

2016

El Bloqueo and Small Business: Revisiting Trademark Protections Amidst Changing United States-Cuba Relations

Christian Morgan

Follow this and additional works at: <https://lawcommons.luc.edu/lucilr>



Part of the [International Law Commons](#)

Recommended Citation

Christian Morgan *El Bloqueo and Small Business: Revisiting Trademark Protections Amidst Changing United States-Cuba Relations*, 13 Loy. U. Chi. Int'l L. Rev. 141 (2016).

Available at: <https://lawcommons.luc.edu/lucilr/vol13/iss2/5>

This Student Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

EL BLOQUEO AND SMALL BUSINESS: REVISITING TRADEMARK PROTECTIONS AMIDST CHANGING UNITED STATES-CUBA RELATIONS

Christian Morgan

I. Introduction	141
II. The Genesis of Cuban Trademark Law	143
A. Pre-1904: Cuban Industrial Property in Its Infancy	143
B. The Paris Convention: Modernization of Cuban IP Rights ...	144
C. El Bloqueo: Effects of the U.S. Embargo Against Cuba on Trademark Rights	146
III. The Freeze Thawing? El Détente and the Shift in United States- Cuba Relations	148
A. The Obama Administration and the Theoretical Underpinnings Spurring Normalization	148
B. Learning from the Artists: Treatment of Cuban Copyrights as a Comparator	150
C. Recognizing the Need to Address Unresolved Issues	151
1. International Human Rights Violations	151
2. Political Opposition and Uncertainty	152
IV. An Unharmonious International Regime: The WTO, TRIPS, and U.S. Disregard of Treaty Obligations	153
A. The Transfer of (Non-existent) Rights and Havana Club.....	153
B. The “Cohiba” Mark and Empresa Cubana	155
C. Lessons for Cuban Business Owners and Alternate Forms of Protection.....	156
V. Conclusions and a Proposal for Change	157

I. Introduction

The primary conflict discussed in this Note is the United States embargo against Cuba and its impact on the intellectual property rights—specifically, trademarks—of small businesses in both countries. The embargo (or “El Bloqueo” as it is called in Cuba), which is still in effect, is the most enduring trade embargo of modern history at fifty-five years and counting.¹ Despite President Obama’s announced moves to reestablish diplomatic relations and loosen economic policies, uncertainty runs rampant as the embargo still limits American

¹ S. Tamer Cavusgil et al., *INTERNATIONAL BUSINESS: THE NEW REALITIES* 198 (2014). For the purpose of isolating and punishing a particular government for some disapproved policies or acts, an embargo is an official ban on exports and imports to and from the country of said government. *Id.* at 199. Other countries currently under a trade embargo include: North Korea since 2006, barred from importing luxury goods and arms; and Syria since 2011, barred from importing arms and other countries barred from importing Syrian oil. *Sanctions List Countries*, BUS. & SANCTIONS CONSULTING NETH. (Jan. 7, 2016), <http://www.bscn.nl/sanctions-consulting/sanctions-list-countries>.

El Bloqueo and Small Business

businesses—both small and large—from conducting business with Cuban interests.² Only an act by Congress can lift the embargo and end the half-century of disconnect and turmoil with this Caribbean island.³

This Note offers much needed practical perspective and guidance to those small businesses navigating trademark law in an embroiled United States-Cuban relationship. This article addresses two distinct groups: small *American* businesses seeking to expand into the (potentially) opening Cuban market and small *Cuban* businesses seeking recourse in American courts, as well as preparing for an unprecedented wave of competition.

Section II provides historical perspective for small American businesses on the development of Cuban trademark law—focusing on three successive epochs in Cuban history—and serves to highlight its intricacies both domestically and in relation to the United States. Beginning with the Spanish colonization, shifting to the Paris Convention, and then ending with the U.S. embargo against Cuba, Section II will provide the necessary backdrop to understanding Cuban trademark law today.

Section III is dedicated to the current state of Cuban trademark law and focuses on the effect of “El Détente” (which is the loosening and potential elimination of the economic embargo) on both American and Cuban small businesses alike. It offers guidance to American businesses seeking to register trademarks in Cuba, providing both legal and pragmatic analysis of the state of affairs and the outlook going forward. Section III concludes by arguing that, although United States-Cuba relations seem to be thawing, small American businesses should not yet register their trademarks in Cuba, as several key obstacles are in the way of lifting the embargo.

Section IV expands beyond Cuba and discusses international treaties and agreements, to which both Cuba and the United States are contracting parties, that affect trademark rights, registration, and procedures. Specifically, this section discusses the two countries involvement with the World Trade Organization and the Agreement on Trade-Related Aspects of Intellectual Property Rights. It will then highlight United States’ transgressions of these agreements and discuss the harmful consequences realized by Cuban trademark holders. Section IV concludes with guidance for those small Cuban businesses that seek recourse for trademark violations in American courts and elsewhere.

And lastly, Section V concludes this Note with general observations, key takeaways, and argues for the lifting of the economic embargo against Cuba and the continued effort to normalize relations between the two discordant nations.

² James Stewart & Ashley Green, *Legal Alert: Change in U.S. Policy Towards Cuba*, DLA PIPER: RE: MARKS ON COPYRIGHT AND TRADEMARK (Dec. 22, 2014), <http://www.remarksblog.com/legal-alert-change-in-us-policy-towards-cuba/>.

³ *Id.* (noting that although “President Obama announced plans to authorize certain types of travel to Cuba, exports of telecommunication devices and industrial materials to help build Cuba’s infrastructure, and the use of U.S. debit cards [. . .] these changes will not take effect immediately, and Congressional approval is also required [. . .].”).

II. The Genesis of Cuban Trademark Law

Industrial property law⁴ began to take its shape and form part of Cuban legislation during the nineteenth century.⁵ Since its ratification of the Paris Convention for the Protection of Industrial Property of 1883 (“Paris Convention”) in 1904, Cuba has seen occupation, independence, revolution, political unrest, and isolation from the international community.⁶ In order for any small business owner to understand Cuban trademark law as it stands today, and where it will be going forward, knowledge of the political and social influences exerted on Cuba throughout its history is critical.

