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You Say Embargo, I Say Bloqueo--A Policy Recommendation for Promoting Foreign Direct Investment and Safeguarding Human Rights in Cuba

Marcia Narine Weldon

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YOU SAY EMBARGO, I SAY BLOQUEO—A POLICY RECOMMENDATION FOR PROMOTING FOREIGN DIRECT INVESTMENT AND SAFEGUARDING HUMAN RIGHTS IN CUBA

*Marcia Narine Weldon**

ABSTRACT

The United States is the only major industrialized nation that restricts trade with Cuba. Although President Obama issued several executive orders that have facilitated limited trade (and President Trump has scaled some back), an embargo remains in place, and by law, Congress cannot lift it until, among other things, the Cuban government commits to democratization and human rights reform. Unfortunately, the Cuban and U.S. governments fundamentally disagree on the definition of “human rights,” and neither side has shown a willingness to compromise. Meanwhile, although some U.S. investors clamor to join their European and Canadian counterparts in expanding operations in Cuba, many have an understandable concern regarding the rule of law and expropriation in a communist country. Bilateral investment treaties aim to address those concerns.

After discussing the legal and political barriers to lifting the embargo, I propose a partial solution to the stalemate on human rights, which will: (1) facilitate foreign direct investment in Cuba; (2) protect investor interests through a bilateral investment treaty; and (3) require an examination of human rights impacts on the lives of Cuban citizens before investors can

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receive the protection of the treaty. Specifically, I recommend the inclusion of human rights clauses in bilateral investment treaties (BITs) and investor-state dispute mechanisms as a condition precedent to lifting the embargo. My solution also requires “clean hands” so that investors seeking relief must provide proof that their business interests have not exacerbated or been complicit in human rights abuses, rebut claims from stakeholders that their business interests have not exacerbated or been complicit in human rights abuses, or both. Finally, I propose revisions to the 2016 U.S. National Action Plan on Responsible Business Conduct to incorporate human rights requirements in future BITs and other investment vehicles going forward.

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INTRODUCTION

[T]he United States will continue to speak up on behalf of democracy, including the right of the Cuban people to decide their own future. We'll speak out on behalf of universal human rights, including freedom of speech, and assembly, and religion.

—President Barack Obama, March 21, 2016¹

How many countries comply with all 61 human rights? Do you know? I do. None. None.

—President Raul Castro, March 22, 2016²

Relations between the United States and Cuba have changed following President Barack Obama's announcement on December 17, 2014, to begin normalization.³ American businesses have begun capitalizing on the Obama administration's frequent executive orders easing restrictions by exploring new opportunities in an attempt to have a first-mover advantage when and if Congress finally lifts the embargo.⁴ For example, Starwood Hotels operates a hotel owned by the Cuban military;⁵ Airbnb's fastest growing home sharing

¹ *Remarks by President Obama and President Raul Castro of Cuba in a Joint Press Conference*, WHITE HOUSE (Mar. 21, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/21/remarks-president-obama-and-president-raul-castro-cuba-joint-press>.

² Matt Spetalnick & Frank Jack Daniel, *Obama Spars with Cuba's Castro Over Human Rights in Historic Visit*, REUTERS (Mar. 22, 2016), <http://www.reuters.com/article/us-usa-cuba-castro-idUSKCN0WN0HQ>.

³ See *FACT SHEET: Charting a New Course on Cuba*, WHITE HOUSE (Dec. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba>; see also *Charting a New Course on Cuba*, WHITE HOUSE (2016), <https://obamawhitehouse.archives.gov/issues/foreign-policy/cuba>; *Third Meeting of the Cuba-US Bilateral Commission Today*, CUBA BUS. REP. (May 16, 2016), <http://www.cubabusinessreport.com/third-meeting-of-the-cuba-us-bilateral-commission-today>; *Cuba's Top Diplomat Assesses US-Cuba Progress*, CUBA BUS. REP. (May 17, 2016), <http://www.cubabusinessreport.com/cubas-top-diplomat-assesses-us-cuba-progress/>.

⁴ See generally *Cuba: Providing Support for the Cuban People*, 80 Fed. Reg. 2286–91 (Jan. 16, 2015); *Cuban Assets Control Regulations*, 80 Fed. Reg. 2291–302 (Jan. 16, 2015); *Enhancing Support for the Cuban People*, 80 Fed. Reg. 56,898–904 (Sept. 21, 2015); *Cuban Assets Control Regulation*, 80 Fed. Reg. 56,915–26 (Sept. 21, 2015); *Cuba Licensing Policy Revisions*, 81 Fed. Reg. 4580–86 (Jan. 27, 2016); *Cuba: Revisions to Licensing Exceptions and Licensing Policy*, 81 Fed. Reg. 13,972–74 (Mar. 16, 2016); *Cuban Assets Control Regulations*, 81 Fed. Reg. 13,989–94 (Mar. 16, 2016). The Trump administration has announced that it will pull back on some of the Obama administration's executive orders, but at the time this article was written, the formal rules had not been announced. However, the U.S. Department of State's website indicates, "any further improvements in the United States-Cuba relationship will depend entirely on the Cuban government's willingness to improve the lives of the Cuban people, including through promoting the rule of law, respecting human rights, and taking concrete steps to foster political and economic freedoms." *Fact Sheet on Cuba Policy*, WHITE HOUSE, June 16, 2017, available at www.whitehouse.gov/blog/2017/06/16/fact-sheet-cuba-policy.

⁵ *Cuba Starwood Hotel Details*, STARWOOD HOTELS, http://www.starwoodhotels.com/corporate/directory/hotels/caribbean/cu/detail.html?language=en_US (last visited Oct. 24, 2017); see Michael

market ever is in Cuba;⁶ a JetBlue flight landed in Cuba on August 31, 2016, with several more airlines offering direct flights to the island by the end of 2016;⁷ and U.S. cruise ships now sail to Cuba for the first time since the 1970s.⁸

Cuba, however, remains a communist nation with a human rights record and policy stance roundly condemned by analysts, dissidents,⁹ nongovernmental organizations (NGOs),¹⁰ the U.S. Department of State,¹¹ and several members of Congress.¹² Although President Raul Castro has

Weissenstein, *Here's the Scoop on Cuba's 1st US-Run Hotel in 50 Years*, ASSOCIATED PRESS (July 28, 2016), <https://apnews.com/14b3972313284640949d08f9ab23c5a8/heres-scoop-cubas-1st-us-run-hotel-50-years>.

⁶ Tim Rogers, *How Airbnb Piggybacked on a Communist Program to Make Cuba its Fastest Growing Market Ever*, SPLINTER NEWS (Mar. 30, 2016), <https://splinternews.com/how-airbnb-piggybacked-on-a-communist-program-to-make-c-1793855922>; see Abha Bhattarai, *Among the Hurdles the U.S. Hotels Face in Cuba: A Booming Airbnb Presence*, WASH. POST (July 4, 2016), https://www.washingtonpost.com/business/capitalbusiness/among-the-hurdles-us-hotels-face-in-cuba-a-booming-airbnb-presence/2016/07/04/1aac15be-36ec-11e6-9ccd-d6005beac8b3_story.html; Abha Bhattarai, *U.S. Hotels Interested in Expanding to Cuba Find Airbnb Already Established There*, L.A. TIMES (July 5, 2016), <http://www.latimes.com/business/la-fi-airbnb-cuba-20160705-snap-story.html>.

⁷ U.S. Transportation Secretary Foxx Approves U.S. Airlines to Begin Scheduled Service to Cuba, U.S. DEP'T OF TRANSP. (June 10, 2016), <https://www.transportation.gov/briefing-room/us-transportation-secretary-foxx-approves-us-airlines-begin-scheduled-service-cuba>; see Mimi Whitefield, *U.S. Clears 6 for Takeoff to Cuba But Flights Won't Start Right Away*, MIAMI HERALD (June 10, 2016), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article83024922.html>.

⁸ Daniel Bukszpan, *First U.S. Cruise Ship Docks in Cuba Since 1978: Here's What They Saw*, FORTUNE (May 2, 2016), <http://fortune.com/2016/05/02/carnival-fathom-cuba-cruise/>; see Marc Frank, *Emotional Return as First U.S. Cruise in Decades Reaches Cuba*, REUTERS (May 2, 2016), <http://www.reuters.com/article/us-cuba-usa/emotional-return-as-first-u-s-cruise-in-decades-reaches-cuba-idUSKCN0XT175>.

⁹ *Cuba's 'Forgotten 51' Prisoners of Conscience*, VICTIMS OF COMMUNISM MEM'L FOUND., <http://victimsofcommunism.org/cubas-forgotten-51-prisoners-of-conscience/> (last visited Oct. 24, 2017); see Lourdes Rivery, *As a Cuban Exile, Here is What I Think of Obama's Visit to My Country*, INDEPENDENT (Mar. 24, 2016), <http://www.independent.co.uk/voices/as-a-cuban-exile-here-is-what-i-think-of-obama-s-visit-to-my-country-a6950301.html>; Ana Quintana & Ricardo Pita, *Obama's Legacy Will Be Marked by His Silence on Human Rights in Cuba*, DAILY SIGNAL (Mar. 25, 2016), <http://dailysignal.com/2016/03/25/obamas-legacy-will-be-marked-by-his-silence-on-human-rights-in-cuba/>; Guillermo Martinez, *Cuban Dissidents Criticize Obama's Trip to the Island*, SUN SENTINEL (Mar. 4, 2016), <http://www.sun-sentinel.com/opinion/fl-gmcol-oped0303-20160304-column.html>.

¹⁰ *Cuba 2016/2017*, AMNESTY INT'L, <https://www.amnesty.org/en/countries/americas/cuba/report-cuba/> (last visited Oct. 24, 2017); *Cuba Human Rights*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/countries/americas/cuba> (noting Amnesty's support for lifting the U.S. embargo) (last visited Oct. 24, 2017); *Cuba Events of 2015*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/country-chapters/cuba> (last visited Oct. 24, 2017).

¹¹ *Cuba 2016 Human Rights Report*, U.S. DEP'T OF STATE, <https://www.state.gov/documents/organization/265790.pdf> (last visited Oct. 24, 2017).

¹² See Press Release, Ileana Ros-Lehtinen, Congresswoman, Comments on Obama's Legacy and Cuba's Human Rights Record (Apr. 13, 2016), available at <https://ros-lehtinen.house.gov/press-release/obama%E2%80%99s-legacy-castro-regime-dupe-cemented-state-department-admits-cuba%E2%80%99s-human-rights>; Press Release, Mario Diaz-Balart, Congressman, Comments on Obama's Trip to Cuba (Mar. 19,

announced that he will step down from power in February 2018,¹³ President Trump has significantly rolled back some of the Obama-era reforms and made it clear that there will be no more movement on Cuba-U.S. relations without human rights reform from Castro, in addition to the resolution of a number of claims related to the confiscation of properties by the Castro regime in 1959.¹⁴

Other nations share the U.S. government's concern with Cuba's human rights record. Nonetheless, eighteen European Union member states have signed agreements to conduct business with Cuba,¹⁵ and many European companies have joined Canadian firms by investing in joint ventures with the Cuban government.¹⁶ In the past, the EU itself had historically maintained a more restrictive trading stance—the Common Position—due to the same human rights concerns shared by the U.S. government.¹⁷ In March 2016, however, the EU announced a landmark Political Dialogue and Cooperation Agreement (PDCA) with Cuba designed to increase the flow of foreign direct investment.¹⁸

In this Article, I argue that, notwithstanding the Trump administration's pullback of his predecessor's movement toward rapprochement, the United States should follow the EU's lead to spur reform in Cuba. To do so, I advocate requiring human rights clauses in bilateral investment treaties (BITs)

2016), available at <https://mariodiazbalart.house.gov/media-center/press-releases/diaz-balart-instead-of-shaking-blood-stained-hands-of-cuban-peoples>.

¹³ Damien Cave, *Raúl Castro Says His New 5-year Term as Cuba's President Will Be His Last*, N.Y. TIMES (Feb. 24, 2013), <http://www.nytimes.com/2013/02/25/world/americas/raul-castro-to-step-down-as-cubas-president-in-2018.html>.

¹⁴ *Frequently Asked Questions Related to Cuba*, U.S. DEPT. OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf (last updated Nov. 8, 2017); *Treasury, Commerce, and State Implement Changes to the Cuba Sanction Rules*, U.S. DEPT. OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_fact_sheet_11082017.pdf (last visited Oct. 24, 2017).

¹⁵ *A New Phase in EU-Cuba Relations*, EUR. PARLIAMENTARY RESEARCH SERV. BLOG (June 25, 2014), <https://epthinktank.eu/2014/06/25/a-new-phase-in-eu-cuba-relations/>.

¹⁶ *International Corporations Doing Business in Cuba*, CUBA BUS. REP. (Apr. 4, 2016), <http://www.cubabusinessreport.com/international-corporations-doing-business-in-cuba/>; see Alistair Macdonald, *Canadian Companies Operating in Cuba Prepare for Change*, WALL ST. J. (Dec. 18, 2014), <http://www.wsj.com/articles/canadian-companies-operating-in-cuba-prepare-for-change-1418955005>; *Cuba EDC's Position*, EXPORT DEV. CAN., <http://www.edc.ca/EN/Country-Info/Pages/Cuba.aspx> (last visited Oct. 24, 2017).

¹⁷ 1996 O.J. (L 322) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996E0697&from=EN>; see also *A New Phase in EU-Cuba Relations*, *supra* note 15.

¹⁸ *EU-CUBA Negotiations Towards a Political Dialogue and Cooperation Agreement*, EUR. UNION EXTERNAL ACTION, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2017\)607278](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)607278) (last visited Oct. 24, 2017).

and investor-state dispute mechanisms¹⁹ as a condition precedent to Congress's lifting of the embargo. Specifically, I recommend that any eventual BIT between Cuba and the United States contains: (1) human rights language from treaties and instruments that both nations have ratified; (2) a "clean hands doctrine" that dictates admissibility of investor claims so that perpetrators of human rights abuses cannot receive BIT protections; and (3) investor-state dispute resolution mechanisms that build in avenues for stakeholder access, including NGOs and others who can attest to or provide credible evidence on an investor's human rights record.

The development of a Cuba-U.S. BIT provides the ideal opportunity for the United States to impose appropriate human rights conditions.²⁰ Indeed, many other states have included investment-related human rights provisions in their National Action Plans (NAPs) related to corporate responsibility to respect human rights.²¹ The United States, which released its NAP in December 2016, did not include such provisions and must therefore reconsider and revise its policy to provide more robust measures to protect human rights in Cuba and beyond.²²

In addition, an appropriately drafted BIT may help allay investor concerns because, despite the U.S. liberalization of trade rules, not everyone is rushing to Cuba. Eager but wary investors have raised valid concerns about the rule of law,²³ given the realities of doing business with state-owned enterprises²⁴ as

¹⁹ *Investor-State Dispute Settlement (ISDS)*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (last visited Oct. 24, 2017).

²⁰ Cuba's human rights violations have been well documented, including forced detentions of political dissidents and restrictions on freedom of assembly and movement. See MARK P. SULLIVAN, CONG. RESEARCH SERV., R43926, CUBA: ISSUES AND ACTIONS IN THE 114TH CONGRESS 9-13 (2016); *Cuba 2016/2017*, *supra* note 10; *Cuba Events of 2015*, *supra* note 10. Notwithstanding those critical issues, I will focus on labor rights, specifically those International Labour Organization rights that Cuba purports to support. See *Cuba 2016 Human Rights Report*, *supra* note 11.

²¹ *Study on Implementation of the UN Guiding Principles on Business and Human Rights*, at 21 (Feb. 2, 2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU\(2017\)578031_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf).

²² See *infra* Part IV.

²³ For the purposes of this Article, rule of law "consists of procedures giving all people in a society meaningful access to justice, unimpeded by corruption or discrimination." See Mark P. Lagon, *A Global Trust for Rule of Law Policy Innovation Memorandum No.26*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/rule-of-law/global-trust-rule-law/p29170> (last visited Oct. 24, 2017). See generally K. M. Paparelli, *Reforming Foreign Investment Law in Cuba* (Oct. 1, 2015) (unpublished manuscript) (on file with author).

²⁴ See Marcia Narine, *The Cuban Conundrum: Corporate Governance and Compliance Challenges for U.S. Publicly-Traded Companies*, 18 U. PA. J. BUS. L. 865, 869-72 (2016).

well as legitimate concerns about nationalization of foreign assets and contract enforcement.

