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Managed Engagement: The Case of Castro's Cuba

Daniel Fisk

Courtney R. Perez

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Managed Engagement: The Case of Castro's Cuba

Daniel Fisk* & Courtney R. Perez⁺

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I. INTRODUCTION

New attention on Cuba and speculation about its evolution were prompted last year by reports of Havana's intent to release fifty-two political prisoners,¹ the actual release of a select number of prisoners of conscience,² the announced layoff of 500,000 Cubans from the government payroll,³ and Fidel Castro's visible

* Daniel W. Fisk is currently the Vice President for Policy and Strategic Planning at the International Republican Institute and has served in a number of positions in the U.S. government with responsibility for policy development and implementation toward Latin America, including as Special Assistant to the President and Senior Director for Western Hemisphere Affairs on the National Security Council (2005-2009) and Deputy Assistant Secretary of State for Western Hemisphere Affairs (2002-2005), as well as service on the staffs of the U.S. Senate Committee on Foreign Relations and the House of Representatives Committee on Foreign Affairs. He holds J.D. and master degrees from Georgetown University and a bachelor of science from the University of Tulsa. He is a member of the Maryland State Bar Association and the Council on Foreign Relations.

⁺ Courtney R. Perez is a Program Officer at the International Republican Institute. She holds a J.D. degree from Washington College of Law, American University and a B.A. degree from Georgetown University.

1. Juan O. Tamayo, *Church: Castro to Free Prisoners*, MIAMI HERALD, July 8, 2010, <http://www.miamiherald.com/2010/07/07/1720412/church-castro-to-free-prisoners.html>.

2. Juan O. Tamayo, *Seven Cuban Political Prisoners Freed; Flown to Madrid*, MIAMI HERALD, July 12, 2010, <http://www.miamiherald.com/2010/07/12/1727475/seven-cuban-political-prisoners.html>; Fabiola Santiago, *11 Cuban Prisoners; Expatriated to Spain, are Wairy, Ailing, Defiant, and Free*, MIAMI HERALD, July 17, 2010, <http://www.miamiherald.com/2010/07/17/1735709/11-cuban-prisoners-expatriated.html>.

3. Juan O. Tamayo, *Cuban Jobs Going Private in Overhaul*, MIAMI HERALD, Sept.

re-emergence and reported admission that “the Cuban model doesn’t even work for us anymore.”⁴ What these events portend for Cuba’s future remains open to question; yet, that they reflect a sclerotic regime’s effort to manage the continuing pressures upon it seems certain.

In the nearly two decades since the end of the Soviet Union and its financial underwriting of Fidel Castro’s adventurism and totalitarian model, Havana has struggled to engineer its survival through selective engagement strategies, balancing Cuba’s inability to remain immune from globalization while restraining the interaction of Cuban citizens with the broader world through restrictions on travel and access to communications and information. To date, several tactical moves have delayed “Castro’s final hour:”⁵ limited reforms in the economic sphere and symbolic gestures of human rights, overlaid with a pervasive apparatus for repression. However, the Cuban government’s need to generate revenues, including through its participation in global capital markets, has not been alleviated. Since Fidel Castro, due to illness, initially passed temporary power to his brother Raúl Castro beginning in August 2006, the internal and external pressures on the country have only increased. These pressures are due partly to the regime’s inability to reconcile its objective of maintaining the political and economic power of the ruling elite with the consequences of opening up sectors of the economy; partly to the global economic downturn; and partly to a consistent U.S. policy that has denied the Cuban government the ability to generate significant revenues in areas like mass tourism, which Havana has seen as a way to finance its perpetuation in power.⁶

13, 2010, <http://www.miamiherald.com/2010/09/13/1823521/cuban-jobs-going-private-in-overhaul.html>.

4. Jeffrey Goldberg, *Fidel: Cuban Model Doesn’t Even Work for Us Anymore*, ATLANTIC (Sept. 8, 2010, 12:00 PM), available at <http://www.theatlantic.com/international/archive/2010/09/fidel-cuban-model-doesnt-even-work-for-us-anymore/62602/>.

5. ANDRES OPPENHEIMER, *CASTRO’S FINAL HOUR: THE SECRET STORY BEHIND THE COMING DOWNFALL OF COMMUNIST CUBA* (Touchstone 1992).

6. Larry Luxner, *Cuba Seeks End to American Travel Ban, Readies for an Onslaught of U.S. Tourists*, LUXNER NEWS INC. (Oct. 2010), http://www.luxner.com/cgi-bin/view_article.cgi?articleID=1925 (discussing the importance of tourism to the Cuban government); *Denuncian Perdidas por Restricciones a Viajes desde EEUU*, EL NUEVO HERALD, Oct. 16, 2010, http://www.elnuevoherald.com/2010/10/16/820904/denuncian-perdidas-por-restricciones.html#storylink=omni_popular. See BUREAU OF W. HEMISPHERE AFFAIRS, U.S. DEP’T OF STATE, COMM’N FOR ASSISTANCE TO A FREE CUBA: REPORT TO THE PRESIDENT, ch. 1 (2004), available at <http://2005-2009.cafc.gov/rpt/index.htm> (hereinafter “CAFC REPORT”). The Cuban tourism sector is dominated

Early in 2008, citizen expectations for reforms that would lead to improved living conditions abounded when Fidel Castro formally resigned and ceded authority as President of Cuba to Raúl Castro.⁷ Within days of that leadership succession, the anticipation of significant change was further fed when the Cuban government signed two United Nations (UN) human rights covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – released some political prisoners,⁸ made early public statements and initiated a series of dialogues throughout the nation on the state of the Cuban economy.⁹

In the period since, rather than genuinely moving toward harmonization with international human rights practices, the Cuban government under Raúl Castro's titular leadership has remained focused on maintaining power. The Cuban government has encouraged its citizens to tighten their belts, while it announced a reduction in the bloated government pay-roll in conjunction with expanded categories of self-employment. These so-called "reforms" also come with a new tax structure by which the government will profit from the self-employed.¹⁰

Internal inefficiencies, the lingering effects of three hurricanes in 2008, and the decrease in earnings from key exports, tourism, and services as a result of the global economic downturn have left Cuban citizens facing their deepest hardships since the

by the Cuban military, making tourism even more critical to the Cuban government's survival strategy. See also Marc Frank, *Military Man to Head Cuba's Biggest Company*, REUTERS (Sept. 27, 2010), <http://www.reuters.com/article/idUSTRE68Q54H20100927?pageNumber=1>.

7. James C. McKinley Jr., *Raúl Castro Becomes Cuban President*, N.Y. TIMES (Dec. 4, 2008), <http://www.nytimes.com/2008/02/24/world/americas/24iht-cuba.5.10342397.html>.

8. *Cuba Signs Human Rights Pledges*, BBC NEWS (Feb. 28, 2008, 10:44 PM), <http://news.bbc.co.uk/2/hi/americas/7270179.stm>.

9. Under Raúl Castro's tenure, economic changes have occurred in two primary ways: 1.) removing what are deemed to be excessive prohibitions and 2.) changes in selected economic sectors such as agriculture and through small pilot project initiatives. See Marc Frank, *Chronology – Raul Castro's Road to Reform in Cuba*, REUTERS (Sept. 20, 2010), <http://www.foxbusiness.com/markets/2010/09/20/chronology-raul-castros-road-reform-cuba/> (providing a chronology of Raul Castro's reform-oriented speeches since 2007).

10. For discussions on Cuba's recent economic announcements, see Jose Azel, *Is Cuba Moving Towards Capitalism?*, CUBA TRANSITION PROJECT, INST. FOR CUBAN AND CUBAN-AM. STUDIES, UNIV. OF MIAMI 132 (Sept. 27, 2010); Mario A. Gonzalez-Corzo, *The Reduction of State-Sector Workers in Cuba*, CUBA TRANSITION PROJECT, INST. FOR CUBAN AND CUBAN-AM. STUDIES, UNIV. OF MIAMI 133 (Oct. 12, 2010). See also Jose Azel, *So Much for Cuban Economic Reform*, WALL ST. J., Jan. 10, 2011, <http://online.wsj.com/article/SB10001424052970203418804576039640218425926.html>.

difficulties experienced during the “special period” in the immediate wake of the end of Soviet subsidies.¹¹ At the same time, political repression remains pervasive and commonplace as the government continues to utilize oppressive tactics against those individuals seeking to exercise fundamental freedoms.¹²

Tensions increased on the island in the weeks following the death of Orlando Zapata Tamayo, an Amnesty International prisoner of conscience who died on February 23, 2010, following an eighty-six day hunger strike for better prison conditions.¹³ The Cuban government initiated a campaign to deny the *Damas de Blanco* (Ladies in White) the ability to hold silent marches of protest for their loved ones.¹⁴ In fact, the Cuban government increased pressure on virtually all of its citizens allegedly for the purpose of defending the country against what it called an “enemy campaign” condemning human-rights abuses on the island.¹⁵

These increased tensions in the early months of 2010 not only raised the calls of world leaders for the Cuban government to respect human rights, but it also prompted new groups within Cuba to come to the front of the discussion and help mediate solutions. Namely, the Catholic Church, recognizing that change was needed and needed soon, began a dialogue with the Cuban government. In an interview published in *Palabra Nueva*, the magazine of the Roman Catholic Archdiocese of Havana, Cardinal Jaime Ortega first gave voice to the difficult social and economic situation that Cuba faces and the need to find immediate solutions:

11. For an overview of the “special period,” see JAIME SUCHLICKI, *CUBA: FROM COLUMBUS TO CASTRO AND BEYOND* ch. 15 (Potomac Books, 5th ed. 2002).

12. See *2009 Human Rights Report: Cuba*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (Mar. 11, 2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136108.htm>. See also Juan O. Tamayo, *Cuban Security Agents Again Halt March by Ladies in White*, MIAMI HERALD, Apr. 18, 2010, <http://www.miamiherald.com/2010/04/18/1586107/agents-again-halt-march-by-the.html#ixzz0tCfN9eim> (discussing the increased repression on all sectors of society).

13. See *Death of Cuban Prisoner of Conscience on Hunger Strike Must Herald Change*, AMNESTY INT’L. (Feb. 24, 2010), <http://www.amnesty.org/en/news-and-updates/death-cuban-prisoner-conscience-hunger-strike-must-herald-change-2010-02-24>.

14. See Tamayo, *supra* note 12. The Ladies in White are comprised of the relatives and supporters of individuals arrested and imprisoned in March 2003 during the government’s crackdown on Cuban dissidents and pro-democracy activists, known as the “Black Spring.” During that period, approximately seventy-five independent journalists, librarians, and democracy and human rights advocates were ultimately convicted with sentences ranging from six to twenty-eight years. See generally LADIES IN WHITE, <http://www.damasdeblanco.com/> (last visited Oct. 28, 2010); *Ladies in White*, YOUTUBE (Aug. 27, 2010), <http://www.youtube.com/watch?v=4vWNAHLOzVk>.

15. See Tamayo, *supra* note 12.

Our country is in a very difficult situation, surely the most difficult we have lived through in the 21st Century There is a basic common denominator among almost all opinion givers: the changes needed to remedy this situation should be made in Cuba soon. I believe this opinion has reached a kind of national consensus and its delay produces impatience and malaise among the people.¹⁶

Recognizing that impatience and malaise with the economic and social conditions was precisely what was forming amongst Cuban citizens, Cardinal Ortega and the Catholic Church worked as mediators between independent civic actors and the Cuban government. The Catholic Church, however, was not the only group to call on the Cuban government to improve its human rights practices. The Cuban government faced an unprecedented level of international scrutiny and pressure. Amnesty International among other international organizations, leaders, and governments across the globe actively pressured the Cuban government to end the repression.¹⁷ With the international and domestic pressures on the Cuban government mounting, the Cuban government made initial concessions to improve the living conditions of political prisoners, such as moving them closer to home and releasing some of those with the most troubling health conditions.¹⁸ This was followed by an announcement that it would release fifty-two of the seventy-five individuals arrested in the “Black Spring” 2003 government crackdown on civic activists.¹⁹ Shortly thereafter, declaring victory, civic activist Guillermo Farinas ended his hunger strike of more than four months, with the stipulation that he would resume if the Cuban government did not keep its promise to release the prisoners.²⁰

Economically, Cuba’s woes have continued to worsen with the

16. Orlando Marquez, *Entrevista con el Cardenal Jaime Ortega, Arzobispo de La Habana [Our Voice is a Call to Dialogue: Interview with Cardinal Jaime Ortega, Archbishop of Havana]*, PALABRA NUEVA (Apr. 2010), http://www.palabranueva.net/contens/noticias2010/pn_1011.pdf.

17. See *Dissident Group Allowed to March in Cuba*, LATIN AMERICAN HERALD TRIBUNE, <http://www.laht.com/article.asp?ArticleId=356354&CategoryId=14510> (last visited Oct. 21, 2010).

