

STRONGER TRADE OR STRONGER EMBARGO: WHAT THE FUTURE HOLDS FOR UNITED STATES-CUBA RELATIONS

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INTRODUCTION

The United States' trade restrictions against Cuba have been a well-known fact of life for Cubans and Americans alike for over 45 years. Whether known as "the embargo" or "*el bloqueo*," the prohibition has had an impact upon various factions in both populations. Though lesser known, there have been hundreds of millions of dollars of trade between the two countries for over five years as a result of the *Trade Sanctions Reform and Export Enhancement Act* (TSRA), which authorizes the export of U.S. agricultural products to Cuba under strict restrictions.

This paper provides an analysis of the history and politics of TSRA, a description of trade relations under this Act, and the Cuban and U.S. perspective of the authorized agricultural trade. Beginning with the political climate and events that have led to the current state of trade relations between the two countries, the article proceeds to identify the possibility for enhanced trade. The subject of the TSRA is important in its own right and may serve as an indicator of what potential exists for future U.S.-Cuban relations. Though such a relationship may prove to be economically beneficial for both the United States and Cuba, there is much more at stake from a historical, political and ideological perspective, which may impede the development of normalized trade and travel relations between the neighbouring countries. The article concludes with the realization that while the economic experience and current political climates may support a policy shift in both the United States and Cuba, the political difficulties may be too great to overcome.

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I. THE OPENING OF AGRICULTURAL EXPORTS TO CUBA

Dating back to the Castro-led Cuban revolution and its defeat of the existing Batista regime on 1 January 1959, there has been an on-going deterioration of relations between the United States and its Caribbean neighbour. As the freshly minted Cuban state quickly implemented its defining policy reforms and aligned itself with Communist Russia, tensions between the proximate nations grew. Exacerbating this troubled relationship, on 17 April 1961 President John F. Kennedy ordered an invasion upon Cuban soil at the Bay of Pigs. This unsuccessful attempt at overthrowing the Castro regime resulted in the death and capture of more than 1,500 U.S.-resident Cuban exiles and the escalation of an already distressed relationship. Determined to cut off all support for the Castro regime, the U.S. government swiftly took actions that would stifle the potential for any future connectivity between the U.S. and Cuba, displacing what had once been a flourishing trade relationship.

In February 1962, President Kennedy issued Presidential Proclamation 3447, initiating the existing U.S. embargo against Cuba, banning nearly all trade between the neighbouring countries.¹ Thirty years later, in 1992, with the prohibitions still intact, President Clinton transformed the Presidential Decree into Congressional Act by signing two pieces of legislation – the *Cuban Democracy Act*² and the *Cuban Liberty and Democratic Solidarity (Libertad) Act*.³ These Acts codified previous laws restricting commercial trade between the United States and Cuba, setting forth specific conditions to be met by the Cuban Government prior to any waiver of the embargo by the U.S. Government.⁴

¹ The proclamation, which came on the heels of the Cuban Government's confiscation of property in Cuba owned by U.S. citizens and corporations, prohibited the importation of all goods of Cuban origin, all goods imported from or through Cuba and all exports from the United States to Cuba. See *Embargo on All Trade with Cuba*, 27 Fed. Reg. 1085 (1962) 3 C.F.R.

² *Cuban Democracy Act*, 22 U.S.C. §§ 6001-6010 (2007) (restricting the importation and export of any goods between the U.S. and Cuba).

³ *Cuban Liberty and Democratic Solidarity (Libertad) Act*, 22 U.S.C. §§ 6021-6091 (2007) (restricting any kind of foreign investment in Cuba).

⁴ For the embargo to be waived, the Cuban Government must show signs that they have, "held free and fair elections...; permitted opposition parties ample time to organize and campaign for such elections...; [shown] respect for the basic civil liberties and human rights of the citizens of Cuba; [moved] toward establishing a

The intent of the embargo, and subsequent codification of the trade restrictions, was to pressure Cuba to facilitate a multi-party, democratic election process and force Fidel Castro to alter his position regarding “internationally accepted standards of human rights.”⁵

Since its inception, the embargo has served as the source of great controversy in the United States, Cuba and the global community.⁶ It has been widely criticized for its failure to function as an impetus for regime change in Cuba and was even noted as a potential factor in Fidel Castro’s ability to retain power for nearly half a century, only then to pass it off to his brother Raul.⁷ It can be argued that the embargo has had the exact opposite effect on the Cuban Government and the Castro Regime than what the U.S. government had intended when initiating the trade restrictions.⁸ More recently, the trade sanctions have been harshly criticized for their impact upon various U.S. economic sectors, specifically the loss of significant earning potential that could result from open trade relations between the United States and Cuba.⁹

In 1999, the House Committee on Agriculture held a hearing to address the detrimental effects that unilateral U.S. sanctions on trade with Cuba imposed on U.S. agriculture.¹⁰ Two themes ran through the testimony of Representatives and witnesses from agricultural entities and

free market economic system; and committed itself to constitutional change that would ensure regular free and fair elections....” 22 U.S.C. §§ 6007(a)(1)-(5).

⁵ See 22 U.S.C. § 6001 (highlighting Congressional findings and naming Castro specifically throughout).

⁶ The embargo has been criticized for at least three of the following reasons: (1) the U.S. Government’s inappropriate use of food and medical supplies as a tool to achieve foreign policy goals; (2) lost opportunities for various sectors of the U.S. and global economies; and (3) providing a platform upon which the Castro Regime has maintained political authority in Cuba.

⁷ See Josep M. Colomer, “Who Could End the Embargo? A Game-Theoretical Perspective” (2004) 14 *Transnat’l L. & Contemp. Probs.* 163 at 171. The embargo has been used as a tool to assist the Cuban leadership base, serving as an excuse when criticized for the policy failures of their communist experiment. The economic sanctions can even be viewed as an impediment to the furtherance of Cuba’s political liberalization.

⁸ The Cuban government has benefited from the embargo, in using it as an “alibi for its own failures and as a platform for moral condemnation of the United States.” *Ibid.* at 163.

⁹ For example, Rep. Jerry Moran from Kansas has criticized the lost economic opportunities on behalf of the constituents from his state. Rep. Jerry Moran, “Time for a Change in Cuba Trade Sanctions” *Wichita Eagle* (24 December 2006) at A3.

¹⁰ U.S., *Economic Sanctions and the Effect on U.S. Agriculture: Hearing Before the H. Comm. On Agriculture*, 106th Cong. (1999) at 1-76 [106th Hearings].

governmental agencies. First, a disservice was being done to the larger Cuban population.¹¹ There were concerns that food and medical supplies were being utilized as a tool to achieve foreign policy goals. The restrictions were seemingly intended to limit any contributions to the success of the Cuban government and stimulate social upheaval by the Cuban populace against the Castro regime.¹² This tactic met both strong popular and political opposition for its inhumane nature and failure to meet its objectives.¹³ One representative concluded that the sanctions had a “debilitating effect, not on the leadership, but on the citizens.”¹⁴ The sanctions were ineffective in initiating a change in the polity of the Cuban state.

Second, domestically, the more significant concern was the impact felt by American farmers and ranchers.¹⁵ An estimated \$500 million of agricultural sales were lost annually as a result of embargoes of Iran, Syria, Sudan and Cuba.¹⁶ The trade sanctions aimed at Cuba, specifically, were noted as creating a loss of market share to competing agricultural suppliers (e.g. Canada, the European Union, and Argentina), driving up the prices at which those countries sell their products as a

¹¹ See *ibid.*

¹² *Ibid.* at 1 (statement of Rep. Larry Combest, Chairman, H. Comm. on Agriculture) (“[F]ood should not be used as a tool of foreign policy....Food should not, under most circumstances be used as a weapon.”). See also Philip Peters, “U.S. Sanctions Against Cuba: A Just War Perspective” (Presented to the XVI Annual Conference of the Association for the Study of the Cuban Economy, 5 August 2006), online: Lexington Institute <<http://lexingtoninstitute.org/932.shtml>> (“[W]hile U.S. sanctions affect the finances of the Cuban government, they also affect the welfare of Cuban citizens who are ‘noncombatants’ – they are targeted by the sanctions because they live in Cuba, not because they have a specific affiliation with the Cuban government.”).

¹³ See also *ibid.* at 391: “[H]istorian Luis Aguilar, [a] former professor at Georgetown University and a university classmate of Fidel Castro, wrote in *El Nuevo Herald* in 1999...:

...it is possible to defend the bombing of a town, if this hard punishment succeeds in weakening or defeating an enemy. But if it is demonstrated that the bombardment, or any such action, is hurting the people but is far from weakening the military power of the enemy, it would be necessary to stop the attack and resort to other methods.”

¹⁴ 106th Hearings, *supra* note 9, at 4 (prepared statement of Rep. Earl F. Hillard, Member, H. Comm. On Agriculture).

