

1996

Establishing and Protecting United States Foreign Investment in a Post Castro Cuba: By Waiting for Castro, Will U.S. Investors Miss the Boat?

Francisco J. Viñas

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Viñas, Francisco J. (1996) "Establishing and Protecting United States Foreign Investment in a Post Castro Cuba: By Waiting for Castro, Will U.S. Investors Miss the Boat?," *Florida State University Journal of Transnational Law & Policy*. Vol. 5: Iss. 2, Article 2.

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Establishing and Protecting United States Foreign Investment in a Post Castro Cuba: By Waiting for Castro, Will U.S. Investors Miss the Boat?

Cover Page Footnote

Assistant State Attorney for the 2nd Judicial Circuit, Florida; J.D., The Florida State University, 1995; B.B.A. Finance, Florida International University, 1992. The author in no way condones the recent inhumane and unprovoked attack of the two Hermanos al Rescate (Brothers to the Rescue) airplanes which were shot down off the coast of Cuba. This type of action continues to demonstrate that Fidel Castro is in full control of Cuba and will remain in such control until his long-awaited death. The author would like to thank FSU Law Professor Frank Garcia for his assistance and development of this article.

ESTABLISHING AND PROTECTING UNITED STATES FOREIGN INVESTMENT IN A POST CASTRO CUBA: BY WAITING FOR CASTRO, WILL U.S. INVESTORS MISS THE BOAT?

FRANCISCO J. VIÑAS*

I.	Introduction.....	227
II.	Current United States Policy Toward Cuba	227
	A. The Effect of the CDA.....	230
	B. Western Hemispheric Reaction to the CDA.....	227
	C. Cuba's Attempts to Conform	227
III.	Investing in Cuba and the United States' Western Hemispheric Foreign Investment Goals	235
IV.	Protecting U.S. Foreign Investment in Cuba	237
	A. Forms of Investment.....	227
	B. Protecting Foreign Investment.....	239
	C. Trade Agreements Given Cuba's Present Situation.....	242
	D. Future Free Trade Zones and Agreements with Cuba	244
V.	Chile, Mexico, and Argentina: Case Studies for Cuba	245
	A. Chile.....	245
	B. Mexico.....	245
	C. Argentina.....	246
VI.	Opening Trade and Investment with Cuba	249
VII.	Conclusion.....	251

I. INTRODUCTION

The nation of Cuba is either on the brink of its final economic downfall or on the verge of becoming the Caribbean's newest "hot spot" for foreign investment. Many foreign investors in the United States of America anxiously await the opportunity to invest in Cuba. With the existing U.S. embargo of Cuba and the Cuban Democracy Act of 1992 ("CDA"),¹ U.S. citizens can only dream, discuss, plan, and wait for the opportunity to invest in Cuba. Corporations, business people, and professionals look toward the future when they will

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1. Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-10 (Supp. 1995).

be able to cross the ninety miles of the Gulf of Mexico to participate in investment opportunities available in Cuba. However, the present situation in Cuba and resulting U.S. foreign policy prevent any investment by U.S. citizens in Cuba until Fidel Castro² conforms with the democratic movement of the world and shifts his regime to a democratic society.

The United States has continually maintained a policy of prohibiting all trade and assistance to Cuba even after the former Soviet Union relinquished its ties to and its support of Cuba. The United States has politically influenced other countries to adopt the embargo that prevents any extensive trade or investment with Cuba. Currently, Castro is feeling the combined sting of withdrawal of Soviet support and the stringent enforcement of the U.S. foreign policy. Castro's once economically strong island paradise is regressing into an age of horse-drawn carriages and candlelight. In an attempt to rehabilitate the economy and to launch Cuba into the current world economy, Castro is opening Cuba's doors to foreign investment.

Several countries are beginning to consider the U.S. policy toward Cuba inappropriate and ineffective.³ The international community has changed its view regarding the U.S. embargo of Cuba due to the fact that the United States inconsistently regulates foreign subsidiaries of U.S. corporations. Prior to the CDA, the United States allowed some foreign subsidiaries of U.S. corporations to conduct trade with Cuba while the United States asked the rest of the world to boycott all trade with Cuba. Additionally, the international community currently believes that trading with Cuba is not a violation of international law.⁴ As a consequence, several world leaders have initiated discussions with Cuba regarding the development of policies and the protection of foreign investment in Cuba.⁵

Many people in the United States believe that the time has come to alter U.S. foreign policy and to discuss the possibility of foreign investment in Cuba. U.S. foreign investors believe that due to the current U.S. policy, they will lose the opportunity to favorably invest in Cuba before other countries invest. With the international community expressing its desire to disregard U.S. policies and to invest in Cuba, these critics may be right.

2. Fidel Castro, the Communist Dictator of Cuba, wrested control of Cuba from President Fulgencio Batista in January, 1959.

3. See *infra* notes 30-53 and accompanying text.

4. See generally Jason S. Bell, Comment, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 U. MIAMI INTER-AM. L. REV. 77, 80 (1993).

5. See *infra* notes 32-39 and accompanying text.

An enormous number of exiled Cubans in Miami, Florida, are awaiting the opportunity to invest and to participate in rehabilitating Cuba's economy. The United States has provided exiled Cubans with the education and the resources to build successful businesses and careers. Many Cuban-Americans anticipate the time when they can utilize their education and experiences to develop successful businesses and professional practices in their former homeland of Cuba.

Latin America and the Caribbean community have established several free trade areas, in part to promote foreign trade and investment. The Caribbean community created a free trade area in the Caribbean called the Caribbean Common Market ("CARICOM").⁶ CARICOM provides its members with the ability to legally enforce certain property rights between trading and investing countries.⁷ CARICOM membership is open to all countries in the Caribbean and could be modified to include Cuba.⁸ In an attempt to entice foreign investors into Cuba and at the behest of Castro, Cuba may join a free trade area. Joining a free trade area would likely transform Cuba's devastated economy into a more vibrant and economically strong market.

In order for a country to establish foreign investment in Cuba, the Cuban government⁹ will have to develop and to establish specific policies to protect the rights of foreign investors. In the past, the United States established several policies to protect U.S. foreign investment such as Treaties of Friendship, Commerce and Navigation, Bilateral Investment Treaties, Investment Incentive Agreements, and most recently, the North American Free Trade Agreement ("NAFTA"). These agreements with foreign countries establish a means of protecting property should a dispute arise regarding a foreign investor's rights.

As the opportunity draws closer for future investment by U.S. citizens in Cuba, the United States should be developing ways to protect U.S. investors against expropriation, repatriation of profits, currency transfers, political changes, and any investment disputes that may arise in the host country. This article examines the current policies of the United States regarding investment in Cuba and the

6. Treaty Establishing the Caribbean Community, July 4, 1973, 946 U.N.T.S. 17, *reprinted in* 12 I.L.M. 1033; *see* JENNIFER HOSTEN-CRAIG, *THE EFFECT OF A NORTH AMERICAN FREE TRADE AGREEMENT ON THE COMMONWEALTH CARIBBEAN 1* (1992) (discussing the establishment of CARICOM).

7. 2 INTERNATIONAL ECONOMIC LAW 643 (Stephen Zamora & Ronald A. Brand eds. 1990).

8. *Id.*

9. Fidel Castro and the Cuban government will be used interchangeably in this article.

ways the United States can protect its investors from some anticipated problems.

