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Cuba's Changing Foreign Investment Climate: Castro's Attempt to Lure Foreign Investors

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Cuba's Changing Foreign Investment Climate: Castro's Attempt to Lure Foreign Investors

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I. INTRODUCTION

The Republic of Cuba, a socialist¹ country with vast labor resources,² currently struggles economically to survive.³ The economic collapse of Cuba has taken place over the last five years and is predominantly due to the demise of the Soviet Union and the financial support that it no longer provides to the Castro led Cuban government.⁴

In response to the economic predicament it has found itself facing, the Cuban government recently enacted a new investment law,⁵ through which it hopes to

1. *Cuba*, COUNTRY REPORTS, Jan. 30, 1995, at 10, available in LEXIS, World Library, Profil File (stating that Cuba has a one party socialist system whose 1976 constitution recognizes the Communist Party as "the organized Marxist-Leninist vanguard of the working class and the highest leading force of society and of the state"). Castro first admitted to the Cuban people that he was a Marxist-Leninist in a 1961 nationwide speech. ERIC N. BAKLANOFF, EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE 118 (1975).

2. U.S. CENTRAL INTELLIGENCE AGENCY - THE WORLD FACTBOOK, Oct. 20, 1994, available in LEXIS, World Library, Profil File [hereinafter WORLD FACTBOOK] (giving a July 1994 population estimate of 11,064,344). Cuba's population had an annual growth rate of 0.7% as of 1992, and has the ninth largest population in all of Latin America. Lisandro Perez, *The Population of Cuba: The Growth and Characteristics of its Labor Force*, COLUM. J. WORLD BUS., Spring 1995, at 58, 59. As of 1988, the Republic of Cuba had a labor force of 4,620,800. WORLD FACTBOOK, *supra*.

3. Jose de Cordoba, *Cuba's Business Law Puts Off Foreigners: Even Castro Concedes Disappointing Response*, WALL ST. J., Oct. 10, 1995, at A12 (reporting that the Cuban economy's future is "delicate" and that the economy only grew 0.7% in 1994). This growth was after four years in which the economy decreased by one-third its former level. *Id.* In 1988, Cuba's total trade was approximately US\$13 billion, but by 1993 Cuba's total trade had dropped to US\$3.7 billion. Donna Rich Kaplowitz, *The Cuban Market: Opportunities and Barriers*, COLUM. J. WORLD BUS., Spring 1995, at 6, 7. Others have put the amount of decrease as high as fifty percent. *Castro Takes One More Step Towards Capitalism*, THE ECONOMIST, Sept. 9, 1995, at 45.

4. WORLD FACTBOOK, *supra* note 2 (stating that the current Cuban economic depression was caused by the former Soviet Union no longer providing aid, causing the Cuban Gross Domestic Product to decrease by 40% between 1989 and 1993). Also contributing to the economic stagnation was a decrease in sugar output that caused a loss of US\$400 million in export revenue in 1993. *Id.*

5. Law Number 77 Foreign Investment Act, Final Provision (1995) (establishing that this law became effective September 6, 1995 when it was published in the Official Gazette) [hereinafter 1995 Cuban Investment Act]. A copy of this Act was obtained by sending a faxed request to the Cuban Interests Section of the Swiss Embassy in Washington D.C. Their phone number is (202) 797-8518 and their fax number is (202) 797-8521.

attract foreign investment.⁶ It is through the influx of foreign investment that Cuba hopes to bolster its failing economy.⁷

This comment outlines the developments in the Republic of Cuba that have led to economic hardship and analyzes the opportunities and challenges that face the foreign investor who considers investment in Cuba. Part II discusses Cuba's recent history, both before and after the rise of Fidel Castro.⁸ Part II also explains the current condition of the Cuban economy, including the withdrawal of Soviet financial support and the historically strained relations between the U.S. government and Castro's Cuba.⁹ Part III discusses the details of Cuba's new investment law and compares its provisions to the former investment law.¹⁰ Part IV analyzes other factors of concern to the foreign investor, such as the amount of Cuban resources, the current condition of Cuba's transportation infra-structure, and, perhaps most importantly, the current provisions of the U.S. embargo against Cuba and the possible changes that the U.S. government may make to that embargo in the very near future.¹¹ Part V summarizes the current investment outlook in the Republic of Cuba for the foreign investor, including some future concerns that will develop as conditions change both in Cuba and in the United States, and concludes that the foreign investor is going to be assuming some potential risks.¹²

II. A BRIEF CUBAN HISTORY: 1956-1995

On December 2, 1956, Fidel Castro landed in Cuba with a small band of guerrillas¹³ with the intention of overthrowing the repressive Batista government.¹⁴ Approximately two years later, on January 1, 1959, Cuban president

6. Pascal Fletcher, *Cuba Unveils New Foreign Investment Law*, REUTERS, Sept. 4, 1995, available in LEXIS, News Library, Wires File (quoting the Cuban Minister for Foreign Investment Ernesto Melendez Bach as saying that the purpose of the new investment law is to attract foreign investment into Cuba).

7. *1995 Cuban Investment Act*, *supra*, note 5, Preamble (stating that the purpose of the new law is for "achieving sustainable development in the country and a recovery of the national economy"). *But see Investors Would Evade Requirement of Pending Cuba Bill, Nuccio Says*, INT'L TRADE REP. (BNA), Dec. 13, 1995, at 2059 (where University of Miami Professor Luis Locay says that the Cubans are not trying to accomplish an economic transition, but rather are only trying "to survive the current crisis and change American policy").

8. *See infra* notes 13-39 and accompanying text (discussing recent Cuban history).

9. *See infra* notes 13-39 and accompanying text (describing the breakdown of relations between Cuba and the United States).

10. *See infra* notes 40-198 and accompanying text (contrasting the old investment law with the new).

11. *See infra* notes 199-304 and accompanying text (discussing topics to consider when investing in Cuba).

12. *See infra* notes 305-10 and accompanying text (concluding the article).

13. GEORGIE A. GEYER, *GUERRILLA PRINCE: THE UNTOLD STORY OF FIDEL CASTRO* 160 (1991). The invasion consisted of one thirty-eight foot wooden yacht that had sailed from Mexico. *Id.* at 156. The landing in Cuba was described as a "shipwreck." *Id.* at 161.

14. CUBA, *A COUNTRY STUDY* 35 (James D. Rudolph ed., 1985) (reporting that Batista took power in 1952 via a coup d'etat and although he led the country toward prosperity, he did so by sacrificing freedom, to the point that "repression . . . reached unprecedented levels"). Batista's repressive activities, political illegitimacy, and disrespect of the expectations of the Cuban public, led to the breakdown of his regime and

Batista fled the country, leaving Castro and his revolutionaries in power.¹⁵ In November 1959, "Che" Guevara was appointed as the president of the National Bank of Cuba, and at the same time, the seeds of economic warfare between Cuba and the United States were planted.¹⁶

In late 1959, Cuba refused to pay U.S. and British Oil companies for the oil they had imported into Cuba,¹⁷ deciding instead to use Soviet crude oil.¹⁸ When the Western oil companies refused to refine the oil from the Soviet Union, Cuba seized the oil refineries without offering indemnity to the oil companies who owned the plants.¹⁹ Cuba did not respond to the U.S. government's offers to negotiate.²⁰ During this same period, the Cuban government began to seize farms and ranches, without compensating the owners of the property.²¹ In 1960, the Castro government nationalized all of the U.S. enterprises that were operating in Cuba.²² In response, the United States declared in July 1960 that it would discontinue the importation of sugar from Cuba in the following year.²³ In October 1960, the

caused the alienation of the middle classes. *Id.* at 38. A major factor in the defeat of Batista once Castro had landed, was when Castro was interviewed by the New York Times after the Batista government had claimed to have killed him two months prior. *Id.* at 37.

15. JAIMÉ SUCHLICKI, *CUBA FROM COLUMBUS TO CASTRO* 155-56 (1986). On January 2, 1959, Ernesto "Che" Guevara and the revolutionaries captured Havana. *CUBA*, *supra* note 14, at 38. Che Guevara was part of the Cuban revolution from the beginning, being one of the men who accompanied Castro on his landing in Cuba on December 2, 1956. GEYER, *supra* note 13, at 158-60 (1991). While conducting a guerrilla campaign in Bolivia in 1967, Guevara was executed by the Bolivian Army. *Id.* at 317.

16. BAKLANOFF, *supra* note 1, at 117.

17. *See id.* (reporting that the Western Oil companies' Venezuelan subsidiaries' claim on the unpaid oil was US\$80 million).

18. *Id.*

19. *Id.*

20. *Id.* at 117-18. The U.S. government realized that the Cuban government had the right to seize this property, provided that prompt, just, and effective compensation was given. *Id.* Cuba, however, refused to negotiate with the United States and then president Dwight D. Eisenhower, who had offered in January 1960 to negotiate all disputes between the United States and Cuba. *Id.*

21. *Id.* at 117. *But see* James D. Whisenand, *Cuba's Legal Structure: How it Affects Foreign Investment and Trade*, *COLOM. J. WORLD BUS.*, Spring 1995, at 16, 22 (giving the Cuban government's position that there was no expropriation of U.S. property, as the Cubans offered to compensate the U.S. businesses and the compensation was rejected). Cuba also claims that international law recognizes that fact. *Id.* Of the foreign banks that were nationalized, only the Canadian institutions received compensation from the Cubans. *CUBA*, *supra* note 14, at 40.

22. *CUBA*, *supra* note 14, at 40 (including the Cuban Telegraph and Telephone Company, the Cuban Electric Company, all oil companies, and most foreign banks). As of 1995, there were 5911 potential expropriation claims against the Cuban government by U.S. citizens for a total of US\$1.8 billion (US\$5.6 billion if interest is taken into account). Whisenand, *supra* note 21, at 16, 21.

23. BAKLANOFF, *supra* note 1, at 118. At that time, the United States accounted for 50 percent of Cuba's sugar export. *Cuba's Sugar Industry - Facing a New World Order*, SITUATION AND OUTLOOK REP., Sugar and Sweetener, Mar. 1992, available in LEXIS, News Library, Mags File. The United States imported almost three million tons of sugar a year prior to Castro coming into power. *Id.* The Cuban government's position was that the embargo on sugar imports into the United States did not threaten the Cuban government in any way, as ideologically they believed that Cuba's dependence on exporting sugar was the cause of many of its problems. *Id.*

United States began an embargo against most exports from Cuba;²⁴ on January 3, 1961, the United States broke diplomatic relations with Cuba.²⁵ In the spring 1961, U.S. trained and U.S. backed anti-Castro Cuban forces landed in Cuba at the Bay of Pigs and were completely defeated within three days.²⁶ Furthering Cuba's isolation in the Western hemisphere, by 1964 every nation belonging to the Organization of American States, with the exception of Mexico, had severed trade and diplomatic relations with Cuba.²⁷

As U.S. presidents changed, the feeling toward Cuba remained the same. In 1971, the Nixon Administration officially blamed the poor relations between the United States and Cuba on Cuba's strong military ties to the Soviet Union and its revolutionary goals in the Americas.²⁸ Over twenty years later, in 1992, President Bush signed into effect the Cuban Democracy Act, which further strengthened the embargo against Cuba.²⁹

As Cuba's relations with the United States and other western countries diminished, its dealings with the Soviet Union increased, and in February 1960 the Soviet Union and Cuba signed an agreement that would allow Cuba to buy equipment and technical assistance with Soviet financing.³⁰ In addition, the Soviet Union agreed to buy almost 400,000 tons of sugar in 1960 and four million additional tons by 1964.³¹ The 1960 agreement also stated that the Soviets would trade oil with the Cubans.³² On May 8, 1960, the Soviet Union officially established diplomatic relations with Castro's Cuba.³³ Castro's government soon became very dependent on the Soviet Union; during the 1960s Soviet economic assistance to Cuba totaled over US\$1 million per day.³⁴ The Soviet Union forgave Cuba's huge accumulated debt in December 1972.³⁵

24. SUCHLICKI, *supra* note 15, at 163. The embargo included everything imported by Cuba from the United States, with the exception of medical supplies and food. BAKLANOFF, *supra* note 1, at 118.

