ISI),[48] which effectively used protectionism to keep out competing imports to allow governments to focus on domestic production and industry diversification. Cuba, however, stayed focused on sugar exports as its principal source of revenue.[49] This worked well in the early 1950s as sugar prices were high and Cuban companies acquired more interests in sugar plantations and production facilities. But by the end of the decade, sugar prices declined precipitously (see Figure 3, above), placing the Cuban economy in dire straits.[50]

When Castro came to power, it was clear that the Cuban economy, which was dependent on a single commodity that was fetching

48. *See, e.g.*, Juan Carlos Santamarina, *The Cuba Company and Eastern Cuba's Economic Development*, ESSAYS IN ECON. & BUS. HIST. 75, 83-84 (2001).

49. *Id.* at 84-85.

50. *Id.*

51. Tyler James Wiltgen, An Economic History of the United States Sugar Program, at 13 (Aug. 2007) (unpublished Master of Science in Applied Economics dissertation, Montana State University), https://scholarworks.montana.edu/xmlui/bitstream/handle/1/2554/WiltgenT1207.pdf (reporting data from U.S. Department of Agriculture ERS Sugar Statistical Bulletins from 1961-2007).

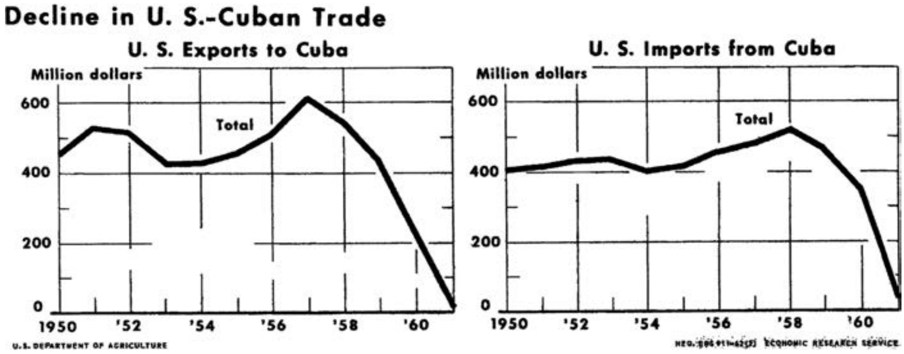

FIGURE 4: U.S.-Cuba Trade (1950-1961).[54]

unsustainable prices, needed economic reform and assistance. As discussed above, Castro blamed U.S. influence on the island for many of the economic ills Cuba was facing. Rather than seek U.S. support for Cuba's economy, Castro capitalized on Eisenhower's terse response to the revolution in 1959 by nationalizing U.S. interests in Cuba.[52] His actions met with swift responses by the United States that spiraled quickly out of control, pitting two militant administrations against one another.[53] A U.S. Department of Agriculture report issued shortly after the embargo was enacted shows the dramatic drop in all trade between Cuba and the United States (see Figure 4, above).

In response to the economic blockade, Cuba turned its attention to the Soviet Union, which supported Castro's move toward becoming a socialist republic (see Figure 4, above).[55] Cuba signed a trade agreement with the Soviet Union in January of 1962, including minimal levels of Cuban exported sugar.[56] In exchange for its political alignment with the Soviet mission, including support for Soviet actions in Ethiopia and Angola,[57] the Soviets increased their imports of sugar

52. *See* Fandl, *supra* note 28, at 318. *See generally id.* (providing a comprehensive history of the economic embargo on Cuba).

53. *See id.* at 318-23.

54. U.S. DEP'T OF AGRIC., ECON. RES. SERV., ERS-FOREIGN-23, CUBA SHIFTS TRADE IN FARM PRODUCTS TO SOVIET BLOC 2 (Mar. 1962), http://usda.mannlib.cornell.edu/usda/ers/ERSF//1960s/1962/ERSF-03-07-1962_Cuba%20Shifts%20Trade%20in%20Farm%20Products%20to%20Soviet%20Bloc.pdf [hereinafter CUBA SHIFTS TRADE].

55. *See, e.g.*, Richard R. Fagen, *Cuba and the Soviet Union*, WILSON Q., Winter 1978, at 69, 73; Robert S. Walters, *Soviet Economic Aid to Cuba: 1959-1964*, 42 INT'L AFF. 74, 74 (1966).

56. *See* Fagen, *supra* note 55, at 72.

57. *See, e.g.*, Tsokhas, *supra* note 46, at 357; Stephanie S. Kessler, Cuba's Involvement in Angola and Ethiopia: A Question of Autonomy in Cuba's Relationship with the Soviet Union (Dec. 1990)

from Cuba, helping to sustain their economy. Sugar exports to the Soviet Union were as high as 70%, despite falling world sugar prices.[58] Soviet bloc countries also provided most of the agricultural imports that Cuba had previously imported from the United States, such as wheat and soy.[59]

The new partnership between Cuba and the Soviet Union provided a lifeline for Cuba by providing Castro with a destination for his sugar exports. But it also provided a strategic outpost that would allow the Soviets to come within striking distance of the continental United States.[60] The 1962 Cuban Missile Crisis was a seminal moment in Cold War history, bringing the U.S. and the Soviet Union to the brink of war. And although the crisis was defused, it led President Kennedy to take formal action against Cuba in retaliation for their nationalization of U. S. property and alliance with the Soviets. Kennedy enacted the 1962 economic embargo, an executive action that blocked all exports from Cuba to the United States.[61]

During most of the Cold War, the Soviets directed Cuba's trade policy, encouraging Cuba to focus exclusively on sugar production and export that sugar to Soviet republics, while importing industrial goods from the Soviet bloc.[62] This was similar to the colonial and post-colonial dependency models applied in other parts of Latin America—Cuba effectively traded one colonizer for another.[63] As Cuba became more dependent upon Soviet support for basic goods, it also became indebted to the Soviet Union, creating a total deficit in 1974 of $5 million.[64] That same year, Castro said in an interview when asked about the relationship between Cuba and the Soviet Union: "Undoubtedly, our commerce with them is less important to them than it is to us, but that happens to many countries."[65]

In an attempt to break free of the allegation that Cuba had replaced its dependency on the United States with dependence on the Soviet Union, Cuba pushed for entry into the Intergovernmental Commission of Socialist Countries for the Development of Electronic Computation

(unpublished thesis, Naval Graduate School), https://calhoun.nps.edu/bitstream/handle/10945/30621/90Dec_Kessler.pdf?sequence=1.

58. *See* CUBA SHIFTS TRADE, *supra* note 54, at 4.

59. *See id.*

60. *See, e.g.*, Benjamin Schwarz, *The Real Cuban Missile Crisis*, ATLANTIC (Jan.-Feb. 2013), https://www.theatlantic.com/magazine/archive/2013/01/the-real-cuban-missile-crisis/309190/.

61. *See* Proclamation No. 3447, Embargo on All Trade with Cuba, 22 U.S.C. § 2369 (1962).

62. *See* Tsokhas, *supra* note 46, at 325.

63. *See id.* at 327-28.

64. *Id.* at 326-27.

65. *Id.* at 327 (citation omitted).

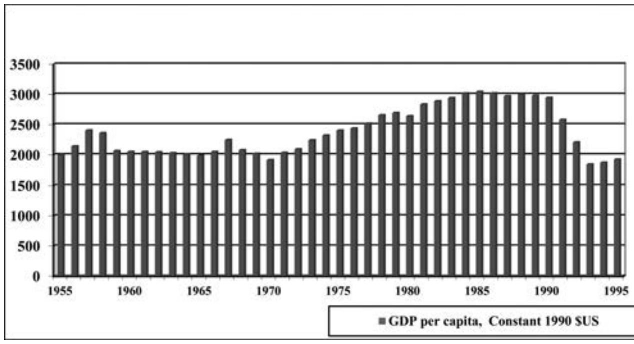

FIGURE 5: Cuban GDP Per Capita (1955-1995).[71]

("COMECON") in 1972.[66] It began investing in technology, introducing accounting controls, and improving productivity.[67] That year, Cuban productivity increased by 21%.[68] Cuba's positive economic growth during this period was largely due to exports to the Soviet bloc and domestic improvements in productivity (see Figure 5, above).[69] However, the collapse of the Soviet Union in 1989 brought an end to this sustained growth.

A. *The Post-Soviet Cuban Economy*

With the absence of Soviet support and the ongoing and increasingly restrictive blockade by the United States, Cuba faced a stark choice—find another sponsor-nation outside the watchful eye of the United States or engage in free market reforms that might lead the United States to soften sanctions. While not abandoning his socialist roots and continuing to seek support from like-minded states, such as Venezuela, Castro chose to push forth limited free market reforms beginning in 1995.[70]

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66. *See, e.g.*, Nora Hamilton, *Dilemmas of Socialist Construction*, *in* CUBA: A DIFFERENT AMERICA 36, 43 (Wilber A. Chaffee, Jr. & Gary Prevost eds.,1992).

67. *See* Tsokhas, *surpa* note 46, at 341.

68. *Id.*

69. Archibald R.M. Ritter, The Cuban Economy: Revolution, 1959-1990, 15-18 (Oct. 7, 2010) (unpublished manuscript) (on file with author); *see also* Ernesto Hernandez-Catá, *A Brief Comparative History of Gross Domestic Production in "Revolutionary" Cuba*, ASS'N FOR STUDY CUBAN ECON. (Nov. 30, 2008), https://www.ascecuba.org/asce_proceedings/a-brief-comparative-history-of-gross-domestic-production-in-revolutionary-cuba/ (describing the dependence of Cuba upon the Soviet Union beginning in the 1970s).

70. *See, e.g.*, Ley Numero 77 de la Inversion Extranjera art. 21(f) (1995) (Cuba), *repealed by* Ley Numero 118 de la Inversion Extranjera (2014) (Cuba) [hereinafter Law 77].

71. Ritter, *supra* note 69, at 14.

The regime's first concerted effort to open its markets and rejoin the world economy was Decree 77 of 1995, also known as the Foreign Investment Act.[72] This Act authorized foreign investment in all sectors of the Cuban economy other than health, education, and the armed services.[73] Under this new law, foreign investors could establish joint venture vehicles by partnering with local Cubans to conduct business in Cuba.[74] However, it was short-lived. Castro's efforts to solicit foreign investment without changing the politics of his regime were met with resistance in the United States, where Congress quickly put forth legislation that would curtail those efforts.

In 1996, the U.S. Congress passed the Helms-Burton Act, a legislative economic embargo that effectively took congressional control over the economic relationship between the United States and Cuba.[75] Rather than allowing the President to decide how to manage economic relations between the two countries, the Act froze in place the existing regulations and created conditions for their removal.[76] Although the authority of congress to intervene in foreign relations between any two countries is uncertain,[77] the effect of the Act on trade with Cuba cannot be understated.

Cuban economic growth maintained a slow but steady pace during the years in which it received support from the Soviet Union.[78] Throughout that period, Cuba became entirely dependent upon trade with the Soviet republics (COMECON) for its survival.[79] By the end of the 1980s, 41% of Cuba's GDP came from imports (such as vegetable oil and clothing) and 85% of its exports were to COMECON countries.[80] However, the collapse of that system in 1990 corresponded with

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72. Law 77, *supra* note 70.

73. *See id.*

74. *See, e.g.*, Kevin J. Fandl, *Foreign Investment in Cuban Real Property: The Case for American Investors*, 45 REAL ESTATE L. J. 166, 180 (2016).

75. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021-6091 (Supp. II 1996)) [hereinafter Helms-Burton Act].

76. *Id.* § 204; 22 U.S.C. § 6064.

77. *See, e.g.*, Fandl, *supra* note 28, at 297.

78. *See, e.g.*, *Cuba*, WORLD BANK, https://data.worldbank.org/country/cuba (last visited May 21, 2018).

79. *See, e.g.*, Ed Canler, *The Miracle of the Cuban Economy in the 1990s*, ASS'N FOR STUDY CUBAN ECON. (Nov. 30, 2001), https://www.ascecuba.org/asce_proceedings/the-miracle-of-the-cuban-economy-in-the-1990s/.

