

The EU to the Rescue of the Cuban Economy? the Political Dialogue and Cooperation Agreement (PDCA) and the State of Cuba-EU Economic Relations

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Abstract: The Political Dialogue and Cooperation Agreement (PDCA) between the E.U. and Cuba was an important change in the way that the E.U. sought to engage with developing states. PDCA remains an important milestone for European foreign policy. It has become the template for European engagement with states and a means of projecting European values (either in the form of capacity building or continuous dialogue through trade and structural elements) in trade. Its importance was underlined by the late 2020 negotiations of a similar pact, a “Comprehensive Agreement on Investment,” with the People’s Republic of China. It makes sense, then, to consider the form and substance of Cuba-EU trade through the lens of the PDCA, and that is the object of this paper. The paper is divided into two parts, the first examines the PDCA in detail. In that context it seeks to extract the core bargain the Europe has been willing to strike as the foundation of its trade relationships with states the conduct of which are incompatible with European values and its human rights law. Part 3 then examines the state of trade relations through 2020, and in the shadow of the global pandemic. What appears here is that despite the transformation of driving trade principles, the state of actual trade and investment remains little affected. But that is not what PDCA appears to have bought the E.U. Rather, PDCA is an important element in the project of international normative legalization, that is in the construction of a distinct “common position” grounded in the narratives of the foundational normative principles of liberal democracy, markets and human rights.

1. Introduction.

Since the 1960s, European states have continued to do business with Cuba, despite an American embargo that sometimes sought to substantially affect those relationships. European-Cuba economic activity sometimes served as that marginal additional source of trade that avoided disaster, especially when Cuba experienced substantial financial and political challenges. The election of Donald Trump in 2016, and the partial reversal of U.S. opening to Cuba that was then put into effect again produced a divergence in policy between the U.S. and its European friends. This became apparent when, in 2017, even as the United States retreated from direct economic connections with Cuba, the European Union sought to step into the space left by the American action.

That strategic initiative, the Political Dialogue and Cooperation Agreement (PDCA)¹ took final form accelerated in the wake of the prior U.S. Administration's policy of opening up.

Negotiations for the Political Dialogue and Cooperation Agreement (PDCA) were launched in April 2014 and concluded on 11 March 2016. After the approval by the Council of the European Union, it was officially signed on 12 December 2016. In parallel, the agreement was submitted to the EU Member States' national parliaments and the Cuban National Assembly for ratification. The European Parliament gave its consent on 5 July 2017. Most parts of the agreement started to be provisionally applied as of 1 November 2017.²

The Europeans viewed this as the marker of a new and more intensely profitable relationship with the Cuban state--though one not without its costs to Cuba. As Ms Federica Mogherini, at the time the EU High Representative for Foreign Affairs and Security Policy put it: "También me siento alentada por el inicio del diálogo sobre derechos humanos en 2015 y su segunda sesión en La Habana el pasado mes de junio. Este foro ya ha demostrado su utilidad para profundizar el diálogo y el entendimiento en esta área sensible, con miras a desarrollar la cooperación y la consecución de los objetivos de nuestro partenariado reforzado."³

¹ Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, 2016/0297 (NLE) COLAC 76 CFSP/PESC 753, 12504/16 Brussels 25 November 2016; available [https://data.consilium.europa.eu/doc/document/ST-12504-2016-INIT/en/pdf].

² Delegation of the European Union to Cuba, "Cuba and the EU," EEAS Homepage (27 October 2017); available [https://eeas.europa.eu/delegations/cuba_en/8106/Cuba%20and%20the%20EU; see also Press Release: "MEPs Back First Ever EU-Cuba Deal," European Parliament News (5 July 2017); available [https://www.europarl.europa.eu/news/en/press-room/20170629IPR78654/meps-back-first-ever-eu-cuba-deal]; "Initialing Ceremony of the Political Dialogue and Cooperation Agreement between Cuba and the European Union," EEAS Website (3 March 2016); available [https://eeas.europa.eu/headquarters/headquarters-homepage/3719_en] ("Joint Declaration at the Initialing Ceremony of the Political Dialogue and Cooperation Agreement between Cuba and the European Union").

³ Intervención de la Alta Representante / Vice-Presidente Federica Mogherini en el acto de firma del Acuerdo de Diálogo Político y de Cooperación entre la UE y Cuba," Delegación de la Unión Europea en Cuba (12 December 2016); available [https://eeas.europa.eu/delegations/cuba/16936/intervencion-de-la-alta-representante-vice-presidente-federica-mogherini-en-el-acto-de-firma_es].

PDCA is the successor policy to the EU's Common Position on Cuba which was repealed 12 December 2016.⁴ The older policy was focused on the use of trade and relations as a means of promoting “respect for human rights and real progress toward pluralist democracy.”⁵ It sought to use trade as leverage for political and economic reform to the liking of the E.U.⁶ And it centered the evaluation of the EU-Cuba relationship on an evaluation of Cuban progress toward democracy.⁷ As is traditional, the EU-Cuba relationship was to an important extent influenced by Spain,⁸ and Spain remains a significant long term investor in the island, though by no means the only one, within Europe.⁹

The finalization of the PDCA was capped off by an official visit to Cuba of the E.U. High Representative for Foreign Affairs

Ms. Mogherini noted: “Cuando nosotros, en Europa, hablamos de un vínculo transatlántico, se suele pensar en los Estados Unidos. Pero hay más. Nuestro vínculo trasatlántico con el Caribe, con América Latina, es tan fuerte como nuestro lazo con los Estados Unidos. Para una italiana como yo, esto es evidente. El acuerdo nos ayudará a aprovechar plenamente el potencial de nuestra amistad. Se crea un marco para el diálogo político aún más fuerte, para nuevos diálogos de políticas sobre sectores específicos y para ampliar y concretizar la cooperación en una gran variedad de temas. El Acuerdo también nos ayudará a cooperar aún más estrechamente para encontrar soluciones conjuntas a los desafíos globales, tales como la migración, la lucha contra el terrorismo, el cambio climático” (Ibid.).

⁴ Proposal of the High Representative of the Union for Foreign Affairs and Security Policy to the Council for a Council Decision repealing Common Position 697/96 on Cuba COLAC 77; RELEX 783; CFSP/PESC 754; 12505/16 Brussels (25 September 2016); available [https://data.consilium.europa.eu/doc/document/ST-12505-2016-INIT/en/pdf].

⁵ Council of the European Union, Common Position (96/697/CFSP) No. L 322/1 (2 December 1996); available [https://op.europa.eu/en/publication-detail/-/publication/8804281d-389f-4256-9850-7575ba769ec2/language-en], ¶3(a).

⁶ Ibid., ¶¶3(e) and (f).

⁷ Ibid., ¶ 4.

⁸ On the development of the economic relationship during the Special Period, see, e.g., Eric N. Baklanoff, *Circumventing the Embargo: The Strategic Context of Spain's Economic Relations with Cuba, Cuba in Transition*, ASCE, 2001, p. 302, available [http://www.ascecuba.org/publications/proceedings/volume11/pdfs/baklanoff.pdf].

⁹ Daniel P. Erikson, “Europe's Cuba Problem: The Limits of Constructive Engagement,” *International Institute for Democracy and Electoral Assistance* (Stockholm, 2009).

and Security Policy. The EU's Press Release announced the visit this way:

The High Representative/Vice President Federica Mogherini will travel to Cuba on 3-4 January, reconfirming the strong EU-Cuban relationship. During her visit, she will meet with government representatives, with a view to an ambitious and swift joint implementation of the Political Dialogue and Cooperation Agreement (PDCA) between the EU and Cuba. Together with Cuban Foreign Minister Bruno Rodríguez Parrilla she will also prepare for the first EU-Cuba Joint Council meeting at ministerial level within the framework of the PDCA.¹⁰

The object was not only to negotiate implementation of the PDCA, but also to celebrate it as a model of E.U. relations with states whose political and economic systems were in some ways incompatible with those of Europe. Critically important, in that sense, and the core component of system bridging at the heart of the PDCA, was the structuring of the Joint Council established by PDCA to oversee the fulfillment of the agreement (PDCA art. 81) and the Joint Committee charged with the actual implementation of the PDCA (Art. 82). Some factions of the Cuban independent and dissident communities were highly critical of this endeavor generally and the visit more specifically.¹¹

The PDCA remains an important milestone for European foreign policy. It has become the template for European engagement with states and a means of projecting European values (either in the form of capacity building or continuous dialogue through trade and structural elements). Its importance was underlined by the late 2020 negotiations of a similar pact, a "Comprehensive Agreement on Investment," with the People's Republic of China.¹² The latter was designed, in imitation of the PDCA, to force the hand of the United States and drive relations between the liberal democratic and socialist

¹⁰ Press Release: HR/VP Federica Mogherini on official visit in Cuba," EEAS (Brussels 29 December 2017); available [https://eeas.europa.eu/headquarters/headquarters-homepage/37943/hrvp-federica-mogherini-official-visit-cuba_en].

