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U.S. Nonprofit Activity in Cuba: Challenges in Cuban Law and Practice

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U.S. Nonprofit Activity in Cuba: The Cuban Context

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Introduction

American regulatory restrictions on nonprofit activity in Cuba have decreased dramatically over the past three years.¹ As a result, interest in undertaking projects in Cuba among U.S. nonprofits has increased significantly over that same period. Despite President Trump's recent directive that rolled back several aspects of the previous administration's Cuba policy and ordered new restrictions on U.S.-Cuban engagement,² U.S. nonprofits are unlikely to be deterred from seeking to expand their engagement in Cuba over the long term. As nonprofits explore potential opportunities and navigate legal and political challenges, this Article seeks to advance the conversation³ by answering the following questions: What is the current state of U.S. and non-U.S. nonprofit activity within Cuba? What are the Cuban legal and other constraints that affect nonprofit activity in the country? What recommendations might we offer to U.S. nonprofits that are interested in pursuing work in Cuba, in light of the constraints identified above? And finally, what legal, policy or other measures in Cuba might help address these constraints and facilitate increased nonprofit engagement?

It is important to emphasize at the outset that we do not address the many U.S. laws and regulations governing commercial and nonprofit activ-

1. On December 17, 2014, President Obama announced that the United States would "chart a new course with Cuba," making the way for expansion and promotion of "authorized engagements" and "normalization" of relations. See OFF. OF THE PRESS SECRETARY, PPD-43, UNITED STATES-CUBA NORMALIZATION (2016). See also Megan O'Neil, *U.S.-Cuba Thaw is Making American Nonprofit Work on the Island Nation Easier*, THE CHRON. OF PHILANTHROPY (June 4, 2015), <https://philanthropy.com/article/us-cuba-thaw-is-making/230573> [<https://perma.cc/U29C-7LZZ>].

2. See OFF. OF THE PRESS SECRETARY, REMARKS BY PRESIDENT TRUMP ON THE POLICY OF THE UNITED STATES TOWARDS CUBA (June 16, 2017).

3. We take as our starting point the premise that increasing the foreign nonprofit activity in Cuba would be a positive development, but we do not explore or set out to demonstrate the truth of that premise here.

ity by U.S. citizens or entities in Cuba.⁴ Nor do we explore the impact of the U.S. government's June 2017 decision to tighten several of the U.S.-based regulations that had been relaxed over the past three years. Compliance with these complex regulations will remain both challenging and crucial to successful U.S. nonprofit activity in Cuba. The focus of this Article, however, is Cuban legal and other constraints to nonprofit activity within Cuba.

I. Current State of U.S. and Non-U.S. Nonprofit Activity Within Cuba

A. Which Nonprofits are Currently Active in Cuba?

A variety of domestic and foreign nonprofit organizations, both secular and faith-based, are currently active in Cuba.⁵ A number of U.S. nonprofit organizations registered in the United States engage in work in Cuba. The list includes, among others, the American Friends of the Ludwig Foundation, the Caribbean American Children's Foundation, the Center for

4. See *e.g.* 22 U.S.C. §§ 2370(a), 6001-10, 6021-91, 7201-11 (2012); see 31 U.S.C. § 321(b); see also 50 U.S.C. §§ 4301-41; 31 C.F.R. § 515.

5. Our research suggests that there are between thirty and thirty-five foreign NGOs currently working in Cuba; approximately twenty to twenty-five are American. Of those, we interviewed staff members from nineteen: B'nai B'rith; the Cuba America Jewish Mission; Christian Aid Mission; ECHO Cuba; Florida Baptist Convention; Green Cities Fund; the Environmental Defense Fund; the Friendship Association; Fundación Amistad; Hombre Nuevo, Tierra Nueva; Lutheran Hour; Presbyterian World Hour; Cuban Association of the Order of Malta; MEDICC; Roots of Hope; the Social Science Research Council; United Methodist Volunteers Mission; and World Monument Fund. The experiences of these individuals and their organizations are reflected in the discussion throughout this Article. Telephone Interview with Sienna Girgenti, Assistant Dir. of Int'l Ctr. for Human Rights and Pub. Policy, B'nai B'rith (May 25, 2016); Telephone Interview with Rabbi Sunny Schnitzer, President and Spiritual Dir., Cuba America Jewish Mission (June 2, 2016); Telephone Interview with David Bogosian, Overseas Dir., Christian Aid Mission (May 20, 2016); Telephone Interview with Sumaya Davila, Program Dir., Evangelical Christian Humanitarian Outreach (ECHO) Cuba (May 31, 2016); Telephone Interview with Dr. Craig Culbreth, Lead Catalyst with the Missions in Ministries Team, Fla. Baptist Convention (May 23, 2016); Telephone Interview with Tom Miller, Co-Founder, Green Cities Fund (June 8, 2016); Telephone Interview with Daniel Whittle, Senior Attorney and Senior Dir., Env'tl. Def. Fund (June 16, 2016); Telephone Interview with Soledad Pagliuca, Sec'y., Friendship Ass'n (May 23, 2016); Telephone Interview with Faye Miller-Pettway, Managing Dir., Fundación Amistad (May 24, 2016); Telephone Interview with Víctor Bernal, President, Hombre Nuevo, Tierra Nueva (June 7, 2016); Telephone Interview with Rev. Dr. Nilo Figu, Regional Dir. for Latin America, Lutheran Hour (May 31, 2016); Telephone Interview with Dr. Valdir Franca, Coordinator for Latin America and the Caribbean, Presbyterian World Missions (June 1, 2016); Telephone Interview with Juan Jose Calvo, President, Cuban Ass'n. of the Order of Malta (June 22, 2016); Telephone Interview with Gail Reed, Co-Founder of MEDICC and Exec. Dir. of the MEDICC Review, MEDICC (May 24, 2016); Telephone Interview with Raul Moas, Exec. Dir., Roots of Hope (May 25, 2016); Telephone Interview with Sarah Doty, Cuba Project Dir., Soc. Sci. Research Council (Aug. 4, 2016); Telephone Interview with Paulette West, Dir. of the Southeast Jurisdiction, United Methodist Volunteers Mission (June 2, 2016); Telephone Interview with Lisa Ackerman, Exec. Vice President, World Monuments Fund (May 20, 2016). We also interviewed Mario Bronfman, consultant to the Ford Foundation and former representative of the foundation's Mexico and Central America office. Telephone Interview with Mario Bronfman, Consultant and former Central and South America Representative, Ford Found. (July 29, 2016).

International Policy, the Center for Democracy in America, the Environmental Defense Fund, the Friendship Association, Fundación Amistad, the Fund for Reconciliation and Development, Global Exchange, Global Links, the Green Cities Fund, Insight Cuba, Medical Education Cooperation with Cuba (MEDICC), Optics for the Tropics, Roots of Hope, the Social Science Research Council, the Washington Office on Latin America, Witness for Peace, and the World Monuments Fund. Institutions of higher education—including Cornell University⁶—are also active in Cuba on a number of fronts, particularly in the agriculture and life sciences fields.

Nonprofit work affiliated with the Catholic Church is primarily channeled through Caritas Cubana (the largest independent nongovernmental organization (NGO) on the island), which is aided by another Catholic organization, Catholic Relief Services (CRS).⁷ The Cuban Association of the Order of Malta, a Catholic religious order, also maintains projects in Cuba.⁸ Protestant faith-based organizations working in Cuba include the Presbyterian World Mission, the United Methodist Volunteers Mission, the Baptist Convention, and Evangelical Christian Humanitarian Outreach for Cuba (ECHO Cuba).⁹ B'nai B'rith and the Cuba-American Jewish Mission

6. As just a few examples, Cornell Abroad offers three programs in Cuba: *Viva Cuba (HE 4020)* (which is a Spring Break field lab); *Cornell-in-Cuba: CASA Consortium* (with the University of Havana faculties of philosophy and history); and *Cornell-in-Cuba: Research Program* (with the University of Havana faculty of biology). In addition, Cornell has recently been accepted into IIE's *International Academic Partnership Program (IAPP) Cuba Cohort*. The College of Veterinary Medicine has been approached by the Egg Nutrition Center to help them undertake a scoping visit and some broad preliminary research in Cuba on nutrition, health, and food access. Several colleges, including the College of Business, the College of Human Ecology, Weill Cornell Medicine and the College of Agriculture and Life Sciences, offer courses with field work in Cuba. See *Cornell International Course: Viva Cuba (HE 4020)*, CORNELL U., http://www.cuabroad.cornell.edu/index.cfm?FuseAction=Programs.ViewProgram&Program_ID=10452 (last visited Aug. 25, 2017) [<https://perma.cc/B7PU-7NLW>]; *Cornell in Cuba: CASA Program*, CORNELL U., http://www.cuabroad.cornell.edu/index.cfm?FuseAction=Programs.ViewProgram&Program_ID=10284 (last visited Aug. 25, 2017) [<https://perma.cc/FM4R-X466>]; *Cornell in Cuba: Research Program*, http://www.cuabroad.cornell.edu/index.cfm?FuseAction=Programs.ViewProgram&Program_ID=10285 (last visited Aug. 25, 2017) [<https://perma.cc/7FP4-ZJ6X>]; AIPP Cuba, *IIE Cuba Higher Education Initiative*, INST. INT'L EDUC., <http://www.iie.org/en/Programs/Cuba-Higher-Education-Initiative/IAPP-Cuba#.WLUK-hlrKRt> (last visited Feb. 28, 2017) [<https://perma.cc/PC3Y-UENM>]; Sherrie Negrea, *Class Observes Cuban Art, Medicine, Farming on Trip*, CORNELL CHRON. (Apr. 14, 2016) <http://www.news.cornell.edu/stories/2016/04/class-observes-cuban-art-medicine-farming-trip> [<https://perma.cc/ZNN9-YBJ5>]; Daniel Aloï, *Cornell Initiates Semester Abroad in Havana*, CORNELL CHRON. (Apr. 17, 2014), <http://www.news.cornell.edu/stories/2014/04/cornell-initiates-semester-abroad-havana> [<https://perma.cc/8K88-FBCF>].

7. See *Cuba*, CARITAS, <http://www.caritas.org/where-we-are/latin-america/cuba> (last visited Feb. 28, 2017) [<https://perma.cc/P6LN-UGU8>].

8. See *Cuban Association*, ORDER OF MALTA, <http://www.ordendemaltacuba.org/> (last visited Feb. 28, 2017) [<https://perma.cc/57CU-6W4W>].

9. See *Cuba*, PRESBYTERIAN MISSION AGENCY, <http://www.presbyterianmission.org/ministries/global/cuba/> (last visited Feb. 28, 2017) [<https://perma.cc/3RG8-WYBF>]; *Cuba*, GENERAL BOARD OF GLOBAL MINISTRIES, <http://www.umcmission.org/Explore-Our-Work/Latin-America-and-the-Caribbean/Cuba> (last visited Feb. 28, 2017) [<https://perma.cc/7SK5-JQM6>]; *Cuba*, BAPTISTS ON MISSION, <http://baptistsonmission.org/missions/outside-us/cuba> (last visited Feb. 28, 2017) [<https://perma.cc/XL52-GPUW>]; *About Us*,

are two of the major Jewish faith-based organizations that work in Cuba.¹⁰

Outside of the United States, a number of nongovernmental organizations work in Cuba, particularly organizations from Canada and Europe. Canadian organizations include Oxfam Canada, CARE Canada, and the Cuban-Canadian Friendship Association, among others.¹¹ Examples of European organizations include Hombre Nuevo, Tierra Nueva (a Spanish NGO) and KarEn (a nonprofit based in Berlin).¹²

Beyond nonprofit NGO activity, the United Nations (UN) has a presence in Cuba. The UN has a Resident Coordinator and resident agencies with offices, including the Food and Agriculture Organization (FAO), the United Nations Development Fund (UNDP), the United Nations Educational Scientific and Cultural Organization (UNESCO), the United Nations Children's Fund (UNICEF), the United Nations Population Fund (UNPF), the World Food Programme (WFP), and the World Health Organization (WHO).¹³ Other UN agencies engage in projects in Cuba but do not maintain an office there.¹⁴ The European Union, a regional intergovernmental

ECHO CUBA, <http://www.echocuba.org/12About/> (last visited Feb. 28, 2017) [https://perma.cc/FWH3-XMTV].