A. Pre-1904: Cuban Industrial Property Law in its Infancy

Cuban industrial property law originates, in the first instance, from Spanish colonization of the nation.⁷ By 1833, fifty years before the first signatories ratified the Paris Convention, the Spanish Royal Decree established the first “legal instrument relating to Industrial Property rights” in Cuba.⁸ In 1884, the first Legislation of Trademarks was adopted through another Royal Decree.⁹ The driving force behind the implementation of the Legislation of Trademarks in Cuba was tobacco: “[the purpose of this legislation was to] assure the unquestionable trademark and product rights of individuals who invest their capital and dedicate their work to the industry of the production of tobacco.”¹⁰

⁴ “Industrial Property” is the term given to protective rights conferring an exclusive monopoly on exploitation and, unlike copyright, is obtained upon completion of filing and registration formalities. If copyright, otherwise known as literary and artistic property rights, which are obtained without filing formalities and arise simply from creative activity, is added to industrial property, the resulting whole forms intellectual property. WORLD INTELLECTUAL PROP. ORG., UNDERSTANDING INDUSTRIAL PROPERTY 3-5, http://www.wipo.int/edocs/pubdocs/en/intproperty/895/wipo_pub_895.pdf (last visited Jan. 8, 2016).

⁵ *Que es la OCPI? Breve reseña histórica*, OFICINA CUBANA DE LA PROPIEDAD INDUSTRIAL, http://www.ocpi.cu/quienes_somos/node/1012 (last visited Mar. 7th, 2016). [hereinafter OCPI].

⁶ *The World Factbook: Cuba*, CENTRAL INTELLIGENCE AGENCY (2015), <https://www.cia.gov/library/publications/the-world-factbook/geos/cu.html>.

⁷ Already in the first three decades of the nineteenth century every colony of Spain had been released save two: Cuba and Puerto Rico. OCPI, *supra* note 5. It was at this time that the Spanish monarch decided to give the Royal Decree of July 30, 1833, which extended an earlier decree granting privileges for inventions and improvements on the basis of the first Patent Act enacted in Spain in 1820. *Id.* This was followed by a long line of royal orders and decrees: the Royal Order of 1842 established provisions to allow review before the courts of the privileges granted to those who submitted false data, the Royal Order of 1849 which stated the manner and conditions of checking the implementation of inventions, aspects that were not well defined in the earlier Royal Decrees. *Id.* The Royal Order of 1849 provided that the demands of cancellation of privileges designed for reasons of lack of novelty were the jurisdiction of the ordinary courts. *Id.* This all set the stage for the first Legislation of Trademarks. *Id.*

⁸ *Id.*; see also OFICINA INTERNACIONAL DE LAS REPÚBLICAS AMERICANAS, LEYES Y REGLAMENTOS SOBRE PRIVILEGIOS DE INVENCION Y MARCAS DE FÁBRICA EN LOS PAISES HISPANO-AMERICANOS, EL BRASIL Y LA REPÚBLICA DE HAITI 198 (Rev. Aug. 1904), available at <http://babel.hathitrust.org/cgi/pt?id=hdv3.32044097780639;view=1up;seq=204> [hereinafter Oficina Internacional].

⁹ OCPI, *supra* note 5. The draft decree was developed by the Colonial Secretary, Manuel Aguirre de Tejada, who presented it to the King of Spain, who believed that the development of the tobacco industry and the rise of their brands required effective protection. *Id.*

¹⁰ Ana Cristina Carrera, *A Comparative Analysis of the Evolution of Trademark Law in Cuba and the Dominican Republic*, 96 J. PAT. & TRADEMARK OFF. SOC'Y 600, 605 (2014) (citing Oficina Internacional, *supra* note 8, at 198).

El Bloqueo and Small Business

Spanish colonization gave way, which, shortly thereafter, led to U.S. occupation.¹¹ Cuban industrial property law, still in its infancy, continued to develop—now under U.S. direction—during the brief U.S. occupation of Cuba in 1899.¹² Importantly, during this time the U.S. ordered that all industrial property rights granted in the U.S. also be protected in Cuba.¹³

In 1904, two years after its independence, Cuba ratified the Paris Convention, which signaled a turning point in Cuban industrial property law and pushed the nation to establish its first autochthonous law on industrial property by 1936.¹⁴ Understanding this interplay of Spanish colonization and U.S. occupation illuminates the underpinnings of today's complex Cuban trademark law.

B. The Paris Convention: Modernization of Cuban IP Rights

Modern Cuban industrial property law traces back to 1904, when Cuba ratified the Paris Convention.¹⁵ The Paris Convention, a multilateral intellectual property agreement, was among the first of its kind.¹⁶ It was also the first contact developing countries, such as Cuba, had with international industrial property laws.¹⁷

The goal of the Paris Convention was to harmonize the diverse and, at often times, conflicting industrial property laws of countries throughout the world.¹⁸ Prior to the Paris Convention, it was exceedingly difficult to provide consistent protection—or protection at all—for industrial property because of the varying laws among the countries of the world.¹⁹ The Paris Convention, in turn, sought to protect patents, trade names, and trademarks.²⁰ In addition, the Paris Conven-

¹¹ OCPI, *supra* note 5.

¹² *Id.*

¹³ *Id.* American intervention also introduced changes by way of setting the term of patent validity to seventeen years as well as setting the amount of concession rights to thirty-five pesos.

¹⁴ Oficina Internacional, *supra* note 8.

¹⁵ Carrera, *supra* note 10.

¹⁶ Carolyn Deere-Birkbeck, *Developing Countries in the Global IP System before TRIPS: The Political Context for the TRIPS Negotiations*, in RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 22, 25 (Carlos M. Correa ed., 2010).

¹⁷ In fact, Cuba was among the first developing countries in the Americas to ratify the Paris Convention. *Paris Convention for the Protection of Industrial Property*, WIPO, http://www.wipo.int/wipolex/en/wipo_treaties/details.jsp?treaty_id=2 (last visited Jan. 10, 2016). Cuba acceded to the Paris Convention for the Protection of Industrial Property Rights of 1883 on September 22, 1904. *Id.* The Paris Convention went into force in Cuba on November 17, 1904. *Id.* Also among some of the first countries to ratify the Paris Convention for the Protection of Industrial Property of 1883 were the United States in 1887, Brazil in 1884, and Mexico in 1903. *Id.*

¹⁸ *Summary of the Paris Convention for the Protection of Industrial Property*, WIPO, http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Jan. 10, 2016) [hereinafter Paris Convention Summary].

¹⁹ See generally Seth M. Reiss, *Commentary on the Paris Convention for the Protection of Industrial Property*, LEX-IP.COM, <http://www.lex-ip.com/Paris.pdf> (last visited Feb. 25, 2016) (“Prior to the Convention, those wanting protection for inventions in multiple countries needed to file patent applications in all such countries simultaneously, and needed to do so prior to any publication or exhibition of the invention at a trade fair, in order to avoid the unintentional loss of eligibility of patent protection in one or more of the countries.”).