¹¹ Discussed in Larry Catá Backer, "Democracy Part 41: The E.U. in Cuba: Reflections From the Cuban Independent Sector," *Law at the End of the Day* (30 January 2018); available [https://lcbackerblog.blogspot.com/2018/01/democracy-part-41-eu-in-cuba.html].

¹² Ebony Bowden, "China and EU advance on trade deal in spite of human rights abuses," *The New York Post* (30 December 2020); available [https://nypost.com/2020/12/30/china-and-eu-advance-on-trade-deal-in-spite-of-human-rights-abuses/].

camps, during a moment between American Administrations.¹³ And, indeed, the value of these agreements as a means of resisting American moves against trading partners has proven useful.¹⁴

It makes sense, then, to consider the form and substance of Cuba-EU trade through the lens of the PDCA, and that is the object of this paper. The paper is divided into two parts, the first examines the PDCA in detail. In that context it seeks to extract the core bargain the Europe has been willing to strike as the foundation of its trade relationships with states the conduct of which are incompatible with European values and its human rights law. Most interesting is the possibility that in return for stronger ties the EU might have effectively waived the application of its strong business and human rights measures to EU Cuba bilateral relations. The E.U. appears to be willing to pay for its influence--from supporting the realization of Cuba's sector driven 2030 Economic Plan, to the E.U.'s help in avoiding or weakening the effects of the Cuban Embargo. In effect, a discursive analysis of the PDCA suggest that it is essentially a political document, rather than one the principal objective of which is to rationalize trade. It is also one that seeks to create a comprehensive normative framework within which the political objectives, expressed through trade, might be structured.

Part 3 then examines the state of trade relations through 2020, and in the shadow of the global pandemic. What appears here is that despite the transformation of driving trade principles, the state of actual trade and investment remains little affected. That, in part, may be driven by the realities that Cuba has little to offer other than its strategic place in the world order. And yet the E.U. may well have purchased something of value through PDCE that was unavailable through the mechanics of the more overtly political 1996 Common Position.¹⁵ PDCA is an important element in the project of international normative legalization, that is in the construction of a distinct "common position" grounded in the narratives of the foundational normative principles of liberal democracy, markets and human rights. To the extent that the EU may be able to purchase it--

¹³ Evelyn Cheng, "China scores an EU investment deal before Biden takes office — and it wants to do more," CNBC (31 December 2020); available [<https://www.cnbc.com/2020/12/31/china-eu-trade-deal-beijing-wants-more-agreements-after-europe-deal.html>]

¹⁴ Larry Catá Backer, "Feeding a 'Spiral of Legal Actions'--The EU and Canada Respond to the New US Initiatives on Cuba and the Caribbean," *Law at the End of the Day* (20 April 2019); available [<https://lcbackerblog.blogspot.com/2019/04/feedins-spiral-of-legal-actions-eu-and.html>].

¹⁵ Discussed *infra* Part 2.

through aid and economic activity tie in, it can potentially more effectively project ideological conformity through dialogue, capacity building, and conformity to its regulatory model. The template, then, provides insight into the way that the EU approaches its relations with China,¹⁶ and suggests that challenges as well as the objectives of the European form of intertwining of political and economic relations

2. The Political Dialogue and Cooperation Agreement (PDCA)

The PDCA emerged within a context of international trade and politics that had long been in the making. It represented a fortuitous convergence of the external relations templates of Cuba and the EU at a moment when both were relatively flexible and both saw an opportunity for movement as the U.S. policy moved from engagement to confrontation with the start of the Trump Administration.

Cuba's external relations template was rigid but also provided some room for flexibility at the margins. Since the 1959 Revolution, Cuba has created a pattern of economic and political relations that has changed very little. First it is driven by opposition to and from the United States. That relationship, in turn, is operationally dysfunctional based on mutual antipathy and substantial integration in trade, migration and the like. Second Cuban external relations are based on a strong (though sometimes contentious) relation with a principal patron, most importantly first the Soviet Union (strong patron) and then Venezuela (patron-colleague-partner). Third they include a secondary group of important partners, e.g., a long-standing relationship with a moving target of what can best be called an anti-US Bloc (currently including Iran, North Korea, China, and Russia) and a regional integration bloc, which has included CARICOM and ALBA, and other sympathetic states. Lastly, and for our purposes most importantly, it includes those states that serve a mediating role. These consist principally of the European Union (and first among these Spain, then Italy, France, Germany and the Netherlands) and Vietnam.

Europe has occupied a space between Cuba and the United States almost from the start of the current political system in

¹⁶ See, e.g., Silvia Amaro, "China's investment deal with the EU has raised 3 big concerns in Europe," CNBC (6 January 2021); available [<https://www.cnbc.com/2021/01/06/china-eu-trade-deal-what-it-is-and-why-it-might-fail.html>].

Cuba. At times, the Europeans has worked against US interests,¹⁷ even after the Trump Administration.¹⁸ European policy is driven by Spain, but other states also pursue their own objectives. It tends to be grounded in political calculation: reflecting the state of EU-US relations and European engagement policies generally with developing states. It also reflects the substantial changes in European approaches to trade and international relations, which have been moving from state-based, to multilateral to European values-based internationalism tied to the system of public international institutions. Its ideologies have moved decisively from the transition-oriented EU Common Position on Cuba of 1996 to the 2017 Political Dialogue and Cooperation Agreement (PDCA). Most importantly, the PDCA may serve as a new template for European economic relations, for example in the 2020 agreement with China

PDCA entered into provisional application on 1 November 2017. This landmark agreement – the first ever between the EU and Cuba – constitutes the new legal framework for EU-Cuba relations. It foresees an enhanced political dialogue, improved bilateral cooperation and the development of joint action in multilateral fora.¹⁹ It marked a strong break with the EU's Common Position,²⁰ as well as with the fundamental position of the United States. The US position was to view economic relations with Cuba as a function of the overall objective to contribute to the transition of Cuban political institutions from Caribbean-style Marxist-Leninism to a markets-based and more liberal democratic friendly economic-political model. "The objective of the European Union in its relations with Cuba is to encourage a process of transition to pluralist democracy and respect for human rights and fundamental freedoms , as well as a sustainable recovery and improvement in the living standards of the Cuban people."²¹

The impact of that change in basic focus cannot be underestimated. It was meant at once to align EU-Cuban economic interests against those of the United States, to further declare European independence from dominance by or accommodation to US

¹⁷ See, Daniel P. Erikson, "Europe's Cuba Problem: The Limits of Constructive Engagement," *supra*; Bruce Love, "Companies caught in EU-US sanctions crossfire," *Financial Times* (29 January 2020); available [<https://www.ft.com/content/97a75318-16a8-11ea-b869-0971bfffac109>].

¹⁸ This was reported in the Chinese press, see "EU agrees to mediate in Cuba-U.S. relations," *Xinhuanet* (1 April 2021); available [http://www.xinhuanet.com/english/northamerica/2021-04/02/c_139854305.htm].

¹⁹ See Fact Sheet, "EU-Cuba Relations" (Brussels, EEAS, 2019); available [https://eeas.europa.eu/sites/default/files/cuba_factsheet_revised.pdf].

²⁰ See, Council of the European Union, Common Position (96/697/CFSP) No. L 322/1 (2 December 1996), *supra*.

²¹ PDCA, *supra* note 1, ¶1.

Cuban policies, and on a more personal level it marked the antipathy of European elites to the new Trump administration, its rhetoric, methods, and objectives. More importantly, perhaps, the rejection of the fundamental driving principles of the 1996 Common Position could be attributed to three principal factors:

- First, the basis of multilateralism had changed dramatically since 1996. European states now championed the notion of international law-norm supremacy over the more narrow Soviet era objectives of transition to liberal democratic market-oriented political regimes. That movement then refocused European efforts from transition to conformity to international law and principles.
- Second, the Europeans sought to control or at least drive the interpretation and implementation of these international principles, through dialogue and by the development of key partnerships with elite civil society and the press. In this way they might control the narrative of international law and norms in ways that might prove more effective than through traditional methods of state to state relations.
- Lastly, European states may have assumed that soft power methods—grants, engagements with Cuban civil society, and other measures—would have more effect on the embedding of Cuba within the emerging structures of international norms, and on its economic (as well as political) practices. This had been the view of the Obama administration to some extent, but ran opposite from the policy and methods of the US after 2016. In this last respect, the PDCA carried over and augmented the objective of the 1996 EU Common Position “to carry out focused economic cooperation actions in support of the economic opening being implemented.”²²

The PDCA binds the EU (and since Brexit excluding the U.K.). The General Principles²³ reaffirm general commitments to a set of ambiguous concepts: multilateralism, respect for international law and the principles of the U.N. Charter, the principles of equality, reciprocity and mutual respect, and the promotion of sustainable development.²⁴ Of course these are likely understood in almost diametrically different ways by the EU and Cuba, but they provide sufficient cover for moving forward along pragmatic lines without losing face. That fig leaf is made clear by

²² Council of the European Union, Common Position (96/697/CFSP) No. L 322/1 (2 December 1996), supra., ¶3(f).