18. See Fabiola Santiago, *The Hardest Life: Surviving Cuban Jail*, MIAMI HERALD, July 30, 2010, <http://www.miamiherald.com/2010/07/30/1754665/the-hardest-life-surviving-cuban.html>; Santiago, *supra* note 2; Tamayo, *supra* note 2.

19. See Jeff Franks, *Cuba Takes First Steps Toward Prisoner Release*, REUTERS (July 8, 2010), <http://www.reuters.com/article/idUSTRE66760320100709>.

20. See Jeff Franks et al., *Factbox: Dissident Guillermo Farinas Ends Hunger Strike*, REUTERS (July 8, 2010), <http://www.reuters.com/article/idUSTRE66758M20100708>.

Cuban government reporting decreases in foreign investment and agricultural production, as well as confronting a reduction in imports that could compensate for production inefficiencies and provide food for the country. Faced with this dire economic situation, the government announced economic restructuring ranging from announcements that 500,000 state workers will be dismissed by March 2011, to the potential issuance of 250,000 new private sector licenses, a new foreign investment law that will allow investors ninety-nine year property leases, and the firing of the minister for basic industry for “shortcomings” – all changes reminiscent of those taken in the mid-1990s under similar economic pressures.²¹ Amidst this flurry of social, political, and economic developments, Fidel Castro made his first of a series of public appearances since falling ill over four years ago.²²

While internal and external pressure, including continuing discussions of policy changes by the European Union and the United States, has led the Cuban government to take steps to improve its image, such as the release of political prisoners held since the crackdown of 2003,²³ repression and attempts by the government to close any space for independent expression and civic activity by Cuban citizens remain prevalent.²⁴ Meanwhile, on a day-to-day level, Cuban citizens struggle with limited economic opportunities, a shortage of housing, a failing health care system, and increasing food scarcity, with continued official promises of reforms that have yet to materialize.

Confronted with these hard realities, the question remains whether the Cuban government will make concrete social, politi-

21. The Cuban government announced the layoff of 500,000 workers in 1995, which the U.S. and other media trumpeted as a sign of significant change in Cuba. See *Joblessness: Cuba's Newest Crisis State Firing Workers in Risky Attempt to Halt Economic Free Fall*, MIAMI HERALD, May 2, 1995, at 1A (“President Fidel Castro’s government has declared it expects to lay off up to 500,000 workers – as many as one in seven – in addition to the twenty percent who have already lost their jobs. It is an unavoidable step in the government’s blueprint for economic survival”); see also *Cuba to Allow Small Restaurants*, WASH. POST, June 15, 1995, at A33 (reporting that Cuba announced it will allow small family-run restaurants).

22. See Marc Frank, *Cuba Announces Mass Layoffs in Bid to Spur Private Sector*, REUTERS (Sept. 14, 2010), <http://www.reuters.com/article/idUSTRE68D0FG20100914>; see also Juan Tamayo, *Cuba's Raúl Castro Fires Powerful Cabinet Minister*, MIAMI HERALD, Sept. 20, 2010, <http://www.miamiherald.com/2010/09/20/1833709/cuba-fires-minister-for-oil-mining.html>; Juan Tamayo, *Cuba Extends Lease Limits for Foreign Investors*, MIAMI HERALD, Sept. 1, 2010, <http://www.miamiherald.com/2010/08/31/1799824/cuba-extends-lease-limits-for.html#ixzz11meuGGuW>.

23. Santiago, *supra* note 2; Tamayo, *supra* note 2.

24. See *2009 Human Rights Report: Cuba*, *supra* note 12.

cal, and economic structural adjustments that respect the fundamental rights of the Cuban people, including making decisions on who governs them and how they will be governed, and allow for a society where citizens can freely meet their needs. Or is this simply another moment, as has been seen before during the past two decades, when the Cuban government makes tactical adjustments, including continuing a strategy of managed engagement with external actors, to preserve the current closed, centralized power arrangement?

To provide some context for the larger discussion on Cuba, part one of this article presents general background on the contemporary socio-political environment in Cuba. Part two describes Cuba's effort to benefit from foreign investment while managing the impact of that engagement. Part three then provides an overview of U.S. policy towards Cuba.

II. THE CURRENT CUBAN SOCIO-POLITICAL CONTEXT

“[I]n Castro's Cuba, it is necessary to distinguish between the stubborn reality and the idyllic facts presented by the authorities.”

A. *The Realities of Life in Cuba*

During the struggle in the 1950s against the government of strongman Fulgencio Batista, Fidel Castro's 26th of July Movement gained popular support both because of its militancy towards Batista and its promise to restore civil liberties and political democracy. Upon success in forcing Batista into exile, instead of a rebirth of political pluralism and freedom, Castro and his allies imposed a totalitarian model on Cuba – with the political fundamentals of that model remaining in place to this day.

Under the Castro brothers, the Cuban state allows no political choice, the judiciary dispatches cases based on political criteria, and the 614 member national assembly has never voted in opposition to a proposal presented by the country's leader.²⁵ The state controls the media and a single party controls the state.²⁶ A centralized authority controls significant economic policy decisions and labor relationships. The state restricts speech, assembly, association, and worship, and it uses mass surveillance and intrusion of privacy, including the pervasive monitoring of private

25. *Id.*

26. *Id.*

communications, to control the population.²⁷

Further, there is no notion of the “rule of law” under which the law is neutral in its application. Rather, Cuban law is an instrument of social control meant to reinforce the power of the state, not protect the rights of individuals. There are laws, but there is no constraint upon the application of those laws, and the legal code itself is Orwellian. As former Justice Department official and constitutional scholar Bruce Fein summed it up:

[I]t is almost oxymoronic to speak of rule of law [in Cuba] because, as I said, the earmark of the regime is lawlessness. That is how we recognize them being totalitarian. That is, there is no principled restraint upon what those in authority may do at anytime, anyplace, anywhere. It is all by whimsy and arbitrary decree of one or a few.²⁸

To illustrate Fein’s point and Cuba’s Orwellian use of “law” as a means of state control, the following are examples from the Cuban Penal Code:²⁹

- “Dangerousness” (*peligrosidad*): defined generally as occurring when a person acts in a manner contradictory to “socialist morality” or engages in “anti-social behavior.” The penalty for “dangerousness” is up to four years imprisonment.³⁰
- “Disrespect” (*descacato*): occurs when a person has been determined to threaten, slander, defame, insult, or in any way, offend the dignity of a public official. Under this provision, a person can be imprisoned from three months to a year or fined, or both. However, if one is found to have “disrespected” the head of state or other senior officials, the penalty is one to three years imprisonment.³¹

27. *Id.*

28. *Cuban Liberty and Democratic Solidarity Act: Hearing on S. 381 Before the S. Comm. on Western Hemisphere and Peace Corps Affairs*, 104th Cong. 152 (1995) (statement of Bruce Fein, former Associate Deputy Attorney General of the United States), available at 1995 WL 360389.

29. CÓDIGO PENAL [CÓD. PEN.] Ley 62 (Cuba), available at <http://www.ruleoflawandcuba.fsu.edu/law-penal-code.cfm>. Summaries of the Cuban Penal Code articles are also taken from Amnesty Int’l, *Cuba: Dissidents Imprisoned or Forced into Exile*, AI Index AMR 25/29/96 (July 1, 1996); Amnesty Int’l, *Cuba: Government Crackdown on Dissent*, AI Index AMR 25/14/96 (Apr. 1996). DOUGLAS PAYNE, IMMIGRATION AND NATURALIZATION SERVICE, CUBA: SYSTEMATIC REPRESSION OF DISSENT (Dec. 1998), available at <http://www.worldpolicy.org/globalrights/carib/1997-cuba.html>.

30. CÓD. PEN. Ley 62 arts. 72-90 (Cuba). These terms – “socialist morality” or “anti-social behavior” – have no precise definition or standards; the Cuban authorities determine when behavior reaches a point of “dangerousness.”

31. *Id.* at art. 144.

- “Enemy propaganda” (*propaganda enemiga*): creates and defines the crime of “enemy propaganda” as existing when a person incites, by any means, against the social order, international solidarity or the socialist Cuban state.³² This crime further covers the conveyance of what the authorities determine to be false or malicious information, which could cause alarm among the citizenry or public disorder.³³ Violators can be imprisoned from one to eight years, with penalties increasing up to fifteen years if an act in this area involves the mass media.³⁴
- “Dissemination of false information against international peace” (*difusión de falsas informaciones contra la paz internacional*): this crime is determined to occur when a person spreads anything deemed by Cuban authorities to disturb international peace or place in danger Cuba’s prestige or the Cuban State’s “good relations” with another state.³⁵ The punishment is from one to four years imprisonment.³⁶
- “Conspiracy” (also known as “associating with others to commit a crime”/*asociación para delinquir*): potentially exists when three or more persons meet together and are then determined to engage in some behavior deemed illegal, such as meeting in a context determined to constitute “dangerousness” or “disrespect.”³⁷ Penalties under this provision range from one to three years imprisonment.³⁸
- “Illicit association” (*asociación ilícita*): applies to anyone belonging to an unregistered group or association, including meetings or demonstrations deemed by Cuban authorities to be illegal.³⁹ Participation in an “illicit association” is punishable by a fine or from one to three months imprisonment; promoters, leaders, or organizers of an illicit association can be fined or jailed from three months to a year.⁴⁰

According to the State Department, in 2009, as many as 5,000 Cubans were detained for “dangerousness,” meaning that these

32. Código Penal [CÓD. PEN.] Ley 62 art. 103 (Cuba).

33. *Id.*

34. *Id.*

35. Código Penal [CÓD. PEN.] Ley 62 art. 115 (Cuba).

36. *Id.*

37. Código Penal [CÓD. PEN.] Ley 62 art. 207 (Cuba).

38. *Id.*

39. Código Penal [CÓD. PEN.] Ley 62 arts. 208-209 (Cuba).

40. *Id.*

individuals were not charged with any specific crime.⁴¹ This number is in addition to those individuals deemed prisoners of conscience, the numbers of which range from 50 to 200.⁴² The systematic harassment of Cuban citizens, including short-term detentions, continued to take place throughout 2010.⁴³

For those incarcerated in Cuba, beatings and the abuse of detainees and prisoners, including human rights activists, are practiced with impunity; Castro's prisons include life-threatening conditions, and the denial of medical care is common.⁴⁴ Government-recruited mobs, police, and state security officials harass, beat, and threaten independent political and civil activists, while human rights advocates and members of independent professional organizations are subject to arbitrary arrest and detention.⁴⁵ Restrictions on freedom of movement include selective denial of exit permits to citizens and the forcible removal of persons from Havana to their hometowns.⁴⁶ Consistent with its treatment of its citizens, the government refuses to recognize domestic human rights groups or permit them to function legally.

Living under a repressive system has become normal for a large majority of Cubans. More than seventy-three percent of Cuba's population has been born since 1959.⁴⁷ As a result, "[N]o Cuban under the age of fifty has lived with a free press, free labor unions, or an independent judicial system or legislature; nor has he participated in pluralistic elections or in any way been exposed

41. See *2009 Human Rights Report: Cuba*, *supra* note 12.

42. *Id.*

43. For a typical example, see *Urgent Action: Pro-Democracy Activists Arbitrarily Detained*, AMNESTY INT'L (Aug. 25, 2010), <http://www.amnesty.org/en/library/asset/AMR25/013/2010/en/932cb071-5166-4c7b-bc80-12c6b2f023bc/amr250132010en.pdf>; see also *Urgent Action: Pro-Democracy Activists Released*, AMNESTY INT'L (Sept. 8, 2010), <http://www.amnesty.org/en/library/asset/AMR25/014/2010/en/72bb1f2a-9934-4103-a294-de6debaab940/amr250142010en.pdf> (regarding the temporary detention by Cuban authorities of five activists who were told they were to be charged with public disorder). According to *Amnesty*, their detention "seems to be an attempt to intimidate them and prevent them from peacefully exercising their right to freedom of expression, assembly and association."

44. See *2009 Human Rights Report: Cuba*, *supra* note 12.

45. See *id.* See also, Yoani Sanchez, "Ladies in White" Attacked by Government Sanctioned Mob, HUFFINGTON POST (Mar. 18, 2010, 4:32 PM), http://www.huffingtonpost.com/yoani-sanchez/ladies-in-white-attacked_b_504817.html (describing an attack by a Cuban government sanctioned mob on the Ladies in White as they peacefully marched to mark the seventh anniversary of the 2003 "Black Spring" arrests of civil society activists).