25. CUBA, *supra* note 14, at 44. The U.S. government stated that "[t]here is a limit to what the U.S. in self-respect can endure . . . [and] [t]hat limit has now been reached." SUCHLICKI, *supra* note 15, at 163.

26. GEYER, *supra* note 13, at 270-79. Adding insult to injury, 1400 anti-Castro Cubans were taken prisoner, and 1113 of them were eventually ransomed to the United States for US\$53 million worth of medicine and equipment. *Id.* at 281.

27. BAKLANOFF, *supra* note 1, at 119. Ties were severed with Cuba primarily in response to Cuba's "subversive activities" in Latin America, including a Cuban-sponsored guerilla invasion of Venezuela in 1964. *Id.*

28. *Id.* at 121-22.

29. See *infra* notes 270-92 and accompanying text (outlining the content of the Cuban Democracy Act).

30. CUBA, *supra* note 14, at 42 (stating that Soviet First Deputy Premier Anastas Mikoyan extended US\$100 million in credit).

31. *Id.* By 1964, two-thirds of Cuba's sugar export was going to socialist markets. *Cuba's Sugar Industry - Facing A New World Order*, *supra* note 23.

32. SUCHLICKI, *supra* note 15, at 163.

33. CUBA, *supra* note 14, at 42.

34. BAKLANOFF, *supra* note 1, at 120 (excluding military assistance). By the end of 1970, Cuba had an estimated US\$2.2 billion trade deficit with the Soviet Union. *Id.*

35. *Id.* at 121 (reporting that in addition, the Soviet Union granted Cuba long-term economic credits, and doubled the price that it would pay Cuba for sugar and nickel exports).

Apparently because of severe hardship, the Cuban government in 1982 passed Legislative Decree Number 50 on Economic Associations between Cuban and Foreign Entities.³⁶ The stated purpose of this investment law was to expand Cuba's exports and international tourism.³⁷ In 1989, the Soviet Union system collapsed and with it the support provided to Castro's Cuba, thereby sending Cuba into an economic depression.³⁸ Once the Soviet Union withdrew its financial support and the Cuban need for foreign investment increased, this law was resuscitated³⁹ to facilitate much needed capital investment.

III. CUBA'S FOREIGN INVESTMENT LAW

A. *The Stated Purpose of the New Cuban Investment Law*

On September 5, 1995, the Republic of Cuba's National Assembly⁴⁰ passed a new foreign investment law that became effective on September 6, 1995, when it was published in a special issue of the *Gazeta Oficial de la Republica*.⁴¹ This new investment law repeals Cuba's 1982 foreign investment law, Decree Number 50 on Economic Associations between Cuban and Foreign Entities.⁴² Reportedly, the 1982 investment law was a disappointment to the Cubans.⁴³ The new Cuban investment legislation states that the goal of the new law is to protect Cuban accomplishments from the demise of the socialist bloc, as well as from the U.S. embargo.⁴⁴ Cuba realizes that it needs the help of foreign investors to provide

36. Legislative Decree Number 50 on Economic Associations Between Cuban and Foreign Entities (1982) [hereinafter *1982 Cuban Investment Act*].

37. *Id.*, Preamble.

38. See *supra* note 3 and accompanying text.

39. Whisenand, *supra* note 21, at 16.

40. The National Assembly is the "supreme organ of the state power" and its duties consist of approving laws, formulating the Cuban budget and supervising other Cuban government bodies. *Cuba, supra* note 1, at 9.

41. 1995 Cuban Investment Act, *supra* note 5, Final Provision (providing that the new investment law would go into force when it is published in the *Gazeta Oficial de la Republica*).

42. *Id.* (repealing also any other Cuban legislation that is contrary to the contents of the new investment law).

43. Cordoba, *supra* note 3, at A12 (quoting Fidel Castro's statements that he made during the debate on the new investment law, showing his disappointment with the 1982 investment law and the undesirable type of investors the old investment law had attracted). Castro reportedly said that because of the investment law, he had to waste his time talking to "idiots" and "swindlers" who had "come to Cuba with false offers and papers proposing all sorts of nonsense." *Id.*

44. 1995 Cuban Investment Act, *supra*, note 5, Preamble (referring to the American embargo as the "fierce blockade"). In addition, the new law also cites the globalization of the world's economy and the "strong hegemonistic tendencies in the economic, political, and military fields" as reasons why the Republic of Cuba needs foreign investment to protect its achievements. *Id.*

capital, markets, and technology, and hopes that the new investment law will provide the impetus for further economic growth through foreign investment.⁴⁵

B. Foreign Investment Forms Allowed

Under the old foreign investment law, foreign investors were prohibited from complete ownership of their businesses in Cuba.⁴⁶ The law permitted the formation of a Joint Venture with the Cuban government, but only allowed the foreign corporation to own as much as forty-nine percent of the venture.⁴⁷ Under the new law, foreign companies, depending on the investment entity chosen, may potentially own the entire business.⁴⁸ Whereas the old investment law only allowed joint venture investments,⁴⁹ the new investment law allows foreigners to participate in and create three different types of investment entities.⁵⁰ The foreign investment⁵¹ entities allowed include Joint Ventures,⁵² International Economic Association Contracts,⁵³ and Totally Foreign Capital Companies.⁵⁴

1. The Joint Venture

The investment law defines Joint Ventures as commercial nominal share corporations that contain Cuban as well as foreign investors.⁵⁵ Unlike the

45. *Id.* (listing the Cuban governmental goals of ushering in innovative and advanced technology, modernization of Cuban industries, more efficient production, creation of new jobs, better services and products, cost reduction, a better ability to compete internationally, and accessibility to certain markets through the use of foreign investment).

46. *Id.* ch. II, art. 15.

47. *Id.* (stating that while the foreign participation is limited to 49 percent, the Cuban Executive Committee of the Council of Ministers was authorized to grant a higher percentage of participation in "exceptional cases").

48. *Id.* ch. V, art. 15.1 (citing to the benefits of the Totally Foreign Capital Company foreign investment form).

49. 1982 Cuban Investment Act, *supra* note 36, ch. I, art. 1 (limiting the authorization of foreign investment to those which join with Cuban enterprises and other Cuban national organizations).

50. 1995 Cuban Investment Act, *supra* note 5, ch. V, art. 12(a)-(c).

51. *Id.* ch. V, art. 11(a) (b) (stating that the new foreign investment law defines "foreign investment" as "direct investments" as well as investments in either public or private securities which may not fit into the definition of direct investments. "Direct investments" are defined as contributions into an international economic association contract, or an investment through which the investor effectively participates in the management of either a joint venture or a totally foreign capital company. *Id.*

52. *See infra* notes 55-59 and accompanying text (defining and explaining Joint Ventures under the new investment law).

53. *See infra* notes 60-70 and accompanying text (defining and explaining International Economic Association Contracts under the new investment law).

54. *See infra* notes 71-78 and accompanying text (defining and explaining Totally Foreign Capital Companies under the new investment law).

55. 1995 Cuban Investment Act, *supra* note 5, ch. II, art. 2(i) (defining a Joint Venture as a "Cuban commercial company which adopts the form of a nominal share corporation, in which one or more national investors and one or more foreign investors participate"). "Foreign Investor" is defined as a foreignly domiciled

International Economic Association Contract,⁵⁶ a Joint Venture implies the creation of a new legal entity that is separate from that of any one of the parties to the Joint Venture.⁵⁷

Before entering into a Joint Venture, one should be aware that once the Joint Venture has been created, the parties to the investment cannot be changed without the consent of each party.⁵⁸ In addition, the Cuban government organization that authorized the Joint Venture must also authorize the changing of any parties.⁵⁹

2. *The International Economic Association Contract*

An International Economic Association Contract is an agreement between one or more national investors and one or more foreign investors.⁶⁰ This type of business organization does not imply that a legal business entity has been created which is separate from the foreign and national contracting parties.⁶¹ Each of the parties provide separate contributions to the economic association, and each party retains ownership of its contribution.⁶² The new investment law does not require the parties to establish a common fund, although it recommends this procedure.⁶³

When one party to the International Economic Association carries out an "act of management" that involves a third party and which benefits the parties to the economic association, that party is fully responsible to the third party.⁶⁴ However,

person or corporation that uses "foreign capital," becomes a party to an international economic association contract, a shareholder in a joint venture, or participates in a totally foreign capital company. *Id.* art. 2(m). "Foreign Capital" is defined as capital that has originated outside of Cuba, including any profits and dividends that the foreign investor reinvests. *Id.* art. 2(c). "National Investor" is defined as a legal State company or entity, or a corporation or other Cuban national entity whose address is in Cuba and is either a party to an international economic association contract, or a shareholder of a joint venture. *Id.* art. 2(n).

56. *See id.* ch. V, art. 14.1.

57. *Id.* ch. V, art. 13.1. This differs from the old investment law, in that under the old law, the joint venture did not imply the creation of a corporate body with its own legal status. *1982 Cuban Investment Act, supra* note 36, ch. I, art. 1.

58. *1995 Cuban Investment Act, supra* note 5, ch. V, art. 13.5 (defining a "change of partners" as either the foreign or Cuban partner being substituted by another person or company).

59. *Id.* The new investment law defines "authorization" as a document that is issued by a Cuban government Commission "for the realization of one of the forms of foreign investment authorized" in the new Cuban foreign investment law, for a specific period of time. *Id.* ch. II, art. 2(b).

60. *Id.* art. 2(g). The terms "Foreign Investor" and "National Investor" as used in the new investment law are defined *supra* note 55.

61. *Id.* ch. V, art. 14.1(a); *cf.* Joint Ventures, *supra* note 57 and accompanying text.

62. *Id.* art. 14(d).

63. *See id.* art. 14.1(d) (advising that it is in the interest of the parties to create a common fund, but warning the parties that they will want to keep well defined the portion of the fund belonging to each party).