Although investors raise concerns about the rule of law and the loss of their assets as a violation of *their* rights, they rarely acknowledge the potential human rights violations that *they themselves* may commit, or even condone, as passive bystanders to governmental abuses.²⁵ Other than those that tout corporate social responsibility, most businesses have no incentive to think about the effects their activities have on the workers and citizens in the host country.

Further, many businesses remain unaware that under the 2011 United Nations Guiding Principles on Business and Human Rights (UNGP or Guiding Principles),²⁶ which I will discuss in more detail in Part II, firms must respect human rights and should provide non-judicial grievance mechanisms for claims brought against them based upon their human rights violations.²⁷ Although the UNGPs are not binding on businesses,²⁸ a number of companies have voluntarily adopted them.²⁹ Additionally, many companies already have

²⁵ See Jena Martin, *What's in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1, 7 (2011) (stating, "TNCs . . . with their vast economic multi-jurisdictional influence, wield an enormous amount of power in the international social, economic, and legal arena. The rise of their power and influence has coincided with their increased involvement in human rights-related issues. And yet, TNCs consistently reject the notion of their active participation or complicity in these events. In doing so, TNCs are labeling themselves 'bystanders' under international law.").

²⁶ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, Hum. Rts. Council, 17th Session, U.N. Doc. A/HRC/17/31, (Mar. 21, 2011) [hereinafter Guiding Principles].

²⁷ *Id.* at 24 ("States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.").

²⁸ Guiding Principles, *supra* note 26. However, in its General Principles, "[the] Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure." *Id.* The Guiding Principles also provide that "[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." *Id.* at 13.

²⁹ *The Road from Principles to Practice: Today's Challenges for Business in Respecting Human Rights*, UNIVERSAL RTS. GROUP, <http://www.universal-rights.org/urg-policy-reports/the-road-from-principles-to-practice-todays-challenges-for-business-in-respecting-human-rights/> (last visited Oct. 24, 2017). In May 2011, Coca-Cola formally endorsed the draft UN Guiding Principles on Business and Human Rights. *2012/2013 Sustainability Report*, COCA-COLA COMPANY, <http://assets.coca-colacompany.com/44/d4/e4eb8b6f4682804bdf6ba2ca89b8/2012-2013-gri-report.pdf> (last visited Oct. 24, 2017). Google has done the same, and its policy states:

Google developed the following requirements for its suppliers (each a "Supplier") based on the Electronic Industry Citizenship Coalition Code of Conduct ("EICC") and international standards such as the United Nations Guiding Principles on Business and

human rights policies or issue corporate social responsibility reports,³⁰ and those that do not have faced shareholder proposals or investor pressure on the topic.³¹ Adding more urgency, the EU, the U.S. Securities and Exchange Commission (SEC), and a number of other regulatory bodies around the world seek or require environmental, social, and governance disclosures.³²

My proposal addresses both the UNGP's corporate responsibility to respect human rights and the duty to provide judicial and non-judicial access to remedies. I would require firms to defend their human rights record in Cuba if they wish to take advantage of favorable BIT provisions. The proposal further provides some measure of access to remedy through the ability of stakeholders to provide evidence to an arbitral panel to determine the admissibility of an investor's claim.

Private businesses may not focus on the UNGPs, but these UNGPs *are* binding on states through treaty and customary international law.³³ The UNGPs can and should provide leverage through BIT clauses to incentivize appropriate corporate behavior in Cuba and other nations.

Human Rights and the Universal Declaration of Human Rights, as well as Google's values.

Responsible Manufacturing, GOOGLE, <https://www.google.com/about/company/responsible-manufacturing.html> (last visited Oct. 24, 2017).

³⁰ *Human Rights Policy*, GAP INC., http://www.gapinc.com/content/attachments/sersite/HumanRightsPolicy_FINAL.pdf (last visited Oct. 24, 2017); *Labor and Human Rights: Workers' Rights are Human Rights*, APPLE, <http://www.apple.com/supplier-responsibility> (last visited Oct. 24, 2017); *Human Rights*, BP GLOBAL, <http://www.bp.com/en/global/corporate/sustainability/society/human-rights.html> (last visited Oct. 24, 2017).

³¹ *Nordstrom—Human Rights—2016*, TRILLIUM ASSET MGMT., <http://www.trilliuminvest.com/shareholder-proposal/nordstrom-human-rights-2016/> (last visited Oct. 24, 2017); *Shareholder Advocacy*, AFL-CIO, <https://aflcio.org/what-unions-do/social-economic-justice/shareholder-advocacy> (last visited Oct. 24, 2017); Marta Maretich, *ESG Disclosure: Investors' New Obsession*, TRIPLE PUNDIT (Apr. 2, 2015), <http://www.triplepundit.com/2015/04/esg-disclosure-new-obsession-investors-businesses/>.

³² *See Improving Corporate Governance: Europe's Largest Companies Will Have to Be More Transparent About How They Operate*, EUR. COMM'N (Apr. 15, 2014), http://europa.eu/rapid/press-release-STATEMENT-14-124_en.htm; SEC. & EXCH. COMM'N, Doc No. S7-06-16, at 204-215 (2016), available at <https://www.sec.gov/rules/concept/2016/33-10064.pdf>.

³³ *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS. 1, 9 (2014), http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf ("Protecting human rights against business-related abuse is expected of all States, and in most cases is a legal obligation through their ratification of legally binding international human rights treaties containing provisions to this effect. The State duty to protect in the Guiding Principles is derived from these obligations.").

The UNGPs also provide support for states' development of National Action Plans³⁴ to provide incentives and penalties for businesses operating at home and abroad to respect human rights. Although the UNGPs do not require NAPs, the U.N. Working Group on Business and Human Rights has interpreted their requirement as a part of the UNGPs.³⁵ The U.S. government has released a NAP, but it does not go far enough.³⁶ As the government looks to reshape policy in Cuba, both pre- and post-embargo, my proposed additions to the NAP will provide the United States with an opportunity to model appropriate leadership in investment and BITs that can be applied to countries other than Cuba.

Part I of this Article will discuss the law of the embargo. Part II will address: (1) how Cuba and the United States differ on defining human rights, (2) how that impasse impedes progress on lifting the embargo, (3) the human rights records of both the United States and Cuba, and (4) the role of transnational corporations in exacerbating human rights abuses. Part III will focus on: (1) the rule of law concerns for investors, (2) the resolution of commercial disputes with the Cuban government, and (3) the use of BITs to encourage investment and allay fears in general. Part IV will build on recent scholarship calling for human rights clauses in BITs.³⁷ In Part IV, I contend that the United States must add human rights standards for due diligence and must allow access to remedy for the Cuban people to any potential BIT and investor-state dispute mechanisms, and it should do so to comply with its obligations to promulgate a National Action Plan.³⁸ Part V will briefly conclude with the legal and strategic implications for U.S. policymakers working towards lifting the embargo. Despite the Castro regime's slow pace of internal reform and engagement with the United States, the Cuban government will have to change tactics to promote additional investment.

³⁴ *State National Action Plans*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS., <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited on October 24, 2017).

³⁵ *Id.* ("The UN Working Group strongly encourages all States to develop, enact and update a national action plan on business and human rights as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights.")

³⁶ *U.S. National Action Plan on Responsible Business Conduct*, U.S. DEP'T OF STATE, <https://www.state.gov/e/eb/eppd/csr/naprbc/index.htm> (last visited on Sept. 24, 2017).

³⁷ See, e.g., Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 2003), https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf; Patrick Dumberby & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13 J. WORLD INV. & TRADE 349 (2012); Ursula Kriebaum, *Aligning Human Rights And Investment Protection*, TRANSNAT'L DISP. MGMT. (Jan. 2013), <http://opiniojuris.org/wp-content/uploads/tdm-v10-01.pdf>.

³⁸ *Investor-State Dispute Settlement*, *supra* note 19.

I. A CHRONOLOGICAL OVERVIEW OF THE U.S. LAW GOVERNING BUSINESS RELATIONS WITH CUBA

Lifting the U.S. embargo will not be an easy task because a number of complex, interrelated laws prevent U.S. businesses and persons from conducting business freely with Cuba. These laws exist notwithstanding near constant formal, informal, and off-the-record negotiations between the United States and Cuba since the revolution in 1959.³⁹ Indeed, every U.S. president from Eisenhower through Obama has made some effort to negotiate formally or informally with the Castro government, often with these negotiations being the most pressing when relations were most strained.⁴⁰ Even President Trump, who now opposes lifting the embargo, attempted to do business in Cuba prior to entering politics.⁴¹

Both the Cuban government and the United Nations⁴² label the current embargo as the “blockade” or “bloqueo,” reflecting their view that U.S. policies have not only prohibited American⁴³ companies from trading with the island, but have also imposed an economic blockade preventing other countries and companies from engaging in full trade.⁴⁴ For example, U.S. law prohibits the import of items with materials of Cuban origin.⁴⁵ This means that a foreign car that uses Cuban nickel cannot be imported into the United States even though that foreign car company is itself not subject to the U.S. embargo. As one commentator observed:

³⁹ See generally MARC FRANK, *CUBAN REVELATIONS: BEHIND THE SCENES IN HAVANA* (2015) (written from the perspective of a U.S. reporter living and working in Cuba and discussing, among other things, the Cuban perspective on the embargo and sanctions regime as well as the internal legislative changes within Cuba); WILLIAM M. LEOGRANDE & PETER KORNNLUH, *BACK CHANNEL TO CUBA: THE HIDDEN HISTORY OF NEGOTIATIONS BETWEEN WASHINGTON AND HAVANA* (2014) (using formerly classified documents and interviews with participants to outline the series of negotiations and attempts to reach rapprochement); *Futures: Historical Perspectives*, BILDNER CTR. FOR WESTERN HEMISPHERE STUD. (June 17, 2011), <http://cubaproject.org/wp-content/uploads/2014/08/HistoricalPerspectivesWEB.pdf>.

⁴⁰ Charlotte England, *All the US Presidents Fidel Castro Outlasted, and How They Dealt with the Cuban Leader*, INDEPENDENT (Sept. 19, 2017), <http://www.independent.co.uk/news/people/fidel-castro-us-presidents-outlasted-and-how-they-dealt-with-him-eisenhower-kennedy-johnson-nixon-a7440486.html>.

⁴¹ Marcy Kreiter, *A Trump Casino in Cuba? Donald Trump Reportedly Explored Doing Business in Cuba in Violation of US Policy*, INT’L BUS. TIMES (Sept. 19, 2017), <http://www.ibtimes.com/trump-casino-cuba-donald-trump-reportedly-explored-doing-business-cuba-violation-us-2424258>.

⁴² Press Release, General Assembly, As General Assembly Demands End to Cuba Blockade for Twenty-Third Consecutive Year, Country’s Foreign Minister Cites Losses Exceeding \$1 Trillion, U.N. Press Release GA/11574 (Oct. 28, 2014).

⁴³ For the purposes of this Article, “American” refers to the United States and not the Americas generally. Canada and countries in Central and South America have traded freely with Cuba for decades.

⁴⁴ See, e.g., Joy Gordon, *El Bloqueo: The Cuban Embargo Continues*, HARPER’S MAG. (July 2016), <http://harpers.org/archive/2016/07/el-bloqueo/>.

⁴⁵ Cuban Assets Control Regulations, 31 C.F.R. § 515.204 (2009).

In the American imagination, the embargo serves mostly to deny us access to Cohibas and Havana Club rum, but its damage to the Cuban people has been, and continues to be, pervasive and profound. It affects their access to everything from electricity to video games to shoes. It has prevented Cubans from buying medical supplies from American companies, from buying pesticides and fertilizer, from purchasing Microsoft Word or downloading Adobe Acrobat. It has restricted how much money Cuban Americans can send to their families on the island. Americans have been prosecuted for selling water-treatment supplies to Cuba and threatened with prosecution for donating musical instruments.⁴⁶

In fact, the United States stands alone in isolating Cuba.⁴⁷ Indeed, every year for almost a quarter century, the U.N. General Assembly has called for an end to the embargo through a resolution.⁴⁸ Every year for the past several years, only the United States and Israel have voted against the resolution, including in 2015 after normalization efforts commenced.⁴⁹ In 2016, for the first time, the United States abstained from the vote condemning its own embargo, and Israel joined in that abstention.⁵⁰ The United States under the Trump administration returned to the tradition of voting against the resolution.⁵¹

Despite the U.S. government's softened stance under President Obama (which will likely harden again under President Trump), several U.S. laws still require sanctions on Cuba, ranging from the Trading with the Enemy Act of 1917 to the Trade Sanctions Reform and Export Enhancement Act of 2000.⁵² The most important of these laws is the Helms-Burton Act or LIBERTAD,

⁴⁶ Gordon, *supra* note 44.

⁴⁷ Lee Edwards, *Why We Isolated Cuba for 53 Years*, DAILY SIGNAL (Sept. 19, 2017), <http://dailysignal.com/2014/12/18/isolated-cuba-53-years/>.

⁴⁸ Merrit Kennedy, *For First Time, U.S. Abstains on U.N. Resolution Criticizing Cuba Embargo*, NPR (Sept. 19, 2017), <http://www.npr.org/sections/thetwo-way/2016/10/26/499469386/for-first-time-u-s-abstains-on-u-n-resolution-condemning-cuba-embargo>.

⁴⁹ *UN General Assembly Renews Long-Standing Call for End to US Embargo Against Cuba*, U.N. NEWS CENTRE (Oct. 27, 2015), <http://www.un.org/apps/news/story.asp?NewsID=52391#.V5N7SpODFBc>.

⁵⁰ Somini Sengupta & Rick Gladstone, *U.S. Abstains in U.N. Vote Condemning Cuba Embargo*, N.Y. TIMES (Oct. 26, 2016), <https://www.nytimes.com/2016/10/27/world/americas/united-nations-cuba-embargo.html>; Giovanna Maselli, *US, Israel Abstain from U.N Vote on Cuba Embargo*, CBSMIAMI (Oct. 26, 2016), <http://miami.cbslocal.com/2016/10/26/u-s-abstains-from-u-n-vote-on-cuba-embargo/>.

⁵¹ Rick Gladstone, *Trump Administration Defends Cuba Embargo at U.N., Reversing Obama*, N.Y. TIMES (Nov. 1, 2017), https://www.nytimes.com/2017/11/01/world/americas/cuba-un-us-embargo.html?_r=0.

⁵² Alan Dunn & Sahar Hafeez, *U.S.-Cuba Related Sanctions Update and Overview: Obama Administration Further Eases Cuba Sanctions Against the Backdrop of Strict Statutory Restrictions*, STEWART L. (Sept. 19, 2017), <http://www.stewartlaw.com/Article/ViewArticle/1082>.

enacted in 1996.⁵³ This patchwork of laws gives the executive branch latitude in enforcing them but still prevents any president from unilaterally lifting the embargo all at once.⁵⁴ I will briefly discuss these laws below in chronological order.⁵⁵

A. *Trading with the Enemy Act (TWEA) (1917)*

The Trading with the Enemy Act (TWEA), first implemented under Woodrow Wilson's administration during World War I, authorizes the President, in times of national emergency, to impose embargoes on transactions between the United States and targeted countries.⁵⁶ It also provides the President the power to put in place and maintain economic sanctions against hostile nations.⁵⁷ In October 1960, President Eisenhower invoked the TWEA in response to the nationalization of U.S. companies in Cuba.⁵⁸ Under this law, U.S. companies cannot export anything to Cuba other than food and medicine—although some of these rules have been liberalized as discussed.⁵⁹ Ironically, considering the normalization efforts, President Obama reauthorized Cuba's listing on the TWEA because this allowed him to continue to use his executive authority to improve ties with the communist country.⁶⁰ Thus, notwithstanding Obama's former overtures toward the island, Cuba and the United States are still formally "enemies."⁶¹

⁵³ DIANNE E. RENNACK & MARK P. SULLIVAN, CONG. RESEARCH SERV., R43888, CUBA SANCTIONS: LEGISLATIVE RESTRICTIONS LIMITING THE NORMALIZATION OF RELATIONS (2017).