46. See *2009 Human Rights Report: Cuba*, *supra* note 12.

47. JOSÉ AZEL, *MAÑANA IN CUBA: THE LEGACY OF CASTROISM AND TRANSITIONAL CHALLENGES FOR CUBA 3* (Author House 2010).

to the rights, privileges, and obligations of citizens in a pluralistic democratic system.”⁴⁸

Contrasting with its effective system of repression, the Cuban state has not been effective at the delivery of services.⁴⁹ A consequence has been lip service to “socialist values” contrasted by an every-person-for-himself reality. This is known on the island as *doble moral*, dual morality, where one face is for public consumption while another face reflects private realities.⁵⁰ It is a culture in which “[b]ypassing legal norms to overcome the impersonal bureaucracies of ineffective government institutions immerses individuals into a culture of practicing illegality as a means of surviving.”⁵¹

B. Recent Events

In early 2010, the world began to take note of new voices in the wake of the death of Orlando Zapata Tamayo, an Amnesty International prisoner of conscience, who died following an 86-day hunger strike for better prison conditions.⁵² “On the eve of the second anniversary of Raúl Castro coming to power, Orlando Zapata Tamayo has died. We decree national mourning” tweeted Cuban blogger Yoani Sanchez from Havana on February 23, 2010.⁵³ President Raúl Castro, in a rare response to the situation, said that he “regretted” Zapata’s death.⁵⁴ This overt acknowledgement on the part of the Cuban government was unprecedented. This single event occurred at a time when Cuba was already seeing a wave of increased civic engagement and the emergence of new critics within the government structure.⁵⁵ These events acted as a cata-

48. *Id.*

49. See KATHERINE HIRSCHFELD, *HEALTH POLITICS, AND REVOLUTION IN CUBA SINCE 1898* (Transaction Publishers 2007).

50. AZEL, *supra* note 47, at 70.

51. AZEL, *supra* note 47, at 69.

52. See *Cuba Signs Human Rights Pledges*, *supra* note 8. Zapata was arrested in 2003 during a crackdown by Cuban authorities against independent civil society. He was charged with an array of offences including resistance, contempt, and disrespect.

53. See Yoani Sanchez, *Hunger Striking Amnesty International Prisoner of Conscience Orlando Zapata Tamayo Dies Today in Cuba*, HUFFINGTON POST (Feb. 23, 2010, 8:37 PM), http://www.huffingtonpost.com/yoani-sanchez/hunger-striking-amnesty-i_b_474170.html (providing Tweets from Yoani Sanchez).

54. See generally *Castro ‘Laments’ Death of Hunger-Striking Dissident*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8535390.stm> (last updated Feb. 24, 2010, 11:06 PM). The statement by the Cuban government was originally released to international media and placed on the *Granma* website; however, it was subsequently taken down.

55. Esteban Morales, an academic and high-ranking official in the Communist Party of Cuba, was separated from the ranks of the party in mid-2010 after he wrote

lyst for significant developments throughout 2010.⁵⁶

Although not unprecedented, the current level of independent civic activism is the most noteworthy since the 2002-early 2003 period.⁵⁷ It is different from those earlier activist efforts because of its attempt to effect change by holding the Cuban government accountable for its actions. In part, this new dynamic within independent civil society can be attributed to increased access to information technology and the opportunity these tools allow for interaction with peers across the world. Larger numbers of Cubans are now communicating with the outside world and spreading information, including within Cuba, on what is taking place on the island.⁵⁸ Despite facing retribution for their honesty, Cuba's bloggers have emerged in the past couple of years as one of the most prominent critical voices in the country. With an increased day-to-day awareness on the part of the international community and Cuban citizens of what is taking place across the island, more individuals, organizations, and nations can put pressure on the Cuban government to improve its human rights practices.⁵⁹

an article critiquing Cuba's internal situation and calling corruption the true anti-revolutionary. See Esteban Morales, *Corruption: The True Counter-Revolution?*, PROGRESO WEEKLY (Apr. 21, 2010, 1:10 PM), http://progresoweekly.com/2/index.php?option=com_content&view=article&id=1589:corruption-the-true-counter-revolution&catid=36:in-cuba&Itemid=54; see also Pedro Campos, *Esteban Morales Booted from Cuba's Communist Party*, HAVANA TIMES (June 28, 2010), <http://www.havanatimes.org/?p=25669> (discussing Morales' fall from favor for expressing his views and denouncing what he considers the counter-revolutionary corruption and bureaucracy that exists in the country).

56. See *Cuban Dissident Orlando Zapata Tamayo's Death Draws Attention To Cuba*, LATIN AMERICA NEWS DISPATCH (Feb. 25, 2010), <http://latindispatch.com/2010/02/25/cuban-dissident-orlando-zapata-tamayos-death-draws-attention-to-cuba/>.

57. In 2002, citing Articles 63 and 88 of Cuba's Constitution, Osvaldo Payá Sardiñas organized the Varela Project, bringing together a group of Cuban citizens representing more than 140 independent organizations across Cuba. They presented a petition with over 11,000 signatures to the Cuban National Assembly. The petition requested a constitutional referendum to introduce substantive changes to preserve the general welfare of Cuban citizens and respect human rights. The Cuban government reaction was a massive crackdown on peaceful civic activities, including the arrest and arbitrary detention of human rights activists in early 2003. See *Annual Report on Cuba*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://www.cidh.oas.org/annualrep/2003eng/chap.4a.htm> (last visited Oct. 28, 2010).

58. See Claudia Cadelo, *This Street Belongs to the Ladies in White*, OCTAVO CERCO (Mar. 21, 2010), <http://octavocercoen.blogspot.com/2010/03/this-street-belongs-to-ladies-in-white.html>; see also Yoani Sanchez, *GENERACION Y*, <http://www.desdecuba.com/generacion/> (last visited Oct. 28, 2010).

59. Communication and exchange with and between Cuban citizens continues to expand with the increased use of information and communication technologies. Additionally, independent issue-based organizations in Cuba are contributing to this

Whether reporting in real-time on the events taking place on the island, writing a retrospective blog post on their activities, or spreading information and news received from abroad, Cuban citizens with higher levels of technical skills and external contacts are working collaboratively with other members of Cuba's independent civil society.⁶⁰ This collaboration was apparent in 2010 when independent actors across the island, from bloggers to issue-based civil society groups, joined the voices of the Ladies in White and independent journalist Guillermo Farinas⁶¹ in their calls for better living conditions for prisoners.⁶²

This pressure from on and off the island ensured that some form of action on the part of the Cuban government would be necessary for continued stability and positive external relations.⁶³

exchange of ideas and information in larger numbers through their use of new technologies. For a portal to Cuban blogs see PORTAL DESDE CUBA, <http://www.desdecuba.com/> (last visited Oct. 28, 2010); see also CONSEJO DE RELADORES DE DERECHOS HUMANOS DE CUBA, <http://www.crdhcamanecerderechoshumanoscuba.org/> (last visited Oct. 28, 2010); POSRACIALIDAD – COMITÉ CIUDADANOS PO LA INTEGRACIÓN RACIAL, <http://www.cir-integracion-racial-cuba.org/> (last visited Oct. 28, 2010) (documenting two issue-based independent organizations in Cuba).

60. Increasingly, not only technically savvy bloggers, but also various members of independent society from economists to journalists are joining together to share experiences, exchange skill sets, and conduct trainings. See Claudia Cadelo, *End of the Course*, OCTAVO CERCO (Apr. 10, 2010), <http://octavocercoen.blogspot.com/2010/04/end-of-course.html>.

61. Guillermo Farinas is a Cuban psychologist and independent journalist. He stopped eating or taking any liquids the day following the death of Orlando Zapata Tamayo, calling for better prison conditions and the release of the prisoners those with the greatest ailments. See Nelson Acosta, *Cuban Hunger Striker Says Ready to Die if Necessary*, REUTERS (Mar. 5, 2010, 4:18 PM), <http://www.reuters.com/article/idUSTRE6244DJ20100305>; see also Alberto Nunez Betancourt, *Cuba no Acepta Presiones ni Chantajes*, DIARIO GRANMA (Mar. 8, 2010), <http://www.granma.cubaweb.cu/2010/03/08/nacional/artic02.html> (discussing where the Cuban government first acknowledges Farinas and then condemns foreign press coverage of his hunger strike, upholding that the government will not accept pressure or blackmail).

62. See Cadelo, *supra* note 58; *Brave Ladies in Castro's Cuba*, WALL ST. J., Apr. 27, 2010, <http://online.wsj.com/article/SB10001424052748703465204575208343522388902.html> (discussing the Ladies in Support, a group of women who physically join the Ladies in White in their marches).

63. See *Dissident Group Allowed to March in Cuba*, LATIN AMERICAN HERALD TRIBUNE (<http://www.laht.com/article.asp?ArticleId=356354&CategoryId=14510>) (last visited Oct. 21, 2010); see *Insulza Pide al Gobierno Cubano la Excarcelación de los Presos Políticos Enfermos*, GOOGLE (Mar. 30, 2010), <http://www.google.com/hostednews/epa/article/ALeqM5jpTEIoZE-WODDH-rfQg-jFjXR08w>; *Presidente Chileno Dice que Abogará por Recuperar la Democracia en la Isla*, CUBAENCUENTRO (Mar. 23, 2010), <http://www.cubaencuentro.com/es/internacional/noticias/presidente-chileno-dice-que-abogara-por-recuperar-la-democracia-en-la-isla-232023>; *Mexico Worried About Health of Cuban Hunger Striker*, LATIN AMERICAN HERALD TRIBUNE, <http://www.laht.com/article.asp?ArticleId=353829&CategoryId=14510> (last visited Oct. 21, 2010); *European Parliament Resolution of 11 March 2010 on Prisoners of Conscience*

Hence, the government began to take small steps to improve the living conditions of political prisoners, such as moving them closer to home and releasing some of those with the most troubling health conditions.⁶⁴ Since the announcement of the Cuban government's intent to release fifty-two prisoners, forty have been released on the condition that they go into exile in Spain.⁶⁵ One member of the group of fifty-two prisoners, Arnaldo Ramos Lauzurique, was released in Cuba in November 2010 on humanitarian grounds and, as of mid-January 2011, the remaining eleven from the group have refused to leave Cuba and therefore remain in prison.⁶⁶ While this development relieved some of the increased pressure on the island, it has thus far fallen short of being transformative of human rights practices on the island. For instance, in August, a group of students who stood on the steps of the University of Havana, in peaceful solidarity with other young human-rights activists in the eastern city of Baracoa, were themselves arrested for this peaceful civic activity.⁶⁷ Eduardo Pérez Flores, one of the youths arrested, wrote in a letter to his mother from prison: "[t]ell the world that in Cuba they are releasing political prisoners on the one hand and incarcerating more on the other."⁶⁸ Just days later on those same steps, Fidel Castro gave his first speech before the Cuban public since falling ill in 2006 detailing not plans on how to address the economic situation in the country, or any of the numerous issues that plague Cuba, but rather speaking about an impending threat of nuclear war in the Middle

in Cuba, EUROPEAN PARLIAMENT (Mar. 11, 2010), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0063+0?OC+XML+VO//EN&language=en>; *Ban Ki-moon Lamenta la Muerte del Preso Politico Cubano Orlando Zapata*, EL NUEVO HERALD (Mar. 23, 2010), <http://www.elnuevoherald.com/2010/03/23/680418/ban-ki-moon-lamenta-la-muerte.html#ixzz0kLwlHeKV>; Statement by the President on the Human Rights Situation in Cuba (Mar. 24, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-human-rights-situation-cuba>.

64. See Franks, *supra* note 19.

65. See *Cardinal Expects More Dissidents to Be Released in Cuba*, LATIN AMERICAN HERALD TRIBUNE (Jan. 2, 2011), <http://www.laht.com/article.asp?ArticleId=382851&CategoryId=14510>.

66. *Id.*

67. See Alberto de la Cruz, *Cuban Democracy Activists Arrested in Havana*, BABALU BLOG (Aug. 17, 2010, 9:01 AM) <http://babalublog.com/2010/08/cuban-democracy-activists-arrested-in-havana/>; see also *Pro-Democracy Leaders Arrested at the University of Havana*, CAPITOL HILL CUBANS (Aug. 16, 2010, 11:37 PM), <http://www.capitolhillcubans.com/2010/08/pro-democracy-leaders-arrested-at.html>.

68. Orlando Gutierrez-Boronat, *Resistance to the Regime is Here to Stay*, MIAMI HERALD, Sept. 5, 2010, <http://www.miamiherald.com/2010/09/05/1808547/resistance-to-the-regime-is-here.html#ixzz12AbXJYvR>.

East.⁶⁹

The Cuban government recognizes the danger that independent civic engagement poses to its control over its population. Increasing independent access to information, communication, and external engagement with the rest of the world is something the Cuban government has tried to limit and manage, even as it has expanded its own external relations for economic gain. Nevertheless, independent Cuban actors are being recognized around the world for their courage in defending human rights and freedom of expression in Cuba. The Atlantic Council also presented the Ladies in White with its 2010 Freedom Award.⁷⁰ This was followed by the European Parliament's awarding of its Sakharov Prize for Freedom of Thought to Guillermo Farinas.⁷¹ Farinas' receipt of this award marks the third time since 2002 that the Sakharov Prize has been awarded to Cuban activists. Previous recipients were Osvaldo Paya in 2002 and the Ladies in White in 2005.⁷²

At the same time, the island's poor economy and the government's need for capital have placed the Cuban government at a crossroads where the path to economic growth inherently implies a weakening of its own centralized power. Speeches by Raúl Castro and debate among Cuban officials about how to make the country more productive have continued for more than two years.⁷³ In August 2010, Raúl Castro stated in a speech before the National Assembly, "[w]e have to erase forever the notion that Cuba is the only country in the world where it is not necessary to work."⁷⁴ However, actual actions on the part of the government have been limited or almost inconsequential for most Cuban citizens. In 2009, the economy again failed to meet original economic growth forecasts, this time by more than 66 percent.⁷⁵ The Cuban

69. *Id.*

70. *Wroclaw Global Forum*, ATLANTIC COUNCIL (Oct. 6, 2010), <http://www.acus.org/event/wroclaw-global-forum>.