²⁰ Paris Convention Summary, *supra* note 18.

El Bloqueo and Small Business

tion sought to protect, promote, and indeed mandate, the ideals of fair competition.²¹

Regarding trademarks, some of the major provisions of the Convention include national treatment, right of priority, and common rules to be had among the contracting States (those States that ratified the agreement).²² National treatment of industrial property, as the Paris Convention provides, mandates that “each contracting State must grant the same protection to nationals of the other contracting States as it grants to its own nationals.”²³ The Paris Convention further provides that each contracting State must grant the same protection to nationals who are not from a contracting state but are instead domiciled in a contracting State or, alternatively, have an industrial or commercial business in the contracting State.²⁴

As to trade names, a national of a contracting State registering her mark cannot be denied such registration, “unless, for example, the mark would infringe on third party rights, would be contrary to morality or public order, would deceive the public, or was obtained without authorization.”²⁵

Important for small businesses, the Paris Convention is still in effect and currently has 176 contracting parties, including both the United States and Cuba.²⁶

After Cuba’s ratification and adoption of the Paris Convention, Cuba began to focus on the development of its own IP laws, but saw little change for over thirty years, until 1936 when Cuba established its first autochthonous law on industrial property.²⁷ Then, in 1983, Cuba’s Law No. 68 of Scientific Inventions, Industrial Designs, Trademarks, and Appellations of Origin repealed the 1936 industrial property laws.²⁸ Finally, in response to Cuba’s ratification of the agreement

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Carrera, *supra* note 10, at 601-02 (citing Paris Convention Summary, *supra* note 18).

²⁶ WIPO-Administered Treaties > Contracting Parties/Signatories > Paris Convention, WORLD INTEL. PROP. ORG., http://www.wipo.int/wipolex/en/wipo_treaties/parties.jsp?treaty_id=2&group_id=1 (last visited Jan. 10, 2016).

²⁷ Oficina Internacional, *supra* note 8.

²⁸ Cuba, WIPO, <http://www.wipo.int/fympolex/en/profile.jsp?code=CU> (last visited Jan. 10, 2016). Law No. 68 defined trademarks as all “signs, words, name or material medium, whatever their class, form and color, that identifies and distinguishes products or services from others of the same class.” Decreto-Ley N° 68 (May 14, 1983) de invenciones, descubrimientos científicos, modelos industriales, marcas y denominaciones de origen, art. 134-135, May 14, 1983 (Cuba) (Ana Cristina Carrera trans.), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=241337. That which was excluded from trademark protection include trademarks that were composed solely of “coat of arms, flags, signs, hallmarks, insignias, honorary titles, national or foreign decorations or other emblems of States, governments, social and mass organizations or intergovernmental organizations, names or images of officials, leaders, or national heroes.” *Id.* at art. 139. Furthermore, Law No. 68 mandated the use of a trademark within three years after the approved registration with a lifespan of ten years, subject to renewal. *Id.* at art. 141, 145. In addition, it stated that “geographic indications belong to the national heritage,” and that only Agencies of the Central Administration of the State, Businesses, Provincial and Municipal Organs of the Populist Power, Small Farmers, and Agricultural Cooperatives could solicit the registration of a geographic indication. *Id.* at art.164, 167.

El Bloqueo and Small Business

establishing the World Trade Organization and the TRIPS Agreement²⁹ in 1995, Law No. 203 of Trademarks and Other Distinctive Signs—which remains in effect as Cuban domestic trademark law today—repealed Law No. 68 in 1999.³⁰

The Madrid Agreement Concerning the International Registration of Marks, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, and the Trademark Law Treaty helped to shape Law No. 203.³¹ Those seeking to register trademarks in Cuba must note that the law implemented major changes to Cuban IP law.³² For example, Law No. 203 defines trademarks as:

(1) (a) denominative signs such as letters, words, numbers and all combinations of these signs; b) figurative signs such as images, figures, drawing, symbols, and graphics, like color, as long as it is delimited by a given form, and the combination of colors; c) mixed signs from the combination of words and figurative marks; d) three-dimensional shapes, provided that the products can be delimited, including wrappings, packaging, the products shape, or the products presentation; e) smells; f) the sounds and combinations of sounds; and (2) The names of specific individuals can be word signs, as long as authorization is given, expressed by public document and it does not cause confusion or mislead the public.³³

In order to facilitate the registration process, which had become convoluted and ineffectual, Law No. 203 also created the Cuban Office of Industrial Property.³⁴ In addition, the application of the International Classification of Goods and Services for the Registration of Marks, established by the Nice Agreement, became mandatory.³⁵ Modernization of its trademark laws, registration, and procedures sought to streamline and encourage new businesses to protect their assets through Cuban IP law in what should have been the country's economic emergence. Instead, the U.S. trade embargo against Cuba, coupled with the Cuban regime's own actions, ensured a downward economic spiral of over fifty years.

C. El Bloqueo: Effects of the U.S. Embargo Against Cuba on Trademark Rights

The embargo, which is currently in effect in the United States, is the single greatest factor that affects how businesses—both large and small—deal with and inside of Cuba. Essential to successful, and sanction free, operation of any busi-

²⁹ See *infra* pp. 17-21.

³⁰ OCPI, *supra* note 5; Decreto- Ley NO. 203 De Marcas Y Otros Signos Distinctivos, art. 2, May 2, 2000 (Cuba) (Ana Cristina Carrera trans.) [hereinafter Law No. 203].

³¹ Yosleidys I. Gonzalez et al., *Legislation de marcas en Cuba: Consideraciones esenciales*, GESTIOPOLIS (2006), <http://www.gestiopolis.com/canales7/mkt/brand-legislacion-sobre-las-marcas.htm> (last visited Jan. 10, 2016).

³² See *supra* note 28 and accompanying text.

³³ Law No. 203, *supra* note 30, at art. 3.1.

³⁴ Gonzalez et al., *supra* note 31.

³⁵ Law No. 203, *supra* note 30, at art 10.

El Bloqueo and Small Business

ness dealing with Cuban interests requires keen awareness and relentless attention to the intricacies of the embargo.