⁵⁴ *Id.*

⁵⁵ *See generally id.*

⁵⁶ Trading with the Enemy Act of 1917, 50 U.S.C. §§ 4301–4341 (2011); Laura A. Michalec, *Trade with Cuba Under the Trading with the Enemy Act: A Free Flow of Ideas and Information?*, 15 FORDHAM INT'L L.J. 808 (1991); *see also* Exec. Order No. 2729-A (Oct. 12, 1917), *transcript available at* <http://www.presidency.ucsb.edu/ws/?pid=75446>.

⁵⁷ Peter Schroeder, *Can Obama Lift Cuba Embargo Alone?*, THE HILL (Dec. 17, 2014), <http://thehill.com/policy/finance/227442-can-obama-lift-cuba-embargo-without-congress>.

⁵⁸ *U.S. Foreign Policy Sanctions: Cuba*, USA ENGAGE (Sept. 19, 2017), <http://usaengage.org/Issues/Sanctions-Programs/Cuba/>.

⁵⁹ Cuban Import Regulations, 31 C.F.R. §§ 515.201-515.801 (1962); *U.S. Foreign Policy Sanctions: Cuba*, *supra* note 58.

⁶⁰ Taylor Wofford, *Obama Extends Cuba's Designation Under Trading with the Enemy Act*, NEWSWEEK (Sept. 19, 2017), <http://www.newsweek.com/cubatradingwithenemyactextension-obama-castro-371978>.

⁶¹ Serena Marshall, *President Obama Reauthorizes Cuba Listing on 'Trading with the Enemy Act'*, ABC NEWS (Sept. 11, 2015), <http://abcnews.go.com/Politics/president-obama-reauthorizes-cuba-listing-trading-enemy-act/story?id=33690036>.

B. *Foreign Assistance Act (FAA) (1961)*

In September 1961, President Kennedy signed the Foreign Assistance Act of 1961 (FAA), which authorized a total embargo on trade with Cuba.⁶² The FAA had an extraterritorial reach, banning transport of U.S. goods on ships owned by companies that do business with Cuba and prohibiting foreign assistance to countries providing assistance to Cuba.⁶³ Although the FAA provides that the embargo is discretionary, LIBERTAD, discussed below, only allows suspension of the embargo if the President determines that Cuba has a transition government in power and a democratically elected government.⁶⁴

C. *Cuban Assets Control Regulations (CACR) (1963)*

President Kennedy issued an executive order prohibiting travel to Cuba and all financial and commercial transactions with Cuba in 1963.⁶⁵ Through this comprehensive act, the Treasury Department, using the authority of the TWEA and the FAA, prohibited most financial transactions with Cuba and also froze the Cuban government's assets in the United States.⁶⁶ This legislation is frequently amended but is still the main source of embargo law today.⁶⁷ The Office of Foreign Asset Control and the Bureau of Industry and Security govern the administration of this complex set of regulations.⁶⁸

D. *Cuba Democracy Act (CDA) (1992)*

The codification of Cuba sanctions, which had thus far been largely based on executive orders, began in October 1992, when President Bush signed the

⁶² Embargo on All Trade with Cuba, 27 Fed. Reg. 1085 (Feb. 3, 1962).

⁶³ *U.S. Foreign Policy Sanctions: Cuba*, *supra* note 58.

⁶⁴ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act 22 U.S.C §§ 6021–6091 (2016).

⁶⁵ *U.S. Foreign Policy Sanctions: Cuba*, *supra* note 58.

⁶⁶ Cuban Assets Control Regulation, 28 Fed. Reg. 6974–85 (1963).

⁶⁷ CACR regulations have been amended on January 16, 2015; September 21, 2015; January 27, 2016; and March 16, 2016. *See* Cuba: Providing Support for the Cuban People, 80 Fed. Reg. 2286–91 (Jan. 16, 2015); Cuban Assets Control Regulations, 80 Fed. Reg. 2291–302 (Jan. 16, 2015); Enhancing Support for the Cuban People, 80 Fed. Reg. 56,898–904 (Sept. 21, 2015); Cuban Assets Control Regulation, 80 Fed. Reg. 56,915–26 (Sept. 21, 2015); Cuba: Revisions to Licensing Exceptions and Licensing Policy, 81 Fed. Reg. 13,972–74 (Mar. 16, 2016); Cuban Assets Control Regulations, 81 Fed. Reg. 13,989–94 (Mar. 16, 2016); *see* SULLIVAN, *supra* note 20, at 27.

⁶⁸ Embargoes and Other Special Controls: Cuba, 15 C.F.R. § 746.2 (2016); Exportations from the United States to Cuba, 31 C.F.R. § 515.533 (2016); *see also* 81 Fed. Reg. 13,989 (Mar. 16, 2016); *Resource Center*, U.S. DEPT. OF THE TREASURY, <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/cuba.aspx> (last updated Jan. 24, 2017); *Frequently Asked Questions Related To Cuba*, U.S. DEPT. OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf (last updated Jan. 6, 2017).

Cuban Democracy Act (CDA), also known as the Torricelli Act.⁶⁹ The CDA includes provisions that: (1) prohibit foreign-based subsidiaries of U.S. companies from trading with Cuba, (2) require the interning of foreign flag ships traveling from Cuba, (3) prohibit travel to Cuba by U.S. citizens, and (4) restrict family remittances to Cuba.⁷⁰ The President has the discretion to waive some, but not all, of the provisions of the CDA, with the Helms-Burton Act limiting much of that discretion.⁷¹

Of note, relevant portions of §6002 of the CDA state:

It should be the policy of the United States – (1) to seek a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people . . . (3) *to make clear to other countries that, in determining its relations with them, the United States will take into account their willingness to cooperate in such a policy . . .* (5) *to continue vigorously to oppose the human rights violations of the Castro regime; (6) to maintain sanctions on the Castro regime so long as it continues to refuse to move toward democratization and greater respect for human rights; (7) to be prepared to reduce the sanctions in carefully calibrated ways in response to positive developments in Cuba; (8) to encourage free and fair elections to determine Cuba’s political future; (9) to request the speedy termination of any military or technical assistance, subsidies, or other forms of assistance to the Government of Cuba from the government of any other country.*⁷²

Clause 3 in particular has provided ammunition for the Cuban government to claim that the United States has interfered with the Cuban government’s ability to trade with other nations.⁷³

Under § 6007 of the CDA, the President can take steps to end the embargo only if Cuba: (1) “has held free and fair elections;” (2) allows “for political opposition and monitors;” (3) shows “respect for the basic civil liberties and human rights of the citizens of Cuba;” and (4) is “moving toward establishing a free market economic system.”⁷⁴ This provision serves as one of the major hurdles to negotiations between the two states because Cuba believes the

⁶⁹ *The US Embargo Against Cuba*, AMNESTY INT’L (Sept. 19, 2017), <https://www.amnestyusa.org/pdfs/amr250072009eng.pdf>.

⁷⁰ 22 U.S.C. § 6001 (2010).

⁷¹ RENNACK & SULLIVAN, *supra* note 53.

⁷² 22 U.S.C. § 6001 (2010) (emphasis added).

⁷³ *Id.*

⁷⁴ 22 U.S.C. § 6007(a)–(b) (2010).

United States is interfering with its internal affairs by requiring a change in the form of government and by defining human rights in a manner that is incompatible with communist ideals. I will discuss these differing definitions for human rights in Part II.

E. Helms-Burton Act/LIBERTAD (1996)

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, also known as the Helms-Burton Act, officially codified the U.S. embargo against Cuba.⁷⁵ President Clinton signed the legislation less than a month after Cuban air force jets shot down two American planes over international waters—killing four Cuban exiles.⁷⁶ LIBERTAD is a mixture of previously existing economic sanctions, policies related to restoration of democracy in Cuba, threats against third parties that do business with Cuba, and restrictions on entry into the United States by persons who “traffic in confiscated property” or who are affiliated with such persons by ownership, employment, or family.⁷⁷ At a higher level, LIBERTAD outlines U.S. policy and economic assistance towards a future transition or democratic Cuban government.⁷⁸ It allows lawsuits in U.S. courts against foreign companies who invest in businesses once owned by Americans or by Cubans now living in the United States.⁷⁹ Of note, as permitted by law, Presidents Bush, Clinton, and Obama have suspended this clause for six-month intervals.⁸⁰

Significantly, if the U.S. opposes a loan, § 6034 of LIBERTAD requires the Secretary of the Treasury to withhold U.S. payments from international financial institutions in the amount that the institutions have loaned money to Cuba.⁸¹ The provision also directs the Secretary of the Treasury to require U.S. executive directors of international financial institutions to oppose Cuba’s admission.⁸² These institutions include the powerful International Monetary Fund and the Inter-American Development Bank.⁸³ Because of these

⁷⁵ 22 U.S.C §§ 6021–6091 (2016).

⁷⁶ William J. Clinton, President of the United States, Remarks on Signing the Cuban and Democratic Solidarity (LIBERTAD) Act of 1996 (Mar. 12, 1996) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=52531>).

⁷⁷ See Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT’L L. 419, 419 (1996).

⁷⁸ 22 U.S.C §§ 6021–6091 (2016).

⁷⁹ Joy Gordon, *Cuba’s Entrepreneurial Socialism*, ATLANTIC MONTHLY, Jan. 1997, at 18-30, <https://www.theatlantic.com/magazine/archive/1997/01/cubas-entrepreneurial-socialism/376758/>.

⁸⁰ SULLIVAN, *supra* note 20, at 23.

⁸¹ 22 U.S.C. § 6034 (2016).

⁸² *Id.*

⁸³ *Id.*

provisions, Cuba has largely depended on other nations for financing, and many of those lenders have recently forgiven Cuba's debts.⁸⁴ Nonetheless, LIBERTAD's provisions provide additional support for the Cuban government's argument that the embargo is in fact a blockade.

Most importantly, LIBERTAD makes clear that Congress cannot lift the embargo until the President makes a determination that a "democratically elected government," as defined in the Act, is in power in Cuba.⁸⁵ LIBERTAD also requires that the government makes "*demonstrable progress in returning to United States citizens . . . property taken by the Cuban government . . . on or after January 1, 1959, or providing full compensation . . . in accordance with international law standards and practices.*"⁸⁶ These confiscated properties have been a key sticking point in negotiations between the United States and Cuba,⁸⁷ and almost eight billion dollars' worth of claims, including interest, are under the jurisdiction of the Foreign Claim Settlements Commission.⁸⁸ Of all of the laws discussed in this Article, LIBERTAD is the most important. By signing this law, President Clinton gave up his right, and the right of all future presidents, to unilaterally lift the embargo. The Trump administration has made clear that settling the confiscated property claims is a top priority.⁸⁹

F. Trade Sanctions Reform and Export Enhancement Act of 2000

In October 2000, President Clinton signed the Trade Sanctions Reform and Export Enhancement Act (TSRA), which allowed sales of U.S. food and

⁸⁴ In 2014, Russia wrote off ninety percent of Cuba's debt to the former Soviet Union, and in 2015, several nations entered into the Paris Club Agreement to forgive over seventy-five percent of Cuba's debt. See Andrey Ostroukh & José de Córdoba, *Russia Writes Off Cuba Debt*, WALL ST. J. (July 12, 2014), <https://www.wsj.com/articles/russia-writes-off-cuba-debt-1405083869>; Jason Chow, *Cuba Reaches Deal to Pay \$2.6 Billion in Arrears to Paris Club*, WALL ST. J. (Dec. 12, 2015), <https://www.wsj.com/articles/cuba-reaches-deal-to-pay-2-6-billion-in-arrears-to-paris-club-1449947319>.

⁸⁵ U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-951R, U.S. EMBARGO ON CUBA: RECENT REGULATORY CHANGES AND POTENTIAL PRESIDENTIAL OR CONGRESSIONAL ACTIONS (2009); see also 22 U.S.C. §§ 6021–6091 (2016).

⁸⁶ 22 U.S.C. § 6066 (2016) (emphasis added).

⁸⁷ See RICHARD E. FEINBERG, RECONCILING U.S. PROPERTY CLAIMS IN CUBA: TRANSFORMING TRAUMA INTO OPPORTUNITY 2 (2015), <http://www.brookings.edu/~media/research/files/papers/2015/12/01-reconciling-us-property-claims-cuba-feinberg/reconciling-us-property-claims-in-cuba-feinberg.pdf>. See generally *Claims Against Cuba—Lead Decisions*, U.S. DEP'T OF JUST.: FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE U.S., <https://www.justice.gov/fcsc/claims-against-cuba-lead-decisions> (outlining opinions on early Cuba claims) (last visited Oct. 24, 2017).

⁸⁸ See *Completed Programs—Cuba*, U.S. DEP'T OF JUST.: FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE U.S., <https://www.justice.gov/fcsc/claims-against-cuba> (last visited Oct. 24, 2017).

⁸⁹ Richard E. Feinberg & Ted Piccone, *Here's a Blueprint for a Trump-Castro Deal on Cuba*, AM. Q. (Dec. 8, 2016).

medicine to Cuba (and all other sanctioned countries) but required that commodities exported be paid for by cash in advance and financed by third-country financial institutions.⁹⁰ Given Cuba's cash flow difficulties after the fall of the Soviet Union and the current economic crises in Brazil and Venezuela,⁹¹ its main trading partners, this law is virtually meaningless to Cuba today. The TSRA also prohibits most tourist travel to Cuba.⁹² Americans can only travel to Cuba if they meet an exception codified by law.⁹³ Unlike many of the other laws discussed above, the President does not have the discretion to waive enforcement.⁹⁴

Notwithstanding these obstacles, beginning in December 2014, President Obama leveraged his executive powers to gradually weaken restrictions on trade and travel, banking and financial institutions, physical presence, and telecommunications.⁹⁵ On April 14, 2015, President Obama also removed Cuba from the list of state sponsors of terrorism,⁹⁶ a move that eliminates some barriers to access to foreign capital.⁹⁷ Even so, as this brief discussion of the law of the embargo demonstrates, past presidents have placed significant hurdles in the way of future presidents who may wish to lift the restrictions.

Thus, a president cannot lift the embargo alone, and one of the most critical barriers is the United States' insistence on human rights reform, which runs through many of the laws discussed above. Accordingly, Part II examines how

⁹⁰ *U.S. Foreign Policy Sanctions: Cuba*, *supra* note 58.

⁹¹ Marc Frank & Anthony Boadle, *Rousseff's Fall in Brazil Casts Cloud on Cuba*, REUTERS (May 12, 2016), <http://www.reuters.com/article/us-cuba-brazil-idUSKCN0Y32T7>; see Victoria Burnett, *Amid Grim Economic Forecasts, Cubans Fear a Return to Darker Times*, N.Y. TIMES (July 12, 2016), <http://www.nytimes.com/2016/07/13/world/americas/cuba-economy-venezuela-power-cuts.html>.

⁹² *Traveling to Cuba*, U.S. EMBASSY IN CUBA: U.S. CITIZEN SERVICES, <https://cu.usembassy.gov/traveling-to-cuba> (last visited Oct. 24, 2017).

⁹³ *Id.*; see also Travel-Related Transactions To, From, and Within Cuba by Persons Subject to U.S. Jurisdiction, 31 C.F.R. § 515.560 (2016).

⁹⁴ RENNACK & SULLIVAN, *supra* note 53, at 10.

⁹⁵ See SULLIVAN, *supra* note 20 (listing congressional proposals and observing that “[t]he overall embargo, however, remains in place, and can only be lifted with congressional action or if certain conditions in Cuba are met, including that a democratically elected government is in place”). *But see* Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, AM. BUS. L.J. (forthcoming) (manuscript at 31–32), available at <http://ssrn.com/abstract=2789819> (arguing that the foreign affairs power, including the powers relating to the embargo, is an executive function and that no Congressional approval is required to lift it).

⁹⁶ *State Sponsors of Terrorism*, U.S. DEPT OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Oct. 24, 2017); see also Arms Export Control Act § 40A, 22 U.S.C. § 2781 (2010); 80 Fed. Reg. § 30,319 (2015).

⁹⁷ Randal C. Archibold & Julie Hirschfeld Davis, *Cuba to Be Removed from U.S. List of Nations That Sponsor Terrorism*, N.Y. TIMES (Apr. 14, 2015), <http://www.nytimes.com/2015/04/15/world/americas/obama-cuba-remove-from-state-terror-list.html>.

Cuba and the United States define human rights and compares their respective human rights records.

