

GLOBAL CORPORATE SOCIAL RESPONSIBILITY (GCSR) STANDARDS WITH CUBAN CHARACTERISTICS: WHAT NORMALIZATION MEANS FOR TRANSNATIONAL ENTERPRISE ACTIVITY IN CUBA

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The normalization of relations between the United States and Cuba brings Cuba closer to more robust integration with the global economic order. That process of integration poses both great opportunities and great challenges for Cuba. Both are likely to be felt as Cuba assumes a place on the global supply chain. In that respect, Cuba occupies a unique position. To some extent Cuba presents an economic situation that will likely place it far down the supply chain—a site for the production of the least value-added work, like Korea and China a generation ago. Moreover, as a result of continued international economic interaction, Cuba faces the same problems similar states that are situated in the lower to mid-level of the supply chain face. On the other hand, Cuba's biotechnology and other industries are likely to place Cuba well up the supply and production chain, and a likely home state for the production of commodities related to this high value-added work. As a result, Cuba will have to reform its conduct

when it deals with other states that are situated at a lower level of the supply chain.

Among the more challenging of the problems Cuba will face will involve its engagement with emerging global standards and expectations for the societal and human rights impacts of economic activity—in whatever form engaged. This essay considers the issue of Cuban engagement with these emerging business and human rights standards. This essay is divided into three sections. After this introduction, the second section provides a brief overview of the emerging structure of global human rights. More specifically, the essay provides an overview of the United Nations Guiding Principles on Business and Human Rights (UNGPs);¹ the OECD Guidelines for Multinational Enterprises (MNEs);² the UN Global Compact;³ Bilateral Investment Treaties (BITs) with human rights components;⁴ some private standards or third party ordering regimes, including the Global Reporting Initiative (GRI),⁵ the

1. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK (United Nations 2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

2. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, (OECD Publ'g 2011), available at <http://dx.doi.org/10.1787/9789264115415-en>.

3. See United Nations Global Compact, The Ten Principles, available at <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>; see e.g., Larry Catá Backer, *Disputed Concepts in Contemporary Business Association Law: Discussions on Fiduciary Duty and Capital Lock-in: The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 Tulsa L. Rev. 541, 565 (2006).

International Standard Organization (ISO) Standard 26000,⁶ as well as a number of emerging rules, like the ILO Conventions;⁷ and MNE internal norms.⁸ The third section looks at Cuba's investment laws, and most importantly, its state-to-state agreements, such as the ALBA framework *grannacional* projects,⁹ in which Cuba barter services in exchange for goods.¹⁰ Finally, the fourth section discusses what occurs when the global regulation initiatives discussed in the second section collide with Cuba's practices discussed in the third section and the challenges Cuba will face as a result.

THE EMERGING STRUCTURE OF GLOBAL HUMAN RIGHTS

Evolving international business norms are evinced by the promulgation of numerous attempts by different global actors to regulate MNE behavior. These emerging international norm structures are best exemplified by six tools that seek to regulate or establish global corporate social responsibility: the UNGPs; the OECD Guidelines for MNEs; the UN Global Compact; BITs with human rights components; third party or private standards; and MNE internal norms. What follows is an overview of these structures.

The UNGPs

The UNGPs were endorsed by the UN Human Rights Council, which includes Cuba, in 2011. The guidelines rest on three pillars. First, they enforce a state duty to protect human rights. The UN Working Group encouraged states to form National Action Plans (NAPs) "as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights."¹¹ They extend no further than legal obligations of the state and open the door to extraterritorial application. Second, they require corporate responsibility to respect human rights. And third, they require remedial obligations for states and enterprises. They should be implemented principally through the state. These remedial obligations can also be implemented through international and private mechanisms.¹²

The OECD Guidelines for MNEs

The OECD Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws and internationally recognized standards. Moreover, observance of the Guidelines by enterprises is voluntary and not legally enforceable. The Guidelines cover a number of general areas, including: transparency/disclosure, human rights, employment/industrial relations, environmental issues, bribery/corruption, consumer pro-

4. See, e.g., Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT'L L. & POL'Y 483 (2011).

5. See <https://www.globalreporting.org/Pages/default.aspx>; see, e.g., Galit A. Sarfaty, *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 Va. J. Int'l L. 575 (2013).

6. See <http://www.iso.org/iso/home/standards/iso26000.htm>; see, e.g., Janelle M. Diller, *Private Standardization in Public International Lawmaking*, 33 MICH. J. INT'L L. 481 (2012).

7. See <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>; see, e.g., Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006).

8. See, e.g., Larry Catá Backer, *A Lex Mercatoria for Corporate Social Responsibility Codes Without the State?: On the Regulatory Character of Private Corporate Codes*, 23(2) IND. J. GLOBAL LEG. STUD. (forthcoming 2016).

9. See, e.g., Larry Catá Backer, *Globalization and the Socialist Multinational: Cuba and ALBA's Grannacional Projects at the Intersection of Business and Human Rights*, 7 CONSORTIUM FOR PEACE & ETHICS 1 (2011), available at <http://ssrn.com/abstract=1646962>.

10. See, e.g., 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 (2009).

11. See, e.g., Larry Catá Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All*, 38 Fordham Int'l L.J. 457, 469 (2015).

12. See, e.g., Backer, *Globalization and the Socialist Multinational*, at 20.

tection, technology transfer, anti-competitive schemes, and taxation. The Guidelines establish complaint procedures through National Contact Points (NCPs). These complaints procedures have been used increasingly in two contexts. First, they have been used by NGOs to advance an international normative agenda. Second, by labor unions to leverage national litigation.