Beginning in 1963, the U.S. imposed a commercial, economic, and financial embargo on Cuba.³⁶ The imposition of the embargo was the American response to the Cuban government, specifically the Castro Regime, appropriating and nationalizing the property of United States citizens and corporations.³⁷ That same year, the United States also established the Cuban Assets Control Regulations (CACR).³⁸ The CACR “prohibits persons subject to U.S. jurisdiction from engaging in transactions involving property where Cuba or a Cuban national has an interest, including transactions related to travel, trade, and remittances, without authorization, that is a government license from the Treasury.”³⁹ But, the CACR did authorize a general license for transactions related to the “renewal of patents, trademarks, and copyrights in which the Cuban government or a Cuban national has interest.”⁴⁰

Then, however, under the Section 211 of the Omnibus Appropriations Act of 1998 (“Section 211 of the Omnibus Act”), the U.S. prohibited courts from “considering or enforcing trademark claims of Cuban national[s], or their successors in interest, regarding property confiscated by the Cuban government.”⁴¹ Section 211 of the Omnibus Act has had a consistent, ongoing negative impact on holders of Cuban trademarks.⁴²

Section 211 compounded an already difficult Cuban economic climate that was struggling due to the U.S. Cuban Liberty and Democratic Solidarity Act (“Helms-Burton Act”) of 1996, which strengthened and continued the U.S. embargo against Cuba.⁴³ Seeking to fiscally asphyxiate the Cuban government, the oft-maligned Helms-Burton Act—which remains in effect today—extends the territorial application of the embargo to also apply to foreign companies trading with Cuba.⁴⁴ It also penalizes foreign companies for allegedly “trafficking” property formerly owned by U.S. citizens.⁴⁵ In short, the Helms-Burton Act attempts to further isolate Cuba by forcing foreign companies to choose between

³⁶ Melisa Rivière, *What Does the US-Cuba Détente Mean for the Culture Industries and Ethnographic Praxis?*, EPIC (Jan. 23, 2015), <https://www.epicpeople.org/us-cuba-detente/>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-951R, U.S. EMBARGO ON CUBA 1, 4 (2009), <http://www.gao.gov/products/CAO-09-951R> (last visited Jan. 16, 2016).

⁴⁰ *Id.* at 23.

⁴¹ *Id.*

⁴² See *infra* p. 14.

⁴³ Rivière, *supra* note 36. Until 1991, Cuba's primary trading partner since its revolution had been the Soviet Union. *Id.* When Soviet President Mikhail Gorbachev resigned and declared his office extinct, signaling the fall of the Soviet Union, Cuba saw immediate economic contraction. *Id.* During this economic contraction, which was called the “Special Period in Time of Peace (or “Período especial” in Spanish), Cubans endured electrical black outs, transportation shortages, and water rationing. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

El Bloqueo and Small Business

the United States and Cuba.⁴⁶ In this regard, the Helms-Burton Act has been successful. Small businesses have been forced to side with the United States in order to avoid stiff sanctions that threaten to ruin its continued success.⁴⁷

No executive order can undo the embargo or the Helms-Burton Act; both are retractable only by a majority vote in Congress.⁴⁸

III. The Freeze Thawing? El Détente and the Shift in United States-Cuba Relations

Despite the end of the Cold War, an ideological and political conflict endured and continued to hinder relations between the U.S. and Cuba for over fifty years.⁴⁹ But, in light of increased international outcry regarding the United States' treatment of Cuba, especially the embargo, the potential lift of the embargo is becoming an even hotter hot-button in the American political sphere.

A. The Obama Administration and the Theoretical Underpinnings Spurring Normalization

Perhaps in response to the overwhelming international backlash and the growing collective voice of small business owners advocating for an open market with Cuba, the Obama Administration released Cuba's political prisoners in December 2014 and proposed to normalize diplomatic relations between the two countries.⁵⁰

In one of the first steps toward normalization, President Obama, using his executive powers, has eased travel restrictions for Americans to Cuba.⁵¹ For example, recent amendments to the Office of Foreign Assets Controls (OFAC) regulations permit travel to Cuba for professional research and meetings.⁵² In fact, President Obama himself visited the island, becoming the first sitting U.S. President to do so since Calvin Coolidge in 1928.⁵³ And although U.S. travelers

⁴⁶ *Id.*

⁴⁷ Rupinder Hans, *The United States' Economic Embargo of Cuba: International Implications of the Cuban Liberty and Democratic Solidarity Act of 1995*, 5 J. Int'l L. & Prac. 327 (1996).

⁴⁸ See Section 211 of the Omnibus Appropriations Act of 1998.

⁴⁹ Rivière, *supra* note 36.

⁵⁰ *Id.*

⁵¹ While the U.S. eases travel restrictions, Cuba braces for the massive influx of tourism and business. Rivière, *supra* note 36. The Associated Press reports that Cuba is unprepared to handle the massive wave of U.S. travelers expected in 2015 and beyond, which will lead to greater development of the private sector and the micro-economies independent of the state-government. Michael Weissenstein & Andrea Rodriguez, *Obama's New Cuba Policy Depends Partly On Hotel Hand Towels*, ASSOCIATED PRESS (Jan. 16, 2015), <http://bigstory.ap.org/article/2e54d8617d5d429e8ed4bdaf658fcdc4/obamas-new-cuba-policy-depends-partly-hotel-hand-towels>.

⁵² Amendments to section 515.564 of the Cuban Assets Controls Regulations published January 16, 2015. The amendments also permit travel to Cuba for education activities (515.565), support for the Cuban people (515.574), humanitarian projects (515.575), public performances or athletic competitions (515.567), and activities of private foundations or research and educational institutes (515.576).

⁵³ Tanya Somanader, *Big News: President Obama is Headed to Cuba*, WHITEHOUSE.GOV BLOG (Feb. 18, 2016, 7:01 PM), <https://www.whitehouse.gov/blog/2016/02/18/big-news-president-obama-headed-cuba>.

El Bloqueo and Small Business

are still required to go on supervised group trips, U.S. companies and organizations are now able to design such trips without the lengthy documentation and inspections that OFAC previously required.⁵⁴ Furthermore, amendments to CACR have legalized the use of U.S. debit and credit card transaction on the island as well as facilitate institutional banking transactions.⁵⁵ This is especially important for small businesses in the area geared toward lodging, food, and entertainment, which all will undoubtedly experience a new boom.⁵⁶

For many large companies and organizations that have been trying to get into Cuba, these recent and rather sudden changes by the Obama Administration come at a great surprise.⁵⁷ In 2014, the beverage company Red Bull was fined for failing to get travel authorization to Cuba to film a documentary.⁵⁸ Carlson Wagonlit Travel and American Express paid \$5.9 million and \$5.2 million, respectively, to the U.S. Treasury Department after they violated the embargo when they booked travel to Cuba from third-party countries.⁵⁹

Regardless, the changes seem to be spurred by U.S. companies, both small and large, that do not want to be left out of prime, and now burgeoning, the Caribbean investment prospects that Cuba now offers.⁶⁰ Private property is becoming more and more available to businesses as Cuba seeks to rectify the confiscation of such property dating back to before the embargo of 1963, which is a key indicator of lasting change.⁶¹ Notwithstanding, it is easy to confuse movement with action, and as any Cuban artist will tell you, change comes slow for Cuban IP laws.