¹⁵ *Ibid.* at 4 (statement of Rep. Bill Barrett, Member, H. Comm. On Agriculture) (Trade sanctions are ineffective and only hurt American farmers and ranchers).

¹⁶ See *ibid.* at 2-3 (statement of Rep. Charles W. Stenholm, Member, H. Comm. on Agriculture).

result of thin competition, and undermining the United States' reputation as a reliable supplier to its regular customers.¹⁷

U.S. farmers and ranchers organized a concerted lobbying effort. It was led by the U.S. Rice Producers, the American Soybean Association, the National Corn Growers Association, etc., with the support of legislators from states dependent upon the success of their agricultural sector (including Nebraska, Michigan, Texas, North Dakota and others).¹⁸ In 1999, Congressman George Nethercutt (R-Wa) and Senator John Ashcroft (R-Mo) proposed legislation to create agricultural trade exceptions to countries against which the United States had imposed unilateral trade sanctions.¹⁹ Trade agreements would be permitted between U.S. agricultural entities and Cuba, allowing for the export of commodities abroad, but continuing the prohibition against the importation of any commodities from Cuba into the United States.²⁰ Bipartisan support for the measure was eventually achieved by appealing to humanitarian, religious, farm and commodity organizations.²¹ In 2000, Congress authorized the sale of agricultural commodities to Cuba with the adoption of the *Trade Sanctions Reform and Export Enhancement Act* (TSRA).²² While TSRA created trade exceptions for exported medical and agricultural commodities, it did not affect any other aspects of the existing embargo.²³ Additionally, the exports were subject to strict restrictions and prohibitions.²⁴

¹⁷ See *ibid.*

¹⁸ See *ibid.* at 39-75 (detailing commentary in support of agricultural trade exceptions from agricultural associations and governmental representatives and officials).

¹⁹ Nethercutt proposed H.AMDT. 141 to U.S., Bill H.R. 1906, *Making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for the fiscal year ending September 30, 2000, and for other purposes*, 106th Cong., 1999, which was withdrawn by unanimous consent. The bill entered the Senate as U.S., Bill S. 1233, *An original bill making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs for the fiscal year ending September 30, 2000, and for other purposes*, 106th Cong., 1999, where Ashcroft proposed S. AMDT. 1507 and S. AMDT. 1516. Both amendments passed by voice vote. See online: The Library of Congress, <<http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR01906>> and related links.

²⁰ *Trade Sanctions Reform and Export Enhancement Act*, 22 U.S.C. §§ 7201-7211 (2000) [TSRA]. TSRA was passed in 2000, but not published until 2001.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.* at §§ 7207-08 (prohibiting non-agricultural or medical exports to Cuba, as well as imports from Cuba).

²⁴ See Part II, below.

When the TSRA provisions took effect on 25 February 2001, Cuba did not immediately jump at the opportunity to purchase agricultural commodities from the United States.²⁵ It took nearly one year and dire circumstances for the Castro regime to accept the U.S. offer.²⁶ Following the disastrous effects of Hurricane Michelle in November 2001 and the subsequent food supply shortages experienced by the Cuban population, the Cuban government not only continued to reject the opportunity to import U.S. food products, but more significantly it also turned down the U.S. offer of disaster assistance.²⁷ It was not until later - by the end of 2001, when their food reserves had become fully depleted - that Cuba finally seized the opportunity to purchase bulk agricultural commodities from the United States.²⁸ The Cuban government had felt slighted by the fact that the entire embargo had not been repealed; rather the U.S. government had only opened up a specific sector with significant restrictions.²⁹

TSRA-authorized trade was a significant initial step, easing the trade restrictions and moving towards opening trade, social and political relations. However, it was also a sign of the difficulties that will surely be encountered in any enhanced relationship between the United States and Cuba. Cuba's reluctance to immediately enter into such a relationship with the United States, once TSRA had been passed, is a strong indication that there are not only economic factors at play in the limited trade relations between the two nations, but a multitude of other factors. Any normalization of a U.S.-Cuban trade relationship will be played out against an imposing political, historical and ideological backdrop.

II. TSRA OBSTACLES TO TRADE

Opening the door to the export of medical and agricultural commodities, while a step forward, was accompanied by a number of daunting obstacles for those wishing to take advantage of TSRA. The legislative and administrative requirements have presented a series of burdens and logistical setbacks for interested U.S.

²⁵ See James E. Ross, "The Impact of Potential Changes in U.S.-Cuba Relations on Midwest Agribusiness Trade and Investment" (2004) 14 *Transnat'l L. & Contemp. Probs.* 743 at 770.

²⁶ *Ibid.*

²⁷ *Ibid.* This maneuver by the Cuban government was a strong sign of the complex political factors constantly at play between Cuba and the United States. Even offers of humanitarian aid in times of natural disaster have been refused.

²⁸ *Ibid.* at 770-771.

²⁹ *Ibid.*

corporations, which have served as a prohibitive factor for some. Over the years, it has become exceedingly difficult for firms to take advantage of the legislation and tap into the potential benefits of trading with the Cuban state.

While the passage of TSRA allowed the export of U.S. agricultural products to Cuba, such sales are subject to extensive conditions, restrictions and prohibitions,³⁰ making any commercial relationship difficult to navigate and flourish. The Department of Treasury's Office of Financial Asset Control (OFAC) requires any U.S. corporation exporting exempted agricultural products to Cuba to obtain a license, specifically depending upon the product to be sold.³¹ The language in the TSRA provisions detailing the licensing of agricultural exports has been described as "unclear and contradictory," generating conflicts over its application.³²

In addition to the confusion over the complex licensing mechanism, TSRA details payment and financing terms to ensure that Cuba does not receive any financial benefit from approved transactions.³³ Consistent with the existing economic sanctions, U.S. banks, private entities, and local, state, and federal governments are expressly prohibited from providing trade financing or credit to facilitate the purchase of agricultural products by Cuba or any person in Cuba.³⁴ Under the TSRA, payment for agricultural sales to Cuba must be made by "cash in advance"³⁵ or financed through a third country bank.³⁶ For a

³⁰ See *supra* note 20 at §§ 7207-7209.

³¹ OFAC issues both general licenses, avoiding the need to detail each individual transaction, and specific licenses, issued on a case-by-case basis for an individual transaction. Though the OFAC licensing process is quite complex, TSRA aimed to streamline the application process, shifting away from requiring multiple licenses for an individual sale. See Remy Jurenas, "Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation" CRS Report for Congress, IB10061 (25 February 2005), online: Federation of American Scientists <<http://www.fas.org/sgp/crs/misc/IB10061.pdf>> at CRS-2 and CRS-3.

³² *Ibid.* at CRS-6.

³³ *Ibid.* at CRS-6. See also TSRA, *supra* note 20 at § 7207(b).

³⁴ See Jurenas, *supra* note 31 at CRS-7 to CRS-9. See also TSRA, *supra* note 20 at § 7207(b).

³⁵ TSRA, *supra* note 20 at § 7207(b)(1)(A) (2000). This language has been very controversial and its meaning subject to various interpretations. See *infra* notes 39-40 and accompanying text.

³⁶ TSRA, *supra* note 20 at § 7207(b)(1)(A)-(B). One State Department Official appropriately analogized the situation to, "You don't get my gumball until I get your quarter." Portia Siegelbaum, "U.S. Trade with Cuba? You Bet!" *CBS News*

country that does not have much capital,³⁷ and a very poor credit ranking with foreign countries,³⁸ the TSRA payment options greatly restrict the ability for Cuba to purchase an optimal amount of agricultural commodities from the United States.

In 2004, U.S. financial institutions became so confused by the TSRA language, and the OFAC licensing procedures, that they ceased payments and sought guidance from the Department of the Treasury.³⁹ It was unclear whether the “payment of cash in advance” requirement intended for funds to be received by the U.S. financial institutions prior to the seller’s shipment of the goods, or prior to the transfer of the goods from the seller to Alimport, the sole body authorized by the Cuban government to import food products into the country.⁴⁰ In response, OFAC clarified the phrase “payment of cash in advance” to mean that “payment is received by the seller or the seller’s agent prior to shipment of the goods from the port at which they are loaded.”⁴¹ OFAC Director Robert Werner claimed that the clarification “conforms to the common understanding of the term in international trade.”⁴² However, this clarification has further constrained trade relations between U.S. agricultural entities and Cuba, drawing criticism from both.

The 2004 Treasury Department’s tightening of an already difficult trade structure was seen by legislators who drafted TSRA, as well as

(11 March 2005), online: CBS News

<<http://www.cbsnews.com/stories/2005/03/10/world/main679400.shtml>>.

³⁷ “The Cuban economy is still recovering from a decline in gross domestic product of at least 35% between 1989 and 1993 [the Special Period following the collapse of the Soviet Empire].” U.S. Department of State, Bureau of Western Hemisphere Affairs, “Background Note: Cuba” (November 2007), online: U.S. Department of State <<http://www.state.gov/r/pa/ei/bgn/2886.htm>>.