64. *See id.* art. 14.3 (failing to state anywhere in the new investment law what type of act constitutes an "act of management").

the party can then be indemnified by the other contracting party to the extent that it is stipulated in the investment contract.⁶⁵

The national investor must negotiate all aspects of the investment with the foreign party, including the economic feasibility of the investment, the responsibility for payments, the management of the association, as well as the legal document that is required to create the international economic association.⁶⁶ However, the parties can stipulate anything in the contract that they believe is in their interest, provided they do not violate any existing Cuban law and do not infringe upon the conditions of the authorization.⁶⁷ The International Economic Association Contract must state each party's proportionate share of any taxes that will be owed, state the times of the year that profits, if any, will be distributed among the parties, and allocate the risk of loss for each party should the investment lose capital or experience loss.⁶⁸

The same restrictions apply to changing the parties of an International Economic Investment Contract as apply to changing the parties of a Joint Venture. That is, the parties to the contract cannot be changed unless all of the parties consent to the change and the Cuban government organization that authorized the International Economic Association Contract also authorizes the change.⁶⁹ In the event that the parties cannot agree upon a price, the investment law provides that the price upon which all the parties agree shall be determined by a government-approved internationally recognized organization.⁷⁰

3. *The Totally Foreign Capital Company*

The Totally Foreign Capital Company is a commercial entity which is wholly funded with foreign capital.⁷¹ This type of investment form does not have a national investor.⁷² The new Cuban law allows the Totally Foreign Capital investor to be either a corporation or an individual.⁷³ In this investment form, the

65. *Id.* If the portion to be indemnified is not stipulated in the investment contract, or the parties to the investment contract cannot agree on the amount of indemnification, then the resulting litigation between the parties to the investment contract is within the jurisdiction of the economic division of the People's Courts that have been established by the Governing Council of the People's Supreme Court. *Id.* ch. XVII, art. 58.

66. *Id.* ch. VIII, art. 20.1. The contract itself is a public document and it goes into effect once it is included in the Registry that is maintained by the Republic of Cuba's Chamber of Commerce. *Id.* ch. V, art. 14.5. In order to be valid, the contract must be inscribed in the Registry within thirty days following the date of the authorization. *Id.* ch. XIV, art. 48.

67. *Id.* ch. V, art. 14.1(c).

68. *Id.* art. 14.2.

69. *Id.* art. 14.4.

70. *Id.* ch. III, art. 7 (limiting the organization to one that is authorized to operate in Cuba by the Ministry of Finance and Prices).

71. For a definition of the term "foreign capital" as used in the new investment law, see *supra* note 55.

72. *Id.* ch. II, art. 2. For a definition of the term "national investor" as defined in the new investment law, see *supra* note 55.

73. *Id.* ch. V, art. 15.2.

foreign investor manages the company and enjoys all rights that accompany complete ownership.⁷⁴ However, the foreign investor is also responsible for all of the business obligations.⁷⁵ This type of investment is a total departure from the type allowed under the old investment law, since foreigners may now maintain complete ownership of their investment.⁷⁶

If an individual or corporation wishes to establish a Totally Foreign Capital Company, it must first work with, and then obtain approval from, the responsible Cuban government entity in that business sector.⁷⁷ In addition, the owner of a Totally Foreign Capital Company may sell or transfer all or part of the company at any time, provided the Cuban government authorizes the sale or transfer.⁷⁸

C. The Procedure for the Authorization of Foreign Investment

Under the new investment law, any foreign investment into Cuba must be authorized by the Executive Committee of the Council of Ministers.⁷⁹ To have either a Joint Venture established or an International Economic Association Contract granted, both the national and the foreign investor must submit a written request to the Executive Committee.⁸⁰ Along with the written request, a draft version of the economic association agreement and the bylaws of the proposed Joint Venture must be submitted.⁸¹ Also, both the national and foreign investor have individual requirements that must be met.⁸² Finally, in addition to the above

74. *Id.* art. 15.1.

75. *See id.* (providing further that the foreign investor is responsible for all obligations described in the Cuban authorization of the business).

76. *See supra* note 47.

77. 1995 Cuban Investment Act, *supra* note 5, ch. VIII, art. 20.2 (stating that the Ministry of Foreign Investment and Economic Cooperation will indicate to the foreign investor who is the responsible Cuban entity in the sector).

78. *Id.* ch. III, art. 6.2 (adding that the price shall be paid in freely convertible currency, unless there is an express agreement stating otherwise).

79. *Id.* ch. VIII, art. 21.1 (allowing also that a commission may be established for the purpose of authorizing foreign investment). The new investment law provides the Executive Committee *exclusive* power to grant the authorization of foreign investment when: the combined foreign and national investments is more than US\$10 million; the investment entity sought is a Totally Foreign Capital Company; investments are made in public service areas; the foreign company has capital shares that are owned by a foreign state; the investment involves the exploitation of a natural resource; the investment calls for the transferring of either a Cuban property right; or the investment is in the armed forces commercial sector. *Id.* at 22.2 (a)-(g). The commission also has the power to authorize investment in any areas that were not mentioned in Article 22.2, but the investment law does not state that its authority is exclusive in the unmentioned areas. *Id.* at 22.3.

80. *Id.* art. 23.1.

81. *Id.* art. 23.2(a).

82. *Id.* art. 23.2. Foreign investors must present documentation that attests to their identity and solvency. *Id.* art. 23.2(b). In addition, the foreign investor must show that they are a representative of the corporation that is investing, if there is one. *Id.* The national investors in an investment that is either a commercial association or civilian service organization that is based on Cuban capital, must provide express authorization of a general shareholders meeting that shows the granting of authority to sign investment documents with the foreign investor. If the national investor is a state enterprise or entity, they must show that

requirements, if investors seek to have an authorization granted to create a Totally Foreign Capital Company, they must also present both the acceptance of the proposal by the Cuban entity in that business sector and an economic feasibility study.⁸³

Once the Ministry of Foreign Investment and Economic Cooperation accepts the investment request, it must be submitted to all "corresponding agencies and institutions" for consultation so that they can report on all relevant matters.⁸⁴ Once all the authorization request procedures have been complied with, the Ministry of Foreign Investment and Economic Cooperation shall give all of the documentation and its evaluation to the Executive Council of Ministers, who will then make the final decision.⁸⁵ Within sixty days from the time the request was submitted, the Council will decide and the applying investors notified as to whether or not the proposal was approved.⁸⁶

If the request is approved, the authorization shall specify the conditions under which it was granted, as well as the objective of the investment and the time period of the investment.⁸⁷ If the objective of the investment involves the exploitation of a public service, public work or natural resource, or the construction of a public work, then administrative concessions may be granted by the Executive Committee.⁸⁸

Finally, once an authorization has been granted, the investment entity must be inscribed in the Registry maintained by Cuba's Chamber of Commerce within

they have been granted authority to operate in that sector of business. *Id.* art. 23.2(c).

83. *Id.* art. 22 (requiring the request be submitted to the Ministry of Foreign Investment and Economic Cooperation). The Ministry of Foreign Investment and Economic Cooperation is located at Calle 1, No. 201, Vedado, Havana. *Cuba, Int'l Trade Rep. (BNA)*, Oct. 4, 1995, at 81, 86. The Ministry can be reached by telephone at 3-6661 and by telex at 511297. *Id.* In addition to the written request, the following documents must accompany the written request: approval by the pertinent Cuban authority in that sector; the text of the bylaws; an economic feasibility study; documentation that proves the investor's identity and solvency; and if the investor is a corporation, proof that the foreign investor is an authorized representative to make the investment. *1995 Cuban Investment Act, supra* note 5, ch. VIII., art. 23.2(d).

84. *Id.* art. 23.4.

85. *See id.* art. 23.5 (allowing in pertinent cases, a government commission to make the decision instead).

86. *See id.* art. 23.6 (leaving it ambiguous as to whether the 60 days starts to run from the time that the investors submitted the request to the Ministry of Foreign Investment and Economic Cooperation, or from the time that the Ministry submits the request to the Executive Committee).

87. *Id.* art. 24.1. If the investors need to have the conditions in the authorization clarified, they can request clarifications from the Ministry of Foreign Investment and Economic Cooperation. *Id.* art. 25.

88. *See id.* art. 24.2 (limiting the concessions to the terms and conditions that the Executive Committee sees fit). An "administrative concession" is defined as a "[u]nilateral action on the part of the Government of the Republic, whereby an entity is granted the right to exploit a public service or natural resource, or to build or utilize a public work under the terms and conditions to be determined." *Id.* ch. II, art. 2(f).

thirty days of the date of authorization.⁸⁹ Until they are inscribed in the Registry, the investment entity cannot commence operations.⁹⁰

D. Land Ownership or Long-Term Lease?

The language of the new investment law allows foreign companies, for the first time, to own property.⁹¹ However, this provision seems to be in direct conflict with the Cuban constitution.⁹² The old foreign investment law only allowed the foreign investor to lease land and other installations that either already existed or were to be built in Cuba.⁹³ Under the language of the new foreign investment law, investments can be made in real estate and the investor is allowed to own the property.⁹⁴ Foreign investors will be allowed to invest in property if the property is to be utilized for the following purposes: private residences or tourist activities of non-permanent residents; housing or offices for foreign companies; or real estate that is to be developed for tourism-related uses.⁹⁵

E. Employment of Cubans

Like the old investment law, the new law tightly controls the hiring and salary payment aspects of foreign companies utilizing Cuban employees.⁹⁶ The new Cuban investment law mandates that any workers utilized by the foreign investors in any of the three foreign investment forms must be either Cubans or foreigners that permanently reside in Cuba.⁹⁷ However, the new law contains an exception to this general rule, declaring that if the foreign investment form decides that it needs non-permanent resident Cubans in either a top administrative or technical

89. *Id.* ch. XIV, art. 48. The Cuban Chamber of Commerce (or *Camara de Comercio de la Republica de Cuba*) is located at Calle 21, No. 661/701, esq. Calle A, Apdo. 4237, Vedado, Havana, and can be reached by telephone at 70-9341, by fax at 7-6234, and by telex at 511174. *Cuba, supra* note 83, at 81, 86.

90. *See id.* ch. XIV, art. 48. Inscription must occur "within a period of 30 days following the date of authorization." *Id.*

91. *Id.* ch. VI, art. 16.1.

92. Cordoba, *supra* note 3, at A12 (stating that while Cuba's Minister of Foreign Investment, Octavio Castilla, realizes that the selling of land is against the Cuban Constitution, Cuba is willing instead to offer the foreign investor 25 year or longer leases).

93. *1982 Cuban Investment Act, supra* note 36, ch. I, art. 2 (setting forth specifically that "land and industrial, touristic or other types of installations that already exist or that may be built in Cuban national territory" may be leased to the joint ventures). The old investment did not specify the duration of the leases.

94. *1995 Cuban Investment Act, supra* note 5, ch. VI, art. 16.1 (detailing that "investments can be made in real estate" and property ownership and other property rights over that real estate can be acquired).

95. *Id.* ch. VI, art. 16.2(a)-(c). Under the new investment law, an investment that consists of the purchase of real estate that constitutes corporate activity is considered a direct investment. *Id.* art. 17. As a direct investment, the investment is considered a "foreign investment" as the term is used in the new Cuban investment law. *Id.* ch. V, art. 11(a).

96. *Id.* ch. XI; *1982 Cuban Investment Act, supra* note 36, ch. V.