The UN Global Compact

The UN Global Compact is a voluntary initiative that has two main objectives: (1) to mainstream the ten principles in business activities around the world; and (2) to catalyze actions in support of UN goals.¹³ Furthermore, it promotes responsible citizenship so that business can be a part of solving the challenges of globalization. However, it must be noted that the Compact is not a regulatory instrument, meaning that does not police, enforce, or measure corporate behavior. Instead, it relies on public accountability, transparency, and self-interest of companies.¹⁴

BITs with Human Rights Components

BITs typically deal with investment and investment protection. Cuban BITs tend to focus on state prerogatives. However, most other BITs internationalize national law; discriminate in favor of foreign investors over domestic; and their stabilization provisions protect investment against later state law. Some BITs include a new feature: bringing in human rights norms to business behaviors as a trump to state practice. These BITs produce strong enforcement mechanism through arbitration. The current multinational trade deal, the Trans-Pacific Partnership (TPP), generalizes the model.¹⁵ Although BITs can empower

MNEs to encumber a state's regulatory power regarding human rights, they can and have been reformed to limit the encumbrances.¹⁶ Additionally, BITs can be used to hold MNEs liable for human rights violations.¹⁷ For example, in the context of labor rights, the incorporation of labor standards into BITs can help prevent labor rights violations.¹⁸

Third Party Standards

Third party standards or private standards currently emerging are best exemplified by the GRI, private public partnerships, and private organizations. First, the GRI is best described as social, economic and rights based reporting of economic activity. The GRI guidelines are a global standard used for corporate sustainability reporting.¹⁹ The Board of the GRI provides that governments should take leadership by: (1) "Introducing policy requiring companies to report on *environmental, social and governance* (ESG) factors or publicly explain why they have not done so." (2) "Requiring ESG reporting by their public bodies, in particular: state owned companies, government pension funds and public investment agencies." (3) "Integrating sustainability reporting within the emerging global financial regulatory framework being developed by leaders of the G20."²⁰ Second, an example of public private partnership is the ISO Standard 26000 on social responsibility. MNEs may purchase this standard, like all other ISO Standards. The voluntary standard provides guidance on practices in social responsibility.²¹ Finally, some private organizations provide certification of compliance with their standards. Moreover, these organizations engage in monitoring. For example the ILO Conventions are

13. See, e.g., Backer, *Disputed Concepts in Contemporary Business Association Law*, at 565.

14. See, e.g., *id.*

15. Available at <https://medium.com/the-trans-pacific-partnership/dispute-settlement-a5b4569a9a55>.

16. See, e.g., Sheffer, at 484.

17. See, e.g., Sharon Hang, Comment: *Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations*, 37 *FORDHAM INT'L L.J.* 1215, 1260 (2014).

18. See, e.g., *id.* at 1261–62.

19. See, e.g., Sarfaty, at 591–92.

20. See Press Release, Global Reporting Initiative, The Amsterdam Declaration on Transparency and Reporting (March 10, 2009), available at <http://tinyurl.com/mvyqetl>; see also Sarfaty, at 598.

21. See, e.g., Diller, at 481.

the main proclamations of labor standards issued by the ILO.²² However, member states of the ILO are free to either ratify or not the standards issued by the ILO conventions. Once a state ratifies the standards, they are legally bound to adhere to them.²³

MNE Internal Norms

The largest MNEs already have harmonized and sometimes complex systems of CSR-based control of their supply and production chains throughout their global operations.²⁴ These MNEs include: Walmart, Apple, Nike, Target, and El Corte Inglés to name a few. For example, some MNEs have established corporate codes of conduct. These codes of conduct, when combined with other monitoring institutions and consumer action, may offer a non-legal solution to enforce corporate responsibility.²⁵

THE CUBAN INVESTMENT STRUCTURE

As normalization of relations between the United States and Cuba proceeds, Cuba has promulgated new foreign investment laws to attract more Foreign Direct Investment (FDI). As a result, corporate activity in Cuba will increase. However, normalization not only brings implications to Cuba's inward investment practices, it will also have an effect on Cuba's outbound investment practices and interactions with other states. On the one hand, Cuba has amended its investment laws with the purpose of providing a more favorable business climate that will seduce and

attract MNEs to invest in Cuba. On the other hand, Cuba will continue, and perhaps increase its involvement and partnerships with other states, mainly through its ALBA framework agreements and through joint ventures. What follows is an overview of Cuba's inbound and outbound investment practices in light of normalization.

Inbound Investment

Law 77, Foreign Investment Act²⁶ “serves as the primary legal framework” for investment in Cuba, outlining the “principal legal structures for the implementation of investment projects in Cuba.”²⁷ Law 77 regulates: (1) “international association contracts;” (2) “joint ventures or mixed companies;” and (3) “completely foreign-owned companies.”²⁸ The Ministry of Foreign Investment and Economic Cooperation develops and enforces the regulations.²⁹ The law mandates that foreign investors hire Cuban workers.³⁰ Moreover, Law 77 establishes “Free Trade Zones,” “where tax and other benefits would be provided to foreign investors choosing to invest in these geographical locations.”³¹ Since the promulgation of Law 77 in 1995, Cuba has signed 59 BITs with other states.³² Although Cuba saw an increase in economic activity as a result of Law 77, an economic crisis in Cuba's closest trading partner, Venezuela, saw a slow down of the Cuban economy.

22. See, e.g., Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, *Shared Responsibility and the International Labour Organization*, 34 MICH. J. INT'L L. 675, 694–95 (2013).