80. *Id.*

a collapse in the growth of the Cuban economy (see Figure 6, below). The early 1990s were challenging for Cubans, with shrinkage of 30% of their GDP and even a resultant 24% reduction in caloric intake among Cuban citizens.[81] Many political economists at the time believed that the collapsing economy in Cuba would lead, as it did in many former Soviet republics, to an abandoning of communism.[82] However, it did not.

Cuba quickly undertook political and economic reforms that would help it transition away from its former dependence on trade with the Soviet bloc countries. These reforms included reinstituting its tax system, allowing the circulation of foreign currency, encouraging foreign tourism, and promoting small and medium enterprises.[83] However, growth was hampered by passage of the Cuban Democracy Act of 1992[84] and the Cuban Liberty and Democratic Solidarity (Libertad) Act in 1996.[85] These two acts aimed to force democratization on the island at a time when communism seemed to have staged a disappearing act. Passage of the acts likely caused the second dip in Cuban GDP following the collapse of the Soviet Union (see Figure 6, below). Nevertheless, ongoing domestic reforms allowed Cuba to restart its economic growth, which continued largely unabated until the mid-2000s, when it slowed again.[86] The economic reforms that drove this growth are discussed in the next section.

1. Economic Reforms in Cuba

Like many developing countries, Cuba is largely a primary commodity exporter. This approach often leads to radical economic and political swings as the success or failure of the economy is intrinsically tied to

81. *Id.*

82. *See, e.g.*, Jorge F. Perez-Lopez, *The Cuban Economic Crisis of the 1990s and the External Sector*, 8 CUBA IN TRANSITION 386, 386 (1998), https://ascecuba.org//c/wp-content/uploads/2014/09/v08-41perez.pdf.

83. *See* Canler, *supra* note NOTEREF _Ref510625313 \h * MERGEFORMAT 79.

84. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992) (codified at 22 U.S.C.S. §§ 6001-10 (1993)).

85. Helms-Burton Act, 22 U.S.C. §§ 6021-6091 (2012).

86. *See Cuba*, WORLD BANK, https://data.worldbank.org/country/cuba (last visited May 21, 2018).

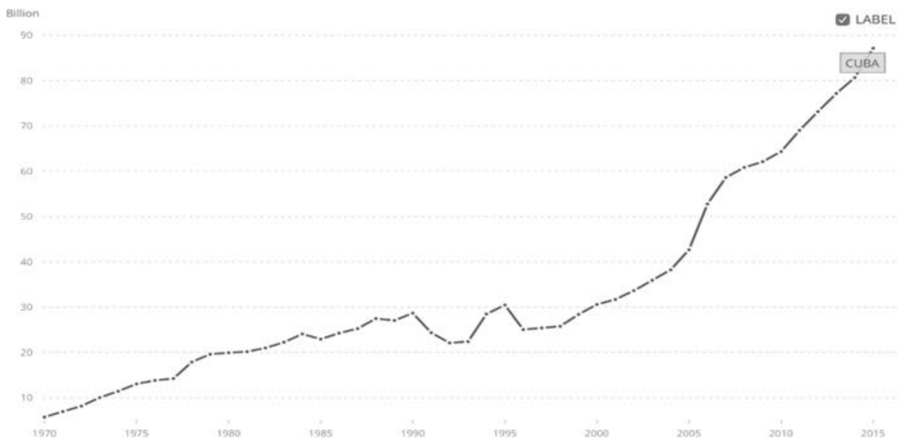

FIGURE 6: GDP for Cuba (1970-2015).[87]

market prices for those commodities.[88] In the case of Cuba, sugar exports constitute the bulk of their foreign trade and, as noted above (see Figure 3, above), sugar prices historically have been low and volatile.[89] Dependence on sugar worsened under Soviet control as Soviet central planners encouraged Cuba to principally emphasize sugar production above other economic sectors.[90] Following the collapse of the Soviet Union, Castro enacted a number of reforms, as discussed above, to diversify the Cuban economy and create sustainable growth.[91] However, Castro also imposed increased central control to secure his political leadership.[92] Fidel Castro was more of the political revolutionary whereas his brother, Raul, was more of the economic revolutionary.[93]

87. *Id.*

88. *See, e.g.*, *Commodity Dependence and International Commodity Prices*, UNDP, http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Towards%20Human%20Resilience/Towards_SustainingMDGProgress_Ch2.pdf (last visited Apr. 20, 2018).

89. *See* Tsokhas, *supra* note 46, at 321; *supra* Part II.

90. *See id.* at 325.

91. *See supra* note 83 and accompanying text.

92. *See, e.g.*, Fandl, *supra* note 28, at 318-320 (describing Fidel Castro's assertion of power following the revolution).

93. *See, e.g.*, Hamish McRae, *Fidel Castro's Cuba Failed Economically – But He Had Little Choice in the Matter*, INDEPENDENT (Nov. 26, 2016, 4:41 PM), https://www.independent.co.uk/voices/fidel-castro-economy-death-cuba-economics-communism-a7441066.html.

Due to failing health, and in the midst of a stagnating economy, Fidel Castro temporarily ceded power to his brother, Raul, in August 2006.[94] Raul Castro is widely perceived to be the more free-market-reform-focused of the two brothers, though by no means a capitalist.[95] As Fidel's health failed to improve, Raul Castro was officially elected President of Cuba in February 2008.[96] Along with positive signs from the Obama Administration in the United States, Raul Castro's election was a step toward a new era in U.S.-Cuban relations. This new approach to diplomacy and trade between the United States and Cuba became evident with the passage of the 2010 Foreign Investment Law in Cuba.[97] For the first time, foreign investors would be permitted to lease land in Cuba on renewable ninety-nine year terms.[98] These "surface rights" would allow investors to take out leases on land to build golf courses, resort communities, and hotels, so long as those investments aligned with the law's stated intent of promoting tourism: the law is intended to enhance "participation of foreign investment in international tourism."[99] In addition, the law allowed for Cuban citizens to acquire surface rights in perpetuity.[100]

The Foreign Investment Act of 2014 was passed to replace the failed 1995 law of the same name.[101] The new law contains many of the same provisions as the original foreign investment law, but includes some significant departures that go further in opening the door to foreign investment. For instance, unlike under the 1995 law, investors are now permitted to operate a business in Cuba with no local partner.[102] In addition, foreign investors are exempt from paying income tax in Cuba on their net profits.[103]

94. *See, e.g.*, *Castro Hands Power to Brother During Surgery*, CNN, (July 31, 2006), http://www.cnn.com/2006/WORLD/americas/07/31/cuba.castro/index.html.

95. *See, e.g.*, Richard Feinberg, *What Will be Raul Castro's Legacy?*, BROOKINGS (Dec. 4, 2017), https://www.brookings.edu/blog/order-from-chaos/2017/12/04/what-will-be-raul-castros-legacy/; William Branigin, *End of Castro's Rule Opens Door to Reforms*, WASH. POST (Feb. 19, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/02/19/AR2008021901782.html.

96. *See, e.g.*, *Legal Implications of the Resignation of the Cuban President*, Libr. Congress, https://www.loc.gov/law/help/cuba-resignation.php (last updated June 9, 2015).

97. Decreto-Ley Numero 273 que modifica el Código Civil (2010) (Cuba).

98. *Id.* art. 222.1.

99. *Id.* art. 222.1(3).

100. *See, e.g.*, Philip Peters, Cuba's New Real Estate Market 16 (2014) (unpublished manuscript) (on file with author).

101. Ley Numero 118 de la Inversion Extranjera (2014) (Cuba).

102. *Id.* art. 16.1(2).

103. *Id.* art. 35.

These laws do not necessarily mean that Cuba is following a free market approach. One researcher noted that, "[o]n paper, Law 118 (along with Law 77) portrays security and the sense of a changed Cuban business government. But in practice, doing business in Cuba remains a risky endeavor."[104] Many barriers to free market trade remain in Cuba, but the Castro Administration has recognized the need for foreign investment, which includes not only opening the door to those investors, but also protecting their investments in the country.[105]

Today, the Cuban economy continues to operate in the red. Cuban sugar exports account for 23% of total exports, with refined fuels, tobacco, nickel, and pharmaceuticals comprising the rest of their exports.[106] Yet those exports are insufficient to pay for their imports of machinery, food, and fuel that they do not produce domestically.[107] The difference is partially made up in Cuba's export of tourism and receipt of remittances from abroad.[108] Cuba principally exports to the European Union, which has been actively pursuing expanded trade relations with the small island.[109] Unless and until the United States removes its economic embargo on the island, increasing economic engagement by the EU and others is a virtual certainty.

III. Trends in U.S. Law Toward Cuba

Equally and perhaps even more significant than the small opening in the Cuban economy to foreign trade is the loosening of trade restrictions on Cuba by the United States. The economic door that President Kennedy slammed shut in 1962 was cracked open slightly twice before President Barack Obama took office in 2008. First, President Gerald Ford made a concerted effort to begin the process of normalizing trade

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104. Alyssa K. Ortiz, *Cuba's New Foreign Investment Law Number 118: Can Tax Incentives Buy Foreign Investors' Trust and Be Justified in Increasing FDI?*, 21 L. & Bus. Rev. Am. 169, 180 (2015) (noting the example of a British foreign investor with a significant investment in a hotel in Cuba who was arrested and detained for over a year and had millions of dollars seized by the Cuban government in 2011).

105. *See, e.g.*, *id.* at 180-81.

106. *See The Observatory of Economic Complexity, Cuba*, MIT, http://atlas.media.mit.edu/en/profile/country/cub/ (last visited Apr. 21, 2018).

107. *See* Wilhelm Schöllmann, Eur. Parliamentary Res. Serv., *Cuba's International Trade* 1 (Feb. 2015), http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/548984/EPRS_ATA(2015)548984_REV1_EN.pdf.

108. *Id.*

109. *See, e.g.*, Marc Frank, *Top EU Diplomat Meets Cuban President at End of Visit*, Reuters (Jan. 4, 2018, 1:47 PM), https://www.reuters.com/article/us-cuba-eu-mogherini/top-eu-diplomat-meets-cuban-president-at-end-of-visit-idUSKBN1ET26C.

relations with Cuba in 1974, a first step in restoring diplomatic ties.[110] Castro shortly thereafter sent Cuban troops into Angola to support a socialist revolution, effectively snapping the olive branch that President Ford had offered.[111] Again in the 1970s, President Jimmy Carter attempted to initiate diplomatic talks by establishing "interests sections" (pseudo-embassies) for the United States in Havana and for Cuba in Washington and lifting travel restrictions on U.S. citizens that wanted to travel to Cuba.[112] The 1980 Mariel boatlift and news of a Soviet brigade being established in Cuba halted Carter's approach and led him to focus on Cuban exiles rather than Cuban relations.[113] Nothing significant was done from that time until President Obama took office.

Animosity toward the Castro regime is a hallmark of Cuban exiles in the United States. Losing land, businesses, and other assets and being forced to flee their homeland has led these exiles to speak out vociferously against the relaxation of sanctions against the regime.[114] And because these exiles become U.S. citizens, thanks to a unique law benefiting Cuban emigrants that flee to the United States,[115] their voice carries farther in the halls of Congress than that of non-voting immigrants. However, this dynamic has been changing, as second-generation Cuban-Americans are being born and raised in the United States, largely free of the animosity borne by their parents.[116] According to the Pew Research Foundation, the majority of U.S. citizens today favor dismantling the economic embargo on Cuba (see Figure 7, below).[117]

The Obama Administration capitalized on this changing political dynamic in the United States and took steps to begin the liberalization of trade with Cuba. The first step was taken in April 2009, one year after President Obama took office, by lifting the travel ban on Cubans

110. *See* PATRICK J. HANEY & WALT VANDERBUSH, THE CUBAN EMBARGO: THE DOMESTIC POLITICS OF AN AMERICAN FOREIGN POLICY 26 (2005).

111. *See id.*; James Brooke, *Cuba's Strange Mission in Angola*, N.Y. TIMES, 1987, https://www.nytimes.com/1987/02/01/magazine/cuba-s-strange-mission-in-angola.html?pagewanted=all.