10. *Cuba Missions*, B'NAI B'RITH INT'L., <http://www.bnaibrith.org/cuba-missions.html> (last visited Feb. 28, 2017) [https://perma.cc/NW2B-D2W8]; *Welcome to the Cuba America Jewish Mission*, CUBA-AMERICA JEWISH MISSION, <http://www.cajm.org/> (last visited Apr. 28, 2017) [https://perma.cc/9VHV-PPW8].

11. *Oxfam in Cuba*, OXFAM CANADA, <https://www.oxfam.ca/our-work/where-we-work/americas/cuba> (last visited Feb. 28, 2017) [https://perma.cc/5UKN-9WX5]; *Cuba*, CARE CANADA, <http://care.ca/country/cuba> (last visited Feb. 28, 2017) [https://perma.cc/A7JY-WVWA]; *Who We Are*, CANADIAN-CUBAN FRIENDSHIP ASSOC. TORONTO, <http://ccfatoronto.ca/who-we-are> (last visited Feb. 28, 2017) [https://perma.cc/E45G-684Q].

12. *Nuestra organización*, HOMBRE NUEVO TIERRA NUEVA, http://ongayudacuba.org/?page_id=37 (last visited Feb. 28, 2017) [https://perma.cc/TYLZ-WMPV]; *Nuestra Meta*, KARÉN, http://www.karen-berlin.de/index_es.php?c=verein (last visited Feb. 28, 2017) [https://perma.cc/AS8X-F2Y4].

13. See *Explanatory Note for the UN Resident Coordinator/ Humanitarian Coordinator/ Designated Official & UN Country Team Performance Appraisal Process*, UNDP (Dec.2013); *Cuba*, UNFAO, <http://www.fao.org/countryprofiles/index/en/?iso3=CUB> (last visited Feb. 28, 2017) [https://perma.cc/3R9N-DS82]; *Cuba Panorama*, CUBA UNDP, <http://www.cu.undp.org/content/cuba/es/home/ourwork/overview.html> (last visited Feb. 28, 2017) [https://perma.cc/7RK4-Q2AN]; *Cuba*, UNESCO, <http://www.unesco.org/new/en/unesco/worldwide/latin-america-and-the-caribbean/cuba/> (last visited Feb. 28, 2017) [https://perma.cc/PS48-RURX]; *Cuba*, UNICEF, <https://www.unicef.org/infobycountry/cuba.html> (last visited Feb. 28, 2017) [https://perma.cc/NB7F-NLSR]; *About Us*, UNFPA CUBA, <http://www.unfpa.org/about-us> (last visited Feb. 28, 2017) [https://perma.cc/TE3U-P39N]; *Cuba*, WFP CUBA, <http://www1.wfp.org/countries/cuba> (last visited Feb. 28, 2017) [https://perma.cc/4TQN-TPCS]; *Proyectos de OPS en Cuba*, WHO, http://www.paho.org/cub/index.php?option=com_content&view=article&id=650:proyectos&Itemid=246 (last visited Mar. 9, 2017) [https://perma.cc/2VE5-GC3L].

14. Non-resident UN agencies that work in Cuba include the Economic Commission for Latin America and the Caribbean (ECLAC), the International Atomic Energy Agency (IAEA), the International Labor Organization (ILO), the International Trade Centre (ITC), the United Nations Environmental Program (UNEP), the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the United Nations Human Settlement Pro-

organization, allocates funds for development projects in the country.¹⁵ At a national level, several German foundations, European and Canadian development agencies, and foreign embassies directly support projects in Cuba.¹⁶ The Organization of American States, the primary regional organization for the Americas, does not have a presence in Cuba.¹⁷

B. What are They Doing?

The focus of most foreign nonprofit activity in Cuba—both nongovernmental and intergovernmental—falls within three categories: projects involving cultural activity and exchange; projects that seek to assist society's most vulnerable groups; and projects that promote the country's sustainable development.

U.S. nonprofits engage in a wide range of activities in the country, including projects aimed at strengthening health care and health education,¹⁸ improving U.S. and Cuba relations,¹⁹ protecting the environment,²⁰ promoting sustainable agriculture and fisheries,²¹ bringing food and mate-

gramme (UN Habitat), the United Nations High Commissioner for Refugees (UNHCR), and the United Nations Industrial Development Organization (UNIDO).

15. *Cuba*, THE EUROPEAN COMMISSION: INTERNATIONAL COOPERATION AND DEVELOPMENT, http://ec.europa.eu/europeaid/countries/cuba_en (last visited Aug. 5, 2016) [<https://perma.cc/3CAX-CSQA>].

16. Mario Bronfman, *The Role of U.S. Private Cooperation with Cuba*, Paper Commissioned by the Cuban Artists' Fund, 13 (2015). These include the German Ebert and Böll Foundation, the "Norwegian Agency for Development Cooperation (NORAD), Canadian International Development Agency (CIDA), [and] Cooperación Suiza de Desarrollo (COSUDE); [and] . . . embassies [] from Scandinavian countries, Holland, Germany and Switzerland[.]" *Id.*

17. As early as 1975, the United States supported the Organization of American States' vote to lift the ban on Cuba's membership in the organization, but it was not until 2009 that the 1962 suspension was reversed. *Coordinating Office: Cuba*, ORGANIZATION OF AMERICAN STATES, https://www.oas.org/en/about/offices_detail.asp?sCode=CUB (last visited July 9, 2016) [<https://perma.cc/G6JV-66KU>]. Cuba, however, has so far declined to rejoin the regional association. *See Cuba Will Never Rejoin OAS over Venezuela Row, says Castro*, BBC NEWS (June 5, 2016), <http://www.bbc.com/news/world-latin-america-36454209> [<https://perma.cc/R83N-B9E5>].

18. *Programs*, MEDICC, http://medicc.org/ns/?page_id=5 (last visited June 7, 2016) [<https://perma.cc/V4WM-7N3P>].

19. *Mission Statement*, THE FRIENDSHIP ASS'N, <http://friendshipassociation.org/> (last visited June 7, 2016) [<https://perma.cc/4BEP-X72Z>]; *About*, FUNDACIÓN AMISTAD, <http://fundacionamistad.org/> (last visited June 7, 2016) [<https://perma.cc/WWR3-K48B>]; *Delegations to Cuba*, WITNESS FOR PEACE, <http://www.witnessforpeace.org/section.php?id=109> (last visited June 8, 2016) [<https://perma.cc/H6KV-C77P>]; *Our Mission*, FUND FOR RECONCILIATION & DEV., <http://www.ffrd.org/#our-mission> (last visited June 8, 2016) [<https://perma.cc/SZ3R-RK5W>]; *Programs - Cuba*, WASH. OFF. ON LATIN AM., <http://www.wola.org/program/cuba> (last visited June 9, 2016) [<https://perma.cc/9ZT7-99V6>].

20. *Current Campaigns*, CAFC - CARIBBEAN AM. CHILD. FOUND., <http://www.afrocubaweb.com/Cacf.htm#joining> (last visited June 13, 2016) [<https://perma.cc/7DRX-PBA2>]; *Projects*, GREEN CITIES FUND, <http://greencitiesfund.org/projects/> (last visited June 13, 2016) [hereinafter *Green Cities Fund Projects*] [<https://perma.cc/K6AR-F597>].

21. *See Securing a Sustainable Future for Cuba's Fisheries*, EVNTL. DEF. FUND, <https://www.edf.org/oceans/cuba-crossroads> (last visited July 5, 2016) [<https://perma.cc/MJ64-H7C8>]; *see Green Cities Fund Projects*, *supra* note 20.

rial goods to the island,²² promoting art and culture,²³ organizing travel and exchanges,²⁴ protecting animals,²⁵ developing programs for Cuban youth, and ending the embargo.²⁶ Most organizations do not limit their work to one of these goals but focus instead on several different, interconnected objectives.

Among the faith-based organizations working in Cuba, Caritas runs programs for seniors, children with and without disabilities and learning difficulties, young people at social risk, and people with HIV/AIDS.²⁷ CRS helps to strengthen the institutional capacity of Caritas by training its staff and volunteers.²⁸ Other faith-based organizations lead religious missions to Cuba,²⁹ support religious education and training,³⁰ and provide funding and material support to churches or religious communities.³¹

The activities of the United Nations vary depending on the agency, but include: promoting a more diverse and competitive economy that takes into account natural resources (UNDP);³² producing healthier and more sus-

22. *Our Ties with Cuba Date Back to 1943*, B'NAI B'RITH CUBAN JEWISH RELIEF, <http://www.bnaibrith.org/cuba-relief.html> (last visited July 5, 2016) [hereinafter *The B'nai B'rith Legacy*] [<https://perma.cc/3EV6-M7TG>].

23. *Overview*, AM. FRIENDS LUDWIG FOUND. CUBA, <http://www.aflfc.org/whowere/ludwig-foundation-of-cuba/> (last visited June 9, 2016) [<https://perma.cc/79BJ-NPF7>]; *Green Cities Fund Projects*, *supra* note 20; *Our Programs*, FUNDACIÓN AMISTAD, <http://fundacionamistad.org/our-programs/> (last visited July 13, 2016) [<https://perma.cc/3CMM-J4PC>]; *Culture and Art*, THE FRIENDSHIP ASS'N, <http://friendshipassociation.org/art/> (last visited July 13, 2016) [<https://perma.cc/UT6C-UT24>].

24. *About Us*, INSIGHT CUBA, <http://insightcuba.com/about-us> (last visited June 10, 2016) [<https://perma.cc/QLQ9-SGBH>]; *The B'nai B'rith Legacy*, *supra* note 22; *Green Cities Fund Projects*, *supra* note 20; *Programs: Cuba*, GLOBAL EXCHANGE, <http://www.globalexchange.org/country/cuba> (last visited June 7, 2016) [<https://perma.cc/VM3A-MPRW>].

25. *People and Projects of OT—Migratory Birds and Forest Conservation in Western Cuba*, OPTICS FOR THE TROPICS, <http://www.opticsforhetropics.org/projects4.shtml> (last visited June 3, 2016) [<https://perma.cc/7BK5-L6FC>].

26. *About*, ROOTS OF HOPE, <http://www.rootsofhope.org/#about> (last visited June 6, 2016) [<https://perma.cc/ZBL7-5JVD>].

27. CARITAS, *supra* note 7.

28. *Where We Work: Cuba*, CATHOLIC RELIEF SERVICES, <http://www.crs.org/our-work-overseas/where-we-work/cuba> [<https://perma.cc/T2FK-XMWL>].

29. *The B'nai B'rith Legacy*, *supra* note 22; *Increasing Christianity's Impact*, ECHO CUBA, <http://www.echocuba.org/12IncreasingChristianity/> (last visited July 7, 2016) [<https://perma.cc/2CP8-96XC>]; *Partnership Missions/Cuba*, FLORIDA BAPTIST CONVENTION, <https://flbaptist.org/missions-ministry/> (last visited July 7, 2016) [<https://perma.cc/SQ5F-AMUT>].

30. *Leadership and Education*, ECHO CUBA, <http://www.echocuba.org/12Leadership/> (last visited July 7, 2016) [<https://perma.cc/8KRF-PS8X>].

31. *The B'nai B'rith Legacy*, *supra* note 22; *Biblical Poverty*, ECHO CUBA, <http://www.echocuba.org/12BiblicalPoverty/> (last visited July 7, 2016) [<https://perma.cc/5ZT2-WAER>]; Melissa Hinnen, *Bearing Fruit in Cuba*, GLOBAL MINISTRIES: THE UNITED METHODIST CHURCH, <http://www.umcmmission.org/Learn-About-Us/News-and-Stories/2012/March/Bearing-Fruit-in-Cuba> (last visited Aug. 9, 2016) [<https://perma.cc/74WD-35FD>].

