

FURTHERING CUBAN REFORMS THROUGH AGRICULTURAL TRADE

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The freehold buying and selling of residential real estate became legal in Cuba on November 10, 2011, marking a major milestone on the island's road to economic liberalization. In addition, the Cuban government is encouraging the creation of small businesses and private farming. More than 180,000 "self-employment" licenses have been issued since 2010, and the government has turned over 4 million acres of land to 143,000 private farmers since 2008. Today there are over 350,000 small private farmers in Cuba, producing 57% of food consumed on the island and 60% of agricultural exports on just 24% of the land. The Cuban state owns more than 70% of the arable land on the island, of which some 50% lies fallow. Yet even this is changing as economic reforms accelerate. In 2011, Cuba's government announced that private farmers would be eligible to receive land grants covering as much as 67 hectares (170 acres), up from the current maximum of 13 hectares (33 acres).

Cuba's private farmers are an entrepreneurial class with growing disposable income. They buy imported foreign goods, including new automobiles (now also legal), and are eager to sell their agricultural products to the United States. However, Cuban agricultural products are still banned from import into the United States. Cuban private farmers and businessmen could find this puzzling given that, according to the U.S. Commerce Department, American businesses have exported nearly \$3.6 billion worth of food and agricultural products to Cuba since 2001.

While the U.S. will undoubtedly seek to help stabilize Cuba economically when relations are normalized, it will be constrained by our presumed massive budget deficit and significantly reduced foreign aid budgets. Official U.S. policy is to help the growth of the private sector in Cuba as a means of developing democratic institutions.

The U.S. government could concretely help the development of Cuba's private agricultural sector—at no cost to the U.S. taxpayer—through legislation that would allow preferential market access for Cuban agricultural products before the embargo is lifted and relations are normalized. This would require that the U.S. implement preferential (including protected) trade access for those of the island's agricultural products that would not compete with products grown in the United States.

The U.S. has a history of providing development assistance and preferential trade access to developing countries, particularly to its neighbors in Latin America and the Caribbean. Several programs offer preferential access to the U.S. market for certain agricultural and manufactured goods from developing countries. For example, the U.S. has developed a Generalized System of Preferences (GSP), in addition to several regional preferential trade programs such as the Caribbean Basin Initiative, the Andean Trade Preference program, and the African Growth and Opportunity program.

The President retains ultimate decision-making authority as to which countries and products are eligible for GSP status. There are certain mandatory cri-

teria countries must meet to be considered eligible for GSP treatment. Of particular interest with respect to Cuba, Communist countries are not eligible for GSP treatment “unless the country receives Normal Trade Relations (NTR) treatment, is a World Trade Organization (WTO) member and a member of the International Monetary Fund (IMF), and is not dominated by international communism.”¹ In addition, a GSP beneficiary “may not have nationalized, expropriated or otherwise seized property of U.S. citizens or corporations without providing, or taking steps to provide, prompt, adequate and effective compensation, or submitting such issues to a mutually agreed forum for arbitration.”²

While certain products from Cuba would certainly be eligible for GSP treatment, the mandatory criteria present hurdles for preferential trade treatment even apart from the current political climate. However, these are not insurmountable. For example, Cuba has repeatedly offered to negotiate the settlement of claims for expropriated U.S. property and is no longer dominated by “international communism” since the demise of the Soviet Union.

Like the GSP, the Caribbean Basin Initiative (CBI) (involving regional preferential trade programs for certain Central American and Caribbean countries) was intended to encourage economic development and export diversification by providing trade and tariff benefits. However, such benefits were denied to any country deemed to be under Communist control.

President Clinton signed the African Growth and Opportunity Act in 2000 (AGOA) to increase trade and investment with sub-Saharan Africa. AGOA sought to “stimulate economic growth, to promote a high-level dialogue on trade and investment-related issues, to encourage economic integration, and to facilitate sub-Saharan Africa’s integration into the global economy.” Thirty-eight sub-Saharan African countries are eligible for preferential treatment under

the AGOA. In addition to the 4,600 products already eligible for the GSP, the AGOA adds 1,800 products that may receive preferential treatment from AGOA countries. Most agricultural products are included in these lists.

AGOA beneficiaries are eligible for substantial trade preferences that, in addition to the preferences of the GSP, permit marketable goods produced in AGOA countries to enter U.S. duty-free. The U.S. government, in seeking to encourage and assist AGOA countries, established four regional trade hubs through which it provides assistance to governments and businesses seeking to export to the U.S. market.