II. THE HUMAN RIGHTS DILEMMA

A. *How Do Cuba and the United States Define Human Rights? A Comparison of Constitutions and Treaties*

Because Congress has imposed a human rights requirement for lifting the embargo, it is important to understand how both Cuba and the United States define the term and why both nations have criticized each other for their respective human rights records.⁹⁸

According to the United Nations:

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status . . . Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law.⁹⁹

The United Nations enshrined these rights in the Universal Declaration of Human Rights (UDHR), approved by the General Assembly of the United Nations in Paris following the end of World War II.¹⁰⁰ The International Bill of Rights is comprised of the UDHR, the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols.¹⁰¹ I will discuss the ICESCR and the ICCPR separately below.

The International Bill of Human Rights broadly categorizes human rights as either civil and political rights or economic, social, and cultural rights.¹⁰² Civil and political rights, codified in the ICCPR,¹⁰³ include the rights to life,

⁹⁸ Marjorie Cohn, *Human Rights Hypocrisy: U.S. Criticizes Cuba*, HUFFINGTON POST: THE BLOG (Mar. 8, 2016), http://www.huffingtonpost.com/marjorie-cohn/human-rights-hypocrisy-us_b_9493892.html.

⁹⁹ *What are Human Rights?*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS., <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Oct. 24, 2017).

¹⁰⁰ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

¹⁰¹ *See Fact Sheet No.2 (Rev. 1), The International Bill of Human Rights*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS., <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (last visited on Oct. 24, 2017).

¹⁰² G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

¹⁰³ *See id.*

free expression, freedom of religion, fair trial, self-determination, as well as the right to be free from torture, cruel treatment, and arbitrary detention.¹⁰⁴ The ICESCR contains the rights to education, social security, paid maternity leave, equal pay, reduction of infant mortality, as well as the right to form and join unions and strike.¹⁰⁵ In 2008, Cuba signed both the ICCPR and ICESCR but has failed to ratify either.¹⁰⁶ The United States signed both treaties in 1997 but has only adopted and ratified the ICCPR.¹⁰⁷

Neither Cuba nor the United States must comply with the ICESCR because neither of these countries has ratified it. In the United States, most of the guarantees go unfulfilled, in part because human rights in this country stem from the Constitution, which dictates what the government cannot do rather than what the government can or must do.¹⁰⁸ The Cuban Constitution, on the other hand, has more positive rights, such as the affirmative right to gender equality.¹⁰⁹

Although it has not ratified the ICESCR, the Cuban government has used legislative measures to enact many of its policy directives.¹¹⁰ Cuba, for example, provides free education through college and free healthcare to its citizens.¹¹¹ Neither the “right” to education nor healthcare is guaranteed to all

¹⁰⁴ *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/faq-covenant-civil-political-rights-iccpr> (last visited Oct. 24, 2017).

¹⁰⁵ G.A. Res. 2200 (XXI), International Covenant on Economic, Social and Cultural Right (Dec. 16, 1966) [hereinafter ICESCR].

¹⁰⁶ *Ratification Status for Cuba*, U.N. OFF. OF THE HIGH COMM’R HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=44&Lang=EN (last visited Oct. 24, 2017).

¹⁰⁷ *Reporting Status for United States of America*, U.N. OFF. OF THE HIGH COMM’R HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=USA&Lang=EN (last visited Oct. 24, 2017).

¹⁰⁸ Ann M. Piccard, *The United States’ Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 SCHOLAR 231, 238-39 (2010).

¹⁰⁹ Keiko Rose, *Gender Equality in Cuba: Constitutional Promises vs. Reality 1* (Univ. of Chi. Law Sch. Int’l Immersion Program, Working Paper No. 11, 2015), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=international_immersion_program_papers.

¹¹⁰ *International Covenant on Economic, Social & Cultural Rights*, UNITED NATIONS: TREATY COLLECTION (Sept. 17, 2007), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-3&chapter=4&lang=en [hereinafter Treaty Collection]; ICESCR, *supra* note 105; Fiona Hill, *Prevention Better than Cure in Cuban Healthcare System*, BBC, Dec. 13, 2015, <http://www.bbc.com/news/health-35073966>; *Quality Education Without Money*, CBS NEWS (Aug. 13, 2001), <http://www.cbsnews.com/news/quality-education-without-money>.

¹¹¹ Hill, *supra* note 110; *see also* Edward W. Champion & Stephan Morrissey, *A Different Model—Medical Care in Cuba*, 368 NEW ENG. J. MED. 297, 297 (2013); *Quality Education Without Money*, *supra* note 110; *Latin Lessons: What Can We Learn from the World’s Most Ambitious Literacy Campaign?*, INDEP. (Nov. 7, 2010), <http://www.independent.co.uk/news/world/americas/latin-lessons-what-can-we-learn-from-the-worlds-most-ambitious-literacy-campaign-2124433.html>.

citizens in the United States, although public education is free through high school.

Cuba also has a more family-friendly social welfare system than the United States. Cuba has provided paid maternity leave since 1963, and has now extended paid leave in some instances to fathers.¹¹² Further, Cuba's healthcare system is generally well-regarded, and despite the island's relative poverty, Cuba has a lower infant mortality rate than the United States.¹¹³ On the other hand, despite being first in the world in GDP, the United States is the only wealthy nation in the world that does not provide paid maternity leave.¹¹⁴ While Cuba has made strides to minimize the gender gap, even the U.S. government acknowledges that, despite federal laws, significant pay gaps exist.¹¹⁵ Cuba has also had a social security pension system for its citizens since the 1920s.¹¹⁶ As of late, however, many retirees have struggled in the face of rising prices, a depressed Cuban economy, and the dual currency system.¹¹⁷ On the other hand, the social security system in the United States is so notoriously underfunded that many people cannot afford to retire.¹¹⁸

The countries also differ significantly on other labor issues. Although Cuba's social welfare system may provide more basic benefits for its citizens,

¹¹² *Cuba to Women: Please Have More Babies*, NBC NEWS (Oct. 29, 2014), <http://www.nbcnews.com/news/latino/cuba-women-please-have-more-babies-n236406>; see also Debra Evenson, *Cuba's Maternity Leave Extended to Fathers, But Few Dads Take It*, MEDICC REVIEW http://www.medicc.org/publications/medicc_review/0605/mr-features.html (last visited Oct. 24, 2017).

¹¹³ *Mortality Rate, Infant (per 1,000 Live Births)*, WORLD BANK, <http://data.worldbank.org/indicator/SP.DYN.IMRT.IN> (last visited Oct. 24, 2017); *The World Fact Book, Infant Mortality Rate*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2091rank.html> (last visited Oct. 24, 2017).

¹¹⁴ *Maternity Leave: How America Is Failing Its Mothers*, BROADLY (Mar. 8, 2016), https://broadly.vice.com/en_us/video/maternity-leave-how-america-is-failing-its-mothers.

¹¹⁵ See generally Barack H. Obama, President of the United States, Presidential Proclamation – National Equal Pay Day, 2016 (Apr. 11, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/presidential-proclamation-national-equal-pay-day-2016>.

¹¹⁶ Lorenzo L. Pérez, *The Pension System of Cuba: The Current Situation and Implications of International Pension Reform Experiences for Addressing Cuba's Problems*, ASS'N FOR THE STUDY OF THE CUBAN ECON. (Nov. 30, 1998), <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v08-53perez.pdf>.

¹¹⁷ *Id.*; David Strug, *Cuba's Retired Population Struggles with Economic Reform*, NACLA (Nov. 10, 2014), <http://nacla.org/news/2014/11/10/cuba%E2%80%99s-retired-population-struggles-economic-reforms>; Carmelo Mesa-Lago, *Institutional Changes of Cuba's Economic-Social Reforms: State and Market Roles, Progress, Hurdles, Comparisons, Monitoring and Effects*, FOREIGN POLICY AT BROOKINGS 10–11, 18–22 (Aug. 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/cubaseconomicssocialreformsmesalago.pdf>.

¹¹⁸ Jamie Hopkins, *Social Security Could Be in Worse Shape Than We Thought*, FORBES (Feb. 18, 2015), <http://www.forbes.com/sites/jamiehopkins/2015/02/18/social-security-could-be-in-worse-shape-than-we-thought/#5e949eda75a6>; Mitchell Hartman, *Many Boomers Can't Afford to Retire*, MARKETPLACE (Aug. 3, 2015), <https://www.marketplace.org/2015/08/03/economy/many-boomers-cant-afford-retire>.

the United States has a stronger record on labor rights. The United States permits organized workers to strike under the National Labor Relations Act (with some limitations).¹¹⁹ Cubans, however, have no legal right to strike and have access to only one legally recognized trade union, the Communist party-controlled CTC.¹²⁰ The National Independent Workers' Confederation of Cuba, the National Independent Laborer Confederation of Cuba, and the Unitarian Council of Workers of Cuba comprise the Independent Trade Union Association of Cuba, created to replace the Coalition of Independent Unions of Cuba.¹²¹ But because the Cuban government has not officially recognized these organizations, members have reported harassment, infiltration by government agents, and the inability to advocate effectively for workers.¹²² Thus, it appears that even though neither nation has ratified the ICESCR, the United States has provided more protection for workers' rights than Cuba.

Although the United States has not ratified the ICESCR, it has ratified the ICCPR.¹²³ However, a 2014 U.N. report on U.S. compliance with the ICCPR¹²⁴ provides talking points for the Castro regime against the United States and on its own human rights record. In its most recent observations of U.S. progress, the United Nations recommended that the United States focus on, among other things, remedying past human rights violations, especially during combat; addressing racial disparities in the criminal justice system; combatting and eliminating racial profiling; strengthening protections related to the death penalty, particularly regarding racial bias; reviewing its immigration detention policies; improving homelessness; and, most important for the purposes of this Article, ending the administrative detention of prisoners without charges or trial at the Guantanamo Bay Naval Base in Cuba.¹²⁵

In its response to the criticism related to Guantanamo, which Amnesty International has called “emblematic of the gross human rights violations

¹¹⁹ *The Right to Strike*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/strikes> (last visited on Sept. 24, 2017).

¹²⁰ *Cuba 2016 Human Rights Report*, *supra* note 11, at 26.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, CARTER CTR. (June 28, 1992), <https://www.cartercenter.org/news/documents/doc1369.html> (last visited Oct. 24, 2017); *see* Treaty Collection, *supra* note 110, at 2.

¹²⁴ U.N. Hum. Rts. Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4.

¹²⁵ *Id.*

perpetuated by the U.S. government in the name of terrorism,”¹²⁶ the United States reiterated then-President Obama’s commitment to closing Guantanamo and outlined steps it had taken to transfer detainees and provide some measure of due process.¹²⁷ Under the Trump administration, however, Guantanamo is likely to remain open and house more prisoners.¹²⁸ Further, while the U.S. government points to Cuba’s incarceration of dissidents, in 2015, the United States had the largest incarcerated population of the world.¹²⁹ Thirty-one states continue to impose the death penalty, and seven of those states carried out executions in 2014.¹³⁰

Despite the United Nations’ criticism of the U.S. government’s treatment of citizens at home and abroad, Cuba is not in the clear. Not only has Cuba failed to ratify the ICCPR, it has a long list of vocal critics on its human rights record.¹³¹ Upon signing the ICCPR, Cuba declared:

. . . it was the Revolution that enabled its people to enjoy the rights set out in the International Covenant on Civil and Political Rights. The economic, commercial and financial embargo imposed by the United States and its policy of hostility and aggression against Cuba constitute the most serious obstacle to the Cuban people’s enjoyment of the rights set out in the Covenant. The rights protected under this Covenant are enshrined in the Constitution of the Republic and in national legislation. The State’s policies and programs guarantee the effective exercise and protection of these rights for all Cubans. With respect to the scope and implementation of some of this international instrument, Cuba will make such reservations or interpretative declarations as it may deem appropriate.¹³²

¹²⁶ *Guantánamo and Illegal Detention*, AMNESTY INT’L, <https://web.archive.org/web/20170209132922/amnestyusa.org/our-work/issues/security-and-human-rights/guantanamo> (last visited Oct. 24, 2017).

¹²⁷ *One-Year Follow-Up Response of the United States of America to Priority Recommendations of the Human Rights Committee on its Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights*, PERMANENT MISSION OF THE U.S. 9–11 (Apr. 1, 2015), <http://www.state.gov/documents/organization/242228.pdf>.

¹²⁸ See Rebecca Kheel, *Gitmo Numbers Likely to Rise Under Trump*, THE HILL (Jan. 26, 2017), <http://thehill.com/policy/defense/316215-gitmo-numbers-likely-to-rise>.

¹²⁹ *United States: Events of 2015*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/country-chapters/united-states> (last visited Oct. 24, 2017).

¹³⁰ *Id.*

¹³¹ *Ratification Status for Cuba*, *supra* note 106. See generally *Cuba 2016 Human Rights Report*, *supra* note 11; *Cuba: Events of 2015*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/country-chapters/cuba> (last visited Oct. 24, 2017).

¹³² Martin Palous, *Cuba and Human Rights Law*, FLA. INT’L U. VÁCLAV HAVEL PROGRAM FOR HUM. RTS. & DIPL. 1 (July 1, 2014), <http://havel.fiu.edu/news/2014/cuba-and-human-rights-law-by-martin-palous/cuba-and-human-rights-law.pdf>.

Contrary to Cuba's declarations, Cuba does not provide for freedom of speech or assembly, nor does it provide freedom from arbitrary detention and arrest.¹³³ Cuba received a ninety-one out of one hundred—nine spots from the bottom of the list—for freedom of the press in 2016.¹³⁴ The government controls almost all media, and only a quarter of Cubans use the Internet, with only five percent having home access.¹³⁵ Freedom of speech and the right to be free from arbitrary arrest and detention are fundamental human rights guaranteed by the UDHR, and as a member of the United Nations, the UDHR is binding on Cuba.¹³⁶ Neither Cuba nor the United States is perfect in regards to guaranteeing human rights, although U.S. citizens clearly enjoy much greater freedom.

Significantly, although the United States criticizes Cuba's record on human rights, the United States has failed to ratify several key international human rights treaties,¹³⁷ including:

- 1) the Convention on the Elimination of All Forms of Discrimination against Women¹³⁸—ratified by 185 countries, including Cuba and all other industrialized nations;¹³⁹
- 2) the Convention on the Rights of the Child,¹⁴⁰ which protects children from physical and mental abuse and hazardous work—the United States is only one of two nations in the world that has not signed it;¹⁴¹
- 3) the Rome Statute of the International Criminal Court,¹⁴² which allows trials of individuals accused of genocide, war crimes and crimes against humanity—Cuba has not signed;¹⁴³

¹³³ *Cuba: Events of 2015*, *supra* note 131.

¹³⁴ *Compare Cuba—Country Report—Freedom of the Press 2016*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2016/cuba> (last visited Oct. 24, 2017), *with United States—Country Report—Freedom of the Press 2016*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2016/united-states> (last visited Oct. 24, 2017) (giving the U.S. a score of 21).

¹³⁵ Josefina Salomon, *Six Facts about Censorship in Cuba*, AMNESTY INT'L (Mar. 11, 2016), <https://www.amnesty.org/en/latest/campaigns/2016/03/six-facts-about-censorship-in-cuba/>.

¹³⁶ *Cuba Signs Human Rights Pledges*, BBC, Feb. 28, 2008, <http://news.bbc.co.uk/2/hi/americas/7270179.stm>; *see also Member States*, UNITED NATIONS, <http://www.un.org/en/member-states/>.

¹³⁷ *See View the Ratification Status by Country or by Treaty*, U.N. OFF. OF THE HIGH COMM'R, HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (last visited Oct. 24, 2017).

¹³⁸ G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

¹³⁹ *Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.

¹⁴⁰ G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

¹⁴¹ *Ratification Status for CRC - Convention on the Rights of the Child*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (last visited Oct. 24, 2017).

- 4) the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;¹⁴⁴
- 5) the Convention on the Rights of Persons with Disabilities,¹⁴⁵ which Cuba has ratified;¹⁴⁶ and
- 6) the International Convention for the Protection of All Persons from Enforced Disappearance,¹⁴⁷ which states that it is a crime against humanity when practiced in a widespread or systematic manner—Cuba has ratified.¹⁴⁸

Cuban President Raul Castro has made it clear that the two states' differing definitions and prioritization of human rights will be a significant sticking point in negotiations. He has also emphatically stated that human rights "should not be politicized" and that there are no greater rights than education and health care.¹⁴⁹ Because it is unlikely that Cuba's stance on human rights will change merely because of U.S. demands, the United States can, and should, use another route to encourage human rights reform—trade and transnational corporations.