97. *1995 Cuban Investment Act, supra* note 5, ch. XI, art. 31.1.

position, they can be directly hired.⁹⁸ Although the language of the law is clear, it would appear that the Cuban government might at least be willing to negotiate on this point.⁹⁹

1. Employment Pools

The new Cuban foreign investment law does not change the practice that a Joint Venture cannot, for the most part, hire workers directly but rather requires the workers be hired through a Cuban employing entity.¹⁰⁰ The exception to using an employing entity to employ workers is when the Cuban worker or permanent resident of Cuba is either a member of management or is filling a top administrative position, as the new investment law allows the persons that fill these positions to be hired directly by the Joint Venture.¹⁰¹ Only in "exceptional cases," following authorization by the Cuban government, may the joint venture directly hire its employees.¹⁰²

Any workers that are employed by an International Economic Association are contracted for by the Cuban party, and must follow all current Cuban employment provisions.¹⁰³ When a Totally Foreign Capital Company utilizes either Cuban or permanent Cuban residents, the new investment law follows provisions similar to the employment laws that pertain to Joint Ventures.¹⁰⁴

98. *Id.* ch. XI, art. 31.2. If a person is to be brought into Cuba to fill a top administrative or technical position, that person must conform to current Cuban legislation regarding immigration and foreigners. *Id.* Although the new investment law does not define "top administrative position," it does define "top management posts" as the positions that belong to the members of the management and administration of totally foreign capital companies and joint ventures, as well as the investment parties' representatives to international economic association contracts. *Id.* ch. II, art. 2(d).

99. Lionel Martin, *Club Med Sings Agreement For Cuban Resort*, THE REUTER EUR. BUS. REP., Jan. 21, 1996 (reporting that in January 1996, Club Med signed an agreement with Gaviota, the Cuban tourist enterprise, in which Club Med agreed to manage the staff of a major hotel in Varadero, and in which Club Med was able to get Gaviota to agree to let Club Med bring in from outside of Cuba at least 30%—approximately 80 people—of the hotel staff).

100. *1995 Cuban Investment Act*, *supra* note 5, ch. XI, art. 33.1 (providing further that the Cuban employing entity that is to be used is proposed by the Ministry of Foreign Investment and Economic Cooperation and is authorized by the Ministry of Labor and Social Security). The new investment law defines "employing entity" as a legal Cuban organization that is authorized to contract with and provide skilled workers to joint ventures and Totally Foreign Capital Companies. *Id.* ch. II, art. 2(j).

101. *1995 Cuban Investment Act*, *supra* note 5, ch. XI, art. 33.1. In addition, employees who are going to be in management or administrative positions are designated at the general shareholders meeting. *Id.*

102. *Id.* (failing to state anywhere in the new investment law what may constitute an "exceptional case").

103. *Id.* ch. XI, art. 33.2.

104. *Id.* ch. XI, art. 33.3. See *supra* notes 100-02 and accompanying text (discussing the employment laws that apply to Joint Ventures).

2. Salary Payments

Any Cubans or permanent residents directly hired and paid by the foreign investment entities are to be paid in Cuban pesos, instead of foreign currency.¹⁰⁵ The Cuban employing entities used by the Joint Ventures and Totally Foreign Capital Companies contract directly with the Cuban workers and permanent residents, not the foreign investment form.¹⁰⁶ The foreign investment form that uses workers provided by a Cuban employing entity does not pay the workers, but rather it is the employing entity which pays the workers.¹⁰⁷

Although the new investment law fails to directly state a particular foreign currency that the foreign investment form must use when making payments to the employing entity, some believe that the foreign investment entities must pay the Cuban employee's salary in U.S. dollars.¹⁰⁸ The payments that the Cuban workers receive from the employing entity are a fraction of the dollar salary that the employing entity receives from the foreign investment entity.¹⁰⁹ Under the old investment law, this type of wage distribution forced some foreign companies to pay their Cuban employees a second, secret wage in U.S. dollars to prevent Cuban employees from stealing the companies' inventory.¹¹⁰

The new investment law contains provisions allowing foreign investment entities to create a bonus or "economic stimulus fund" for their Cuban and permanent resident workers.¹¹¹ However, the Cuban Ministry of Foreign Investment and Economic Cooperation must approve the amount of the contribution to the fund.¹¹² Under the provisions of the old Cuban investment law, Joint Ventures were required to create an economic incentive fund for their Cuban workers.¹¹³

105. *Id.* ch. XI, art. 33.4 (mandating that the payments in pesos that are made to the directly hired workers by the foreign investment form are obtained by exchanging foreign currency). In addition, the new foreign investment law states that all of the foreign investment forms shall open bank accounts in a bank that is part of the Cuban National Banking System, and it is through these bank accounts that the foreign investment form must receive and make payments that pertain to the business operation. *Id.* ch. IX, art. 26.1. When opening the bank accounts, the foreign investors are to use freely convertible currency. *Id.* As of October 1995, the Cuban peso's official exchange rate with the U.S. dollar was 1:1. Cordoba, *supra* note 3, at A12.

106. 1995 Cuban Investment Act, *supra* note 5, ch. XI, art. 34.1.

107. *Id.*

108. *Castro Fishing for Capital: Cuba Approves Law to Net Foreign Investment*, SUN-SENTINEL (Fort Lauderdale), Sept. 10, 1995, at 1G.

109. Cordoba, *supra* note 3, at A12 (reporting that the Cuban government then keeps the difference from what it has received from the foreign investment form and what it has passed on to the Cuban worker).

110. *Id.*

111. 1995 Cuban Investment Act, *supra* note 5, ch. XI, art. 32.1.

112. *Id.* ch. XI, art. 32.2 (specifying that the contributions to the economic stimulus fund can only be made up of earned profits).

113. 1982 Cuban Investment Act, *supra* note 36, ch. V, art. 42 (dictating that the Executive Committee of the Council of Ministers decide the amount of the annual contributions to the fund as well as the purpose of the fund).

If the foreign investment entity is not satisfied with a worker that has been provided by an employing entity they can request that the employing entity replace the worker.¹¹⁴ In the event of a labor dispute involving a worker provided by the employing entity, the parties to the dispute include the worker and the employing entity, but not the foreign investment entity.¹¹⁵ If the worker is entitled to indemnification, then the employing entity must pay it, and under "pertinent cases," the foreign investment entity indemnifies the employing entity.¹¹⁶

F. Taxes and Fees

The new investment law is comparable to the old law in that it provides the same five types of taxes for Joint Ventures and International Economic Association Contracts. The five types of taxes that foreign investors may have to pay include: a Profit (or income) tax,¹¹⁷ a Labor tax,¹¹⁸ a Customs tax,¹¹⁹ a Land Transportation tax,¹²⁰ and a Documents tax.¹²¹ However, the new investment law contains only minor tax differences from the old investment law.

1. The Profit or Income Tax

The old investment law dictated that the profit tax was to be thirty percent of the net profit, with net profit equaling the amount of profit, minus any reinvestment, any contributions to the worker's economic incentive fund, and any amount held in reserve for contingencies.¹²² The new investment law also calls for a thirty percent income tax, but it does not provide for deductions on calculating net profit as with the old investment law.¹²³ Rather, the new law states that the Executive Committee of the Council of Ministers may, at its discretion, exempt the amount of net income that is reinvested into the country from the Profit tax.¹²⁴ The new investment law also states that when the exploitation of

114. 1995 Cuban Investment Act, *supra* note 5, ch. XI, art. 34.2. Although the Cuban labor force is well educated, it has been suggested that it is possible that since Cuba has been under a system of guaranteed employment for so long, Cubans may not have "developed" the motivation, work habits, discipline, and competitiveness necessary for employment in a market economy. Perez, *supra* note 2, at 58, 64.

115. See 1995 Cuban Investment Act, *supra* note 5, ch. XI, art. 34.2 (stating that the indemnification that is to be paid to the worker by the employing entity will be determined by the "competent authorities").

116. See *id.* (failing to define what a pertinent case would be).

117. See *infra* notes 122-25 and accompanying text (defining the income tax).

118. See *infra* notes 126-29 and accompanying text (explaining the labor tax).

119. See *infra* notes 130-31 and accompanying text (discussing the customs tax).

120. See *infra* notes 132-33 and accompanying text (defining the land transportation tax).

121. See *infra* notes 134-35 and accompanying text (outlining what the documents tax entails).

122. 1982 Cuban Investment Act, *supra* note 36, ch. III, art. 26(a).

123. 1995 Cuban Investment Act, *supra* note 5, ch. XII, art. 39(a); 1982 Cuban Investment Act, *supra* note 36, ch. III, art. 26(a).

124. 1995 Cuban Investment Act, *supra* note 5, ch. XII, art. 39(a).

either renewable or nonrenewable natural resources is involved, the Executive Committee of the Council of Ministers can raise the income tax rate as they see fit, to a limit of fifty percent.¹²⁵ The ability to raise the tax rate due to the exploitation of natural resources did not exist under the old investment law.

2. *The Labor Force Tax*

As compared to the old investment law, the new investment law contains no net change in the Labor Force tax.¹²⁶ The old investment law states that a rate of twenty-five percent must be paid, and this amount includes the Social Security contribution.¹²⁷ The new investment law provides that the Cubans are offering a "discount" and that the tax is now set at an eleven percent labor force rate, plus an additional fourteen percent Social Security contribution.¹²⁸ The new Labor Force tax rate combined with the Social Security contribution rate equals twenty-five percent. Both the old and new investment law dictate that the tax rate be paid on all wages and other income given to workers, excluding any amount given to them as an economic stimulus.¹²⁹

3. *Other Taxes*

The new investment law contains no change from the old investment law in regard to customs and tariffs. Both the new and the old investment law require the payment of tariffs and other custom duties.¹³⁰ However, this amount may be reduced or eliminated if the Cuban government decides that it is appropriate to do so.¹³¹ This apparently allows the possibility of providing business incentives.

The Land Transportation tax exists in the same form in both the new and old investment laws.¹³² This tax is identified in the new law as applying only to the ownership or possession of land motor vehicles.¹³³

125. *Id.* ch. XII, art. 39(b).

126. *Id.* ch. XII, art. 39(c); see *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(b).

127. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(b).

128. *1995 Cuban Investment Act*, *supra* note 5, ch. XII, art. 39(c)(1)-(2).

129. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(b) (excluding payments the workers receive from the "workers economic incentive fund"); see *1995 Cuban Investment Act*, *supra* note 5, ch. XII, art. 39(c)(3) (exempting from the tax any income turned over to the workers as "economic stimulus").

130. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(c); see *1995 Cuban Investment Act*, *supra* note 5, ch. XII, art. 38(c).

131. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 28; see *1995 Cuban Investment Act*, *supra* note 5, ch. XII, art. 41.

132. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(d); see *1995 Cuban Investment Act*, *supra*, note 5, ch. XII, art. 38(d).

133. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(d); see *1995 Cuban Investment Act*, *supra*, note 5, ch. XII, art. 38(d).