³⁸ As a result of Cuba’s increasing debt and chronic delinquencies, Moody’s lowered Cuba credit rating to Caa1 – “speculative grade, very poor”. *Ibid.* “Cuba is considered an extremely high credit risk in global financial markets, with Euromoney Magazine ranking Cuba 181st out of 184 countries in their 2003 analysis of country credit risk.” William A. Messina, Jr., “U.S.-Cuban Agricultural Trade: Present Realities and Future Prospects” (Testimony presented before the U.S. Senate Finance Committee, 4 September 2003), EDIS document FE438, online: University of Florida IFAS Extension

<<http://edis.ifas.ufl.edu/pdf/FE/FE43800.pdf>> at 3.

³⁹ See *Cuban Assets Control Regulations*, 70 Fed. Reg. 9225 (2005) (to be codified at 31 C.F.R. § 515.533(2)(i)).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² U.S., *U.S. Department of the Treasury: Hearing Before the H. Comm. on Agriculture*, 109th Cong. (2005) (testimony of Robert Werner, Director of the Office of Financial Asset Control).

leading figures in the U.S. agricultural industry, as the Bush Administration's attempt to further restrict trade with Cuba.⁴³ This measure has been considered a "deliberate misinterpretation of the Trade Sanctions Reform Act," that could destroy all of the progress that had been achieved over the nearly five years since the Act was passed.⁴⁴ Comments by legislators who drafted and supported TSRA are an indication that the OFAC clarifications do not reflect the Congressional intent when TSRA was passed; rather it is a sign of the Bush Administration flying in the face of deliberate Congressional action to ease trade restrictions between the United States and Cuba. Senator Byron Dorgan (D-ND), commented that he "wrote the law that they are now misinterpreting, [which] does not require the wrong headed action they are taking today."⁴⁵ Senator Max Baucus (D-MT) referred to the "administration's attempt to keep [states] from selling agricultural products to Cuba [as] an outrage."⁴⁶ Further adding that he had "worked hard with Congressional colleagues to open up trade with Cuba... [and is] not going to let Treasury Department bureaucrats shut the door on Cuba trade that Congress purposefully opened."⁴⁷

Shortly after the OFAC "clarification" was made, Representative Moran (R-KS) and Senator Craig (R-ID) introduced H.R. 719⁴⁸ and S. 328⁴⁹, respectively. The purpose of the proposed legislation was to clarify and codify the Congressional intent of TSRA, "that a seller of a product authorized under [TSRA] receive payment only before a Cuban purchaser takes physical possession of that product."⁵⁰ Additionally, proposed Acts would allow "for travel to, from, or within Cuba in connection with activities undertaken in connection with sales and marketing,"⁵¹ which would more easily facilitate TSRA approved trade. However, the House and Senate bills were not reported out of their respective committees.

⁴³ Forrest Laws, "Farm Groups Blast Ruling on Cuban Payments" *Southwest Farm Press* (10 March 2005) at 8.

⁴⁴ Namrata Nadkarni, "Treasury Deals Blow to New US-Cuba Export Market: Deliberate Misinterpretation of the Trade Sanctions Reform Act" *Lloyd's List International* (25 February 2005) at 4.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ U.S., Bill H.R. 719, *Agricultural Export Facilitation Act of 2005*, 109th Cong., 2005.

⁴⁹ U.S., Bill S. 328, *Agricultural Export Facilitation Act of 2005*, 109th Cong., 2005.

⁵⁰ *Ibid.* at § 2.

⁵¹ *Ibid.* at § 3.

Aside from legislative concerns, the practical effect of the OFAC clarification of “payment of cash in advance” has created greater difficulties for the U.S. role in the Cuban economy, while allowing other competing nations to advance their own position. The longer an importer has to wait for goods to arrive, for which it has already paid, the more likely they are to look elsewhere for goods.⁵² The OFAC clarification is merely another obstacle to successful trade relations, constraining the opportunity for the U.S. agricultural firms to achieve long-term market potential in Cuba, while other foreign competitors advance their own potential.⁵³

The most burdensome restriction to successful trade relationships between U.S. agriculture corporations and Cuba may be the stringent prohibitions on the travel of U.S. citizens to Cuba. In order for a representative of a U.S. firm to travel to Cuba to negotiate the commercial export sale of agricultural commodities, he or she must obtain an additional license through OFAC - which adds another burdensome element to the process.⁵⁴ Effective June 2004, President Bush further tightened the restrictions regulating U.S. citizen travel to Cuba.⁵⁵ The new regulations not only affect those entering into trade agreements with Cuba, but also Cuban-Americans visiting family, students participating in educational activities and any others visiting non-Cuban nationals.⁵⁶

One way for U.S. agriculture entities to avoid this hurdle is by granting power of attorney to a third party who can more easily travel to Cuba, but this creates a whole other set of potential legal complications.⁵⁷ The inability for U.S. agriculture companies to meet face

⁵² See Nadkarni, *supra* note 44.

⁵³ See U.S., *Federal Farm Policy, Hearing Before the H. Comm. On Agriculture*, 109th Cong. (2006) (statement of Paul T. Combs, Chairman, U.S. Rice Producer’s Group) [109th Hearings]. The administration’s additional restriction, aimed at further isolating Cuba, instead allowed other nations to realize trade opportunities that would have otherwise gone to American companies and U.S. farmers. Rep. Jerry Moran, “Time for a Change in Cuba Trade Sanctions” *Wichita Eagle* (24 December 2006) A3.

⁵⁴ See Michael C. McClintock, “Selling Agricultural Commodities to Cuba – What Happens Next?” (2004) 17 *St. Thom. L. Rev.* 225 at 231.

⁵⁵ *Cuban Assets Control Regulations*, 69 Fed. Reg. 33768 (16 June 2004) (to be codified at 31 C.F.R. § 515). See also Ignacio M. Sarmiento, “International Legal Affairs: Traveling to Cuba? Sorry It’s Closed” (2005) 29 *Nova L. Rev.* 287 at 300.

⁵⁶ Sarmiento, *supra* note 55, at 300-305.

⁵⁷ Nuris Pinero Sierra, Director, Bufete Servicios Especializados, (Address to the New York University School of Law Cuban Law and Society Class, Havana, Cuba, 13 March 2007) [unpublished] [Sierra Address].

to face with Alimport,⁵⁸ the Cuban state run food purchasing agency, makes it difficult for the parties to strike deals, restricting the prospects of taking advantage of the intentions of TSRA.⁵⁹ It has been estimated that lifting the travel restrictions would produce an additional US\$126 million to \$252 million in annual U.S. agricultural exports and create an additional 3,490 to 6,980 jobs for Americans.⁶⁰

The TSRA and OFAC restrictions make it more difficult for Cuba to enter into an agricultural trade agreement with U.S. firms compared to other countries who do not present similar hurdles. Though agricultural trade agreements may be mutually beneficial to both the Cuban population and the U.S. agricultural industry, the complex regulations, referred to by Alimport as a “maze of restrictions...[has] pushed the Cuban market away from [U.S.] competitive and professional supply and in favor of [U.S.] competitors elsewhere who are aggressively keen to deal with [Cuba].”⁶¹ There may be economic incentives for Cuba to trade with the United States, but the extent of prohibitions and restrictions often seem to outweigh the benefits.

III. TSRA AND U.S.-CUBAN TRADE IN PRACTICE

The United States and Cuban governments report significantly different figures on the amount of U.S. agricultural commodities purchased by Cuba. U.S.-generated figures claim that \$1.7 billion⁶² in agricultural products (i.e. those qualifying under TSRA) have been purchased by Cuba since trade relations were re-established in

⁵⁸ As Cuba’s state run food purchasing agency, under the umbrella of the Cuban Ministry of Foreign Trade, Empresa Cubana Importada Alimentos (“Alimport”) is the only body authorized by the Cuban government to import food products into the country. The Cuban agency is responsible for all contracts, payments, trade regulations and the organization and facilitation of all agricultural imports. Interview of Jose Roman Mendez, President, Cuban Chamber of Commerce, in Havana, Cuba (15 March 2007) [unpublished] [Mendez Interview].

⁵⁹ See Sierra Address, *supra* note 57.

⁶⁰ Enrique R. Carrasco, “Introduction to the Symposium (Whither Goes Cuba? Prospects for Economic & Social Development Part I of II): Cuba’s Development and Trade with the U.S. Midwestern States: Opening Observations” (2004) 14 *Transnat’l L. & Contemp. Probs.* 1, 9-10.

⁶¹ Pedro Alvarez Borrego, Alimport Chairman, (Remarks by teleconference at the National Summit on Cuba in Mobile, Alabama, 10 June 2005), online: World Policy Institute <<http://www.worldpolicy.org/projects/uscuba/Alvarez05.html>> [Borrego National Summit Remarks].