In the section below, I will discuss the current level of accountability that corporations bear for human rights. I will then outline how a bilateral investment treaty can provide some level of human rights protections to Cubans even though they will not personally be parties to the BIT.

¹⁴² Rome Statute of the International Criminal Court, Jul. 1, 2002, 2187 U.N.T.S. 90.

¹⁴³ *Cuba*, COALITION FOR INT'L CRIM. COURT, <https://web.archive.org/web/20161019063648/http://www.iccnw.org/?mod=country&iduct=43> (last visited Oct. 24, 2017).

¹⁴⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Jul. 7, 2003, 2220 U.N.T.S. 3.

¹⁴⁵ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

¹⁴⁶ *Ratification Status for CRPD - Convention on the Rights of Persons with Disabilities*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (last visited Oct. 24, 2017).

¹⁴⁷ International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3.

¹⁴⁸ *Ratification Status for CED - Convention for the Protection of All Persons from Enforced Disappearance*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (last visited Oct. 24, 2017).

¹⁴⁹ Stephen Rex Brown & Leonard Greene, *President Obama and Cuban President Raul Castro Voice Differences over Human Rights after Historic Havana Meeting*, N.Y. DAILY NEWS, <http://www.nydailynews.com/news/national/president-obama-meet-cuban-president-raul-castro-article-1.2571711> (last updated Mar. 22, 2016).

B. Do Transnational Corporations Have Responsibilities for Human Rights? Voluntary Codes and Soft Law Initiatives

Clearly, the state has an obligation to protect its citizens from human rights violations, but what role should companies play in safeguarding human rights, especially when (1) transnational corporations (TNCs) have no direct, positive human rights obligations under international law,¹⁵⁰ (2) no international criminal court system has explicit and direct jurisdiction over corporations, and (3) no provisions in treaties create international criminal courts for the prosecution of corporations?¹⁵¹

Absent a specific law in the home or host state, TNCs have no legal obligation to improve or protect worker rights.¹⁵² Instead, corporations obligate themselves through voluntary “soft” law initiatives such as corporate social responsibility programs.¹⁵³ Below, I discuss soft law principles because firms and states are familiar with these principles, and many can co-exist with the “clean hands doctrine” of a bilateral investment treaty, in addition to the revised U.S. NAP discussed in Part IV.

Many firms burnish their reputations by purchasing membership in the most important and widely regarded corporate social responsibility program—the U.N. Global Compact (the Compact). The Compact is the world’s largest

¹⁵⁰ Human Rights Council Res., U.N. Doc. A/8/5, at 1 (April 7, 2008) [hereinafter Ruggie Report] (observing that “the international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm”); Eric De Brabandere, *Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 268–283 (Jean d’Aspremont ed., 2011).

¹⁵¹ Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations, Confusion in the Courts*, 6 NW. U. J. INT’L HUM. RTS. 304, 306 (2008); Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 183-89 (2005); *In Controversial Landmark Resolution, Human Rights Council Takes First Step Toward Treaty on Transnational Corporations’ Human Rights Obligations*, INT’L JUST. RES. CTR. (July 15, 2014), <http://www.ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first-step-toward-treaty-on-transnational-corporations-human-rights-obligations/>. There are currently two draft treaties pending that would bind businesses to human rights obligations. Joe Zhang, *Negotiations Kick Off on a Binding Treaty on Business and Human Rights*, INT’L INST. FOR SUSTAINABLE DEV. (Nov. 26, 2015), <https://www.iisd.org/itn/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights/>. The Open-Ended Intergovernmental Working Group for the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises (TNCOBES) has begun negotiations on a binding treaty on business and human rights. *Id.*

¹⁵² Marcia L. Narine, *Living in a Material World — From Naming and Shaming to Knowing and Showing*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 219-54 (2015).

¹⁵³ De Brabandere, *supra* note 150, at 275.

such initiative and focuses on ten principles related to human rights, labor, the environment, and anti-corruption.¹⁵⁴ As of 2017, the Compact had 12,000 participants, including 9,000 companies.¹⁵⁵ Of note, the Compact lists Cuba as one of the countries in the Americas served by its members.¹⁵⁶ Indeed, many of the Compact members operate in countries with similar human rights records to Cuba, such as China.¹⁵⁷

Another soft law initiative stems from the International Labour Organization (ILO). For years, organized labor in the United States has pushed for TNCs to agree to the principles in the ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy.¹⁵⁸ The ILO aims to “promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.”¹⁵⁹

In 2016, the United States was the largest single member state and donor of the ILO and funded twenty-two percent of the organization’s expenses but had only ratified fourteen of the ILO’s 189 conventions.¹⁶⁰ This hardly set an example for U.S.-based TNCs to do more than required in a country where only 11.1% of employees are members of unions as of 2015.¹⁶¹ In contrast,

¹⁵⁴ *A New Era of Action and Impact*, U.N. GLOBAL COMPACT, available at <http://unglobalcompact.org/what-is-gc/strategy> (last visited Oct. 24, 2017). The Ten Principles state that businesses should: (1) support and respect the protection of internationally proclaimed human rights; (2) make sure that they are not complicit in human rights abuses; (3) uphold the freedom of association and the effective recognition of the right to collective bargaining; (4) eliminate all forms of forced and compulsory labour; (5) effectively abolish child labour; (6) eliminate discrimination in respect to employment and occupation; (7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; (9) encourage the development and diffusion of environmentally friendly technologies; and (10) work against corruption in all its forms, including extortion and bribery. *The Power of Principles*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Oct. 24, 2017).

¹⁵⁵ *Our Participants*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/participants> (last visited on Oct. 24, 2017).

¹⁵⁶ *Global Compact Profile*, BUSINESS.UN.ORG, <https://business.un.org/en/entities/34> (last visited Oct. 24, 2017).

¹⁵⁷ See Ruggie Report, *supra* note 150.

¹⁵⁸ *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)*, ILO (5th ed. 2017), http://www.ilo.org/wcmsp5/groups/public/—cd_emp/—emp_ent/—multi/documents/publication/wcms_094386.pdf.

¹⁵⁹ *About the ILO*, ILO, <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Oct. 24, 2017).

¹⁶⁰ *The U.S.: A Leading Role in the ILO*, ILO, <http://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang--en/index.htm> (last visited Oct. 24, 2017).

¹⁶¹ *Economic News Release*, U.S. DEP’T OF LABOR, <http://www.bls.gov/news.release/union2.nr0.htm> (last updated Jan. 26, 2017); *Ratifications for the United States*, ILO, http://www.ilo.org/dyn/normlex/en/?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited Oct. 24, 2017).

notwithstanding the labor issues identified earlier, Cuba has ratified ninety ILO Conventions and one protocol.¹⁶²

Some companies also agree to the tenets of the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines). These guidelines are voluntary principles for responsible business conduct for participating governments and multinational enterprises operating in, or from, adhering countries.¹⁶³ The OECD Guidelines require, among other things, risk-based due diligence within the supply chain and that the employment section aligns with the ILO Tripartite Declaration.¹⁶⁴ Aggrieved individuals may utilize grievance mechanisms established through National Contact Points (NCPs).¹⁶⁵ Research has not revealed any Cuban citizen utilizing the NCPs in any country.

Introduced in 2010, after five years of multi-stakeholder meetings, ISO 26000 is another unenforceable, but important, industry best practice standard related to Corporate Social Responsibility. Cuba participated in the development of the standard and has indicated that it would develop a corresponding national standard.¹⁶⁶ ISO 26000 has many linkages with the Compact because it addresses human rights, labor practices, community involvement and development, fair operating practices, the environment, and consumer issues.¹⁶⁷

¹⁶² *Ratifications for Cuba: Occupational Safety and Health*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_INSTRUMENT_SORT,P11200_COUNTRY_ID:2,102603#Occ_occupational_safety_and_health (last visited Oct. 24, 2017).

¹⁶³ *OECD Guidelines for Multinational Enterprises*, OECD (2011), www.oecd.org/corporate/mne/48004323.pdf [hereinafter *Guidelines for MNE*].

¹⁶⁴ *Id.* The OECD partnered with the Global Reporting Initiative (GRI) in 2010 in an effort to make sustainability reporting more mainstream and to give greater guidance to member organizations as well as to corporations in the adhering countries that are not member organizations. See *OECD-GRI Partnership to Help Multinational Companies Operate Responsibly*, OECD (Dec. 13, 2010), <http://www.oecd.org/corporate/mne/oecd-gripartnershiptohelpmultinationalcompaniesoperateresponsibly.htm>.

¹⁶⁵ *National Contact Points for the OECD Guidelines for Multinational Enterprises*, OECD, <http://www.oecd.org/investment/mne/neps.htm> (last visited Oct. 24, 2017).

¹⁶⁶ *ISO 26000 Project Overview*, INT'L ORG. FOR STANDARDIZATION 10, http://www.iso.org/iso/iso_26000_project_overview.pdf (last visited Oct. 24, 2017); see also *The 2011 Survey of Post Publication Activities Related to ISO 26000*, INT'L ORG. FOR STANDARDIZATION, <https://www.iso.org/iso-26000-social-responsibility.html> (last visited Oct. 24, 2017); *ISO 26000 Country information*, INT'L ORG. FOR STANDARDIZATION, <http://iso26000.info/countries/> (last visited Oct. 24, 2017).

¹⁶⁷ *UN Global Compact and International Standard ISO 26000 Guidance on Social Responsibility: An Introduction to Linkages between UN Global Compact Principles and ISO 26000 Core Subjects*, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/docs/news_events/8.1/UNGC_ISO_Final.pdf (last visited Oct. 24, 2017); see also *ISO 26000—Social responsibility*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/management-standards/iso26000.htm> (last visited Oct. 24, 2017) (discussing the standards and guidance on how businesses and organizations can do so responsibly).

Many U.S.-based TNCs also state in their codes of conduct that they adhere to the spirit (if not the letter) of the UDHR, drafted in part by the United States,¹⁶⁸ adopted by the U.N. in 1948, and adopted by Cuba in February 2008,¹⁶⁹ shortly after Raul Castro ascended to the presidency.¹⁷⁰ Other companies that have a human rights component to their codes of conduct either refer directly to the UDHR or use similar language.¹⁷¹

The most critical development in corporate accountability for human rights came in 2011, when the U.N. Human Rights Council, of which Cuba was a member, unanimously endorsed the adoption of the UNGPs.¹⁷² The UNGPs were again voluntary and nonbinding but were generally praised as a step forward by the business and intergovernmental community—including the OECD, which adopted its recommendations and added a human rights component to its own guidelines.¹⁷³ Specifically, the UNGPs require companies to develop a policy statement on human rights, based on appropriate expertise, that outlines the responsibilities of employees, partners, and other stakeholders.¹⁷⁴ The policy must be embedded in operational policies and procedures and must be approved at the most senior level of the company.¹⁷⁵ Companies must perform due diligence throughout their supply

¹⁶⁸ *Human Rights & The U.S.*, ADVOCATES FOR HUM. RTS., http://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states (last visited Oct. 24, 2017).

¹⁶⁹ *Cuba: Cuba Signs International Human Rights Agreements with the United Nations*, U.S. LIBRARY OF CONGRESS (Mar. 2, 2008), <http://www.loc.gov/law/foreign-news/article/cuba-cuba-signs-international-human-rights-agreements-with-the-united-nations/>.

¹⁷⁰ *Cuba Signs Human Rights Pledges*, BBC, <http://news.bbc.co.uk/2/hi/americas/7270179.stm> (last updated Feb. 28, 2008).

¹⁷¹ See, e.g., *Corporate Social Responsibility Policy for AAM & Group Companies*, ABERDEEN GRP., [http://www.aberdeen-asset.com/pdfupload.nsf/631A812E68A81E7180256FB800384050/\\$file/groupcsr.pdf?OpenElement](http://www.aberdeen-asset.com/pdfupload.nsf/631A812E68A81E7180256FB800384050/$file/groupcsr.pdf?OpenElement) (last visited Oct. 24, 2017); *Company Code of Basic Working Conditions and Human Rights*, BOEING, <http://www.boeing.com/boeing/aboutus/culture/code.page> (last visited Oct. 24, 2017); *Human Rights Statement*, COCA-COLA CO., http://assets.coca-colacompany.com/e9/c2/f1c4a6314f93bd7545fe43934621/human_rights_statement.pdf (last visited Oct. 24, 2017).

¹⁷² *Study on Implementation of the UN Guiding Principles on Business and Human Rights*, *supra* note 21, at 8.

¹⁷³ In 2011, the OECD amended the OECD Guidelines to adopt the Guidelines and add a human rights section that is consistent. *Guidelines for MNE*, *supra* note 163, at ch. IV; see also Lene Wendland, Advisor on Business and Human Rights, U.N. Off. of the High Comm'r Hum. Rts., Statement at OECD Roundtable on Corporate Responsibility (June 29, 2011) (transcript available at <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48365284.pdf>); Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 69 (2012) (examining the Guiding Principles as well as some of the vulnerabilities).

¹⁷⁴ Guiding Principles, *supra* note 26, at 15.

¹⁷⁵ *Id.*

chains to assess both actual and potential impacts on human rights—based on feedback from stakeholders—and must track and communicate their performance frequently and publicly.¹⁷⁶ Under the UNGPs, businesses should integrate the findings from their assessments across their organizations and address the findings by allocating the appropriate budget and oversight depending upon whether the business has caused the impact directly or through a business relationship.¹⁷⁷ Finally, the UNGPs require the companies to remedy their human rights impact by providing a legitimate, transparent, accessible, predictable, and equitable mechanism to aggrieved individuals.¹⁷⁸

Though laudable, these voluntary soft law regimes do not go far enough. The lack of enforcement mechanisms means that firms have no incentive to do more than necessary to appear socially responsible. Particularly, in developing nations such as Cuba, some TNCs may take advantage of the fact that the host state has lax or unenforced labor, freedom of association, and discrimination laws, among others. In some nations, TNCs may provide the only employment opportunities for local citizens outside of lucrative government jobs that may only be available through patronage or familial connections. That is not likely to be the case in Cuba, where a large number of citizens still work for the state for an average official salary of twenty-five USD per month,¹⁷⁹ and the government takes ninety-two percent of workers' pay from an international employer.¹⁸⁰ Further, some TNCs may take comfort in the fact that there are no strong labor unions in Cuba and that it is illegal for workers to strike.¹⁸¹ This may conflict with a number of the voluntary ethical codes that the firms have endorsed.¹⁸²

Accordingly, the U.S. government must provide the proper incentives and penalties for its firms that choose to do business in Cuba through a BIT and its own NAP. This is particularly important because the Cuban business model

¹⁷⁶ *Id.* at 16-20.

¹⁷⁷ *Id.* at 12.

¹⁷⁸ *Id.* at 20.

¹⁷⁹ See Mimi Whitefield, *Study: Cubans Don't Make Much, but It's More than State Salaries Indicate*, MIAMI HERALD (July 12, 2016), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article89133407.html>. Cubans who do not work for the government but instead are self-employed—the *cuentapropistas*—can earn much more. *Id.*

¹⁸⁰ Circles Robinson, *Cuban Gov. to Keep 92% of Worker Salaries*, HAVANA TIMES, <http://www.havanatimes.org/?p=107948> (last visited Oct. 24, 2017).

¹⁸¹ *A List of What the Cuban People CAN NOT Do in Cuba*, HAVANA JOURNAL (Apr. 16, 2007), <http://havanajournal.com/politics/entry/a-list-of-what-the-cuban-people-can-not-do-in-cuba/>.

¹⁸² See generally Marcia Narine, *Ten Ethics-Based Questions for U.S. Companies Seeking to Do Business in Cuba*, 1 COMPLIANCE ELLIANCE J. 1 (2015) (discussing potential conflicts with ethical codes and norms).

promotes joint ventures with the very state that has human rights issues. In Part III, I will discuss how the Cuban government authorizes firms to conduct business in Cuba, as well as concerns about enforcement of contracts and dispute resolution when the Cuban government is a partner. Following that discussion, I will focus on the call for human rights provisions in BITs with a Cuba-specific proposal so that U.S. firms do not exacerbate human rights abuses. Although the United States may have little credibility with the Cuban government when it comes to human rights, my proposal could move towards a change in that perception.