II. CURRENT UNITED STATES POLICY TOWARD CUBA

The Cuban Democracy Act ("CDA") became effective on October 23, 1992.¹⁰ The United States Congress enacted the CDA for the purpose of tightening the already present trade embargo on Cuba and forcing Cuba toward a democratic government.¹¹ The CDA eliminated the loophole that enabled foreign subsidiaries of U.S. corporations to trade with Cuba.¹²

A. *The Effect of the CDA*

The main purpose of the CDA is to bring about a peaceful democratization of Cuba, and to ultimately end the regime of the Castro government, by eliminating trade by foreign subsidiaries of U.S. corporations with Cuba.¹³ The CDA, however, has "been remarkably effective at perpetuating the suffering of the Cuban people" by making food very scarce.¹⁴ As stated by one Cuban-American expert, "no regime falls when people are spending twenty hours a day thinking about how to find food. If anything happens in Cuba, it will happen only when things improve."¹⁵ A report prepared for the United Nations regarding Cuban human rights states that the United States' hard line policy toward Cuba is irrational and counterproductive.¹⁶

The CDA prevents trade with Cuba by removing the licensing authority of the Office of Foreign Assets Control.¹⁷ In addition, the CDA bans foreign subsidiaries of U.S. corporations from legally trading with Cuba by imposing penalties under the Trading with the

10. 22 U.S.C. §§ 6001-10; Bell, *supra* note 4, at 79.

11. Bell, *supra* note 4, at 79.

12. Before the CDA, the U.S. banned all direct trade between U.S. companies and Cuba. See 31 C.F.R. § 515.543 (1992). Due to the harsh criticism that the United States received regarding its regulation of foreign subsidiaries, the Legislature established an exception for foreign subsidiaries trading with Cuba. The exception requires that the foreign subsidiaries obtain a license from the Treasury Department. 31 C.F.R. § 515.559 (1995).

13. Bell, *supra* note 4, at 118; 22 U.S.C. § 6001(6) & (8) (Supp. 1993); see 137 CONG. REC. H8763 (daily ed. Oct. 30, 1991) (statement of Florida Rep. Smith).

14. Bell, *supra* note 4, at 119.

15. Tom Carter, *Some Say U.S. Embargo Keeps Castro in Power*, WASH. TIMES, Aug. 9, 1992, at A9 (quoted in Bell, *supra* note 4, at 120).

16. Bell, *supra* note 4, at 121 (discussing the Special Rapporteur of the Commission on Human Rights, Ambassador Caro-Johan Broth's findings contained within his interim report on the *Situation of Human Rights in Cuba*, U.N. Doc. A/47/625, Nov. 19, 1992).

17. *Id.* at 125.

Enemy Act.¹⁸ The CDA states that the United States' "President should encourage the governments of countries that conduct trade with Cuba to restrict their trade and credit relations with Cuba in a manner consistent with the purposes of this chapter."¹⁹ This statutory section gives the United States another tool to achieve its foreign policy goals through export controls.

The embargo has not affected Castro's governmental policy but has caused Cuba's economy to continue to crumble.²⁰ The CDA has failed to accomplish its goals.²¹ It fails to achieve its most fundamental policy objective of weakening Castro's control and actually may strengthen Castro's control over Cuba.²² Foreign subsidiaries of U.S. corporations have a very small line of trade compared to the amount of Cuban imports.²³ For example, almost all of the imported goods from foreign subsidiaries of U.S. corporations in 1990 consisted of food and medical supplies.²⁴ By eliminating the ability of foreign subsidiaries of U.S. corporations to trade with Cuba, the CDA will not prevent Cuba from importing foodstuffs. Cuba will simply obtain the supplies it needs from non-U.S. corporations.²⁵ The enforcement of the embargo upon foreign subsidiaries of U.S. corporations does not promote the democratization of Cuba. Although the CDA reduced trade by foreign subsidiaries of U.S. corporations with Cuba, the CDA has not prevented foreign countries from trading with Cuba.

B. *Western Hemispheric Reaction to the CDA*

The United States Congress evidently believes that its policy toward foreign subsidiaries, through the CDA, conforms with international law.²⁶ Several of the United States' closest allies, however, maintain that the U.S. policy violates international law.²⁷ Some

18. *Id.*; see Trading with the Enemy Act, 50 U.S.C. app. §16 (1995); 22 U.S.C. §§ 6001-6005 (Supp. 1995).

19. 22 U.S.C. § 6003(a) (Supp. 1995).

20. Cf. Bell, *supra* note 4, at 80-81 (finding that the current United States policy towards Cuba "will either strengthen . . . Castro's control over the Cuban people or lead to a state of anarchy . . .").

21. *Id.* at 81.

22. *Id.*

23. In 1992, Cuba's total imports represented \$4 billion. See Donna R. Kaplowitz & Michael Kaplowitz, *New Opportunities for U.S.-Cuban Trade*, JOHNS HOPKINS U. PAUL H. NITZE SCH. ADVANCED INT'L STUD. 3 (1992); Bell, *supra* note 4, at 112.

24. CUBA'S TIES TO A CHANGING WORLD 233 (Donna R. Kaplowitz ed., 1993) [hereinafter CUBA'S TIES]; see Wayne S. Smith, *The End of the Cold War? U.S.-Cuba Relations Remain Unchanged*, L.A. TIMES, Sept. 13, 1992, at M2.

25. CUBA'S TIES, *supra* note 24, at 233.

26. Bell, *supra* note 4, at 100.

27. *Id.*

countries claim that the United States violates international law by attempting to directly control foreign subsidiaries through extra-territorial jurisdiction.²⁸ By enacting the CDA, the United States put foreign subsidiaries in a difficult position and left them to decide whether they will continue trading with Cuba, possibly forcing their U.S. parent corporations to violate the CDA which subjects them to U.S. civil and criminal penalties, or foreign subsidiaries could discontinue trade with Cuba altogether, subjecting the foreign subsidiaries to civil and criminal penalties under the foreign states' laws.²⁹

Several countries have expressed displeasure over the United States' enactment of the CDA. Even before the signing of the CDA, the European Community planned on filing a formal complaint with the General Agreement on Tariffs and Trade challenging the "extra-territorial application of . . . [the United States'] laws."³⁰ In 1993, the European Parliament took a firmer stance by issuing "a resolution calling for [its] member governments to ignore the provisions of the CDA which prohibit subsidiaries of U.S. firms from trading with Cuba."³¹

In 1992, Canada legislated a provision under the Foreign Extraterritorial Measures Order³² which prohibits corporations from complying with the CDA.³³ The provision states that a corporation must notify the Attorney General whenever a foreign subsidiary's home country establishes any type of legislation or initiative that would impede trade or commerce between Canada and Cuba.³⁴ Under the Canadian Extraterritorial Measure, officers of a corporation who violate the order could be imprisoned and fined.³⁵

In October 1992, the United Kingdom responded to the CDA by invoking the Protection of Trading Interests Act.³⁶ Similar to Canada's Foreign Extraterritorial Measures Order, the Protection of Trading Interests Act prohibits foreign subsidiaries in the U.K. from

28. *Id.*; CUBA'S TIES, *supra* note 24, at 234.