112. HANEY & VANDERBUSH, *supra* note 110, at 27.

113. *See id.* at 28-30; Kevin J. Fandl, *Cuban Migration to the United States in a Post-Normalized Relations World*, 26 MINN. J. INT'L L. 81, 87-89 (2017).

114. *See, e.g.*, Fandl, *supra* note 28, at 324-26 (tracing the history of Cuban exiles in U.S. politics).

115. *See* Fandl, *supra* note 113, at 90 (citing Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (1994)).

116. With many notable exceptions, such as Senator Ted Cruz.

117. Alec Tyson, *Americans Still Favor Ties with Cuba after Castro's Death, U.S. Election*, PEW RES. CTR. (Dec. 13, 2016), http://www.pewresearch.org/fact-tank/2016/12/13/americans-still-favor-ties-with-cuba-after-castros-death-u-s-election/.

Republicans Less Supportive Than Democrats of U.S. Ties With Cuba, But 59% Favor Ending Trade Embargo

% saying they approve/favor...

	Re-establishing diplomatic relations			Ending trade embargo		
	Jan 2015	July 2015	Change	Jan 2015	July 2015	Change
	%	%		%	%	
Total	63	73	+10	66	72	+6
Republican	40	56	+16	47	59	+12
Cons Rep	33	52	+19	40	55	+15
Mod/Lib Rep	54	66	+12	61	67	+6
Independent	67	75	+8	69	72	+3
Democrat	74	83	+9	78	82	+4
Cons/Mod Dem	69	79	+10	72	78	+6
Lib Dem	80	90	+10	87	88	+1

Survey conducted July 14-20, 2015.

PEW RESEARCH CENTER

FIGURE 7: Attitudes of Americans Toward Cuba Embargo (2015).[118]

wishing to visit family members in Cuba.[119] At the time, a member of Obama's National Security Council noted: "This is a step to extend a hand to the Cuban people, in support of their desire to determine their own future."[120] But this was only the beginning.

In December 2014, the Obama Administration announced that it would restore diplomatic ties with Cuba.[121] This statement followed months of secret negotiations largely facilitated by Pope Francis and signaled a significant departure from the years of silence between the two diplomatic communities.[122] In response, Cuba released one American and one Cuban working for the United States who had been imprisoned in Cuba, along with fifty-three dissidents who had been

118. *Id.*

119. *Obama Eases Limits on Cuba Travel, Remittances*, NPR (Apr. 13, 2009, 12:38 PM), https://www.npr.org/templates/story/story.php?storyId=103030021.

120. *Press Briefing by Press Secretary Robert Gibbs and Dan Restrepo, Special Assistant to the President and Senior Director for Western Hemisphere Affairs*, AMERICAN PRESIDENCY PROJECT (Apr. 13, 2009), http://www.presidency.ucsb.edu/ws/?pid=85997 (statement of Daniel Restrepo).

121. Press Release, White House, Office of the Press Sec'y, Statement by the President on Cuba Policy Changes (Dec. 17, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes.

122. *See, e.g.*, Dan Roberts & Rory Carroll, *Obama and Raúl Castro Thank Pope for Breakthrough in US-Cuba Relations*, THE GUARDIAN (Dec. 17, 2014, 2:47 PM), https://www.theguardian.com/world/2014/dec/17/us-cuba-diplomatic-relations-obama-raul-castro.

detained.[123] These prisoner releases had been preconditions set by the United States before full restoration of diplomatic relations could take place.[124]

To continue this process, the Administration in Washington would have to certify that Cuba is no longer a state sponsor of terrorism, a designation that requires the United States to impose unilateral sanctions on the country, including denial of trade benefits and refusal to support World Bank loans.[125] President Obama announced his intention to remove Cuba from the list of state sponsors of terrorism, a designation that Cuba shared with only Syria, Sudan, and Iran,[126] because Cuba had not engaged in any terrorist activities over the prior six months and pledged not to do so in the future.[127] Congress did not object, and Cuba was officially removed from this list on May 29, 2015.[128]

At the Summit of the Americas in April 2015, Raul Castro made a public speech praising the Obama Administration for its efforts to restore relations with Cuba and calling for the reopening of their respective embassies.[129] This call became a reality on July 20, 2015, when full diplomatic relations were restored and the interests sections were upgraded to embassies.[130]

The restoration of diplomatic ties came with trade benefits as well. The first charter flights from the United States to Cuba began in March 2015.[131] An agreement in December 2015 authorized up to 110 daily flights from the United States to Cuba beginning in February 2016;[132]

123. Dana Ford & Juan Carlos Lopez, *Cuba Releases 53 Political Prisoners*, CNN (Jan. 12, 2015, 4:29 PM), https://www.cnn.com/2015/01/12/americas/cuba-prisoners-release/index.html.

124. *See* Press Release, White House, Office of the Press Sec'y, *supra* note 121.

125. *See* 22 U.S.C. § 2656f (Westlaw through Pub. L. No. 115-164 (excluding Pub. L. No. 115-141)).

126. Note that North Korea was added to this list in 2017.

127. Randal C. Archibold & Julie Hirschfeld Davis, *Cuba to be Removed from U.S. List of Nations that Sponsor Terrorism*, N.Y. TIMES (Apr. 14, 2015), https://www.nytimes.com/2015/04/15/world/americas/obama-cuba-remove-from-state-terror-list.html.

128. *See, e.g.*, Julie Hirschfeld Davis, *U.S. Removes Cuba From State-Sponsored Terrorism List*, N.Y. TIMES (May 29, 2015), https://www.nytimes.com/2015/05/30/us/us-removes-cuba-from-state-terrorism-list.html.

129. Barack Obama, President, Remarks by President Obama and President Raul Castro of Cuba Before Meeting (Apr. 11, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/04/11/emarks-president-obama-and-president-raul-castro-cuba-meeting.

130. *U.S., Cuba Restore Full Diplomatic Ties After 5 Decades*, CBC NEWS (July 20, 2015,12:55 AM), http://www.cbc.ca/news/world/u-s-cuba-restore-full-diplomatic-ties-after-5-decades-1.3159608.

131. *Direct Flights Between Cuba and New York Have Started*, SKIFT (Mar. 18, 2015), http://www.cubatravelservices.com/2016/10/12/skift-direct-flights-cuba-new-york-started/.

132. Michael Weissenstein, *US-Cuba Aviation Deal Allows 110 Scheduled Flights a Day*, AP NEWS (Dec. 17, 2015), https://apnews.com/7177813fe8d846ffa52ae1a1dc40c31f.

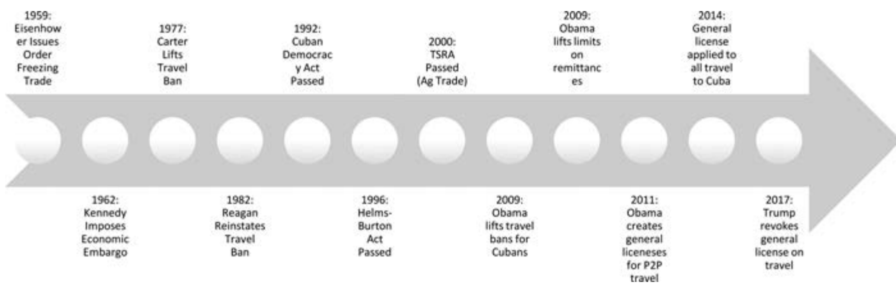

FIGURE 8: Timeline of the Economic Embargo on Cuba.

however, this included only charter flights at the time. In July 2016, eight U.S. commercial airlines were authorized to fly directly to Cuba, which they began servicing in August 2016.[133]

U.S. citizens would be permitted to travel to Cuba under a general U.S. Department of Treasury Office of Foreign Assets Control ("OFAC") license.[134] They would also be permitted to take home cigars and other Cuban-made goods in their personal luggage, though commercial trade in these goods was still restricted due to the Helms-Burton Act.[135] These small steps signaled a new era in trade relations between Cuba and the United States and a changed perspective on Cuban goods by U.S. consumers.[136] A timeline of the trade and travel restrictions on Cuba by the United States is displayed below (see Figure 8, above).

IV. TRADING WITH THE ENEMY: DOING BUSINESS IN CUBA

In the process of normalizing relations, President Obama achieved the additional milestone of becoming the first sitting U.S. president to visit Cuba since Calvin Coolidge in 1928.[137] He was accompanied by forty lawmakers and a number of business executives, from Jose Andres (chef and entrepreneur) to Arne Sorenson (Marriott President and

133. Alan Gomez, *First Commercial US-Havana Flight Lands as Country Mourns Fidel Castro*, USA TODAY (Nov. 28, 2016, 7:49 PM), https://www.usatoday.com/story/news/world/2016/11/28/flight-cuba-fidel-castro/94555668/.

134. *See* 31 C.F.R. § 515.560 (2016).

135. *See* 31 C.F.R. § 515.582.

136. *See, e.g.*, Kevin J. Fandl, Cameron Verhaal & Oliver Hahl, *Effects of Economic Embargos on Trade in Luxury Goods: An Analysis of the Cuban Cigar Market* (forthcoming 2018).

137. Dan Roberts, *Barack Obama Lands in Cuba as First US President to Visit in Nearly a Century*, THE GUARDIAN (Mar. 21, 2016, 3:10 PM), https://www.theguardian.com/world/2016/mar/20/barack-obama-cuba-visit-us-politics-shift-public-opinion-diplomacy.

CEO).[138] Obama met with Raul Castro, Cuban political dissidents, and Cuban business leaders while in Havana. The significance of this trip cannot be overstated. One Cuban resident noted, "I am 83 years old, and I have seen a lot happen . . . . I did not think I would see that."[139]

A flurry of economic activity between the United States and Cuba took place between 2016 and early 2017, including the first contract between a U.S. company (Starwood Hotels) and the Cuban government,[140] cruise lines ferrying passengers back and forth between Cuba and the United States (Carnival), airlines with recently acquired licenses to fly direct routes to Cuba (American Airlines, JetBlue, Alaska Airlines, Delta Airlines, Frontier Airlines, Southwest Airlines, Spirit Airlines and United Airlines), financial service providers (PayPal), non-financial service providers (*e.g.*, Google, Air BnB, Netflix), and restaurants (*e.g.*, Jimmy Buffet's Margaritaville),[141] among others. Many of these businesses, whether operating now in Cuba or planning to, may see their investment diminished in light of new restrictions as of 2017.

The Starwood deal, which would permit Starwood to improve and operate two existing government-run hotels and become the first U.S.-brand hotel in Cuba, has the potential to boost revenues of this Connecticut-based company.[142] It would also provide much-needed private-sector jobs and income for Cubans. Keith Grossman, vice president and general counsel for Starwood, said that the company plans "to cultivate local talent, provide career enriching opportunities, and locally source art, decor, food, and materials to ensure we deliver authentic experiences."[143]

This opening was short-lived, however. Elections late in 2016 in the United States brought Donald Trump, who has expressed conflicting

138. Mimi Whitefield, *CEOs, Lawmakers in Cuba for Historic Visit*, MIAMI HERALD (Mar. 20, 2016, 7:15 PM), http://www.miamiherald.com/news/nation-world/world/americas/cuba/article67220777.html.

139. Frances Robles, *Obama Visits Cuba*, N.Y. TIMES (Mar. 22, 2016), https://www.nytimes.com/interactive/projects/cp/international/obama-in-cuba.

140. Steven Mufson, *Starwood Signs Historic Deals in Cuba for Three Havana Hotels*, WASH. POST (Mar. 19, 2016), https://www.washingtonpost.com/business/economy/starwood-signs-deals-in-cuba-for-three-havana-hotels/2016/03/19/4eb2e9c6-ee1e-11e5-b0fd-073d5930a7b7_story.html (detailing the agreement for Starwood to operate the Hotel Inglaterra as a Starwood luxury hotel and the Hotel Quinta Avenida as a Four Points Sheraton).

141. *See, e.g.*, Kate Linthicum, *U.S. Companies Line Up to Do Business in Cuba*, L.A. TIMES (Mar. 25, 2016), http://www.latimes.com/world/mexico-americas/la-fg-cuba-gold-rush-20160325-story.html.

