

At freedom's mercy

Cuba

The fate of US-Cuba sanctions depends on the winner of the US election, which could go some way to determining Cuba's maritime potential. **Lacey Jones** reports

In the early 1960s, President John F. Kennedy proclaimed an embargo on trade between the US and Cuba in response to certain actions taken by the Cuban government, which remains in place today. There have been few amendments to the basic structure of the sanctions programme over the past six decades, although there was some easing of limitations by the Obama administration. However, there is a chance that this could change following the upcoming US election.

The Cuba sanctions programme is the oldest US sanctions programme still in existence and does not follow the same template as other US sanctions programmes. At present, the sanctions generally prohibit all trade between Cuba and the US although it is subject to multiple exceptions. Daniel Pilarski, partner at law firm Watson Farley & Williams, told **CM**: "There are general licences that say certain trade between the US and Cuba can occur if it falls into certain specified categories, including agricultural commodities and medicine."

Other items under the general licences that the US has made permissible to be provided to Cuba include mail and telecommunications and certain information materials. However, a lot of the licences are limited in that they do not apply to the Government of Cuba and/or the Communist Party of Cuba.

In addition to the embargo, under the '180-day rule,' some ships that trade to Cuba are limited in trading to the US. "The point of the 180-day rule was that, traditionally, a ship that traded to Cuba legally would have to wait 180 days to trade at a US port – that was the kind of general rule which creates somewhat of a disincentive to trade with Cuba because then you have to wait," Pilarski explained.

Under an exemption that was put into place by the Obama administration and which, so far at least, has not been repealed by President Trump, the 180-day rule does not apply to some ships under specific conditions. These are when what they deliver to Cuba does not violate any other US sanctions but also that the products traded to Cuba are either potentially licenced US goods, or are non-US origin goods that fall into category 99 of the export administration regulations (referred to as EAR99), which applies to most categories of goods.

"What that means for most goods being shipped to Cuba is that the ship can then trade in a US port, although they generally couldn't trade directly from Cuba to the US. They couldn't deliver Cuban goods to the US and, in most cases, you would see at least one voyage in between. You

rarely see a ship going direct from Cuba to the US but the key point is that you don't have to wait 180 days and you can engage in trade of cargo to and from the US without having to wait as long as you fall into this very broad exception," Pilarski said.

Due to the 1996 Helms-Burton Act the trade embargo as a whole is unable to be lifted without congressional approval which, for the near future, seems unlikely. However, during his time as president, Obama made many small moves to thaw trade relations between the US and Cuba. In 2009, Obama eased restrictions on travel and remittances which had been tightened by his predecessor. Six years later, he and then-President of Cuba Raul Castro announced that they would restore full diplomatic ties and Cuba was removed from the US State Department's list of state sponsors of terrorism. The latter was first imposed in 1982 and had prevented Cuba from accessing international finance.

An industry source involved in trade in the region told **CM**: "Sadly, due to the extremely extensive nature of the US embargo, the Cuban economy is severely impacted by the policies of the occupier of the White House. With Obama it was positive, with Trump it has been negative, despite the fact that his own Trump Corporation has investigated the possibility of owning/operating hotels and golf courses on the island."

Pilarski added: "When it was Trump versus Clinton and Trump somewhat unexpectedly won I think a lot of people, myself included, expected that Trump would perhaps not substantially lessen the Cuba sanctions but that he wouldn't move to tighten them just on the grounds that, from a pure US business perspective, Cuba is geographically close to the US and there's certainly a lot of opportunity for trade which can help both counties – I did predict that and that was wrong."

During his time at the helm, President Trump has for the most part undone the progress made by the Obama administration in easing trade restrictions and taken a pretty

TC Mariel, which acts as a gateway for 90% of the Cuba's containerised cargo, currently averages volumes of around 350,000 teu per year. However, it has annual quayside capacity for 800,000 teu and 300,000 teu of rail capacity and could easily handle short-term growth without the need for additional investments. That said, despite the tightening of sanctions under the current administration, volumes at the terminal have grown over the years that TC Mariel has been operating, which might be regarded as a testament to the considerable potential of the Cuban economy in the future.