71. The Sakharov Prize honors exceptional individuals who have demonstrated courage to defend human rights and the freedom of expression. *See 2010 Sakharov Prize Goes to Cuban Dissident Guillermo Fariñas*, EUR. PARLIAMENT, http://www.europarl.europa.eu/news/public/focus_page/015-84708-274-10-40-90220101001FCS84570-01-10-2010-2010/default_p001c004_en.htm.

72. *Id.*

73. *See* Frank, *supra* note 9.

74. Raúl Castro Ruz, General of the Army, Speech Given at the 5th Ordinary Session of the 7th Legislature of the National Assembly of People's Power (Aug. 1, 2010), *available at* <http://www.granma.cu/ingles/cuba-i/2agosto-discursoraul.html>.

75. *See* Juan O. Tamayo, *Cuba Faced Worst Economic Crisis in '09*, MIAMI

government responded by implementing new austerity measures such as ration card reductions, a law permitting Cuban citizens to work more than one job, and the closure of certain government cafeterias, which were replaced by a lunch stipend.⁷⁶ The need to take these measures further alienated citizens who already often have to break the law, steal, or hustle to meet daily requirements while living with the paranoia that the government can decide at any time to prosecute them for simply trying to survive.⁷⁷

One consequence of this has been that criticism and calls for reform by Cuban citizens are more and more common. Independent organizations, which struggle to exist despite government repression, are active in calling for more economic opportunities for Cuban citizens. For example, the Latin American Federation of Rural Women (FLAMUR) submitted more than 10,000 signatures to the Cuban National Assembly in support of their *Con la Misma Moneda* (With the Same Currency) campaign calling on the Cuban government to address issues that stem from the dual currency system.⁷⁸ When Cuban citizens are asked what their number one concern is, more than one-half (fifty-two percent) cite worries about low salaries, the high cost of living, and challenges with the island's double-currency system.⁷⁹

Largely because of criticisms and calls for reform, beginning in 2007, the Cuban government under Raúl Castro initiated the use of grassroots structures to undertake "consultations with the people" in which citizens were encouraged to express their needs, even allowing pointed criticism of government performance – as long as such criticisms did not question the legitimacy of the government.⁸⁰ Given the wide thematic and geographic scope of the

HERALD, Jan. 1, 2010, <http://www.miamiherald.com/2001/12/31/1405416/cuba-faced-worst-economic-crisis.html> (discussing the 2009 economic situation in Cuba).

76. See *The Demise of the Free Lunch*, ECONOMIST (Oct. 8, 2009), <http://www.economist.com/node/14587237>.

77. For a discussion of the contradictions in Cuban society, see BEN CORBETT, *THIS IS CUBA: AN OUTLAW CULTURE SURVIVES* (Westview Press, 2002).

78. See *Entregan 10,489 Nuevas Firmas en Apoyo a la Campaña "Con la Misma Moneda,"* FLAMUR CUBA (Nov. 25, 2009, 1:56 AM), http://flamurcuba.org/artman2/publish/Inicio_Noticias/Entregan_10_489_nuevas_firmas_en_apoyo_a_la_Campa_a_Con_la_Misma_Moneda.shtml.

79. *Cuban Public Opinion Survey*, THE INTERNATIONAL REPUBLICAN INSTITUTE (July 4-Aug. 7, 2009), <http://www.iri.org/sites/default/files/2009-November-17-Survey-of-Cuban-Public-Opinion-July-4-August-7-2009.pdf>.

80. See generally Raul Castro Ruz, President of the State Council and the Council of Ministers, Year 50th of the Revolution (Feb. 24, 2008), available at <http://emba.cuba.cubaminrex.cu/Default.aspx?tabid=7329> ("In those cases where it is deemed necessary, there will be a previous consultation with the people in the corresponding

meetings and the suggestion of reform, which Raúl himself publicly articulated, these sessions contributed to increased citizen expectations. However, almost two years after Raúl Castro formally assumed the presidency of Cuba, more than four in five citizens (eighty-two percent) responded in a survey sponsored by the International Republican Institute that they did not believe things were going well in Cuba. In fact, the survey demonstrated that a vast majority of Cubans would vote for fundamental political change (seventy-five percent) and economic change (eighty-six percent) if given the opportunity. Moreover, approximately two-thirds (sixty-six percent) of Cubans do *not* believe that their government will succeed in solving Cuba's most pressing challenges.⁸¹ Since the hurricanes of 2008 and the subsequent drought in 2010, Cuba has struggled to meet the needs of its population while continuing to be impacted by the global economic downturn, all of which has affected the government's capacity to compensate for production inefficiencies through import substitution.

In 2009, in a move more desperate than reform-minded, the Cuban government began to undertake small pilot initiatives ranging from the opening of government-administered retail merchandise outlets selling items in Cuban pesos, which previously could only be purchased with hard currency, to permitting dairy producers to supply milk locally rather than through the inefficient central distribution system.⁸² However, agricultural production in Cuba dropped 7.5 percent in the first half of 2010 compared with the same period in 2009, in spite of government movement to put more than one million hectares (2.5 million acres) of idle lands into the hands of new producers to spur food production and reduce imports.⁸³ At the same time, according to the Cuban national statistics office, foreign investment dropped 14.7 percent during the first half of 2010.⁸⁴

Cuba's most dramatic move under Raúl Castro has been the

sector of society, or even with the entire people, if it were a very transcendental issue.”).

81. *Id.* at 75.

82. See Juan Varela Pérez, *6103 Bodegas ya la Reciben*, GRANMA INT'L (Mar. 16, 2010, 9:00 PM), <http://www.granma.cubaweb.cu/2010/03/16/nacional/artic01.html> (reporting on the increased use in local dairy distribution since 2007); see also Marc Frank, *In Cuba, Peso Makes a Comeback, Pleasing Customers*, REUTERS (Feb. 1, 2010), <http://www.reuters.com/article/idUSN0123504820100201?typeUSDollarRpt>.

83. *Agricultural Production Falls 7.5% in Cuba*, LATIN AMERICAN HERALD TRIBUNE, <http://laht.com/article.asp?ArticleId=362576&CategoryId=14510>.

84. Oficina Nacional de Estadísticas (ONE), <http://www.one.cu/>.

announced layoff of 500,000 workers.⁸⁵ Most of these workers will be expected to survive economically through self-employment in specific, legalized categories, or through the transformation of a number of small state-owned businesses to co-operatives, now to be run by their employees. In each of these cases, Cubans will be expected to pay taxes and conform to regulations, the parameters of which have yet to be laid out.⁸⁶

These developments are further signs that, in the economic sector at least, the Cuban government is being forced to relinquish some of the paternalistic control it can no longer afford to maintain. With no significant economic improvement for most citizens on the horizon, or any meaningful personal freedoms, the frustrations of Cuban citizens can be expected to continue to increase.

III. CUBA'S MANAGED GLOBAL ENGAGEMENT

As the average Cuban struggles to survive in a still largely centralized economy, the Cuban government will continue its strategy to attract foreign direct investment (FDI) that benefits and reinforces the current power structure. Since 1990, foreign capital by way of FDI has increased significantly, with FDI becoming the biggest source of external financing for many countries, regardless of their form of government.⁸⁷ Cuba has not been outside this evolution in the international economic structure, at least in terms of attracting FDI.⁸⁸ Rather, since the loss of Soviet subsidies, the Cuban government has sought to harness the global economy for its own survival purposes.⁸⁹

85. Tamayo, *supra* note 3.

86. For discussions on Cuba's recent economic announcements, see Jose Azel, *Is Cuba Moving Towards Capitalism?*, CUBA TRANSITION PROJECT, INST. FOR CUBAN AND CUBAN-AM. STUDIES, UNIV. OF MIAMI 132 (Sept. 27, 2010); Mario A. Gonzalez-Corzo, *The Reduction of State-Sector Workers in Cuba*, CUBA TRANSITION PROJECT, INST. FOR CUBAN AND CUBAN-AM. STUDIES, UNIV. OF MIAMI 133 (Oct. 12, 2010). See also Jose Azel, *So Much for Cuban Economic Reform*, WALL ST. J., Jan. 10, 2011, <http://online.wsj.com/article/SB10001424052970203418804576039640218425926.html>.

87. See *Foreign Aid and Foreign Investment*, WORLD BANK, http://www.worldbank.org/depweb/beyond/beyondco/beg_13.pdf (describing the forms of financial flows to countries and the rise in private capital flows, specifically the increase in foreign direct investment).

88. See Omar Everlenny Perez Villanueva, *Cuba: An Overview of Foreign Direct Investment* (2002), <http://www2.carleton.ca/economics/ccms/wp-content/ccms-files/cep02-04.pdf> (discussing Cuba's opening to foreign resources).

89. See Leandro Venacio, *La Inversión Extranjera Directa y la Crisis Económica Cubana* [Direct Foreign Investment and the Cuban Economic Crisis] (2005), <http://www.eumed.net/libros/2005/lv/> (discussing the benefits Cuba derives from foreign investment).

New laws, regulations, and agreements implemented since the early 1990s have served to attract foreign investment to Cuba. However, the extent to which these instruments have substantively improved the framework for investment on the island remains questionable.⁹⁰ The government continues to rule by fear and repression, stifling creativity and innovation. Further, the economic engagement of multinational businesses with Cuba has not produced fundamental changes in the daily lives of Cuban citizens. For the Cuban government, maintaining absolute political power has been more important than anything else, including the welfare of the Cuban people.

A. *Economic Policy: 1959 – 2009*

Prior to the Cuban Revolution in 1959, a significant amount of foreign direct investment, largely from the United States, was in place on the island.⁹¹ Foreign companies wishing to do business on the island simply had to register with the Cuban government and comply with local laws.⁹² There were few special restrictions or other constraints on foreign investors. Following the emergence of the revolutionary government, foreign companies, including U.S. companies, were nationalized and the property of foreign nationals expropriated, leaving foreign investment in the country virtually non-existent for more than thirty years.⁹³ Until the early 1990s, Cuba shared preferential trade relationships with the former Soviet Union and its satellites. In effect, Cuba ended its dependency on the United States and replaced it with reliance on the largesse of the Soviet Union.

From its open embrace of Soviet communism in the 1960s through 1991, Cuba's number one trading partner was the Soviet Union. Cuba exported sixty-three percent of its sugar to the Soviet Union, along with seventy-three percent of its nickel, ninety-five

90. Matias F. Travieso-Diaz & Alejandro Ferrate, *Recommended Features of a Foreign Investment Code for Cuba's Free Market Transition*, 21 N.C.J. INT'L L. & COM. REG. 511, 513-14 (1996).

91. See Eric Baklanoff, *Cuba on the Eve of the Socialist Transition: A Reassessment of the Backwardness-Stagnation Thesis*, in 8 CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE EIGHTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 268-71 (1998), available at <http://lanic.utexas.edu/la/ca/cuba/asce/cuba8/31baklanoff.pdf>.

92. *Id.*

93. See MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF PROPERTY RIGHTS IN CUBA* 69-108 (1976) (providing a history of the expropriation process).

percent of its citrus, and 100 percent of its electricity exports.⁹⁴ Cuba, in return, received ninety percent of its machinery from the Soviet Union and ninety-eight percent of its fuel needs.⁹⁵

The dissolution of the Soviet Union in 1991 sent a series of shocks through the Cuban economy. In the following four years, eighty percent of Cuba's exchange capacity was lost.⁹⁶ This ushered in an economic depression known as the "Special Period."⁹⁷ In response, the Cuban government made the tactical decision to modify policies to prioritize food production, reduce overall consumption, allow greater foreign direct investment, restructure and diversify its trade relationships, and develop the tourism, biotechnology and pharmaceuticals industries.⁹⁸

As early as the 1980s, Cuba determined that it needed technology and new markets to revive certain sectors, including tourism.⁹⁹ To facilitate investment while maintaining control and containing any unwanted influences, the Cuban government revised its legal structure to provide a framework for FDI. Legislative Decree 50, the first of these measures, was passed in 1982, permitting foreign investment on the island in the form of joint ventures between foreign companies and Cuban enterprises.¹⁰⁰ This decree resulted in a joint venture between a Cuban entity and a Spanish company to build a resort in Varadero.¹⁰¹ However, foreign investment remained stagnant as the language of this

94. CANADA, THE UNITED STATES, AND CUBA 15 (Sahadeo Basdeo et al. eds., North-South Center Press, 2002).

95. *Id.*

96. SUCHLICKI, *supra* note 11. See also Joy Gordon, *Cuba's Entrepreneurial Socialism*, ATLANTIC MONTHLY (Jan. 1997), <http://www.theatlantic.com/past/docs/issues/97jan/cuba/cuba.htm> (discussing Cuba's loss of its primary trading partner).