²³ PDCA, supra note 1, Art 1.

²⁴ Ibid., Art. 1 ¶¶1-2, 4.

the agreement that implementation of PDCA would be undertaken "in accordance with their respective constitutional principles, legal frameworks, legislation, norms and regulations, as well as the applicable international instruments to which they are parties."²⁵

Complicating these initial principles are declarations of "respect for and the promotion of democratic principles, respect for all human rights and fundamental freedoms laid down in the Universal Declaration of Human Rights and in the core international human-rights instruments and their optional protocols which are applicable to the Parties, and respect for the rule of law."²⁶ But this is limited both by the provisions of ¶¶ 1-2 as well as by the provisions of ¶ 6 in which both sides "recognise that all peoples have the right to freely determine their political system and to freely pursue their economic, social and cultural development."²⁷ Taken together these Principles balance nicely the political needs of the EU and Cuba in a way that recognizes both but permits each to ignore the contradictions of their respective positions applied to the condition of the other.

Article 2 specifies the objectives of the PDCA. These are both straightforward and general. They are meant to help Cuba update its economy and society²⁸ through dialogue and cooperation,²⁹ promote mutual trade,³⁰ and achieve the 2030 Agenda for Sustainable Development.³¹ Most interesting is the objective of enhancing regional trade in the Caribbean and Latin America.³² The core focus is on "a result-oriented dialogue on the basis of international law"³³ within international fora "with the aim of strengthening human rights and democracy, achieving sustainable development and ending discrimination in all its aspects."³⁴

To those ends, Part II of PDCA speaks to the contours of political dialogue. These touch on the usual: promoting exchanges, enabling broad exchanges of views, focusing exchanges on the UN system, and promoting strategic partnerships between the EU and the Community of Latin American and Caribbean States (CELAC) created in 2010.³⁵

²⁵ Ibid., Art. 1 ¶ 3.

²⁶ Ibid., Art. 1 ¶5.

²⁷ Ibid., Art. 1, ¶ 6.

²⁸ Ibid., Art. 2 ¶ (b).

²⁹ Ibid., Art. 2 ¶¶ (a), (g).

³⁰ Ibid. Art. 2 ¶ (e).

³¹ Ibid., Art. 2 ¶ (d).

³² Ibid. Art. 2 ¶ (f).

³³ PDCA, supra, note 1 ¶2 (c).

³⁴ Ibid.

³⁵ Ibid., Art. 3. On CELAC see, Ximena de la Barra & R. A. Dello Buono, "From ALBA to CELAC toward 'another integration'?" *NACLA Report on the Americas*

The latter is particularly useful to Cuba, which has had long term ambitions to lead the Caribbean regional trade and political framework.³⁶ All of this cooperation is to be undertaken at the state-to-state level; there is no people-to-people focus here.³⁷ That approach serves as the heart of an open-ended and vague provision respecting human rights. Article 5 provides in its entirety:

Within the framework of the overall political dialogue, the Parties agree to establish a human rights dialogue, with a view to enhancing practical cooperation between the Parties at both multilateral and bilateral level. The agenda for each dialogue session shall be agreed by the parties, reflect their respective interests and take care to address in a balanced fashion civil and political rights and economic, social and cultural rights.³⁸

The key is in the last sentence. The Cubans will emphasize economic, social and cultural rights while the Europeans will push civil and political rights. To some extent this serves U.S. interest as well--to the extent that the EU can be used as a proxy for pushing for political reform acceptable to the Americans. The Cubans, anticipating this, will likely negotiate hard.

In addition, PDCA covers illicit trade in small arms and light weapons and other conventional weapons (Art. 6);³⁹ disarmament and nonproliferation of weapons of mass destruction (Art. 7); anti-terrorism measures (Art. 8); international criminality (Art. 9); and unilateral coercive measures (Art. 10). Additional areas of cooperation include combating trafficking in persons and migrant smuggling (Art. 11); trade in illicit drugs (Art. 12); and combating race discrimination, xenophobia and related intolerance (Art. 13). With respect to the latter the focus is on exchanging best practices. Lastly Article 14 focuses on sustainable development, mostly through the exchange of views.

45(2):32-36 (2012); Denis Kennedy and Brian Beaton, "Two Steps Forward? Assessing Latin American Regionalism Through CELAC," *Latin American Policy* 7(1):52-79 (2016).

³⁶ For a discussion, see, Larry Catá Backer and Augusto Molina, "Cuba and the Construction Of Alternative Global Trade Systems: ALBA and Free Trade in the Americas," *University of Pennsylvania Journal of International Law* 31(3):671 (2010).

³⁷ PDCA, *supra* note 1, Art. 4.

³⁸ *Ibid.*, Art. 5

³⁹ *Ibid.*, Art. 6. The focus on international dialogue and cooperation, and the domestication of international norms runs through these provisions. See e.g., Art. 6 ¶ 5: "They agree to establish a regular political dialogue that shall accompany and consolidate this undertaking, taking into account the nature, scope and magnitude of illicit trade in arms for each Party."

Article 10, of course, is the most interesting, to the extent that the specter of the U.S. embargo hangs over it. But much more important is the potential effect of Article 10 on the ability of the EU to export its increasingly effective extraterritorial regime for the promotion of human rights.⁴⁰ Yet much of this amounts to very little at least at the inception of PDCA. First, the provision commits the parties solely to an “exchange of views.” Second, it is not clear how this provision would connect with the more substantive and mandatory provisions of PDCA, or otherwise affect a party’s application of its obligations. On the EU side, for example, it is important to think through *whether this provision is meant to prohibit the application of new measures--the Modern Slavery Act and the French Supply Chain Due Diligence Law in relations between the EU and Cuba, wherever they might manifest.*⁴¹ The EU will resist that reading by emphasizing the language “that are contrary to international law and commonly accepted rules of international trade.”⁴² The Cubans, on the other hand, would emphasize the language: “which are used as a means of political and economic pressure against States and affect the sovereignty of other States.”⁴³ How this will be decided remains to be seen, but for the moment it is clear that both sides believe they have protected their respective principles and thus created a contradiction that will manifest itself the first time a human rights related charge is brought against enterprises operating in or through Cuba or its SOEs. Expect to see this potentially through the OECD Guidelines for Multinational Enterprise NCP mechanisms.⁴⁴

⁴⁰ Article 10 ¶ 1 provides: “The Parties shall exchange views on coercive measures of unilateral character with extraterritorial effect that are contrary to international law and commonly accepted rules of international trade, by which they are both affected and which are used as a means of political and economic pressure against States and affect the sovereignty of other States.”

⁴¹ For a discussion of their relevance see, e.g., Sandra Cossart, Jérôme Chaplier, and Tiphaine Beau De Lomenie, “The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All,” *Business and Human Rights Journal* 2(2):317-323 (2017); Justine Nolan, “Global supply chains and human rights: spotlight on forced labour and modern slavery practices,” *Australian Journal of Human Rights* 24,(1):44-69 (2018).

⁴² PDCA, supra note 1, Art. 10 ¶ 1.

⁴³ *Ibid.*

⁴⁴ “Governments adhering to the Guidelines are required to set up a National Contact Point (NCP) whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that may arise from the alleged non-observance of the guidelines in specific instances.” OECD, National Contact Points for the OECD Guidelines for Multinational Enterprises; available [https://www.oecd.org/investment/mne/ncps.htm] accessed 5 May 2021.

Part III gets to the root of things: the provisions on cooperation and sector-policy dialogue. These touch on the core areas of development set out in the Cuban 2030 Plan.⁴⁵ In particular, Part III, Title VI deals with sector-specific EU-Cuba economic development ties to the focal points of the Cuban 2030 Economic Plan.⁴⁶ These touch on agriculture (Art. 50); tourism (Art. 51); science, technology and innovation (Art. 52); technology transfer (Art. 53); energy production (Art. 54); and transport (Art. 55).