142. *See, e.g.*, Geoff Dyer, *Starwood Hotels Signs Landmark Cuba Deal*, Fin. Times (Mar. 19, 2016), https://www.ft.com/content/bcd63dcc-ee4b-11e5-9f20-c3a047354386.

143. *See* Mufson, *supra* note 140.

views on Cuba policy, to high office. He stated in 2015 that he supported President Obama's détente with Cuba, though he believed that he could have negotiated a better deal.[144] Yet Trump also sought the support of more conservative Cuban-Americans by promising to roll back the Obama-era reforms.[145] Following his election in 2016, bowing to the support that he received from Cuban-Americans,[146] President Trump made clear that he was displeased with the deal made by the Obama Administration. In a tweet, he quipped, "If Cuba is unwilling to make a better deal for the Cuban people, the Cuban/American people and the U.S. as a whole, I will terminate the deal."[147] This left many in the business community uncertain about the fate of their investments.[148]

The new policy toward Cuba was announced by President Trump on June 17, 2017, in Miami, home to many of the Cuban-American supporters of the current administration. President Trump said: "I am canceling the last administration's completely one-sided deal with Cuba."[149] He contended that normalization of economic relations between the two countries would only support the Castro regime and would do nothing to assist the Cuban people.[150] The fate of existing deals for U.S. companies in Cuba, such as the Starwood deal, is uncertain. The Administration has signaled that existing deals would be

144. *See, e.g.*, Jeremy Diamond, *Trump Backs U.S.-Cuba Diplomatic Relations*, CNN (Sept. 8, 2015, 10:47 AM), https://www.cnn.com/2015/09/08/politics/donald-trump-cuba-diplomatic-opening/index.html; Jesse Byrnes, *Trump: I'd Open a Hotel in Cuba*, THE HILL (Mar. 21, 2016, 6:03 PM), http://thehill.com/blogs/ballot-box/presidential-races/273815-trump-id-open-a-hotel-in-cuba (stating in an interview that, once permitted to do so, he would like to open a hotel in Cuba).

145. *See, e.g.*, J. Weston Phippen, *Trump's Cuba Policy Reversal*, ATLANTIC (June 16, 2017), https://www.theatlantic.com/news/archive/2017/06/trump-cuba-policy/530514/.

146. *See, e.g.*, Michael Putney, *Donald Trump Makes Promises to Cubans, Haitians, Venezuelans*, Local 10 News (Sept. 16, 2016, 6:19 PM), https://www.local10.com/news/elections/donald-trump-makes-promises-to-cubans-haitians-venezuelans.

147. David Wright, *Trump Threatens to Roll Back US-Cuba Relations*, CNN (Nov. 28, 2016, 10:15 PM), https://www.cnn.com/2016/11/28/politics/cuba-trump-threat/index.html.

148. Karen DeYoung & Nick Miroff, *Trump Set to Unveil New Cuba Policy After Promising to Reverse Obama's 'Bad Deal'*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/world/national-security/trump-set-to-unveil-new-cuba-policy-after-promising-to-reverse-obamas-bad-deal/2017/06/14/ab9118fe-5126-11e7-b064-828ba60fbb98_story.html?utm_term=.d358c3defdd1.

149. *See, e.g.*, Dan Merica, *Trump Unveils New Restrictions on Travel, Business with Cuba*, CNN (June 17, 2017, 2:00 PM), https://www.cnn.com/2017/06/16/politics/trump-cuba-policy/index.html.

150. *Id.*

allowed to continue unabated.[151] However, as new deals are largely being blocked despite Cuba's efforts to open their economy to foreign investment, the United States is losing its position as the first mover.[152] Instead, the European Union, among others, is quickly asserting its business interest in Cuba as an alternative to the United States.[153] Some Republicans supported Trump's tough stance on human rights abuses in Cuba, but he was met with wide criticism from Democrats (and a few Republicans), business leaders,[154] and Ben Rhodes, the architect of the normalization policy under the Obama Administration who said[155]: "We must never stop pressing the Cuban government on democracy and human rights, but further restricting economic and cultural engagement between our two nations betrays the spirit of cooperation that will ultimately help empower the Cuban people to choose their own destiny."[156]

The effect of this new policy on businesses may be less significant than the rhetoric surrounding it, however. Secretary of State Rex Tillerson noted: "[t]he general approach . . . is to allow as much of this continued commercial and engagement activity to go on as possible, because we do see the sunny side of benefits to the Cuban people."[157] The changes will mainly affect the ease of travel for U.S. citizens intending to visit the island.

The Administration issued its changes to Cuba travel policy via a National Security Presidential Memorandum.[158] Changes include a strengthening of the existing ban on tourism by U.S. citizens in

151. *See, e.g.*, Drew Harwell & Jonathan O'Connell, *With Shift on Cuba, Trump Could Undercut His Company's Hotel-Industry Rivals*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/politics/with-policy-shift-on-cuba-trump-could-undercut-his-rivals-in-the-hotel-industry/2017/06/15/d77a8b2c-5148-11e7-be25-3a519335381c_story.html.

152. *See, e.g.*, Robert Valencia, *Trump, A Year Later: Washington Is Losing Opportunity to Be a Leader in Latin America, Experts Say*, NEWSWEEK (Jan. 23, 2018, 5:32 PM), http://www.newsweek.com/washington-mexico-cuba-venezuela-785814.

153. Reuters, *As the U.S. Retreats, Europe Moves to Strengthen Ties with Cuba*, FORTUNE (Jan. 4, 2018), http://fortune.com/2018/01/03/european-union-federica-mogherini-cuba/.

154. *See* DeYoung & Miroff, *supra* note 148.

155. Ben Rhodes, *Trump's Cuba Policy Will Fail*, ATLANTIC (June 16, 2017), https://www.theatlantic.com/international/archive/2017/06/cuba-trump-obama-opening/530568/.

156. *See* Merica, *supra* note 149 (quoting Sen. Mark Warner, a democrat from Virginia).

157. DeYoung & Miroff, *supra* note 148.

158. Press Release, White House, Office of the Press Sec'y, National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (June 16, 2017), https://www.scribd.com/document/352141752/National-Security-Presidential-Memorandum-on-Strengthening-the-Policy-of-the-United-States-Toward-Cuba-whitehouse-gov; Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875 (U.S. Dep't of State Oct. 20, 2017).

Cuba[159]—including regular audits of traveler records to ensure people-to-people or organizationally-sponsored educational travel[160]—and a prohibition on financial transactions with Cuban government entities and sub-entities.[161] The majority of additional sections of the Order reiterate existing policy changes made by the Obama Administration.[162]

A. *U.S. Business Opportunities in Cuba Today*

Doing business in Cuba as an U.S. entity has changed little since the start of the 1962 economic embargo. Since that time, there have been three major legal changes affecting trade with Cuba. Each of them is discussed briefly below.

1. The 1996 Helms-Burton Act

The Cuban Liberty and Democratic Solidarity ("Libertad") Act of 1996 ("Helms-Burton Act")[163] reaffirmed the economic embargo on Cuba and added several important provisions. For purposes of this discussion, the new provision affecting trade is found in Title III of the Act. That Title prohibits trafficking in any personal property or business interest in Cuba that has been confiscated from a U.S. citizen.[164] "Confiscation" refers to any property seized by the Cuban government after January 1, 1959, without adequate compensation or permission of the owner or the claim being settled by an appropriate settlement procedure.[165] The Helms-Burton Act does not add any new restrictions on travel or trade with Cuba by U.S. citizens.[166] However, it did add a provision allowing lawsuits in U.S. courts against any company, foreign or domestic, found to be trafficking in confiscated Cuban property

159. 82 Fed. Reg. at 48,877 (section 3(b)).

160. 82 Fed. Reg. at 48,877 (section 3(b)(i)-(iv)).

161. 82 Fed. Reg. at 48,876 (section 3(a)(ii)).

162. *See, e.g.*, Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. at 48,876-77 (section 2(e), effectively not reinstating the "Wet Foot, Dry Foot" immigration policy, which the Obama Administration terminated, and § 3(b), reiterating the need to follow existing regulations regarding tourism in Cuba).

163. Helms-Burton Act, 22 U.S.C. §§ 6021-6091 (2012).

164. *Id.* Title III, § 4(13), 22 U.S.C. § 6023.

165. *Id.* § 4(4), 22 U.S.C. § 6023.

166. *See id.* § 102, 22 U.S.C. § 6032 (affirming existing economic prohibitions on trade and travel but not creating new restrictions or limitations); *see also*, Jeffrey Dunning, *The Helms-Burton Act: A Step in the Wrong Direction for United States Policy Toward Cuba*, 54 WASH. U. J. URB. & CONTEMP. L. 213, 217 (1998).

claimed by U.S. citizens.[167] The Act included a waiver provision allowing the President to block the application of this right.[168] Since passage of the Act, every administration has chosen to invoke this waiver.[169]

2. The 2000 TSRA Law

President George W. Bush signed the Trade Sanctions Reform and Export Enhancement Act ("TSRA") into law in 2000.[170] The TSRA, which is discussed more extensively below, opened the door to U.S. agricultural exports to Cuba but prohibited any export financing to assist with these exports.[171] Exports to Cuba in the specified sectors surged into the hundreds of millions of dollars.[172]

3. The 2014 CACR Updates

The Obama Administration modified the Cuban Asset Controls Regulations ("CACR") in 2014 to create new avenues for business with Cuba.[173] The modification allowed U.S. entities to sell building materials for residential construction in Cuba, farm equipment, and to sell goods and services directly to Cuban entrepreneurs.[174] The last

167. Helms-Burton Act § 302, 22 U.S.C. § 6082 (establishing civil liability for any person trafficking in property claimed by U.S. nationals); *see also* Dunning, *supra* note 166, at 227.

168. Helms-Burton Act § 302(h)(1)(a), 22 U.S.C. § 6082(h)(1)(a) (allowing the President to waive application of this provision of the statute).

169. *Press Briefing by Deputy National Security Advisor Sandy Berger and Under Secretary of State for Political Affairs Peter Tarnoff*, AM. PRESIDENCY PROJECT (July 16, 1996), http://www.presidency.ucsb.edu/ws/index.php?pid=58160 (noting that President Clinton allowed Title III to take effect but simultaneously issued the first six-month suspension of the right to file suit in U.S. courts); Bush Renews Waiver of Helms-Burton Provision, PBS NEWSHOUR (July 17, 2001, 4:10 PM), https://www.pbs.org/newshour/politics/politics-july-dec01-cuba_07-17 (noting the waiver of Title III by President Bush); Mimi Whitefield, One of Obama's parting acts: Suspending lawsuit provision of Helms-Burton, MIAMI HERALD (Feb. 6, 2017, 1:14 PM), http://www.miamiherald.com/news/nation-world/world/americas/cuba/article131092324.html (noting the waiver of Title III by President Obama).

170. 22 U.S.C. §§ 7201-7211 (2006).

171. MARK A. MCMINIMY, CONG. RES. SERV., U.S. AGRICULTURAL TRADE WITH CUBA: CURRENT LIMITATIONS AND FUTURE PROSPECTS 2 (Sept. 21, 2016), https://fas.org/sgp/crs/row/R44119.pdf.

172. *See id.* at 4.

173. *See Treasury and Commerce Announce Significant Amendments to the Cuba Sanctions Regulations Ahead of President Obama's Historic Trip to Cuba*, U.S. DEP'T OF TREAS.: PRESS CTR. (Mar. 15, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0379.aspx.

174. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-201 U.S. POLICY CHANGES INCREASED ENGAGEMENT WITH PRIVATE SECTOR, BUT AGENCY INFORMATION COLLECTION IS LIMITED (Dec. 2016), https://www.gao.gov/assets/690/681641.pdf.

category has been largely unutilized due to a law in Cuba preventing Cuban entrepreneurs from working directly with foreign entities.[175]

4. Risky Business

Combined, these three legal changes are central in understanding the limited trade relationship between Cuba and the United States. None of them effectively removes the restrictions put in place by the economic embargo (in fact, the Helms-Burton Act strengthens those restrictions), but the risk-taking investor will find openings for trade in certain sectors or with special licenses.