29. Bell, *supra* note 4, at 118; *see also* 50 U.S.C. app. §16(b)(1) (Supp. 1993); *see infra* text accompanying notes 23-30.

30. Michael A. Novo, Comment, *Cuba Sí, Castro No! The Cuban Democracy Act of 1992 and Its Impact on the United States' Foreign Policy Initiatives Towards Establishing a Free and Democratic Cuba*, 3 J. TRANSNAT'L L. & POL'Y 265, 274 (1994).

31. *Id.* at 274-75.

32. Foreign Extraterritorial Measures (United States) Order, 1992, 124 C. Gaz. SOR/90-751 (Can.).

33. Novo, *supra* note 30, at 275; Bell, *supra* note 4, at 116-17.

34. Bell, *supra* note 4, at 116-17.

35. *Id.* at 117.

36. *Id.*; United Kingdom's Protection of Trading Interests (U.S./Cuban Assets Control Regulations) Order, 1992 No. 2449, Statutory Instruments (Oct. 14, 1992); CUBA'S TIES, *supra* note 24, at 234-36.

conforming with the U.S. embargo on Cuba.³⁷ Mexico also has issued directives that impose severe sanctions on any Mexican-based businesses that comply with the Cuban trade restrictions created by the CDA.³⁸

In December 1992, the United Nations General Assembly responded to the CDA and passed a resolution calling for the end of the U.S. trade embargo against Cuba.³⁹ In November 1993, a non-binding U.N. resolution was passed that condemned the U.S. trade embargo on Cuba and called on member nations to disregard the embargo.⁴⁰ One of the main reasons so many countries are outraged at the U.S.-Cuban embargo is due to the United States' inconsistent policy towards regulating the foreign subsidiaries of U.S. companies.⁴¹ While the United States asserts that the CDA's prohibition of trade by foreign subsidiaries in Cuba is legal under customary international law and should be binding on all states, the United States has decided not to abide by similar embargos.⁴² The United States fails to see that its approach to Arab countries' foreign policy parallels that which Mexico, Canada, and the U.K. have taken toward United States foreign policy. This hypocrisy of the United States angers the international community.⁴³

At the Ibero-American Summit in June 1994, the U.S. trade embargo on Cuba was condemned for the second consecutive year.⁴⁴ Referring to the U.S. trade embargo on Cuba, the Summit "called for the end of 'unilateral, coercive economic and commercial measures . . . that hurt the conditions of life of Ibero-American peoples.'"⁴⁵ During the Summit, Castro attacked the United States for failing to include Cuba in the Miami Summit to be held later that year.⁴⁶ The United States may be making a mistake by excluding Castro from Latin America and Caribbean conferences. Cuba will be unable to survive economically much longer without foreign investment. Western Hemispheric countries are beginning to completely ignore

37. Bell, *supra* note 4, at 117.

38. *Id.*; *Mexico to Punish Firms that Obey U.S. Rule*, J. COM., Dec. 4, 1992, at A4.

39. Novo, *supra* note 30, at 275.

40. *Id.* at 275-76; *Key U.S. Allies at U.N. Vote Against Cuba Embargo*, MIAMI HERALD, Nov. 4, 1993, at A22.

41. Bell, *supra* note 4, at 126-27.

42. *Id.* at 127. The United States passed blocking legislation to prohibit U.S. corporations from participating in the Arab Boycott of Israel in 1977. *Id.*

43. *Id.*

44. Mary Beth Sheridan & Andres Oppenheimer, *Latin Leaders Press Castro for Reforms: Embargo Condemned Again*, MIAMI HERALD, June 16, 1994, at A24.

45. *Id.*

46. *Id.*

U.S. foreign policy by investing in Cuba.⁴⁷ The United States is overlooking the present opportunities developing in Cuba by adhering to its hard line embargo of Cuba.

Spain, meanwhile, emerges as Cuba's "leading foreign investor and as a key Western intermediary in economic and diplomatic arenas."⁴⁸ The United States, disturbed by Spain's involvement with Cuba, attempted to persuade Spain to restrain from foreign investment in Cuba.⁴⁹ Spain refused to comply with the United States request and argued that "Castro should be tempted toward democracy with sweet prosperity from large-scale Western investment."⁵⁰ Spanish Foreign Minister Javier Solana stated that Spain and the United States have a common goal to incorporate Cuba into the "trend of democracy in Latin America."⁵¹ He added, however, "we think the embargo is not the best mechanism to change the situation in Cuba . . . We see some contradictions between lifting the embargo on Vietnam and maintaining the embargo on Cuba."⁵² U.S. foreign policy reflects inconsistencies and stirs doubt in the international community as to the reliability of United States methods. Several countries including Mexico, Britain, and Canada recognize the opportunity to invest in Cuba and are beginning to open trade with Cuba.⁵³

C. Cuba's Attempts to Conform

In the past few years Castro has attempted to increase foreign investment in Cuba. In the summer of 1991, the London-based Euromoney Publications brought together 120 business executives for a seminar on investing in Cuba.⁵⁴ Practically every important economic official from Cuba attended.⁵⁵ Castro was also present to meet with the potential investors.⁵⁶

In June 1992, Castro attended the Earth Summit conference held in Rio de Janeiro.⁵⁷ In July 1992, while taking part in a two day meeting of Cuba's National Assembly to discuss proposed changes

47. See *supra* notes 32-35 and accompanying text.

48. Steve Coll, U.S., *Spain Tangle over Cuba: Washington Miffed at Madrid's Role in Diplomacy, Investments*, THE WASH. POST, June 17, 1994, at A22.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; see *supra* text accompanying notes 23-30.

54. Mimi Whitefield, *American Business Anxious to Grab a Foothold in Cuba*, MIAMI HERALD, June 21, 1991, at 1K.

55. *Id.*

56. *Id.*

57. *Cuban Leader Backs Green Clause in Revised Constitution*, REUTER NEWSWIRE, July 12, 1992.

to Cuba's Constitution, Castro stated that "Cuba would be the first country in the world to include the linked themes of the environment and development in its national constitution."⁵⁸ Also in July, Cuban officials approved several changes to Cuba's constitution: permitting direct and secret elections to Cuba's National Assembly, allowing foreign investors ownership rights in their investments, and abandoning Cuba's commitment to supporting overseas revolutions.⁵⁹ Later in July, before leaving for Spain to meet with Latin American and European leaders, Castro stated that Cuba is in the process of making several political and economic reforms. Castro also suggested that Cuba would initiate further changes if the United States lifted the embargo against Cuba.⁶⁰ The United States should take advantage of this opportunity to get Cuba to make political and economic reforms in exchange for a partial or total lifting of the embargo on Cuba.

III. INVESTING IN CUBA AND THE UNITED STATES' WESTERN HEMISPHERIC FOREIGN INVESTMENT GOALS

In 1991, President George Bush recognized the long-term benefits of consolidating strategic trade policies in the Western Hemisphere.⁶¹ Following the end of the Cold War, the President changed his initiative from persuading democratic reform in the Soviet Union to becoming the leader of North and South America by establishing trade zones.⁶² President Bush later established the Enterprise for the Americas Initiative ("EAI")⁶³ followed by the North American Free Trade Agreement ("NAFTA") with Mexico and Canada.⁶⁴ The EAI was implemented with several purposes, including the intent to increase regional trade, encourage regional direct investment, reduce Latin American and Caribbean external debt burdens, and protect the environment.⁶⁵

Over the past decade, the United States has been promoting the EAI to stimulate trade and growth throughout the Western Hemis-

58. *Id.*

59. Pamela Constable, *An Underdone Overture? Some Analysts Are Skeptical of Political, Economic Reforms Adopted In Cuba*, BOSTON GLOBE, July 22, 1992, at 2 (National/Foreign section).