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The Documents Tax, as it is called in the new investment law, is the same as the "Document Fees" described in the old investment law, and both pertain to the fees or taxes associated with requesting, obtaining or renewing certain documents.¹³⁴ Other than nomenclature, no difference exists between the two investment laws in terms of the payment of document taxes or fees.¹³⁵

4. Personal Income Tax Exemption

The new investment law exempts foreign investors who are partners in a Joint Venture or are a party to an International Economic Association Contract from paying a personal income tax in Cuba.¹³⁶ This is not a departure from the old investment law, since under the old law, the partners, managers, and officers of any Joint Venture were exempt from paying either a personal income tax or a tax on the gross income of the private enterprise.¹³⁷

5. Tax and the Totally Foreign Capital Company

The new investment law does not clearly establish what taxes the Totally Foreign Capital Companies will have to pay. The law simply states that "[t]he totally foreign capital company is obligated throughout the duration of its operations to pay taxes in accordance with the current tax legislation."¹³⁸ This statement creates an ambiguity as to whether the same taxes paid by Joint Ventures and International Economic Association Contracts are also paid by Totally Foreign Capital Companies. Whereas this would appear to be a plausible explanation, it does not explain why the taxes that apply to the Totally Foreign Capital Corporations contain their own article,¹³⁹ while the taxes that pertain to the other two types of business forms are listed together under a single article.¹⁴⁰ On the other hand, if the Cuban government desired a different tax structure to apply, it seems odd that a new scheme would be left out and the provision only contains the words "current tax legislation."

134. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(e); *see 1995 Cuban Investment Act*, *supra* note 5, ch. XII, art. 38(e) (failing to define on what types of documents this tax will be levied).

135. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(e) (referring to it as a document fee); *see 1995 Cuban Investment Act*, *supra* note 5, ch. XII, art. 38(d) (referring to it as a document tax).

136. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 26(e); *see 1995 Cuban Investment Act*, *supra*, note 5, ch. XII, art. 38(d) (limiting the exemption to income earned from the businesses profit).

137. *1982 Cuban Investment Act*, *supra* note 36, ch. III, art. 25 (a)-(b).

138. *See 1995 Cuban Investment Act*, *supra* note 5, ch. XII, art. 40 (failing to state what exactly the current tax legislation entails).

139. *Id.*

140. *Id.* ch. XII, art. 38.

G. Industries Not Covered by the Law

While the old investment law did not place restrictions on the industries in which foreigners could invest, the new investment law contains express prohibitions.¹⁴¹ With the exception of the health and education services provided to the general population, the new foreign investment law states that the Cuban government may authorize foreigners to invest in any and all sectors, except for Cuban armed forces institution.¹⁴² However, the new law allows investment in Cuban armed forces *commercial* ventures.¹⁴³ Notwithstanding this openness, a number of sectors are rumored to be unofficially excluded from foreign investment, including retailing, retail banking, and gasoline distribution.¹⁴⁴

H. Reserve and Insurance Requirements

Apparently intending to protect Cuba from businesses that are either under capitalized during operations or under insured, the new Cuban investment law contains requirements regarding obligatory reserves and suggested insurance policies.¹⁴⁵

1. Reserves

The new investment law dictates that the foreign investment form must establish a reserve fund to cover contingencies that may arise during the operation of the business.¹⁴⁶ The Cuban Ministry of Finance and Prices regulates the establishment, utilization, and liquidation of the reserves.¹⁴⁷ The obligation to create a contingency reserve is not a new one, as it was also required by the old

141. *Id.* ch. IV, art. 10.

142. *See id.* (providing in full that "[f]oreign investments may be authorized in all sectors, excluding health and education services for the population and the armed forces institutions, with the exception of the latter's commercial system").

143. *See id.* (failing to identify what areas are covered by the Cuban armed forces commercial systems).

144. *See Cordoba, supra* note 3, at A12 (reporting that Octavio Castilla, Cuba's Minister for Foreign Investment, has said that although the new law does not rule out investment in retailing, gasoline distribution, or retail banking, the Cuban government will not be opening these areas up to foreign investors, at least for now). In addition, Mr. Castilla said that the Cuban government will not be opening up the sugar industry to foreign investors, except for the refining of raw sugar, as the Cuban government hopes that the production of the sugar crop will grow without foreign investment. *Id.*

145. *See 1995 Cuban Investment Act, supra* note 5, ch. XIII, art. 45.1 (stating that all foreign investment forms "are obliged to establish reserves. . ."). Additionally, the new law states that the foreign investors "should establish insurance policies . . .," *Id.* art. 47.1.

146. *Id.* art. 45.1.

147. *Id.* ch. XII, art. 45.2.

investment law.¹⁴⁸ As long as optional reserves are not detrimental to the required ones, they can be established by the entities.¹⁴⁹

2. Insurance Policies

The new investment law requires lands and installations leased to the foreign investor by any Cuban state enterprise or national organization to be insured by the lessee in favor of the lessor.¹⁵⁰ The new investment law recommends, but does not require, that all investors in any of the three types of foreign investment forms establish insurance policies to protect their goods, operations and any other activities against risk.¹⁵¹ The Cuban Ministry of Finance and Prices must authorize the companies that issue the insurance policies.¹⁵² The law states that the insurance policy premiums will be competitive with those that are available on the international insurance market.¹⁵³

I. Expropriation and Indemnification

Perhaps mindful of the large extent of Castro's past expropriation of foreign businesses,¹⁵⁴ the new Cuban investment law guarantees that the assets of foreign investment forms cannot be expropriated by the Cuban government, unless the government has a valid reason to do so for the public good or in the interest of society.¹⁵⁵ The law further states that the expropriations can only be carried out in accordance with the Cuban Constitution and any international agreements that cover the protection of investments in Cuba.¹⁵⁶ The old investment law did not provide that the government would not expropriate property, but rather only stated in the event that the Joint Venture was suspended as a result of the Cuban

148. 1982 Cuban Investment Act, *supra* note 36, ch. II, art. 22.

149. 1995 Cuban Investment Act, *supra*, note 5, ch. XII, art. 46 (stating that the Cuban Ministry of Finance and Prices also regulates the optional reserves).

150. *See id.* ch. XIII, art. 47.2 (including industrial and tourist installations and property).

151. *Id.* ch. XIII, art. 47.1.

152. *Id.*

153. *Id.*

154. *See supra* notes 17-29 (explaining the extent of Cuban expropriation when the Castro government came to power).

155. *See 1995 Cuban Investment Act, supra* note 5, ch. III, art. 3 (reassuring further that foreign investors within Cuba shall enjoy "full protection and security," while not actually stating what would qualify as being in the country's public good or societal interest). Perhaps shedding some light on what may constitute the public good or the interest of society, the Cuban Minister for Foreign Investment Ernesto Melendez Bachs told Cuba's National Assembly prior to the passing of the new investment law, that foreign investment would only be allowed when it was in keeping with the country's socialist principals. Fletcher, *supra* note 6. On December 19, 1995, Ernesto Melendez Bachs was replaced as Cuba's Minister of Foreign Investment, apparently because he was not "reform-minded" enough when it came to opening up the state-controlled economy. Gary Borg, *Cuba Replaces Minister Who Courts Foreign Investment*, CHL TRIB., Dec. 20, 1995, at 20.

156. 1995 Cuban Investment Act, *supra* note 5, ch. III, art. 3.

government's activities, the National Bank of Cuba *may* guarantee that the foreign partner *may* be allowed to repatriate his share of the business upon the liquidation of the Joint Venture.¹⁵⁷

In the event that appropriation of assets is proper under the new investment law, the Cuban government will provide indemnification in freely convertible currency (i.e. not in the Cuban peso), up to the commercial value of the assets as has been established by the parties.¹⁵⁸ If the parties involved cannot agree on the commercial value of the expropriated assets, then the new investment law provides that an internationally recognized business asset assessment organization shall be consulted to determine the amount of indemnification that is appropriate, provided all the parties involved can agree to use a particular organization.¹⁵⁹

The new Cuban foreign investment law protects foreign investments against third party reclamations.¹⁶⁰ This provision appears to be an effort to ease the fears of foreign investors who may be interested in using property and other assets that were expropriated by Castro and Cuba in the past from U.S. and other foreign companies.¹⁶¹

J. The Transferring of Income Abroad by the Foreign Investors and Workers

Like the old investment law, the new investment law guarantees the foreign investor that any net profits or dividends, as well as any moneys received through the transfer of a business interest, may be transferred out of Cuba in freely convertible currency without being subjected to transferring taxes and fees.¹⁶² In addition, the new investment law also states that any money that the foreign investor receives from the indemnification of assets expropriated by the Cuban government can be transferred out of Cuba without the levy of a tax or fee.¹⁶³

157. 1982 Cuban Investment Act, *supra* note 36, ch. II, art. 24.

158. 1995 Cuban Investment Act, *supra* note 5, ch. III, art. 3. The "parties" consist of the Cuban government and the party whose assets are being expropriated. *Id.*

159. *See id.* ch. III, art. 3 (stating further that the Cuban party will be the Ministry of Finance and Prices, unless the other party is a Totally Foreign Capital Company, in which case the Cuban party is to be the Ministry of Foreign Investment and Economic Cooperation).

160. *See id.* ch. III, art. 5 (providing in full that "[f]oreign investments are equally protected against third party reclamations which comply with the law and are in accordance with Cuban laws and rulings of national courts of justice").

161. *See infra* note 296 and accompanying text (explaining the intent of the U.S. Republican party to allow U.S. owners of expropriated Cuban property to sue foreign companies that benefit from its use of the property).

162. 1982 Cuban Investment Act, *supra* note 36, ch. II, art. 23; *see* 1995 Cuban Investment Act, *supra* note 5, ch. III, art. 8(a)-(b) (referencing Law Number 77 Foreign Investment Act, 1995, ch. III, art. 6 to include money received for the transferring of a business interest).

163. *See* 1995 Cuban Investment Act, *supra* note 5, ch. III, art. 8(b) (referencing, ch. III, art. 3 to include money received for the reimbursement of expropriated assets).

Unlike the old investment law, the new investment law allows people who are working for the various foreign investment entities that are neither Cubans nor permanent Cuban residents to transfer the income they have earned out of Cuba.¹⁶⁴ However, the law does not seem to be as generous to the foreign workers as it is to the foreign investor, because the law states the amount that may be transferred out of the country by the foreign worker is limited by a set amount dictated by the National Bank of Cuba.¹⁶⁵ Furthermore, the transferring is also subject to any other regulations that the National Bank of Cuba dictates.¹⁶⁶ Nowhere in Article 8 of the new law does it indicate that the amount the workers are allowed to transfer out is free from any transferring tax or fees.¹⁶⁷

K. Environmental Protection Concerns

While the old Cuban investment law did not discuss Cuban environmental protection, the new investment law dedicates an entire chapter to protecting the Cuban environment and natural resources from the foreign investor.¹⁶⁸ The new investment law states that the Cuban government is only concerned with allowing foreign investment into the country to the extent that the country can sustain development.¹⁶⁹ Cuba has a large amount of greatly varied natural resources that foreign investors will find favorable to utilize and export.¹⁷⁰

When a foreign investor submits an investment proposal to the Ministry of Foreign Investment and Economic Cooperation, in appropriate cases, that ministry then submits the foreign investment proposal to the Ministry of Science, Technology and the Environment.¹⁷¹ This environmental Ministry then evaluates the proposal to determine if it is suitable from an environmental point of view.¹⁷² The Ministry of Science, Technology and the Environment also decides whether the pertinent environmental licenses should be granted.¹⁷³ What the new law fails to address is whether the additional requirement of submitting the proposal to the Ministry of Science, Technology and the Environment, and awaiting their subsequent approval or rejection, still allows the Cuban government to approve or

164. *Id.* ch. III, art. 8.2.