23. See, e.g., *id.*

24. See Larry Catá Backer, *Are Supply Chains Transnational Legal Orders?: What We Can Learn from the Rana Plaza Factory Building Collapse*, 1 UCI J. INT'L TRANSNAT'L, COMP. L. (forthcoming 2015).

25. See, e.g., Elizabeth Tuttle, *Made In Violation: Non-Legal Solutions To Labor Abuses Perpetrated By American Multinational Corporations In Foreign Sweatshops*, 17 Duq. Bus. L.J. 101 (2015).

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

27. See, e.g., Daniel Fisk & Courtney R. Perez, *Managed Engagement: The Case of Castro's Cuba*, 42 U. MIAMI INTER-AM. L. REV. 47 (2010).

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.*

32. See Investment Instruments Online: Bilateral Investment Treaties, United Nations Conference on Trade and Development, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/52#iiaInnerMenu>.

Law 118 of 2014³³ is the newest investment law in Cuba. Law 118 and Cuba's investment laws evince competing visions of economic planners. Law 118 opens up investment in a larger number of economic sectors. Moreover, in an effort to attract more FDI, Law 118 reduces the profit tax to 15 percent of net taxable profits.³⁴ Law 118 also limits taxes on "raw material ventures" to 22.5 percent.³⁵ These tax incentives differentiate Law 118 from Law 77 and demonstrates Cuba's continued interest in attracting more FDI.³⁶ Besides providing new tax incentives, under Law 118 central planning and large state (and military) enterprises will continue to drive the economy with a small private sector. As a result, foreign investment will be treated as a form of state-to-state activity. Authorization to invest is granted on the basis of business proposals to the Ministry of Foreign Trade and Foreign Investment (MINCEX), which relies on a Business Evaluation Commission (composed of 8 ministries and the Central Bank of Cuba), to assess the proposals.

Moreover, Law 118 provides a number of conditions and opportunities for foreign investors. For example, firms must "guarantee" foreign markets, business plans must provide projections on the impact on the balance of payments. The Cuban government will "favor the diversification of different countries." As expected, however, privatization of state-held enter-

prises is ruled out (although the transformation of smaller state businesses into cooperatives in the service and construction sectors is proceeding apace). Finally, foreign investors may partner with cooperatives but not with the emerging small-scale private enterprise.

Outbound Investment

Besides opening itself up for FDI, Cuba will likely continue to interact globally with its trading partners through the *Alianza Bolivariana Para los Pueblos de Nuestra América* (ALBA) framework.³⁷ *Grannacionales* are the only corporate enterprises that the ALBA framework calls for.³⁸ They are best understood as a political project with three components: "(1) historical and geopolitical, (2) socio-economic, and (3) ideological."³⁹ Their "theoretical framework is implemented through grannacionales projects (proyectos grannacionales) (PG) and grannacionales companies (empresas grannacionales) (EG)."⁴⁰ On the one hand, EGs focus on creating entities that are under the control of ALBA states and geared to either, the production, sale or distribution of goods.⁴¹ EGs are also understood as forms of integration, which are based on agreements between ALBA countries in order to progress and take advantage of each other's potential and abiding to the social necessities of great importance for the population.⁴² On the other hand, PGs are inter-governmental and include enterprises

33. Ley de Inversión Extranjera Número 118, Gaceta Oficial de la República de Cuba 29 de Marzo de 2014 (Cuba), available at http://www.cubadebate.cu/wp-content/uploads/2014/04/GO_X_20_2014_gaceta-ley-de-inversion-extranjera.pdf [hereinafter Law 118].

34. See *id.* at art. 36; see also Alyssa K. Ortiz, Note: *Cuba's New Foreign Investment Law Number 118: Can Tax Incentives Buy Foreign Investors' Trust and Be Justified in Increasing FDI?*, 21 LAW & BUS. REV. AM. 169, 175–76.

35. For an in-depth discussion on the investment options available to investors in Cuba see *e.g.*, Karin Marie Paparelli, *Reforming Foreign Investment Law in Cuba: What Does it Really Mean for Eager Investors?*, 10 (Essay, 2015), available at <http://ssrn.com/abstract=2678019>.

36. See, *e.g.* Ortiz, at 176.

37. For a discussion of ALBA see, *e.g.*, Backer & Molina.

38. See, *e.g.*, Larry Catá Backer, *The Cooperative as a Proletarian Corporation: The Global Dimensions of Property Rights and the Organization of Economic Activity in Cuba*, 33 NW. J. INT'L L. & BUS. 527 (2013).

39. See *id.*

40. See *id.*

41. See, *e.g.*, Backer, *Globalization and the Socialist Multinational*, at 4.

42. See, *e.g.*, Maria Fatima Pinho De Oliveira, *Ventajas competitivas de las empresas grannacionales como modelo empresarial del ALBA-TCP*, XV Encuentro de Latinoamericanistas Españoles, Trama editorial/CEEIB, 695–707 (2013), available at <https://halshs.archives-ouvertes.fr/halshs-00875178/document>.

that target education, tourism, and provision of medical services.⁴³ Although not every PG must turn into an EG, every EG must be the product of a GP, because GPs must guide an EG's development.⁴⁴ Financing of EGs and PGs occurs through Banco del ALBA.⁴⁵