⁶² All dollar figures throughout this study will be assumed as U.S. dollars.

November 2001.⁶³ Alternatively, Alimport has issued a report claiming that Cuba has made \$2.1 billion in actual cash payments for U.S. food and agricultural products for the same period.⁶⁴ However, common trends can be identified in both sets of figures.

Sales increased steadily for the first few years after TSRA was codified, as a larger number of U.S. agricultural firms became involved in trading with Alimport.⁶⁵ According to one set of figures, sales rose from \$7 million in 2001, to \$146 million in 2002, to \$259 million in 2003, to \$404 million in 2004.⁶⁶ However, after travel restrictions were tightened by the Bush administration in 2004 and the Treasury Department clarified the “payment of cash in advance” language of TSRA, sales dropped as relationships became more difficult to maintain under the new regulations. In 2005, as a result of the tightened restrictions, agricultural exports to Cuba fell by nearly 25%.⁶⁷ For the first time since the initiation of agricultural trade under TSRA, the amount of trade between the two countries decreased; in 2005 Cuba purchased only \$369 million in agricultural commodities.⁶⁸ Though sales slightly rebounded in 2006,⁶⁹ it is not clear that the level of growth will reach the levels attained prior to the enactment of the additional restrictions in 2005. The additional restrictions have had a significant effect on the fragile trade relations. Alimport stated that the “OFAC rule and its consequent uncertainties about US supply, compelled us to resort to alternative sellers in other foreign countries for \$300 million in food and agricultural purchases that had originally been planned from the US.”⁷⁰ There is no guarantee that U.S. agricultural entities will be able to regain the share of the Cuban market that has been lost.

⁶³ Mark P. Sullivan, “Cuba: Issues for the 110th Congress” CRS Report for Congress, RL33819 (21 August 2007), online: Federation of American Scientists <<http://www.fas.org/sgp/crs/row/RL33819.pdf>> at CRS-20 (reporting only through the first 11 months of 2006).

⁶⁴ Alimport, *Experiences and Prospects on Purchases from the U.S.*, Havana, Cuba (March 2007). While it is possible that the difference can be explained by the different fiscal calendars (Cuba’s fiscal calendar is pinned to the calendar year, unlike the United States), the cumulative figures should match up.

⁶⁵ See Sullivan, *supra* note 63 at 17.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Borrego National Summit Remarks, *supra* note 61.

IV. TRADE FROM THE CUBAN PERSPECTIVE

Since the beginning of the Special Period – the period of economic crisis in Cuba, at its worst from 1990-1993, following the termination of its special trade relationship with the former Soviet Union – Cuba has had to alter priorities within its economic infrastructure and identify a variety of new international trade partners to meet its needs.⁷¹ Such opportunities have been created by the new geopolitical reality in Latin American nations, such as Venezuela and Bolivia, which share Cuba's opposition to "neo-liberal globalization" and capitalist imperialism.⁷² In 2006, the three countries entered into the *Agreement for the Application of the Bolivarian Alternative for the Peoples of Our America and People's Trade Agreement*, which calls for cooperation in health, trade, education and other joint ventures to mutually benefit one another.⁷³

The burgeoning relationship between both Fidel and Raul Castro and Venezuelan President Hugo Chavez, in particular, has been fruitful for the two nations. A recent agreement between them has resulted in the transfer of low-cost Venezuelan oil exports in exchange for Cuban medical services.⁷⁴ The U.S. government estimates that Venezuelan oil "subsidies" reached more than \$2 billion in 2006, while also providing upwards of \$500 million in credit for various projects, including housing and electricity.⁷⁵ As further indication of how this relationship has flourished, in 2004 and 2005 Cuba imported more than double the amount of commodities from Venezuela than they had from any other nation.⁷⁶ In this new political climate, Cuba's continued investment in medical services and education, even throughout the Special Period, is paying off in large returns, as there is an increasing demand for such services by Latin American and Caribbean countries.⁷⁷

China is another example of a country that has improved its standing with Cuba and increased trade relations with Cuba since the

⁷¹ See Archibald R. M. Ritter, "Cuba's Strategic Economic Re-Orientations", online: (2006) 16 *Cuba in Transition* 140.

⁷² *Ibid.* at 141.

⁷³ See Evo Morales, Fidel Castro, & Hugo Chavez, *Agreement for the Application of the Bolivarian Alternative for the Peoples of Our America and the Peoples' Trade* (4 August 2006), online: [Venezuelanalysis.com](http://www.venezuelanalysis.com) <<http://www.venezuelanalysis.com/articles.php?artno=1789>>.

⁷⁴ See Ritter, *supra* note 71, at 141.

⁷⁵ Sullivan, *supra* note 63 at 6-7.

⁷⁶ Carlos M. Menendez, "New Trends," *Cuba Foreign Trade* (March 2006) at 77.

⁷⁷ See Ritter, *supra* note 71 at 144.

dissolution of the Soviet Union.⁷⁸ Through the deferral of loan payments - which Cuba incurred during the Special Period - and grants of credit, China has steadily increased its role in the Cuban trade market in recent years as a result of the countries' similar political regimes.⁷⁹

While TSRA has allowed the United States to play a role in the Cuban economy, American interests have not flourished quite like those of Venezuela and China. Though the United States entered the Cuban market in 2001 and steadily increased their share for nearly four years, 2005 presented a stumbling block in that growth.⁸⁰ Following the Bush administration's tightening of trade and travel restrictions, the U.S. share of the Cuban import market decreased from 8% to 6%, while Venezuela increased their share from 20% to nearly 25%, and China's share increased from 10.5% to 11.8%, surpassing Spain.⁸¹ Today, the U.S. Department of State claims it is the fourth largest supplier of goods to the Cuban economy, behind only Venezuela, China and Spain.⁸² Despite the fact that it solely provides agricultural commodities to Cuba in the face of increased restrictions, the United States has clearly made its presence felt amongst other nations competing for a position in the Cuban market.

Cuba has continually claimed that its government is open to any and all trade with the United States, explicitly placing the burden on the United States to normalize and enhance trade relations between the two countries. Alimport has issued statements reflecting the desire to normalize the regulatory business environment and continue to increase the amount of U.S. imports.⁸³ They have reached out to U.S. states with strong agricultural interests, as well as to U.S. agricultural firms.⁸⁴

The most significant advantage Cuba has in trading with the United States is the savings that can be achieved on transportation costs, as compared with those costs when trading with European, Asian

⁷⁸ *Ibid.* at 142.

⁷⁹ *Ibid.* See also Jorge F. Perez-Lopez, "The Cuban Economy in 2005-2006: The End of the Special Period?", online: (2006) 16 Cuba in Transition 1 at 8. China has granted \$6.1 million in credit for the purchase of hospital supplies and medical equipment, credit to purchase 1 million Chinese televisions, and deferred the repayment of pre-existing loans for 10 years among other various joint venture development projects.

⁸⁰ See Sullivan, *supra* note 63 at 17.

⁸¹ Menendez, *supra* note 76 at 77.

⁸² U.S. Department of State, *supra* note 37.

⁸³ See e.g., Borrego National Summit Remarks, *supra* note 61.

⁸⁴ See *infra* note 97 and accompanying text.

or even South American countries.⁸⁵ Cuba annually imports approximately \$1 billion of agricultural goods from countries other than the United States, of which transportation costs constitute nearly thirty-five percent of production costs.⁸⁶ It has been estimated that Cuba can save up to \$100 million annually on transportation costs alone, should it import primarily U.S. agricultural products.⁸⁷ With those figures in mind, one would imagine that the savings realized would be enough to motivate Cuba to meet restrictions and regulations required by TSRA and OFAC. Consistent with this premise, the Cuban Chamber of Commerce has indicated that if the United States wishes to open a dialogue with Cuba, opening trade lines between the two countries, then Cuba would be interested.⁸⁸ The cheaper transportation costs as a result of the geographical proximity would be a very strong factor influencing Cuban trade relations with the United States over other international trade partners.⁸⁹

However, the situation is not so clean cut when viewed outside of the sheer economic lens and perspective from which the Cuban Chamber of Commerce may be approaching the situation. The state of affairs is more complex than a mere economic analysis would indicate. This is evidenced by statements made by Raul Castro, while sitting as Acting President of Cuba, shortly after assuming office.⁹⁰ In a December 2006 speech commemorating the 50th anniversary of the Cuban Revolution, Raul stated:

We take this opportunity to once again state that we are willing to resolve at the negotiating table the longstanding dispute between the United States and Cuba, of course provided they accept, as we have previously said, our condition as a country that will not tolerate any blemishes on its independence, and as long as said resolution is based on the principles of equality, reciprocity, non-interference and mutual respect. In the meantime, after almost half a century, we are willing to wait patiently until

⁸⁵ Carrasco, *supra* note 60 at 2.