Doing business in Cuba is not easy and is potentially unlawful, so U.S. entities must proceed with caution before diving into the Cuban financial waters. And yet the Cuban market is bursting with opportunities, so there is no shortage of U.S. companies trying to take advantage of the narrow pathways carved into the economic embargo. Among those U.S. firms that are operating today in Cuba:

- AirBnB: connecting Cuban homes to U.S. visitors via their online web site. Began operations in Cuba in 2015.[176]
- Google: partnering with the Cuban government to provide Wi-Fi service to those resident in Cuba.[177]
- Marriott International: approved to operate in Cuba by the U.S. Department of Treasury.[178]
- PayPal: setting-up its "Xoom" money-transfer service in Cuba to facilitate remittances, which were unburdened of restrictions under the Obama Administration.[179]

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175. *See, e.g.*, Ted A. Henken & Archibald R.M. Ritter, *Overcoming Cuba's Internal Embargo*, CURRENT HIST., Feb. 2015, at 73, 73, http://www.currenthistory.com/Henken-Ritter_CurrentHistory.pdf (explaining that the Castro government largely restricts independent entrepreneurial activity in key entrepreneurial sectors).

176. *See, e.g.*, Olivia Zaleski, *AirBNB's Early Lobbying Led to a Win in Cuba: The Influence Game*, BLOOMBERG NEWS (Feb. 15, 2018, 4:00 AM), https://www.bloomberg.com/news/articles/2018-02-15/airbnb-s-early-lobbying-led-to-a-win-in-cuba-the-influence-game.

177. *See, e.g.*, Sheera Frenkel, *Google Just Became the First Foreign Company to Launch in Cuba*, CNBC (Apr. 26, 2017, 7:05 PM), https://www.cnbc.com/2017/04/26/google-just-became-the-first-foreign-internet-company-to-launch-in-cuba.html.

178. *See, e.g.*, Mimi Whitefield, *Marriott International Sees Promising Future in Cuba*, MIAMI HERALD (Aug. 18, 2017, 6:24 PM), http://www.miamiherald.com/news/nation-world/world/americas/cuba/article168072462.html.

179. *See, e.g.*, Leena Rao, *PayPal Brings Money Transfers to Cuba*, FORTUNE (Mar. 21, 2016), http://fortune.com/2016/03/21/paypal-cuba-xoom/.

- Priceline: operating its "Booking.com" subsidiary to connect U.S. travelers with available hotel rooms in Cuba.[180]
- Starwood Hotels and Resorts: as noted above, currently managing two formerly government-owned Cuban hotels.[181] Note that Starwood was acquired by Marriott in 2016.[182]
- Stripe: connecting Cuban entrepreneurs to U.S. customers and banks through the Stripe Atlas online hub.[183]
- Western Union: like PayPal, provides remittance services to facilitate money transfers into Cuba.[184]

V. Doing Business with Cuba: the Practical Approach

The laws and regulations affecting the commercial relationship with Cuba are complex and often confusing, which makes any venture both time-consuming and risky. While the statutes enacted by Congress lay the policy foundation for the embargo, it is the regulations interpreting those statutes that have the most direct effect on the conduct of business with Cuba. The U.S. Department of Treasury's Office of Foreign Assets Control issues the majority of commercial regulations affecting trade with Cuba.[185] In this section, we will look more closely at the two major statutory changes to the embargo as well as the state of the OFAC regulations.

A. *The Office of Foreign Assets Control*

The United States exported $283 million in goods to Cuba in 2017.[186] No goods were imported from Cuba for the last eight years

180. *See, e.g.*, Mimi Dwyer, *Priceline Strikes Deal with Cuba to Let Americans Book Hotels*, Bus. Insider (Mar. 21, 2016), http://www.businessinsider.com/r-priceline-strikes-deal-with-cuba-to-let-americans-book-hotels-2016-3.

181. *See, e.g.*, Nancy Trejos, *Starwood: 1st U.S. Company to Run Cuba Hotels in Decades*, USA Today (Mar. 19, 2016, 11:46 PM), https://www.usatoday.com/story/travel/roadwarriorvoices/2016/03/19/starwood-become-first-us-hotel-company-run-cuba-hotels-decades/82040434/.

182. *Marriott Buys Starwood, Becoming World's Largest Hotel Chain*, CNBC (Sept. 23, 2016), https://www.cnbc.com/2016/09/23/marriott-buys-starwood-becoming-worlds-largest-hotel-chain.html.

183. *See, e.g.*, Leena Rao, *Stripe Wants to Help Cuban Entrepreneurs Enter the Digital Age*, Fortune (Mar. 18, 2016), http://fortune.com/2016/03/18/stripe-cuba/.

184. *See, e.g.*, *Western Union Expands in Cuba: Connects the World*, BusinessWire (Mar. 21, 2016), https://www.businesswire.com/news/home/20160321005381/en/Western-Union-Expands-Cuba-Connects-World.

185. Cuban Assets Control Regulations, 31 C.F.R. § 515 (2015).

186. *Foreign Trade: Trade in Goods with Cuba*, U.S. Census Bureau, https://www.census.gov/foreign-trade/balance/c2390.html#2017 (last visited May 6, 2018).

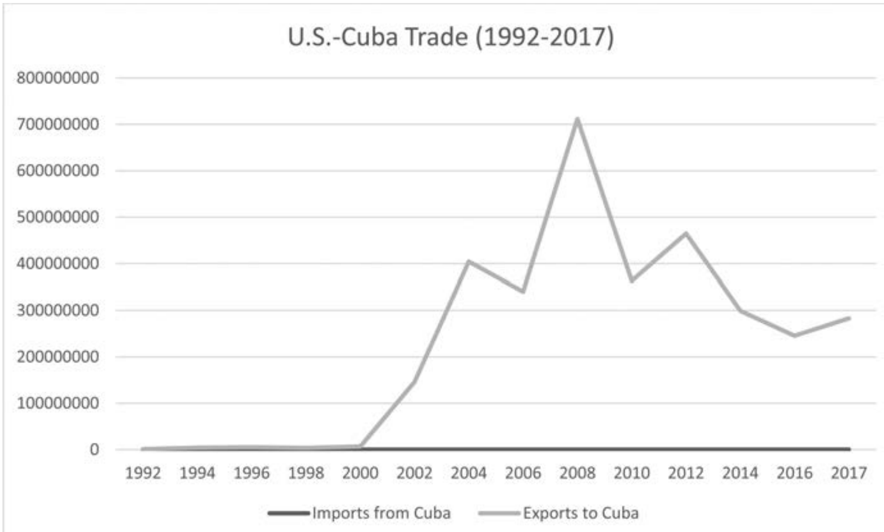

FIGURE 9: U.S. Imports from and Exports to Cuba (1992-2017).[190]

(through January 2018).[187] The trade deficit at the end of 2017 was $283 million.[188] This created a $283 million trade surplus with Cuba (see Figure 9, above).[189]

The top export categories (two-digit Harmonized System) in 2015, the latest year for which specific data is available, were: "meat ($78 million), food waste, animal feed ($44 million), miscellaneous grain, seeds, fruit ($22 million), miscellaneous chemical products ($13 million), and inorganic chemicals ($9 million)."[191]

Cuba today effectively has two economic sectors: the public sector, which controls imports and exports, credit markets, real property markets, and government services; and the private sector, which includes mostly service providers in the hospitality and transport sectors as well

187. *See id.* Cuban imports, other than the narrow exceptions noted above, are prohibited by 31 C.F.R. § 515.204, which prohibits the entry into the United States any good that:

(1) is of Cuban origin;

(2) is or has been located in or transported from or through Cuba; or

(3) is made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba.

188. *See Foreign Trade: Trade in Goods with Cuba*, *supra* note 186.

189. *See id.*

190. *See id.*

191. *Cuba*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/americas/cuba (last visited May 6, 2018).

as a handful of licensed Cuban entrepreneurs.[192] Trade by a U.S. firm with any entity within or connected to the public sector is prohibited.[193]

B. *Black Letter Law: Statutes Affecting Commerce with Cuba*

As discussed earlier, the economic embargo on Cuba began as an executive proclamation[194] issued by President Kennedy on February 3, 1962.[195] That proclamation remained in place through several subsequent administrations, with slight modifications mostly to restrictions on travel to Cuba, not to trade.[196] In 1992, Congress stepped in to turn the screws of the executive embargo through legislation.[197] It enacted the Cuban Democracy Act ("CDA") in order to reaffirm the embargo and to add restrictions on trade with Cuba by foreign subsidiaries of U.S. companies.[198]

1. The Cuban Democracy Act of 1992

The CDA was a reflection of the growing influence of Cuban-Americans in Congress as well as the newfound vulnerability of the Cuban regime in the post-Cold War era.[199] The Act was meant to

192. *See, e.g.*, Raj M. Desai, *Can Raul Castro Revive Cuba's Private Sector?*, BROOKINGS (Mar. 4, 2008), https://www.brookings.edu/research/can-raul-castro-revive-cubas-private-sector/.

193. *See List of Restricted Entities and Subentities Associated with Cuba as of November 9, 2017*, U.S. DEP'T OF STATE, BUREAU OF ECON. & BUS. AFF. (Nov. 8, 2017), https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/275331.htm (listing the state-owned enterprises in Cuba that U.S. parties may not do business with).

194. Note that an executive proclamation operates similarly to an executive order, but whereas an executive order largely directs government action, a proclamation typically directs private actions. *See* JOHN CONTRUBIS, CONG. RES. SERV., EXECUTIVE ORDERS AND PROCLAMATIONS 1 (Mar. 9, 1999).

195. Proclamation No. 3447, Embargo on All Trade with Cuba, 22 U.S.C. § 2369 (1962).

196. *See, e.g.*, Tom Gjelten, *10 Presidents, One Dictator: U.S.-Cuba Policy*, NPR (Aug. 4, 2006, 7:32 PM), https://www.npr.org/2006/08/04/5615898/10-presidents-one-dictator-u-s-cuba-policy; Gerald M. Boyd, *Reagan Acts to Tighten Trade Embargo of Cuba*, N.Y. Times (Aug. 23, 1986), https://www.nytimes.com/1986/08/23/world/reagan-acts-to-tighten-trade-embargo-of-cuba.html. *But see* Press Release, White House, Office of the Press Sec'y, Presidential Policy Directive—United States-Cuba Normalization (Oct. 14, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/presidential-policy-directive-united-states-cuba-normalization.

197. *See* Fandl, *supra* note 28, at 324-26 (providing a comprehensive outline of the history of the trade embargo).

198. *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Title XVII, 106 Stat. 2578 (1992) (codified at 22 U.S.C. §§ 6001-6010 (1994)).

199. *See, e.g.*, Fandl, *supra* note 28, at 324.

further restrict trade with Cuba and to "wreak havoc on the island."[200] The Act authorized the President to sanction countries that trade with Cuba by restricting their access to foreign aid and debt relief.[201] The Act further banned vessels from U.S. ports if they carried people from Cuba or had recently docked in a Cuban port.[202]

Most significantly for our discussion here, the CDA banned subsidiaries of U.S. firms from engaging in business transactions with Cuban entities.[203] Other than a few specific exceptions, foreign subsidiaries of U.S. firms would no longer be able to import from or export to Cuba in the absence of a special license granted by OFAC.[204] Prior to the CDA, foreign subsidiaries of U.S. firms were not supposed to trade with Cuba, but they were exempted by the discretion of the Department of Treasury so long as their trade with Cuba was "incidental to the conduct of business activities."[205] OFAC's Chief Counsel at the time, Stanley Sommerfield, noted: "if it develops that a substantial amount of trade is being conducted by subsidiaries with Cuba (and constant checks are being made on this point) then the exemption will be reconsidered."[206]

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200. Jane Franklin, *The Politics Behind Clinton's Cuba Policy*, BALT. SUN (Aug. 30, 1994), http://articles.baltimoresun.com/1994-08-30/news/1994242173_1_jorge-mas-canosa-cuba-president-clinton (quoting House of Representatives sponsor of the CDA, Robert Toricelli).