A prime example of how EGs and PGs operations are accomplished, in essence, to barter goods for services is through conventions with other ALBA states. One such convention is the *Misión Barrio Adentro* (MBA).⁴⁶ The MBA consisted of a barter system between Cuba and Venezuela, whereby Cuba would send doctors and other medical personnel to Venezuela, at no cost to Venezuela. These physicians were compelled to enroll to serve, for a period of two years, the most underserved sectors of Venezuela. In exchange, Venezuela provided Cuba with petroleum.⁴⁷

Another example of how normalization will affect Cuban investment practices is through its impact on joint ventures. The first joint venture under the Castro administration was done with a hotel chain from Spain, Sol-Meliá, in 1990, with the Spanish chain owning 50%.⁴⁸ Out of the 540 enterprises established in Cuba that include foreign participation, Spain, the country with the largest number of investors, has 104.⁴⁹ Spanish investors are the largest foreign investors in Cuba, with a significant number of

investments in tourism and other economic sectors.⁵⁰ The largest hotel chain in Cuba is the Spanish hotel chain, Meliá Hotels International, with 28 Cuban properties.⁵¹ Before Spain and Cuba signed a BIT in 1994, there were 25 joint ventures and 37 in the next 3 years.⁵² The abovementioned investment practices will accelerate. As a result, there will be a collision between the international norms discussed above and the Cuban investment practices discussed in this section. A discussion of what might this collision will mean for Cuba follows.

WHEN GLOBAL REGULATION INITIATIVES COLLIDE WITH CUBAN PRACTICES

As new corporate social responsibility (CSR) guidelines and regulations are implemented globally, Cuban activity either through MNE behavior inside Cuba or Cuban corporate behavior abroad may clash with emerging standards and expectations for the societal and human rights impact of economic activity. Enterprises are returning to Cuba,⁵³ and U.S. enterprises may be included.⁵⁴ Many of these enterprises are embedded in the international norm systems discussed above. With this inevitable clash in mind, several pertinent questions arise: Will an enterprise forego its CSR policies as part of an investment agreement with Cuba? Will foregoing CSR policies open MNEs to a specific claim before a National Contact Point? To what extent will extraterritorial

43. See, e.g., Backer, *Globalization and the Socialist Multinational*, at 4.

44. See e.g., Pinho De Oliveira, note 30.

45. See *id.*

46. For a discussion on the MBA see, e.g. Backer, *Globalization and the Socialist Multinational*, at 22–25.

47. See, e.g., *id.*

48. Matías F. Travieso-Díaz & Alejandro Ferrate, *Recommended Features of a Foreign Investment Code for Cuba's Free Market Transition*, 21 N.C.J. INT'L L. & COM. REG. 511, 516 (1996).

49. Matías F. Travieso-Díaz & Charles P. Trumbull IV, *Foreign Investment in Cuba: Prospects and Perils*, 35 GEO. WASH. INT'L L. REV. 903, 917 (2003).

50. Thomas, J. H., Kitterlin-Lynch, M., & Lorenzo Del Valle, D., *Cuba's future hospitality and tourism business: Opportunities and obstacles*, 15(11) CORNELL HOSPITALITY REPORTS, 6–16 (2015).

51. See *id.*

52. Jorge F. Pérez-López & Matías F. Travieso-Díaz, *The Contribution of BITs to Cuba's Foreign Investment Program*, 32 LAW & POL'Y INT'L BUS. 529, 562–63 (2001).

53. See Graham Sowa, *Cuba Sees Return of Multinationals*, *Havana Times*, June 4, 2013.

54. See Reem Nasr, *Cuba is Opening Slowly, But It has a Long Way to Go*, CNBC (April 21, 2015).

application of foreign law (US-EU) impede Cuban trade deals with foreign MNEs? Will global certification NGOs be permitted access to MNE operations in Cuba? If not what will be the ramifications? What would be the alternatives for MNEs resulting from adverse human rights due diligence under UNGPs? How would the application of rules for weak government zones play out for Cuba?

It is likely that in the face of increased interaction within global production chains, Cuban industry, and at least as an initial matter with respect to outbound investment, Cuban SOEs will have to confront the problem of conformity to emerging global CSR and business and human rights standards. That confrontation will likely occur in two forms. The first tends toward convergence and the second toward contradiction and potential conflict. The first touches on the willingness of the Cuban state, in its outbound and domestic behaviors, to conform at least to some respect, with some portion of the emerging CSR regimes. And that move toward conformity may require a certain amount of pressure from trading partners. The second considers the possibilities of resistance and continued Cuban detachment from global trade flows.

Convergence Through Trade and Trade Practices?

Convergence, to the extent it occurs, will likely come as MNEs seek to ensure that their production chains are harmonized.⁵⁵ In that respect, the location of portions of that chain will be less important than the need to ensure internally coherent systems across the production chains of multinationals. But the process will be challenging, as MNEs seek to transpose their global operating rules within a system that has, for the most part, neither been engaged in the production practices, nor embedded the behavior sensibilities of global business. It should be noted that Cuba

has been active in efforts to embed human rights norms within the business practices of MNEs at the international level. In 2014, for example, Cuba was at the forefront of efforts to negotiate a comprehensive treaty for business and human rights.⁵⁶ In 2011, Cuba endorsed the U.N. Guiding Principles for Business and Human Rights. Convergence, then, might be the consequence of embedding in global trade regimes and could be accomplished, however painfully for Cuba, within three distinct contexts—(1) pressure from MNE trading partners and investors; (2) pressure from international financial institutions (IFIs); and (3) convergence through trade agreements. Each is considered in turn.