Opposite Page:

Top: Terminal de Contenedores de Mariel S. A.

Bottom Left: Biden has hinted at returning to Obama's previous policies Credit: Gage Skidmore

Bottom Right: Trump has slowly been tightening the Cuba sanctions Credit: Gage Skidmore



hard-line approach to the Cuba sanctions. **CM's** industry source said: "Undoubtedly under the Trump administration there has been a rollback of commercially positive policies from the Obama administration, for example, US-visitors rose to almost 600,000 per year and have dropped to almost zero as cruise lines were banned from calling Cuba by the US administration in May 2019 and flights have been drastically curtailed. Even recently the White House has banned US citizens from staying at a huge swathe of state-owned (foreign managed) hotels."

The Trump administration also lowered the permissible level of de minimis US origin content in goods to be exported to Cuba. Items manufactured outside of the US must have no more than 10% US-origin content, reduced from 25%, if they are to be exported to Cuba without violating US export controls – essentially reversing some of the changes made by the Obama administration. Additionally, there is no longer a 'U-turn exception' for US dollar trading with Cuba, meaning that it is generally no longer possible to use US dollars in conjunction with Cuban trade.

"For example," Pilarski said, "for a ship that's on charter, and charter payments are made in US dollars or even financing is made in US dollars, I wouldn't go so far as to say it's by definition a violation to trade that ship to Cuba but I would say that you start running risks. What we see in practice is that for most ships, certainly ships that are owned by US persons or non-US subsidiaries of US persons, there will be a clause that says that they can't go to Cuba."

Perhaps the biggest change made by Trump, and the one which has potentially caused the most damage to Cuba's trade relations, was when Title III of the Helms-Burton act was permitted to take effect. Title III creates a private right of action that permits US nationals to bring a lawsuit in US courts against those who "traffic" expropriated property. In this case, trafficking includes most uses of said property. It was consistently waived by all US presidents until Trump permitted it in April 2019.

Pilarski said: "It is a concern and the concern is primarily for companies that have significant assets in the US or are at significant risk of a US lawsuit. Companies that have very few ties in the US may be technically subject to the rules, but they would tend to be less at risk of a US lawsuit because the truth is if you don't have any assets that can be seized – what's the point of a lawsuit?" So far this has mostly affected cruises. That said, the threat of legal action, however minor, could have the potential to dissuade trade with Cuba.

Much of what President Trump has done with regards to the sanctions is said to be heavily influenced by the Florida Republican party which has consistently been against the easing of Cuba trade restrictions. Should he continue on into a second term of presidency, it is not far-fetched to expect an incremental tightening of the sanctions. Pi-



larski said: "What we've seen is a slow and steady tightening of the sanctions anytime any political point wants to be made and I would expect that a second Trump term would see more of that."

Leading Democratic candidate Joe Biden has so far suggested that he would like to go back toward the Obama policy but has yet to give any specifics on the Cuba sanctions. Unlike Trump, Biden does not have the same immediate consideration within his party but Florida is very important politically and he will most likely want to be responsive to Florida's voters. Pilarski opined: "It's the kind of thing that he might want to tread very slowly, I think in general he has given off a lot of signals that he intends to proceed cautiously."

Much like Obama, Biden would be limited in what he could do due to the current congressional laws which, bar any radical change within congress, are unlikely to change. Such laws prevent the opening of full relations with Cuba whilst either Fidel Castro or Raul Castro are in power. With Fidel dead and Raul Castro retired from government as of the beginning of 2019, and set to step down as Chairman of the Cuban Communist Party in 2021, there is some hope for much larger strides towards normalising US-Cuba relations.

Pilarski stated: "My prediction, for what it's worth, is that I would expect that under a Biden administration some moving back the other way. If you think of it like a pendulum swinging back and forth, I would expect to see some moving back toward more normalisation of relations but I would think it would be very slow and cautious."

Due to the extensive nature of the US embargo, the Cuban economy is severely impacted by US policies in this regard and trade between the countries is very limited as a result. It is hard to predict what may happen if either of the candidates wins the election, however there is a massive potential for trade growth and imports from the US with a loosening of the embargo related policies.