32. *Sustainable Development Goal*, UNDP, <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (last visited Mar. 10, 2017) [<https://perma.cc/29V4-GEF5>].

tainable food (FAO and WFP);³³ developing programs in the areas of education, natural sciences, social and human sciences, culture and communication (UNESCO);³⁴ promoting children's rights (UNICEF);³⁵ enhancing disease prevention and immunization, and promoting environmental health (WHO);³⁶ and protecting and increasing sexual and reproductive services, and promoting gender equality (UNFPA).³⁷

The European Union has allocated fifty million euros to support work in Cuba in the areas of food security and sustainable agriculture, environment and climate change, and sustainable economic and social modernization.³⁸ The Spanish NGO, Hombre Nuevo, Tierra Nueva, manages a variety of programs in Cuba that aid to farmers in damaged rural areas, sponsor campaigns for children and disabled people, provide medicine to dispensaries, and provide food to the elderly to help ensure a balanced diet.³⁹ German nonprofit organization KarEn's work in Cuba includes exploring renewable energies and improving safe water supplies.⁴⁰ CARE Canada and Oxfam Canada work to support Cuban responses to humanitarian emergencies, improve livelihoods, and expand the capacity of their Cuban partners.⁴¹ The Canadian-Cuban Friendship Association organizes cultural exchanges and donates books and other forms of material aid.⁴²

C. How do Nonprofit Organizations Working in Cuba Operate?

1. Cuban Organizations

The term most often used in Cuban legal documents to refer to nonprofit activity is *actividad sin ánimo de lucro*, although the term *actividad no lucrativa* is also used to describe the same concept.⁴³ The legal framework

33. Food and Agriculture Organization of the United Nations, *Healthy People Depend on Healthy Food Systems 4* (Rome: United Nations, 2013) http://www.fao.org/fileadmin/templates/getinvolved/images/WFD_issues_paper_2013_web_EN.pdf [<https://perma.cc/F8QH-RXY7>].

34. *Major Programmes*, UNESCO, <http://www.unesco.org/new/en/unesco/themes/> (last visited Mar. 10, 2017) [<https://perma.cc/EAW3-D6JP>].

35. *Protecting Children's Rights*, UNICEF, https://www.unicef.org/crc/index_protecting.html (last visited Mar. 10, 2017) [<https://perma.cc/3S63-4YL4>].

36. *Programmes*, WHO, <http://www.who.int/bulletin/volumes/86/2/07-040089/en/> (last visited Mar. 10, 2017) [<https://perma.cc/VD87-R35T>].

37. *Gender Equality*, UNPF, <http://www.unfpa.org/gender-equality> (last visited Mar. 10, 2017) [<https://perma.cc/B7Z2-WX6A>].

38. *EU Relations with Cuba*, EUROPEAN UNION EXTERNAL ACTION, http://eeas.europa.eu/cuba/index_en.htm (last visited June 20, 2016) [<https://perma.cc/GEU3-N3VG>].

39. *Nuestro Trabajo*, HOMBRE NUEVO, TIERRA NUEVA, <http://www.hombrenuevotier-ranueva.pangea.org/> (last visited June 20, 2016) [<https://perma.cc/K4X9-B7VA>].

40. *Proyectos*, KAREN, http://www.karen-berlin.de/index_es.php?c=proyectos (last visited June 20, 2016) [<https://perma.cc/A9YK-RYCC>].

41. *Cuba*, CARE CANADA, <http://care.ca/country/cuba> (last visited July 10, 2016) [<https://perma.cc/NZM5-S6QN>]; *Oxfam in Cuba*, OXFAM CAN., <http://www.oxfam.ca/our-work/where-we-work/americas/cuba> (last visited July 10, 2016) [<https://perma.cc/FHN5-E7FH>]. Oxfam also engages in programs that advance gender equality. *Id.*

42. *What is the CCFA?*, CAN.-CUBAN FRIENDSHIP ASS'N, <http://www.ccfatoronto.ca/> (last visited July 10, 2016) [<https://perma.cc/B3XK-F62R>].

43. Memorandum from Dr. Rolando Suarez on legal opinions about the following questions (June 9, 2016).

for domestic nonprofit entities is comprised of the Cuban Constitution (*La Constitución de la República de Cuba*),⁴⁴ the Civil Code (*Código Civil*),⁴⁵ the Associations Law of 1985 (*Ley 54 de Asociaciones*) (the Associations Law),⁴⁶ and the Regulation of the Law of Associations (*Reglamento de la Ley de Asociaciones de 1986*).⁴⁷

Moreover, a number of resolutions have been approved by the Ministry of Finance and Prices and the Ministry of Justice to regulate certain aspects of nonprofit activity in Cuba, namely Resolution 234-2005 (*Resolución No. 235-2005*),⁴⁸ Resolution 43/05 (*Resolución No. 43/05*),⁴⁹ Resolution 44/05 (*Resolución No. 44/05*),⁵⁰ Resolution 45/05 (*Resolución No. 45/05*),⁵¹ and Resolution 46/05 (*Resolución No. 46/05*).⁵² This legal framework applies to organizations that are based in Cuba, not to foreign organizations that engage in Cuba from offices in other countries.

The right to associate is a constitutional right ostensibly afforded to all Cuban citizens,⁵³ “as long as such association is not contrary to the revolution.”⁵⁴ Article 23 of the Constitution states that recognized associations can hold private property and establishes that the use and disposition of such property will be governed by Cuban law, international treaties, and the organization’s own statutes and regulations.⁵⁵

The Civil Code provides for different types of non-commercial organizations.⁵⁶ Cubans can undertake nonprofit activity through one of three forms—civil partnerships, foundations and associations⁵⁷—all described in the Code as “entities that, having their own private property, are capable

44. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1976), as amended CUBA CONST. art. 66 (1976).

45. *Código Civil* (1987), as amended COD. CIV. Ley No. 59 (Cuba 1987).

46. *Ley de Asociaciones* (1985) LEY No. 54 (Cuba 1985).

47. Resolución núm. 53 del Ministerio de Justicia, de 14 de julio de 1986, por la que se dicta el reglamento de la ley núm. 54, de 27 de diciembre de 1985.

48. Resolución No. 235-2005 del Ministerio de Finanzas y Precios, de 30 de Septiembre de 2005 (regulates the use and control of accounting books and other supporting documentation of economic activities by several public and private entities, including associations).

49. Resolución No. 43/2005 del Ministerio de Justicia, de 19 de Febrero de 2005 (regulates construction operations in offices and land of religious associations).

50. Resolución No. 44/2005 del Ministerio de Justicia, de 19 de Febrero de 2005 (regulates inspection activities on associations by the Ministry of Justice).

51. Resolución No. 45/2005 del Ministerio de Justicia, de 19 de Febrero de 2005 (regulates control activities by state bodies and associations, as specified in relationship agreements).

52. Resolución No. 46/2005 del Ministerio de Justicia, de 22 de Febrero de 2005 (regulates the procedure to carry out nonprofit activity by religious associations in private residences).

53. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1976), as amended CUBA CONST. art. 54 (1976).

54. *Id.* at art. 62; Simone Grant, *Cuban Civil Society Revisited: An Examination of the Theory and Reality*, 19 ASS’N FOR THE STUDY OF THE CUBAN ECON. 453, 459 (2009).

55. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1976), as amended CUBA CONST. art. 23 (1976).

56. See *Código Civil* (1987), as amended COD. CIV. art. 39.2 § ch. d, f (Cuba 1987).

57. See Suarez, *supra* note 43.

of being subject to rights and obligations.”⁵⁸

Civil partnerships (*Sociedades Civiles*) are created by parties who “bind themselves to provide money and other goods, or their work, with the aim of reaching the goals of the partnership, in harmony with its social interest.”⁵⁹ They require a partnership agreement, in writing, and the partnership must be approved or authorized by Cuban authorities. In addition, they must be registered in the appropriate registry,⁶⁰ as determined by law.⁶¹ Civil partnerships differ from commercial partnerships described in the Code of Commerce, in that commercial partnerships are for-profit; consequently, nonprofit groups cannot use the Code of Commerce as their legal framework.⁶² The number of civil partnerships is low in Cuba,⁶³ and the ones that exist “have strong ties to the institutions and ministries of the State,” operating as a form of organization “that benefits and strengthens public institutions.”⁶⁴

The Civil Code defines foundations as “ensembles of goods donated by their former owners to nonprofit activities allowed by the law.”⁶⁵ As with civil partnerships, there are relatively few foundations in the country,⁶⁶ and those that exist often operate as quasi-state programs. For instance, the *Fundación Escuela Latinoamericana de Cine* is a school, and the *Fundación Núñez Jiménez* “carries out studies on the protection of nature [.]”⁶⁷ Arguably the “most important” Cuban foundation is *Sociedad Económica de Amigos del País*, founded in the nineteenth century.⁶⁸ Today it continues to own a historically significant building where it maintains its library.⁶⁹

According to the Associations Law, the third form of nonprofit organization—an association—can only be created to serve certain specified interests: science and technology,⁷⁰ art and culture,⁷¹ athletics,⁷² friend-

58. *Código Civil* (1987), as amended COD. CIV. art. 39.1 (Cuba 1987).

59. *Id.* at art. 396.1.

60. *Id.* at art. 396.2-3.

61. *Id.* at art. 108.

62. Suarez, *supra* note 43.

63. *Id.*

64. *Id.* One example of a civil partnership that collaborates in government programs is *Centro Félix Varela*. *Id.*

65. *Código Civil* (1987), as amended COD. CIV. art. 39.2 § d (Cuba 1987).

66. Suarez, *supra* note 43.

67. *Id.*

68. *See id.*

69. *Id.*; *see also* Bronfman, *supra* note 16, at 10 (listing six major Cuban foundations: the Ludwig Foundation, the Antonio Núñez Jiménez Foundation, the Fernando Ortiz Foundation, the Foundation for New Latin American Cinema, the Caguayo Foundation, and the Alejo Carpentier Foundation, all of which have cultural purposes).

70. Scientific or technical activities “contribute to the investigation and application of the achievements of science and technique.” *Ley de Asociaciones* (1985) LEY No. 54 art. 2 § a (Cuba 1985).

71. Cultural and artistic activities “contribute to fostering and developing artistic education and the vocation for creativity, art and culture.” *Id.* at art. 2 § b.

72. Sportive activities “have as a goal the development and practice of sports and physical recreation and education.” *Id.* at art. 2 § c.

ship and solidarity,⁷³ and “others [goals] that [promote the] social interest.”⁷⁴ More than half of Cuba’s approximately 2200 registered associations are friendship and solidarity organizations.⁷⁵ Certain activities traditionally associated with nonprofit activity do not appear on the list of permissible interests because they are reserved to the exclusive purview of the government: education, medical and hospital assistance, assistance to the elderly, and agricultural development.⁷⁶ Associations are explicitly prohibited from carrying out activities that are within the exclusive jurisdiction of the state.⁷⁷

Associations can be national, provincial, or municipal, according to the territory where they carry out their activities.⁷⁸ The Associations Law does not apply to mass organizations,⁷⁹ religious organizations, agricultural cooperatives, credit and service organizations, or other similar groups.⁸⁰ By definition, associations are nonprofit, but they may carry out certain income-generating activities within the area of their focus.⁸¹ They may receive international funding in certain circumstances, as well as contributions from their members and third parties, provided they have set out this possibility in their founding documents and have a bank account in which they can receive such funds.⁸²

To establish an association, its founders must request authorization from the Ministry of Justice.⁸³ The Ministry of Justice may deny an application for any of the following reasons:

- a) failure to comply with the state agencies’ requirements;
- b) lack of clear objectives or territory of operation;

73. Friendship and solidary activities are those “whose aim is to develop friendship relationships between different regions and study their history or culture.” *Id.* at art. 2 § d.

74. *Id.* at art. 2 § e.

75. Ivet González, *Ley cubana de asociaciones espera por su demandada reforma*, INTER-PRESS SERV. (July 13, 2016), <http://www.ipsnoticias.net/2016/07/ley-cubana-de-asociaciones-espera-por-su-demandada-reforma/> [<https://perma.cc/NUQ2-56ZL>].

76. See Suarez, *supra* note 43.

77. *Id.*

78. *Ley de Asociaciones* (1985) LEY No. 54 art. 3 (Cuba 1985).

79. Mass organizations are state-controlled organizations that represent diverse sectors of the Cuban society, and whose aim is “to represent their specific interests and to collaborate in the edification, consolidation and defense of the socialist society”. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1976), as amended CUBA CONST. art. 7 (1976). Historically, mass organizations are the entities through which the Cuban state has directed and controlled the growth and management of civil society. To give one a sense of size, there are only seven, and a significant percentage of the population belongs to one or more. It is estimated, for example, that eighty-five percent of women over the age of fourteen participate in the Cuban Federation of Women.