⁸⁶ *Ibid.*

⁸⁷ Mendez Interview, *supra* note 58.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ See Raul Castro (Remarks at the Commemoration of the 50th Anniversary of the Cuban Revolution and the Celebration of the 80th Birthday of Cuban Leader Fidel Castro, 2 December 2006), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/6202898.stm>> [Raul Speech].

the moment when common sense prevails in the Washington power circles.⁹¹

These statements reflect not only the state of economic and trade relations, but also to the social and political relations between the United States and Cuba; yet another indication that much more than mere economics is at play when speaking of normalizing trade relations between the two nations. Political, ideological and historical forces lie at the root of the 50 year standoff between the United States and Cuba, and trade relations cannot be expected to exist independently of these other forces. While Alimport and the Cuban Chamber of Commerce may be making significant strides in developing relationships with U.S. states and agricultural entities, the Castro government has made it clear that U.S. recognition of their regime is necessary before trade relations can flourish.

V. TRADE FROM THE U.S. PERSPECTIVE

Since the latter part of the 1990s, beginning with the lobby for the passage of TSRA, various states and industries have placed increasing pressure upon the U.S. government to ease trade and travel restrictions and end the embargo. TSRA is seen as the necessary first step in the longer journey towards the total breakdown of the embargo and a changed political stance with respect to Cuba and the Castro regime.⁹² However, while a segment of the U.S. public is in favor of lifting the embargo and the associated restrictions, there are also those who believe “the embargo is finally working and to lift it now would only add strength to the Castro regime and betray the faith of those Cubans who have supported U.S. policy since the revolution.”⁹³ The pro-embargo contingency is in favor of retaining the hard-line U.S. policy toward Cuba and believes TSRA is the unfortunate catering of the U.S. government to special interests that directly benefit from the expanding trade.⁹⁴ Those same interests would see an end to the embargo while the Castro regime remains in power as the worst possible outcome. They believe catering to

⁹¹ *Ibid.*

⁹² See Parr Rosson & Flynn Adcock, *Economic Impacts of U.S. Agricultural Exports to Cuba*, Texas A&M University, Department of Agricultural Economics, Center for North American Studies, CNAS 2002-2 (April 2002), online: Center for North American Studies <<http://cnas.tamu.edu/publications/CubaFinal2.pdf>> at 1-2.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

foreign and domestic powers opposing the embargo would equate to a complete failure of the policy pursued over the last 45 years.⁹⁵

The push to limit trade and travel restrictions imposed against Cuba has been spearheaded by a number of economically depressed states in the U.S. whose agricultural sectors are constantly in search of export opportunities.⁹⁶ Since agricultural trade with Cuba has been permitted under TSRA, numerous commercial agreements have been signed between Alimport and primarily Southern and Midwestern states.⁹⁷ Those states who see economic potential under the new policies have advocated greater easing of the trade and travel restrictions. Southern and Midwestern states have also been the most active in encouraging enhanced trade relations as they stand to benefit the most.⁹⁸ One study estimates that 60,000 new jobs in Southern states would be realized if uninhibited trade with Cuba resumed.⁹⁹ In Alabama alone, the Alabama Department of Agriculture and Industries reported that since TSRA was passed, sales to Cuba have had a total impact of \$300 million on the state economy.¹⁰⁰ Even in the state of Florida, which has traditionally been home to the strongest opposition to opening up trade relations with Cuba and the Castro regime,¹⁰¹ there has been a move to take advantage of the economic opportunities that would result from agricultural trade relations with Cuba.¹⁰²

⁹⁵ See Colomer, *supra* note 7 at 177. This paper will not further address the implications of policy failure should the embargo be lifted while the Castro regime and a one party system is still governing Cuba.

⁹⁶ Carrasco, *supra* note 60 at 2.

⁹⁷ See Alimport, *supra* note 64. The states that have themselves entered into commercial agreements with Alimport, or are home to cities who have entered into such agreements, include: Alabama, Indiana, Iowa, Montana, Texas, Minnesota, Florida, Idaho, South Carolina, Pennsylvania, California, Vermont, Kansas, Louisiana, North Dakota, Nebraska, Michigan and Virginia.

⁹⁸ "Economists: South would gain most from trade with Cuba" *Birmingham Business Journal* (10 June 2005), online: Birmingham Business Journal <<http://birmingham.bizjournals.com/birmingham/stories/2005/06/06/daily36.html>>.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Florida's strong opposition to entering into relations with Cuba stems from the large population of Cuban exiles living in Florida, who fled the Revolution and are opposed to any political dealings with the Castro regime.

¹⁰² See Chris Echegaray, "Tampa Businessmen Plan Increased Trade with Cuba" *The Tampa Tribune* (28 February 2007), online: Cuba Journal <<http://cubajournal.blogspot.com/search/label/John%20Parke%20Wright%20I%20V>>. See also Ferdie De Vega, "It's Time to Trade with Cuba Again" *Tallahassee Democrat* (19 January 2007), online: Cuba Journal

In addition to cities and states, a variety of other entities have entered into agreements with Alimport as trade continues to flourish. Ports, primarily along the Gulf of Mexico, have struck commercial deals with Alimport for the shipping of agricultural commodities to Cuba, including: Mobile, Alabama; Corpus Christi, Texas; Manatee, Florida; Houston, Texas; Philadelphia, Pennsylvania; Lake Charles, Louisiana; and New Orleans, Louisiana.¹⁰³

Highlighting the diversity of entities seeking to take advantage of this newly emerging market by entering into trade agreements with Alimport, in 2006 the Navajo Nation in New Mexico, through the Navajo Agricultural Products Industry, signed a letter of intent to sell agricultural commodities to Cuba.¹⁰⁴ The Navajo President was not only enticed by the deal's recognition of the Navajo as a sovereign nation within a nation, but also the capacity to generate millions of dollars for its population.¹⁰⁵ The delegation that traveled to Havana to negotiate the deal with Alimport was the highest level U.S. delegation to visit Cuba since presidential power was transferred from Fidel to Raul Castro on 31 July 2006.¹⁰⁶

Additionally, agricultural trade associations, such as the U.S. Rice Federation, U.S. Rice Producers Association, U.S. Wheat Associates, U.S. Grain Council, and U.S. Soybean Association have entered into commercial trade agreements to export commodities to Cuba.¹⁰⁷ The U.S. rice industry has been outspoken regarding trade relations with Cuba, testifying at Congressional hearings and lobbying for relaxing the restrictions. Prior to President Kennedy's declaration initiating the embargo, Cuba was the U.S. rice industry's top export market.¹⁰⁸ From the beginning of the embargo through the adoption of TSRA, Southeast Asian countries such as China, Vietnam and Thailand had cornered Cuba's rice import market.¹⁰⁹ However, since late 2001, the U.S. rice industry has begun to regain a share of that market, exporting \$64

<<http://cubajournal.blogspot.com/search/label/John%20Parke%20Wright%20I>
V>.

¹⁰³ See Alimport, *supra* note 64.

¹⁰⁴ Michelle Chen, "Navajos, Cuba Strike Unprecedented Trade Deal" *The New Standard* (4 September 2006), online: *The New Standard* <<http://newstandardnews.net/content/index.cfm/items/3629>>.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ See Alimport, *supra* note 64.

¹⁰⁸ See 109th Hearings, *supra* note 53.

¹⁰⁹ *Ibid.*

million of rice to Cuba in 2004.¹¹⁰ Other U.S. agricultural industries have followed a similar path, lobbying for less restrictive trade regulations, specifically the 2004 OFAC clarification, in order to increase their market share in the Cuban economy. Alimport has even taken an official stance, encouraging states and other entities with whom they have entered commercial agreements to lobby Washington to put an end to the embargo.¹¹¹

VI. ADDITIONAL U.S. LEGISLATION AND POLICY INITIATIVES

Since the passage of TSRA, United States legislators have come under significant and increased pressures to end the trade embargo and all related trade restrictions. The lessons learned from trade between the United States and Cuba under TSRA has highlighted the lost economic opportunities resulting from the embargo and the trading potential that exists between the two countries. One study estimates that, should the embargo be repealed and the United States pursue investments in Cuba, agricultural exports could approach nearly \$517 million of value added annually to the U.S. economy.¹¹² The same study calls for an additional 10,656 jobs created in the agricultural sector.¹¹³ States that would stand to benefit the most from value added and employment are Arkansas, Iowa, California, Texas and Nebraska.¹¹⁴

The potential for such significant economic advancement, in the agricultural sector and beyond, have created a political climate ripe for governmental action to ease the trade restrictions and move closer towards ceasing the embargo. Policy specialists have identified a multitude of reasons aside from economic achievements, including human rights, education and travel, in support of a shift in U.S. policy

¹¹⁰ *Ibid.*

¹¹¹ See Mendez Interview, *supra* note 58.