Pressure from MNE trading partners and investors. The premises here are simple and straightforward. Cuba will be increasing its participation in global trade and engagement with trading partners. That engagement will require interaction with foreign enterprises, both public and private. It will also provide Cuba, through its SOEs at first, with opportunities to more vigorously engage in outbound investment. Where Cuba will be opening its doors to foreign investment inside Cuba, it will be dealing with enterprises which have highly developed and sophisticated internal governance rules. These rules structure both the operation of companies within the production chain—of which the MNE forms the head—and also of the production chain itself. Those rules, in turn, are made up of national rules, as a baseline, augmented in substantial respect, by international norms. These internal operating rules are heavily tied to the disciplinary structures of investment and consumer markets. They are also increasingly sensitive to the growing power of “soft law” frameworks for enforcing international standards—and particularly the OECD Guidelines for Multinationals, and through

55. See, e.g., Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39(4) UNIVERSITY OF CONNECTICUT LAW REVIEW 1739–1784 (2007).

56. See, Bolivia (Plurinational State of), Cuba, Ecuador, South Africa, Venezuela (Bolivarian Republic of): Resolution: Human Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, U.N. Human Rights Council, A/HRC/26/L.22/Rev.1 (24 June 2014), available http://www.business-humanrights.org/media/documents/ecuador_&_so._africa_resolution_ec_sa_24_06_14.doc.

them, the UN Guiding Principles for Business and Human Rights.⁵⁷ Many of these companies will be engaged, as a matter of routine, with human rights due diligence under the Guiding Principles. That exercise will touch on all operations of the MNE, wherever located, including Cuba. And this human rights due diligence will incorporate, in large measure, the international human rights norms—and the interpretation of those norms—which has evolved over the last quarter century.⁵⁸

What might make the transition easier for Cuba are initial concentrations on points of common policy. One might be environmental sustainability, which could be used as a wedge to socialize Cuban officials, and the enterprises they oversee, in the cultures and behavior expectations of global business conduct. Another might be corruption, although this one may be easier in theory than in practice.⁵⁹ A third might be gender-based rights and protection. And indeed, given the recent work of Cuban ministries in the area, this might well be the most logical opening edge for moving Cuban enterprises toward internationalized practices, both within Cuba and in Cuban operations abroad. Indeed, leading elements of the Cuban

state have been instrumental in seeking to internationalize the legal and societal framework within which issues touching on sexual minorities are implemented in Cuba.⁶⁰ And, indeed, there appears to be an alignment between Cuban national and international aspirational standards in this area already.⁶¹ What might prove most difficult, because of incompatibility grounded in ideological differences, are likely labor rights, the rights of indigenous people to consultation and inclusion, and association rights.⁶² Intellectual property rights may also prove difficult—but here the difficulty is as great within the global business community as well.⁶³

Pressure from international financial institutions (IFIs). While Cuba will likely encounter substantial pressure from private sector partners, especially the largest MNEs already committed to internationalization of their operations, additional pressure is likely to come from the public sector. Thus, at the same time that Cuba will likely experience pressure from its private sector (including SOE) partners respecting business behaviors, it is also likely that Cuba will also experience pressure from existing and potential pub-

57. As discussed in Larry Catá Backer, Case Note: *Rights And Accountability In Development (Raid) V Das Air (21 July 2008) And Global Witness V Afrimex (28 August 2008)*; *Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 258–307 (2009).

58. For a sense of the development of these norms, structures and sensibilities, see Business and Human Rights Resource Centre, *Due Diligence, General*, available <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/ue-diligence-general>.

59. See, e.g., Susan Rose Ackerman, *Governance and Corruption*, in GLOBAL CRISES, GLOBAL SOLUTIONS 301–344, edited by Bjorn Lomborg (Cambridge University Press, 2004).

60. See, e.g., Mariela Castro Leads LGBT March, *The Washington Blade*, May 16, 2015, available <http://www.washingtonblade.com/2015/05/16/mariela-castro-leads-lgbt-march/>.

61. See, e.g., Raúl Castro's daughter first lawmaker to vote 'no' in Cuban parliament, *The Guardian* (August 19, 2014) available <http://www.theguardian.com/world/2014/aug/19/mariela-castro-raul-no-vote-discrimination>.

62. Cf., F. Endara Flores, *The Right to Consult and the Right of States to Grant Concessions for the Extraction of Natural Resources in the Territory of Indigenous or Tribal Communities in the Case Law of the Inter-American Court of Human Rights*, 11 TRANSNATIONAL DISPUTE MANAGEMENT 3 (2014); Tara Ward, *The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. J. INT'L HUMAN RTS 54 (2011).

63. Consider Laurence Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. Davis L. Rev. 971 (2006–2007)

lic sector partners as well—especially those in the financial sector.

Should Cuba eventually embrace the global finance system, its engagement with IFIs will also likely produce pressure to conform to global expectations. The International Finance Corporation, for example, already speaks of human rights due diligence as a core obligation of business.⁶⁴ They point to interactive tools that have been developed for that purpose resulting from collaboration between the International Business Leaders Forum (IBLF) and International Finance Corporation (IFC), in association with the United Nations Global Compact. These tools are designed to be practical, capable of enabling “companies to identify, understand, and evaluate actual or potential human rights impacts of a project at each stage of development and operations. This approach links human rights assessment to existing management processes.”⁶⁵ One, the Human Rights Identification tool, is designed to assist companies in identifying potential and/or existing human rights risks and impacts. A second tool, a Human Rights Due Diligence Mapping tool, is meant to “help companies map the policies, risks and impact assessment processes and management systems that address potential and/or existing human rights risks and impacts.”⁶⁶

More important, perhaps, these tools offer teaching materials that provide technical assistance for understanding and complying with global expectations.⁶⁷ Scenarios presented might serve a critical socialization role for Cuba. Or they might serve to highlight the gulf that remains between the practical implementation of state ideology in Cuba, at the moment, and the expectations and practices of the global business community (including, ironically, Chinese and Vietnamese enterprises). Consider, for example, the sort of hypothetical actions below that might generate obligations to conduct human rights due diligence, and that, if well founded might require corrective action—in accordance with both national law and international standards.⁶⁸ The scenarios involve two hypothetical MNEs—Bed and Slumb—operating in two hypothetical states—Carion and Larion.