However, Title I on cooperation sectors follows the language of EU agreements:⁴⁷ "(a) sustainable development, (b) human rights and good governance, (c) environmental sustainability, (d) disaster prevention, (e) gender perspective, (f) persons in a situation of vulnerability, (g) building national capacities, and (h) knowledge management." The objectives⁴⁸ emphasize Cuban economic development goals within the sustainable development framework. The principles⁴⁹ focus on cooperation through which each side makes the best deal it can (echoing, ironically enough, the recasting of trade policy by the Trump Administration before 2021).⁵⁰ Sector policy dialogue (Art. 17) is centered on information sharing, the harmonization of standards, and capacity building through best practices sharing. Implementation of dialogue (Art. 18, Cooperation modalities and procedures) is meant to be enhanced by EU funding,⁵¹ and by coordination that "furthers and complements Cuba's development strategies and policies."⁵²

⁴⁵ See, Larry Catá Backer, "The Algorithms of Ideology in Economic Planning: A Critical Look at Cuba's National Economic and Social Development Plan 2030, with a Focus on the Pharma Sector," *Cuba in Transition: Proceedings of the Association for the Study of the Cuban Economy* 27:115-136 (2017) available [https://www.ascecuba.org/asce_proceedings/algorithms-ideology-economic-planning-critical-look-cubas-national-economic-social-development-plan-2030/]. Discussed generally in Larry Catá Backer, "Central Planning Versus Markets Marxism: Their Differences and Consequences for the International Ordering of State, Law, Politics, and Economy," *Connecticut Journal of International Law* 32(1):1-47 (2017).

⁴⁶ Partido Comunista de Cuba, *Conceptualización del modelo económico y social Cubano de desarrollo socialista y plan nacional de desarrollo económico y social 2030* (2017); available [http://www.granma.cu/file/pdf/gaceta/Copia%20para%20el%20Sitio%20Web.pdf].

⁴⁷ PDCA, supra note 1, Art. 20.

⁴⁸ Ibid., Art. 15.

⁴⁹ Ibid., Art. 16.

⁵⁰ See, Larry Catá Backer, "Let's Make a Deal" as Economic Policy," *Jurist* (29 December 2016); available [https://www.jurist.org/commentary/2016/12/Backer-lets-make-a-deal/].

⁵¹ PDCA, supra note 1, Art. 18 ¶1((a) ("technical and financial assistance").

⁵² Ibid., Art. 18 ¶1((b).

Also interesting is the focus on the EU's help in securing financing for Cuban economic ambitions.⁵³ Cuba for its part agrees not to use EU cooperation as a means of enhancing its revenues and not impede travel by officials (Art. 18 ¶5). Article 19 then identifies relevant actors covered by the cooperation arrangements. In addition to the usual international public actors, Art. 19 ¶ (e) also identifies "civil society, including scientific, technical, cultural, artistic, sports, friendship and solidarity associations, social organisations, trade unions and cooperatives." Again, the provision is vague enough to give Cuba the authority to ban civil society groups that it deems politically threatening, while the EU might take the position that all such organizations come within the umbrella of this provision. Expect some friction here. Some clarity, however, is attempted in Article 36:

The Parties recognise the potential contribution of civil society, including academia, think tanks and media, to the fulfilment of the objectives of this Agreement. They agree to promote actions in support of greater civil-society participation in the formulation and implementation of relevant development and sectoral cooperation activities, including through capacity-building.⁵⁴

It would be expected that the Cubans might read this narrowly (academics, think tanks and credentialed media). Expect some friction as well in the context of the anti-fraud and corruption provisions of Article 21. That friction, of course, will be expressed dialogically, and it is not clear that it will be backed up with changes in trade or aid policy.

Part III, Title II deals specifically with the EU's great concerns--democracy, human rights and good governance. Provisions in Title II give the EU some leeway in tying economic benefits to political reform, but the potential hidden in those provisions may require substantial work for their realization--at least as the EU might see things. Article 22 touches on human rights. Its first paragraph nicely evidences the mishmash resulting from an attempt to push together two very different views of human rights

Mindful that the protection and promotion of human rights and fundamental freedoms is the first responsibility of governments, bearing in mind the significance of national and regional

⁵³ Ibid., Art. 18 ¶1((g) ("innovative cooperation and financing modalities and instruments in order to improve the effectiveness of cooperation").

⁵⁴ Ibid., Art. 36.

particularities and of various historical, cultural and religious backgrounds and acknowledging that it is their duty to protect all human rights and fundamental freedoms regardless of their political, economic and cultural systems, the Parties agree to cooperate in the area of democracy and human rights.⁵⁵

Note the tensions in the provisions, the balancing of distinct approaches that will be difficult to untangle and that provides neither side with an advantage. The likely result will be little beyond the usual rhetoric and claims to victory by both sides as their respective enterprises seek to make money. Article 23 (good governance) and Article 25 (modernization of public administration) provide the Cuban side with necessary capacity building that aligns with the focus of the Cuban *Lineamientos* on the development of governance in furtherance of their economic model.⁵⁶ It is not clear in what direction Article 24 (rule of law) will develop. It is likely that this will be used to ensure a measure of protection of EU investors operating in Cuba through agreements negotiated under the umbrella of PDCA, something to which Article 26 (prevention and resolution of conflicts) is also devoted.

Part III, Title II also focuses on issues of justice, citizen security and migration. These include issues around the protection of personal data (Art. 27), an issue quite dear to the EU and less so to the Cubans. It also touches on trade in illicit drugs (Art. 28); money laundering (Art. 29); organized crime (Art. 30); anti-corruption measures (Art. 31); illicit trade in small arms (Art. 32); anti-terrorism (Art. 33); migration (Art. 34); and consular protection (Art. 35).

Part III, Title IV touches on social development and social cohesion. This furthers basic Cuban policy elaborated in the 7th Cuban Communist Party Congress' *Conceptualización del Modelo Económico y Social Cubano de Desarrollo Socialista* (2017).⁵⁷

⁵⁵ *Ibid.*, Art. 22.

⁵⁶ See Partido Comunista Cubano, *Lineamientos de la política económica y social del Partido y la Revolución para el período 2016-2021*; available [<http://www.granma.cu/file/pdf/gaceta/Lineamientos%202016-2021%20Versi%C3%B3n%20Final.pdf>]. See also, Jessica González, "Lineamientos de la Política Económica y Social del Partido y la Revolución: An Overview of Cuban Domestic Reform," Law School International Immersion Program Papers, No. 6 (2015); available [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1005&context=international_immersion_program_papers].

⁵⁷ See, Partido Comunista de Cuba, *Conceptualización del modelo económico y social Cubano de desarrollo socialista y plan nacional de desarrollo económico*

Article 37 essentially summarizes the Cuban position on the integration of socialist economic and social development from its 7th PCC principles. Article 38 may be more problematic for Cuba, aligning cooperation around ILO standards. Article 39 speaks to educational cooperation, Article 40 to public health, and Article 41, tersely, with consumer protection. There is a wide scope of agreement possible with respect to a number of related areas of cooperation: culture and heritage (Art. 42); protection of vulnerable persons (Art. 43); a focus on gender (Art. 44); interaction of youth (Art. 45); and local community development (Art. 46 with respect to which Cuba has a long history especially with EU-based NGOs).

Part III, Title V focuses on environment, disaster risk management, and climate change. These are areas in which cooperation is likely to produce a substantial amount of positive effects. The principal focus includes conservation and sustainable development, protection of fresh and marine waters, and climate change issues generally.⁵⁸ Disaster risk management of critical importance to Cuba, looks to "common commitment to improving prevention, mitigation, preparedness, response and recovery measures in order to increase the resilience of their societies and infrastructure, and to cooperate, where appropriate, at bilateral and multilateral political level to improve disaster-risk-management outcomes."⁵⁹ Water sanitation⁶⁰ has also been a concern of Cuban planning as its infrastructure, especially in the older portions of its major cities, has been deteriorating. This also aligns with Cuban central planning goals for 2030.

Beyond its focus on the sectoral development of the Cuban economy that aligns with the Cuban 2030 Economic and Social Plan, Part III, Title VI touches on modernization of the economic and social model. Technology transfer, of course, is high on the list of priorities, though here the EU was expertly cagey. The focus is not only on mutual exchanges but also on capacity building through aid to educational institutions.⁶¹ As well, this modernization is narrowly tailored to avoid the complications of political repercussions or back

y social 2030 (2017), supra. Core concepts discussed in Backer, "Central Planning versus Markets Marxism," supra.

⁵⁸ PDCA, supra note 1, Art. 47 ¶ 4. There is a link as well between development and sustainability. "The Parties, mindful of the impact of this Agreement, shall pay due attention to the relationship between development and the environment." Ibid., Art. 47 ¶2.

⁵⁹ Ibid., Art. 48 ¶1.

⁶⁰ Ibid., Art. 49 speaking to issues of infrastructure, modernization, water quality, and mass education.