Similar to other preferential trade programs, the U.S. President applies certain criteria to determine on an annual basis whether sub-Saharan countries are eligible for participation in AGOA. These criteria include demonstration of progress toward the creation of a market-based economy, establishment of the rule of law, and enactment of economic policies to reduce poverty, protect internationally recognized worker rights, and fight corruption. Under these criteria, Cuba could be eligible for an AGOA-type of preferential program for its agricultural exports.

The U.S. and Cuba both were parties to the General Agreement on Tariffs and Trade (GATT), the predecessor of the WTO. In 1962, the U.S. notified the GATT that it was imposing economic sanctions with respect to Cuba pursuant to Article XXI of the GATT, “Security Exceptions.” The U.S. invoked this article to revoke Cuba’s preferential sugar tariff and access to the U.S. market. As a result, the U.S. denied Most-Favored-Nation (MFN) status to Cuba.

MFN is a guiding principle of the GATT/WTO. It requires that member countries not discriminate in the way in which they treat WTO partners. Article 1 of the GATT states “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other

1. “U.S. Generalized System of Preferences Guidebook,” http://www.ustr.gov/webfm_send/1597, at 20 [“GSP Guidebook”]. See 19 U.S.C. § 2462(b).

2. *Id.* See 19 U.S.C. § 2462(b).

country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”³

The U.S. is currently exempt from providing MFN status to Cuba pursuant to Article XXI. However, if the U.S. were to resume normal trade relations, it would be required to give Cuba “no less favorable” treatment than is given to every other country in the WTO, pursuant to this MFN principle. Article II of the GATT provides that “[e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this agreement.” Thus, the U.S. would be required to provide Cuba with the MFN rate of duty provided in the Harmonized Tariff Schedule (the HTS).

It follows that granting MFN status to Cuba would result in Cuba having the same rights of access to the U.S. market as all other countries. In the event Cuba requests access to the sugar trade-rate quota (TRQ), the U.S. would be required to comply with this request pursuant to the WTO rule that all countries with a “substantial interest in supplying a product” be allocated a portion of the TRQ.”

To date, the WTO has used the “10% share” rule to trigger a “substantial interest.”⁴ This means that countries with the ability to supply at least 10% of the import market are to be considered for allocation. In addition, if countries that supply less than 10% of the import market are given a portion of the TRQ, then all countries capable of providing any portion of the import market share are to be considered. The U.S. has historically assigned part of the TRQ to countries that provided less than 1% of the import share. Thus, even if Cuba is unable to provide 10% of the market for sugar, it would still be considered to have a “substantial interest” and thus would be granted access to the TRQ.

At this point, the U.S. would have several options to determine the TRQ for Cuban sugar and other products. As there have been no recent official trade shares, the U.S. has little recent history on which to base an appropriate TRQ allocation for Cuban products. The U.S. could open a competitive bidding process to reset country-specific quotas, or it could simply reduce current TRQs and provide a portion of the market share to Cuba. It could also increase the overall TRQ for certain products.

As the U.S. has implemented several broad preferential trade programs aimed at increasing economic development throughout the developing world, it seems likely that Cuba could be included in such a program upon the resumption of normal trade relations. The trend seems to be to enter into bilateral or regional free trade agreements as a means of reducing barriers to trade within the principles of the GATT and WTO.

Cuba would also presumably be eligible for membership in the North American Free Trade Agreement (NAFTA), which would allow preferential access to Cuban agricultural products.

CONCLUSION

The U.S. has implemented several broad preferential trade programs aimed at increasing economic development throughout the developing world. In addition to the preferential trade programs, outlined above, the United States has entered into several free trade agreements. The trend seems to be to enter into such bilateral or regional free trade agreements as a means of reducing barriers to trade.

The U.S. has a history of providing development assistance and preferential trade access to developing countries, particularly to its neighbors in Latin America and the Caribbean. While the U.S. will undoubtedly seek to help stabilize Cuba economically when relations are normalized, it will be constrained by significantly reduced foreign aid budgets. A strong

3. General Agreement on Tariffs and Trade [the “GATT”] at http://www.wto.org/english/docs_e/legal_e/gatt47.pdf. note 1 at Article I.

4. Boughner, Devry S., and Coleman, Jonathan R., “Normalizing Trade Relations with Cuba: GATT-Compliant Options for the Allocation of the U.S. Sugar Tariff-rate Quota,” http://esteyjournal.com/j_pdfs/boughnercoleman3-1.pdf note 2 at 49.

argument could therefore be made that the best means of assisting Cuba at minimal cost to the U.S. would be to implement preferential (including protected) trade access for the island's products, particu-

larly those such as tobacco which are of agricultural origin and would not compete with products actually grown in the United States.