165. *See id.* (failing to state at what the stipulated amount is set at).

166. *See id.* (failing to provide the contents of any applicable National Bank of Cuba regulations).

167. *Id.* ch. III, art. 8.

168. *Id.* ch. XVI. In addition, the Purpose and Content chapter of the new Cuban investment law mentions that the Cubans are concerned about protecting the use of Cuban natural resources. *Id.*

169. *Id.* ch. XVI, art. 54 (mandating that "during the course of the investment, environmental conservation and the rational use of natural resources shall be carefully undertaken").

170. *See infra* notes 241-57 and accompanying text (discussing Cuba's resources).

171. *1995 Cuban Investment Act, supra* note 5, ch. XVI, art. 55.

172. *See id.* (adding further that the Ministry of Science, Technology, and the Environment may determine that an environmental impact evaluation is required).

173. *See id.* (stating that it is also up to the Ministry of Science, Technology and the Environment to establish an environmental control and inspection program that conforms to current legislation in the field).

deny the proposal within sixty days of submission, as the new law guarantees.¹⁷⁴ In the event that the foreign investment proposal is authorized, the authorization will contain any conditions under which it has been granted, as well as the objective of the investment.¹⁷⁵

The Ministry of Science, Technology and the Environment is the government ministry that institutes the procedures that may be necessary to protect the natural resources and minimize the risks to the environment.¹⁷⁶ In the event that the Cuban environment is damaged, the person or company responsible for the harm must recreate the previously existing environmental condition, repair the material damage and indemnify the injured.¹⁷⁷

L. Duty-Free Zones and Industrial Parks

The new Cuban foreign investment law authorizes the Executive Committee of the Council of Ministers to establish duty-free zones and industrial parks in Cuba, while the old investment law made no such concessions.¹⁷⁸ The stated purpose of creating duty-free zones and industrial parks is to stimulate exports and international trade.¹⁷⁹ In addition to the provisions in the new investment law, a Vice Minister in the Cuban government stated that by March 1996, new laws will be passed to create additional free-trade and "special economic zones."¹⁸⁰

The investment law defines duty-free zones as areas in which a special system can be established that covers customs, currency exchange rates, tax, labor, migration, capital investment, and foreign trade.¹⁸¹ Cuba's Minister of Foreign Investment stated that the legislation's labor provisions¹⁸² may be modified in the free-trade zones.¹⁸³ In addition, the Minister also declared that the

174. *See id.* ch. VIII, art. 23.6 (stating merely that "[t]he decision denying or approving the foreign investment is handed down within a period of sixty (60) days from the date on which the request was presented . . .").

175. *Id.* ch. VIII, art. 24.1.

176. *See id.* ch. XVI, art. 56.1 (stating that the Ministry "institutes the measures which may be required to properly control situations that could lead to damage, dangers or risks for the environment and the rational use of natural resources").

177. *Id.* ch. XVI, art. 56.2.

178. *Id.* ch. XV, art. 50.

179. *Id.*

180. *See Cuba: More New Foreign Investment Laws*, CARIBBEAN UPDATE, Dec.1, 1995, available in LEXIS, News Library, Nwlters File (failing to detail what the additional laws would consist of, other than to say that there should be three new laws and that they would cover free-trade, special economic zones, real estate, and stock and bond ownership).

181. *1995 Cuban Investment Act*, *supra* note 5, ch. XV, art. 51.1 (stating that the foreign investors can be allowed to participate in the duty-free zones "for the purpose of financial operations, importing, exporting, storage, productive activities or reexporting").

182. *See supra* notes 96-116 and accompanying text.

183. Cordoba, *supra* note 3, at A12. The new Cuban investment law allows the modification of the labor provisions, as well as other provisions, as the law states that the operation of the duty-free zones and the industrial parks will be regulated by special legislation. *1995 Cuban Investment Act*, *supra* note 5, ch. XV, art.53.

Cuban government will be opening "special economic zones" near Jose Marti Airport in Havana, as well as at the ports of Mariel and Cienfuegos.¹⁸⁴

Industrial parks are defined as areas where a system can be established by the Cubans that will give the foreign investors an advantage in the areas of customs, duties, tax, labor, capital investment, and foreign trade.¹⁸⁵ If and when a foreign investment proposal is authorized, the authorization, if "pertinent," may consign facilities and incentives to the foreign investors in the duty-free zones and industrial parks.¹⁸⁶

M. The Banking Provisions

The new investment law does not vary from the old investment law in mandating that every foreign investment entity open accounts in a bank organized under the Cuban National Banking System.¹⁸⁷ The bank accounts are to be used to receive and make business operations payments.¹⁸⁸ In addition, the new investment law allows Joint Ventures and the parties to International Economic Association Contracts to open bank accounts in foreign banks that are located outside of Cuba, when authorized to do so by the National Bank of Cuba.¹⁸⁹

While the Cuban government apparently prefers the foreign investment forms to make business payments in freely convertible currency,¹⁹⁰ the Cuban Executive Committee of the Council of Ministers can allow certain payments and charges to be made in the Cuban Peso, when an exceptional basis exists.¹⁹¹

In the area of financing foreign investments in Cuba, the new investment law allows all foreign investment entities to arrange to receive loans in foreign currency with either a bank that is in the Cuban National Banking system or a

184. *Cuba: More New Foreign Investment Laws*, *supra* note 180.

185. *See 1995 Cuban Investment Act*, *supra* note 5, ch. XV, art. 51.2 (explaining that the purpose of the industrial parks is the development of productive activities with the participation of foreign capital). The new foreign investment law will allow the foreign investor to use the industrial parks to establish assembly plants that are used to manufacture for export, similar to the Mexican maquiladora model. *Castro Takes One More Step Toward Capitalism*, *supra* note 3, at 45.

186. *1995 Cuban Investment Act*, *supra* note 5, ch. XV, art. 52. (failing to define what areas of proposed foreign investment the Cuban Executive of the Council of Ministers would consider "pertinent" enough to grant the use of the duty-free zones and industrial parks).

187. *1982 Cuban Investment Act*, *supra* note 36, ch. II, art. 19; *see 1995 Cuban Investment Act*, *supra* note 5, ch. IX, art. 26.1 (dictating further that the accounts shall be opened with freely convertible currency, not with the Cuban peso).

188. *1995 Cuban Investment Act*, *supra* note 5, ch. IX, art. 26.1. The old investment law also was the same in this regard. *1982 Cuban Investment Act*, *supra* note 36, ch. II, art. 19.

189. *See 1995 Cuban Investment Act*, *supra* note 5, ch. IX, art. 26.2 (omitting the Totally Foreign Capital Company, apparently because the fact that all the investors are foreign, they do not need permission to open and maintain bank accounts outside of Cuba).

190. *Id.* ch. IX, art. 27.

191. *See id.* (failing to state what would actually qualify as an "exceptional basis").

financial institution that is approved by the National Bank of Cuba.¹⁹² The new investment law allows loans from outside of the Republic of Cuba to be made with foreign banks and financial institutions abroad, if transaction conforms with existing legal regulations.¹⁹³ The old law allowed foreign currency loans to be made from banks in the national banking system and from foreign banks as long as Cuban banking regulations allowed it, but did not mention borrowing from financial entities, either inside Cuba or abroad.¹⁹⁴

N. Contributions and Their Valuation

The new Cuban foreign investment law contains a separate chapter that deals with contributions and their valuation.¹⁹⁵ Perhaps most importantly, this chapter contains a provision that dictates that payments made in foreign currency shall be valued by their worth in that currency on the international market, and when converted into the Cuban peso, the exchange rate between the payment and its value in Cuban pesos shall be set by the National Bank of Cuba.¹⁹⁶

The law requires payments not made in freely convertible currency and which are to be used for the purchase of capital stock or as payments in international economic association contracts, to be valued according to the methods that were agreed upon by the parties to the investment form.¹⁹⁷ Any contributions that are not made in freely convertible currency must be valued with the help of the expert certifications that have been drawn up under the authority of the Cuban Ministry of Finance and Prices.¹⁹⁸

192. *See id.* ch. IX, art. 28(a) (failing to state what type of situation is needed in order for authorization to be given).

193. *Id.* (demanding the loan amount be in foreign currency).

194. 1982 Cuban Investment Act, *supra* note 36, ch. II, art. 21(a)-(b).

195. 1995 Cuban Investment Act, *supra*, note 5, ch. VII, art. 19. "Contributions" are defined as being "[f]reely convertible currency . . . [m]achinery, equipment, or other physical or tangible goods . . . [i]ntellectual property rights and other rights over intangible goods . . . [p]roperty rights over personal items and real estate, and other rights over these, including usufruct and surface rights . . . and . . . [o]ther goods and rights". *Id.* ch. VII, art. 19.1.

196. *Id.* ch. VII, art. 19.3 (adding that foreign capital in the form of foreign currency should be brought into the Republic of Cuba through an authorized banking entity).

197. *Id.* ch. VII, art. 19.4 (excepting those payments that are made in the form of intellectual property rights and other rights over intangible goods). The law mandates that "[t]he payments in intellectual property rights and other rights over intangible goods shall be covered by current legislation on the matter." *Id.* ch. VII, art. 19.2. However, seemingly at odds with this is the provision that dictates that "[p]ayments consisting of intellectual property and other rights over intangible goods shall be assessed by methods freely agreed upon by all of the national and international investors . . ." *Id.* ch. VII, art. 19.6.

198. *Id.* ch. VII, art. 19.5 (excepting those contributions that are made in the form of intellectual property rights and other rights over intangible goods). The law further dictates that when the national investor transfers as a contribution to an investment form his rights, or the state's rights over property, the transfer must be done in accordance with the Cuban constitution, with the prior certification of the Cuban Ministry of Finance and Prices and with the approval of the Executive Committee of the Council of Ministers. *Id.* ch. VII, art. 19.2

IV. OTHER INVESTMENT CONSIDERATIONS

A. Energy Limitations

Of obvious concern to any investor, especially in the manufacturing sector, is Cuba's lack of electricity and fuels.¹⁹⁹ Cuba has no coal and only a small ability to produce hydroelectric power.²⁰⁰ Historically, Castro's Cuba depended on the Soviet Union to provide imported oil, but the amount imported has been reduced dramatically.²⁰¹ Cuba has been pumping its own oil, but as of 1993, this only amounted to 1.1 million tons,²⁰² with bicycles now outnumbering the cars on the streets of Cuba.²⁰³

While the sugar industry generates its own electricity,²⁰⁴ the country still suffers from frequent power outages.²⁰⁵ In 1990, the Cuban government demanded a ten percent cutback on both domestic and commercial use of electricity, and companies that violated the restriction were fined.²⁰⁶

Hoping to solve its energy crisis, Cuba seems to be very close to completing its first nuclear power plant.²⁰⁷ In 1992, the development of this plant was suspended indefinitely because Cuba could not afford to complete it.²⁰⁸ However, in October 1995, Russian officials said they could finish the plant for US\$800

199. *Business Climate*, POL. RISK SERV., July 1, 1995, at 1, available in LEXIS, World Library, Ibrcpt File.