⁶¹ Ibid., Art. 53.

door regime change strategies. Art. 56 ¶ 1 focuses on strengthening Cuban public administration and the development of Cuban cooperatives and enterprises. This is somewhat sensitive in light of recent efforts by the Cuban state to stop licensing cooperatives and to better control the private sector.⁶² Article 56 makes the "helpful but not threatening" approach explicit.

The Parties agree to promote and encourage cooperation between institutions, including sector-based institutions, that promote instruments to support SMEs, particularly those whose efforts are aimed at improving competitiveness, technological innovation, integration in value chains, access to credit and training as well as strengthening the institutional capacity and institutional framework. They also agree to promote contacts between companies from both Parties to support their insertion into international markets, investments and technology transfer.⁶³

Lastly issues of good governance in taxation (Art. 58) and statistics and data production (Art. 57) are covered. The latter is particularly important as regulation moves from command to big data management systems. It encourages "the exchange of scientists; the development of improved and consistent methods of data collection, disaggregation, analysis and interpretation; and the organisation of seminars, working groups or programmes complementing statistical capacities."⁶⁴

Part IV of Title VII then turns to trade and trade cooperation. Beyond regional cooperation, the intention was to open the process and engagement to the non-governmental sector.⁶⁵ Article 60's objectives include the usual. The text points to the unequal element in the cooperation deal that the PDCA represents. Cuba has a need that the EU does not -- to be integrated into the world economy.⁶⁶ That means not merely integration into economic globalization, but also avoidance of the U.S. trade sanctions in place since the 1960s. That is a tall order,

⁶² Discussed in Larry Catá Backer, *Under Cover of the Sonic Weapons Attack: The Cuban Private Sector as Collateral Damage as Cuba Retreats Toward Central Planning*, *Law at the End of the Day* (24 December 2017); available [<https://lcbackerblog.blogspot.com/2017/12/under-cover-of-sonic-weapons-attack.html>].

⁶³ PDCA, *supra* note 1, Art. 56 ¶3.

⁶⁴ *Ibid.*, Art. 57 ¶2.

⁶⁵ *Ibid.*, Art. 59 ¶ 2 ("Cooperation shall reinforce the involvement of all sectors, including civil society, in the regional cooperation and integration process, in accordance with the conditions defined by the Parties, and include support for consultation mechanisms and awareness campaigns.").

⁶⁶ *Ibid.*, Art. 60 ¶ (b).

especially as the U.S. moves from global embargoes to precision blacklists. This is especially likely with expanded use by the U.S. of Global Magnitsky Act sanctions.⁶⁷ The EU has also adopted this approach.⁶⁸ As important, Europe is seen as an important target zone for the exploitation of a key area of sectoral development in Cuba under its 2030 Plan -- pharmaceuticals.⁶⁹

Part IV, Title VII focuses on trade and the outlines of bilateral investment terms. It adopts a core premise of markets-oriented global trade as a core objective: the reduction of trade barriers, which “serve as a vehicle for promoting growth, economic diversification and prosperity.”⁷⁰ PDCA also adopts the principle that such trade cooperation be grounded on a “rule-based multilateral trading system under which the Parties are responsible for maintaining the primacy of rules and their effective, fair and balanced implementation.”⁷¹ The parties pledge to accord most favored nation treatment to each other with the usual exceptions in accordance with WTO agreements (Art. 62) as well as to each accord national treatment to the goods of the other (Art. 63). There are affirmances of transparency of trade measures (Art. 64) and of mutual commitment to the WTO Trade Facilitation Agreement (Art. 65)⁷² and the WTO Agreement on Technical Barriers to Trade⁷³ (Art. 66) along with standards agreements (Art. 67), trade defense (Art. 68), and of existing obligations under Article XX of GATT (Art. 70), all subject to mutually agreed revision (Art. 69).

Part IV, Title VII, focuses on trade related cooperation. Included are customs matters (Art. 71) and administrative measures around

⁶⁷ Human Rights Watch, “The US Global Magnitsky Act: Questions and Answers” (13 September 2017); available [https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act#].

⁶⁸ For its effects on Caribbean economies and potentially against Cuba See, Larry Catá Backer, “The List as Law: CARICOM, Cuba and the EU’s Tax Haven List,” *Law at the End of the Day* (12 December 2017); available [https://lcbackerblog.blogspot.com/2017/12/the-list-as-law-caricomm-cuba-and-eus.html].

⁶⁹ See PDCA, *supra* note 1, See Art. 60 ¶(f).

⁷⁰ *Ibid.*, Art. 61 ¶1.

⁷¹ *Ibid.*, Art. 61 ¶2.

⁷² World Trade Organization, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (Decision of 27 November 2014) WT/L/940; available [https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/940.pdf&Open=True].

⁷³ World Trade Organization, Agreement on Technical Barriers to Trade (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, vol. 31, at p. 138 P

trade facilitation (Art. 72). These latter commitments will pose something of a challenge for both the rules-rigid EU and the sometimes heavy-handed administrative control cultures of Cuba. But it is the thought that counts and many of these measures are written as inspirational goals rather than as implementable measures. Protection of intellectual property is the focus of Article 73, which itself can pose problems given the messiness on that score that was generated after the 1959 Revolution. Going forward, deals may be easier. Capacity building is an important focus on measures regarding cooperation on technical barriers to trade (Art. 74) and trade defense (Art. 78).

Increasing trade in agricultural products is the core of the provisions around food safety and animal welfare (Art. 75), with a similar objective for trade in traditional and artisanal goods (Art. 76) though in the absence of strong consumer markets in Cuba, it is hard to see how this flows any way but out of Cuba and into the hands of wealthy European consumers. A sustainable development chapeau is also provided (Art. 76). The EU secured recognition of the importance (to it) of protection of rules of origin (Art. 79) and both parties pledged greater and better coordinated mutual investment (Art. 80).

All of these aspirations have to be institutionalized somehow, and Part V serves to memorialize these new institutional structures. Given the heavily bureaucratized cultures of the EU and of Cuba it comes as no surprise that

A Joint Council is hereby established. It shall oversee the fulfilment of the objectives of this Agreement and supervise its implementation. It shall meet at ministerial level at regular intervals, not exceeding a period of two years, and extraordinarily whenever circumstances so require, if the Parties so agree.⁷⁴

Beyond the policy and direction of the Joint Council, a working directorate--the Joint Committee--is established to actually attempt implementation (Art. 82). It meets once a year. It is unlikely to have much control of the day to day activity of the agreement which suggests that the driving force will be elsewhere within the EU and Cuban bureaucracies. These may be augmented by the various sub-committees that may be established under the Joint Committee (Art. 83), though these too are slated to meet infrequently though regularly.

Taken together, the PDCA appears to give both parties what they want most. For the Cubans, a counterweight to both their

⁷⁴ PDCA, supra note 1, Art. 81 ¶ 1.

friends (the Russians and Chinese) and their frenemies (the Americans). It provides a more solid basis for the fulfillment of key areas of the 2030 Economic Plan through entry into lucrative European markets--but only if the Cubans can deliver. And that may take a bit of financial help from either the Europeans (intimated in the PDCA) or from their friends. Even better, the PDCA might help Cuba avoid the effects of the U.S. embargo--especially those aspects targeting the economic drivers of the Cuban economy that have been targeted by the latest round of U.S. sanctions. For the Europeans it appears to broaden their influence abroad. It also appears to provide a wedge in to reform on two levels. The first is with respect to human rights related reforms on the political level. The second, and much more achievable in part is the opening to human rights and sustainability based business conduct.

Nonetheless, much of this is built on gossamer. Much of the many pages of the agreement can be reduced to an obligation to discourse. The rest is a long laundry list of discursive topics. And yet, there is power in this framework as well--especially from the European perspective. First, even in the absence of mandatory provisions, the list itself-- and the principles that underlie them -- frame the narrative within which mutual relations may be framed. Second, that narrative framing can then be hardened through the incorporating of its provisions, sensibilities, and objectives in the web of agreements that make up the sum of trade between mostly private European enterprises and the Cuban state. This is especially the case with respect to the human rights and sustainability elements of such agreements.⁷⁵

Cuba and the Europeans have been down this road before. It is far too early to determine whether this time there will be greater success over the long term than in the past. Given the potential instability of the beginning of the transition era, it is likely that success will have to target very long term targets.

3. The State of Cuba-EU Trade Relations

The PDCA framework has provided a loose framework within which Cuba-EU trade relations have developed since 2018. The application of PDCA provisions has met with mixed results.

The PDA Joint Council

⁷⁵ See, Anna Beckers, "Corporate codes of conduct and contract law: a doctrinal and normative perspective," in Roger Brownsword, Rob A.J. van Gestel and Hans-W. Micklitz eds., *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar, 2017), pp.