¹¹² See Rosson & Adcock, *supra* note 92, at 11-40. The \$517 million of value added represents the study's moderate export growth forecasts. The high forecast calls for \$1.5 billion of value added annually, while the low forecast calls for \$47 million of value added annually to the U.S. economy.

¹¹³ *Ibid.* 10,656 represents the moderate export growth forecasts, while the high forecast calls for 31,262 additional jobs and the low forecast predicts 995 additional jobs.

¹¹⁴ *Ibid.* Though there is some fluctuation in the rankings of states that stand to benefit, for the most part they remain the same.

towards Cuba.¹¹⁵ In recent years, a number of new coalitions formed to lobby for a change in policy, resulting in important governmental officials increasingly supporting change and proposing legislation in Congress.¹¹⁶ Politicians have utilized the success of TSRA as a springboard to advance even more progressive trade measures and policy goals.

In 2002, President Carter became the first U.S. President to travel to Cuba since 1928, as he ventured upon a mission to mend relations between the neighbouring countries.¹¹⁷ The former President expressed the goals he hoped to achieve:

[A] Cuba fully integrated into a democratic hemisphere, participating in a Free Trade Area of the Americas and with our citizens traveling without restriction to visit each other. I want a massive student exchange between our universities. I want the people of the United States and Cuba to share more than a love of baseball and wonderful music. I want us to be friends, and to respect each other.¹¹⁸

While this ambitious vision extends far beyond the mere opening of trade relations, President Carter recognized that the first step involves an act of Congress to lift the embargo, creating an open trade relationship and permitting unrestricted travel.¹¹⁹ These words were not only a good will gesture towards the Cuban government and people, but were a plea to U.S. legislators to take action regarding existing policy towards Cuba.

¹¹⁵ USA*Engage - a coalition of businesses, agricultural groups and trade associations working to promote the benefits of U.S. engagement abroad - has developed a list of the top ten reasons for changing U.S. policy toward Cuba. Some of the non-economic reasons include: (1) The policy has produced nothing in decades; (4) The policy is an assault on family values; (5) The policy infringes on the rights and liberties of all U.S. citizens; (6) The policy hurts America's image abroad; (7) The Castro government uses our policy to advance its own ends; (8) The policy puts political interests above the national interests. See USA*Engage, "In Our National Interest: The Top Ten Reasons for Changing U.S. Policy Toward Cuba" (2007), online: USA*Engage <http://www.usaengage.org/storage/usaengage/Publications/2007_01_cda_toptenreasons.pdf>.

¹¹⁶ See *infra* notes 122-126.

¹¹⁷ Jimmy Carter, "The United States and Cuba: A Vision for the Twenty-First Century" (2002) 16 *Emory Int'l L. Rev.* 391 at 391.

¹¹⁸ *Ibid.* at 393.

¹¹⁹ *Ibid.*

More recently, in December 2006, a delegation representing the House of Representatives' Cuba Working Group traveled to Havana as the largest U.S. delegation to visit Cuba since the Revolution.¹²⁰ The 10 person delegation, a bi-partisan group led by Representative Delahunt (D-MA) and Representative Flake (R-AZ), met with foreign minister Felipe Perez Roque and economic minister Yadira Garcia to discuss various issues of U.S.-Cuba policy and improved relations.¹²¹ This visit was another factor that has led to the recent proliferation in proposed legislation regarding enhanced relations between the two countries.

Within the first three months of 2007 alone, four bills were proposed in the House and one in the Senate with the express goal of breaking down travel and trade restrictions between the United States and Cuba. These include: the *Cuba Reconciliation Act*,¹²² the *Export Freedom to Cuba Act of 2007*,¹²³ the *Agricultural Export Facilitation Act of 2007*,¹²⁴ *Free Trade with Cuba Act*¹²⁵ and the *Freedom to Travel to Cuba Act of 2007*.¹²⁶ Though the bills have varying degrees of support in their respective houses, the sheer volume of these proposals is a strong indication that there is sentiment in Congress favouring the improvement of trade and travel relations with Cuba.

¹²⁰ Julia Preston, "Castro to Recover but Not Return, Cubans Say" *N.Y. Times* (18 December 2006) A6.

¹²¹ *Ibid.*

¹²² U.S., Bill H.R. 217, *Cuba Reconciliation Act of 2007*, 110th Cong., 2007 (intending to remove any provisions restricting trade and other relations with Cuba, including the repeal of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act).

¹²³ U.S., Bill H.R. 654, *Export Freedom to Cuba Act of 2007*, 110th Cong., 2007 (intending to restrict the president from prohibiting or regulating travel to or from Cuba by U.S. citizens).

¹²⁴ U.S., Bill H.R. 1026, *Agricultural Export Facilitation Act of 2007*, 110th Cong., 2007 (intending to clarify the congressional intent of TSRA regarding "cash in advance," facilitating travel between the United States and Cuba for citizens of both countries dealing with agricultural trade and authorizing the direct transfer of funds between U.S. and Cuban banking institutions).

¹²⁵ U.S., Bill H.R. 624, *Free Trade with Cuba Act*, 110th Cong., 2007 (intending to restrict the President from prohibiting the imposition of export controls with respect to Cuba, prohibiting the regulation and banning of travel to Cuba, repealing the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act, and urging the President to take all necessary steps to conduct negotiations with the government of Cuba).

¹²⁶ U.S., Bill S. 721, *Freedom to Travel to Cuba Act of 2007*, 110th Cong., 2007 (intending to prohibit the President from regulating or prohibiting travel to Cuba).

President Bush has made it clear that he would veto any attempt by Congress to relax trade and travel restrictions with Cuba.¹²⁷ Since the beginning of his Presidency, Bush has affirmed, that “[t]he United States...will oppose any attempts to weaken sanctions against the Castro regime until it respects the basic human rights of its citizens, frees political prisoners, holds democratic free elections, and allows free speech.”¹²⁸ Any change in congressional policy towards Cuba, encouraging the easing of trade and travel restrictions, would confront a veto.

One of the most significant reasons that President Bush and his executive predecessors have taken little, if any, action to improve relations with Cuba is the political influence of the Cuban-American population residing in south Florida.¹²⁹ Should the sentiment of this support base begin to shift away from its strong anti-Castro views toward a more cooperative stance, there is reason to believe the executive would be more responsive to the legislature’s proposals. There is reason to believe this shift is already underway.¹³⁰

VII. ROLE OF SOUTH FLORIDA CUBAN-AMERICANS INFLUENCING TRADE POLICY

Over the years, a key factor preventing the adoption of any legislation or policy initiatives that would open trade relations with Cuba has been the presence of a strong political contingency of Cuban-Americans residing in southern Florida. From the early days of the Cuban revolution through the present, nearly one million Cubans have left their homeland for the United States for economic, political and familial reasons. A large majority of these exiles currently reside in south Florida.¹³¹ For decades, these Cuban-Americans, both first-generation immigrants and their children, have carried strong political weight

¹²⁷ Bruce Odessey, “Congress Passes Massive Spending Bill, Dropping Cuba Provisions” *U.S. Department of State’s Bureau of International Information Programs* (23 November 2004), online: USINFO <<http://usinfo.state.gov/wh/Archive/2004/Nov/23-447801.html>>.

¹²⁸ George W. Bush, “Toward A Democratic Cuba” (13 July 2001), online: U.S. Department of State <<http://www.state.gov/p/wha/rls/rm/2001/4301.htm>> [Bush Speech].

¹²⁹ See Part VII, below.

¹³⁰ *Ibid.*

¹³¹ Matias F. Travieso-Diaz, “Immigration Challenges and Opportunities in a Post-Transition Cuba” (1998) 16 *Berkeley J. Int’l L.* 234 at 240-251.

influencing not only domestic issues but also the creation and enforcement of the federal government's policies towards Cuba and the Castro regime. The *Cuban Democracy Act*, which created additional trade restrictions and codified the embargo in 1992, was signed by President Bush at the behest of the Cuban-Americans residing in Miami.¹³² There was a strong belief amongst that population that a tightening of the embargo would trigger Castro's fall from power.¹³³

As witnessed in the 2000 presidential election, appealing to Cuban-Americans in any election in Florida is critical because of their sheer number and tremendous political influence.¹³⁴ Over the last decade a small number of swing states have played a pivotal role in determining the winner of closely challenged races, particularly in Presidential elections due to the Electoral College system. As a result, states like Florida, Ohio, Michigan and Pennsylvania have obtained disproportionate influence, with strong voting bases like the Cuban-American population in south Florida becoming increasingly critical. While this population base has developed considerable influence in Florida, its significance has simultaneously transcended to the national level. Hence, it is no surprise that legislators and other officials in Washington have catered to the majority Cuban-American sentiment in Miami when crafting Cuba related policy.