1. Last year, 13 hotel chambermaids lodged a sexual harassment case against Slumb management. Following their official complaint, they were dismissed for their ‘poor timekeeping’; however, according to the local trade union, this claim is unsubstantiated.
2. Employees of African descent have complained that Bed management exclusively places “light-skinned Larions and staff with European fea-

64. See International Finance Corporation, Guide to Human Rights Impact Assessment and Management available http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/.

65. Id.

66. International Finance Corporation, Guide to Human Rights Impact Assessment and Management, Determining a Company’s Human Rights Due Diligence Approach, available http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/Guide+to+HRIAM/PREPARATION/Determining+a+company+human+rights+due+diligence+approach/.

67. These “Scenarios are hypothetical human rights scenarios written for companies which aims to: Stimulate thinking on potential and existing human rights challenges faced by companies, and Help companies assess their capacity to address such challenges.” International Finance Corporation, Guide to Human Rights Impact Assessment and Management, Human Rights Scenarios, available http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/guide+to+human+rights+impact+assessment+and+management/guide+to+hriam/scenarios/scenarios. Scenarios are offered for the following sectors: Agriculture (Extensive); Agriculture (Intensive); Banking and Business Services; Construction and Infrastructure; Extractives (Mining); Extractives (Oil and Gas); Food and Beverage; Pharmaceutical and Chemical; Retail (Garment, Footwear, Homeware and Toys); Telecommunications; Tourism; and Transport. Id.

68. International Finance Corporation, Guide to Human Rights Impact Assessment and Management, Human Rights Scenarios, Tourism Sector, Available http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/guide+to+human+rights+impact+assessment+and+management/guide+to+hriam/scenarios/tourism/tourism. The scenario involves two hypothetical MNEs—Bed and Slumb—operating in two hypothetical states—Carion and Larion.

tures” in customer-facing positions, in spite of being equally qualified and experienced.

3. Child laborers have been found mining white sandstone during the day in northern Larión for Natural Materials Limited, which exclusively manufactures bathroom suites for Bed.
4. Water geologists employed by the international NGO found traces of sewage effluent in a local water stream near Bed’s largest resort in Larión. Children frequently play in the local stream and many women use the stream to wash clothes. The same experts also noticed a lowering of the water table around the hotel that they attribute to the new swimming pool and golf course that were recently built on the hotel premises.
5. Local residents have complained that Bed’s private security personnel frequently use excessive force to remove them from the public beach, which is adjacent to Bed’s flagship resort in Larión.
6. Doctors have noted a surge in syphilis among the male waiters working in the six luxury resorts in Larión. National health NGOs claimed that the front of house staff “turn a blind eye for a fee” to international tourists using prostitution services in their resorts.
7. Three months ago, two managers were found taking money from a guest to find “a couple of young girls.” A local NGO believes that these young girls had been trafficked from neighbouring Carion.

Many of these situations would have some relevance for the operation of the tourist sector in Cuba. Most already ought to have produced the necessary human rights due diligence among the partners (especially the EU home based partners) of Cuban hotel facilities. That they have not is no indication of the potential these represent for conflict and behavior modification among Cuban officials. In addition, Cuban outbound investment and economic activity, especially in the pharmaceuticals area, will also call for some sensitivity to global standards.⁶⁹ These include everything from whistleblowing, to sales of data about consumers, to pricing policies, to labor policies, to environmental degradation and sustainability issues.⁷⁰

In addition, of course, the usual pressures from IFIs apply. These include pressure to conform to loan conditions for IFI lending. Cuba might believe it could avoid these issues either through the ALBA Bank or the new Asian Infrastructure Investment Bank (AIIB).⁷¹ But the former has little by way of effective funds. And the latter has made it clear that they will abide by international standards, and, more importantly, the Asian Infrastructure Investment Bank does not appear to be a screen for hiding unconditional foreign aid to states.⁷² This will be especially difficult for Cuba, which has long championed a significantly nationalist view of sovereign finance.⁷³

Convergence through trade agreements. Lastly, private and public sector pressure will be augmented by pressure exerted through national and regional trading partners. It has already been shown that Cuba

69. International Finance Corporation, Guide to Human Rights Impact Assessment and Management, Human Rights Scenarios, Pharmaceuticals & Chemical Sector, Available http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/Guide+to+HRIAM/Scenarios/Pharmaceuticals-chemical.

70. Id.

71. AIIB, About Us, available <http://www.aiib.org/>.

72. The AIIB’s website notes:

The Bank’s foundation is built on the lessons of experience of existing MDBs and the private sector. Its modus operandi will be lean, clean and green: lean, with a small efficient management team and highly skilled staff; clean, an ethical organization with zero tolerance for corruption; and green, an institution built on respect for the environment. The AIIB will put in place strong policies on governance, accountability, financial, procurement and environmental and social frameworks.

AIIB, What is the Asian Infrastructure Investment Bank?, available <http://www.aiib.org/html/aboutus/AIIB/>.