⁵⁴ Rivière, *supra* note 36.

⁵⁵ Amendments to section 515.584 of the Cuban Assets Controls Regulations published January 16, 2015.

⁵⁶ Rivière, *supra* note 36. (“Small businesses geared toward providing lodging, food and entertainment such as bed and breakfasts, restaurants, salons, cabarets, and guided tours will experience a new boom. In order to be competitive in the market they will also be looking to upgrade their standards (from toilet paper to flat screen televisions) in order to draw clientele.”). American agricultural companies also stand to experience a new boom in their economy with sales of products and farming equipment in the Cuban market. *Id.* U.S.-based agricultural companies, as well as the United States Agriculture Coalition for Cuba, stated purpose are to “re-establish Cuba as a market for U.S. food and agricultural exports.” UNITED STATES AGRICULTURE COALITION FOR CUBA, <http://www.usagcoalition.com/> (last visited Jan. 9, 2016).

⁵⁷ *Id.*

⁵⁸ Patrick M. Sheridan, *Red Bull Settles with U.S. on Cuba Violations Claims*, CNNMONEY (June 27, 2014, 4:04 PM), <http://money.cnn.com/2014/06/27/news/companies/red-bull-cuba/>.

⁵⁹ Gay Nagle Myers, *Carlson Wagonlit to Pay Fine for Unlawful Cuba Bookings*, BUS. TRAVEL NEWS (Apr. 23, 2014), <http://www.businesstravelnews.com/Business-Travel-Agencies/Carlson-Wagonlit-To-Pay-Fine-For-Unlawful-Cuba-Bookings/?ida=Travel%20Mgt%20Companies&a=trans>; Peter Orsi, *Cuba Criticizes U.S. Embargo Fine for AmEx, Bank*, ASSOCIATED PRESS (July 30, 2013, 3:52 PM), <http://bigstory.ap.org/article/cuba-criticizes-us-embargo-fine-amex-bank>.

⁶⁰ Stewart, *supra* note 2.

⁶¹ Damien Cave, *Cuba to Allow Buying and Selling of Property, With Few Restrictions*, N.Y. TIMES (Nov. 3, 2011), <http://www.nytimes.com/2011/11/04/world/americas/cubans-can-buy-and-sell-property-government-says.html?pagewanted=all>.

B Learning from the Artists Treatment of Cuban Copyrights as a Comparator

As changes are on the horizon (with the untapped Cuban market ready to open its doors to America once again), small businesses planning to expand and take advantage of the Cuban market must plan now to ensure long-term success. Of key importance to establishing a foothold in the Cuban market, is the registration of one or more trademark on branding such as the business's name, logo, and/or slogan. However, when to register such trademarks is a bit of a gambling game that businesses will have to play over the next several months and years. If the business owner waits too long, a competitor has the opportunity to register the mark first, causing her to lose market share, potential revenue, and time spent developing a brand in that market. On the other hand, if the business registers too early, then it runs the risk of paying unnecessary registration and maintenance fees or even losing the mark due to abandonment if U.S.-Cuba relations take a turn for the worse. A look at the treatment and evolution of copyrights is illustrative of a possible timeline for business owners as they await change in the context of trademark law.

The treatment of copyright (and trademark) registration reveal fundamental differences between the United States and Cuba—that is, between capitalism and socialism—regarding labor, private property, and social equality.⁶² This was evident when Fidel Castro, in an attempt to socialize the nation, removed individual intellectual property rights.⁶³ Thus, under Fidel's Marxism-Leninism regime, authorship became property of the state, making independent artists everywhere nothing more than “cultural laborers.”⁶⁴ Regarding copyrights, Cuban authors were no longer entitled to royalties from their American publishers and distributors, which was further justified by the U.S. embargo.⁶⁵ This allowed American publishers and distributors to “hyper-capitalize” on Cuban copyrights.⁶⁶

However, in 1974, Cuba joined the United Nations World Intellectual Property Organization (WIPO).⁶⁷ Cuba's inclusion in WIPO led the U.S. to lift restrictions and reestablish copyright payments to Cuban copyright owners, also known as the “informational material exemption” found in § 2502(a) of the Omnibus Trade and Competitiveness Act.⁶⁸ However, this only came fourteen years later in 1988.⁶⁹ Today, royalty payments and registrations of copyrights are synchro-

⁶² Rivière, *supra* note 36.

⁶³ *Id.*

⁶⁴ Rivière, *supra* note 36.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Ariana Hernández-Reguant, *Copyrighting Che: Art and Authorship Under Cuban Late Socialism*, 16 *PUB. CULTURE* 1, 1-29 (2004).

⁶⁸ *Id.*

⁶⁹ *Id.*

El Bloqueo and Small Business

nizing between the U.S. and Cuba,⁷⁰ which is facilitating an unprecedented cultural exchange.⁷¹

A quick look at the past, and an examining look at the present state of affairs, reveals that changes now may only be the beginning of a long road. For small business owners, this should be a signal that now is still not the right time to register a trademark in Cuba.⁷² Fees and expenses to such registration can quickly become cost prohibitive; especially considering that conducting business with the island is still prohibited, thus reducing the return on investment to little or nothing for the foreseeable future.⁷³ In addition, if the trademark is not used in Cuba within three years of the date of registration, or has not been used for a continuous period of three years—which, for American businesses, will be the case until a formal act by Congress—it may be subject to cancellation.⁷⁴

C. Recognizing the Need to Address Unresolved Issues

Recognizing the issues that Cuba still needs to resolve, as well as the uncertainty with the upcoming election cycle, a formal act by Congress lifting the embargo might not soon be on the political horizon.

1. *International Human Rights Violations*

To be sure, Cuba has committed serious crimes against its own people.⁷⁵ From abridging the rights of free press and free speech by imprisoning opposition journalists and political dissenters,⁷⁶ to widespread corruption of political officials, law enforcement, and the like, Cuba has committed obvious human rights

⁷⁰ Travel-related transactions to, from, and within Cuba by persons subject to U.S. jurisdiction, 31 C.F.R. § 515.560 (2015).