60. *Id.*

61. LAWRENCE W. TULLER, *DOING BUSINESS IN LATIN AMERICA AND THE CARIBBEAN* 29 (1993).

62. *See id.*

63. *Id.* at 30. The idea behind the EAI was to "support policy reforms which either are taking place or which are being called for in various countries and to build a stronger trade and investment relationship in the Western Hemisphere." (quoting administration trade officials).

64. *Id.*

65. *Id.*

phere, describing the EAI as a "partnership for economic liberalization and growth."⁶⁶ Development in the Western Hemisphere grew stronger as Latin American countries overthrew their outmoded dictators in exchange for democratically elected administrations and converted their state-controlled economic and banking systems into market economies.⁶⁷ As a result of these changes, the United States has improved its position with several Latin American countries, and these countries have realized the need and benefit of foreign investment.⁶⁸

The signing of the NAFTA⁶⁹ has now set the tone for structuring other agreements in the region under the EAI. However, the U.S. trade policy toward Cuba is the opposite of the NAFTA.⁷⁰ The United States continues to maintain the trade and investment embargo against Cuba it established on February 7, 1962, shortly after Castro abolished democracy.⁷¹

Latin American and Caribbean leaders believe a different approach to the U.S. embargo policy should be implemented.⁷² With the demise of the Soviet Union and communist Eastern Europe—the former main suppliers of Cuban oil, food, consumer goods, and industrial products to Cuba—many Latin American and Caribbean leaders believe that the time is ripe to develop trade and investment with Cuba while simultaneously reintegrating the Cuban economy into the American community.⁷³

The potential gains of investment in Cuba are becoming more and more apparent as western hemispheric countries discuss Cuba's willingness to adopt foreign investment measures.⁷⁴ Cuba will inevitably reenter the world community, and when it does, a large, formerly suppressed market for consumer goods and industrial investment will reopen and flourish.⁷⁵ U.S. foreign investors are anticipating the opportunity to establish a direct line of foreign investment with Cuba. However, in order to adequately protect U.S.

66. TULLER, *supra* note 61, at 30 (quoting administration trade official).

67. *Id.*

68. *See infra* part V.

69. The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 and 32 I.L.M. 605. The NAFTA negotiations ended in August, 1992, with the NAFTA scheduled to take effect on January 1, 1994. TULLER, *supra* note 61, at 40. On December 17, 1992, all 3 governments had signed the NAFTA. *Id.*

70. Whereas the United States through NAFTA is attempting to open trade with Mexico and Canada, its current policy with Cuba closes all doors to trade.

71. Proclamation No. 3447, 3 C.F.R. 157 (1962).

72. *See* TULLER, *supra* note 61, at 13.

73. *Id.*

74. *See id.* at 14; Kaplowitz & Kaplowitz, *supra* note 23, at 2.

75. TULLER, *supra* note 61, at 14.

foreign investment in Cuba, the United States government will have to commence investment and trade discussions while simultaneously developing foreign investment protection measures.

IV. PROTECTING U.S. FOREIGN INVESTMENT IN CUBA

A. *Forms of Investment*

1. *Joint Ventures*

Businesses and corporations use joint ventures to establish investments abroad. Utilizing joint ventures as a means to initiate investment can be beneficial as well as problematic. By establishing partnerships with local business people, U.S. investors can capitalize on the business people's knowledge of the local government and market. However, joint ventures are also very risky. When establishing a joint venture, foreign governments and business people want partial control and profits. Unfortunately, the business people and governments in these developing countries are unfamiliar with management techniques required of large investments. Other problems arise when U.S. investors attempt to repatriate profits or when foreign governments decide to nationalize or expropriate U.S. investment without compensating investors. U.S. investors in foreign economies must always consider if appropriate remedies are available should a foreign government decide to expropriate investment from United States businesses.⁷⁶

Most less developed countries appear to favor joint venturing on the following grounds: "it permits local capital to participate more fully in the benefits of economic development, . . . it transmits technical and business know-how more rapidly and effectively than either purely local, or 100 percent foreign-owned ventures, and . . . it lessens the danger of foreign domination of industry."⁷⁷ Less developed countries insist upon government participation in joint ventures due to a distrust of foreign investment and the political and social influence foreign investment brings with it.⁷⁸

Joint ventures seem to be the most appropriate avenue to begin investment in Cuba, which could lead to change in the Cuban government. Establishing successful ventures with Cuban citizens

76. Emile Benoit, *Attitudes and Motivations*, in *JOINT INTERNATIONAL BUSINESS VENTURES* 125, 129-30 (Wolfgang G. Friedman & George Kalmanoff eds., 1961).

77. *Id.*

78. *Id.* at 131; Kaplowitz & Kaplowitz, *supra* note 23, at 8, 23.

would allow them to gain influence and power within Cuba.⁷⁹ These citizens would recognize how establishing foreign investment and creating a market economy could transform Cuba. Thus, developing trade with several Cuban businesses would create a group of economically improved Cubans with the incentive to press toward change in their country.

2. 100% Owned Investment

Host countries usually require foreign investors to invest with host businesses and corporations for the benefit of the host countries' populace. Traditionally a host country will even legislate joint venture laws which require that investment in its country must be established with local ownership. Investing in a country with host businesses can be costly and problematic. Host businessmen are unfamiliar with managing and running the company which requires training and experience.⁸⁰ Thus, if investors can simply establish an investment with full control, they can avoid the problems of co-ownership.⁸¹

As much as U.S. investors would like to be in full control of their investment in Cuba, it is highly unlikely that a post-Castro Cuba would allow such investment. Without requiring local participation in foreign investment, the local government simply allows the foreign investors to remove profits from the developing country. This leads to governments nationalizing or expropriating foreign investment for the benefit of the host country. Furthermore, U.S. investors would suffer tremendous losses if not compensated for their investment. U.S. investors experienced such losses when Castro first gained control of Cuba.⁸²

79. Kaplowitz & Kaplowitz, *supra* note 23, at 8; Bell, *supra* note 4, at 127-28 (concluding that now is the time to establish relations with Cuba).

80. See generally Lawrence E. Koslow, *Mexican Foreign Investment Laws: An Overview*, 18 WM. MITCHELL L. REV. 441, 450 (1992) (discussing Mexico's 100% ownership requirements under the 1989 Regulations).