One of the more potent areas of development has been in the aggregation of trade and human rights issues — that is on the alignment of trade and politics — certainly from the European side. Thus for example, in November 2018, the European Parliament approved a resolution condemning Cuban human rights violations against political dissidents and, among other actions, calling on “VP/HR Frederica Mogherini to recognise the existence of a political opposition to the Cuban Government and to support its inclusion in the political dialogue between the EU and Cuba.”⁷⁶ Indeed by July 2019, civil society organizations were attempting to pressure the EU to include independent civil society in the PDCA.⁷⁷ Also by 2019, European civil society began to express frustration at the ability of the Cuban state to use PDCA not to advance but to block a wider participation of civil society in the dialogue mandated by its provisions.⁷⁸

The first EU-Cuba Joint Council meeting took place on 15 May 2018.⁷⁹ The meeting set the tone: Cuba was effectively paid to participate in dialogue in which it might be lectured by the representatives of the European Union. This appeared to give each side what it wanted. The EU got agreement on five new areas of dialogue: countering the proliferation of weapons of mass destruction, control of conventional arms, coping with unilateral coercive measures, the implementation of Agenda 2030 for sustainable development and human rights.⁸⁰ The Cubans got “a financing agreement for a cooperation programme on renewable energy, to which the European Commission will contribute € 18 million. This programme will make a

⁷⁶ European Parliament, “The human rights situation in Cuba,” Resolution of 15 November 2018 on the human rights situation in Cuba (2018/2926(RSP)) P8_TA(2018)0460; available [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0460_EN.pdf], ¶15.

⁷⁷ See, Civil Rights Defenders, Letters From Cuba to the European Union (For the Inclusion of Independent Civil Society in the Political Dialogue and Cooperation Agreement Between Cuba and the EU) (2020); available [https://crd.org/wp-content/uploads/2020/01/CRD-8700-FINAL-Rapport_Letters-from-Cuba_ENG-1.pdf].

⁷⁸ Manuel Cuesta Morúa and Erik Jennische, “The EU needs to drive for democracy in Cuba openly,” Euractiv (8 October 2019); available [https://www.euractiv.com/section/global-europe/opinion/the-eu-needs-to-drive-for-democracy-in-cuba-openly/].

⁷⁹ Council of the European Union, “EU-Cuba Joint Council meeting” (15 May 2018); available [https://www.consilium.europa.eu/en/meetings/international-ministerial-meetings/2018/05/15/cuba/].

⁸⁰ *Ibid.*

contribution to Cuba's energy sector with a specific attention to renewable energies and energy efficiency targets. This is the first ever financing agreement signed between the EU and the Cuban government."⁸¹

The second meeting took place in early September 2019 in Cuba followed by a meeting in Europe. Neither produced much to report.⁸² The parties were able to announce that they were engaged in a dialogue on the broad range of issues contemplated under the PDCA, but beyond that there was very little. The exclusion of civil society from these discussions did not sit well either, especially with civil society. Ms. Mogherini provided a breezy summary of her travels,⁸³ and in her remarks noted that the central purpose of the meeting was "to celebrate and to further strengthen our dialogue and cooperation."⁸⁴ And as expected, while the Europeans focused on the advancement of discussion of its values embedded within trade, the Cuban delegation focused on sovereign rights and the local context, especially the effects of US sanctions.

"Cuba has full relations with the EU on the basis of mutual respect," said on Twitter Bruno Rodríguez Parrilla, Minister of Foreign Affairs. "In the Joint Council we will exchange on the implementation of the PDCA, cooperation and future dialogue on sectoral policy, trade and investment, including the Helms-Burton Law and its extraterritorial effects," said Rodríguez.⁸⁵

⁸¹ *Ibid.*

⁸² European Council, Council of the European Union, EU-Cuba Joint Council (9 September 2019); available [https://www.consilium.europa.eu/en/meetings/international-ministerial-meetings/2019/09/09/].

⁸³ Federica Mogherini blog, "Back to Latin America: Cuba, Mexico and Colombia" (15 Sept. 2019); available [http://www.federicamogherini.net/back-to-latin-america-cuba-mexico-and-colombia/?lang=en] ["My first stop was in Cuba, on the occasion of the "EU-Cuba Joint Council" – that is, our annual opportunity for discussion with Cuban authorities, which we created with the historic 2016 deal between the European Union and Cuba. My visit started with a meeting with Foreign Minister Bruno Rodríguez, before the Joint Council: we discussed how to accompany the modernisation of the Cuban economy, human rights, multilateralism and climate change, but also how to protect our firms investing in Cuba from the impact of American sanctions." *Ibid.*].

⁸⁴ European Council, Council of the European Union, EU-Cuba Joint Council (9 September 2019), *supra*.

⁸⁵ Jorge Ruiz Miyares (ed.), Cuba and European Union prepare for their 2nd Joint Council meeting (3 September 2019); available [https://www.radiohc.cu/en/noticias/nacionales/200822-cuba-and-european-union-prepare-for-their-2nd-joint-council-meeting].

The Cubans also got the E.U. talking about the evils of extraterritoriality, at least when applied through the U.S. Helms-Burton Act.⁸⁶

By the time of the third Joint Committee meeting in December 2020, this template was well established. In light of the pandemic, the meeting was held online.⁸⁷ By 2021, the discursive agenda had shifted a little, now consisting of the following seven areas: human rights, unilateral coercive measures, non-proliferation of weapons of mass destruction, control of conventional arms, 2030 agenda for sustainable development, energy, environment and climate change.⁸⁸ And again, the connection between dialogue and investment was emphasized on the European side.⁸⁹ The Cuban side reported in similar terms. The Cuban Ministry for External Commerce (MINCEX) noted:

Hemos constatado que, a pesar de los obstáculos impuestos por la COVID-19, se ha avanzado en la implementación de los tres sectores del Programa Indicativo Multianual 2014-2020, lo que constituye una muestra del impacto que ha tenido la aplicación provisional del Acuerdo de Diálogo Político y de Cooperación en la profundización de nuestras relaciones bilaterales.⁹⁰

Indeed, the thrust of the third meeting appeared to be an affirmation that all is well. That notion was well represented in press accounts before the third meeting:

⁸⁶ European Council, Council of the European Union, EU-Cuba Joint Council (9 September 2019) (“Trade and investment between the EU and Cuba, including the extraterritorial effects of the US Helms-Burton legislation, were also discussed.”).

⁸⁶ European Council, Council of the European Union, EU-Cuba Joint Council (9 September 2019) (“Trade and investment between the EU and Cuba, including the extraterritorial effects of the US Helms-Burton legislation, were also discussed.”).

⁸⁷ Council of the European Union “Informal video conference of the members of the EU-Cuba Joint Council” (20 January 2021); available [https://www.consilium.europa.eu/en/meetings/international-ministerial-meetings/2021/01/20/].

⁸⁸ *Ibid.*

⁸⁹ EEAS, “EU-Cuba-Relations 2021”; available [https://eeas.europa.eu/sites/default/files/cuba_factsheet_revised.pdf].

⁹⁰ “Discurso de clausura del Tercer Subcomité de Cooperación Cuba-UE,” MINCEX; available [https://www.mincex.gob.cu/index.php/site/data/?lang=es&location=Noticia&title=Discurso+de+clausura+del+Tercer+Subcomit%C3%A9+de+Cooperaci%C3%B3n+Cuba-UE].

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In the meeting, both parties highlighted the progress of bilateral relations and cooperation in the last year and reiterated their willingness to continue working for its strengthening.⁹¹ What appears to be driving the dialogue are the usual subjects of trade and capacity building. Cuba's Foreign Ministry said such a cooperation gives priority to food safety and adaptation to climate change, renewable energies, modern economy, culture and also to the preservation of heritage.⁹²

And again, there was a reward for talking, in this case a grant of €4 Million "for the creation of a one-stop-shop to facilitate trade and foreign investment in Cuba."⁹³

The US loomed in the background—with the possibility of suing European companies for trafficking in expropriated property, the EU-Cuba relationship had become more complicated for business in 2020.⁹⁴ The effort went mostly toward the protection of the significant investments of Spanish companies in Cuba.⁹⁵ The EU supported Cuba against the potential problems of the US sanctions regime in the context of

⁹¹ Cuba, Ministry of Foreign Affairs, "Cuba and the European Union Hold Third Joint Council" (20 January 2021); available [<http://www.cubaminrex.cu/en/cuba-and-european-union-hold-third-joint-council>]

⁹² "Havana: Political will for Cuba-EU relations," *Prensa Latina* (29 September 2020); available [<https://news.prensa-latina.cu/?p=18403/2020/09/29/havana-political-will-for-cuba-eu-relations/>].