III. RULE OF LAW CONCERNS FOR U.S. INVESTORS

A. *Doing Business in Cuba—Law 118*

Although advocates and the U.S. government focus on human rights violations in Cuba, investors have another major concern—the protection of their assets. In 2014, Cuba attempted to address this concern while promoting investment through a new foreign investment law¹⁸³ permitting three modes of international investment. Cuba outlines its specific needs in the Portfolio of Opportunities for Foreign Investment.¹⁸⁴ Like earlier Cuban investment laws, the 2014 law known as Law 118 excludes foreign investment in healthcare, education, and military ventures.¹⁸⁵ Investors can only choose from International Economic Association Contracts (IEA), which according to the government includes, “among others, contracts for hotel management, production or services, contracts to provide professional services, risk contracts to explore non-renewable natural resources, for construction and agricultural

¹⁸³ See *Ley No. 118: Ley de la Inversión Extranjera* [Foreign Investment Law Number 118], Gaceta Oficial de la Republica de Cuba [Official Gazette of the Republic of Cuba] (Mar. 29, 2014), available at http://www.granma.cu/file/pdf/2014/04/16/G_2014041609.pdf [hereinafter Law No. 118]; see also Daniel Trotta, *Cuba Approves Law Aimed at Attracting Foreign Investment*, REUTERS, (Mar. 29, 2014), <http://www.reuters.com/article/2014/03/29/us-cuba-investment-idUSBREA2S0EJ20140329>; Raul J. Valdes-Fauli, *What Does the New Cuban Foreign Investment Act Mean?*, FOX ROTHSCHILD, LLP (July 2014), <http://www.foxrothschild.com/publications/what-does-the-new-cuban-foreign-investment-act-mean/>; Larry Catá Backer, *The Cuban Communist Party at the Center of Political and Economic Reform: Current Status and Future Reform*, 8 NW. INTERDISC. L. REV. 71, 95 (2015) (citing Larry Catá Backer & Augusto Molina, *Cuba and the Construction of Alternative Global Trade Systems: ALBA and Free Trade in the Americas*, 31 U. PA. J. INT’L L. 679 (2010)) (discussing Law 118 in detail and the historical methods of foreign investment in Cuba); Paparelli, *supra* note 23.

¹⁸⁴ MINISTERIO DEL COMERCIO EXTERIOR Y LA INVERSIÓN EXTRANJERA, CUBA: PORTFOLIO OF OPPORTUNITIES FOR FOREIGN INVESTORS (2016-17).

¹⁸⁵ See Law No. 118, *supra* note 183.

production;”¹⁸⁶ joint enterprises between the state and foreign shareholders; and full foreign capital companies.¹⁸⁷

Law 118 caused excitement among the foreign investment community initially, but even if Congress were to lift the embargo tomorrow, the Cuban government will not likely license many U.S. full-foreign capital companies. According to the Cuban government, fifty percent of foreign investment in Cuba occurs through joint ventures, forty-five percent through IEAs, and just five percent through full foreign capital companies.¹⁸⁸ The U.S. government has only approved one American company to operate as a full-foreign capital company in Cuba as of the time of this writing. But after one year of negotiations, the Cuban government failed to approve it.¹⁸⁹

Accordingly, notwithstanding Law 118’s provisions for full-foreign capital companies, most firms will still partner with the Cuban government in order to conduct business in Cuba because the government almost never approves the full-foreign capital companies. Indeed, most of the European and Canadian companies doing business in Cuba are involved in joint ventures with the Cuban government.¹⁹⁰ In an effort to promote more joint ventures, the Cuban government has recently relaxed some of its terms.¹⁹¹ The government, for

¹⁸⁶ MINISTERIO DEL COMERCIO EXTERIOR Y LA INVERSIÓN EXTRANJERA, *supra* note 145, at 1, 12.

¹⁸⁷ *Id.*; Law No. 118, *supra* note 183. A joint venture is a “Cuban commercial company which adopts the form of a corporation with registered shares in which one or more national investors and one or more foreign investors participate as shareholders.” *Id.* ch. II, art. 2(h). An IEA is “an agreement between one or more national investors and one or more foreign investors”; each party imparts its separate contributions, and each party retains ownership of these separate contributions. *Id.* ch. II, art. 2(f), 15.1(d). A full-foreign capital company is wholly owned by foreign investors and the Cuban government has no investment stake. *Id.* ch. II, art. 2(g).

¹⁸⁸ MINISTERIO DEL COMERCIO EXTERIOR Y LA INVERSIÓN EXTRANJERA, *supra* note 185.

¹⁸⁹ Susan Adams, *The Unlikely Entrepreneurs Behind Cuba’s First U.S. Factory Since the Revolution*, FORBES (Feb. 16, 2016), <http://www.forbes.com/sites/forbestreptalks/2016/02/16/the-unlikely-entrepreneurs-behind-cubas-first-u-s-factory-since-the-revolution/#6de203a75f18>; Melissa Block, *First U.S. Factory OK’d For Cuba Aims To Plow A Path Into 21st Century*, NPR: PARALLELS (Feb. 22, 2016), <http://www.npr.org/sections/parallels/2016/02/22/467372666/first-u-s-factory-okd-for-cuba-aims-to-plow-path-into-the-21st-century>; *Updated: After One-Year, Cuba Rejects Alabama-Based Cleber LLC Tractor Assembly Proposal*, CUBA TRADE BLOG, <http://www.cubatrade.org/blog/2016/11/1/after-one-year-cuba-rejects-alabama-based-cleber-llc-tractor-assembly-proposal> (last updated Nov. 5, 2016).

¹⁹⁰ *University of Miami Study Examines the Plight of Workers in Cuba*, FOUND. FOR HUM. RTS. IN CUBA, <http://www.fhrcuba.org/2012/12/university-of-miami-study-sponsored-by-fhrc-examines-the-plight-of-workers-in-cuba/> (last visited Oct. 24, 2017); *Foreign Businesses Tread Carefully as Cuban Opens Up*, FIN. TIMES, <http://www.ft.com/cms/s/0/eb663b9a-a7b3-11e4-8e78-00144feab7de.html#axzz3iKhPDTFA> (last visited Oct. 24, 2017).

¹⁹¹ *Foreign Investment in Cuba’s “Updating” of Its Economic Model*, ASS’N STUD. CUBAN ECON. (Nov. 30, 2015), http://www.asceccuba.org/asce_proceedings/foreign-investment-in-cubas-updating-of-its-economic-model/.

example, recently allowed Unilever to have a sixty percent stake compared to the typical forty-nine percent in traditional contracts.¹⁹²

More importantly for investors, Law 118 promises greater protection against expropriation, repatriation of dividends and profits free from taxes in convertible currency, and to offer tax incentives, including reduced-profit tax, exemption from income tax, and the elimination of the labor tax for most companies.¹⁹³ Despite these incentives, those doing business in Cuba must recognize that their practices at home and in other host nations will not apply in Cuba. For example, foreign companies employing Cuban workers cannot legally pay them directly.¹⁹⁴ Instead, they must pay a company controlled by the Cuban government in the home currency, and the Cuban worker receives payment in the Cuban peso, which has a much lower value.¹⁹⁵ The Cuban employee receives only eight percent of the employer's desired wage due to a law that allows the government to keep ninety-two percent of wages paid from foreign firms.¹⁹⁶ As previously discussed in Part II, Cuban employees cannot strike or collectively bargain for their rights.¹⁹⁷ This may pose internal difficulties for firms with organized employees in other parts of the world.

B. Resolving Commercial Disputes under Law 118

Law 118 has specific dispute resolution provisions.¹⁹⁸ Conflicts that arise between the partners must be resolved in accordance with the parties' contract.¹⁹⁹ These conflicts include: any issues related to inactivity of the key governing bodies; winding up, dissolution, and termination of joint ventures; and execution of the contracts between the various modalities of foreign investments. Alternatively, conflicts arising from execution of contracts between the partners and a Cuban national must go before the Economic

¹⁹² *The 2016 Outlook for Foreign Investors in Cuba*, CUBA J. (Feb. 19, 2016), <http://cubajournal.co/the-2016-outlook-for-foreign-investors-in-cuba/>.

¹⁹³ Law No. 118, *supra* note 183, at arts. 3, 4.1, 9.1.; see Nahila Cortes, *U.S.-Cuba Relations: What is Next for U.S. Investors?*, KLUWER ARB. BLOG (Jan. 15, 2016), <http://kluwarbitrationblog.com/2016/01/15/u-s-cuba-relations-what-is-next-for-u-s-investors/>.

¹⁹⁴ Jose Maria Viñals Camallonga, *Hiring Staff in Cuba—A Guide for the Foreign Investor*, LUPICINIO INT'L L. FIRM (Sept. 19, 2016), <http://www.lupicinio.com/en/hiring-staff-in-cuba-a-guide-for-the-foreign-investor/>.

¹⁹⁵ *University of Miami Study Examines the Plight of Workers in Cuba*, *supra* note 190.

¹⁹⁶ Robinson, *supra* note 180.

¹⁹⁷ *A List of What the Cuban People CAN NOT Do in Cuba*, *supra* note 181.

¹⁹⁸ Foreign Investment Act, 2014, (Cuba), <http://www.cubadiplomacia.cu/LinkClick.aspx?fileticket=IsdG-CVp5To%3D&tabid=21894>

¹⁹⁹ Valdes-Fauli, *supra* note 183.

Division of People's Provincial Courts in Cuba.²⁰⁰ Conflicts arising between partners in investments related to natural resources, public services, and public works must go to the People's Provincial Courts unless there are other resolution mechanisms in the governing documents.²⁰¹

Notably, Articles 60 and 61 of Law 118 also permit arbitration through the Cuban Court of International Commercial Arbitration (CCACI), which Cuban contract law favors as the default mechanism if the parties do not designate alternative dispute resolution mechanisms.²⁰² CCACI is also the Cuban representative of the International Chamber of Commerce's (ICC) International Court of Arbitration.²⁰³

Foreign investors concerned about arbitrating in Cuba or litigating in local courts have other mechanisms to resolve disputes. For instance, Cuba joined the New York Convention in 1974,²⁰⁴ and thus, investors may have their disputes heard outside of Cuban courts or arbitral proceedings.²⁰⁵ The International Chamber of Commerce in Paris, for example, hears a number of cases from Cuba because that provision appears in typical IEA and joint venture contracts.²⁰⁶

Although arbitration provides more comfort to investors than the uncertainty of litigation in a foreign land, many international investors prefer the added protection of BITs that include an international arbitration component. In the case of Cuba, investors may worry whether their properties will be expropriated—given the past history with Castro's seizure of business interests during the Cuban Revolution—and whether they can collect on a judgment from the Cuban government given the current economic climate.

²⁰⁰ Law No. 118, *supra* note 183, at art. 61; Cortes, *supra* note 193.

²⁰¹ Law No. 118, *supra* note 183, at art. 61.

²⁰² Miguel-Julian Mateos Cuesta, *International Arbitration 2016: Cuba*, CHAMBERS AND PARTNERS: PRACTICE GUIDES, <http://practiceguides.chambersandpartners.com/practice-guides/comparison/4/164/E394-O-193-197-200-204-207-233-240-211-215-216-220-224-> (last updated Oct. 21, 2016); K. M. Paparelli, *International Dispute Resolution in Cuba*, 32 FLA. B.J., INT'L L. Q. 1 (2015); see Gustavo J. Membiela & Román Ortega-Cowan, *Cuba Disputes: The Arbitration Option*, LATINVEX (Dec. 9, 2015), <http://latinvex.com/mobile/article.aspx?id=2443>.

²⁰³ Cuesta, *supra* note 202, at §1.1.

²⁰⁴ Membiela & Ortega-Cowan, *supra* note 202 (discussing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, which protects the ratification of foreign arbitral awards).

²⁰⁵ *Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/countries> (last visited on Oct. 24, 2017).

²⁰⁶ Cuesta, *supra* note 202.

Part IV below will discuss BITs in general and the practicalities and obstacles of imposing human rights obligations in these treaties.

IV. BILATERAL INVESTMENT TREATIES, NATIONAL ACTION PLANS, AND HUMAN RIGHTS

A. *A Brief Introduction to Bilateral Investment Treaties*

BITs are agreements made between two sovereign nations in which the country that seeks investment agrees to certain terms with the country that is exporting capital through investors.²⁰⁷ The investors seek to mitigate economic and political risks, and the contracting countries provide that assurance through a BIT.²⁰⁸ No global legal regime governs agreements between states regarding foreign direct investment.²⁰⁹ Instead, states have established bilateral or multilateral agreements to protect their investors in host states.²¹⁰

However, many human rights activists criticize BITs for providing corporations substantial and substantive rights without any true obligations.²¹¹ Rather, the host and home states agree to protect the *investor* by allowing the *investor* to sue the host state for failing to meet its obligations. Indeed, in most BITs, arbitrators cannot hear a claim unless an investor brings it.²¹² To be clear, the host country that signs the BIT generally cannot seek arbitration against an investor. It is strictly a one-way street, although it does not have to be.²¹³

²⁰⁷ Helena Sprenger & Bouke Boersma, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets*, ABA: BUS. L. TODAY, https://www.americanbar.org/publications/blt/2014/03/01_sprenger.html (last visited Oct. 24, 2017).

²⁰⁸ See *Bilateral Investment Treaties*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited on Oct. 24, 2017).

²⁰⁹ Ibrahim F.I. Shihata, *Regulation of Foreign Investment*, 2 INT'L SUSTAINABLE DEV. L., available at <http://www.eolss.net/sample-chapters/c13/E6-67-03-04.pdf>.

²¹⁰ *Expropriation—Investment Protection and Mitigating the Risks*, NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/knowledge/publications/30459/expropriation-investment-protection-and-mitigating-the-risks> (last visited Oct. 24, 2017).

²¹¹ Patrick Dumberry & Gabrielle Dumas-Aubin, *How to Impose Human Rights Obligations on Corporations Under Investment Treaties?*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 569–598 (Karl P. Sauvant ed., 2011–2012).

²¹² *Id.* at 573.

²¹³ See Anil Yilmaz-Vastardis & Tara Van Ho, *Integrating Human Rights into the Extractive Industries: How Investment Contracts Can Achieve Protection*, in NATURAL RESOURCES GRABBING: AN INTERNATIONAL LAW PERSPECTIVE 225–244 (F. Romanin Jacur, A. Bonfanti, & F. Seatzu eds., 2015) (“Investment contracts can initially make an explicit reference to the UN Guiding Principles or to human rights as a specific term.”).

Many advocates have also criticized the BIT system because the actual parties to the BIT—the states—do not always share power equally.²¹⁴ Indeed, over half of BITs are entered into between rich home states and poor host states.²¹⁵ Despite investors having no BIT obligations, they can enforce their significant rights against these impoverished host states—which they frequently do.²¹⁶ Between 1990 and 2012, foreign firms sued ninety-four host states under BIT provisions.²¹⁷ According to one source, during that time, investors filed 564 international arbitrations against 110 host states, often resulting in awards against host states in the hundreds of millions of dollars.²¹⁸

This power asymmetry between the host state and investors causes many to question whether the investors have the far better end of the bargain. However, many investors would not undertake the economic risks, political risks, or both, without the assurance of a BIT. One observer notes:

[S]everal studies have examined the relationship between the rule of law, investment treaties and economic development. The results of these studies largely demonstrate that the three concepts are necessarily intertwined. More specifically, investment treaties act as signals of a state's commitment to the rule of law, and when this is combined with favourable economic conditions, and the presence of strong rule of law institutions, then this provides the most suitable environment for economic growth.²¹⁹

BITs, therefore, aim to ensure the right “climate” for investors, even though they are not signatories. These agreements typically contain: (1) a preamble, which provides substantive and procedural context for the agreement; (2) a description of the scope and coverage of the protected assets,

²¹⁴ Uche Ewelukwa Ofofiele, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 147 (2013).

²¹⁵ Helen V. Milner, *Symposium: The Regime of International Investment—Foreign Direct Investment, Bilateral Investment Treaties, and Trade Agreements*, 66 WORLD POL. 1, 4 (Jan. 2014), [https://www.princeton.edu/~hmilner/forthcoming%20papers/Milner%20\(2014\)%20Introduction%20-%20The%20Global%20Economy,%20FDI,%20and%20the%20Regime%20for%20Investment.pdf](https://www.princeton.edu/~hmilner/forthcoming%20papers/Milner%20(2014)%20Introduction%20-%20The%20Global%20Economy,%20FDI,%20and%20the%20Regime%20for%20Investment.pdf).