81. See Alan Robinson, *IBM To Bid Again To Build Computers In Mexico*, MIAMI HERALD, Feb. 4, 1985, at 23BM.

82. MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 231 (1976). After Fidel Castro took control of Cuba in 1959, the Cuban government expropriated foreign private property in order to restructure the nation's economic institutions. The Cuban government nationalized all of Cuba's industry, including the Cuban Telephone Company owned by the U.S. corporation International Telephone and Telegraph. Few if any of these corporations were paid by the Cuban government for the expropriation. *Id.*

B. *Protecting Foreign Investment*

Fearful of losing U.S. foreign investment, many organizations and corporations have utilized protection methods such as the Multilateral Investment Guarantee Agency, Treaties of Friendship Commerce and Navigation, OPIC Investment Incentive Agreements, Free Trade Zones and Agreements, and joint ventures. In addition, two forms of insurance reduce the risk of expropriation. These two forms of insurance are available from the Multilateral Investment Guarantee Agency, created by the World Bank, and the United States' Overseas Private Investment Corporation.⁸³

1. *Multilateral Investment Guarantee Agency*

The purpose of the Multilateral Investment Guarantee Agency ("MIGA") is "to encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries."⁸⁴ MIGA protects foreign investment to its member countries by issuing guarantees to investors against "non-commercial" risks and providing counseling to help developing member countries maintain an increasing flow of foreign investment.⁸⁵ MIGA covers four types of "non-commercial" risks:

(i) currency transfer risk due to restrictions and delays in conversion and transfer of local currency, (ii) expropriation or other actions of the host government that have the effect of depriving investors of ownership or substantial benefits from investments, (iii) war risk and civil disturbances, and (iv) breach or repudiation of contract by the government where investors have no access to a competent court or arbitral forum, face unreasonable delays in such forum, or are unable to enforce the forum's decision.⁸⁶

Under MIGA, investments are eligible for coverage if they "include equity investment and medium or long-term loans made or guaranteed by owners of equity in the enterprise . . ."⁸⁷ Special coverage may be obtained for different forms of direct investment as long as they meet approval by special majority of the MIGA board.⁸⁸ "These forms of direct investment include franchising, licensing, production-sharing, leasing, and turnkey contracts with terms of at

83. See RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* 881 (2d ed. 1991).

84. 1 *INTERNATIONAL ECONOMIC LAW* 498 (Stephen Zamora & Ronald A. Brand eds. 1990) (article 2 of the Multilateral Investment Guarantee Agency), reprinted in 24 *I.L.M.* 1598 (1985).

85. 1 *INTERNATIONAL ECONOMIC LAW*, *supra* note 84, at 498.

86. See *id.* at 492 (discussing Article 11(a) of MIGA).

87. *Id.* at 493 (discussing Article 12(a) of MIGA).

88. *Id.* (discussing Article 12(b)).

least three years, provided that returns are related to the operating results of the investment."⁸⁹ However, "only new investments are eligible for coverage" under MIGA's policy.⁹⁰

In order for MIGA to grant coverage, investments must meet certain criteria, "including economic soundness of the investment, compliance of the investment with host country laws and regulations, contribution of the investment to development, and the availability of adequate legal protection and other investment conditions in the host country."⁹¹ The host country may withhold approval of projects not considered to be a priority. Consequently, "[t]he host country must approve the guarantee issued by MIGA."⁹²

Seeking coverage from the MIGA may be one form of protection U.S. investors can obtain should Cuba open for U.S. foreign investment. Political practices of the host country are not as important under MIGA as under the Overseas Private Investment Corporation for determining whether coverage will be granted.⁹³ Cuba would have to become a member as a developing country to meet the guidelines for coverage under MIGA.⁹⁴ In order for this to be a viable solution, MIGA would have to allow Cuba to sign its Convention and accept a capital subscription from Cuba.

2. OPIC Investment Incentive Agreement

Investment Incentive Agreements⁹⁵ provide a procedural framework for the operation of the United States program; the United

89. *Id.*; "Section 1.05 of Operational Regulations approved by MIGA's Board on June 22, 1988, 27 I.L.M. 1232 (1988), the Board may extend coverage in the future to other forms of direct investment." at 493 n.10.

90. *Id.*; Under article 12(c) "[o]nly new investments are eligible for coverage; however, modernization, expansion or financial restructuring of existing investments are considered to be new investments." *Id.*

91. *Id.* (discussing Article 12(d) of MIGA which sets guidelines before allowing investment).

92. *Id.* Article 15 of MIGA requires acceptance of the investment on the part of the host country.

93. Paul E. Comeaux & N. Stephen Kinsella, *Reducing Political Risk In Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 44 (1994).

94. See 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 503. Article 14 of MIGA states that investments are only guaranteed if "made in the territory of a developing member country." See *id.* at 522-24 (noting that there are two categories of members to MIGA. Category one includes well established and developed countries. Category two includes developing countries.).

95. "This is the current standard title. Most existing agreements are referred to as 'Agreements on Investment Guaranties' and are indexed under that title in publications such as *Treaties in Force* and the *Treaties and Other International Acts Series (TIAS)* issued by the U.S. Department of State." *Id.* at 665 n.1.

States program insures foreign investment loss due to political risk.⁹⁶ The Overseas Private Investment Corporation ("OPIC") administers Investment Incentive Agreements through its office.⁹⁷ Congress empowered OPIC to issue "insurance against losses due to currency inconvertibility; expropriation; war, revolution, insurrection and civil strife; and business interruption resulting therefrom."⁹⁸ U.S. diplomats negotiate OPIC agreements by exchanging notes with foreign governments which set forth the proposed agreement.⁹⁹ The receipt of a reply note concludes the proposed agreement.¹⁰⁰

As a standard practice of negotiating these agreements, foreign governments approve each project for the purpose of issuing the coverage provided by the United States government.¹⁰¹ However, these agreements do not "require that the government of the project country hold the U.S. government harmless in the event of a claim, nor does it require any form of counter-guaranty."¹⁰² OPIC allows the U.S. government to defend the claim of a U.S. investor.¹⁰³ An OPIC agreement between the United States and Cuba should be established once the government in Cuba stabilizes. An OPIC Agreement, like an executive agreement, is not as extensive as a treaty and does not require the United States Senate's ratification.¹⁰⁴ U.S. investors can obtain OPIC coverage for a portion of their

96. *Id.* at 665.

97. *Id.*; see 22 U.S.C. § 2191 *et seq.* (1985) (stating the purpose and function of the Overseas Private Investment Corporation [hereinafter OPIC]).

98. 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 665; see also 22 U.S.C. at 2194(a)(1).

(A) inability to convert into United States dollars other currencies, or credits in such currencies, received as earnings or profits from the approved project, as repayment or return of the investment therein, in whole or in part, or as compensation for the sale or disposition of all or any part thereof; (B) loss of investment, in whole or in part, in the approved project due to expropriation or confiscation by action of a foreign government; (C) loss due to war, revolution, insurrection, or civil strife; and (D) loss due to business interruption caused by any of the risks set forth in subparagraphs (A), (B), and (C).

22 U.S.C. at 2194(a)(1).

99. 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 666.

100. *Id.*

101. *Id.*; The agreements cover the issuance of political risk insurance and reinsurance, 22 U.S.C. 2194(a), and the issuance of all-risk financial guaranties of credit, and other investments, 22 U.S.C. 2194(b). Pursuant to 22 U.S.C. 2197(a), the issuance of insurance, guaranties, and reinsurance require a bilateral agreement between "any less developed friendly country or area with the government of which the President of the United States has agreed to institute a program." 22 U.S.C. 2197(a). "As a matter of policy, OPIC generally does not offer any of its programs in countries with which there is no active bilateral agreement." 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 666 n.7.

102. 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 667.

103. *Id.*; see 22 U.S.C. 2197(b); see also 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 669-70.