⁹³ David Urra, "Third EU-Cuba Joint Council Held," *Cuba Business Report* (January 2021); available [<https://www.cubabusinessreport.com/third-eu-cuba-joint-council-held/>].

⁹⁴ See, e.g., Andreas Knobloch, "US sanctions against Cuba keep Europe puzzled," *Deutsche Welle* (19 February 2020); available [<https://www.dw.com/en/us-sanctions-against-cuba-keep-europe-puzzled/a-52430829>]; Bruce Love, "Companies caught in EU-US sanctions crossfire," *Financial Times* (29 January 2020); available [<https://www.ft.com/content/97a75318-16a8-11ea-b869-0971bffa109>]

⁹⁵ Ana Garcia Valdivia, "The EU Stands Up For Spanish Companies In Cuba Against Trump's Sanctions," *Forbes* (22 April 2019); available [<https://www.forbes.com/sites/anagarciavaldivia/2019/04/22/the-eu-stands-up-for-spanish-companies-in-cuba-against-trumps-sanctions/?sh=7088cee569fd>].

meeting the challenges of COVID-19 in 2020.⁹⁶ It also welcomed the arrival of Cuban doctors.⁹⁷

The Extent of Trade

Recent patterns of EU trade with Cuba are not unexpected. They show a strong imbalance, with the rate of exports to Cuba far exceeding Cuban exports to the EU. Cuban exports have remained fairly stable; EU exports have shown some cyclicity. Cuba's main imports are machinery, food and fuels, while its major exports are refined fuels, sugar, tobacco, nickel and pharmaceuticals.⁹⁸ The pattern of trade on the eve of the adoption of the PDCA was straightforward:

Cuba runs a large deficit in merchandise trade. Exports are highly concentrated on a small range of products: 82% of exports fall under seven product categories, while imports are more diversified. Cuba imports machinery, fuel and manufactured goods in particular, but also has to import cereals and processed foodstuffs.⁹⁹

Goods trade deficits, to the extent they can be made up, are financed through the export of services, principally tourism, medical personnel, and nationals working abroad. Additional financing is derived from remittances from Cubans living abroad. Most importantly, and especially before the death of Hugo Chavez, substantial subsidies from patron states—Venezuela in the early part of the 21st century—also financed goods trade deficits.

⁹⁶ "Sanctions should not impede coronavirus fight, EU diplomat says," *The Guardian* (4 April 2020); available [https://www.theguardian.com/world/2020/apr/04/sanctions-should-not-impede-coronavirus-fight-josep-borrell-eu] ("The EU would apply humanitarian exceptions to ensure that sanctions currently in place would not hamper any efforts to fight the disease, [Josep Borrell, the EU's high representative for foreign affairs] said, that it "also encourages other jurisdictions to provide the necessary clarifications to ensure that their respective sanctions are no obstacle to the global fight against the pandemic".")

⁹⁷ Tom Phillips and Angela Giuffrida, "Doctor diplomacy: Cuba seeks to make its mark in Europe amid Covid-19 crisis," *The Guardian* (6 May 2020); available [https://www.theguardian.com/world/2020/may/06/doctor-diplomacy-cuba-seeks-to-make-its-mark-in-europe-amid-covid-19-crisis].

⁹⁸ European Parliament, At a Glance: Cuba's International Trade (February 2015); available [https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/548984/EPRS_ATA(2015)548984_REV1_EN.pdf].

⁹⁹ *Ibid.*

The Observatory of Economic Complexity (OEC)¹⁰⁰ reported a net decline in Cuban exports between 2014 and 2019.¹⁰¹ EU Member states remain a significant factor among Cuban export-receiving states. The most recent exports were led by rolled tobacco (\$287M), raw sugar (\$211M), nickel mattes (\$134M), hard liquor (\$97.3M), and zinc ore (\$78.4M). The most common destination for Cuba's exports are China (\$461M), Spain (\$127M), Netherlands (\$65.5M), Germany (\$64.7M), and Cyprus (\$48.9M).¹⁰² Imports have followed a similar trajectory. "During the last five reported years the imports of Cuba changed by -\$797M from \$6.08B in 2014 to \$5.28B in 2019."¹⁰³ Food was the largest import group, with Spain the largest exporter of foodstuffs to Cuba (followed by China, Italy, Canada, and Russia).¹⁰⁴ The United States appears no longer to have a significant economic footprint in Cuban trade. Interestingly, it was the Netherlands rather than Spain that appears to have become the fastest growing import and export markets for Cuba.¹⁰⁵ The specifics of EU-Cuba trade for 2009-2019 and a breakdown of trade for 2019 by product category are given in the chart and table that follow.

¹⁰⁰ "The Observatory of Economic Complexity (OEC) is an online data visualization and distribution platform focused on the geography and dynamics of economic activities. The OEC integrates and distributes data from a variety of sources to empower analysts in the private sector, public sector, and academia." OEC, "About the Site,"; available [<https://oec.world/en/resources/about/>].

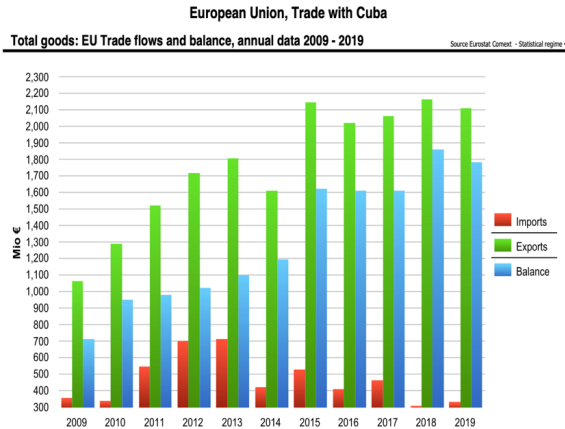
¹⁰¹ "In 2019, Cuba exported a total of \$1.21B, making it the number 152 exporter in the world. During the last five reported years the exports of Cuba have changed by -\$459M from \$1.67B in 2014 to \$1.21B in 2019." OECD, "Cuba,"; available [<https://oec.world/en/profile/country/cub>].

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* ("The most recent imports of Cuba are led by poultry meat (\$286M), wheat (\$181M), soybean meal (\$167M), corn (\$146M), and concentrated milk (\$136M). The most common import partners for Cuba are Spain (\$1.01B), China (\$790M), Italy (\$327M), Canada (\$285M), and Russia (\$285M)").

¹⁰⁵ *Ibid.*



Investment

Foreign investment in Cuba has remained relatively stable, and its development over time is the subject of substantial speculation. Before 2020, the rate of inbound investment—counted as the present value of deals—struck at around \$2.0 billion, but that was a historic high.

The COVID-19 pandemic has brought challenge and opportunity. The challenge is the substantial effect of the pandemic on traditional sources of inbound investment—usually linked to tourism or infrastructure. Both of these sectors have been significantly affected by COVID-19. But there is opportunity as well. The first focuses on pharmaceuticals. The second is by a limited sort of liberalization in inbound investment. As part of its package of economic reforms, the Cuban government announced a liberalization of investment ownership rules. Beyond a number of sectors critical to the public economy, the state will allow foreign investors to own a majority interest in certain enterprises. No details yet. And it is not clear how hard or easy it will be to manage this given the traditions of bureaucratic control in Cuba. And yet, it—like the elimination of dual currency—may be a start. For the moment, however, little has changed.

Among European countries, Spain and the Netherlands appear to drive investment. In 2019, and as a counter to Trump Administration measures, the Spanish government announced:

that it would convert some 375 million euros (420 million dollars) of Cuban debt owed to Spain into investments in the

island ... The announcement came less than a week after the US reactivated a law allowing its citizens to sue foreign companies and individuals utilizing property confiscated in Cuba by the government. “[The new fund] is good news,” said Reyes Maroto, the Spanish minister of industry, trade and tourism, in Havana. “It will allow us to continue to develop investments of Spanish companies in Cuba and strengthen ties,” she added. The money will be given to Spanish companies, without the need to refund it, to cover the expenses of investment in projects which the Madrid and Havana governments consider priorities for the Cuban economy.¹⁰⁶

The effect, of course, is a hybrid investment. That is to say, investment is actually the end product of state indirect aid to Cuba in the form of subsidies to private Spanish investors, many of them in the tourist sector. And that underlines an important element of the investment relationship with Cuba—much of it is either subsidized, guaranteed or otherwise supported by states. In effect it may be difficult to characterize it as private direct investment or perhaps more like public foreign aid in privatized forms. In 2019, Spain was also the biggest participant in the Havana International Trade Fair held in November.¹⁰⁷

The year 2020 did see some growth in the Mariel Special Zone—in the form of seven new businesses.¹⁰⁸ Yet in terms of Cuba’s needs, that is hardly sufficient. The approval process has been streamlined, though its operation has yet to be assessed.¹⁰⁹ In addition, trade figures would be incomplete without considering the aid numbers.