97. See Archibald R. M. Ritter, *Cuba's Strategic Economic Re-Orientations*, ASS'N FOR THE STUDY OF THE CUBAN ECON. (2006), <http://lanic.utexas.edu/project/asce/pdfs/volume16/pdfs/ritter.pdf> (discussing economic reformulation starting in the nineties with the end of the special relationship with the former Soviet Union).

98. For a journalistic perspective on Cuba's post-Soviet era efforts to address economic realities, including efforts to harness tourism for the government's benefit, see CORBETT, *supra* note 77, at 20-29.

99. Jesus R. Mercador, *Reality of Labor in Cuba and the Social Responsibility of Foreign Investors* (2006), at 129 (discussing the background to Cuban Law 77 of 1995 on foreign investment).

100. Jorge F. Pérez-López, *Foreign Investment in Cuba: An Inventory*, CUBA IN TRANSITION (2004), available at http://www.cubastudygroup.org/index.cfm/files/serve?File_id=76779219-61b8-4c76-b1e7-338796686dac (outlining the forms of foreign investment).

101. See Félix Blanco Godínez, *Cuba's Tourism Industry: Sol Meliá as a Case Study*, 8 CUBA IN TRANSITION 50 (1998) (providing a case study of Sol Meliá, the leading foreign corporation in the Cuban tourism industry).

decree was very general and did not authorize the creation of full foreign ownership companies.

In 1992, a series of changes to Cuban property laws provided for the express capacity of investors to acquire a long-term lease to property on the island and participate in production agreements.¹⁰²

The 1982 and 1992 changes were further solidified in 1995 when the Cuban government approved Law 77, the "Foreign Investment Act," which replaced Law 50.¹⁰³ Law 77 serves as the primary legal framework for investment on the island.¹⁰⁴ It outlines the principal legal structures for the implementation of investment projects in Cuba: 1.) international association contracts; 2.) joint ventures or mixed companies; and 3.) completely foreign-owned companies.¹⁰⁵ Investment regulations are developed and enforced by the Ministry of Foreign Investment and Economic Cooperation (MINVEC), established in 1994 by the Council of State. MINVEC coordinates all investment activity in the country, including the processing and negotiation of foreign investment applications.¹⁰⁶

Law 77 also requires that foreign investors must hire Cuban workers, with limited exceptions, through a Cuban government employment agency designated by MINVEC.¹⁰⁷ This employment

102. The basis for long-term lease arrangements rests on a 1992 revision of the Cuban Constitution, available at http://www.uiowa.edu/ifdebook/issues/cuba/docs/law_government/Constitution1976withAMEND.pdf. Article 23 of the 1992 constitution states, "El Estado reconoce la propiedad de las empresas mixtas, sociedades y asociaciones económicas que se constituyen conforme a la ley. El uso, disfrute y disposición de los bienes pertenecientes al patrimonio de las entidades anteriores se rigen por lo establecido en la ley y los tratados, así como por los estatutos y reglamentos propios por los que se gobiernan." [Informal translation: "The State recognizes the property of joint ventures, companies and economic associations that are formed in accordance with the law. The use, enjoyment and disposition of property belonging to the above entities are governed by the provisions of the law and treaties and by the statutes and regulations that they themselves are governed by."].

103. Constitución de la Republica de Cuba art. 18, Presentation of the Law on Foreign Investment, Decree-Law No. 77 (Sept. 4, 1995) [hereinafter referred to as Law 77], available at <http://ctp.iccas.miami.edu/LawDocs/ldl00132.pdf>.

104. See Antonio R. Zamora, *Cuba's New Foreign Investment Law: Better, Worse or the Same as Before?*, 4 FOCUS AMERICAS 3 (1996).

105. See Law 77, *supra* note 103, at ch. V, art. 12. Article 12 states that foreign investment should adopt one of the three forms.

106. See Mercador, *supra* note 99, at 132 (outlining the administrative requirements for foreign investment in Cuba).

107. See Law 77, *supra* note 103, at ch. XI, art. 31. Article 31 states the labor system extends to all workers who provide services in the activities of foreign services or foreigners who are permanent residents in Cuba. Exceptions are made for certain top administrative positions or some posts of a technical nature, which may be filled

agency contracts with the foreign investor for the provision of labor and wages, then pays Cuban workers their salaries and benefits in domestic currency (pesos) while the foreign investor pays the Cuban government in hard currency.¹⁰⁸ Resolution No. 3/96 of the Ministry of Labor and Social Security establishes the rules for workers of foreign companies operating in Cuba, including the circumstances under which a Cuban worker may be dismissed.¹⁰⁹

Law 77 also established a structure for the establishment of "Free Trade Zones" or industrial parks, where tax and other benefits would be provided to foreign investors choosing to invest in these geographical locations.¹¹⁰ In these cases, "a special system can be established covering customs duties, exchange rates, taxation, labor, migration, public order, capital investment and foreign trade, and in which foreign investors can participate."¹¹¹ Further, the law allows for the establishment of special labor rules in these areas.

In an effort to further strengthen investor confidence in Cuba while addressing some of the questions left by Law 77, Cuba has signed bilateral investment agreements (BITs) with more than twenty-eight countries.¹¹² This makes BIT one of the most widely used types of international agreement for foreign investment on the island. These agreements are meant to provide equal treatment for foreign investment, facilitate repatriation of profits, and

by non-Cuban nationals and the labor rights, conditions and obligations may be determined by the company.

108. *Id.*

109. Resolución No. 3/96 – Reglamento sobre el regimen laboral en la inversion extranjera, G.O. 266-72 (Mar. 27, 1996) (Cuba). Additionally, Article 32 of Law 77 allows for the establishment of "economic incentive funds" for Cuban workers and foreign permanent residents working in the activities of the foreign company. The contributions to the fund are to be established from the profits of the foreign company and the amount of the contribution is decided on by relevant parties of the foreign company and the ministry of foreign and economic collaboration. *See* Law 77, *supra* note 103, at ch. XI, art. 32 (describing the parameters of the economic incentive funds). Specifically, Article 32 states, "[t]he amount of these contributions shall be agreed upon between the joint ventures, foreign investors and national investors who are party to international economic-association contracts, and totally foreign capital companies, on the one hand, and the Ministry of Foreign Investment and Economic Cooperation, on the other hand.").

110. Law 77, *supra* note 103, at ch. XV, art. 50. *See also*, Ministerio para la Inversion Extranjera y la Colaboracion Economica, *Decreto-ley No. 165 – Ley sobre zonas francas y parques industriales* (June 3, 1996), available at <http://www.cuba.cu/negocios/DL165E.htm>.

111. Law 77, *supra* note 103, at ch. XV, art. 51.

112. *See Investment Instruments Online: Bilateral Investment Treaties*, United Nations Conference on Trade and Development, <http://www.unctadxi.org/templates/DocSearch.aspx?id=779> (last visited Dec.18, 2009).

establish procedures for the arbitration of disputes. Ideally, BITs allow multinational businesses to redress breaches of core economic obligations through direct arbitration. To maintain appearances of a commitment to international standards, and in accordance with these agreements, in 2007 Cuba updated its arbitration system and created the Cuban Court of International Commercial Arbitration, which is part of the Cuban Chamber of Commerce.¹¹³ However, the arbitration court has been criticized for its lack of impartiality and independence.¹¹⁴

According to the United Nations Conference on Trade and Development, Cuba increased FDI flows from \$7 million in 1990-2000 to \$17 million in 2007.¹¹⁵ Tourism, oil and gas, mining, energy, and telecommunications are reportedly the primary sectors of foreign investment on the island.¹¹⁶ Investors in Cuba represent about forty countries, but are mostly from Spain, France, Canada, and Italy and operate in thirty-two sectors of the economy.¹¹⁷ While mechanisms such as Law 77 and BITs created a framework for investment on the island, they neither changed the larger economic environment nor significantly altered the government institutions that regulate the economy. Many obstacles remain for the foreign investor; high taxes, a burdensome regulatory structure, and centralized control of labor all hinder businesses in Cuba. The Cuban state maintains virtually all control of the hiring and firing of employees, including decisions on disciplinary measures and compensation for performance.¹¹⁸ Further, the areas set aside for investment remain limited and are designed to prevent all but the most controlled contact between Cuban citizens and foreigners, yet another way in which the Cuban government meticulously manages its global engagement. Additionally, Cuba lacks a comprehensive set of commercial laws to govern bus-

113. See De la Corte Cubana de Arbitraje Comercio Internacional [Cuban Court of International Commercial Arbitration Act] Decreto-Ley [Law] No. 250 (2007) (Cuba).

114. See Kevin Tuininga, *International Commercial Arbitration in Cuba*, 22 EMORY L. REVIEW 571 (2009) (discussing commercial arbitration practices in Cuba).

115. United Nations Conference on Trade and Development, *World Investment Report: Cuba*, (2008), available at http://www.unctad.org/sections/dite_dir/docs/wir_08_fs_cu_en.pdf. Detailed quantitative data on foreign investment in Cuba is inadequate as access to information is limited, reliant on opaque state agencies.

116. *Foreign Investment in Cuba*, INVESTMENT PROMOTION CENTER OF THE MINISTRY FOR FOREIGN INVESTMENT FOR THE GOVERNMENT OF CUBA, http://www.cubagov.cu/ingles/otras_info/cpi/inversion1.htm [hereinafter Cuba Investment Promotion Center] (last visited Oct. 21, 2010).

117. Paolo Spadoni, *Foreign Investment in Cuba: Recent Developments and Role in the Economy*, 12 CUBA IN TRANSITION 158, 163 (2002).

118. Mercador, *supra* note 99, at 134.

iness transactions and operations. And the Cuban government can change the rules at anytime, with limited recourse available to investors, despite the presence of a BIT or other agreement.¹¹⁹ For instance, in late 2008-early 2009, the Cuban government froze the accounts of several investors, reportedly amounting to hundreds of millions of dollars. After months of stalling, the Cuban government finally offered foreign businesses a payment plan for their frozen assets at two percent interest over five years, “with the proviso that payments can be missed without penalty when money is not available.”¹²⁰

Overall, the changes to Cuba’s foreign direct investment laws may appear to provide the legal basis for foreign direct investment, but the legal culture and business environment are “not conducive to private sector growth.”¹²¹ The annual Index of Economic Freedom, published by the Wall Street Journal and the Heritage Foundation, further confirms this. Cuba’s economy is one of the least free in the world. It places twenty-ninth of the twenty-nine countries ranked in the Latin America and Caribbean region, and it shares the distinction of being among the least free economies in the world, just ahead of Zimbabwe and North Korea. When analyzing the trends across time, rather than steadily improving its score, there has been deterioration since the 2003-2005 period. The 2011 *Index* sums up the investment climate as follows: “In practice, investment is inhibited by a lack of business policy, arbitrary and non-transparent regulation, discrimination against foreign and private domestic investment, and state control of the economy. Private-sector opportunities are limited.”¹²²

B. *Foreign Investment and Human Rights Abuses*

“What do you want to be when you grow up?” a father asks his son in a popular joke in Cuba; “a tourist,” he replies. This story captures the reality of economic life in Cuba. Tourists are envied, and Cuban citizens working in the tourism sector can earn much

119. Hans de Salas del Valle, *Caveat Investor: Realities of Doing Business in Cuba*, 88 FOCUS ON CUBA (Aug. 20, 2007), available at http://ctp.iccas.miami.edu/FOCUS_Web/Issue88.htm.

120. Marc Frank, *Cuba Offers Payback Plan for Frozen Bank Accounts*, REUTERS (Mar. 2, 2010), <http://www.reuters.com/article/idUSN0215925320100302>.

121. United States Agency for International Development, *Cuba Economic Performance Assessment (Highlights of Cuba’s Performance)* (2009), http://pdf.usaid.gov/pdf_docs/PNADQ895.pdf.

122. The Heritage Foundation and Wall Street Journal, *2011 Index of Economic Freedom: Cuba*, available at <http://www.heritage.org/Index/Country/Cuba>.

more than a doctor or lawyer or engineer on the state salary.¹²³ However, foreign direct investment in Cuba also has another, darker side.