104. 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 667.

investment, or their entire investment, depending on the amount of American involvement.¹⁰⁵ Overall, it appears to be a favorable means of protecting rights of U.S. foreign investment in Cuba once the criteria are met.

However, the protection of OPIC requires that the United States establish some sort of bilateral trade prior to an OPIC agreement. OPIC coverage has some drawbacks; OPIC coverage is more difficult to obtain than MIGA because OPIC requires that a host country follow certain political practices.¹⁰⁶ For example, OPIC requires the host country to meet certain "human rights" standards.¹⁰⁷ In addition, investors requesting OPIC coverage "must submit a Request for Registration for Political Risk Investment Insurance before the investment is made or irrevocably committed."¹⁰⁸

C. Trade Agreements Given Cuba's Present Situation

1. Treaty of Friendship, Commerce and Navigation

The United States and forty-eight foreign countries have established treaties of friendship, commerce and navigation ("FCN").¹⁰⁹ FCN treaties provide a framework for bilateral relations.¹¹⁰ FCN treaties are based on the principles of national and most-favored-nation treatment.¹¹¹ FCN treaties attempt to encourage 'friendship' between states while resolving issues of expropriation, dispute settlement, funds transfer, and other business problems.¹¹² FCN treaties also include coverage of the ability of professionals to practice, freedom of commerce and freedom of navigation for ships.¹¹³

A FCN treaty with Cuba may be possible if Castro decides to conform with democratic practices. The United States established a FCN treaty with Japan following World War II; since that time trade and investment practices with Japan have flourished.¹¹⁴ Negotiating a similar FCN treaty with Cuba would lay a foundation for American investment in Cuba.

105. *Id.*

106. See Comeaux & Kinsella, *supra* note 93, at 44 (discussing the different political considerations in MIGA and OPIC).

107. *Id.*

108. *Id.* at 37.

109. *Id.* A list of FCN treaties and similar treaties appears in 20 I.L.M. 565 (1990).

110. 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 627.

111. 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 627; see Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

112. 1 INTERNATIONAL ECONOMIC LAW, *supra* note 84, at 627.

113. *Id.*

114. *Id.*

However, FCN treaties have not been negotiated since 1966.¹¹⁵ FCN treaties are negotiated in an attempt to promote "mutually advantageous commercial intercourse."¹¹⁶ Presently, Cuba is not in a position to develop foreign investment in other countries. Cuba's current situation requires a tremendous inflow of investment which is not the main purpose of a FCN treaty.¹¹⁷ The existence of Cuba's non-productive economy and the current U.S. policy toward Cuba eliminates any possibility of establishing a FCN treaty at this time or in the near future.

2. *Bilateral Investment Treaty (BIT)*

In recent years, the Bilateral Investment Treaty ("BIT") has become the preferred form of agreement for establishing the rights of investors between the United States and foreign countries.¹¹⁸ The BIT is beneficial in establishing trade rights because it focuses on investment related issues, specifies the rights covered in certain current international economic issues (especially when compared to FCN treaties), and allows investors access to binding international arbitration to resolve investment disputes.¹¹⁹ In addition to establishing substantive rights, the BIT has the ability to create new rights.¹²⁰ However, a BIT requires the Senate's advice and consent to ratify, and is thus the most difficult of the agreements to negotiate.¹²¹ For example, as of May 31, 1988, ten BITs were signed but none were ratified by Congress.¹²² The finalizing process of a BIT takes a considerable amount of time to move through the Senate.

The United States is far from preparing a BIT with Cuba. However, if U.S. diplomats were able to compel Castro to change the form of government in Cuba, then initial drafts of an U.S.-Cuba BIT could be prepared. With the Cuban government in a position of needing

115. *Id.*

116. *Id.* at 631. The preamble of the FCN treaty between the United States and Japan seems to apply to developing a FCN treaty between the United States and Cuba. The U.S.-Japan FCN treaty provides as follows: "desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their peoples . . ." *Id.* A portion of the large population of Cuban immigrants in the United States intend to invest in their once democratic country. The fact that Japan was once at war with the United States and now trades heavily with America portends a bright future for the United States' development of a FCN treaty with Cuba.

117. *Cf. id.* (stating the purpose of the U.S.-Japan FCN treaty).

118. *Id.* at 649.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (BIT's have been signed with Bangladesh, Cameroon, Egypt, Grenada, Haiti, Morocco, Panama, Senegal, Turkey and Zaire); see Comeaux & Kinsella, *supra* note 93, at 17 (contains the most current record of signed BIT's).

foreign investment to stabilize Cuba's economy, the opportunity for establishing protection rights for U.S. investments in Cuba exists. Opening discussions on trade and investment with Cuba will ultimately lead to the development of joint venture rights, possible OPIC and MIGA acceptance, and possibly a Bilateral Investment Treaty. Establishing protection rights for investment by U.S. citizens can prevent some of the problems associated with investing abroad such as expropriation, repatriation of profits and political violence. Developing investment rights and investment protection is key to developing successful trade and investment relations with Cuba.

D. Future Free Trade Zones and Agreements with Cuba

The trend for the United States and western hemispheric countries is the establishment of various free trade zones and free trade agreements. The United States began its main thrust for developing trade zones and agreements with western hemispheric countries through the passage of the Caribbean Basin Economic Recovery Act, and from the governments' developmental planning of the Caribbean Basin Initiative ("CBI").¹²³ The United States initially developed the CBI in order to counter the expanding influence in the hemisphere of the former "Soviet-backed" Cuba.¹²⁴ In December 1993, the United States approved the NAFTA, its most extensive free trade agreement with its bordering neighbors, Canada and Mexico.¹²⁵

Through support from the United States, the Caribbean has developed its own free trade block by creating the CARICOM. In CARICOM, the Caribbean community seeks, through the creation of a region-wide common market, the economic integration of member states.¹²⁶ CARICOM promotes integration by coordinated and joint actions in production and extra-regional trade, and also provides a special regime for less developed countries.¹²⁷ The special regime for less developed countries affords incentives for investment in designated member states. In August of 1994, Latin American and Caribbean nations agreed to the creation of the Association of Caribbean States, which is a regional body with the objective of transforming

123. TULLER, *supra* note 61, at 88; see Pub. L. 98-67, title II, 97 Stat. 384, codified at 19 U.S.C. § 2701-06. Relatively minor amendments were made by Pub. L. 98-573, 99-514, 99-570, and 100-418.

124. James E. Stamps, *Caribbean Basin Initiative: Ten Years of Trade Preference*, 3 J. TRANSNAT'L L. & POL'Y 149 (1994).

125. See *supra* note 69.

126. See *supra* note 6-8 and accompanying text.

127. See *supra* notes 6-7 and accompanying text.

into a major trading bloc.¹²⁸ With the addition of Cuba as a member of CARICOM, member countries could gain substantial trading leverage with future production of certain goods.