⁷¹ Randy Kennedy, *Bronx Museum of the Arts Plans Exchange With Cuba*, N.Y. TIMES (Jan. 21, 2015), http://mobile.nytimes.com/2015/01/22/arts/design/bronx-museum-plans-ambitious-art-exchange-with-cuba.html?_r=1&referrer. For example, Cuba's Museo Nacional de Bellas Artes (National Museum of Fine Arts) and the Bronx Museum of Art had one of the largest exchanges of collections in over fifty years in the summer of 2015. *Id.*

⁷² *Id.*

⁷³ *Trademark Registration in Cuba*, HUNTON & WILLIAMS, LLP (2015), <https://www.hunton.com/files/News/0cd4acf2-b112-41b9-bb95-8bc12ef1ba91/Presentation/NewsAttachment/aa3a6fa4-f882-4ed9-a4e4-9179ef61cf7c/trademark-registration-cuba.pdf> (explaining that those seeking to file a national trademark in Cuba must use the assistance of an official local agent, pay a fee for the formal examination process, pay a fee to register the mark—if the application is accepted—as well as renewal fees thereafter; not to mention attorney's fees and expenses).

⁷⁴ *Id.*

⁷⁵ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, CUBA 2014 HUMAN RIGHTS REPORT 12 (2014), <http://www.state.gov/documents/organization/236892.pdf> [hereinafter Cuban Human Rights Report].

⁷⁶ See Julie Hirschfeld Davis & Damien Cave, *A 'New Day' of Openness, Taxed By Old Grievances*, N.Y. TIMES, Mar. 22, 2016, at A1. Cuban President Raúl Castro, while meeting with President Obama in Cuba, engaged with various reporters after one asked about dissidents his government has arrested. *Id.* Playing possum, President Castro asked, "what political prisoners?" *Id.* President Castro then "sought to turn the human rights criticism on the United States, arguing that countries that do not provide universal health care, education and equal pay are in no position to lecture Cuba." *Id.*

violations.⁷⁷ However, the United States continues to use these violations as justification for invalidating and/or not enforcing Cuban trademarks in the U.S. and for its anti-Cuban laws, including the trade embargo, despite evidence that the embargo only exacerbates Cuba's problems.⁷⁸

The United States' long-running embargo against Cuba stands out as a vivid illustration, experts argue, that coercive economic measures tend to exacerbate economic inequality, encourage corruption, spawn black markets, and stoke nationalistic sentiments that strengthen the hand of oppressive regimes.⁷⁹ In fact, U.S. measures have had little to no impact on persuading the Cuban government to release its political prisoners or take any other action to comply with international human rights laws.⁸⁰ On the other hand, U.S. measures have significantly burdened economic development and access to things such as effective medical care.⁸¹ Furthermore, the United Nations Human Rights Commission found that the economic embargo prevented Cuba from introducing political reforms.⁸² And finally, allies of the United States, and even the United Nations, have continually and increasingly urged the U.S. to repeal the embargo.⁸³

2. *Political Opposition and Uncertainty*

Another impediment is political opposition that has curtailed any legitimate attempt to outright lift the Cuban embargo.⁸⁴ Lifting the embargo has only recently re-emerged as a hot-button issue with candidates, and has not seen much agreement to date.⁸⁵ Aside from efforts by the Obama Administration, there should be broad negotiations with Cuba. In the past, the U.S. has negotiated with repressive regimes like Vietnam, North Korea, and China; but U.S. officials say that in those instances the U.S. had important strategic interests to safeguard, which are not present in Cuba.⁸⁶

⁷⁷ Cuban Human Rights Report, *supra* note 75, at 12.

⁷⁸ Hans, *supra* note 47, at 327.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*; see also Davis & Cave, *supra* note 76, at A1 (noting President Castro's comment that the Embargo was "the most important obstacle to [Cuba's] economic development and the well-being of the Cuban people.").

⁸² *Id.*

⁸³ Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269 (2015); U.N. Secretary-General, *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States Against Cuba*, 27, U.N. Doc. A/RES/67/4 (Jan. 29, 2013); AMNESTY INT'L, *The U.S. Embargo Against Cuba: Its Impact on Economic and Social Rights* 13-19 (2009), <http://www.amnesty.org/en/library/info/AMR25/007/2009> [hereinafter Amnesty Report].

⁸⁴ Sahil Kapur, *Congress Stands in the Way of Lifting the U.S. Embargo on Cuba*, TALKINGPOINTS-MEMO.COM (Dec. 17, 2014, 1:02PM, <http://talkingpointsmemo.com/dc/cuba-embargo> (noting scathing criticisms from U.S. senators regarding President Obama's attempts to normalize relations by establishing a U.S. embassy in Cuba; for example, Senator Marco Rubio, who is of Cuban descent, who said that he is "committed to doing everything [he] can to unravel as many of these changes as possible.")).

⁸⁵ *Id.*

⁸⁶ Amnesty Report, *supra* note 83, at 13-19.

El Bloqueo and Small Business

In the meantime, President Obama is using his executive powers to ease travel restrictions.⁸⁷ Nonetheless, even these steps toward change can be just as quickly undone by the next administration as long as the economic embargo remains in place and in the hands of Congress, which will likely defer any such major vote until after the 2016 Presidential Election.⁸⁸ Like many social (and even economic) battles, the greatest assurance of bilateral cooperation and long-term normalization remains at the grassroots level—with the collective voices of the American small business owners urging its legislature to readdress the trade embargo issue, and seek new ways of political resolution. These will be the defining features of the new era of U.S.-Cuba relations.

IV. An Unharmonious International Regime: The WTO, TRIPS and U.S. Disregard of Treaty Obligations

Although both the U.S. and Cuba are members of the TRIPS Agreement and the Paris Convention, Section 211 has allowed U.S. courts to permit infringement of Cuban trademarks, as evidenced by *Havana Club Holding, S.A. v. Galleon S.A.*, and *Empresa Cubana del Tabaco v. Culbro*.⁸⁹

A. The Transfer of Non-existent) Rights and Havana Cuba

In *Havana Club Holding, S.A.*, the plaintiff (HCH) was a joint stock company organized under the laws of Cuba.⁹⁰ HCH owned the “Havana Club” trademark in certain countries outside of the US.⁹¹ However, the “Havana Club” trademark had been owned by Jose Arechabala, S.A (JASA), a Cuban corporation.⁹² JASA owned the mark before Castro’s government seized and expropriated the company’s assets in 1960.⁹³ After Cuba seized and expropriated JASA’s assets, Cubaexport, a Cuban state enterprise, registered the “Havana Club” trademark with the USPTO in 1976.⁹⁴ Although unable to export any of its products to the United States, Cubaexport registered with the USPTO with the intent to begin export to the U.S. if and when the embargo was lifted.⁹⁵ Cubaexport then, in

⁸⁷ MARK P. SULLIVAN, CONG. RESEARCH SERV., RL31139, CUBA: U.S. RESTRICTIONS ON TRAVEL AND REMITTANCES I (2015).