201. 22 U.S.C. § 6003(b)(1)(A)-(B).

202. 22 U.S.C. § 6005(b).

203. 22 U.S.C. § 6005(a).

204. *See* Cuban Assets Control Regulations, 31 C.F.R. § 515.559 (2015).

205. 31 C.F.R. § 515.541 (1963) (revoked by 40 Fed. Reg. 47,108 (1975)) provided:

(a) Except as provided in paragraphs (b), (c), (d) and (e) of this section, all transactions incidental to the conduct of business activities abroad engaged in by any non-banking association, corporation, or other organization, which is organized and doing business under the laws of any foreign country in the authorized trade territory are hereby authorized.

(b) This section does not authorize any transaction involving United States dollar accounts or any other property subject to the jurisdiction of the United States.

(c) This section does not authorize any transaction involving the purchase or sale or other transfer of any merchandise of United States origin or the obtaining of credit in connection therewith.

(d) This section does not authorize the transportation aboard any vessel which is owned or controlled by any organization described in paragraph (a) of this section of any merchandise from a designated foreign country to any country or from any country directly or indirectly to a designated foreign country.

(e) This section does not authorize any person subject to the jurisdiction of the United States other than an organization described in paragraph (a) of this section to engage in or participate in or be involved in any transaction. For the purpose of this section only, no person shall be deemed to be engaged in or participating in or involved in a transaction solely because of the fact that he has a financial interest in any organization described in paragraph (a) of this section.

206. Stanley L. Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 19 BUS. L. 861, 868 (1964).

The prohibition on foreign subsidiaries of U.S. firms trading with Cuba was a politically charged issue at the time.[207] In effect, the Act was instructing foreign firms how to operate, impeding on the sovereignty of the nations in which those firms resided. This led to diplomatic rows as well as economic ones and appears to have done little to effect the intended change to the governing party in Cuba.[208]

2. Cuban Liberty and Democratic Solidarity Act of 1996

Given the many iterations of the economic embargo on Cuba since 1962, it is often difficult for a U.S. businessperson to know what he can and cannot do with respect to trade with and travel to Cuba. To address that question, one must confront the Helms-Burton Act, which is the most significant piece of legislation affecting U.S.-Cuba relations since the Platt Amendment of 1902.[209] Codified as the Cuban Liberty and Democratic Solidarity Act of 1996, the Helms-Burton Act usurps control from the Executive over the economic embargo on Cuba and asserts legislative control.[210]

While the CDA had negative diplomatic effects on foreign affairs due to the provision prohibiting foreign subsidiaries of U.S. firms from trading with Cuba, the Helms-Burton Act went further by opening the door to punishment of foreign companies and individuals, regardless of their nexus with the United States, for trading with Cuba.[211] Europe, Canada, Mexico, and other countries voiced opposition to this provision as an unlawful extraterritorial application of U.S. law.[212] Renowned international trade scholar John Jackson noted at the time that the Act

207. *See generally* Kam S. Wong, *The Cuban Democracy Act of 1992: The Extraterritorial Scope of Section 1706(a)*, 14 U. PA. J. INT'L BUS. L. 651 (1994) (noting that countries that had previously supported the U.S. embargo objected to this invasion of their sovereign control over domestic businesses).

208. *See* Alexander F. Watson, *The Cuban Democracy Act: One Year Later*, 4 DEP'T OF STATE DISPATCH 853, 853 (1993) (noting that the Cuban government has made no substantial change in their approach to civil society despite passage of the CDA).

209. *See* Treaty Between the United States and the Republic of Cuba Embodying the Provisions Defining Their Future Relations as Contained in the Act of Congress Approved March 2, 1901, U.S.-Cuba, May 22, 1903 (promising to maintain Cuba's independence despite U.S. oversight).

210. Helms-Burton Act, 22 U.S.C. §§ 6021-6091 (2012).

211. *Id.* § 302, 22 U.S.C. § 6082.

212. *See, e.g.*, John Jackson, *Helms-Burton, the U.S., and the WTO*, ASIL INSIGHTS (Mar. 3, 1997), https://asil.org/insights/volume/2/issue/1/helms-burton-us-and-wto.

> opens third country companies 'trafficking' in Cuban property once owned by Americans to suits in the United States by the former owners, suits that could result in damages equal not to the value of trade being conducted by the defendants, but to the value of the property once owned by the U.S. plaintiffs, and possibly even to three times that value.[213]

The European Community filed suit against the United States at the World Trade Organization over Title III of the Helms-Burton Act in May 1996.[214] Their claim was that "US trade restrictions on goods of Cuban origin, as well as the possible refusal of visas and the exclusion of non-US nationals from US territory, are inconsistent with the US obligations under the WTO Agreement."[215] The United States claimed that they were invoking their protection under the WTO Agreement's National Security Clause, which allows a country to suspend its obligations to provide certain trade benefits in the interest of its own national security.[216] The suit never went forward, and the WTO's jurisdiction ultimately lapsed, but this did not prevent countries from lodging their complaints publicly.[217]

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213. *Id.*

214. Request for Consultations by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1 (May 3, 1996), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=5231,3572,34010,24298,38632,37935,870&CurrentCatalogueIdIndex=6&FullTextHash.

215. *DS38: United States—The Cuban Liberty and Democratic Solidarity Act*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm (last updated Feb. 24, 2010).

216. *See, e.g.*, Jackson, *supra* note 212. See also WTO Agreement art. XXI, which states:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

  (i) relating to fissionable materials or the materials from which they are derived;

  (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

  (iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

217. Lapse of the Authority for Establishment of the Panel, *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/6 (Apr. 24, 1998), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds38/*)&Language=ENENGLI&Context=FomerScriptedSearch&languageUIChanged=true#; *see* Mirjam Donath & Louis Charbonneau, *For 23rd Time, U.N. Nations Urge End to U.S. Embargo on Cuba*, REUTERS (Oct. 28, 2014, 1:04 PM), https://www.reuters.com/article/us-cuba-un/for-23rd-time-u-n-nations-urge-end-to-u-s-embargo-on-cuba-idUSKBN0IH1RN20141028 (noting that the U.N. General Assembly has voted to

The significance of the Act with respect to trade between the United States and Cuba lies more in the freezing of regulations and tying of the President's hands on foreign policy matters than in any new restrictions. The Act freezes in time the CACRs, preventing the President from revoking them in the absence of certification by the President that, among other things, Cuba has become a democratic state.[218] The Act, which has been criticized on the left[219] and the right,[220] limits what the President can do to loosen trade and travel restrictions with the island by consolidating control of the embargo within Congress.[221]

3. The Trade Sanctions Reform and Export Enhancement Act of 2000

In 2000, President George W. Bush signed the TSRA, which enabled trade with Cuba in certain designated sectors seen as likely to be less related to the Cuban government.[222] As part of that Act, however, new restrictions were placed on export financing, prohibiting any U.S. government support for exports to Cuba.[223] The Act permits a U.S. exporter to apply for a license from OFAC to export food, medicines,

condemn the U.S. economic embargo of Cuba with only the United States and Israel opposing the non-binding vote); *see also* Somini Sengupta & Rick Gladstone, *U.S. Abstains in U.N. Vote Condemning Cuba Embargo*, N.Y. TIMES (Oct. 26, 2016), https://www.nytimes.com/2016/10/27/world/americas/united-nations-cuba-embargo.html (explaining that for the first time since passage of the embargo, the United States abstained to the condemnation vote by the U.N. General Assembly). *But see* John Wagner & Karen DeYoung, *Trump Announces Revisions to Parts of Obama's Cuba Policy*, WASH. POST (June 16, 2017), https://www.washingtonpost.com/politics/trump-announces-revisions-to-parts-of-obamas-cuba-policy/2017/06/16/dee8671c-52ab-11e7-91eb-9611861a988f_story.html?utm_term=.dad83d850d7a (noting that the Trump Administration has instructed their UN envoy to oppose the condemnation vote at the General Assembly once again).

218. Helms-Burton Act § 102(c), (h), 22 U.S.C. § 6032(c), (h) (2012); *see also* Alan M. Dunn & Sahar J. Hafeez, *U.S.-Cuba Related Sanctions Update and Overview: Obama Administration Further Eases Cuba Sanctions Against the Backdrop of Strict Statutory Restrictions*, STEWART & STEWART (Oct. 24, 2016), http://www.stewartlaw.com/Article/ViewArticle/1082 (clarifying that "the regulatory provisions of the CACR were codified in legislation when the Helms Burton Act was signed into law in 1996").

219. *See, e.g.*, Peter Kornbluh & William E. Leogrande, *The Real Reason It's Nearly Impossible to End the Cuba Embargo*, The Atlantic (Oct. 5, 2014), https://www.theatlantic.com/international/archive/2014/10/the-1996-incident-that-made-it-nearly-impossible-to-repeal-the-cuba-embargo/381107/.

220. *See, e.g.*, Mark A. Groombridge, *Missing the Target: The Failure of the Helms-Burton Act* (CATO Institute, Trade Briefing Paper No. 12, June 5, 2001), https://object.cato.org/sites/cato.org/files/pubs/pdf/tbp-012.pdf.

221. *See, e.g.*, Fandl, *supra* note 28, at 298-302 (arguing that foreign policy control should be resolutely within the hands of the President).

222. Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549A-71 (codified as amended at 22 U.S.C. § 7201-7211 (2012)).

223. 22 U.S.C. § 7207(a)(1).

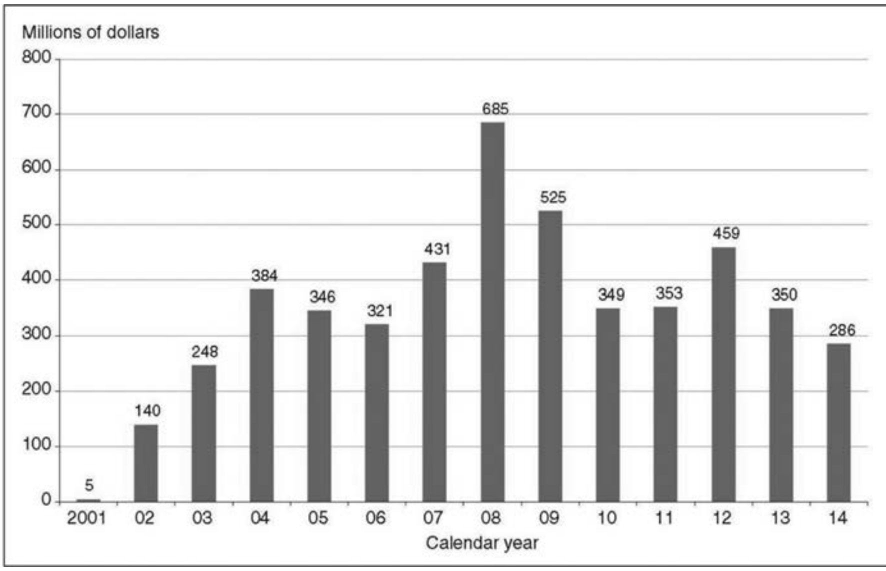

FIGURE 10: U.S. Agricultural Exports to Cuba.[226]

and medical equipment to Cuba (among other countries).[224] The Act defines food to include:

> food commodities, feed, fish, shellfish and fish products, beer, wine and spirits, soft drinks, livestock, fiber, including cotton, wool, and other fibers, tobacco and tobacco products, wood and wood products (including lumber and utility poles), seeds, and reproductive materials such as fertilized eggs, embryos, and semen. It also includes certain fertilizers and organic fertilizers that are not otherwise controlled. The term agricultural commodities does not include furniture made from wood, clothing manufactured from plant or animal materials, agricultural equipment (whether hand tools or motorized equipment), pesticides, insecticides, herbicides, or cosmetics (unless derived entirely from plant materials).[225]

224. *See* 22 U.S.C. § 7205(a)(1).