73. Discussed in Larry Catá Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, 70 DUKE JOURNAL OF LAW & CONTEMPORARY PROBLEMS 1–46 (2007).

sought to develop its own unique approach to regional trade, including with respect to business conduct and human rights related activities, through ALBA. It is also becoming clear that, as Venezuela's domestic situation becomes more unstable after the death of Hugo Chávez, and the price of petroleum continues to remain low, that there is little effective power within ALBA to resist international norm consensus.

One area where such pressure is likely to manifest itself is the negotiation of bilateral investment treaties. Over the last decade, the issue of incoherence between financial and trade instruments, on the one hand, and human rights and business conduct policies, on the other, has moved to the foreground as states begin to consider the addition of human rights protective clauses in their BITs.⁷⁴ Though this move is in its infancy, it is likely that BITs will increasingly be sensitive to internationalized consensus on business behavior, and that this consensus will revolve around emerging business and human rights norms.⁷⁵ Those norms will include corporate social responsibility areas not usually associated with human rights, including environment and sustainability issues.⁷⁶

Another area where pressure may affect Cuban practice relates to multilateral or regional trade agreements with respect to which Cuban industry might interact. This interaction might occur in a number of ways but two stand out. The first relates to business engagement with foreign enterprises whose own op-

erations are subject to regulation and discipline through these multilateral trade agreements. The second relates to Cuban business transactions in states that are members of such multilateral or regional trade pacts. These cover not just the usual suspects—MERCOSUR, for example. New trade pacts forms—the Trans Pacific Partnership, for example—signal the possibility that Cuba will be expected to conform to the practices and be wary of the sensibilities built into such agreements. But because Cuba is in no position to bargain hard, it will face either the unpalatable choice of remaining unattached to global commerce or to conform to some extent.

FLASH POINTS AND CONFLICT ZONES

The three points of convergence described in the prior section suggest the scope of the potential flash points where Cuban economic practices (and the premises supporting them) may conflict with the norms and expectations of a global business community increasingly aligned (at least in theory) around certain normative structures for business conduct. Within the global community as it has emerged, it may be difficult for Cuba to effectively manage these conflicts. That difficulty arises not because corporate and state partners might be unwilling, but because neither has effective control over the business relationships any more. Within the emerging polycentric systems of governance at the transnational level—especially relating to the governance of business conduct—it is not clear that any one group is any

74. Considered in Ursula Kriebaum, *Foreign Investments & Human Rights - The Actors and Their Different Roles*, 10(1) *Transnational Dispute Management* 1 (2013).

75. For a sense of the discussion, see, e.g., Patrick Dumberry and Gabrielle Dumas Aubin, *How to Incorporate Human Rights Obligations in Bilateral Investment Treaties?*, *Investment Treaty News* (March 22, 2013), available <https://www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties/>; Marc Jacob, *International Investment Agreements and Human Rights*, INEF Research Paper Series on Human Rights, Corporate Social Responsibility and Sustainable Development (03/2010) (Duisburg: Institute for Development and Peace, University of Duisburg-Essen, available http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf).

76. See, e.g., John Knox, *Human rights and the environment*, Human Rights Council, 25th Session, A/HRC/25/L.31 (24 March 2014) available <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G14/123/55/PDF/G1412355.pdf?OpenElement>.

longer in control.⁷⁷ For Cuba, long used to hierarchically-oriented control structures, this presents opportunities and at the same time substantial challenges in dealing with institutions that are quite dissimilar from those applied internally. This includes business practices, the prohibition of private corporations, and the quite limited scope of the non-state sector.⁷⁸ And, as the last section suggested, Cuban officials are unlikely to be able to continue to keep the wall of separation between the Cuban domestic and international economies.⁷⁹ A few examples are considered here.

The first touches on the Cuba-private sphere nexus. For enterprises with a connection with OECD states, or for business transactions that are related to OECD states, issues of human rights compliance may arise where an actor pursues a “specific instance” before an NCP, an informal body charged with applying the OECD Guidelines for Multinational Enterprises. Because the standing rules are quite broad, it appears that non-state actors, particularly activist NGOs, are likely to be able to bring such specific instances. And NCPs are been more willing to entertain such actions and provide guidance. Though these procedures have no binding legal effect, they have significant impact. MNEs are unlikely to wholly ignore either the proceedings or the actions taken. This could affect the Cuban state, its SOEs, and private enterprises operating in Cuba or in partnership with Cuban firms outside of Cuba directly or indirectly.

Second, states have been more willing to apply their law extraterritorially. Once a substantially American

project, the use by home states of national legislation to discipline the behaviors of MNEs conduct abroad has grown. While most of the activity still revolves around reporting, it is likely that states will become more aggressive in projecting their domestic law down the production chain and into the territories of downstream supply chain states. More than that, developed states have increasingly shown a willingness to force down stream states to change their domestic law to conform with international norms—especially those with human rights impacts. The case of the actions of the United States and the European Union with Bangladesh in the wake of the Rana Plaza factory building collapse might well be a model for the future.⁸⁰

Third, it is possible that global certification NGOs might be permitted access to MNE operations in Cuba. If that were the case, then the ramifications for Cuban autonomy with respect to the regulation of business conduct within Cuba will certainly be diminished. Cuba may have little choice on the matter. Third party NGO certification has become an important element in the policing of conformity of business behavior to international human rights and environmental sustainability norms.⁸¹ They are thought to be an important factor in consumer choices and affect investor perceptions of MNEs. Where Cuban officials either interfere with or block such certifications, or where Cuban governmental structures remain indifferent to concerns raised, and most importantly where Cuban governmental habits threaten transparency, it is likely that conflict will result. The MNEs caught in the middle are unlikely to

77. See, e.g., Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100(3) *The American Economic Review* 641–672 (June 2010); Larry Catá Backer, *Transnational Corporations’ Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.*, 20(2) *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES* 805–879 (2013).