80. *Ley de Asociaciones* (1985) LEY No. 54 art. 2 (Cuba 1985).

81. Suarez, *supra* note 43. For example, associations may provide bar and café services, teach art, or offer sports training. They are also authorized to make “[d]onations to private or State institutions, [engage in] [d]evelopment projects in cooperation with State entities, [f]inanc[e] development projects carried out by the State, [carry out the] [c]onstruction and reparation of residential units in case of natural disasters, [and engage in] [c]ultural . . . [and] recreation” activities. *Id.*

82. *Id.* at 3.

83. *Ley de Asociaciones* (1985) LEY No. 54 art. 6 (Cuba 1985).

- c) objectives deemed to harm the public interest;
- d) goals and objectives judged to be unattainable;
- e) existence of other organizations with similar objectives;
- f) failure to produce a document that indicates the rules and norms of the organization; or
- g) failure to maintain a name, a registered office, or capital/assets.⁸⁴

In addition to Ministry of Justice authorization, statewide associations must be approved by the *Órgano de Relación* whose jurisdiction relates to the field in which the association founders propose to work.⁸⁵

Once approved, an association must enter into a "relationship agreement" with the Ministry of Justice⁸⁶ and submit its rules, regulations, relationship agreement, and other documents to the Ministry of Justice's Associations Registry (*Registro de Asociaciones*), which has a branch in every province of the country.⁸⁷ The function of these branches is to maintain the legal documents and books of the association.⁸⁸ The Ministry of Justice exercises supervisory power over associations⁸⁹ and can impose sanctions if associations do not comply with the law.⁹⁰ Moreover, associations must keep accounting records and prepare monthly financial statements.⁹¹ Both state and local governments are entitled to request copies of association financial statements.⁹²

2. Foreign Organizations

Foreign NGOs in Cuba have no legal personality except in partnership with duly organized Cuban entities.⁹³ Even in cooperation with such entities, they have to follow a certain process to be able to carry out their projects.⁹⁴ In a chapter on NGO participation in Cuban civil society, Alexander Gray outlined the process that foreign NGOs must follow to partner with a Cuban organization:

The foreign NGO comes to Cuba and contacts either the state through the *Ministerio para la Inversión Extranjera y Colaboración Económica* (MINVEC,

84. *Id.* at art. 8.

85. *Id.* at art. 6.

86. *Id.* at art. 11. Dr. Suarez offers the following example: "[I]f the subject is an association that promotes scientific investigation, they will need a Relationship Agreement with the Ministry of Science, Technology and Environment, where they set the kind of partnership they will establish, including a work program." Suarez, *supra* note 43.

87. See *Ley de Asociaciones* (1985) LEY No. 54 art. 16-17 (Cuba 1985).

88. See *id.* at art. 17.

89. Resolución No. 44/2005 del Ministerio de Justicia, art. 1 § 1-2.

90. See *Ley de Asociaciones* (1985) LEY No. 54 art. 19 (Cuba 1985). These sanctions may be appealed within 30 days to the Attorney General of Cuba (Minister of Justice). See *id.* at art. 20.

91. Resolución No. 235-2005 del Ministerio de Finanzas y Precios, art. 2 § 1, and art. 4 § 1.

92. See *id.* at art. 10-11.

93. Grant, *supra* note 54, at 459; Suarez, *supra* note 43.

94. See Adrian Hearn, *Political Dimensions of International NGO Collaboration with Cuba*, in *CUBA TODAY: CONTINUITY AND CHANGE SINCE THE 'PERIODO ESPECIAL'*, 209, 209-10 (Mauricia Font ed., 2004).

Ministry of Foreign Investment and Economic Cooperation) or more often a Cuban NGO directly; the foreign NGO cannot engage in any activities of its own but has to have a Cuban partner; the Cuban NGO proposes a project to the foreign NGO; the foreign NGO brings the finance and technical assistance in the form of a field representative; the Cuban NGO offers the people and expertise to carry out the project; the Cuban NGO goes to the state to get what are known as the “terms of reference” for the project; once the state gives the terms of reference, the project can start. The Cuban NGO is supposed to go to MINVEC with a project proposal and secured funding from a foreign NGO. The MINVEC will evaluate the project and give its *criterios* (judgment), outlining the conditions under which permission for the project will be granted. Determining the terms of reference for a project is the state’s way of getting involved in the direction a project will take. Once the project is approved, the Cuban NGO can interact with all the local actors, including the People’s Council, people in the municipality, various government agencies, and so on.⁹⁵

We have not found a legal authority that supports this explanation of the process, but academic papers,⁹⁶ Dr. Suarez’s legal analysis,⁹⁷ and other philanthropic organizations active in Cuba,⁹⁸ offer a similar account.

One change to the process described by Gray is the dissolution of Minvec and the assignment of its nonprofit oversight functions to the Ministry of Commerce and Foreign Trade and Investment (*Ministerio del Comercio Exterior y la Inversión Extranjera* or *Mincex*).⁹⁹ In addition to approval by Mincex, projects must be approved by the Cuban ministry that oversees the substantive field in which the proposed project will occur, as well as by the Ministry of Foreign Relations (*Ministerio de Relaciones Exteriores* or *Minrex*).¹⁰⁰ This three-ministry process can be cumbersome and time-consuming. According to Dr. Suarez, the cooperation partnership is most common in two fields: (a) “support health services (with a partnership subscribed by the Ministry of Public Health)”; and (b) “agricultural development, subscribed by a state organization that unites farmers (ANAP), formed by the owners of the agricultural lands and heavily controlled by the Ministry of Agriculture.”¹⁰¹

Beyond partnerships, some lawyers have suggested that foreign nonprofits or NGOs might use the Cuban “cooperative” form in the future. Traditionally associated with agricultural production, cooperatives have also been authorized—experimentally—for organizations in some other sectors regarded as valuable to the State, such as recycling, construction to

95. Alexander I. Gray, *The Genesis of NGO Participation in Contemporary Cuba Perceptions from the Field, as Reported by Local and Foreign NGO Representatives*, in *THE CHANGING DYNAMIC OF CUBAN CIVIL SOCIETY* 166–67 (Alexander Gray & Antoni Kapcia eds., 2008). A similar account (although less specific) is available at Hearn, *supra* note 94, at 209–10.

96. See Gray, *supra* note 95; see also Hearn, *supra* note 94.

97. See Suarez, *supra* note 43 (describing the legal obstacles an NGO would have to overcome in Cuba).

98. Telephone Interview with Sarah Doty, Soc. Sci. Research Council (Aug. 4, 2016).

99. See *infra* notes 164–65 and accompanying text.

100. Telephone Interview with Sarah Doty, Soc. Sci. Research Council (Aug. 4, 2016).

101. Suarez, *supra* note 43.

improve housing infrastructure, tailoring workshops, and animal husbandry.¹⁰² The non-agricultural cooperative form “requires specific authorization by the city council of the municipality, the council of the province, the Ministry that controls the specific activity, a commission of the central government and finally, an authorization by the central government.”¹⁰³ The activity of non-agricultural cooperatives is (currently) for-profit.¹⁰⁴ It is not clear whether the government would authorize a non-profit or—if not—whether a for-profit entity could intentionally operate so as to not make any profits. Nor is it clear whether operating as a for-profit entity (even one that did not actually generate profits) would affect the foreign nonprofit’s status at home in the United States).¹⁰⁵

D. Who Funds U.S. Nonprofit Activity in Cuba?

In addition to traditional funding sources, U.S. nonprofit organizations interested in working with Cuban partners in Cuba may apply for funding from a variety of governmental and nongovernmental organizations, including:

- The U.S. Agency for International Development (USAID), a U.S. governmental body, has supported projects that increase the ability of Cubans to participate in civic affairs and improve human rights conditions on the island.¹⁰⁶ A discussion of the challenges associated with using USAID funding is set out in section II.B.
- The U.S. Embassy in Havana, which reopened in July 2015,¹⁰⁷ offers grants to projects developed in Cuba in the areas of arts, academia,

102. *Id.*

103. *Id.*

104. *Id.*

105. U.S. nonprofits must be careful in this context. Nonprofits must not engage in conduct that is contrary to their domestic “status” or purpose. Very generally, then, they have two options for partnering abroad. (1) Domestic charities may receive funds earmarked for a foreign nonprofit or foreign non-profit activity, but only if the domestic charity retains control over the funds and considers the foreign project to be consistent with its charitable purpose. In other words, the domestic nonprofit must have a great deal of control over the foreign activity. (2) Alternatively, a domestic nonprofit may form or partner with a for-profit subsidiary, but in order to maintain charitable status, the non-profit cannot exert any direct control over the for-profit entity. So for example, the nonprofit cannot be involved in the day-to-day management of the subsidiary or control the for-profit subsidiary’s board of directors. See IRC § 368(c) (2015) and 26 C.F.R. § 1.512(b)-1(1)(4) (2016). Transactions between the nonprofit parent and foreign for-profit entity must be at arm’s length. See I.R.C. § 4958(a)-(c) (2015). This suggests that U.S. nonprofits wanting to form or partner with for-profit Cuban entities could not exercise control over the Cuban entity’s activities or risk their tax-exempt status at home.

106. *About Cuba*, U.S. AGENCY FOR INT’L DEV., <https://www.usaid.gov/where-we-work/latin-american-and-caribbean/cuba> (last visited Apr. 4, 2017) [<https://perma.cc/E59U-E85C>].

107. Although the embassy did not reopen until 2015, the United States maintained an “Interest Section” in Havana since 1977. *U.S. Embassy Havana*, U.S. EMBASSY IN CUBA, <https://cu.usembassy.gov/embassy/havana/> (last visited Jan. 8, 2017) [<https://perma.cc/JZX2-BSPG>]. “This interest section oversaw some of the initial NGO/university outreach to Cuba.” Email from Maria Cristina Garcia, Howard A. Newman Professor of Am. Studies, Dep’t of History, Cornell Univ. (Oct. 1, 2016).

sports, entrepreneurship, technology, education, and youth.¹⁰⁸

- The National Endowment for the Arts (NEA) is a federal agency aimed to support equality in art learning and promote America's cultural heritage.¹⁰⁹ The NEA funds programs to promote cultural exchange between the U.S. and Cuba.¹¹⁰
- The Social Science Research Council funds social science research in Cuba.¹¹¹
- The Arca Foundation offers grants to organizations that advance equity, justice and human rights, both domestic and international.¹¹² In the past they have funded projects working to end the embargo against Cuba and normalize relations between the country and the US.¹¹³
- In the past, Atlantic Philanthropies supported a range of groups, including Cuba Now, a political advocacy group with a strong interest in supporting entrepreneurs in Cuba,¹¹⁴ as well as medical projects of other U.S. based organizations.¹¹⁵ However, Atlantic ended all new funding activity in 2016.¹¹⁶
- The Christopher Reynolds Foundation supports projects aimed at strengthening contacts and understanding between the U.S. and Cuba, and also at covering Cuba's needs with a focus on self-determination.¹¹⁷
- The Florida Humanities Council funds programs that help preserve Florida's history and heritage and promote civic engagement.¹¹⁸ It funds the Friendship Association, among other organizations.¹¹⁹
- The Ford Foundation has supported work in Cuba for three decades, focusing on promoting plurality and diversity and advancing relations

108. *U.S. Mission to Cuba Public Affairs Small Grants Program Statement*, DUKE U., <https://researchfunding.duke.edu/us-mission-cuba-public-affairs-small-grants-program-statement> (last visited Mar. 17, 2017) (providing description of US government small-program grants available in 2016 for Cuba) [<https://perma.cc/3RQ8-PUQJ>]; *Havana Large Grants Opportunity*, DEP'T OF STATE, GRANTS.GOV, <https://www.grants.gov/view-opportunity.html?oppId=282982> (last visited Mar. 17, 2017) [<https://perma.cc/L2WA-ZLXU>].

109. *About the NEA*, NEA, <https://www.arts.gov/about-nea> (last visited June 13, 2016) [<https://perma.cc/ME7L-4QBW>].

110. *The First U.S. Cultural Mission to Cuba*, NEA, <https://www.arts.gov/first-us-cultural-mission-cuba> (last visited June 13, 2016) [<https://perma.cc/672S-S8H7>].