In 2008, a vivid example of exploitative Cuban labor practices was the basis of a claim in the U.S. District Court for the Southern District of Florida. Known as “the Curacao Drydock workers case,” the court awarded \$50 million in compensatory damages and \$30 million in punitive damages under the Alien Tort Claims Act and the Torture Victim Protection Act for what can best be termed slave labor violations.¹²⁴

The court found that the defendant, Curacao Drydock, conspired with Cuba to force the workers into labor camps to repair ships and oil platforms. Over a period of fifteen years the three workers were among 50 to 100 laborers who were trafficked to the site to work over sixteen hours a day to earn hard foreign currency for the Cuban government.¹²⁵ The workers produced the agreement between the Defendant and a Cuban state entity that directly outlined the debt Cuba owed Curacao Drydock, which further stated that the debt would be paid with labor — the labor that the three workers in this case and their colleagues provided.¹²⁶

The three workers escaped the labor camp and were subsequently granted permission to enter the United States. Since then, they have been sought by the Cuban government, and their families who remain on the island face continued repression.¹²⁷ The workers testified to intimidation, threats of persecution, and imprisonment during their time in Curacao.¹²⁸ Furthermore, the working conditions were abysmal, resulting in several work-related injuries to the workers.¹²⁹ The court concluded that the defendant’s conduct was “egregiousness,” played a central role in the conspiracy, and contributed to the subjugation of the Cuban people.¹³⁰

This case is illustrative of the Cuban government’s view of

123. See Luis Locay, *The Future of Cuba’s Labor Market: Prospects and Recommendations*, CUBA TRANSITION PROJECT (2004), http://ctp.iccas.miami.edu/Research_Studies/LLocay.pdf.

124. *Rodriguez Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

125. *Id.* at 1357.

126. *Id.* at 1363.

127. *Id.* at 1357.

128. *Id.* at 1361.

129. *Id.*

130. *Id.* at 1366.

Cuban workers as chattel, whose labor is for the benefit of the state. It is also demonstrative of the willingness of some entities doing business in or with Cuba to conspire in the ill treatment of the Cuban people and ignore internationally recognized labor and human rights standards.

IV. U.S. POLICY TOWARD CASTRO'S CUBA

The fall of the Soviet Union with its accompanying end of subsidies to Cuba and the Cuban government's subsequent turn to foreign (third-country) investment as a potentially significant source of revenue prompted renewed attention in the United States on the instrumentalities of U.S. policy.¹³¹ This new attention also involved the shifting of policy-setting on Cuba from the Executive Branch to Congress.

In the 1990s, legislators from both major parties concluded that the U.S. president lacked the interest to pursue what Congress considered to be new opportunities to increase the pressure for change in Cuba; on the contrary, he appeared to be tempted to "normalize" the bilateral relationship without regard to whether there were more open political and economic conditions in Cuba.¹³² This was evidenced by congressional actions to step into the policy void with legislative initiatives to strengthen the economic pressure on Cuba and mandate more vigorous Executive Branch sanctions enforcement, while recognizing the need to maintain avenues for interaction with the Cuban people.¹³³ By the end of that decade, however, congressional activism took another turn, this time towards liberalizing the embargo for the limited purpose of allowing, either through third-country financing or cash-in-advance transactions, the sale of food and agricultural products to Cuba.¹³⁴

In general terms, U.S. policy towards Cuba since 1959 has had a dual track: one element being continued U.S. pressure on

131. Observation based on the author's experience with or involvement in the policy discussions on Cuba and U.S. policy towards that country.

132. *Id.* See also Daniel W. Fisk, *Cuba in U.S. Policy: An American Congressional Perspective*, in CANADA, THE US AND CUBA: HELMS-BURTON AND ITS AFTERMATH 27, 27-56 (Heather N. Nicol, ed. 1999)

133. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992) (codified as amended at 22 U.S.C. § 6001 (2010)) [hereinafter CDA]; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified as amended at 22 U.S.C. § 6021 (2010)) [hereinafter LIBERTAD Act]. The CDA is Title XVII of the "National Defense Authorization Act for Fiscal Year 1993."

134. Trade Sanctions Reform and Enhancement Act of 2000, 22 U.S.C. § 79 (2010).

Havana; another being the maintenance of avenues of communication to either the Cuban government or the Cuban people, or both, and the occasional exploration of areas for government-to-government cooperation.¹³⁵ From the earliest days of the revolutionary government, there also have been moments of exploring moves towards establishing a more “normal” bilateral relationship.¹³⁶

As one historian of the United States’ relationship with Latin America noted, in 1959 “the [U.S.] administration prepared to work with the new Cuban regime, despite President Eisenhower’s expressed misgivings.”¹³⁷ This was short-lived, as Washington recoiled at the new Cuban government’s summary executions, property expropriations, and political turn to Moscow.¹³⁸ President John Kennedy also gave thought to and made some initial gestures towards a rapprochement with Cuba, as we know from declassified documents from his administration.¹³⁹

In the 1970s, there were again efforts toward reducing tensions and normalizing relations, with the Nixon and Ford Administrations pursuing some tentative approaches to Havana. As part of this effort, in 1975, the U.S. embargo was modified to allow U.S. foreign subsidiaries to trade with Cuba.¹⁴⁰ Under the Carter Administration, the United States lifted the ban on travel to Cuba.¹⁴¹ Further, it negotiated the establishment of “interests sections” – diplomatic offices that fall short of a formal embassy – in

135. For U.S. government outreach to Cuba during the Kennedy, Nixon, and Carter Administrations, see *Cuba and the U.S.: Road Map on Efforts to Improve Relations Revealed in Declassified Documents*, NATIONAL SECURITY ARCHIVE (Jan. 22, 2009), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB269/index.htm>.

136. STEPHEN G. RABE, *EISENHOWER AND LATIN AMERICA: THE FOREIGN POLICY OF ANTICOMMUNISM* 122 (Chapel Hill: University of North Carolina Press 1988)

137. *Id.* at 122.

138. *Id.*

139. See *Cuba and the U.S.: Road Map on Efforts to Improve Relations Revealed in Declassified Documents*, *supra* note 135.

140. See *Chronology of US-Cuban Relations, 1958-1998*, U.S. INTERESTS SECTION IN HAVANA, <http://havana.usint.gov/uploads/images/ypJlFsSBY-nmKb3Z2qZ7Rw/CHRONOLOGY5898.pdf>. See also, KENNETH A. RODMAN, *SANCTIONS BEYOND BORDERS: MULTINATIONAL CORPORATIONS AND U.S. ECONOMIC STATECRAFT* 114-116 (Rowman & Littlefield Publishers 2001); National Security Archive, NATIONAL SECURITY COUNCIL, MEMORANDUM FOR SECRETARY KISSINGER, CONFIDENTIAL, ‘CUBA POLICY,’ Aug. 30, 1974, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB269/index.htm>.

141. See MARK P. SULLIVAN, *CUBA: U.S. RESTRICTIONS ON TRAVEL AND REMITTANCES* 2 (Congressional Research Service 2010); see also, LARS SCHOULTZ, *THAT INFERNAL LITTLE CUBAN REPUBLIC: THE UNITED STATES AND THE CUBAN REVOLUTION* 291-361 (The University of North Carolina Press 2009).

Havana and Washington in 1977.¹⁴²

Beginning in the late 1970s and continuing into the 1980s, Cuban military involvement in Africa, its support for revolutionary movements in Central America and the Caribbean, and the question of repatriating to Cuba criminal exiles from the Mariel exodus undercut these outreach efforts by the United States.¹⁴³ Both Secretaries of State in the Reagan Administration, Alexander M. Haig, Jr. (1981-1982) and George P. Shultz (1982 – January 1989) noted in their respective memoirs the Administration's concerns about Cuban support to guerrillas in El Salvador and the presence of Cuban military advisors in Nicaragua. Haig additionally noted the Cuban presence in Africa, while Shultz referenced the Cuban role in Grenada.¹⁴⁴ Despite efforts at dialogue early in the Reagan Administration, including the dispatch of envoy Vernon Walters to Havana, Cuban adventurism prompted the Administration to return to a harder-line policy, including reimposing restrictions on travel to Cuba.¹⁴⁵ As noted at the outset of this section, U.S. sanctions were strengthened twice in the 1990s through legislation.¹⁴⁶ Both pieces of legislation also authorized the provision of support to the Cuban people.¹⁴⁷

142. See Robert Pastor, *The Carter Administration and Latin America: A Test of Principle*, THE CARTER CENTER (1992), <http://www.policyarchive.org/handle/10207/bitstreams/5130.pdf>; see also, National Security Archive, op. cit., *President Directive / NSC-6, 'Cuba,'* Mar. 15, 1977, signed by President Jimmy Carter, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB269/doc08.pdf> and <http://www.jimmycarterlibrary.gov/documents/pddirectives/pd06.pdf>.

143. See Pastor, *supra* note 142 (“But Cuba’s military cooperation with the U.S.S.R. in Africa was an insurmountable obstacle to normalization, and as it expanded, it also began to affect American relations with the Soviet Union.”); Richard C. Thornton, *The Carter Years: Toward A New Global Order*, CHAPTER 8: SALT II, CUBA, AND CENTRAL AMERICA: THE PURSUIT OF ILLUSION (House, 2007) 358 (“Formal talks in the spring led to agreements on fisheries and maritime boundaries, and later in the year interests sections were opened in both capitals. But Cuba’s heavy involvement in Ethiopia in late 1977 brought Washington’s initiative to a standstill.”). See also ALEXANDER M. HAIG, JR., *CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY* (Macmillian 1984); GEORGE P. SHULTZ, *TURMOIL AND TRIUMPH: MY YEARS AS SECRETARY OF STATE* (Scribner’s 1993). For U.S. preoccupation with migration, see *The Reagan Diaries*, Ed., Douglas Brinkley (Harper Collins 2007), entries regarding Cuba in 1981 and 1982.

144. See HAIG, *supra* note 143; see also SHULTZ, *supra* note 143.

145. See HAIG, *supra* note 143, at 132-137. See also *Reagan v. Wald*, 468 U.S. 222 (1984) (upholding the President’s authority to restrict travel to Cuba by U.S. nationals).

146. *Rodriguez Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

147. CDA, 22 U.S.C. § 6004 (2010) (“Support for the Cuban People”); LIBERTAD Act, 22 U.S.C. § 6039 (2010) (“Authorization of support for democratic and human rights groups and international observers.”).

The Cuban Democracy Act (CDA), introduced by Congressman Robert Torricelli, Democrat of New Jersey, reflected congressional frustration with the George H.W. Bush Administration's "lack of a proactive policy to hasten the downfall of the Castro regime and to promote a peaceful, orderly transition to democracy."¹⁴⁸ The bill also reflected the growth of a politically-active Cuban-American constituency, which worked with Congressman Torricelli and other Members of Congress on the legislation.¹⁴⁹ The George H.W. Bush Administration initially hesitated in its support of the legislation, including taking some steps to negate the need for legislation,¹⁵⁰ but election year politics helped dictate otherwise, especially when the Democrat candidate for president, then-Governor Bill Clinton of Arkansas, embraced the legislation.¹⁵¹

In keeping with the dual-track approach to Cuba, the CDA banned U.S. foreign subsidiary trade with Cuba¹⁵² while also authorizing donations of food, the export of medicines and medical supplies, and the expansion of telecommunications services.¹⁵³ The CDA provision allowing the donation and sale of medicines and medicals supplies to Cuba¹⁵⁴ has resulted in the authorization of more than \$750 million in aid since the bill's enactment.¹⁵⁵ However, the Cuban government has not taken full advantage of this availability; what has actually shipped is far less, maybe by several hundreds of millions of dollars.¹⁵⁶ The Castro propaganda

148. Consideration of the Cuban Democracy Act of 1992: Hearings and Markup: Hearing on H.R. 4168 and H.R. 5323 before the Committee on Foreign Affairs, 102nd Congress 2d Session 76 (1992) (opening statement of Hon. Robert G. Torricelli).

149. Christopher Marquis, *Embargo Bill's Success Testified to Exiles' Clout*, MIAMI HERALD, Sept. 28, 1992, at A1.

150. *U.S. Adds Pressure on Cuba; Bush Bars Ships that Defied Curbs*, BOSTON GLOBE, Apr. 19, 1992, at 2. For the Bush Administration's concerns about the legislation, see Consideration of the Cuban Democracy Act of 1992: Hearings and Markup on H.R. 4168 and H.R. 5323 before the Committee on Foreign Affairs, 102nd Congress 355-83 (1992) (statement of Robert S. Gelbard, Principal Deputy Assistant Secretary of State for Inter-American Affairs, Department of State).

151. Pamela Constable, *Clinton Could Face Pressure on Cuba*, BOSTON GLOBE, Nov. 4, 1992, at 2; see also BILL CLINTON, *MY LIFE* 615 (2004).

152. CDA, 22 U.S.C. § 6005.

153. CDA, 22 U.S.C. § 6004 (b)-(e). This section, in subsection (d), also required onsite verification regarding the delivery of medical supplies, unless provided to a non-governmental organization in Cuba for medical or humanitarian purposes.

154. CDA, 22 U.S.C. § 6004(c).

155. *Exports and Reexports to Cuba*, U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, <http://www.bis.doc.gov/policiesandregulations/regionalconsiderations/cuba.pdf>.