⁸⁸ Mike DeBonis & Paul Kane, *Republicans Vow No Hearings and No Votes for Obama’s Supreme Court Pick*, WASH. POST (Feb. 23, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/02/23/key-senate-republicans-say-no-hearings-for-supreme-court-nominee/> (illustrating political deadlock, Senate Republicans, who make up a majority of the Senate, have vowed not to hold hearings or vote on any Obama-nominee to the Supreme Court vacancy).

⁸⁹ *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 119 (2d Cir. 2000); *Empresa Cubana del Tabaco v. Culbro Corp.*, 399 F.3d 462 (2nd Cir. 2005).

⁹⁰ *Havana Club*, 203 F.3d at 119.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 120.

⁹⁵ Dale L. Carlson et al., *Trapped by TRIPS? Intellectual Property Rights, the Cold War, and the Cuban Embargo Revisited*, 21 QUINNIPAC L. REV. 43, 44 (2001).

El Bloqueo and Small Business

1994, assigned its United States registration for “Havana Club” to HCH.⁹⁶ In 1995, the Office of Foreign Assets Control (OFAC) authorized Cubaexport to complete the transactions relating to the assignment of the mark.⁹⁷

In 1996, HCH renewed the U.S. registration of “Havana Club” for a term of ten years.⁹⁸ However, in 1997, the defendants, Bacardi & Company Ltd. and Bacardi-Martini USA, Inc, American corporations, purchased from JASA the “rights (if any) to the Havana Club trademark.”⁹⁹ Although the OFAC authorized Cubaexport to complete the transactions in 1995, OFAC issued a Notice of Revocation after the lawsuit was filed.¹⁰⁰ OFAC relied on § 515.805 of CACR to nullify the transactions.¹⁰¹

In the ensuing lawsuit, the Second Circuit held that the Cuban Embargo barred assignment of the “Havana Club” mark to HCH.¹⁰² It also held that the Embargo precluded recognition of any trademark rights that HCH “might have to trade name protection under the General Inter-American Convention for Trade Mark and Commercial Protection.”¹⁰³ In other words, the Second Circuit held that U.S. law effectively bars Cuban companies from possessing or transferring U.S. trademarks and trade names that were confiscated from their prior owners by the Cuban government.¹⁰⁴ The ruling, while seemingly in line with the U.S. embargo of Cuba, conflicts with several international agreements and treaties to which the U.S. is a contracting party.¹⁰⁵ Specifically, the U.S., through its involvement in the TRIPs Agreement, is required to recognize those trademarks, trade names, and their transfer and may not discriminate against WTO members in such a way that would disrespect obligations fundamental to TRIPS.¹⁰⁶

As a result of the *Havana Club Holding* decision, which caused uproar in the international community, a complaint was filed before the World Trade Organization.¹⁰⁷ Specifically, the European Communities filed complaint against the

⁹⁶ *Havana Club*, 203 F.3d at 120.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Read in full, OFAC’s Notice of Revocation stated: “You are notified that, as a result of facts and circumstances that have come to the attention of this Office which were not included in the application of October 5, 1995, License No. C-18147 . . . is hereby revoked retroactive to the date of issuance. The determination to revoke License No. C-18147 is made pursuant to § 515.805 of the Cuban Assets Control Regulations, 31 C.F.R. Part 515. Any action taken under this specific license from the date of issuance until now is null and void as to matters under the jurisdiction of the Office of Foreign Assets Control.” *Id.* at 120-21.

¹⁰² *Havana Club*, 203 F.3d at 120-21.

¹⁰³ *Id.* at 119.

¹⁰⁴ Carlson et al., *supra* note 95, at 43.

¹⁰⁵ *Id.*

¹⁰⁶ Carlson et al., *supra* note 95, at 44.

¹⁰⁷ Request for Consultations by the European Communities, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176 (Jul. 8, 1999) [hereinafter Request DS176].

El Bloqueo and Small Business

U.S. alleging illegality of Section 211 of the Omnibus Act, in light of the United States' obligations under international treaties.¹⁰⁸

On January 2, 2002, the Appellate Body of the World Trade Organization concluded—and the Dispute Settlement Body (DSB) of the WTO adopted—that in relation to trademarks, Section 211 of the Omnibus Act was inconsistent with the United States' obligations under Articles 2.1, 3.1, and 4 of the TRIPS Agreement in conjunction with Article 2(1) of the Paris Convention.¹⁰⁹ The Appellate Body of the WTO noted the United States' failure to comply with the requirements to recognize trademarks, trade names, and their transfer and not to discriminate against WTO members.¹¹⁰

The Appellate Body, thus, recommended that the U.S. bring Section 211 of the Omnibus Act into conformity with the agreement.¹¹¹ The U.S., however, did not revise or repeal Section 211.¹¹² Instead, on February 19, 2002, the U.S. requested a “reasonable period of time to comply with the DSB recommendations,” with the deadline being set for December 31, 2002.¹¹³ To date, over 10 years later, the U.S. has not adopted the DSB recommendations.¹¹⁴

Havana Club is just the first lesson for Cuban trademark holders who seek protections for their marks in the United States.

B. The “Cohiba” Mark and Empresa Cubana

In *Empresa Cubana del Tabaco v. Culbro Corporation*, the plaintiff, Empresa Cubana, a Cuban corporation, first registered in Cuba its “Cohiba” mark for use on cigars in 1969.¹¹⁵ By 1978, Empresa Cubana had registered its “Cohiba” mark in seventeen other countries and was selling its products all over the world.¹¹⁶ However, Empresa Cubana did not register the mark in the U.S. because the embargo prevented it from even selling the Cohiba cigars at all in the United States.¹¹⁷

In 1981, General Cigar, an American company, obtained a registration for the “Cohiba” mark in the U.S. and, in an attempt to profit off of the goodwill of the “Cohiba” mark, began selling cigars under that name.¹¹⁸ But for five years starting in 1987, General Cigar ceased using the “Cohiba” mark.¹¹⁹ Then, in 1992,

¹⁰⁸ *Id.*

¹⁰⁹ Appellate Body Report, *United States- Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R ¶ 360 (Jan. 2, 2002) [hereinafter Section 211 Appellate Body Report].