111. Telephone Interview with Sarah Doty, Soc. Sci. Research Council (Aug. 4, 2016).

112. *Who we are*, THE ARCA FOUND., <http://www.arcafoundation.org/> (last visited June 3, 2016) [<https://perma.cc/G6JX-RLVB>].

113. Rick Cohen, *Nonprofits and Cuba: Past and Future*, NONPROFIT Q. (Jan. 15, 2015), <https://nonprofitquarterly.org/2015/01/15/nonprofits-and-cuba-past-and-future/> [hereinafter *Cohen*] [<https://perma.cc/6FAS-WD9B>].

114. *Id.*

115. *Regions: Cuba*, THE ATLANTIC PHILANTHROPIES, <http://www.atlanticphilanthropies.org/regions/cuba> (last visited June 3, 2016) [<https://perma.cc/N69W-H23D>].

116. *Can I Apply for a Grant?*, THE ATLANTIC PHILANTHROPIES, <http://www.atlanticphilanthropies.org/big-questions/funding-policy> (last visited June 3, 2016) [<https://perma.cc/784N-G65B>].

117. *A Brief History*, THE CHRISTOPHER REYNOLDS FOUND., INC., <http://www.creynolds.org/> (last visited Mar. 10, 2017) [<https://perma.cc/4YS9-SZVU>].

118. *Grants*, THE FLORIDA HUMANITIES COUNCIL, <https://floridahumanities.org/grants/> (last visited June 7, 2016) [<https://perma.cc/E4VY-MGK8>].

119. *Support*, THE FRIENDSHIP ASS'N, <http://friendshipassociation.org/> (last visited Mar. 3, 2017) [<https://perma.cc/LPZ5-VY2C>]; Cohen, *supra* note 113.

between Cuba and the U.S.¹²⁰ It has supported Cuban work by organizations like the Environmental Defense Fund, Center for International Policy, Beyond Conflict, and the Cuban Artists Fund, as well as academic exchanges with Harvard, Columbia, and the Lexington Institute.¹²¹

- The Kettering Foundation sponsors and carries out research exchanges with the Antonio Núñez Jiménez Foundation for Nature and Humanity in Cuba.¹²²
- The MacArthur Foundation has supported a variety of projects in Cuba, in the fields of human rights and conservation.¹²³ For example, it has funded Environmental Defense Fund work on natural resource protection and management.¹²⁴
- Optics for the Tropics facilitates partnerships between research and conservation groups in the wintering and breeding grounds of migratory birds.¹²⁵ They provide funding to the Friendship Association.¹²⁶
- The Robert Wood Johnson Foundation has financed MEDICC (Medical Education Cooperation with Cuba).¹²⁷
- The Rockefeller Foundation has also supported projects in Cuba,¹²⁸ including the work of MEDICC.¹²⁹

Our interviews suggest that some organizations, particularly faith-based groups, rely primarily on individual donations to support their work in Cuba.¹³⁰ Despite their reputation as pro-embargo, for example, many Cuban Americans have engaged in outreach on the island.¹³¹ Sometimes they do so privately; other times they do so through community organizations and churches. Since the 1980s, for example, Catholic parishes in

120. Mario Bronfman, *Cuba's Next Generation of Progress*, THE FORD FOUNDATION: EQUAL CHANGE BLOG (Dec. 22, 2014), <https://www.fordfoundation.org/ideas/equal-change-blog/posts/cubas-next-generation-of-progress/> [<https://perma.cc/25NC-VDLJ>].

121. *Id.*

122. *Multinational-Through Networks*, KETTERING FOUNDATION, <https://www.kettering.org/shared-learning/through-networks> (last visited July 27, 2016) [<https://perma.cc/DEZ9-C364>]; see Bronfman, *supra* note 16, at 14.

123. See O'Neil, *supra* note 1.

124. See *Grantee Organizes Trip to Cuba on Oil Drilling Emergency Preparedness*, MACARTHUR FOUND. (Sept. 30, 2011), <https://www.macfound.org/press/from-field/grantee-organizes-trip-cuba-oil-drilling-emergency-preparedness/> [<https://perma.cc/B7QN-FHE7>]; *Grants to Environmental Defense Fund*, MACARTHUR FOUNDATION, www.macfound.org/grantees/284 (last visited Mar. 3, 2017) [<https://perma.cc/KW4H-KZ2F>].

125. *People and Projects of OT*, OPTICS FOR THE TROPICS, <http://www.opticsforthe-tropics.org/projects0.shtml> (last visited Mar. 3, 2017) [<https://perma.cc/Y8HK-R8L2>].

126. THE FRIENDSHIP ASS'N, *supra* note 119.

127. Cohen, *supra* note 113.

128. Bronfman, *supra* note 16, at 17.

129. Cohen, *supra* note 113.

130. See Telephone Interview with David Bogosian, Overseas Dir., Christian Aid Mission (May 20, 2016); Telephone Interview with Dr. Craig Culbreth, Lead Catalyst with the Missions in Ministries Team, Fla. Baptist Convention (May 23, 2016); Telephone Interview with Sienna Girgenti, Assistant Dir. of Int'l Ctr. for Human Rights and Pub. Policy, B'nai B'rith (May 25, 2016); Telephone Interview with Rev. Dr. Nilo Figu, Commc'ns, Lutheran Hour (May 31, 2016); Telephone Interview with Rabbi Sunny Schnitzer, President and Spiritual Dir., Cuba America Jewish Mission (June 2, 2016); Telephone Interview with Alberto Jones, President, Caribbean Am. Children's Found., Vice President, Friendship Ass'n. (June 2, 2016).

131. See, e.g., Telephone Interview with Alberto Jones, President, Caribbean Am. Children's Found., Vice President, Friendship Ass'n. (June 2, 2016).

Miami have funded “sister” parishes throughout Cuba.¹³² Usually this is done with a license, but sometimes this funding occurs “under the table” (e.g., priests from the island visit Miami and return home with funds).¹³³ These sister-parish funds help Cuban churches to remain open and well-maintained, and to provide charitable assistance to the needy. Likewise, hometown organizations (called *municipios*) send clothing, schoolbooks, and similar items to Cuba. These donations are often substantial and are generally not included in official remittance rates.¹³⁴

II. Legal and Other Constraints Affect Nonprofit Activity in Cuba

A. What Are the Cuban Legal Obstacles to Nonprofit Activity in Cuba?

Although the Cuban government has opened its borders to (controlled) foreign investment in recent years,¹³⁵ foreign nonprofit organizations that do work in Cuba still confront a host of legal and practical difficulties. U.S.-based nonprofits, which the Cuban government views with a degree of skepticism, often face particular obstacles.¹³⁶ In this section, we first discuss challenges faced by all nonprofit organizations in Cuba; we then look at the challenges that affect international and, especially, U.S. nonprofits.

1. Legal Constraints on Nonprofit Activity in Cuba Generally

Under the Associations Law, it is very difficult to establish a new organization. First, a new organization may be formed only after demonstrating that no existing organization serves its same purpose.¹³⁷ If there is an overlap in purpose with another organization, and the founders of the proposed organization wish to work for that purpose, the founders of the proposed organization must join the preexisting organization.¹³⁸ This creates nonprofit monopolies and can severely limit the possibility of expanding the number of nonprofits in the country.¹³⁹ In addition, even if the government terminates an organization’s registration, no other organization may be constituted with the same name or even with the same (or

132. Susan Eckstein & Lorena Barberia, *CUBAN-AMERICAN CUBA VISITS: PUBLIC POLICY, PRIVATE PRACTICES* 23 (2001).

133. *See id.*

134. Email from Maria Cristina Garcia, Howard A. Newman Professor of Am. Studies, Dep’t of History, Cornell Univ. (Oct. 1, 2016).

135. *See generally*, K.M. Paparelli, *Reforming Foreign Investment Law in Cuba: What Does it Really Mean for Eager Investors?*, 8 NW. INTERDISC. L. REV. 71 (2015); Kevin J. Fandl, *Foreign Investment in Cuban Real Property: The Case for American Investors*, 45 REAL EST. L.J. 166 (2016); Larry Catá Backer, *The Cuba Communist Party at the Center of Political and Economic Reform: Current Status and Future Reform*, 8 NW. INTERDISC. L. REV. 71, 74-75 (2015); Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives and Free Market Capitalism*, 14 TRANSNAT’L. L. & CONTEMP. PROB. 337, 365-67 (2005).

136. *See infra* Section II.B.3.

137. *Ley de Asociaciones* (1985) LEY NO. 54 art. 10 (Cuba 1985).

138. *Id.* at art. 8.3.

139. *Id.* (“The ministry will deny the request . . . If another organization has identical or similar goals”).

similar) goals and activities.¹⁴⁰ Finally, absent a waiver by the Ministry of Justice, an organization's founders must number more than thirty members at the moment of creation.¹⁴¹

The process for approval intensifies the difficulties presented by the rules. Even where more than thirty founders wish to form an organization for a unique purpose, government approvals are highly centralized and discretionary. The ministries with which organizations must create a Relationship Agreement or partnership do not have the power to decide whether a request will receive approval.¹⁴² Ministries may serve as a link and are necessary to the process, but the final decision rests with the central government, in its absolute discretion.¹⁴³ Dr. Suarez suggests that the process of obtaining government approval to register as an association is the greatest challenge that exists for nonprofit activity in Cuba. He suggests that, "in order to achieve an acceptance by the government, the content of the activity carried out must be interesting for them."¹⁴⁴

Similar challenges emerge when associations decide to undertake a new project, often in collaboration with a foreign NGO. According to Gray:

[S]tate approval for a project comes easily for some Cuban NGOs and with more difficulty for others. Some NGOs report waiting only a few weeks to get their terms of reference from the state, others report waiting up to one year without getting them. Evidently, the state is cautious in approving certain social development projects, taking all the time necessary to ensure that the project is in keeping with the overall goals of the revolutionary socialist project.¹⁴⁵

He notes that "in practice, this means that neither foreign nor Cuban NGOs act independently; the state is always close by, monitoring and managing all resources that come into the country."¹⁴⁶

In thinking about what might be "interesting" or acceptable to the Cuban government, examples are instructive. According to one researcher, "the Government gives no legal right to association to democracy and human right[s] groups."¹⁴⁷ A 2016 report by Freedom House states that "independent racial advocacy or civil rights organizations are illegal, and no autonomous women's or LGBT (lesbian, gay, bisexual, and transgender)

140. *Id.* at art. 10.

141. *See id.* at art. 5.

142. *Id.* at art. 7.

143. *Id.*

144. Suarez, *supra* note 43. Dr. Suarez provides this example as an illustration: "Cultural activities might be a good option, always taking into account that they would need approval by the Ministry of Justice and, in this case, the Ministry of Culture and probably the Ministry of External Commerce and Foreign Cooperation." *Id.*

145. Gray, *supra* note 95, at 167.

146. *Id.*

147. Carlos Eduardo Ponce Silén, LIMITATIONS TO FREEDOM OF ASSOCIATION OF CIVIL SOCIETY ORGANIZATIONS IN LATIN AMERICA: COMPARATIVE VIEW AND SPECIAL CASE STUDY OF NICARAGUA, BOLIVIA, ECUADOR, CUBA, AND VENEZUELA 9 (2010).

organizations are recognized by the state,"¹⁴⁸ although rules prohibiting such activity are not explicit in any legal text. Moreover, activities considered by the regime as counter-revolutionary are prohibited.¹⁴⁹ The regime labels such activities as "against the National Security" or even "terrorist" as justifications for refusing to grant the requisite approvals.¹⁵⁰

Given the difficulties presented by working within the law, it is perhaps unsurprising that some nonprofits do not seek formal recognition. Gray cites Caritas as an example of one such organization.¹⁵¹ But working on the island for a lengthy period of time—even carrying out projects in permitted areas—is not a path to recognition. Without official recognition, civil society groups cannot operate legally, maintain a bank account, own their own office, hire Internet service, or access international funding.¹⁵² Additionally, there can be severe consequences for participating in certain kinds of nonprofit activity without legal authorization. According to Freedom House, "the government will not register any new association or organization that is not supervised by the state."¹⁵³ Nearly all politically motivated short-term detentions in recent years have targeted members of independent associations, human rights groups, political parties, or trade unions.¹⁵⁴ For example, systematic repression has continued against the peaceful and public activities of unauthorized civil and human rights groups.¹⁵⁵

The legal barriers and challenges for nonprofit activity in Cuba are rooted in the particularities of the Cuban social and political context. Ministry of Justice officials have acknowledged the need for a more flexible law governing the regulation of associations but, to date, the National Assembly has not considered an amendment to the Associations Act.¹⁵⁶ There are diverse opinions within the Cuban Government on whether nonprofit work should be encouraged, or even permitted, within a communist state. This ambivalence is evident in the government's approach to the approval process. While some officials believe that the government should completely control NGOs, other officials advance the view that nonprofits can aid in the development of socialism.¹⁵⁷ Gray notes that a "lack of consen-

148. *Freedom in the World: Cuba*, FREEDOMHOUSE.ORG, <https://freedomhouse.org/report/freedom-world/2016/cuba> (last visited Jan. 5, 2016) [<https://perma.cc/V7XD-242U>].