200. *Cuba*, *supra* note 1, at 15-16 (citing that the Toa-Duaba hydroelectric plant was to be completed in 1995 using North Korean technology).

201. *Id.* at 16-17 (reporting that between 1983 and 1990, Cuba imported from the Soviet Union between 12 and 13 million tons of oil a year, but by 1992, that amount had decreased to 6.1 million tons). In late 1994, Russia suspended shipments of oil to Cuba, after Cuba had received only 1.5 million tons, and Russia said that it would renegotiate the deal in 1995 if it decided that it needed to import sugar from Cuba. *Id.*

202. *Cuba*, *supra* note 1, at 18.

203. Jonathan P. Decker, *The \$800 Million Question: Is Cuba Building a Potential Chernobyl in US Backyard?*, CHRISTIAN SCI. MONITOR, Nov. 8, 1995, at 11.

204. *Cuba*, *supra* note 1, at 18 (explaining that the sugar mills generate their electricity by burning the dried residue of ground cane, and that during the milling season, the sugar plants are able to contribute 10% of the electricity to the national use). In 1988, an oil burning power plant became the biggest contributor to electricity production. *Id.*

205. Decker, *supra* note 203, at 11 (reporting somewhat comically that at night power outages are as common as fried plantains).

206. *Cuba*, *supra* note 1, at 18-19 (adding that domestic users are first warned, and then cut off for a period of time).

207. Decker, *supra* note 203, at 11 (identifying Juragua, a location across the bay from Cienfuegos, as the site of the plant).

208. *Cuba*, *supra* note 1, at 17 (stating that Castro suspended construction in the same year that it was supposed to become operational).

million.²⁰⁹ Both the U.S. Nuclear Regulatory Commission (NRC) and former workers on the plant express safety concerns about the plant.²¹⁰

B. Transportation Infra-Structure Limitations

Because Cuba is an island, its ability to handle cargo through its seaports and airports is of special concern to investors. Any investor that is planning on either exporting or importing products into or out of Cuba will want to ensure that the existing transportation infra-structure is adequate to meet their needs without large expenditures of time and/or money. This section provides a general view of the current conditions and capabilities of the Cuban seaports, airports, and roads.

1. Highways and Railroads

Cuba has over 21,000 miles of roads,²¹¹ connecting all of Cuba's seaports.²¹² The highways are relatively new, as one-half of Cuba's highway system has been built since 1960.²¹³ In addition, the railroad system that is currently being used by both the sugar industry and passenger trains covers over 9000 miles of lines.²¹⁴ Although passenger trains still run, many stations need renovation and also replacement of the passenger train equipment.²¹⁵

Although the highway and railroad lines are in relatively good condition, they are not without problems. For example, Cuba's cargo trucks need replacement due to their poor condition.²¹⁶ While Cuba has approximately 15,000 buses, 20,000 trucks, and 20,000 cars,²¹⁷ the transportation system is reportedly near

209. Decker, *supra* note 203, at 11 (reporting that Russia would form a global consortium to generate the needed money).

210. Decker, *supra* note 203, at 11. The NRC is concerned with the design of the nuclear plant as well as the personnel that would be operating it. *Id.* A former worker at the plant said that the construction of the plant was both negligent and reckless. *Id.* In addition, the U.S. General Accounting Office has said that in the event of an accident, radiation would spread as far as Virginia and Texas. *Id.*

211. See Arlene Alligood, *Cuba's Seaports and Airports: Can They Handle a Post-Embargo Cargo Boom?*, COLUM. J. WORLD BUS., Spring 1995, at 66, 72 (specifying that of the 21,118 miles of roads, 6290 are paved, 7391 are surfaced with gravel, and 7437 are either unpaved or dirt).

212. *Id.* at 66, 72.

213. *Id.* Since 1987, a number of highways have been completed after a period of stagnation that was partly caused by lower cash incentives to complete a highway than there were for just moving earth. *Cuba, supra* note 1, at 24. In recent years, the principal highway construction project has been an eight lane highway that is to run the length of the country. *Id.*

214. *Id.* Slightly less than two thirds of the Cuba's railway lines are operated by the sugar ministry. *Cuba, supra* note 1, at 24. The sugar lines are 0.914 and 1.435-meter gauge track, whereas the Cuban National Railways lines are 1.435-meter gauge track. WORLD FACTBOOK, *supra* note 2, at 6.

215. Alligood, *supra* note 211, at 66, 72-73. In addition, Havana does not currently have plans to build a metro system, and plans to develop one were postponed due to a lack of funds. *Cuba, supra* note 1, at 24.

216. Alligood, *supra* note 211, at 66, 72.

217. *Cuba, supra* note 1, at 24.

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collapse as buses, trains, and trucks have long faced a shortage of spare parts and fuel.²¹⁸ In spite of these conditions, the bus system carries three billion passengers a year.²¹⁹

2. Seaports

Cuba has a total of thirty-nine seaports, which consist of seven major commercial ports, nine secondary commercial ports, and twenty-three minor ports.²²⁰ Among the four busiest ports in Cuba, Havana and Mariel on the north coast of the island handle both imports and exports, whereas Santiago de Cuba is primarily used for importing trade, and Cienfuegos is used for exporting goods.²²¹

Havana is the busiest port in the country, with the capability of handling thirty-four vessels at a time, and moving over half of Cuba's cargo traffic.²²² Each of its fifteen docks²²³ is equipped with several cranes having a fifty to eighty ton capacity.²²⁴ As of March 1995, Havana's port primarily handled twenty-foot cargo containers because there are currently no warehouse facilities to handle forty-foot containers.²²⁵ In the arena of ship repairing, the port of Havana currently has dry dock facilities that can handle very large ships.²²⁶ Additionally, the Casa Blanca shipyard has the facilities to repair large ships.²²⁷ According to U.S. seaport officials who have visited the port of Havana, the docks are in good working condition, warehouse space is ample, most of the warehouses are directly served by rail, the water depth is sufficient to accommodate most large ships, and the port appears capable of efficient cargo handling.²²⁸ In addition, Cuba is building three cruise liner ports.²²⁹

218. Alligood, *supra* note 211, at 66, 72.

219. *Cuba*, *supra* note 1, at 24 (stating further that most Cubans rely on buses for their transportation needs).

220. Alligood, *supra* note 211, at 66, 68 (listing the seven major commercial ports as Havana, Mariel, Santiago de Cuba, Cienfuegos, Antilla, Nuevitas, and Matanzas).

221. *Id.* at 66, 69.

222. *Id.*

223. *Id.*

224. *Id.* at 66, 68.

225. *Id.* at 66, 69. However, the port at Mariel is being upgraded so that it will have modern container capabilities. *Id.* The conversion process is being done via a joint venture project with the Japanese. *Id.*

226. *See id.* at 66, 70 (citing that the dry dock facilities can accommodate ships up to 440 feet in length, 91 feet in width and 23 foot drafts).

227. *Id.*

228. *Id.* at 66-68.

229. *See Cuba: Tourism Expands*, CARIBBEAN UPDATE, Dec. 1, 1995, available in LEXIS, News Library, Nwltrs File (identifying the locations of the three ports in Havana, Holguin and Santiago de Cuba).

In the port of Matanzas, a supertanker port has been built.²³⁰ The port at Matanzas is connected via a pipeline to the crude oil refinery at the port of Cienfuegos and can handle oil super tankers up to 150,000 metric tons.²³¹

3. Airports

Cuba currently has sixteen commercial airports, ten of which are international.²³² Cuba's airline, Cubana de Aviacion, flies to Canada, South America, Mexico, Europe, and locations in the Caribbean.²³³ As of March 1995, thirty-five non-Cuban airlines flew in and out of Cuba, from such locations as Europe, Africa, North America, and Latin America.²³⁴ Cuba's main airport, the two-terminal Jose Marti International Airport in Havana, hosts 1.2 million passengers every year.²³⁵ Plans for a third terminal that has the capacity to handle more passengers than the current terminals combined is being considered.²³⁶ Construction is in progress on additional airports in Cuba and existing facilities are being enlarged.²³⁷

Cubana de Aviacion, which manages the country's commercial airports, transports forty-five percent of Cuba's international tourists and has a fleet of over forty Russian made aircraft.²³⁸ These aircraft have a combined seating capacity for 4202 passengers, and a cargo capacity of 470 tons.²³⁹ Cubana de Aviacion leases several DC-10s to supplement its Russian-made airplanes.²⁴⁰

230. See *Cuba*, *supra* note 1, at 25 (citing that part of the work was done by the Soviet Union). The supertanker facilities became operational in the middle of 1991. *Id.*

231. Allgood, *supra* note 211, at 66, 69. The terminal at Matanzas is part of a plan that allows oil to be piped from the oil fields that are located to the east of Havana. *Cuba*, *supra* note 1, at 25. By 1995, the ports at Matanzas and Cienfuegos were to have a combined oil storage capability of 1.15 million cubic meters of oil. *Id.*

232. *Id.* at 66, 72 (listing the airports at Havana, Varadero, Camaguey, Holguin, Santiago de Cuba, Guantanamo, Matanzas, Cienfuegos, Santa Clara, and Cayo Largo as being international airports). The airports at Varadero and Cayo Largo are used primarily for tourist travel. *Id.*

233. *Id.* at 66, 71-72. Cubana de Aviacion was founded in 1929. *Cuba*, *supra* note 1, at 25. Due to fuel shortages, in recent years the number of domestic flights flown by Cubana de Aviacion has decreased. *Id.*

234. *Id.* at 66, 72.

235. *Id.* Cuba's international airport in Varadero has an annual capacity of 1.2 million passengers. *Cuba*, *supra* note 1, at 25.

236. Allgood, *supra* note 211, at 66, 72.

237. See *id.* (stating that a new airport is being built in Ciego de Avila, that new terminals are being built at Cayo Largo, Santa Lucia, and Pilon, and at Cayo Coco hard surfaced runways will replace the existing ones).

238. *Cuba*, *supra* note 1, at 25 (listing that as of March 1994, the Cubana de Aviacion fleet consisted of: three Antonov An-26s, nine Antonov An-24RVs, 12 Ilyushin Il-62Ms, two Ilyushin Il-76MDs, three Ilyushin Il-18, five Tupolev Tu-154B2s, four Tupolev Tu-154Ms, five Yakovlev Yak-40s, and two Yakovlev Yak-42s). However, Cuba has had spare part problems with these aircraft. Allgood, *supra* note 211, at 66, 71-72.

239. Allgood, *supra* note 211, at 66, 71-72.

240. *Id.* at 66, 71.