156. *Id.*; see also *Written Statement of Grant D. Aldonas Under Sec'y for Int'l Trade*

apparatus tries to make points by claiming that the lack of medicines and medical supplies in Cuba is a result of U.S. policies.¹⁵⁷ The reality is that the failure to adequately provide medicines and medical supplies rests in Havana. This is not a case of U.S. policy getting in the way; it is rather a situation where Cuba has chosen not to pursue purchases to the detriment of the Cuban people.¹⁵⁸

A similar frustration with presidential inaction towards Cuba and over-reaction to events in Haiti, combined with perceptions of a presidential agenda to re-orient the bilateral U.S.-Cuba relationship without corresponding political and economic reforms on the island, resulted in another congressional effort to consolidate the policy. This time the chief protagonists were a Democrat President, Bill Clinton, and Republican Senator Jesse Helms of North Carolina. Unlike Torricelli who was a newcomer to the Cuba issue when he introduced the Cuban Democracy Act, Helms had built a Senate career on anti-communism, including opposition to Castro's Cuba and attention to developments in Latin America.¹⁵⁹ As Helms summed it up in his memoirs, "Fidel Castro survived the Clinton years for one reason: the Clinton administration *never* made the dictator's removal from power a goal of its foreign policy" [emphasis in original].¹⁶⁰

In February 1996, Cuban military jets shot down two U.S. civilian planes, killing four U.S. nationals. This brutal action by Cuba led to congressional approval of the Cuban Liberty and Democratic Solidarity Act and its signing into law by President Clinton.¹⁶¹ More commonly known as the LIBERTAD Act or Helms-Burton, this legislation further strengthened U.S. sanctions while significantly expanding authorities to provide support to the Cuban people.¹⁶²

U.S. Dep't of Commerce, THE U.S. SENATE COMM. ON FINANCE, <http://finance.senate.gov/imo/media/doc/090403gatest.pdf>.

157. See *Speech Delivered by Cuban Foreign Minister, Bruno Rodríguez Parrilla at the United Nations Gen. Assembly, New York, Oct. 28, 2009*, MINISTRY OF FOREIGN AFFAIRS OF CUBA, http://www.cubaminrex.cu/English/UNGA/Articulos/64Session/Statements/1028_ING.html; see also *Embargo as Genocide? U.S., Cuba Spar Over it*, ASSOCIATED PRESS (Dec. 4, 2009), http://www.msnbc.msn.com/id/34277833/ns/world_news-americas/#.

158. *Embargo as Genocide? U.S., Cuba Spar Over it*, *supra* note 157.

159. See SENATOR JESSE HELMS, *HERE'S WHERE I STAND: A MEMOIR* (2005); see also WILLIAM A. LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM* (2008).

160. HELMS, *supra* note 159, at 265.

161. LIBERTAD Act, 22 U.S.C. § 6021.

162. For background on the legislative history of the LIBERTAD Act, see Daniel W.

The LIBERTAD Act also included a provision codifying the embargo, including the restrictions “as in effect on March 1, 1996,” until the President determines that a transition government is in place in Cuba.¹⁶³ According to the Conference Report accompanying the LIBERTAD Act, Congress made it clear that:

It is the intent of the committee of conference that all economic sanctions in force on March 1, 1996, shall remain in effect until they are either suspended or terminated pursuant to the authorities provided in section 204 of this Act (requiring a Presidential determination that a democratic transition is under way in Cuba). *It is not the intent of this section to prohibit executive branch agencies from amending existing regulations to tighten economic sanctions on Cuba or to implement the provisions of this Act [emphasis added].*¹⁶⁴

Despite the plain language of the LIBERTAD Act and the accompanying explanation in the Conference Report, the Clinton Administration interpreted the LIBERTAD provision as essentially limited to the codification of the President’s authority to promulgate and modify the Cuban Asset Control Regulations (CACR).¹⁶⁵ The Executive Branch based this interpretation on the President’s broad foreign affairs authority¹⁶⁶ and authorities existing under the Trading With the Enemy Act (TWEA) of 1917, as amended.¹⁶⁷ It is under this interpretation of the law that the Clinton, George W. Bush, and Obama Administrations adjusted elements of U.S. policy towards Cuba, depending on their respective views of how the United States can best help the Cuban people.

There has been little said publicly by the U.S. Executive

Fisk, *Cuba in U.S. Policy: An American Congressional Perspective*, in CANADA, THE UNITED STATES AND CUBA: HELMS-BURTON AND ITS AFTERMATH 27, 27-56 (Heather N. Nicol, ed., 1999); Daniel W. Fisk, *Economic Sanctions: The Cuba Embargo Revisited*, in SANCTIONS AS ECONOMIC STATECRAFT: THEORY AND PRACTICE 65, 65-85 (Steve Chan & A. Cooper Drury, eds., 2000); Daniel W. Fisk, *Cuba in U.S. Foreign Policy: The Emergence of a ‘Post-Helms-Burton’ Era?*, in CANADA, THE UNITED STATES, AND CUBA: AN EVOLVING RELATIONSHIP 95, 95-110 (Sahadeo Basdeo & Heather N. Nicol, eds., 2002).

163. For criteria determining a transition government in Cuba, see LIBERTAD Act, 22 U.S.C. § 6065.

164. H.R. REP. NO. 104-468, at 45-6 (1996) (Conf. Rep. to accompany H.R. 927).

165. See Cuban Assets Control Regulations, 31 C.F.R. § 515.

166. U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); see also U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-99-10, CUBAN EMBARGO: SELECTED ISSUES RELATING TO TRAVEL, EXPORTS, AND TELECOMMUNICATIONS 18 (1998).

167. *Id.*, referencing 50 U.S.C. app. § 5(b).

Branch about its interpretation of the LIBERTAD codification provision. In a 1998 letter to the General Accounting Office (GAO), State and Treasury Department officials outlined the view that the LIBERTAD language “does [not] rule out reasonable adjustments to the licensing regime consistent with the limitations on suspension or termination [of the embargo as outlined in LIBERTAD]” In that same 1998 report, the GAO accepted the Executive Branch’s interpretation, concluding that: “[t]he executive branch has broad authority under U.S. law to make changes in the embargo as circumstances dictate.”¹⁶⁸ Because the LIBERTAD Act also contained a provision on remittances from U.S. nationals to family in Cuba,¹⁶⁹ the Clinton Administration had a legally arguable case in revising the policy in that specific area. The latitude that is presumed to exist in the President’s ability to revise remittance policy has been determined to exist in regards to other elements of the embargo, such as revising rules on travel.¹⁷⁰

The George W. Bush Administration also modified the CACR during its tenure. In 2004, the administration tightened restrictions in a number of areas, including policies on travel, remittances, and gift parcels to Cuba.¹⁷¹ These actions, however, were consistent with congressional intent on the LIBERTAD Act’s codification of the embargo, which clearly viewed with approval the possibility of tightening sanctions.

In 2008, the Bush administration loosened restrictions on selected information technologies, especially involving telecommunications. Again, this action was consistent with statutory mandates. Telecommunications have had a long carve-out in embargo policies. The Cuban Democracy Act of 1992 specifically authorized telecommunications: “[t]elecommunications services between the United States and Cuba shall be permitted.”¹⁷² The CDA further

168. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-99-10, CUBAN EMBARGO: SELECTED ISSUES RELATING TO TRAVEL, EXPORTS, AND TELECOMMUNICATIONS 19 (1998).

169. LIBERTAD Act, 22 U.S.C. § 6042(1)(A).

170. The General Accounting Office reaffirmed its conclusion on the President’s ability to modify the embargo in certain areas – travel, remittances, gift parcels, and trade – in a September 2009 report to Members of Congress. See U.S. GEN. ACCOUNTING OFFICE, GAO-09-951R, U.S. EMBARGO ON CUBA: RECENT REGULATORY CHANGES AND POTENTIAL PRESIDENTIAL OR CONGRESSIONAL ACTIONS 1-17 (2009).

171. Gift parcels are a form of “care packages” from U.S. nationals to family in Cuba. *Report to the President*, COMMISSION FOR ASSISTANCE TO A FREE CUBA, 29-32 (July 2006) <http://www.cafc.gov/>.

172. CDA, 22 U.S.C. § 6004(e)(1).

authorized facilities “in such quantity and of such quality as may be necessary to provide efficient and adequate telecommunications services” between the two countries and authorized the licensing of payments to Cuba as a result of these services.¹⁷³

The LIBERTAD Act modified this CDA telecommunications language by creating a clear statutory prohibition on U.S. investment – as opposed to payments to Cuba for the provision of services – in Cuba’s domestic telecommunications sector.¹⁷⁴ The LIBERTAD legislation’s accompanying Conference Report outlined that the CDA provision on telecommunications “should not be construed as authorizing any United States person to make any direct or indirect investment, in case or in-kind, in the domestic telephone network within the island of Cuba” until the President has determined that a transition government is in place in Cuba.¹⁷⁵ At the time of such a presidential determination, prohibited transactions under the Cuban Asset Control Regulations (amongst other, select provisions of law) can be allowed. Both the George W. Bush and Obama Administrations based their decisions to increase the flow of communications to the Cuban people through telecommunication linkages, including mobile and cellular phone service, on the CDA and LIBERTAD provisions of law.

In April 2009, the Obama Administration adjusted the policy for travel and remittances for those with family in Cuba and expanded telecommunications interaction with Cuba.¹⁷⁶ It is estimated that family travelers to Cuba reached 200,000 in 2009, with that number having increased further during 2010, to a reported 1,000 people a day traveling to the island.¹⁷⁷ Historically, the exact numbers of U.S. nationals traveling both legally and illegally to Cuba remains open to debate. It is estimated that upwards of 170,000 Americans were traveling annually to Cuba by about 2004, of which about 125-130,000 had family in Cuba.¹⁷⁸

173. CDA, 22 U.S.C. § 6004(e)(2)-(3).

174. LIBERTAD Act.

175. H.R. REP. NO. 104-468, at 45 (1996) (Conf. Rep. to accompany H.R. 927).

176. *Fact Sheet: Reaching Out to the Cuban People*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Apr. 13, 2009), http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reaching-out-to-the-Cuban-people/.

177. *Cuba Reports More Tourism, Less Revenue*, MIAMI HERALD, Dec. 25, 2009, <http://www.miamiherald.com/2009/12/25/1398067/cuba-reports-more-tourism-less.html>; *South Florida Sees Upswing in Family Trips to Cuba*, MIAMI HERALD, Sept. 8, 2009, <http://www.miamiherald.com/2009/09/08/1224032/south-florida-sees-upswing-in.html>; Marc Frank, *Big Jump Seen in US Travel to Cuba in 2010*, REUTERS (Dec. 6, 2010), <http://www.reuters.com/article/idUSTRE6B54E520101206>.

178. *Report to the President*, COMMISSION FOR ASSISTANCE TO A FREE CUBA, 14-33

As of October 1, 2010, in addition to those who claim to have “close family” in Cuba, others who can legally travel to Cuba include journalists and support personnel; full-time professionals to conduct research or to attend professional meetings and conferences; those involved in the production or distribution of agricultural products, medicines and medical devices; and U.S. telecommunications service providers.¹⁷⁹

It is also possible to travel to Cuba to pursue educational activities, including course work and academic research; to engage in free-lance journalism, public performances, and activities related to private foundations, research, or educational institutions; or to pursue activities related to the export or import of informational materials.¹⁸⁰

Remittances¹⁸¹ from U.S. nationals to Cuba are another area of interaction between the United States and Cuba. The Executive Branch has modified the policy on the sending of remittances over the years. In 1977, as part of his effort to change the bilateral relationship, the Carter Administration let lapse restrictions on travel to Cuba which also had the effect of permitting remittances. The focus on remittances increased during the Clinton Administration, with that administration tightening the rules in the wake of its policy changes for Cuban migrants, then loosening remittances in the context of Pope John Paul’s visit to Cuba in January 1999.¹⁸² President George W. Bush returned to a more restrictive remit-

(July 2006) <http://www.cafc.gov/>. For various perspectives on Cuba and tourism, see MARK FALCOFF, CUBA: THE MORNING AFTER: CONFRONTING CASTRO’S LEGACY (2003); CORBETT, *supra* note 77; JULIA SWEIG, CUBA: WHAT EVERYONE NEEDS TO KNOW (2009); Jaime Suchlicki, *Implications of Ending the Cuba Travel Ban*, FOCUS ON CUBA, CUBA TRANSITION PROJECT: INST. FOR CUBAN AND CUBAN-AM. STUDIES, UNIV. OF MIAMI (July 20, 2010); James Cason, *The Case Against Unlimited Travel to Cuba as an Agent of Democratization*, ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY: CUBA IN TRANSITION, 23-28 (July 30-Aug. 1, 2009), <http://lanic.utexas.edu/project/asce/pdfs/volume19/pdfs/cason.pdf>; Gary H. Maybarduk, *Comments on “The Case Against Unlimited Travel to Cuba as an Agent of Democratization” by James Cason*, ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY: CUBA IN TRANSITION, 29-30 (July 30-Aug. 1, 2009), <http://lanic.utexas.edu/project/asce/pdfs/volume19/pdfs/maybardukcomment.pdf>; MARK P. SULLIVAN, CONG. RESEARCH SERV., RL 31139, CUBA: U.S. RESTRICTIONS ON TRAVEL AND REMITTANCES (Apr. 16, 2010).