225. *Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) Program*, U.S. DEP'T OF TREAS., https://www.treasury.gov/resource-center/sanctions/Programs/Pages/tsra_info.aspx#def (last updated Jan. 13, 2017) (citing section 102 of the Agricultural Trade Act of 1978 (7 U.S.C. 5602), whose definition is incorporated by reference in 22 U.S.C. § 7201(1)).

226. MCMINIMY, *supra* note 171, at 4.

Product	Value, $1,000	Percent of Total
Total Agricultural Exports	365.3	100%
Animals and Products	161.2	
Chicken meat	148.9	41%
Pork	4.3	1.2%
Grains and Feeds	97.3	
Corn	72.9	20%
Brewing/distilling dregs	14.1	3.9%
Mixed feeds	10.3	2.8%
Oilseeds and Products	103.5	
Soybean meal	59.4	16.3%
Soybeans	44.1	12.1%

Source: U.S. Department of Agriculture, Foreign Agricultural Service.
Note: Totals do not add up because list is limited to major products.

FIGURE 11: Major U.S. Agricultural Exports to Cuba.[228]

The effect of this opening on agricultural exports to Cuba was substantial (see Figure 10, above). It is important to reiterate, however, that this Act had no effect on imports from Cuba to the United States, which remain prohibited.

Those agricultural exports to Cuba from the United States are principally meats, grains, and soybeans (see Figure 11, above).[227]

In addition to agricultural exports, recent changes in U.S. law have exempted additional items from the economic embargo when exported to Cuba. These December 2014 additions include: building materials for private residential construction, goods and services utilized by Cuban entrepreneurs, and agricultural equipment for use by Cuban farmers.[229]

The opening of trade with Cuban entrepreneurs has the potential to be a significant boon to the Cuban economy, as well as to U.S. exporters. However, Cuban law currently prohibits Cuban entrepreneurs from contracting directly with foreign suppliers.[230] Accordingly, the Cuban entrepreneur must first contract with a Cuban government-owned trade agency and then connect through that agency to the foreign supplier. This requirement effectively nullifies the rights granted by the

227. *See id.* at 5.

228. *Id.* at 5.

229. 31 C.F.R. § 515.582 (2014) (exempting from the economic embargo most imports from Cuban entrepreneurs; a number of categories of goods are excluded from this list, such as vegetables, minerals, chemicals and machines). *See generally The State Department's Section 515.582 List*, U.S. Dep't of State, Bureau of Econ. & Bus. Aff. (Apr. 22, 2016), https://www.state.gov/e/eb/tfs/spi/cuba/515582/237471.htm.

230. *Changes in US Sanctions on Cuba Present Opportunities and Challenges*, SHERMAN & STERLING 3 (May 13, 2015), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2015/05/Changes-in-US-Sanctions-on-Cuba-Present-Opportunities-and-Challenges-LT-051315.pdf.

modified regulations. According to one observer, "if the new regulations are to have practical effect, either the Cuban government must relax its controls over the private sector, or US authorities must allow exporters to transact through intermediaries such as Cuban import agencies."[231]

C. *CACR Revisions under the Obama Administration*

As discussed earlier, the Obama Administration took several steps toward the normalization of relations with Cuba. These included changes to diplomatic relations, remittance limits, and travel, among other things.[232] With respect to trade, very little changed within the law under the Obama Administration. What seems to have changed, however, was the perception of an end to the embargo in the near future, generating excitement among Cubans and Americans eager to do business with each other.

The Obama Administration worked within the strict constraints of the Helms-Burton Act to carve out minor changes that worked to build bridges between the United States and Cuba.[233] These included changes to the travel ban that would allow individuals to visit Cuba for one of twelve specific purposes using only a general license, rather than going through the process of requesting a special license from OFAC.[234] Tourism was still strictly forbidden, but these regulatory

231. *Id.*

232. *See supra* Part III.

233. Cuban Assets Control Regulations, 81 Fed. Reg. 71,372 (Oct. 17, 2016) (codified as amended at 31 C.F.R. § 515); Cuba: Revisions to License Exceptions and Licensing Policy, 81 Fed. Reg. 71,365 (Mar. 16, 2016) (codified as amended at 15 C.F.R. §§ 740, 746).

234. 31 C.F.R. § 515.560(a), which identifies the following twelve categories of permissible travel to Cuba:

1. family visits;
2. official business of the U.S. government, foreign governments, and certain intergovernmental organizations;
3. journalistic activity;
4. professional research and professional meetings;
5. educational activity;
6. religious activities;
7. public performances, clinics, workshops, athletics, other competitions, and exhibitions;
8. support for the Cuban people;
9. humanitarian projects;
10. activities of private foundations or research or educational institutes;
11. exportation, importation, or transmission of information or information materials; and
12. certain authorized export transactions that "may be considered for authorization" under BIS policies.

changes, accompanied by the authorization of flights and cruises to Cuba, allowed U.S. travelers an opportunity to see the forbidden island and, possibly, to identify business opportunities there.

Notably, OFAC lifted its limitation on the value of Cuban cigars and rum that a traveler would be permitted to bring back to the United States.[235] Though this did not in any way change the ban on Cuban imports, it did open the door to larger quantities of these luxury items entering the United States. As of the writing of this article, the Trump Administration has not changed these regulations.

The Trump Administration has made some minor modifications to existing rules on travel to Cuba, but has not changed anything with respect to the trade policies described above. Specifically, the Administration has directed OFAC to modify its regulations to restrict people-to-people travel for educational purposes to Cuba, which had been authorized under a general license regime put in place by President Obama.[236] These changes will require individuals to travel with United States-based group tours rather than permitting them to self-regulate their itinerary in accordance with the requirements of the regulation.[237] It is important to note that these changes would only affect the "educational purposes" category of the Code and no others.

The Trump Administration also directed the Secretary of State to identify and publish a list of Cuban government entities and officials in order to ensure that U.S. entities are not doing business in any way with those government officials.[238] The Treasury Secretary was also asked to expand the list of government officials blocked from dealing with U.S. entities to include local and provincial officials.[239] No other significant changes are expected as of the time of this article.

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235. *See* 31 C.F.R. § 515.569; *see also* 81 Fed. Reg. at 71,373.

236. *See* 31 C.F.R. § 515.565.

237. Karen DeYoung, *White House Implements New Cuba Policy Restricting Travel and Trade*, WASH. POST (Nov. 8, 2017), https://www.washingtonpost.com/world/national-security/white-house-implements-new-cuba-policy-restricting-travel-and-trade/2017/11/08/a5597dee-c49b-11e7-aae0-cb18a8c29c65_story.html?utm_term=.21f41ead7a09.

238. *See, e.g.*, Gardiner Harris, *Trump Tightens Cuba Embargo, Restricting Access to Hotels and Businesses*, N.Y. TIMES (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/us/politics/trump-tightens-cuba-embargo-restricting-access-to-hotels-businesses.html.

239. *See* 31 C.F.R. § 515.337; *see also* John P. Barker et al., *Trump Administration Implements Tightening of Cuba Sanctions*, ARNOLD & PORTER (Nov. 13, 2017), https://www.arnoldporter.com/en/perspectives/publications/2017/11/trump-administration-implements-tightening (explaining how the National Security Presidential Memorandum on Strengthening the Policy of the United States toward Cuba expanded the list of officials to be prohibited from doing business with the United States).

VI. Status of Commercial Restrictions and Exceptions in 2018

As of today, the following restrictions on trade with Cuba remain:

- Tourism by U.S. citizens in Cuba is prohibited.
- Credit by U.S. financial institutions for exports to Cuba is prohibited.[240]
- U.S. imports of goods from Cuba are prohibited.
- U.S. agricultural exporters are prohibited from government programs and commercial facilities that would promote those exports.

Running afoul of these OFAC regulations can be costly. Recent OFAC fines and settlements include those against Honda Finance of California ($87,255), American Insurance Group ($148,698),[241] and National Oilwell Varco Inc. ($25 million),[242] among other corporations. They also include fines against individuals, such as Albert A. Fox Jr., a pro-Cuba activist and President of the Alliance for Responsible Cuba Policy Foundation, who was fined $100,000 for taking two trips to Cuba without a license.[243] That fine was reduced to $10,000 in January 2017.[244] Such trips may be permissible but require a license in advance from OFAC.

VII. Economic Opportunity Instead of Economic Sanctions

The U.S. economic embargo on Cuba has failed in its stated purpose of eliminating communism on the island. The Castro brothers have

240. This prohibition was included in TSRA.

241. *See* Squire Patton Boggs (US) LLP, *OFAC Announces Settlement Agreements with American Honda Finance Corporation and American International Group, Inc.*, NAT'L L. REV. (July 26, 2017), https://www.natlawreview.com/article/ofac-announces-settlement-agreements-american-honda-finance-corporation-and-american. Note that the American Insurance Group settlement includes violations of Cuba, Sudan, Iran, and Weapons of Mass Destruction restrictions. *Id.*

242. *See* David Mortlock, Miriam A. Bishop & Nikki M. Cronin, *National Oilwell Varco, Inc. Fined Over $25 Million for Sanctions and Export Control Violations Involving Willful Blindness and Approval of Overseas Operations*, WILLKIE, FARR & GALLAGHER LLP (Dec. 1, 2016), http://www.willkie.com/~/media/Files/Publications/2016/12/National_Oilwell_Varco_Inc_Fined_Over_25_Million.pdf. Note that this settlement includes violations of Cuba, Iran, and Sudan restrictions. *See id.*

243. Nora Gámez Torres, *OFAC Issues Stiff Fines Against Pro-Cuba Activist*, Miami Herald (Sept. 9, 2016, 1:17 PM), http://www.miamiherald.com/news/nation-world/world/americas/cuba/article100855762.html.

244. Nora Gámez Torres, *Treasury Department Reaches Settlement with Pro-Cuba Activist Accused of Violating Embargo*, Miami Herald (Jan. 17, 2017, 5:39 PM), http://www.miamiherald.com/news/nation-world/world/americas/cuba/article127076429.html.

outlived twelve U.S. presidential administrations,[245] including the current Trump administration, and, even with pending elections in Cuba, it appears unlikely that any shift away from communism will be on the agenda.[246] The economy in Cuba continues to be tied to sugar exports and, increasingly, tourism. Interest in expanded trade relationships with major blocs such as the EU is growing and may provide a lifeline for the Cuban economy.[247] The EU has long taken the approach that free trade will help Cuba transition to more social democratic values, regardless of the presence of Castro or his designees in power.[248] However, EU outreach may be hampered by U.S. trade restrictions, which limit what some foreign firms may do with Cuba.[249]

Economic sanctions as a deterrent to acute actions, such as pursuing a nuclear proliferation program[250] or violating human rights protocols,[251] have been met with success in some cases. However, these tend to be sanctions that are carefully crafted to reduce the actor's incentive to continue his violating behavior. Scholars David Cortright and George Lopez argue that "[t]he calculation of effectiveness [of economic sanctions] is a highly complex and nuanced process that must take into account all the purposes that sanctions may serve, stated and unstated,

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245. *See, e.g.*, Charlotte England, *All the US Presidents Fidel Castro Outlasted, and How They Dealt with the Cuban Leader*, INDEPENDENT (Nov. 26, 2016, 7:16 PM), https://www.independent.co.uk/news/people/fidel-castro-us-presidents-outlasted-and-how-they-dealt-with-him-eisenhower-kennedy-johnson-nixon-a7440486.html.

246. *See, e.g.*, Sarah Marsh & Nelson Acosta, *Cuba Holds One-Party Vote as Post-Castro Era Looms*, REUTERS (Mar. 11, 2018, 12:13 AM), https://www.reuters.com/article/us-cuba-election/cuba-holds-one-party-vote-as-post-castro-era-looms-idUSKCN1GN05H.

247. Marc Frank, *Top EU Diplomat Meets Cuban President at End of Visit*, REUTERS (Jan. 4, 2018, 1:47 PM), https://www.reuters.com/article/us-cuba-eu-mogherini/top-eu-diplomat-meets-cuban-president-at-end-of-visit-idUSKBN1ET26C.

248. Daniel P. Erikson, *Europe's Cuba Problem: The Limits of Constructive Engagement*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 3, https://www.idea.int/sites/default/files/publications/chapters/the-role-of-the-european-union-in-democracy-building/eu-democracy-building-discussion-paper-10.pdf (last visited Apr. 22, 2018).