149. *Id.*

150. Silén, *supra* note 147, at 12. As an example, the author notes that, "[a] human rights campaigner was arrested while meeting in 2009 with local civil society representatives and was reportedly charged with espionage. Opposition or any activity to promote democracy is paid with jail time." *Id.* at 13.

151. See Gray, *supra* note 95, at 164.

152. González, *supra* note 75.

153. FREEDOMHOUSE.ORG, *supra* note 148.

154. *Id.*

155. *Id.*; see also International Center for Not-For-Profit Law, *Defending Civil Society*, 14 INT'L J. NOT-FOR-PROFIT L. 1, 15 (2012) (noting that members of unauthorized associations in Cuba are at risk of incurring substantial fines or imprisonment).

156. González, *supra* note 75.

157. See Gray, *supra* note 95, at 164.

sus regarding the usefulness of NGOs results in the state having no clear policy for their management.”¹⁵⁸ Ultimately, it is almost impossible to carry out development projects without the support of the Cuban government, and “[u]nless you’re close to the government, being registered and recognized by Cuba is unthinkable.”¹⁵⁹

2. *Legal Constraints on Foreign or U.S. Nonprofit Activity in Particular*

The legal constraints on nonprofit activity in Cuba discussed above pose significant barriers for U.S. and other foreign nonprofit organizations that would seek to establish a permanent legal presence in Cuba. Several representatives of U.S. nonprofits noted that no American organizations maintain an office in Cuba. Gail Reed, the co-founder of MEDICC and its Cuban Country Representative, makes Havana her home base as a journalist—a status regulated but legal under both Cuban and U.S. law—since she writes for and edits the journal, *MEDICC Review*. She noted, however, that MEDICC, like other U.S. organizations, “is not in Cuba in the sense of having an office or anything like that. That isn’t possible at this time.”¹⁶⁰

Instead, U.S. organizations generally must establish a partnership with a government-recognized Cuban institution or entity and receive specific government approval for the project they plan to undertake.¹⁶¹ Even with the assistance of a Cuban partner, the legal barriers to nonprofit activity are considerable. Approval processes are protracted and opaque; and state interference is common and presents challenges for foreign nonprofits and their Cuban partners; foreign nonprofits are legally and practically dependent on their Cuban partners; it is difficult to bring needed supplies to the island; local employment laws make it difficult for foreign entities to hire Cuban employees; and Cuban immigration laws make it difficult for foreigners to obtain work visas.

a. *The Approval Process*

Many of the nonprofit staff members we interviewed noted that the Cuban government’s permissions process for partnership with a Cuban entity can be lengthy, cumbersome and confusing. It is often difficult to navigate the bureaucracy and determine what the law requires in order to secure approvals. Even when legal requirements are met, approvals may not be granted. Denials are often inferred from the government’s lack of response rather than being understood through a reasoned rejection.

158. *Id.* at 164–65.

159. Interview with anonymous nonprofit representative (2016).

160. Interview with Gail Reed, Co-Founder, Country Dir. and Exec. Editor, MEDICC (May 24, 2016). *See also* Gray, *supra* note 95, at 169 (noting that foreign NGOs are not permitted to officially maintain an office in Cuba and instead tend to work out of the private residences of their representatives).

161. Gray, *supra* note 95, at 166–67.

i. Mincex

As discussed above,¹⁶² the Cuban government has recently updated its rules for foreign entities and the *Ministerio del Comercio Exterior y la Inversión Extranjera* (Mincex) has taken on the role of overseeing foreign philanthropic activity on the island. This role was previously performed by Minvec.¹⁶³ Mincex was created in 2009 by merging the Ministry of Foreign Trade and the Ministry of Foreign Investment and Economic Cooperation.¹⁶⁴

Daniel Whittle, Senior Attorney and Senior Director of the Environmental Defense Fund, noted the updated rules may require greater oversight from Mincex,¹⁶⁵ but said that he had not yet observed any effects of the change from Minvec to Mincex oversight in practice.¹⁶⁶ Another source suggested that Mincex's attitude towards foreign nonprofit activity exhibits the same posture of skepticism held by its predecessor, and that this skepticism is the main source of delay in the process of obtaining Cuban government approval of foreign philanthropic collaboration in Cuba.¹⁶⁷ For example, in at least one case, procuring Mincex approval took over two years.¹⁶⁸ The fact that the process is onerous and uncertain creates tremendous disincentives for U.S. nonprofit activity.

ii. State Interference

The Cuban government's control over foreign organizations' activities may compromise the ability of foreign nonprofits to work closely with Cuban partners and the communities they seek to support. First, the aid structure creates a barrier between the nonprofit and its intended audience. According to the UNFPA director in Cuba, all aid provided by their organization and other UN entities has to pass through Mincex (and previously, Minvec).¹⁶⁹ Thus, the UN agency never has direct contact with the communities it aids. As a result, the agency is not able to monitor how the development work is actually being carried out.¹⁷⁰ One imagines this would not be acceptable to many nonprofits.

Second, the primary goal of many existing Cuban nonprofits is the protection of the central government or state.¹⁷¹ In order to obtain and maintain permission to work in the NGO space, they avoid to competing

162. *Supra* note 105 and accompanying text.

163. REPUBLIC OF CUBA-EUROPEAN UNION, COUNTRY STRATEGY PAPER AND NATIONAL INDICATIVE PROGRAMME FOR THE PERIOD 2011-2013, at 30-31 (2010).

164. *Cuban Government Announcement in English*, MIAMI HERALD (Mar. 2, 2009), <http://www.miamiherald.com/latest-news/article1932464.html> (translating text of official announcement issued by the Cuban Council of State) [<https://perma.cc/4NJN-N3P5>]; LOUIS A. PÉREZ, CUBA: BETWEEN REFORM AND REVOLUTION 343 (5th ed. 2014).

165. Telephone Interview with Daniel Whittle, Senior Attorney and Senior Dir., Cuba Project, Env'tl. Def. Fund (June 16, 2016).

166. *Id.*

167. Telephone Interview with Sarah Doty, Soc. Sci. Research Council (Aug. 4, 2016).

168. *Id.*

169. *See* Hearn, *supra* note 94, at 217.

170. *See id.*

171. *See id.* at 211.

with, or substituting for, the government in any sense. This posture is likely to be a significant obstacle for some U.S. nonprofit organizations. Additionally, several of the nonprofit representatives we interviewed noted that, because of the government's strict oversight and difficult permissions process, Cuban groups tended to be cautious about entering into partnerships with foreign nonprofits, especially U.S. nonprofits. By and large, they are only willing to do so if the benefit to their work is abundantly clear and the alliance does not threaten their relationship with the state.

b. Dependence on Local Partners

In the current legal framework, U.S. nonprofits must depend on local partnerships if they want to be in Cuba. Many interviewees explained how they had developed close relationships with Cuban organizations and emphasized how essential these relationships are to successful nonprofit engagement in Cuba. Among other things, U.S. entities rely on supportive Cuban partners to provide guidance on Cuban law, including how to work around strict legal requirements. Tom Miller of the Green Cities Fund recalled, "One Cuban [partner] said to me, 'Where everything is illegal, everything is legal.' There may be laws on the books but what happens in practice is different and depends on good relationship with people who know what to do."¹⁷²

Formally, the requirement that foreign entities partner with a Cuban nonprofit may be met by creating a partnership with the *Instituto Cubano de los Pueblos* (ICAP), an organization historically identified as the Castro regime's primary mechanism for handling international donations.¹⁷³ The ICAP's stated aim is to secure foreign funds and assess development priorities in the country, and invest the donations where they believe it is most necessary.¹⁷⁴ But creating such a partnership with the ICAP comes with significant costs. These partnerships are not an appealing option for organizations that want to actually carry out defined projects in specific communities, or that do not trust the Cuban government to invest their money as they planned.¹⁷⁵ The ICAP has been described as having "no transparency at all," and money given to it is not accounted for unless there is a formal agreement requiring such an accounting.¹⁷⁶ Some have suggested it has links to Cuban Intelligence.¹⁷⁷ Accordingly, most U.S. nonprofits prefer to work with local NGO partners.

c. Importation Laws and Bringing/Sending Materials to Cuba

A nonprofit organization or partnership that seeks to carry out a construction project must first obtain a construction license, which requires

172. Telephone Interview with Tom Miller, Co-Founder, Green Cities Fund (June 8, 2016).

173. See Hearn, *supra* note 94, at 219.

174. See *id.*

175. See *id.*

176. *Id.*

177. Suarez, *supra* note 43.

approval by a governmental projects agency.¹⁷⁸ Once the organization receives a license, it must acquire the necessary materials.¹⁷⁹ Typically, they must acquire the materials through a contract with the state agencies that supply them, and those supplies are limited.¹⁸⁰

Importing goods is considered the exclusive function of the Cuban state.¹⁸¹ Only certain government agencies are authorized to import goods, and there are extensive rules governing the materials and amounts that can be imported.¹⁸² The Ministry of Construction has a subsidiary that manages this procedure for construction projects.¹⁸³ “Both the law and a specific regulation of the Ministry of External Commerce (Resolution No. 50) allow the Ministry [of Construction] to authorize” the importation of construction materials if it is in the state’s interest.¹⁸⁴ “This resolution has been used to execute collaboration projects.”¹⁸⁵ Both joint ventures and foreign capital companies may obtain, at the moment of their creation, certain allowances for importing goods, but they are not usually granted permission to acquire import construction materials or machinery.¹⁸⁶ In the field of hotel building, however, the government has authorized some joint ventures that will build and run hotels to import construction materials or machinery.¹⁸⁷ These activities, however, are for profit, and nonprofits may find it much more difficult to obtain such authorization.

Restrictions on importing goods into Cuba have also made it difficult for some U.S. organizations to send materials as donations to the island. Alberto Jones, President of the Caribbean American Children’s Foundation and Vice President of the Friendship Association, explained that customs regulations have tightened in recent years to such an extent that, “it isn’t easy to send donations. You need to provide information about everything ahead of time, what you are sending, what brand, what year it was made, . . . [and] the serial numbers . . . You can’t get that information from donors in advance, so it is very difficult.”¹⁸⁸ Other nonprofit representatives noted that customs officials have often held up or intercepted materials sent to Cuba.

In addition to these importation constraints, the U.S. embargo makes it doubly difficult for U.S. nonprofits. Transporting large quantities of material from the United States is currently restricted,¹⁸⁹ so U.S. projects

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Telephone Interview with Alberto Jones, President, Caribbean Am. Children’s Found., Vice President, Friendship Ass’n. (June 2, 2016).

189. Cuban Democracy Act of 1992 (Torricelli Act) 22 U.S.C. § 6005(a)(1)(2) (2012); Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act), 22

that have significant infrastructure needs may not be practicable until a more permissive export policy is approved.¹⁹⁰

d. Cuban Employment Law

Cuban employment law creates challenges for nonprofit organizations that wish to hire Cuban employees. Several interviewees noted that legal restrictions have prevented their organizations from hiring a Cuban employee to contribute to their organizations' work. In order to legally hire staff, a foreign organization must go through a Cuban state agency and follow a suite of Cuban rules regulating virtually all aspects of the employment relationship, including how much the employee will be paid.¹⁹¹ Formally, a Cuban state agency hires employees and determines who can be hired.¹⁹² The foreign entity pays the Cuban agency for the employee's work in convertible Cuban pesos, but the employee receives nonconvertible Cuban pesos at a rate determined by the Cuban agency.¹⁹³ By some estimates, the Cuban employee may receive as little as two percent of the amount the foreign employer pays the Cuban agency for his or her work.¹⁹⁴ In economic terms, this means the Cuban employee may receive as little as the hard currency equivalent of \$6 per month, even though the foreign employer has paid the Cuban state agency \$150.¹⁹⁵ For foreign nonprofits that are philosophically opposed to paying workers such low wages, these restrictions pose a significant obstacle. Faye Miller-Pettway of Fundación Amistad explained that her organization's American staff responded to these challenges by making frequent trips to Cuba to carry out the organization's work and relying on Cuban colleagues only as volunteers,¹⁹⁶ which raises its own set of concerns.