¹⁰⁶ “Spain to Turn Cuban Debt into Investment to Counter US Measures,” *Havana Times* (7 May 2019); available [https://havanatimes.org/news/spain-to-turn-cuban-debt-into-investment-to-counter-us-measures/].

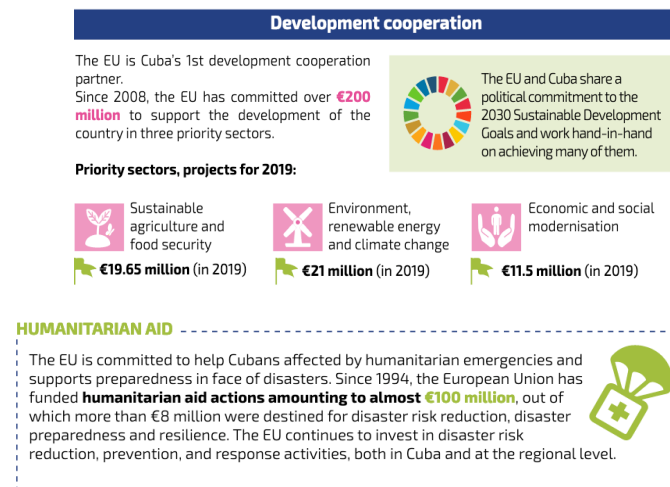
¹⁰⁷ “Spain again the protagonist of the largest trade fair in Cuba,” *On Cuba News* (5 November 2019); available [https://oncubanews.com/en/cuba/spain-again-the-protagonist-of-the-largest-trade-fair-in-cuba/].

¹⁰⁸ “Cuba’s industrial zone closes 2020 with seven new businesses,” *Prensa Latina* (9 December 2020); available [https://www.plenglish.com/index.php?o=rn&id=62558&SEO=cubas-industrial-zone-closes-2020-with-seven-new-businesses] (“In total, there are 55 projects approved to be installed in the ZEDM, eight of them with Cuban capital, 30 with 100 percent foreign investment, 15 are mixed ventures and two are international economic associations”).

¹⁰⁹ “Spotlight: Cuba seeks to promote foreign investment amid COVID-19,” *Xinhuanet* (14 August 2020); available [http://www.xinhuanet.com/english/2020-08/14/c_139290131.htm] (“Earlier, as a new step to draw business people, the Caribbean nation launched a “single-window” service for foreign trade, an online platform that will expedite import and export processes for local and foreign investors.”).

These would include the amounts contributed by the EU and EU Member States to Cuba directly or indirectly through grants to civil society and other actors operating projects in Cuba, that fall within the cooperation and capacity building objectives of PDCA. The value to the EU is important—it is the means through which it can project its soft power to inculcate, to the extent it is possible, its values within Cuban society, through its “missionary” work.

The EU-Cuba Relations Fact Sheet distributed by EU authorities¹¹⁰ (below) suggests the scope of the state-to-state portion of that that trade in aid.



Unfortunately, the figures for indirect trade in aid are harder to come by. But this gives a sense. Not a tremendous amount of money but it suggests at least some significant contribution that indicates the value that Europe places on the soft power cooperation elements of PDCA. It also increases the imbalance in the transfers between Cuba and the EU.

The numbers suggest the ultimate importance of the PDCA. It is not primarily a vehicle for trade. It is not a mechanism for structuring economic relations. It is, instead, most potent as a discursive instrument. PDCA is important for its use in shaping the language, principles, and expectations around trade. It is a critical element in the formal construction of a narrative that can be legalized, and once legalized, eventually imposed either

¹¹⁰ Fact Sheet, “EU-Cuba Relations” (Brussels, EEAS, 2019), supra n. 17.

through contract or by way of the further development of international norms and its expectations (especially of states). The economic effect of PDCA appears only at the margins. Its discursive effect, however, may be more important. The issue for the future is--having identified its true value—to develop the metrics by which that value can be measured and assessed against some sort of ideal.

4. Conclusion

The state of economic relations between Cuba and the EU remains stable. The template, the PDCA, has provided the framework within which EU states can arrange their economic relations with Cuba. However, it is a template that continues to silo trade, investment, and the concerns about the furthering of European values through trade. The result is, to some extent, complicity with Cuban politics, even as the EU decries them, theoretically, when it focuses (generally) on issues of values, including human rights and corruption. The balance of investment and trade remain lopsided.

That suggests that trade and investment are understood as political rather than as points of economic advantage. Part, of course, continues the European pattern of state responsibility (or at least interest) in former colonial territories. But part, as well, appears to take the long view that a constant stream of help that can encourage engagement in economic activity, government-to-government exchanges, and the like, will eventually provide it leverage to project European values into Cuba. The Cubans, of course, view this differently. For them, principles of state-to-state engagement—those well-developed in the principles of ALBA¹¹¹ for example—permit a permanent state of unequal trade and the exploitation of local populations for the implementation of national policy goals. It is in the meeting of these two approaches that EU-Cuba trade and investment will continue to develop. Yet unequal trade exacerbates the gap between markets based trade and state control of economic activity, now fused with its political, cultural and societal objectives. The E.U. appears to believe that it can use that unequal trade as a doorway to fundamental reform; the Cubans believe that they can use the same levers to shield themselves from such reform, or at least to permit them a space to engage in reform on their own terms.¹¹²

¹¹¹ Backer and Molina, *Cuba and the Construction of Alternative Global Trade Systems*, *supra*.

¹¹² Miguel Mario Díaz-Canel Bermúdez, *Speech Delivered at the 8th Congress of the Communist Party of Cuba* (29 April 2021), *Granma* ; available [<http://en.granma.cu/cuba/2021-04-27/diaz-canel-among-revolutionaries-we-communists-go-to-the-fore>] (We will continue to work

It is this consciously tolerated disjunction that continues to frame European approaches to trade and investment relations with Marxist-Leninist State. The E.U. appears willing to use trade and development agreements as a means of subsidizing its transformation projects. That is not either implausible nor ridiculous; but it is hardly consonant with the traditional approaches to globalization in which open market transactions drive everything else. Thus in PDCA the EU has invested in developing deeper interlinkages with the expectation that this will permit them to use various for a to instruct, or at least engage, their trading partners in European values. That model, the Cuba PDCA model effectively turns the prior model on its head. PDCA teaches is that such agreement pay lip service to European values while seeking access to markets or territories where Europe has an interest. And yet, that lip service, in the view of some, is precisely what is most valuable to Europe, even at the expense, in the short term, of the values it seeks to promote through PDCA type deals.

PDCA's power as trade-transformation template is now evident in the 2020 negotiation of a similar agreement with China.¹¹³ What might have been considered the weaknesses of the PDCA are now re-imagined as a means of flexibly using trade to build (political) capacity and to naturalize the European principles of a sustainability and human rights based trade regime (if ever so slowly). But China is not Cuba, and its politics may well make transposition of PDCA principles impossible. Still, the PDCA template and its underlying principles is a strong one. Indeed, the E.U.'s emerging relations with China suggests that the PDCA model may not be projected without risk of great cost. What may be possible in relations with a small and struggling state (and even that is not clear) may actually backfire when used against a state whose own power and cultural self-confidence as

on laws required by the new Constitution and on the strengthening of socialist democracy, linked to social justice and equity; the full exercise of human rights; effective representation and participation of society in economic and social processes underway, directed toward a prosperous, democratic and sustainable socialism. All this in an environment increasingly free of the burdens of bureaucracy, excessive centralism and inefficiency.).

¹¹³ Amrita Narlikar and Samir Saran, "The European Union, CAI, and the abyss," ORF (2 January 2021); available [<https://www.orfonline.org/cdn.ampproject.org/c/s/www.orfonline.org/expert-speak/the-european-union-cai-and-abyss/?amp>] ["we are not convinced by the European Commission President, Ursula von der Leyen's, claim that the "Agreement will uphold our interests and promotes our core values. It provides us a lever to eradicate forced labour. The clauses, at least as they are reported in the EU's Press release, are weak."].

great as that of Europe. And, indeed, the price now may be too steep.¹¹⁴

¹¹⁴ "EU-China investment deal put on ice over sanctions," *Deutsche Welle* (4 May 2021); available [<https://www.dw.com/en/eu-china-investment-deal-put-on-ice-over-sanctions/a-57427703>] ["EU Commission Vice President Valdis Dombrovskis told AFP news agency that efforts to win approval for the deal were effectively on ice. "We now in a sense have suspended ... political outreach activities from the European Commission side," Dombrovskis said in an interview."].