249. *See* Bert Hoffman, *The Helms-Burton Law and Its Consequences for Cuba, the United States and Europe*, LATIN AM. STUD. ASS'N, http://lasa.international.pitt.edu/LASA98/Hoffmann.pdf (last visited Apr. 22, 2018).

250. *See, e.g.*, Kenneth Katzman, *Iran Sanctions*, 5 CURRENT POL. & ECON. MIDDLE E. 41 (2014) (discussing the success of the sanctions on Iran's nuclear proliferation program). *But see* Nayan Chanda, *North Korea: Enough is Enough*, FAR E. ECON. REV., June 23, 1994, at 14 (explaining the failed sanctions on North Korea's nuclear program).

251. *See, e.g.*, Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOBAL STUD. L. REV. 455, 470-72 (2008) (discussing U.S. sanctions on Burma for human rights abuses committed by the government).

instrumental and symbolic. Such a process does not lend itself to convenient quantification or simple conclusions of success or failure."[252]

The economic sanctions against Cuba are drafted in a manner that neither creates incentives for Cuba to change specific behaviors nor identifies any specific objective other than broad regime change. The language of the congressional embargo makes this clear by outlining the requirements necessary for the President to ask Congress to terminate the embargo:

- Legalization of all political activity
- Release of all political prisoners
- Dissolution of the Department of State Security in the Cuban Interior Ministry
- Announcement of a public commitment to free and fair elections within eighteen months after a transition government takes power
- End of interference with Radio and TV Marti broadcasts
- Announcement of a public commitment to the establishment of an independent judiciary
- Empowerment of a transitional government that does not include Fidel or Raul Castro
- Assurance of speedy assistance to the Cuban people[253]

The conditions for removal of the embargo continue into the next section of the Act with set requirements for the type of democratically elected government that would satisfy U.S. lawmakers.[254] The principal focus is on dramatic political reform, though no incentives are offered to encourage diversion from the existing approach.

Putting aside the Good Neighbor Policy espoused by President Roosevelt thirty-five years prior to the first economic embargo (and sixty years prior to the congressional embargo), which promised support for Cuba without U.S. intervention in their national sovereignty,[255] we are left with the fact that the United States has intervened in Cuban affairs and has done so to the detriment of the Cuban people. And

252. DAVID CORTRIGHT & GEORGE A. LOPEZ, THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S 19 (2000); *see also* Justin D. Stalls, *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 115, 146 (2003); George A. Lopez & David Cortright, *Containing Iraq: Sanctions Worked*, FOREIGN AFF., July-Aug. 2004, at 90.

253. Helms-Burton Act § 205, 22 U.S.C. § 6065 (2012).

254. *Id.* § 206; 22 U.S.C. § 6066.

255. Treaty of Relations, Cuba-U.S., May 29, 1934, 48 Stat. 1682 (overturning the Platt Amendment of 1903 and reaffirming the U.S. commitment to Cuban sovereignty).

while loud voices in support of the embargo remain,[256] a majority of analysts agree that the embargo has done more harm than good, prolonging the single-party rule, preventing opportunities for economic growth, and weakening the rights of dissidents and political activists.[257] As a literal and figurative "island," Cuba is insulated from the criticisms of its trading partners and largely free from targeted trade sanctions meant to induce small behavioral changes.

Halfway around the world from Cuba is another communist regime that is treated very differently by the United States. China opened its markets to the world (for a second time) in the late 1970s, rapidly accelerating onto world markets and ultimately becoming the number one exporter of goods in the world.[258] The United States had to issue yearly waivers to allow trade with China in spite of the Jackson-Vanik Amendment, which restricted trade with nonmarket economies with which the United States did not have normalized trade relations.[259] Growing interdependence on trade between the United States and China merited annual waivers and ultimately the normalization of trade relations in 2000.[260] Although China has not replaced its communist government with a democratic government, it has undergone political reforms in line with its growing economy and has become a key player

256. *See, e.g.*, Siddhartha Mahanta, *The Case for the Cuba Embargo*, ATLANTIC (Dec. 3, 2016), https://www.theatlantic.com/international/archive/2016/12/robert-menendez-cuba-castro-embargo/509366/ (explaining the supportive view of Senator Robert Menendez); John Sweeney, *Why the Cuban Trade Embargo Should Be Maintained*, HERITAGE FOUNDATION (Nov. 10, 1994), https://www.heritage.org/trade/report/why-the-cuban-trade-embargo-should-be-maintained.

257. *See, e.g.*, 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 (2007); David Mowry, *Lifting the Embargo Against Cuba Using Vietnam as a Model: A Policy Paper for Modernity*, 25 BROOK. J. INT'L L. 229 (1999) (explaining that out of the two full embargos against communist regimes initiated by the United States, Cuba's is the only one still in effect).

258. *See The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2078rank.html (last visited Apr. 22, 2018).

259. *See* Trade Act of 1974, Pub. L. No. 93-618, Title IV, 88 Stat. 2056 (1975) (codified at 19 U.S.C. § 2432 (1982)), *repealed by* Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule Of Law Accountability Act of 2012 § 401-407, Pub. L. No. 112-208, 126 Stat. 1496 (2012); *see also* VLADIMIR N. PREGELJ, CONG. RESEARCH SERV., RL30225, MOST-FAVORED-NATION STATUS OF THE PEOPLE'S REPUBLIC OF CHINA 2-3 (2001).

260. Press Release, White House Office of the Press Sec'y, President Grants Permanent Trade Status to China (Dec. 27, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/12/20011227-2.html.

in the global marketplace.[261] Today, China espouses communist ideals and might even argue that it has successfully shown that communism and economic growth are not mutually exclusive,[262] yet its economic growth is strong and support by Chinese citizens for its free market approach to trade receives widespread support.[263]

Further, as I have noted in other articles,[264] popular support for maintaining the U.S. economic embargo on Cuba has dramatically declined as a new generation of Americans who grew up after the Cold War come of age.[265] Some authors have gone so far as to argue that the embargo is having no effect on political change in Cuba, but rather is increasing the recalcitrance of the regime there, making matters worse than before the embargo was enacted.[266]

The economic sanctions against Cuba, as discussed at length above, restrict Cuban entrepreneurs and businesses from accessing global markets to sell their goods and services, and in most cases from receiving goods and services from abroad. U.S. legislation, namely the CDA and the Helms-Burton Act, target the Cuban economy unnecessarily, limiting opportunities for economic growth and the spread of democratic ideals. Those statutes achieve their goal by prohibiting indirect financing of any business activity utilizing Cuban property that may be subject to a claim by a Cuban-American,[267] punishing other countries that trade with Cuba,[268] prohibiting Cuban exports to the United States,[269] and opposing Cuban access to support from international

261. *See, e.g.*, Keith Bradsher, *China and Economic Reform: Xi Jinping's Track Record*, N.Y. TIMES (Mar. 4, 2017), https://www.nytimes.com/2017/03/04/business/china-xi-jinping-economic-reform-scorecard.html.

262. *See, e.g.*, Ronald Coase & Ning Wang, *How China Became Capitalist*, CATO INST. (Jan.-Feb. 2013), https://www.cato.org/policy-report/januaryfebruary-2013/how-china-became-capitalist.

263. *See, e.g.*, Katie Simmons, *China's Government May Be Communist, but Its People Embrace Capitalism*, PEW RES. CTR. (Oct. 10, 2014), http://www.pewresearch.org/fact-tank/2014/10/10/chinas-government-may-be-communist-but-its-people-embrace-capitalism/.

264. Fandl, *supra* note 28, at 338-39.

265. *See, e.g.*, Tyson, *supra* note 117; *see also* Dalia Sussman, *Most Americans Support Ending Cuba Embargo, Times Poll Finds*, N.Y. Times (Mar. 21, 2016, 7:01 AM), https://www.nytimes.com/interactive/projects/cp/international/obama-in-cuba/most-americans-support-ending-cuba-embargo-nyt-poll-finds.

266. Carlos Seiglie, *The Political Economy of Trade Sanctions: The Case of Cuba*, 7 CUBA TRANSITION 232, 236 (1997), https://ascecuba.org//c/wp-content/uploads/2014/09/v07-sieglie.pdf.

267. Helms-Burton Act § 103(a), 22 U.S.C. § 6033(a) (2012).

268. *Id.* § 102(a), 22 U.S.C. § 6032(a).

269. *Id.* § 110(a), 22 U.S.C. § 6040(a).

financial institutions such as the World Bank and International Monetary Fund.[270]

In a thoughtful article written by Brookings scholar Richard N. Haass in 1998, Haass makes the case that economic sanctions rarely achieve their desired outcome, especially when designed in the manner of the economic embargo on Cuba.[271] He notes, "As a rule, sanctions need to be less unilateral and more focused on the problem at hand."[272] Similarly, Andrew Kovach of Cleveland State University has written that, "[b]ased on contemporary research, it is evident that the coercive power of sanctions is much more ambiguous than previously realized and that their adverse effects on civilians cast this 'nonviolent' method in more injurious light."[273]

Cuba is not destined to be a market-driver like China. But it does have the potential to recapture its former glory as a tourist destination in the Caribbean, a major commodity exporter, and also, thanks to significant investments in education, an innovative hub of biotech and similar products.[274] For Cuba to move in this direction—both economically and politically—the United States must unchain the island from the weight of archaic and ineffective economic sanctions and allow it to pursue its own path toward economic development. Only by terminating the economic embargo on the island can we witness its potential as a strategic trade partner and good neighbor.

VIII. Concluding Remarks: U.S.-Cuba Trade Going Forward

In this Article, I set out to explain the trade relationship between the United States and Cuba and how we ended up where we are today. And I have shown that despite a significant amount of rhetoric around the edges of this relationship, very few substantive changes to trade policy have taken place since 1959. This is bad news for potential U.S. investors and worse news for the Cuban economy.

Cuba is a small market in terms of U.S. trade relationships, and a complete lifting of the economic embargo would be barely noticeable

270. *Id.* § 104(a), 22 U.S.C. § 6034(a).

271. Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS (June 1, 1998), https://www.brookings.edu/research/economic-sanctions-too-much-of-a-bad-thing/.

272. *Id.*

273. Andrew Kovach, *The Fallacy of Nonviolent Economic Sanctions*, 2 DOWNTOWN REV., no. 1, article 2, 2015, at 1, 1, https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1026&context=tdr.

274. *See, e.g.*, Rachel Gotbaum, *How a Communist Island Nation Became a Biotech Powerhouse*, PRI (Mar. 31, 2016, 6:00 PM), https://www.pri.org/stories/2016-03-31/how-communist-island-nation-became-biotech-powerhouse.

in our global balance of trade. On the contrary, the United States, prior to the economic embargo, was Cuba's principal export destination, so removal of the embargo could substantially impact Cuban economic growth opportunities and help the island nation reinvigorate its largely stagnant economy.

The economic embargo on Cuba has done little if anything at all to facilitate a transition to democracy on the island. And as I have argued elsewhere, the changes taking place in Cuba since 2008 toward a more open economy reflect the first real opportunity not to force democracy on the island, but to allow it to peacefully and slowly grow naturally out of the economic development process.[275] Economic growth and international trade are often accompanied by an interest in a government that represents the interests of the people.[276] With trade comes the possibility of improved governance.

If Cuba is given the chance to engage again in the global economy by trading with its former key trade partner, as well as others interested in doing business on the island, the intent of the U.S. economic embargo on Cuba might just be achieved. At worst, Cuba may follow the path of China and become a free market communist state that operates within the rules of the world trade system. But no matter what path Cuba ultimately follows post-embargo, as a sovereign state that poses no threat to the United States economically or politically, it must be given the chance to decide that free of U.S. interference.

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275. *See* Fandl, *supra* note 28, at 346.

276. *See, e.g.*, John F. Helliwell, *Empirical Linkages Between Democracy and Economic Growth*, 24 BRIT. J. POL. SCI. 225 (1994); *see also* Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69 (1959); Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q. J. ECON. 65 (1956).