The majority of Cuban-Americans residing in south Florida, primarily those first generation immigrants who fled Cuba in the first wave after the Revolution, favour the U.S.-Cuban trade embargo, President George W. Bush's handling of the situation in Cuba, and the additional trade and travel restrictions imposed by the Bush administration in 2004.¹³⁵ An overwhelming majority of immigrants that

¹³² Monroe Leigh, "Agora: The 1994 U.S. Action in Haiti: The Political Consequences of Economic Embargos" (1995) 89 A.J.I.L. 74 at 77. ("While President Bush had initially opposed this measure, he changed position during the election campaign of 1992, after candidate Clinton campaigned in Florida in support of the proposed legislation. Shortly thereafter, Congress passed the bill and President Bush staged a highly public signing ceremony in the presence of Cuban-American political activists in Miami. . . .")

¹³³ *Ibid.*

¹³⁴ D'Anna Harrison, "Deportable Cubans in Limbo: An Issue of Immigration, Foreign Policy, or Both?" (2003) 18 Geo. Immigr. L.J. 179 at 196. 72 percent of Cuban-Americans residing in Miami-Dade and Broward County who are registered to vote are registered Republicans, while only 11% are registered Democrats. See NDN, "Survey of Cuban and Cuban American Resident Adults in Miami-Dade and Broward" (September 2006), online: NDN <<http://www.ndn.org/hispanic/memos/Cuban-Exile-Poll.pdf>> [NDN Survey].

¹³⁵ See NDN Survey, *supra* note 134.

arrived before and during the 1970s still support a continuation of the embargo and the Bush administration's tighter restrictions.¹³⁶ However, the same cannot be said of second and third generation Cubans or those Cuban-Americans who arrived in south Florida in the 1980s or later.¹³⁷ Though a very slight majority of those Cuban-Americans favour a continuation of the embargo, the majority oppose the Bush administration's additional restrictions.¹³⁸

These figures are an indication that a transition is occurring in this influential population's political leanings and policy aims. As the older generation of Cuban-Americans begins to pass, it is likely that the pendulum will swing. Should the trend continue, the majority sentiment in south Florida will soon be opposed to the embargo and tight travel and trade restrictions against Cuba. This fundamental change will be a very strong factor in the future of trade and travel relations between the United States and Cuba.

VIII. INDICATORS FOR THE FUTURE

Though contemporary trade relations between the United States and Cuba have only existed since the adoption of TSRA in 2001, there are many lessons to be learned from these recent experiences should the U.S. government choose to make a concerted effort to expand its presence in the Cuban economy beyond severely restricted agricultural trade. In addition, the historical and political context that lead to the adoption of TSRA may well serve as an indicator of what potential exists for trade relations to normalize and even flourish between the United States and Cuba. Some analysts have suggested that we are at a critical juncture in the relations between the two countries.¹³⁹

On 31 July 2006, Fidel Castro issued a provisional resignation from his positions in the Cuban Government, appointing his brother, Raul Castro Ruiz, as his successor. Less than two years later, on 19 February 2008, Fidel issued his official resignation from his posts as President of the State Council and Commander-in-Chief of Cuba, being

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ See James C. McKinley Jr., "Castro 'Stable,' But His Illness Presents Puzzle" *N.Y. Times* (2 August 2006) A1 (suggesting that Castro's illness presents a time of transition, the result of which is unknown).

officially succeeded by Raul.¹⁴⁰ There has been speculation that Cuba might shift to a different economic model under Raul, more similar to that of China or Vietnam, but there has been little change to date.¹⁴¹ However, the Cuban public's expectation for economic and policy reform may have some influence over the country's new leadership.¹⁴²

Raul has made various public offers to engage in a dialogue with U.S. leaders regarding trade reform between the two countries,¹⁴³ but those offers have been rejected by U.S. officials who maintain that the implementation of a transitional Cuban government is a precondition to any talks to ease or suspend the embargo. These officials take a hard-line stance towards the *Cuban Liberty and Democratic Solidarity Act of 1996*,¹⁴⁴ which sets forth specific conditions for the suspension of the embargo, including the existence of a transitional government that does not include Fidel or Raul Castro. With President Bush at the forefront of this charge, there is little chance that any reform will occur prior to the end of his term in January 2009.

The Executive and the Presidential Veto have served as an immovable obstacle to any such change in policy since the implementation of the embargo. TSRA has been the only exception to the embargo not opposed by the executive, since President Kennedy initiated the trade restrictions by decree. However, even TSRA has been ratcheted up by President Bush, through the Treasury Department, to ensure that the force of the embargo will remain strong until the objectives of the *Cuban Democracy Act* and the *Cuban Liberty and Democratic Solidarity (Libertad) Act* have been met.¹⁴⁵ Steps taken by TSRA-authorized trade to ease restrictions were quickly constricted by the President's actions. This political stalemate¹⁴⁶ is one looming factor - within the U.S. sphere - that

¹⁴⁰ Associated Press, "Full Text of Fidel Castro's Resignation Letter" *Washington Post* (19 February 2008), online: *Washington Post* <<http://www.washingtonpost.com/wp-dyn/content/article/2008/02/19/AR2008021901221.html>>.

¹⁴¹ See Mark P. Sullivan, "Cuba's Political Succession: From Fidel to Raul Castro" CRS Report for Congress, RS22742 (29 February 2008), online: Federation of American Scientists <<http://ftp.fas.org/sgp/crs/row/RS22742.pdf>> at CRS-3

¹⁴² *Ibid.*

¹⁴³ *Ibid.* at CRS-5.

¹⁴⁴ TSRA, *supra* note 20 at §§ 6021-6091.

¹⁴⁵ See 70 Fed. Reg. 9225, *supra* note 39.

¹⁴⁶ Bush has mentioned throughout his presidency that he would not remove or weaken sanctions until the Cuban government "respects the basic human rights of its citizens, frees political prisoners, holds democratic free elections, and allows free speech." Bush Speech, *supra* note 128. Recently, the Cuban government has stated that they "will not tolerate any blemishes on its independence," indicating their unwillingness to cater to U.S. preferences of

does not bode well for the prospects of enhanced trade relations. However, there is the prospect that the next President may recognize the shift in public sentiment toward Cuba and the potential benefits to the economy to be gained through policy change and an easing of trade restrictions.

As the election of a new U.S. President is quickly approaching, this may bring the United States and Cuba closer to a crossroads in defining future trade relations. Candidates Hillary Clinton and John McCain have assumed a conditional stance towards engaging in a dialogue with the Cuban leadership, more consistent with that of the current administration. Candidate Barack Obama, at the other end of the spectrum, has outwardly expressed an interest in shifting the U.S. policy towards Cuba. In 2004, Obama suggested that it is time to repeal the embargo and rethink existing U.S. policies toward relationships with Cuba.¹⁴⁷ More recently, in response to Fidel's resignation, Obama stated, "If the Cuban leadership begins opening Cuba to meaningful democratic change, the United States must be prepared to begin taking steps to normalize relations and to ease the embargo of the last five decades."¹⁴⁸ This suggests that any dialogue with Raul Castro would not be subject to the same preconditions detailed in the *Cuban Liberty and Democratic Solidarity Act of 1996*. With Raul and Obama in their respective offices, the countries would have their best chance at engaging in enhanced trade relations.

However, this complex relationship is much larger than the individuals occupying the respective offices of the presidencies. There are a multitude of factors pertaining to the U.S. political environment, the Cuban socio-political atmosphere and international trade markets that will influence future U.S.-Cuban trade relationships.

The current political and economic climate in the United States would indicate that the time is ripe for a progressive change in favour of enhancing agricultural trade relations, or even expanding trade to other sectors, so that the United States could take advantage of this potential market. Prior to the adoption of TSRA, there was a concerted effort by congressional representatives advocating for the agricultural exception to

Cuban governance. See Raul Speech, *supra* note 90. The conflicting stances have resulted in a stalemate with little chance for change of the U.S. President's position.

¹⁴⁷ Senator Barack Obama, Address, (Speech presented to Southern Illinois University, 20 January 2004) [unpublished].

¹⁴⁸ Barack Obama, "Obama's Statement on Castro's Resignation" (19 February 2008), online: Council of Foreign Relations <<http://www.cfr.org/publication/15524>>.

the trade embargo.¹⁴⁹ Economically depressed states recognized that Cuba, and other countries against which the United States had imposed unilateral trade sanctions, presented an opportunity to stimulate their economy.¹⁵⁰ Similarly today, a large number of representatives from states who stand to benefit from additional trade with Cuba have not only spoken out in favour of easing restrictions prohibiting trade and travel to Cuba, but have also proposed and co-sponsored relevant legislation in both congressional houses.¹⁵¹

Local and state governments have also become increasingly involved in the embargo and trade relations, as they have solicited Congress and the Executive Branch to end the embargo and move towards normalized relations. Somewhat of a localized grass-roots movement has developed in support of a change in U.S. policy towards Cuba. Nearly twenty cities across the United States - including Philadelphia, Oakland, Las Vegas, and Milwaukee - have established sister-city relationships with Cuban cities.¹⁵²

Concurrently, the shift that appears to be occurring amongst the influential Cuban-American population in south Florida¹⁵³ regarding attitudes towards relations with Cuba may support a change in policy. Although this voting block has traditionally opposed the easing of trade restrictions, the second and third generations of Cuban-Americans favour a step back from the hard-line isolationist position.¹⁵⁴ As the shift continues to evolve, this group becomes less likely to exhibit such strong opposition to any enhanced trade policy, and potentially more likely to favour such policy. The relative success of TSRA is yet another indicator that it is possible for trade relations to exist between the United States and Cuba, despite the feelings that a large population of south Florida residents harbour towards Cuba - and the Castro regime in particular.