¹¹⁰ *Id.* at 103.

¹¹¹ *Id.*

¹¹² Carrera, *supra* note 10, at 610.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Empresa Cubana del Tabaco v. Culbro Corp.*, 399 F.3d 462, 465 (2nd Cir. 2005).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 466.

¹¹⁹ *Id.*

El Bloqueo and Small Business

General Cigar relaunched the “Cohiba” cigar in the U.S. and, in a 1997 marketing campaign, even attempted to create an association in “the consumer’s mind to Cuba and the Cuban “Cohiba” because Empresa Cubana’s “Cohiba” mark had gained worldwide recognition.¹²⁰

In 1997, Empresa Cubana commenced a proceeding to cancel General Cigar’s registration of the “Cohiba” mark based on the theory that General Cigar abandoned its original registration of the mark and that Empresa Cubana deserved protection under the famous marks doctrine.¹²¹

The U.S. Court of Appeals for the Second Circuit held that the trademark infringement claim failed because “acquisition of the mark via the famous marks doctrine” is prohibited by the embargo and thus precluded Empresa Cubana from “acquisition of property rights in the U.S. ‘Cohiba’ trademark.”¹²² In addition, the court concluded that the embargo also barred Empresa Cubana from both cancelling General Cigar’s registration of the “Cohiba” mark and obtaining an injunction barring General Cigar’s use of the mark in the U.S.¹²³

Empresa Cubana once again serves as a reminder to small Cuban businesses that they will not be able to seek the same sort of protections required by international agreements; but instead must look for alternate, unique methods to protect their trademark rights.

C. Lessons for Cuban Business Owners and Alternate Forms of Protection

For large and small businesses alike, the role of foreign investment is growing and critical.¹²⁴ Foreign investment is, often times, mutually beneficial.¹²⁵ For the investing business, it can provide access to new skills, products, labor, financing, and technology, as well as access to new markets and marketing channels, and cheaper production facilities.¹²⁶ The host country receiving the foreign investment is afforded a source of new technology, capital, and products, which in turn fosters economic growth and development.¹²⁷ Because trademark protection may bring capital to a country, the trademark itself is a form of foreign investment, albeit an intangible one.¹²⁸

As a result, governments pursuing economic growth have realized the importance of Foreign Direct Investments (“FDI”).¹²⁹ Countries such as Cuba are

¹²⁰ *Empresa Cubana*, 399 F.3d at 466.

¹²¹ *Id.*

¹²² *Id.* at 471-72.

¹²³ *Id.*

¹²⁴ Julien Chaisse & Puneeth Nagaraj, *Changing Lanes: Intellectual Property Rights, Trade and Investment*, 37 HASTINGS INT’L & COMP. L. REV. 223, 248 (2014).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Jean R. Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J.L. & ARTS 277, 277 (2004).

¹²⁹ Alexander J. Belohlavek & Filip Cerny, *Law Applicable to Claims Asserted in International Investment Disputes*, 54 INT’L J.L. & MGMT. 443 (2012).

competing to attract greater FDI, which in turn forces each to create an investment environment that is both stable and secure for potential investors such as small businesses.¹³⁰

In order to provide a legal framework for protecting foreign investors, and thus ensuring a stable and secure investment market, states are entering into bilateral investment treaties (“BITs”) or other international investment agreements (“IIAs”).¹³¹ The shift to a knowledge-based global economy has led many developed nations to adopt stronger domestic IPR protection in the hopes of attracting FDI.¹³² Furthermore, perceived inadequacies of TRIPS and weak enforcement mechanisms for IPR violations in developing countries have catalyzed a movement toward “TRIPS plus” protection.¹³³

Because neither the WTO nor GATT 1994 (the predecessor to the WTO) dealt with the issues of foreign investment rules, nations were left to develop their own policies through BITs and IIAs.¹³⁴ BITs guarantee certain standards of protection and treatment—such as non-Expropriation, MFN, National Treatment, and Fair and Equitable Treatment (“FET”—of which a host country must afford to foreign investors).¹³⁵ In addition to these standards, most BITs also provide for a dispute settlement mechanism.¹³⁶ In such BITs, foreign investors have access to international tribunals when they feel they have not been fairly treated or adequately protected.¹³⁷

Cuba is a contracting party to over forty BITs and other IIAs.¹³⁸ While not the easiest or cheapest mechanism for protection, these treaties act as a back-pocket option for small business owners that are seeking to enforce their rights but have been turned away by American courts.

V. Conclusions and A Proposal for Change

While Cuban trademark law remains wildly uncertain, it is important to remember how far it has come, that it is going in the right direction, and that a more stable future awaits. From an American perspective, small businesses

¹³⁰ Chaisse & Nagaraj, *supra* note 124, at 247; Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment—How will the New EU Competence on FDI Affect the Emerging Global Regime*, 15 J. INT’L ECON. L. 51 (2012).

¹³¹ Genevieve Fox, Note, *A Future for International Investment? Modifying BITs to Drive Economic Development*, 46 GEO. J. INT’L L. 229, 229 (2014).

¹³² Chaisse & Nagaraj, *supra* note 124, at 248.

¹³³ *Id.*

¹³⁴ Michael Mortimore & Leonardo Stanley, *Justice Denied: Dispute Settlement in Latin America’s Trade and Investment Agreements*, 4-8 (Working Group on Development and Environment in the Americas Discussion Paper No. 27, 2009), https://ase.tufts.edu/gdae/Pubs/rp/DP27Mortimore_StanleyOct09.pdf.

¹³⁵ Santiago Montt, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL LAW IN THE BIT GENERATION, 302-304 (Hart Publishing 2009).

¹³⁶ Mortimore & Stanley, *supra* note 134, at 18.

¹³⁷ *Id.* at 20.

¹³⁸ *Bilateral Investment Treaties (BITs): Cuba*, INVESTMENT POLICY HUB, UNITED NATIONS UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/52#iiaInnerMenu>.

El Bloqueo and Small Business

should be mindful of the current events, as changes are coming more rapidly in the long saga that is the U.S.-Cuban relationship. With a presidential election around the corner, small business owners should vote for the candidate that he or she feels will promote an open and close relationship with our Cuban neighbors. Even more, those small businesses wishing to expand into the untapped Cuban market should urge for broad negotiations, which will foster positive political relationships and growing economies. From a Cuban perspective, businesses should be savvy in preparing for the wave of competition and influx of consumerism, as well as prepare their trademark portfolios to register in the United States when full-protection is guaranteed.