V. CHILE, MEXICO, AND ARGENTINA: CASE STUDIES FOR CUBA

A. Chile

With the liberal action of the Chilean economy in the 1970's, Chile became an experimental ground for promoting free market economic principles.¹²⁹ With the support of the Chilean government, University of Chicago-trained economists attempted to control various economic factors while incorporating privatization of state-controlled enterprises.¹³⁰ At first, Chile struggled with its new free market and the attempts to promote privately owned businesses.¹³¹ However, with the election of a new president in 1990, an increased export trade, and reduction of debt through debt-for-equity swaps, Chile shifted its economy in a positive direction.¹³²

In 1990, following the U.S. EAI policy, the United States negotiated a trade and investment framework agreement with Chile.¹³³ In May 1992, due to Chile's economic liberalization and economic growth, the United States expressed a desire to negotiate a comprehensive free trade agreement, and possibly draft an agreement with Chile similar to the NAFTA.¹³⁴ Likewise, the United States should encourage Cuba to continue liberalizing its economy by developing a trade agreement with Cuba.

B. Mexico

The establishment of the NAFTA can be seen as a natural consequence of the Mexican government following Chile's lead in reforming its economy.¹³⁵ Mexico, like most developing countries, began by allowing foreign investment through joint ventures. In the early 1980's, Mexico began its first movement toward free market

128. Prospective members include Colombia, Mexico, Venezuela, Cuba, Haiti, the Dominican Republic, Central American states, Suriname and the 13 English-speaking CARICOM countries.

129. Edward C. Snyder, *The Menem Revolution in Argentina: Progress Toward a Hemispheric Free Trade Area*, 29 TEX. INT'L L.J. 95, 97 (1994).

130. *Id.* at 97-98.

131. *Id.* at 98.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

economic policies.¹³⁶ Initiatives were developed such as privatization of state owned businesses, tax reform, restructuring of debt, and the establishment of intellectual property laws to enhance a market economy.¹³⁷ In developing foreign investment regulations, Mexico decided not to make all the changes desired by the international business community in order to maintain the flexibility of existing law which allows for the expansion or restriction of investment opportunities as the Mexican economy changes.¹³⁸

As the new Mexican market economy began to bloom, barriers to foreign trade were reduced and foreign investment rules were liberalized through new regulations.¹³⁹ Following the advancement and reduction of inflation in Mexico, and the improvement of intellectual property rights, the United States accepted the request for free trade negotiations leading to a free trade agreement.¹⁴⁰ Thus, transpired the development and ratification of NAFTA.¹⁴¹

C. Argentina

When Carlos Menem won the 1991 presidential election in Argentina, he sought to resolve its economic problems by following Chile's economic system.¹⁴² Like Mexico, Argentina transformed its economy by opening it up to the free market.¹⁴³ Governmental control and ownership of enterprises were eliminated; trade and investment regimes were liberalized; debt and inflation were brought under control; and the government's omnipresent regulation of the economy diminished.¹⁴⁴

Consequently, Argentina's improved economic status met the U.S. criteria for a free trade agreement under the EAI.¹⁴⁵ This led to the ratification of a United States-Argentina Bilateral Investment Treaty ("BIT").¹⁴⁶ This treaty has become the model investment treaty for Latin America due to Argentina's abandonment of the

136. *See id.*

137. Koslow, *supra* note 80, at 442.

138. *Id.* at 443.

139. Snyder, *supra* note 129, at 99. In May 1989, President Salinas de Gortari, through his executive power, implemented a new set of regulations designed to open the Mexican economy for foreign investment. *Id.*

140. *Id.*

141. North American Free Trade Agreement [NAFTA], Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 605 (1993).

142. Snyder, *supra* note 129, at 103.

143. *Id.*

144. *Id.*; *see supra* note 63 and accompanying text.

145. Snyder, *supra* note 129, at 103.

146. *Id.* at 113.

Calvo Doctrine.¹⁴⁷ The Calvo Doctrine allows international dispute arbitration only under special circumstances; otherwise, investors must submit any dispute to the host country's courts.¹⁴⁸ Argentina had previously signed BIT's with other countries that recognized portions of the Calvo Doctrine.¹⁴⁹ Under the United States-Argentina BIT, disputes must be negotiated before they are litigated.¹⁵⁰ If they are unable to obtain an amicable settlement, and no prior specific dispute-settlement procedure exists, then the parties have two options: submission of the dispute to the courts of Argentina or the United States; or, after six months, submission of the dispute to binding arbitration.¹⁵¹

"The U.S.-Argentina BIT ensures national treatment for foreign investments and removes performance requirements for the establishment, expansion, or maintenance of investments."¹⁵² Foreign nationals may freely enter and remain in the host country to establish or supervise an investment.¹⁵³ Expropriation is forbidden unless the property is expropriated for a public purpose utilizing a non-discriminatory manner and providing prompt, adequate, and effective compensation.¹⁵⁴ Furthermore, investment transfers, including profit remittances, capital repatriations, or receipts from investment disputes or expropriation, may be made freely without delay.¹⁵⁵ Finally, disagreements over the BIT's interpretation or application must be promptly resolved in accordance with the Arbitration Rules

147. See *id.* at 112 (citing DONALD SHEA, *THE CALVO CLAUSE* (1955) and David Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 *TEX. INT'L L.F.* 289 (1971)). The Calvo Clause, or Doctrine, is named after the famed Argentina jurist and diplomat, Carlos Calvo. Most Latin American countries follow the Calvo Doctrine. The Calvo Doctrine was the result of the exploitation of natural resources in Latin America by large foreign owned corporations during the late nineteenth and early twentieth centuries. The Calvo Clause encompasses two basic ideals. First, the requirement of absolute equality in the treatment of foreigners with the treatment of nationals, more particularly, that the foreign investor is limited to the remedies available to those nationals. The second ideal is the policy of nonintervention of the foreign's native country. Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA*, 25 *ST. MARY'S L. J.* 1147 (1994).

148. Snyder, *supra* note 129, at 112-13.

149. See *id.* at 113.

150. *Id.*

151. *Id.*; see Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., art. VII(6), 31 *I.L.M.* 124, 133 (1992) [hereinafter U.S.-Argentina BIT].

152. Snyder, *supra* note 129, at 113.

153. *Id.*

154. *Id.*; U.S.-Argentina BIT, *supra* note 151, at 131 (article IV(1)).

155. Snyder, *supra* note 129, at 113-14; U.S.-Argentina BIT, *supra* note 151, at 132, 134.

of the United Nations Commission on International Trade ("UNCITRAL").¹⁵⁶

The BIT's investment guidelines closely resemble the provisions of NAFTA.¹⁵⁷ This enables Argentina's foreign investments to be easily adapted into the NAFTA framework.¹⁵⁸ Further, Argentina equates treaties with laws under its Constitution.¹⁵⁹ The BIT overrides Argentina's Foreign Investment Law and forbids any subsequent foreign investment law to supersede the BIT.¹⁶⁰ To further protect the rights of foreign investment, Argentina has adopted several investment dispute settlement conventions: the MIGA convention in 1990; the Inter-American convention in 1991; and the International Convention for the Settlement of Investment Disputes in 1991.¹⁶¹ The government of Argentina has shown its commitment to the protection of foreign investment by adopting these conventions and by ratifying the BIT with the United States.¹⁶² "According to a U.S. Embassy press release, issued Sept[ember] 20, [1994, the BIT] . . . represents a decisive step toward protection of the United States investments in Argentina."¹⁶³ The release stressed that "[t]he treaty is one of the few that the United States has with Latin America and the only one with a South American state."¹⁶⁴ Under the BIT, Argentina must accord U.S. investments the same rights and treatment as local investments.¹⁶⁵

Argentina's desire to interact with the United States has led to Argentina effectively abandoning the Third World.¹⁶⁶ Argentina's leaders consistently denounce Fidel Castro to the dismay of Argentina's Latin American colleagues, such as the leaders of Mexico, who refuse to condemn the Cuban leader.¹⁶⁷ Argentina's progress

156. Snyder, *supra* note 129, at 113.

157. *Id.* at 114.