²¹⁶ Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration*, RTS. & DEMOCRACY, <https://business-humanrights.org/sites/default/files/media/documents/human-rights-and-bilateral-investment-treaties-peterson-2009.pdf> (last visited Oct. 24, 2017).

²¹⁷ Milner, *supra* note 215, at 5.

²¹⁸ Cristina Bodea & Fangjin Ye, *Bilateral Investment Treaties (BIT): The Global Investment Regime and Human Rights* (unpublished manuscript) (on file with the Political Economy of International Organizations).

²¹⁹ René Gayle, *Investment Treaty Arbitration: A Yardstick of The Rule Of Law? An Investigation of the Correlation Between the Rule of Law and International Investment Treaty Arbitration*, 1 LATIN AM. J. INT'L TRADE L. 481, 482 (2013).

investments, and investors; (3) most-favored nation treatment so that foreign investors do not experience discrimination compared to other domestic or foreign investors; (4) performance standards; (5) fair and equitable standards and full protection and security; (6) guarantees of investors' property rights via compensation for expropriation by the host state; and (7) an obligation to provide for the free transfer, repatriation, conversion, and liquidation of profits, earnings, and other funds.²²⁰

BITs also generally provide one or more of a number of arbitration options, including: (1) the World Bank's International Centre for Settlement of Investment Disputes (ICSID), established so investors could directly enforce their rights against host states, which has adjudicated the majority of these types of disputes—significantly, Cuba is not a party of ICSID;²²¹ (2) the U.N. Commission on International Trade Law (UNCITRAL), which provides harmonized procedural rules for parties to use during arbitration;²²² and (3) the International Chamber of Commerce (ICC), based in Paris, which generally handles more private commercial than investor-state disputes.²²³

B. *Cuban and U.S. BITs*

The United States has signed fifty-eight BITs, most recently with Rwanda in 2008.²²⁴ The Cuban government has signed nearly as many, although they are not all in force; Cuba's most recent BIT was with China in 2007.²²⁵ Cuban BITs focus on the state's prerogatives and do not internationalize national

²²⁰ Marie-France Houde, *Novel Features in Recent OECD Bilateral Investment Treaties*, in INTERNATIONAL INVESTMENT PERSPECTIVES 143 (OECD 2006), available at <http://www.oecd.org/investment/internationalinvestmentagreements/40072428.pdf>; see also Peterson, *supra* note 216.

²²¹ Peterson, *supra* note 216; see also *About ICSID*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/en/Pages/about/default.aspx> (last visited Oct. 24, 2017); Membiela & Ortega-Cowan, *supra* note 202.

²²² Peterson, *supra* note 216; see also U.N. COMM'N ON INT'L TRADE L., A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (2013).

²²³ Peterson, *supra* note 216.

²²⁴ Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., Feb. 20, 2008, S. Treaty Doc. No. 110-23 (2008); *United States Bilateral Investment Treaties*, U.S. DEP'T OF STATE, <https://www.state.gov/e/eb/ifa/bit/117402.htm> (last visited Oct. 24, 2017).

²²⁵ *Database of Bilateral Investment Treaties*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx> (last visited Oct. 24, 2017); see also Agreement Between the People's Republic of China and the Government of the Republic of Cuba Concerning the Encouragement and Reciprocal Protection of Investments, China-Cuba, Apr. 24, 1995, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/724>.

law.²²⁶ Instead, they generally focus on “(1) conditions for the approval of foreign investments, (2) state treatment of foreign investors, (3) expropriation, and (4) resolution of disputes between the foreign investor and the host country.”²²⁷ Cuba is also a member of several multilateral trade agreements, including the CARICOM-Cuba Agreement,²²⁸ the Cotonou Agreement,²²⁹ and the Treaty Establishing the Latin American Integration Association.²³⁰ Due to the embargo, Cuba and the United States do not have a BIT, thus this Article will propose some terms and parameters for a potential agreement, with a focus on human rights concerns—given that prerequisite for lifting the embargo.

C. *Human Rights Provisions in BITs*

BITs, which can exceed one hundred pages, generally do not discuss human rights, even though they can clearly affect such rights.²³¹ Businesses, which may not see themselves as responsible for protecting human rights, have no incentive to focus on this issue, and as previously stated, are *beneficiaries of*, but not *signatories to*, the BITs. Further, BITs may have an adverse effect on human rights because investors can sue states that have enacted laws that benefit host-state citizens at the expense of the investor firms. As one article notes:

BITs have the potential to negatively influence human rights practices because they lock in legally enforceable conditions attractive to investors, both retrospectively and into the future. The lock-in effect of BITs can force the hand of the government to favor multi-national corporations or foreign investors even at the cost of violating the rights of their own citizenry. Retrospectively, many developing countries compete for investment and trade on issues

²²⁶ Larry Catá Backer, *Global Corporate Social Responsibility (GSCR) Standards with Cuban Characteristics: What Normalization Means for Transnational Enterprise Activity in Cuba 3* (Coalition for Peace & Ethics, Working Paper No. 1/12, 2015), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2699855.

²²⁷ Charles P. Trumbull, IV & Matias Travieso-Diaz, *Foreign Investment in Cuba: Prospects and Perils*, ASS'N FOR THE STUD. OF THE CUBAN ECON. (Nov. 30, 2002), http://www.ascecuba.org/asce_proceedings/foreign-investment-in-cuba-prospects-and-perils.

²²⁸ Trade and Economic Co-Operation Agreement Between the Caribbean Community (CARICOM) and the Government of the Republic of Cuba, July 5, 2000, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2498> (omitting any mention of human rights, despite being 89 pages).

²²⁹ Cotonou Agreement, Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, June 23, 2000, O.J. L 317/3, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2499> (mentioning “human rights” in some form twenty times).

²³⁰ Eugenia López-Jacoiste Díaz, *The Latin American Integration Association, in* LATIN AMERICAN AND CARIBBEAN INTERNATIONAL INSTITUTIONAL LAW 34 (2015).

²³¹ Dumbery & Dumas-Aubin, *supra* note 211, at 569, 574.

ranging from environmental regulations to labor standards and welfare spending and tend to be destinations of vertical investment seeking cost efficiencies. . . . In addition, BIT provisions constrain future policies, from the provision of welfare benefits, basic infrastructure and investment in environmentally friendly technologies to land reform. Locked-in low standards for environmental protection or labor rights and constrained policies are important sources of popular grievance in host states. The literature on the causes of repression suggests that human rights violations are key responses of states to the manifested or just anticipated protest that can result[] from these grievances.²³²

The authors studied 113 developing countries from 1981 to 2009 and found that the countries that had ratified the most BITs also had the worst human rights records—particularly in a non-democratic regime.²³³

More importantly, for the purposes of this Article, ordinary citizens have no recourse from BITs and other investment treaties. For example, one of the biggest concerns with the Trans-Pacific Partnership Treaty (TPP) was that the investor-state dispute resolution mechanism provided no relief for workers, communities, or other stakeholders that were not direct parties to the agreement.²³⁴ This criticism makes sense. For obvious reasons, it is unlikely that host governments will sue their corporate partners—firms that may provide significant tax revenue—over a human rights grievance. Although the TPP did allow for public participation and public grievances with amicus participation, critics argued that such a remedy falls short.²³⁵ Under the TPP, the tribunal must consult with the parties about amicus submissions and can only accept submissions that relate to “a matter of fact or law within the scope of the dispute.”²³⁶

Despite its flaws and the withdrawal from the TPP by President Trump,²³⁷ the TPP has some provisions worth salvaging. Therefore, I recommend that the Cuba-U.S. BIT adopt the amicus submission process, but I would *not* require that the briefs relate to the scope of the dispute. Rather, as I discuss later, the

²³² Bodea & Ye, *supra* note 218, at 2.

²³³ *Id.*

²³⁴ Lance Compa, *How to Make the Trans-Pacific Partnership Work for Workers and Communities*, THE NATION (Jan. 14, 2016), <https://www.thenation.com/article/how-to-make-the-trans-pacific-partnership-work-for-workers-and-communities/>.

²³⁵ *Id.*

²³⁶ Ko-Yung Tung, *Investor-State Dispute Settlement under the Trans-Pacific Partnership*, 23 CAL. INT'L L.J. 19, 22 (2015).

²³⁷ *Trump Executive Order Pulls Out of TPP Trade Deal*, BBC (Jan. 24, 2017), <http://www.bbc.com/news/world-us-canada-38721056>.

tribunal should accept amicus submissions that relate to the investor's human rights record in Cuba to determine whether to admit the case at all. The 2012 U.S. Model BIT also allows tribunals to accept amicus submissions.²³⁸

Unfortunately, most countries' model BITs—including those of the United States, Germany, France, India, China and the United Kingdom—do not specifically mandate human rights protections at all.²³⁹ The closest that some BITs come to addressing human rights and the environment is the inclusion of the following boilerplate language:

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investments . . . [BITs] shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (ii) **necessary to protect human, animal, or plant life or health,**²⁴⁰

Fortunately, some treaties go further than the language above or the unenforceable reference to human rights that may be tucked into the preamble. The ACP-E.U. Partnership Agreement, also known as the Cotonou Agreement, frames the EU's relationship with seventy-nine countries from Africa, the Caribbean, and the Pacific Region.²⁴¹ The Cotonou Agreement mentions human rights twenty times.²⁴² Notably, Cuba is covered by the agreement but did not sign it.²⁴³

²³⁸ 2012 U.S. Model Bilateral Investment Treaty, OFF. OF THE U.S. TRADE REP., Sec. B, Art. 28(3), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

²³⁹ Bodea & Ye, *supra* note 218, at 7–8.

²⁴⁰ See, e.g., Dominican Republic-Central America-United States Free Trade Agreement, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2693> (first entered into force between El Salvador and the United States on March 1, 2006) (emphasis added); Free Trade Agreement Between the Republic of Korea and the United States of America, S. Kor.-U.S., Mar. 15, 2012, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2542>; Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., Feb. 19, 2008, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2241>; United States-Colombia Trade Promotion Agreement, Colom.-U.S., May 15, 2012, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2737>; United States-Panama Trade Promotion Agreement, Pan.-U.S., Oct. 31, 2012, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2535>; United States-Peru Trade Promotion Agreement, Peru-U.S., Feb. 1, 2009, *available at* http://tcc.export.gov/static/PeruTPA_chap10Investment.pdf; see also North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993) (containing similar language).

²⁴¹ ACP—The Cotonou Agreement, EUR. COMM'N, http://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en (last visited Oct. 24, 2017).

²⁴² Cotonou Agreement, *supra* note 229.

²⁴³ *Id.*

D. What Human Rights Provisions Should Be in BITs?

Some commentators²⁴⁴ recommend that, at a minimum, BITs should incorporate the principles espoused in the UDHR²⁴⁵ (ratified by both Cuba and the United States); the ICCPR²⁴⁶ (signed and ratified by the United States, but not ratified by Cuba); the ILO Declaration on Fundamental Principles and Rights at Work (a soft law instrument, but nonetheless binding on ILO member states);²⁴⁷ the United Nations Convention Against Corruption (ratified by both Cuba and the United States);²⁴⁸ and the Rio Declaration on Environment and Development (ratified by both Cuba and the United States).²⁴⁹ Some consider these treaties optimal because they focus on both human rights and core labor rights, including the freedom of association, the right to organize and bargain collectively, and prohibitions against discrimination, forced child labor, and bonded labor.²⁵⁰ They are also widely ratified treaties and instruments that corporations have used as guiding principles for their own codes of conduct.²⁵¹

The United States has ratified all of the aforementioned instruments, but as discussed in Part II, Cuba has failed to ratify the ICCPR, which contains many of the core human rights.²⁵² Cuba will not likely agree to many of these terms, given the two countries' differing views on human rights.²⁵³

For this reason, the United States should focus on investor conduct and the leverage that the United States will have in drafting the BIT with Cuba. I recommend that the Cuba-U.S. BIT refer to the instruments that both states have ratified, as well as the core principles in the Global Compact and the

²⁴⁴ Dumberry & Dumas-Aubin, *supra* note 211, at 582.

²⁴⁵ *Id.*; see UDHR, *supra* note 100.

²⁴⁶ ICCPR, *supra* note 102.

²⁴⁷ Declaration on Fundamental Principles and Rights at Work, *adopted on* June 18, 1998, *available at* <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm>. (reflecting the agreement of the International Labour Conference on terms of fundamental work rights).

²⁴⁸ GA Res. 58/4, U.N. Convention Against Corruption (Oct. 31, 2003).

²⁴⁹ *Framework Convention on Climate Change: Status of Ratification of the Convention*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited Oct. 24, 2017). The convention was adopted by consensus at the United Nations Conference on Environment and Development by 178 countries in Rio de Janeiro, Brazil, in June 1992. *Id.*

²⁵⁰ Dumberry & Dumas-Aubin, *supra* note 211, at 581. The authors recognize that BITs could also reference the OECD Guidelines for Multinational Enterprises or the UN Global Compact but argue that States are unlikely to convert these soft law instruments into binding law. *Id.* at 588.

²⁵¹ *Id.*

²⁵² See UDHR, *supra* note 100; ICCPR, *supra* note 102; Declaration on Fundamental Principles and Rights at Work, *supra* note 247; GA Res. 58/4, *supra* note 248; *Framework Convention on Climate Change: Status of Ratification of the Convention*, *supra* note 249; Ratification Status for Cuba, *supra* note 106.

²⁵³ See Brown & Greene, *supra* note 149.

OECD Guidelines. This will provide some standardization for arbitrators who may not be trained or well-versed in international human rights, and will comport with soft-law initiatives that many investors have already adopted in their own corporate credos.

Unfortunately, even if the Cuban government were to agree to the inclusion of the four treaties they have ratified or even to some of the ICCPR principles in a BIT, the BIT would still not bind investors to these terms. These investors may perpetrate human rights abuses without recourse. Accordingly, below I discuss a screening method for tribunals to ensure that corporate human rights abusers do not receive the benefits of a BIT with the provisions outlined above.

E. The Clean Hands Doctrine as a Filter for Investors

Authors Dumberry and Dumas-Aubin recommend employing a “clean hands doctrine,” defined as “an important principle of international law that ha[s] to be taken into account whenever there [i]s evidence that an applicant State ha[s] not acted in good faith and that it ha[s] come to court with unclean hands.”²⁵⁴ Under the doctrine, a party cannot bring a claim if the party was involved in an unlawful act in relation to its claim.²⁵⁵ Traditionally, arbitrators employ the doctrine when the underlying BIT specifically requires compliance with laws and regulations, and when principles of general international law would allow for it.²⁵⁶

Dumberry and Dumas-Aubin acknowledge that the doctrine is controversial and sparsely used, but they observe that many arbitral tribunals have declined a case by an investor-claimant on jurisdictional grounds or have deemed a matter inadmissible on the basis of illegal conduct such as bribery.²⁵⁷ Nonetheless, they opine that disallowing claims should be a matter of admissibility of the case rather than jurisdiction.²⁵⁸

²⁵⁴ Patrick Dumberry & Gabrielle Dumas-Aubin, *The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*, 1 TRANSNAT’L DISP. MGMT. 1 (Jan. 2013) [hereinafter *The Doctrine of ‘Clean Hands’*]; Int’l Law Comm’n, Rep. on the Work of Its 57th Session, ¶¶ 236, U.N. Doc. A/60/10 (2005).

²⁵⁵ Mariano de Alba Uribe, *Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration* 2 (May 30, 2015) (on file with author), available at https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2612402 (citing ANDREW D. MITCHELL, M. SORNARAJAH & TANIA VOON, GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 29–30 (Oxford University Press, 2015)) (observing the adoption of the doctrine’s underlying principles in various cases).

²⁵⁶ *Id.* at 6.

²⁵⁷ *The Doctrine of ‘Clean Hands,’ supra* note 254, at 1.

²⁵⁸ *Id.* at 10.

I agree that investors who commit illegal conduct should not receive BIT protection, and I would extend the ban to those investors who either commit human rights violations or are complicit with the host state in human rights abuses. A model BIT clause, adapted from the jurisdictional Article 18 of the IISD Model International Agreement on Investment for Sustainable Development states:

Where an investor or its investment has breached any of the obligations mentioned at Article . . . of this Agreement, neither the investor nor its investment shall be entitled to the substantive protections established under this Agreement. A host or home state may raise these allegations as an objection to the admissibility in any dispute under this Agreement.²⁵⁹

Corporate complicity with human rights abuses is a real risk in Cuba, thus complicating the potential use of the doctrine. Further, in the case of Cuba and the United States, it is unlikely that the host state of Cuba will raise human rights issues on behalf of its people.