U.S.C. § 6032 (2012) (referring to the keeping in place of the existing regulations set forth in Title 31 Part 515 of the CFR, which make up the Cuba Embargo); *see also What You Need to Know About the U.S. Embargo of Cuba*, DEPT. OF TREAS. (2001), at *1, <https://www.treasury.gov/resource-center/sanctions/Documents/tab4.pdf> (last visited Mar. 3, 2017) [<https://perma.cc/KTX5-4CSS>].

190. *See, e.g.*, Joshua E. Brown, *Green Gitmo*, U. VT. (Mar. 17, 2016), http://www.uvm.edu/~uvmpr/?Page=news&storyID=22472&category=four_sq (demonstrating the difficulty of engaging in large-scale infrastructure projects in Cuba without greater access to materials) [<https://perma.cc/BY4D-SGM6>].

191. Interview with anonymous nonprofit representative (2016). This description is consistent with a recent analysis of Cuban employment law by Jesus R. Mercader Uguina. *See* Jesus R. Mercader Uguina, *Las Ultimas Reformas Laborales en Cuba (2009-2014)* 11-13, CUBA STUDY GROUP [hereinafter Mercader Uguina-]; *see also* Reglamento sobre el Régimen Laboral de la Inversión Extranjera, Resolución No. 16/2014 [hereinafter Res. 16/2014].

192. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1976), as amended CUBA CONST. art. 45 (1976).

193. *See* Res. 16/2014, art. 12-14.

194. *See* Mercader Uguina, *supra* note 191, at 12.

195. *See id.*

196. Telephone Interview with Faye Miller-Pettway, Managing Dir., Fundación Amistad (May 24, 2016).

e. Visas

Several nonprofit representatives suggested that visa requirements for visitors to Cuba are restrictive, posing a challenge for their organizations' work. Multiple-entry visas are not available, so staff members of U.S. nonprofits must apply for a new visa every time they want to visit Cuba.¹⁹⁷ In addition, visas are granted only for specific, approved purposes, which presents a challenge for project development.¹⁹⁸ Daniel Whittle of the Environmental Defense Fund noted that nonprofit staff members may find that Cubans are unwilling to meet with them to explore potential projects if the staff members lack the proper visa.¹⁹⁹ He suggested that travelling to Cuba for a conference is often the best way to network and explore possibilities for collaboration.²⁰⁰

B. What are the Non-legal Challenges for Nonprofit Activity?

In addition to the legal constraints outlined above, nonprofit organizations must grapple with financial, technical, cultural, and other challenges as well. In practice, these challenges are often just as much of a hurdle as any other to valuable nonprofit engagement in Cuba.

1. Procuring Supplies/Infrastructure

First, nonprofit organizations working in Cuba face a number of basic infrastructure challenges. A lack of technological supplies in the country makes it difficult to carry out certain projects related to energy and scientific research.²⁰¹ Similarly, as noted above, a dearth of construction materials such as steel, beams, and doors, presents a barrier to nonprofits whose projects include construction of some sort,²⁰² and importing those goods is very difficult. Moreover, the lack of communication infrastructure creates challenges for managing projects internationally. For example, Cuban citizens do not have direct access to an Internet connection, because—according to the company that delivers it, ETECSA—it is not permitted to provide its services to individuals, only to institutions.²⁰³

197. U.S. DEP'T OF THE TREASURY, FREQUENTLY ASKED QUESTIONS RELATED TO CUBA (2017), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf [https://perma.cc/2KZA-GF9X].

198. *Id.*

199. Telephone Interview with Daniel Whittle, Senior Attorney and Senior Dir., Cuba Project, Envtl. Def. Fund (June 16, 2016).

200. Telephone Interview with Daniel Whittle, Senior Attorney and Senior Dir., Cuba Project, Envtl. Def. Fund (June 16, 2016).

201. Erin Green, *The State of Cuba's Infrastructure*, ENGINEERING.COM, (Feb. 25, 2016), <http://www.engineering.com/BIM/ArticleID/11567/The-State-of-Cubas-Infrastructure.aspx> [https://perma.cc/2EUC-EW79].

202. *See supra* Section III.A.2.

203. *Preguntas más frecuentes*, ETECSA, http://www.etcasa.cu/?page=internet_conectividad&sub=datos_pmf (last visited June 3, 2016) [https://perma.cc/8HX7-AZTT].

2. Banking Services

According to many of the non-profit representatives we interviewed, it is also difficult for American nonprofits to spend money in Cuba. Historically, U.S. restrictions have been a significant part of this challenge, but Cuban obstacles are also significant. For example, according to Dr. Suarez, “[t]he Decree-Law that constitutes the Central Bank of Cuba does not have any disposition that denies foreign participation, but in every case it must be a [for-profit] function.”²⁰⁴ This poses difficulties for nonprofit organizations seeking to set up a bank account in Cuba.

3. Cuban Government’s Continued Distrust of the United States

The Cuban government’s distrust of U.S. organizations and foundations presents a significant political challenge for U.S. nonprofits. In light of historical attempts by USAID and others to foster regime change through civil society in Cuba, the Cuban government and many Cuban people suspect that other U.S. organizations have similar motivations.²⁰⁵ This distrust is likely to be heightened by the United States’ recent rollback of Obama-era policies that had loosened restrictions on Cuba travel and trade. How organizations are funded will continue to be important to the Cuban government. While Cuba is clearly suspicious of USAID funding, nonprofit representatives suggested that other government funding, even by the National Science Foundation, can raise questions as well.

Even organizations that do not receive U.S. government funding are subject to the vicissitudes of the unstable relationship between Cuba and the United States. Tom Miller of the Green Cities Fund recalled how a local government committee, whose permission was essential to a project that his organization and its Cuban partners were planning, had abruptly cancelled a meeting that Mr. Miller had travelled from the United States to attend.²⁰⁶ He later learned that the central government in Havana ordered the cancellation in response to reports about a USAID project aimed at turning hip-hop performers against the government.²⁰⁷

Some interviewees noted that, under the Fidel Castro regime, Cuba lacked a history of philanthropy and independent civil society organizations, and suggested that this too contributes to the distrust of U.S. foundations and nonprofit organizations. In addition, the Cuban government particularly distrusts and is unlikely to permit nonprofit work that focuses on human rights, democracy, or other politically sensitive topics.

204. Suarez, *supra* note 43.

205. See Gray, *supra* note 95, at 175-76; Silén, *supra* note 147, at 11.

206. Telephone Interview with Tom Miller, Co-Founder, Green Cities Fund (June 8, 2016).

207. *Id.* Mr. Miller further suggested that the U.S. Government’s subsequent change of policy with respect to Cuba may prevent similar incidents from occurring in the future. *Id.*

4. Limited Capacity Among Potential Local Partners

Another challenge is found in the opening up of Cuba itself. Although some organizations described the pace of change as slow and partial, others commented on the uncertainty created by the rapidly changing legal, institutional, and bureaucratic context. In addition, a number of the nonprofit representatives we interviewed noted that recent changes in Cuba have led to a flood of requests for partnerships from U.S. nonprofits and academic institutions. They explained that Cuban organizations and institutions lack the capacity to handle all of these requests, let alone to engage in all of these new proposed partnerships. Moreover, the number of partnership requests have overwhelmed the government and slowed the permissions process. In this context, MEDICC Country Director Gail Reed suggested, "Projects are most likely to be successful if they are economically or socially beneficial for Cuba . . . [and] based on exchange and collaboration."²⁰⁸ It is critical that a U.S. organization interested in working in Cuba pursue projects that are initiated by Cubans or valuable to its proposed Cuban partner.²⁰⁹

Conclusions and Recommendations

A. What Recommendations Might We Offer for U.S. Nonprofits that are Interested in Pursuing Work in Cuba in Light of the Constraints Identified Above?

As U.S. nonprofit organizations undertake new or expand existing work in Cuba, a number of factors will affect their likelihood of success. These factors include the organization's field of work, their structure, and their relationships in the country. Drawing from our research and interviews with representatives of nonprofit organizations, we offer several recommendations for U.S. nonprofits that may be interested in working in Cuba in the future.

First, with the caveats that we identify in the conclusion below, nonprofits should focus their energies on activities that broadly align with the Cuban government's strategic priorities. Priorities include, among others, environmental protection; economic development within the socialist con-

208. Telephone Interview with Gail Reed, Co-Founder, Country Dir. and Exec. Editor, MEDICC (May 24, 2016).

209. It is important to think about "what the value is you are proposing to add. Often people just want to conduct research and have access to data. Often they fail because there is no value from the Cuban perspective. What is most successful is to have something concrete to offer to Cuban partners." Telephone Interview with Daniel Whittle, Senior Attorney and Senior Dir., Cuba Project, Env'tl. Def. Fund (June 16, 2016). Soledad Pagliuca, Sec'y of the Friendship Ass'n., added that nonprofit organizations "should look for projects that spring from the Cubans' initiative and are not imposed by our ideas of what is good for them." Telephone Interview with Soledad Pagliuca, Sec'y, Friendship Ass'n. (May 23, 2016). She noted, however, that once Cuban partners propose a project, "they are often hesitant to object to suggestions the foreign nonprofit organization makes about how to execute it." *Id.*

text; health care improvement; and artistic, cultural, and scientific exchange.

Second, setting up a subsidiary in Cuba does not seem to be a practically viable option (for now); however, if this were to change, the Cuban subsidiary would need to have at least thirty members and meet the other requirements of the Law of Associations.²¹⁰ In particular, the subsidiary would need to link its projects to the categories that the Associations Law contemplates (“scientific, cultural, artistic, athletic, friendship and solidarity, and any others that promote goals of social interest”) and ensure that no other organization is engaging in similar work in the area.²¹¹

In addition, nonprofit activity in Cuba is relatively expensive, from relationship building with people in Cuba, to navigating the various approval and other legal processes, to covering project expenses. Lengthy and expensive bureaucracy is one of the reasons why small organizations decide not to invest in Cuba. In general, organizations should avoid relying on USAID funding and instead seek support from other sources that are not seen to be political.

A nonprofit organization that wishes to work in Cuba for the first time should learn as much as possible about the political, cultural, and legal context of the country. It is important to acknowledge Cuban strengths, and a colonial north/south posture will not be successful.²¹² It may be valuable to consult with other U.S. organizations that have a long history of working in Cuba, as well as with Cuban organizations and legal experts. Attending academic conferences in Cuba can be a useful way for a nonprofit leader to learn about the current issues in a given field of work, network, and explore possibilities for collaboration, all while abiding by the terms of his or her visa.

Critically, a U.S. nonprofit must establish strong personal relationships in Cuba. It should seek partnerships with Cuban organizations; ideally those that have experience working with foreign nonprofits and good relationships with both the Cuban government and local communities. It

210. Boris Arenas, *The Association Act, according to #Otro18*, DIARIO DE CUBA (Jan. 6, 2016), http://www.diariodecuba.com/cuba/1452085758_19289.html [https://perma.cc/C4QL-GLNY].

211. Laritza Diversent, *Legal Requirements for Associations in Cuba*, TRANSLATING CUBA (July 9, 2010) (Tomás A. trans.), <http://translatingcuba.com/legal-requirements-for-associations-in-cuba/> [https://perma.cc/HRA6-EUFC].