179. *Cuba: What You Need to Know About U.S. Sanctions Against Cuba: An Overview of the Cuban Assets Control Regulations – Title 31 Part 515 of the U.S. Code of Federal Regulations*, U.S. DEP’T OF THE TREASURY: OFFICE OF FOREIGN ASSET CONTROL (updated Sept. 3, 2009), <http://www.treas.gov/offices/enforcement/ofac/programs/cuba/cuba.pdf>.

180. *Id.*

181. “A remittance is a payment of money sent to a person in another place.” U.S. GEN. ACCOUNTING OFFICE, *supra* note 166, at n.2.

182. See SHULTZ, *supra* note 143, at 491.

tance policy, keeping the Clinton era amount of \$1,200 annually, but limiting remittances to immediate family in Cuba.¹⁸³ President Obama lifted those restrictions in April 2009. Through a policy directive, the Obama Administration removed the limits on amounts and frequency of remittances, and also expanded the members of a family in Cuba who are eligible to receive funds.¹⁸⁴

As with specific figures on those traveling to Cuba, exact amounts of remittances flowing from the United States to Cubans remain subject to debate. Researchers place total remittances from as low as the \$300-\$500 million range to \$830 to \$985 million annually, depending on the methodological calculations applied.¹⁸⁵ U.S. residents account for about half of all remittances to Cuba. It is estimated that forty to fifty percent of U.S. residents with family in Cuba send money to those relatives. In all, upwards of two million Cubans are receiving remittances from family outside Cuba. Recent economic conditions have impacted these figures, but remittances are a reality and continue.¹⁸⁶

Even with the changes in travel and remittance policies, the most significant interaction between citizens of the United States and the Cuban government – not the Cuban people – involves the sale of food and agricultural products. The Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) authorizes

183. *Report to the President*, COMMISSION FOR ASSISTANCE TO A FREE CUBA, 14-33 (July 2006), <http://www.cafc.gov/>.

184. *Fact Sheet: Reaching Out to the Cuban People*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Apr. 13, 2009), http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reaching-out-to-the-Cuban-people/.

185. See Jorge Perez-Lopez & Sergio Diaz-Briquets, *Remittances to Cuba: A Survey of Methods and Estimates*, ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY: CUBA IN TRANSITION 396-409 (Aug 4–6, 2005), <http://lanic.utexas.edu/project/asce/pdfs/volume15/pdfs/diazbriquetsperezlopez.pdf>; see also *Report to the President*, COMMISSION FOR ASSISTANCE TO A FREE CUBA 14-33 (July 2006), <http://www.cafc.gov/>; Manuel Orozco, *The Cuban Condition: Migration, Remittances, and Its Diaspora*, INTER-AMERICAN DIALOGUE (2009), http://www.thedialogue.org/PublicationFiles/cuban%20condition%20migration%20remittances_FINAL.pdf; Manuel Orozco, *On Remittances, Markets and the Law: The Cuban Experience in President Times*, ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY: CUBA IN TRANSITION 406-11 (July 30-Aug. 1, 2009), <http://lanic.utexas.edu/project/asce/pdfs/volume19/pdfs/orozco.pdf>; *Remittances to Cuba from the United States*, BENDIXEN & ASSOCIATES (May 25, 2005), <http://www.bendixenandassociates.com/studies/IAD%20Orozco%20Cuban%20Remittances%20Presentation%202005.pdf>.

186. On January 14, 2011, the Obama Administration announced its intention to further revise the CACR on “1.) purposeful travel; 2.) non-family remittances; and 3.) U.S. airports supporting licensed charter flights to and from Cuba.” *Reaching Out to the Cuban People*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Jan. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/14/reaching-out-cuban-people>.

cash-in-advance sales or sales financed through third country mechanisms.¹⁸⁷ Rather than being the result of Executive Branch action, this legislation liberalizing the bilateral relationship was the product of a farm-state congressional reaction to Congress' own efforts to increase sanctions regimes generally. This also reflected the specific interest of the farm lobby in expanding commercial markets for U.S. food and agricultural products and was based on the argument that "American farmers and ranchers face a disproportionate burden from U.S. economic sanctions."¹⁸⁸

While travel and remittances are based on people-to-people relationships, there is no trade with the Cuban people in the case of food and agricultural sales. The Cuban state maintains a monopoly on these interactions. The only Cuban entity authorized to import products, including food, is a state agency, *Empresas Comercializadora de Alimentos* (ALIMPORT/Cuban Food Import Agency).

Implementation of TSRA became an element in the struggle between the President and the Congress over Cuba policy beginning in late 2004. The U.S. Treasury Department received "inquiries from U.S. financial institutions on the question of whether or not the shipment of goods prior to receipt of payment by U.S. exporters was permitted" under TSRA's cash-in-advance provision. Because TSRA contained no definition of "cash-in-advance," either in the statute or the accompanying legislative history, the Treasury held extensive consultations on the question. Basically, it came down to a question of payment before shipment or before delivery of the goods to Cuba. The Treasury determined that "the commonly understood meaning of the term [cash-in-advance] in the international trade finance community is that full payment for the goods is received by the exporter before the goods are shipped."¹⁸⁹

Those opposed to the U.S. embargo criticized this interpretation, expressing concerns that it would hinder sales to Cuba.¹⁹⁰

187. Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 79 U.S. H.R.: OFFICE OF THE LAW REVISION COUNSEL (Feb. 1, 2010), <http://uscode.house.gov/download/pls/22C79.txt>.

188. For example, see S. CONG. REC. *The Sanctions Policy Reform Act S. 757*, at 5981-82 (Mar. 25, 1999) (statement of Sen. Richard Lugar). The effort to approve the Sanctions Policy Reform Act was a precursor to TSRA.

189. Report to the President, COMMISSION FOR ASSISTANCE TO A FREE CUBA 14-33 (July 2006), <http://www.cafc.gov/>.

190. See Larry Luxner, *New OFAC Rulings Worry Food Exporters as U.S. Sales to Alimport Pass \$1 Billion*, CUBA NEWS, Dec. 2004, at 1-2.

Despite the near hysteria of embargo opponents, agricultural trade flourished, with the high point in single year sales – \$710 million in 2008 – being reached when the full-payment-for-goods-before-shipment was in effect.¹⁹¹ In 2009, again at the initiative of anti-embargo groups and elements of the farm and business lobby, Congress overturned the Treasury Department’s definition of cash-in-advance, allowing payment before the transfer of title to or control over the goods.¹⁹²

In the ten years since the enactment of TSRA, the total value of authorized food and agricultural product exports to Cuba stands at more than \$3.3 billion dollars. Sales dropped in 2009, to \$528 million, a decrease due to the economic constraints in Cuba which was also hit by the global economic downturn. As of mid-2010, sales stood at \$182 million, representing a thirty-five percent decrease from the same period in 2009. However, as the U.S.-Cuba Trade and Economic Council noted, this decrease was primarily a consequence not of U.S. policy but of Cuban government decisions “which lessen its ability to earn foreign exchange” with which to buy products. Still, as of mid-2010, Cuba ranked fortieth of a total of 225 global export markets for U.S. agricultural products.¹⁹³

V. CONCLUSION

Cuba has long been a focus of attention by U.S. policy-makers and segments of the American public, and not always for geo-strategic or altruistic reasons. As early as the Administration of Thomas Jefferson, Cuba received attention for the place the island was perceived to have in Napoleon’s imperial aspirations.¹⁹⁴ Since that time, the U.S.-Cuba relationship has often been burdened by mythology, misperceptions and misunderstandings on both sides of the Florida Straits.

Since the advent of Fidel Castro’s emergence in power, the central tool of U.S. Cuba policy has been economic pressure (the “embargo”). This overt policy was augmented in the early years

191. *2010-2001 U.S. Export Statistics for Cuba*, U.S.-CUBA TRADE AND ECONOMIC COUNCIL: ECONOMIC EYE ON CUBA (July 2010), <http://www.cubatrade.org/>.

192. See MARK P. SULLIVAN, CONG. RESEARCH SERV., R 40193, CUBA: ISSUES FOR THE 111TH CONGRESS 28-29 (July 16, 2010), available at http://assets.opencrs.com/rpts/R40193_20100716.pdf.

193. *2010-2001 U.S. Export Statistics for Cuba*, *supra* note 191.

194. MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY (1970). For a critical overview of U.S.-Cuban relations through the mid-twentieth century, see SHULTZ, *supra* note 143, at 13-33.

with covert operations seeking the wholesale replacement of the revolutionary government through armed means or the targeted removal of that government's central personality, Fidel Castro.¹⁹⁵

In the post-Cold War world, a form of "managed engagement" with either the Cuban government or the Cuban people, or both has complemented the use of economic pressure. Support for the emergence of a democratic Cuba – where the Cuban people determine the nature and role of their government rather than the government determining the role of Cuba's citizenry – has remained the central objective of U.S. policy.

U.S. policies, including the embargo, have also sought to reflect a political and moral statement that we reject dictatorship and its abuses, and that we have not forgotten those courageous Cubans who are seeking and working towards their dream of a free Cuban society. However, the public discussion of U.S. policy towards Cuba – and whether or how to adjust that policy, namely the "embargo" – often leaves an impression that there is and has been a static relationship with a lack of interaction between those in the United States and the people of Cuba. In reality, there consistently have been avenues for interaction. These avenues have been narrowed as well as widened over the years, as noted in this article, but they have existed.

The fact that U.S. presidents have been reluctant to completely step away from the embargo, even after initially expressing a willingness to do so or pursuing modifications in its application is a testament to its utility and flexibility, albeit within limits. This is the misunderstood aspect of U.S. policy. From a policymaker's perspective, the "embargo" offers a degree of flexibility that may seem counter-intuitive given the policy's characterization in the larger public debate. Within the context of the embargo, the United States has sought occasional openings in its relations with the Cuban government over the past thirty years and to establish avenues of communication with the Cuban people.

One can expect this to remain the case as Cuba evolves and continues its own effort at "managed engagement" with the world. On a superficial level, Cuba appears to be open to business and expanded interaction with the world. This is fed by its efforts to attract and harness foreign investment, especially in segments of the economy that will benefit the current Cuban government's

195. See DON BOHNING, *THE CASTRO OBSESSION: U.S. COVERT OPERATIONS AGAINST CUBA, 1959-1965* (2005).

survival strategy. The average Cuban citizen, however, remains legally constrained in benefitting from that interaction, as well as constrained from having a significant say in the policies that affect their daily lives. The Cuban government's announcement of expanded areas for self-employment does not change this fundamental situation.

While the spread of technology is increasing the capacity of Cubans to form new social relationships and engage in innovation and expression outside of the parameters set forth by the Cuban government, that same government is working diligently to suppress broad citizen access. Technologies initiatives as implemented by Presidents George W. Bush and Obama, respectively, should remain an element of U.S. policy as allowed by existing legal parameters; however, they are not some magic instrument that alone will change the course of Cuba's history or the U.S. relationship with that nation.

The continuing challenge for the United States is a recognition that changes in that country will come from within the Cuban family. In the course of seeking an effective means to support this, we should keep in mind two realities. The first goes to the nature of closed societies, such as that existing in today's Cuba, which was summed up in an observation by former Czech dissident and later democratically elected president Vaclav Havel:

Do not forget, in a totalitarian system we can observe an interesting phenomenon. People in power, like their citizens, speak out only when the time is ripe. Our leaders all wear a uniform mask and declare identical phrases. Perhaps at the moment of history, the masks will fall, and it is only at that moment that we know who is who. It is possible then that we may be surprised to find that the masks concealed an intelligent face.¹⁹⁶

The second reality is life as it is lived by average Cubans on a day-by-day basis and how U.S. policy decisions may affect them. This was summed up in early 2009 in a letter from seventeen independent Cuban civil society activists to President Obama. Speaking in the name of "Cubans who have defied the repression [and] the intimidation" of the Cuban government, they wrote:

We ask that you do not put commercial considerations ahead of political freedom for our people. We invite you not to sacrifice the moral leadership of the United States in the

196. MICHAEL MEYER, *THE YEAR THAT CHANGED THE WORLD: THE UNTOLD STORY BEHIND THE FALL OF THE BERLIN WALL* 141 (2009).

face of commercial temptations. Your presidency is a tribute to everything that can be conquered when a cause is just and correct. We dedicate our lives to the movement for the freedom of Cuba and expect – one day – to have a democratically-elected Cuban president who would welcome you to Havana. Do not forget us. We need your support. We, too, ‘have a dream’ of freedom.¹⁹⁷

How these two realities are balanced in the course of U.S. policy implementation will decide whether U.S. interaction with Cuba enriches and reinforces the current, repressive governmental structure or provides a means to empower and enable the fulfillment of Cubans’ aspirations and priorities.

197. S. CONG. REC. *Letter to President Obama from Cuban Patriots*, at S4302 (Apr. 2, 2009).