The United States, then, should require that an arbitrator receive proof of “clean hands” and a lack of complicity with human rights abuses from the investor claimant *prior* to admitting and adjudicating the case. As with the TPP, the arbitrator should accept both public comments and amicus briefs from stakeholders and those advocating for victims as relevant factors to ascertain whether to adjudicate the claim.

I acknowledge that using the TPP as a model may spark controversy. The TPP and its inclusion of investor-state dispute resolution mechanisms has been a sticking point for academics and politicians.²⁶⁰ Many object that the original goal of protecting investors has been “hijacked” by speculators and hedge funds who may buy companies solely to bring claims against host states when those states enact reforms that hurt the company’s interests.²⁶¹ Drafters of a Cuba-U.S. BIT should take heed of this objection, but it should not derail its inclusion.

²⁵⁹ Dumberry & Dumas-Aubin, *supra* note 211, at 594 (citing art. 18(A) of the IISD Model International Agreement on Investment for Sustainable Development, International Institute for Sustainable Development (IISD), IISD Model Agreement on Investment for Sustainable Development (April 2005), available at https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

²⁶⁰ David Dayen & Ryan Grim, *There’s a New Front in the Battle over the Trans-Pacific Partnership*, HUFFINGTON POST (Sept. 7, 2016), http://www.huffingtonpost.com/entry/tpp-isds-battle_us_57d030cee4b06a74c9f1da0c?section=&; see also 220+ *Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals That Include Investor-State Dispute Settlement (ISDS)*, HUFFINGTON POST (Sept. 7, 2016), <http://big.assets.huffingtonpost.com/ISDSletter.pdf>.

²⁶¹ Dayen & Grim, *supra* note 260.

Admittedly, my proposal has additional obstacles particularly regarding the definition of “human rights.” Although evidence of bribery clearly suffices to bar admissibility, an NGO could argue that paying a Cuban worker in accordance with Cuban law or not allowing unions constitute labor violations, and could thereby argue to prohibit the arbitration. I would counter that a tribunal could accept such a submission but that complying with Cuban law on wages would not rise to the level of a human rights abuse. The Cuban government has already begun relaxing some of the wage rules related to foreign employees, and the U.S. government should work independently on encouraging liberalization of those rules. Further, I contend that if the U.S. firm treats its workers with respect and dignity, the ability to organize will be less of an issue.

As a threshold measure, I would recommend that a tribunal consult with the parties about amicus submissions and seriously consider submissions by credible NGOs or other stakeholder representatives that support or discredit the investor’s human rights records in Cuba, particularly if the investor and Cuba are complicit in human rights abuses. To be clear, the onus is on the parties themselves to prove that they have “clean hands.” Under my proposal, the tribunal can, and should, accept evidence that contradicts or supports the parties’ assertions.

In addition to the “clean hands” rule, other options include allowing the host state to offset damages based on human rights violations and allowing counterclaims by the host state which would allow it to raise violations.²⁶² These options may pose some risks, though, because the Cuban government may not invoke the protection if they themselves have violated human rights.

Therefore, the clean hands doctrine provides the best filter for screening out cases that do not deserve BIT protection. However, although the inclusion of human rights in BITs and the clean hands doctrine provide a small but meaningful starting point, the U.S. government must consider investment more holistically. National Action Plans under the UNGP provide the perfect vehicle to accomplish that goal.

F. The Role of National Action Plans

On September 24, 2014, President Obama announced a new initiative, the U.S. National Action Plan (“NAP”) on Responsible Business Conduct

²⁶² *The Doctrine of ‘Clean Hands,’ supra* note 254.

“consistent with the UNGPs and the OECD Guidelines for Multinational Enterprises.”²⁶³ According to the U.N. Working Group, an NAP is “[a]n evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles. . . .”²⁶⁴ As of the time of this writing, seventeen countries have released an NAP and thirty-two more have either begun development or are completing them.²⁶⁵ The U.S. released its NAP in December 2016.²⁶⁶ Initially, the U.S. NAP promised to address human rights, labor rights, trade and investment, transparency and anti-corruption, procurement, and land and agriculture.²⁶⁷ Unfortunately, it fell far short of expectations because it proposed no new law but, rather, builds on existing laws, although it does use the hammer of the federal government’s vast procurement power. More importantly, it fails to include any concrete policies regarding investment.²⁶⁸ The NAP does provide five broad areas in which the U.S. government hopes to spur responsible business conduct: (1) leading by example; (2) collaborating with stakeholders; (3) facilitating responsible business conduct by companies; (4) recognizing positive performance; and (5) providing access to remedy.²⁶⁹ For each category, the NAP describes the “new actions” that the government is implementing, as well as the “ongoing commitments and initiatives.” Some of the specific initiatives include: (1) a peer review process to enhance access to remedy through the OECD complaint process; (2) stronger enforcement of existing laws related to forced labor and convict labor; (3) a best practices list related to sustainability that the government will use in the procurement process; (4) the designation of “labor compliance advisors” for federal contractors; and (5) more support for voluntary reporting on responsible business conduct by publicly recognizing the effort of compliant companies.²⁷⁰

Unfortunately, for the purposes of this Article, the government missed a golden opportunity to require companies to prioritize responsible business

²⁶³ U.S. DEP’T OF STATE, *RESPONSIBLE BUSINESS CONDUCT: FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA* (2007), <https://www.state.gov/documents/organization/265918.pdf> [hereinafter *First National Action Plan*]; see also U.N. Working Grp. on Bus. and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (Nov. 2016), http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf. The Working Group published an initial version of its Guidance in December 2014 and then published a new version in November 2016. *Id.* at 1.

²⁶⁴ *First National Action Plan*, *supra* note 263, at 3; see also *State National Action Plans*, *supra* note 34.

²⁶⁵ See *State National Action Plans*, *supra* note 34.

²⁶⁶ *First National Action Plan*, *supra* note 263.

²⁶⁷ *Id.*

²⁶⁸ See *State National Action Plans*, *supra* note 34.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

conduct via investment financing. Instead, the NAP provides the following vague statement:

Enhancing Overseas Private Investment Corporation (OPIC) and Export-Import Bank of the United States (EXIM) Standards: OPIC and EXIM will enhance existing procedures and standards that require companies receiving their support to implement RBC principles. OPIC is reviewing its Environmental and Social Policy Statement, while EXIM has developed an improved mechanism for interested parties to provide comments, complaints, or suggestions on the environmental and social consequences of its pending and currently approved transactions, including reviewing ways to improve the new portal for online submission.

Although the effort to use its procurement leverage is commendable, the United States should have “led by example” in the investment finance context precisely because the tie between human rights and investment is so important. In fact, increasingly, a number of other states have begun to focus on investment and human rights through their NAPs. The United States, therefore, should follow their examples and revise its December 2016 NAP.

The United States could, for instance, look to the United Kingdom. The United Kingdom launched its NAP in September 2013.²⁷¹ That NAP’s policies regarding investment-specific action items include: (1) obtaining G8 support for responsible business investment in Myanmar in line with the UNGPs; (2) implementing human rights requirements in government procurement of goods, works, and services; (3) including a requirement under the OECD 2012 Common Approaches for Export Credit Agencies (ECAs) to take into account “relevant adverse project-related human rights impacts” and requiring ECAs to “consider any statements or reports made publicly available by their National Contact Points” so that negative NCP reports will be taken into account when considering a project for export credit; (4) playing a key role in development of the International Code of Conduct for Private Security Service Providers (ICOC); (5) reviewing business activity in conflict and fragile states; and (6) continuing to provide financial support to the Compact.²⁷² The United Kingdom has also pledged to work with other countries to promote NAPs.²⁷³

²⁷¹ See HM GOV’T, IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf.

²⁷² *Id.*

²⁷³ *Id.*

The Netherlands NAP, also introduced in 2013, has even stronger language, making it clear that:

The government is committed to including clear provisions on the relationship between trade, investment and sustainability in trade and investment agreements. Within the EU, the Netherlands urges the inclusion in these agreements of a section on trade and sustainable development, with monitoring and enforcement mechanisms. . . . The EU's aim is for every trade agreement to be linked to a broader partnership and cooperation agreement reaffirming states' human rights obligations. Where human rights are abused, the trade agreement could ultimately be suspended.²⁷⁴

Italy's NAP discusses investment in general but does not focus on bilateral investment treaties.²⁷⁵ In contrast to the U.S. statement regarding export credit and investment vehicles, Italy does, however, note that:

Export Credit Agencies and Investment Insurance Agencies (ECAs) provide government-backed loans, insurance and guarantees to support business enterprises industrial projects abroad, especially with regard to complex and risky environment. *The strategic role of these public agencies (SACE and SIMEST) make them more exposed to the risk of being associated or linked with human rights infringement: they both apply the OECD Recommendation on Common Approaches and Environmental Due Diligence and conduct risk analysis on environmental and social impact in their operations.*²⁷⁶

Norway's NAP²⁷⁷ is similarly instructive because it explicitly states that the government will “[s]eek to ensure that provisions on respect for human rights, including on safeguarding labour rights and working conditions, are included in bilateral free trade agreements and investment treaties.”²⁷⁸

The United States can, and should, re-write its NAP using the examples above for guidance regarding investment—an area in which it clearly fails. The

²⁷⁴ MINISTRY OF FOREIGN AFFAIRS, NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS (2013), <https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>.

²⁷⁵ *The Foundations of the Italian Action Plan on The United Nations “Guiding Principles on Business and Human Rights.”* U.N. OFF. OF THE HIGH COMM’R HUM. RTS., <http://www.ohchr.org/Documents/Issues/Business/NationalPlans/NationalPlanActionItaly.pdf> (last visited Oct. 24, 2017).

²⁷⁶ MINISTRY OF FOREIGN AFFAIRS AND INT’L COOPERATION, ITALIAN NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS, (2016), http://www.cidu.esteri.it/resource/2016/12/49117_f_NAPBHREN_GFINALEDEC152017.pdf (emphasis added).

²⁷⁷ MINISTRY OF FOREIGN AFFAIRS, *supra* note 274.

²⁷⁸ Press Release, Ministry of Foreign Affairs of Norway, National Action Plan on Business and Human Rights (Oct. 12, 2015), https://www.regjeringen.no/en/aktuelt/business_hr/id2457726/.

U.S. NAP fails in another aspect. Under the UNGPs, states and companies must also provide governmental and nongovernmental access to remedy, and the U.S. NAP provides no incentives or penalties for companies in this regard. Adopting the “clean hands” filter for investment dispute resolution and providing stakeholders the opportunity will help fulfill this UNGP mandate. Because BITs do not traditionally accord community members the opportunity to be heard, this provides some access to an impartial tribunal. This is particularly important in Cuba given the potential for corporate complicity in human rights abuses.

In sum, the United States clearly has a number of models from which to choose and should strive to raise the bar when it comes to the integration of human rights requirements into investment strategy. If and when the government works to increase trade with Cuba, my recommendations for drafting a BIT and my proposed revisions to the NAP provides two opportunities to do so.

CONCLUSION

The U.S. embargo remains in effect notwithstanding the efforts by the Obama administration to chip away at the restrictions. During this “thaw,” or “*deshielo*,” and during the Trump administration’s increased pressure on the Castro regime, the U.S. government can, and should, require more from Cuba and U.S. businesses regarding human rights prior to lifting the embargo completely. Although advocacy groups,²⁷⁹ members of Congress,²⁸⁰ and the United Nations²⁸¹ support lifting the embargo immediately, I support lifting it with caveats, in keeping with the policy behind the UNGPs.

However, prior to lifting the embargo, the United States needs to examine its own record on human rights and how it treats other violators, otherwise it will have no credibility with the Cuban government. The U.S. Congress demands human rights reform in Cuba but has not been consistent in its own

²⁷⁹ Megan R. Wilson & Vicki Needham, *Business Believes US Embargo on Cuba to Crumble*, THE HILL (Mar. 10, 2016), <http://thehill.com/business-a-lobbying/business-a-lobbying/272465-lobbyists-bullish-that-cuban-trade-embargo-will-soon>; see also Elizabeth Llorente, *Advocacy Group Engage Cuba Hopes to End Embargo, One State at a Time*, FOX NEWS LATINO (Mar. 31, 2016), <http://latino.foxnews.com/latino/politics/2016/03/31/advocacy-group-engage-cuba-hopes-to-end-embargo-one-state-at-time/>.

²⁸⁰ Tom Emmer & Kathy Castor, *Lift the Cuban Embargo*, AM. Q., <http://www.americasquarterly.org/content/lift-cuban-embargo> (last visited Oct. 24, 2017).

²⁸¹ Julian Borger, *US Abstains from UN Vote to Condemn Cuba Embargo for the First Time*, GUARDIAN (Oct. 26, 2016), <https://www.theguardian.com/world/2016/oct/26/cuba-embargo-us-abstains-united-nations-vote>.

business dealings with other authoritarian or socialist regimes. For example, although the U.S. Department of State has criticized Cuba's human rights record, China, another communist country with a poor human rights record,²⁸² is the United States' third-largest trading partner.²⁸³ The United States lifted its trade embargo with Communist Vietnam twenty years ago, and major U.S. companies now operate there today even though the U.S. government has leveled some of the same human rights criticism against Vietnam as it has against Cuba.²⁸⁴ The communist government of Laos did not fare much better than Cuba in human rights state department reports, but the U.S. government actively promotes potential investment opportunities there.²⁸⁵

This inconsistency in approach to human rights violators diminishes the U.S. government's integrity in negotiating with Cuba. Tellingly, in its 2017 World Report, Human Rights Watch, a respected NGO, warned of the dangers of the Trump administration from a human rights perspective.²⁸⁶ This hardly puts the U.S. in a strong bargaining position with Cuba when discussing the conditions on lifting the embargo.

But the United States can, and should, lift the embargo, keeping in mind the human rights of the Cuban people. The U.S. government will not force the Cuban government to make drastic differences in its understanding of or respect for human rights. Perhaps Congress should amend or repeal LIBERTAD, something beyond the scope of this Article.

The U.S. government *can* ensure that U.S. investors do not exacerbate suffering in Cuba through its investment trade policy. Accordingly, any Cuba-U.S. BIT must include specific human rights language and should incorporate a clean hands doctrine so that companies that are complicit in or perpetuate human rights abuses will not get the benefit of the already favorable investor-state dispute resolution protection. As a former member of the U.N. Human Rights Council that unanimously endorsed the UNGPs, Cuba should agree to

²⁸² U.S. DEP'T OF STATE, CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) HUMAN RIGHTS REPORTS (2015); *see also* U.S. DEP'T OF STATE, VIETNAM 2015 HUMAN RIGHTS REPORT (2015).

²⁸³ *US State Exports to China (2006-2015)*, THE US-CHINA BUSINESS COUNCIL, <https://www.uschina.org/reports/us-exports/national> (last visited Oct. 24, 2017).

²⁸⁴ *See* VIETNAM 2015 HUMAN RIGHTS REPORT, *supra* note 282; *US Firms See Vietnam Investments Skyrocket*, US—ASEAN BUS. COUNCIL, INC. (June 14, 2015), <https://www.usasean.org/council-in-the-news/2015/06/18/us-firms-see-vietnam-investments-skyrocket>.

²⁸⁵ *See* Daniel L. Clune, U.S. EMBASSY IN LAOS, <https://la.usembassy.gov/business/> (last visited Oct. 24, 2017); *see also* U.S. DEP'T OF STATE, LAOS 2015 HUMAN RIGHTS REPORT (2015).

²⁸⁶ HUMAN RIGHTS WATCH, WORLD REPORT 2017: EVENTS OF 2016 (2017).

terms that require the state and TNCs to protect and respect human rights. The U.S. government should also entrench these ideals in a revised NAP.

Cuba and the United States sit ninety miles away from each other but have spent over fifty years in a stalemate over human rights. The embargo, or “blockade” as the United Nations and other nations label it, has caused economic harm to the Castro regime that allows Cuba’s leaders to deflect from the shortcomings of its own socialist system. But now that the *deshielo* has begun, it is time for both nations to come to an acceptable agreement on a workable definition of human rights to ensure the protection of both investor and stakeholder interests.