212. Because foreign NGOs typically bring money and expertise to projects, while local NGOs develop and implement them, the danger is that the relationship can look more like donor-recipient than partner-partner, but it would be a mistake to assume that is always the case. In addition, it is important to remember that Cuba is a country that not only receives but provides aid, especially in the areas of medicine and education. According to Dalhousie professor John Kirk, for example, “[a]s of January 2015 there [were] 51,847 Cuban medical personnel (of whom 50.1% are physicians) working in 67 countries [. . .] To put this in context, approximately 20% of Cuba’s doctors are working abroad as internacionalistas. This would be the same as having 223,000 US doctors serving in developing countries.” Letter from John Kirk, Chair and Professor of Latin American Studies, Dalhousie Univ., to Norwegian Nobel Comm. (Jan. 19, 2015), <http://resumen-english.org/2015/07/nobel-peace-prize-nomination-for-cuban-medical-internationalism-program/> [https://perma.cc/GV7W-WK6F].

is not enough to simply identify a partner and agree to work together. The U.S. organization also needs to build trust among its Cuban collaborators. This requires honesty, transparency, and humility, as well as an ability to approach any challenges that may arise with patience, persistence, and flexibility. Lack of strong relationships, inadequate knowledge of Cuba's communities and traditions, and insufficient understanding of the bureaucratic approvals process can frustrate a nonprofit's planned activities. On the other hand, a strong institutional partner can help the foreign nonprofit to navigate the permissions process, understand and comply with Cuban legal requirements, and ultimately succeed in its work.

A successful partnership and project also depends on the U.S. nonprofit's ability to pursue projects that follow from the initiatives of Cuban partners and are clearly valuable to its partner(s), the Cuban Government, and the communities that the project seeks to benefit. The U.S. nonprofit must also demonstrate what it can offer in particular, distinct from the benefits of collaboration with any of the numerous other organizations seeking to work in Cuba. Academic research projects and other proposed work that does not have a clear collective benefit for Cubans are unlikely to succeed. Taking adequate time to establish relationships and listen to the needs and goals of prospective partners is always important to establishing effective cross-national collaboration. In Cuba, relationship building is absolutely essential, particularly in light of the recent flood of partnership requests that Cuban organizations and institutions have received.

B. What Legal, Policy or Other Measures in Cuba Could Help Address these Constraints and Facilitate Increased Nonprofit Engagement?

Since 1959, U.S. nonprofits have faced substantial obstacles to operating in Cuba. The limitations imposed on U.S. nonprofit activity in Cuba by the U.S. embargo made Cuban legal restrictions and challenges something of a secondary concern. But as U.S. nonprofits have expanded their engagement in Cuba, a trend that may be slowed but is unlikely to be reversed by new regulatory restrictions, internal Cuban obstacles have come to the foreground. With that in mind, we have identified a few steps the Cuban state might take if it wishes to encourage broader foreign nonprofit activity in Cuba.²¹³

213. China has recently taken steps to regulate nonprofit activity in mainland China. CHINA LAW TRANSLATE, 2016 PRC LAW ON THE MANAGEMENT OF FOREIGN NON-GOVERNMENTAL ORGANIZATIONS' ACTIVITIES WITHIN MAINLAND CHINA (2016), <http://chinalawtranslate.com/2016-foreign-ngo-law/?lang=en> [<https://perma.cc/9MPV-2W9G>]. One might argue that the China example could provide a useful model for law reform advocates in Cuba because China is struggling with one of the same key questions facing Cuba, namely, how to reconcile a communist state with NGO nonprofit activity at a conceptual level. Notwithstanding any similarities, however, we are of the view that it would be a mistake for Cuba to move in the direction undertaken by China in this space. The China NGO Law was enacted as part of broad *national security* law reform (*contra* social welfare or business law reform, for example), and its focus and tenor are to strictly regulate foreign nongovernmental activity under the threat of severe penalty. And while

Association Formation: First, if Cuba wanted to make foreign nonprofit activity easier, it would have to alleviate some of the strict requirements of association formation. Most obviously, the fields of work considered appropriate for associations should be expanded; the minimum number of members should be lowered or eliminated; the requirement that prospective organizations demonstrate a different purpose from that of all other registered organizations should be abolished; and the bases on which registration will be denied should be clearly articulated in the law. The government might also consider a mechanism for directly registering foreign nonprofits in Cuba rather than having them form new associations.

Partnership Approval: We also recommend that the Cuban government consider undertaking a review of the current approval process for collaborative projects undertaken by foreign nonprofit organizations and their Cuban partners. This review might consider ways to streamline and expedite the approval process, while ensuring that it becomes more predictable, transparent, and fair. All requirements and procedures should be spelled out in advance and made available online. Those procedures should include clear timelines for reaching a decision. The government should report its decisions in writing and provide reasons for a negative decision, rather than relying on silence to signal denial. It should provide opportunities for organizations to appeal negative decisions. Substantial weight should be given to the opinion of the Cuban partner organization or institution that the project would be valuable for Cuba and its people.

A number of other discrete legal changes would similarly encourage the engagement of U.S. and other foreign nonprofit organizations in Cuba.

- **Imports:** The Cuban government could consider relaxing restrictions on the importation of goods required for nonprofit activities, including construction materials.
- **Banking:** Cuba could facilitate the ability of foreign nonprofits to establish a bank account in Cuba by issuing clear and transparent procedures

providing a new legal framework arguably reduces current uncertainties, many of the obstacles or barriers facing foreign nonprofits in Cuba—both legal and extra-legal—would not be resolved by enacting something similar to the new China NGO Law. For example, the China law institutionalizes and cements government involvement in NGO activity, which may have a chilling effect on such activity. *Id.* Penalties for noncompliance are unduly harsh, and one assumes that as a practical matter, they will act as a disincentive to innovative nonprofit activity. *Id.* Moreover, it seems that the simplest way for continued engagement will be through partnership with a Chinese nonprofit NGO (which is already possible in Cuba). Finally, regulation inevitably means shining a light on previously un- or under-regulated activity, and NGOs currently operating in China without formal legal recognition will undoubtedly come under scrutiny and may need to alter their current practices and assume heightened burdens under the new China NGO Law. Given the uncertainties of the new law, and the potential for serious penalty, enactment may have the effect of reducing nonprofit activity. For more information about the China NGO Law, see HOGAN LOVELLS, CHINA'S NEW LAW ON FOREIGN NGOS: DOES IT APPLY TO YOU, AND IF SO, WHAT DO YOU NEED TO KNOW? (May 9, 2016), [http://www.lexology.com/library/detail.aspx?g=f62b9119-67e4-4b72-8a1d-c5e3261c1ca5; Client_Alert_-_Chinas_New_Law_On_Foreign_NGOS_-_From_the_Pers._._\(2\).pdf](http://www.lexology.com/library/detail.aspx?g=f62b9119-67e4-4b72-8a1d-c5e3261c1ca5; Client_Alert_-_Chinas_New_Law_On_Foreign_NGOS_-_From_the_Pers._._(2).pdf) [<https://perma.cc/8KA3-LLBL>].

through which such accounts may be established and removing the requirement that foreign accounts have a profit-making purpose.

- **Visas:** The Cuban government might consider allowing individuals to apply for and receive multi-entry visas. This would afford valuable flexibility to staff members of foreign nonprofit organizations so that they could travel to Cuba on short notice when a project-related issue or opportunity arises. It would also be useful to expand the purposes for which visas may be obtained to include travel to Cuba for purposes of exploring and developing potential projects. This would ensure that the leaders and staff of foreign nonprofits are able to take the time to learn about the local context of the work they are contemplating and listen to the concerns of potential partners and local communities, so that their proposed work might closely match Cuba's interests and needs.

C. Conclusion

Over the past several years, steps towards the normalization of U.S.-Cuban relations and the Cuban government's interest more broadly in gradually opening its borders to international actors have presented new opportunities for U.S. nonprofits to expand their engagement in Cuba. This expansion is likely to continue over the long term, despite the barriers presented by the United States' recent reinstatement of limitations on Cuba travel and commerce. Cuban law and policy and the approach of nonprofit organizations themselves will continue to play an important role in shaping the direction of U.S. nonprofit engagement in Cuba.

The Cuban government's consultative document (*lineamientos*),²¹⁴ which, since 2010, has provided the basis for reform, recognizes a need for innovation in certain areas, suggesting that Cuba is likely to be receptive to "innovative programming, especially economic fairness, educational opportunity, gender, metropolitan opportunities[,] and sustainable development."²¹⁵ Gender inequality and reproductive health are problems that have been officially recognized in the country, which make them issues on which the Cuban government may be receptive to nonprofit engagement.²¹⁶ On the other hand, one source reported challenges in getting government approval for work relating to sexual orientation.²¹⁷ The nonprofit representatives we interviewed consistently identified environmental protection and sustainability; improved health; and artistic, cultural, and sci-

214. Congreso del Partido Comunista de Cuba, *Resolución sobre los Lineamientos de la Política Económica y Social del Partido y la Revolución* (Apr. 18, 2011), <http://www.cuba.cu/economia/2011-04-19/resolucion-sobre-los-lineamientos-de-la-politica-economica-y-social-del-partido-y-la-revolucion/7845> [<https://perma.cc/5SYE-Y4JE>]. The *lineamientos* is a set of policy guidelines that was adopted by the Cuban government in 2010 and revised in 2011, as part of Raúl Castro's plan for economic and social reform. See also Bronfman, *supra* note 16, at 23; *Cuba's Economic Reforms*, CUBA STUDY GROUP, <http://www.cubastudygroup.org/index.cfm/cuba-s-economic-reforms> (last visited Jan. 8, 2017) [<https://perma.cc/PJ9E-TAQR>].

215. Bronfman, *supra* note 16, at 23.

216. *Id.* at 25.

217. Telephone Interview with Sarah Doty, Soc. Sci. Research Council (Aug. 4, 2016).

entific exchanges as areas in which Cuba seems to be particularly willing to accept international nonprofit activity.

It is important to note that the Cuban government is not receptive to foreign nonprofit engagement on certain topics such as human rights and democracy.²¹⁸ Race is also a sensitive subject that the Cuban government tends to avoid.²¹⁹ It may, however, be possible to work on discrete human rights issues—such as human trafficking—that are of interest to the Cuban government if approached in a collaborative way.²²⁰ Framing the project is especially important when tackling some controversial issues.²²¹ Nevertheless, it is unlikely that Cuba will relax its control over social development activity in the country, nonprofit or otherwise. U.S. nonprofits interested in undertaking new activities in Cuba should understand that focusing on areas other than those identified as priorities by the Cuban government will affect their likelihood of success.

Nonprofit organizations already operating in Cuba advise that organizations should direct efforts to solving the problems that the country faces, and should become knowledgeable about Cuba's specific needs and goals.²²² In other words, activity should be directed for the benefit of Cuba and Cubans, not simply to advance the mission or agenda of the nonprofit itself. Groups with a proven track record of work in Cuba may be able to push the envelope into sensitive areas that would be off-limits to newcomers.²²³ Organizations interested in engaging in nonprofit activity in Cuba will need to make their own cost-benefit assessments with respect to how far to push the limits in determining which activities the Cuban government is likely to allow and how much to accommodate themselves to the Cuban government's priorities and sensitivities.

In the end, what came through in our research is that the Cuban nonprofit space is tightly managed and difficult to navigate. While they were not the focus of this project, the foregoing discussion raises a number of important questions. Why is it so hard? Why are U.S. nonprofits not more welcome or "successful"? What's at stake? Are these obstacles for obstacles sake, as might be the case if motivated primarily by anti-Americanism, retaliation (*vis-à-vis* the embargo), or resistance (to U.S. imperialism)? Or is there a deeper story (or stories) here? What could politics or economics or history tell us about how the law operates in this context? All of these questions provide fruitful avenues for future research and reflection.

218. Silén, *supra* note 147, at 9, 13.

219. Telephone Interview with Sarah Doty, Soc. Sci. Research Council (Aug. 4, 2016).

220. Silén, *supra* note 147, at 9, 13.

221. As an example, "Projects framed as nurturing new spaces for 'diversity and tolerance' are likely to get more traction than those insisting on 'rights' language[,] . . . [and] [p]rojects that understand the importance of 'dialogue and consensus-building' to reform are more likely to have success than those which envision 'advocacy and opposition' as paths to constructive change." Bronfman, *supra* note 16, at 25.

222. Bronfman, *supra* note 16, at 19.

223. Telephone Interview with Sarah Doty, Soc. Sci. Research Council (Aug. 4, 2016).