158. *Id.*; see NAFTA, *supra* note 69, arts. 1101-1136, at 639-47; Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727 (1993).

159. Snyder, *supra* note 129, at 114.

160. *Id.*

161. *Id.*

162. *Id.*

163. U.S., *Argentina Exchange Investment Treaty Documents*, 11 INT'L TRADE REP. (BNA) 1507 (1994).

164. *Id.* (quoting a United States Embassy Press Release).

165. *Id.*

166. See Snyder, *supra* note 129, at 118.

167. *Id.* One explanation for the differing views of the United States and Mexico regarding Cuba is that Mexico does not have a city saturated with exiled Cubans, like Miami. These exiled Cubans in Miami have created a formidable lobbying group with very strong ties to the White House. It's called the Cuban American Foundation and is headed by Jorge Mas Canosa.

parallels Mexico's with striking similarities.¹⁶⁸ Argentina now affords the United States more foreign investment protection than Mexico. Although the United States and Mexico have established NAFTA, their political views of certain western countries is remarkably dissimilar. The United States continues to provide more assistance to those countries who support U.S. policy than to those countries which merely accept U.S. policy.¹⁶⁹ The U.S. policy of be-friending certain countries through investment negotiations in order to promote U.S. foreign policy may be dangerous.¹⁷⁰ The United States' harsh treatment of Cuba through the establishment of the Cuban Democracy Act may prevent the growth of future U.S. foreign investment in Cuba.

VI. OPENING TRADE AND INVESTMENT WITH CUBA

To develop trade with Cuba, the U.S. embargo would have to be lifted, the Cuban government reformed, and investment protection would have to be established. Joint ventures are the most feasible manner in which U.S. investors could invest in Cuba. Joint ventures benefit both the host country and the foreign investor. Even though investors from the host country benefit more than foreign investors, the host country has the ability to improve its economy by creating more demand for goods and investment. Joint ventures therefore benefit any country with a market economy. Nations without market economies are usually in a state of political and economic transition and require an influx of capital, a transfer of technology, an increase of scarce resources, and a modernization of industry.¹⁷¹

Castro is working toward opening Cuba's shores to foreign investment and possibly establishing joint ventures and foreign trade. The changes Cuba has made within its government, including allowing joint ventures and foreign trade, are the beginning steps to Cuban economic progress. Castro also appears to be complying with the demand to change his government into a more democratic form. Although these changes are very minor, at least they are a start. "[I]f the U.S. would loosen up a bit, it would encourage movement in the right direction . . . There's no reason not to adjust our policy to the

168. *Id.* at 120.

169. In a way, Argentina is better off than Mexico because of the BIT established with the United States. The move toward establishing NAFTA between the U.S. and Mexico may have been ratified too quickly. We are now starting to see continued problems in Mexico's government that may affect the NAFTA. See, e.g., Lori M. Berg, Comment, *The North American Free Trade Agreement & Protection of Intellectual Property: A Converging View*, 5 J. TRANSNAT'L L. & POL'Y 99, 111-121 (1995).

170. See Bell, *supra* note 4, at 100-102.

171. FOLSUM, *supra* note 83, at 739.

post-Cold War period."¹⁷² "If a 'rational and sensible' U.S. government emerged with a less hostile stance, it would be 'possible' for Cuba to consider further reforms."¹⁷³ However, many people believe that the few changes Cuba has made are "'meaningless' maneuvers in order to remain in power and obtain foreign currency."¹⁷⁴

Former late President Richard Nixon expressed concern that U.S. investors would be shut out of Cuba by the U.S. embargo.¹⁷⁵ However, U.S. representative Lincoln Diaz-Balart, who represents many exiled Cubans, believes that Nixon's theory is wrong.¹⁷⁶ Representative Diaz-Balart stated that "U.S. business[es] need not fear 'falling behind' in Cuba. On the contrary, those capitalists now helping Castro exploit the Cubans will live to regret that they did so."¹⁷⁷ However, Castro probably will continue to exploit Cuba with or without the help of any "capitalists." Any foreign investment in Cuba would not further exploit Cuba but in fact may help in ending the exploitation of Cubans.

The American policy toward Cuba has failed. Even the international community has rejected the embargo imposed against Cuba.¹⁷⁸ The United States should remove the embargo and establish foreign trade and investment protection in Cuba.¹⁷⁹ Change is occurring in Cuba and is evidenced directly by the implementation of free markets where farmers can sell food directly to the consumers.¹⁸⁰ In a recent visit to France, Castro met with President Mitterrand, and he scorned the United States' embargo against Cuba.¹⁸¹ Castro also discussed developing and establishing commercial trading ties with France.¹⁸² The United States should use Cuba's willingness to trade as leverage for the implementation of foreign investment protection.

172. Constable, *supra* note 59, at 2 (quoting Cuban scholar Wayne Smith).

173. *Id.* (summarizing the opinion of Juan Escalona, Cuban Assembly President).

174. *Id.* (quoting human rights advocate Frank Calzon).

175. Lincoln Diaz-Balart, *Nixon's Reasoning Wrong on Lifting Embargo of Cuba*, MIAMI HERALD, June 17, 1994, at 31A.

176. *Id.*

177. *Id.*

178. Wayne S. Smith, 'Worst is Over' for Castro's Cuba, USA TODAY, Feb. 22, 1995, at 11A (Wayne Smith, top U.S. diplomat in Cuba from 1979 to 1982 as chief of the U.S. Interests Section there, is a senior fellow at the Center for International Policy).

179. *See id.*

180. *Id.*

181. Sharon Waxman, *Castro Finds a Sympathetic Ear in France, Mitterrand Scorns Embargo*, MIAMI HERALD, Mar. 14, 1995, at 1A. In a picture accompanying the article, Castro is giving a speech in a blue suit. This is the first time that Castro has appeared before a major assembly wearing a suit instead of his typical green army fatigues.

182. *See id.* at 4A.

VII. CONCLUSION

U.S.-Cuban investment through joint ventures will allow Cubans to improve their economic standing and power within Cuba. Those Cubans will realize that it was U.S. investment that brought about their good fortune, and not Castro. Consequently, those Cubans will be able to promote political and economic change based on their own economic success with the United States.

To protect U.S. foreign investment in Cuba, the United States should use its leverage with Cuba to establish a FCN treaty similar to the one established with Japan after World War II. As relations improve and rights of U.S. investors in Cuba are established, Cuba could become a member of MIGA. U.S. investors would then be able to obtain insurance to protect their foreign investments in Cuba. MIGA would be preferable to OPIC, because OPIC requires that the host country, Cuba, conform with certain governmental practices. Should relations with Cuba improve and U.S. foreign investment establish a foot hold in Cuba, then a BIT similar to that with Argentina should be negotiated.

Foreign investment in Cuba is inevitable. The United States' hesitation will only leave the United States in a disadvantageous position while other countries gain investment opportunities in Cuba. If the United States continues with its present policy toward Cuba, American investors could be left at the dock watching the boat of foreign investment sail away.