Should all the requisite factors fall into place on the U.S. side in order to ease or lift the existing trade restrictions against the export of agricultural commodities - or even allow other forms of trade - there is no guarantee that Cuba will seize the opportunity to enter into such an enhanced relationship with the United States. As evidenced by its initial rejection of the U.S. offer to export agricultural goods in 2001, immediately following the adoption of TSRA,¹⁵⁵ Cuba may be less willing

¹⁴⁹ See *supra* note 10 and accompanying text.

¹⁵⁰ See *supra* note 96 and accompanying text.

¹⁵¹ See *supra* notes 122-126.

¹⁵² See U.S.-Cuba Sister Cities Association, online: <<http://www.uscsca.org/>>.

¹⁵³ See NDN Survey, *supra* note 134.

¹⁵⁴ *Ibid.*

¹⁵⁵ See *supra* notes 25-26 and accompanying text.

to accept such an offer than an economic analysis would indicate. For Cuba, U.S. commodities - whether agricultural or of another nature - may be significantly cheaper than those offered by other trade partners, as a result of the proximity between the two countries and the related transportation costs.¹⁵⁶ The Cuban government, however, whether under the leadership of Fidel or Raul, has very strong ideals and convictions when it comes to relations with the United States. These may impede the expansion of any such trade.

It is well known that one of the central tenets of the Cuban Revolution and the Castro regime is a strong policy against “neo-liberal globalization,” the United States and capitalist imperialism.¹⁵⁷ These convictions may lead Cuba to balk at the opportunity to take advantage of some forms of trade with the United States. Such selectivity has been present even under TSRA-authorized trade with Alimport. Cuba has claimed that the reduction in purchases by Alimport in 2005 came not as a result of tightened restrictions by the Bush administration and subsequent difficulties working out contracts with U.S. agricultural entities, but rather as a result of “efforts by the government of the Republic of Cuba to increase the motivation of United States-based companies, organization; state and local governmental representatives; and Members of the United States Congress to be more visible in their lobbying efforts for changes in United States policy, law and regulations.”¹⁵⁸

While the U.S. government believes it is in a position to alter Cuban policy through the implementation of trade sanctions and the embargo, the Cuban government believes it is in a similar position to alter U.S. policy by refusing to purchase U.S. commodities. The likely outcome of these conflicting views is a political impasse, resulting in the continuation of the status quo, unless one country chooses to take decisive action toward the situation’s resolution. The United States appears to be in the better position to take that first step toward resolving the standoff by further relaxing trade restrictions.¹⁵⁹ As evidenced by the tenure of the Castro regime, the U.S.-implemented trade restrictions have not been successful in attaining the goal of a democratic political structure in Cuba. Should the United States take the initiative and relax its existing trade policy towards Cuba, it is possible

¹⁵⁶ See *supra* notes 85-86 and accompanying text.

¹⁵⁷ Ritter, *supra* note 71 at 141.

¹⁵⁸ Economic Eye, *supra* note 65 at 3.

¹⁵⁹ President Carter, in a speech given at the University of Havana, noted that the U.S. is in a position to take the first step to resolve the U.S.-Cuban standoff because it is the more powerful nation. See Carter, *supra* note 117 at 393.

that the Cuban government would view such an act as a symbol of U.S. recognition of Cuban independence and governance. However, there is no guarantee the Castro regime would respond accordingly and tensions may continue.

Another relevant factor that may dictate the success of any future U.S.-Cuban trade relations is the state of Cuba's existing partnerships with other foreign countries. Since the Special Period, Cuba has developed strong ties with a number of international trade partners, including Venezuela, China, Spain, Canada, Holland, Brazil, Germany, Italy and Mexico.¹⁶⁰ Though the United States has also played a role in Cuban foreign trade since 2001, solely through TSRA-authorized exports, its share of this total market has hovered around 5%.¹⁶¹ This figure may be impressive given the associated prohibitions and restrictions, but other countries are taking advantage of the Cuban market where the United States would appear to have a leg up on the competition. Alimport itself, in statements made to private entities currently trading with Cuba, noted that "[t]he opportunities available in this neighboring and traditionally friendly country are being tapped by your competition elsewhere in the world."¹⁶² The potential share of the U.S. role in Cuba's total foreign trade, should trade be expanded and travel restrictions be eased or repealed, far exceeds its current state.

While Cuba has been outspoken about the mutual benefits of enhanced trade relations with the United States,¹⁶³ it might not be willing to sacrifice the relationships developed with trade partners that have stepped up since the dissolution of the Soviet presence in Cuba. In particular, trade relations with Venezuela, Bolivia and China, because of their similar political ideals,¹⁶⁴ will likely flourish in years to come, making it increasingly difficult for the United States to occupy any share of the market those countries currently possess. Additionally, countries that are willing to enter into trade agreements with Cuba on the basis of credit, as well as those prepared to defer pre-existing loan payments, will

¹⁶⁰ Menendez, *supra* note 76 at 77 (listing the top ten countries in Cuban foreign trade).

¹⁶¹ *Ibid.* In 2004, trade with the U.S. was 5.7% of Cuba's total foreign trade. In 2005, after increased trade and travel restrictions, this figure dropped to 4.9%.

¹⁶² Pedro Alvarez Borrego, Chairman and CEO, Alimport (Remarks at the opening session of the First 2004 Round of Cuba-U.S. Business Negotiations, 13 April 2004) [unpublished] [Borrego Cuba-U.S. Business Negotiations Remarks].

¹⁶³ *Ibid.* ("A normalized trade and travel relationship will generate additional employment in the U.S., improve the food and living conditions in Cuba, increase our mutual knowledge and understanding, and consequently, promote an atmosphere of peace and friendship between us.")

¹⁶⁴ See Ritter, *supra* note 71 at 140-142.

have a greater opportunity to play an increased role in Cuban foreign trade.¹⁶⁵ Though Cuba does not have any outstanding loans with the United States, the “payment of cash in advance” requirement of TSRA¹⁶⁶ and the subsequent OFAC clarifications of this terminology¹⁶⁷ render the United States a less attractive trade partner than countries offering transactions on the basis of credit. Even if the U.S. Congress can pass legislation easing these restrictions, Cuba’s poor credit rating¹⁶⁸ might discourage U.S. corporations and banking institutions from entering into such agreements.

Finally, Cuba’s long-term development of human capital, through its investment in education and health care services, places the country in a position to give priority to partners willing to enter into trade agreements exchanging goods for services. Venezuela has eagerly taken advantage of such exchange, exporting oil and other commodities to Cuba in return for medical personnel.¹⁶⁹ As a result, Venezuela occupies nearly a quarter of Cuba’s foreign trade market; this stronghold on the Cuban market will not likely be displaced by other trade competitors or the United States, even if the embargo is lifted. The fact that the United States does not have as pressing a need for Cuban health care services or education, one of Cuba’s major new export prospects,¹⁷⁰ as other potential Cuban trade partners may restrict the ability for the U.S. share of Cuban foreign trade to dramatically increase.

Assessing these factors holistically, the U.S. and Cuban political environments and the existing state of Cuban trade relations with other foreign entities make it appear quite difficult for the United States to improve its standing in the Cuban foreign trade market. There are not only economic factors, but strong political, ideological and historical factors that will dictate how any such relationship will develop. We have seen this dance played out through the evolution of agricultural exports to Cuba, authorized by TSRA. The experience over the last six years during which this trade has been operating, and the years leading up to the adoption of TSRA, serve as a strong indicator of the potential that exists for a U.S.-Cuban trade relationship to flourish. However, it has also provided a snapshot of the associated difficulties given the ideological differences between the two countries, the historical tension

¹⁶⁵ China is an example of a country that has rapidly increased their trade relations with Cuba because of their willingness to issue credit and defer loan payments. See *ibid.*

¹⁶⁶ 22 U.S.C. § 7207(b)(1)(A) (2007).

¹⁶⁷ See *supra* notes 40-41 and accompanying text.

¹⁶⁸ See *supra* note 38.

¹⁶⁹ See Ritter, *supra* note 71 at 144.

¹⁷⁰ *Ibid.*

and the complex political climate under which any future relationship would exist.