78. See, e.g., Larry Catá Backer, *The Cooperative as Proletarian Corporation: Property Rights Between Corporation, Cooperatives And Globalization In Cuba* 33 *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS* 527–618 (2013).

79. See, e.g. Javier Corrales, *The Gatekeeper State: Limited Economic Reforms and Regime Survival in Cuba, 1989–2002*, 39(2) *LATIN AMERICAN RESEARCH REVIEW* 35–65 (2004).

80. Discussed in Larry Catá Backer, *Are Supply Chains Transnational Legal Orders?: What We Can Learn From the Rana Plaza Factory Building Collapse*, 1(1) *UNIVERSITY OF CALIFORNIA IRVINE JOURNAL OF INTERNATIONAL, TRANSNATIONAL, AND COMPARATIVE LAW*—(forthcoming 2016).

81. See, e.g., Errol Meidinger, *Multi-Interest Self-Governance through Global Product Certification Programs* (July 2006). Buffalo Legal Studies Research Paper No. 2006–016. Available at SSRN: <http://ssrn.com/abstract=917956> or <http://dx.doi.org/10.2139/ssrn.917956>.

divest themselves of their investment in Cuba. But they are likely to put substantial pressure on the Cuban government to negotiate at least some sort of compromise. And from such compromise might emerge eventual conformity to international standards.

Lastly, it is unclear that the emerging rules for MNE engagement with weak governance zones might not also apply to Cuba.⁸² It is possible to make the argument that Cuba's unwillingness to conform to international standards might itself be a factor, and a strong one, for using the various human rights due diligence tool kits in dealing with economic interactions in those zones and with officials in those states.⁸³ Cuba would have little control over this, but it might affect its trade position. The more risky trade with Cuba becomes because of the "costs" of dealing with adverse effects of human rights-related conduct, the less appealing Cuba might be to potential consumers of Cuban economic production. That is, human rights and business behavior conformity are usually valued by business in the context of its risk assessment. And risk suggests not merely the initial decision of whether to proceed or not with a transaction. More importantly, risk and risk assessment is central to the issue of pricing. The riskier it is to do business in Cuba, the more expensive that business will be. And in a highly competitive environment, higher expenses will substantially reduce Cuba's attraction to global investors. And indeed, at its limit, it will reduce Cuba to its pre-Revolutionary status: a developing country with a very limited productive capacity, focusing on tourism, some agriculture and extractives. Beyond that Cuba might offer little that could not be obtained cheaper elsewhere. But Cuba may be preparing for that eventuality in any case.⁸⁴

CONCLUSION

The 2014 move toward normalization between the U.S. and Cuba has substantial repercussions beyond the scope of the terms of their rapprochement. These repercussions touch on legal or societal constraints of global standards faced by MNEs seeking to operate in Cuba. The projection of these global standards within Cuba may pose difficulties and produce pressure for legal-economic reform within Cuba. Those pressures may be particularly acute with respect to issues now understood as subjects of corporate social responsibility: transparency/disclosure, human rights, employment/industrial relations, environmental issues, bribery/corruption, consumer protection, technology transfer, anti-competitive schemes, and taxation.

While the principal obligation of enterprises is to comply with local law, these emerging global standards may substantially compromise the relationship between local law and global obligations. This essay suggested the scope and character of the issues that may face Cuba and enterprises, including U.S. based enterprises, in the wake of normalization. The second part of this essay considered briefly the local legal and political context in which enterprises may operate in Cuba, with particular focus on the 2014 Foreign Investment Law and its contextualization within the legal structures of Cuban macro-economic policy. That discussion sketched out the tight constraints from out of which Cuba appears readying itself to engage with global markets. But those constraints themselves may be self-defeating if Cuba means to be actively and successfully engaged in those markets, *other than on its own terms*. The next part outlined the normative framework into which Cuba is going to have to engage. Two important standards systems for global CSR with effect in Cuba—the OECD's Guidelines for Multinational

82. Virginia Haufler, *Governing Corporations in Zones of Conflict: Issues, Actors and Institutions*, in *WHO GOVERNS THE GLOBE* 102–130 (Deborah D. Avant, Martha Finnemore and Susan K. Sell, eds.; Cambridge University Press, 2010).

83. OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (Paris: OECD, 2006). Available <http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf>.

84. See, e.g., Michealene Maynard, *Five Industries Set To Benefit From The U.S.-Cuba Thaw*, *Forbes*, December 17, 2014, available <http://www.forbes.com/sites/michelinemaynard/2014/12/17/5-industries-set-to-benefit-from-the-u-s-cuba-thaw/>.

Enterprises and the U.N. Guiding Principles for Business and Human Rights—were used as a way of suggesting the emerging structures of governance that reflect business behavior expectations in global commerce. The essay then considered the ways in which MNEs may have to approach their investment activities in light of these standards, the pressures for change they might produce, and the adverse effects they might have on MNE decisions to invest or oper-

ate in Cuba. What emerges clearly is that the move toward globalization will bring Cuba closer to a moment of decision about its political and economic systems. While it survived substantially detached from the global system in the last half century, it will not be able to avoid it going forward. That engagement, for all its opportunities, poses substantial challenges to the Cuban economic status quo.