C. Cuba's Resources

Cuba has a number of resources, either natural or produced, to encourage foreign investment, including nickel, sugar, tobacco, coffee, citrus and medical products.²⁴¹ Cuba has large reserves of nickel, and it is Cuba's main raw material.²⁴² Cuba anticipates mining 100,000 tons of nickel per year by the year 2000, up from 43,000 tons in 1990,²⁴³ and 30.2 tons in 1993.²⁴⁴ In addition to nickel, Cuba also maintains reserves of chromite, copper, gold, and manganese.²⁴⁵

In spite of the U.S. embargo, Cuba is currently the world's largest exporter of sugar.²⁴⁶ This is remarkable, considering Cuba in 1990 produced over 8 million tons of sugar,²⁴⁷ and by 1994, the production fell to 3.3 million tons.²⁴⁸ In 1995, Cuba hoped that sugar production would increase by 1 million tons in that year, due to US\$200 million in high interest financing.²⁴⁹ However, the Cuban government stated that if the sugar crop increases in production, they would not be interested in seeking foreign investment in this area.²⁵⁰

In 1993, Cuba produced 285 million "units" of tobacco, for a total gross revenue of US\$50 million.²⁵¹ However, it is possible that the quality of Cuban tobacco has decreased in recent years, as evidenced in 1990 with a Swiss cigar importing house refusing to import Cuban tobacco, because it had declined in quality.²⁵² The Cuban government denied that there were problems in the tobacco

241. *Cuba, supra* note 1, at 81, 83 (listing these as among Cuba's principal exports).

242. *Cuba, supra* note 1, at 19 (reporting that Cuba's nickel reserves are the third largest in the world).

243. *Id.* at 19 (listing Cuba behind only the former Soviet Union and Canada in nickel production if the 100,000 tons per year goal is reached).

244. Gareth Jenkins, *Investment Funds in Cuba: An Upcoming Caribbean Tiger*, COLUM. J. WORLD BUS., Spring 1995, at 42, 44 (reporting that in 1993, nickel brought Cuba US\$157 million in gross revenue).

245. *Cuba, supra* note 1, at 19.

246. *Id.* at 21 (reporting that as of 1993, Russia was the largest importer of Cuban sugar, purchasing approximately one ton, in exchange for oil).

247. *Cuba, supra* note 1, at 21 (citing production figures of 7.6 million tons in both 1989 and 1991, 4.3 million tons in 1992, and 4.1 million tons in 1993). The 1993 sugar crop produced US\$720 million in gross revenue. Jenkins, *supra* note 244, at 42, 44.

248. Cordoba, *supra* note 3, at A12. The Cuban government has blamed the recent decline in sugar production on shortages of fuel, spare parts, herbicides, pesticides, and fertilizers, as well as storm damage. *Cuba, supra* note 1, at 21. The shortages were caused by the Soviet Union no longer supplying these materials. *Id.* at 11.

249. See Cordoba, *supra* note 3, at A12 (reporting that the financing has been used to pay for fertilizer, insecticide, fuel, and "other industry needs").

250. See *supra* note 144.

251. See Jenkins, *supra* note 244, at 42, 44 (failing to state what constitutes a "unit"). Cuban tobacco production was 319 million units in 1990, 324 million units in 1991, and 297 million units in 1992. *Id.*

252. See *Cuba, supra* note 1, at 23 (identifying the Swiss importing house as Davidoff et Cie).

quality, and continues to manufacture Cuban cigars using the Swiss company's trademark.²⁵³

In addition to sugar and tobacco, Cuba also grows citrus, and in 1993 alone, Cuba earned US\$12 million in revenue from sales of its citrus crop.²⁵⁴ Citrus is Cuba's main non-sugar export to the socialist countries of the world.²⁵⁵ Cuba's citrus crop includes tangerines, clementines, grapefruit, lemons, and oranges.²⁵⁶ However, it is reported that the quality of Cuban grown fruit is so low that Cuba must import the fruit used in its tourism sector.²⁵⁷

Besides the resources that it grows, Cuba has a very well educated labor force, as ninety-four percent of the population fifteen years of age and older is literate.²⁵⁸ Some believe that since the Castro government guarantees employment, Cuban workers lack the incentive to work hard, and therefore may be unmotivated, have poor work habits, and lack discipline.²⁵⁹ However, evidence demonstrates that just the opposite may be true. Conditions in Cuba are such that in order to live and put food on the table, Cubans must be motivated and creative, if not at work, then at least during their other waking hours.²⁶⁰ Supporting this idea is that the Cuban people have responded strongly to the limited free market, both legal and illegal, that exists in Cuba.²⁶¹

D. The Castro Government—Politically Stable?

Foreign investors must be advised of the stability and political implications of the Castro government. Recently, a poll consisting of risk analysts, risk insurance brokers, and bank credit officers listed Cuba with the seventh highest

253. See *id.* at 21 (reporting that the Cuban tobacco enterprise suggested that the problems with the Swiss importing house really concerned a legal dispute over trademark rights, rather than with an actual decline in the quality of Cuban tobacco).

254. See *id.* at 36 (citing that this revenue is the gross export revenue).

255. See *id.* at 23 (stating that it only became so in recent years).

256. See *Cuba, supra* note 1, at 21 (listing oranges as the largest crop when measured in tons).

257. See *Cuba: Tourism Expands, supra* note 229 (referring to a report that was issued by the Cubans that discussed Cuban tourism).

258. See *WORLD FACTBOOK, supra* note 2 (breaking the literacy rate down by sex shows that 95% of the males are literate as compared to 93% of the females).

259. *Perez, supra* note 2, at 58, 64 (citing an untested theory that 35 years of guaranteed employment that had no economic incentives has led to the Cuban worker not being motivated).

260. *Id.*

261. See *id.* (providing as an example the overwhelming response to the recent decision that allows Cubans to sell their agricultural goods and homemade crafts at market). Also listed as an example were *paladares*, or restaurants that are set up in people's homes, which charge American dollars for meals, and are informally allowed under the existing laws. *Id.* The *paladares* are said to be flourishing throughout Havana. *Id.* However, early in 1995, the Cuban government began to issue licenses to people who wanted to open a *paladare*, charging the proprietors US\$400 per month, which has led many to be operated "underground." Hayes Ferguson, *Cuba, Living on the Edge*, *TIMES-PICTAYUNE*, Oct. 8, 1995, at A1.

political risk in the world.²⁶² In addition, some believe that the long-term possibility of turmoil is high,²⁶³ while others are predicting outright civil war in as soon as three years.²⁶⁴ If Castro is either overthrown, steps down, or dies, it is possible that he might be replaced by a communist successor.²⁶⁵ If that is the case, it is likely that the new head of state would be in favor of limiting the number of restrictions that currently exist in the area of foreign investment.²⁶⁶ If a democratic government were to come to power, then the prediction is that foreign investment restrictions would be abolished.²⁶⁷ The benefit to the U.S. investor if a democratic government came to power would be substantial, as the U.S. embargo against Cuba would come to an end.²⁶⁸ Although one can only speculate as to Cuba's future leadership, it appears that Castro is in firm control of the Cuban government.²⁶⁹

E. The American Embargo

The U.S. government currently prohibits trade with Cuba, via the Cuban Democracy Act,²⁷⁰ in spite of consistently strong United Nations²⁷¹ and individual

262. *Watch Out, Uncle Sam*, EUROMONEY, Sept. 1994, at 376, 379 (listing Liberia, Georgia, North Korea, Mozambique, Iraq, and Rwanda as the only countries that have a higher political risk than Cuba). The risk was defined as "the risk of non-payment or non-servicing of payment for goods or services, loans, trade-related finance and dividends, and the non-repatriation of capital." *Id.*

263. *Cuba—Positive Response to Economic Problems*, POL. RISK SERV., Oct. 1, 1995, available in LEXIS, World Library, Ibrcpt File (ranking the possibility of turmoil in Cuba as "moderate" for the next 18 months, but "high" for the next five years).

264. Mary D'Ambrosio, *Think Tank Chief Foresees Cuban Bloodshed*, EMERGING MARKETS DEBT REP., Jan. 15, 1996, available in LEXIS, World Library, Ibrcpt File (quoting Leslie Gelb, the president of the Council on Foreign Relations, after his visit to Cuba in November 1995). His fear is that as the Castro government loses power and the U.S. embargo is terminated, if the Cuban military disbands and the Miami Cubans return from exile, the island could become embroiled in a civil war that is as bad as the one in Bosnia. *Id.*

265. *Five-Year Forecasts of Investment and Trade Restrictions*, POL. RISK SERV., July 1, 1995, available in LEXIS, World Library, Ibrcpt File.

266. *Id.* If the Castro government were replaced by a communist successor, the U.S. embargo would not necessarily be terminated. *Id.*

267. *See id.* (stating that the democratic government would solicit investments from Cuban exiles).

268. *See id.* (predicting that trade ties between the United States and Cuba would return to their pre-revolution status). The goal of the U.S. embargo against trade with Cuba is to "seek a peaceful transition to democracy." 22 U.S.C. § 6002(1) (1995).

269. *Cuba—Positive Response to Economic Problems*, *supra* note 263.

270. 22 U.S.C. §§ 6001-6010 (1995). In response to the U.S. embargo, Cuba has a claim against the U.S. government for more than US\$40 billion. Whisenand, *supra* note 21, at 16, 22. The claim is based on the fact that Cuba believes that the embargo is illegal under international law. *Id.*

271. *See Gary Borg, U.N. Calls on U.S. to End Cuba Embargo, Deplores Tightening*, CHI. TRIB., Nov. 3, 1995, at 14 (stating that in 1995 the vote was 117 to 3 in favor of the United States ending the sanctions, with 38 countries abstaining, including Britain, Japan, and Germany). The 1995 margin is up from the year before, when 101 votes were cast in favor of ending the embargo. *Id.*

countries' disapproval.²⁷² In addition, there are efforts in the United States to tighten the existing embargo.²⁷³ The embargo is of concern to foreign investors in Cuba, as they may be punished by the U.S. embargo.²⁷⁴

1. The Existing Embargo

On October 23, 1992, the United States renewed its embargo against Cuba with the Cuban Democracy Act.²⁷⁵ The purpose of the embargo is to force a peaceful transition in Cuba to democracy.²⁷⁶ The Cuban Democracy Act states that countries violate the embargo if they provide any:

assistance to or for the benefit of the Government of Cuba that is provided by grant, concessional sale, guaranty, or insurance, or by any other means on terms more favorable than that generally available in the applicable market, whether in the form of a loan, lease, credit, or otherwise, and such term includes subsidies for exports to Cuba and favorable tariff treatment of articles that are the growth, product, or manufacture of Cuba.²⁷⁷

Excluded from the embargo are "donations of food to nongovernmental organizations or individuals in Cuba,"²⁷⁸ medicines, medical supplies, instruments, or equipment²⁷⁹ unless the medicines or medical supplies are likely to be used in torture,²⁸⁰ are likely to be reexported,²⁸¹ or could be used in the manufacture of any biotechnological product.²⁸²

Countries that violate the current U.S. embargo against Cuba are likely to find the U.S. government withholding assistance and not reducing any debt which that

272. See *Freeing or Freezing the Cuban Market Places?*, 15 INT'L LAWYERS' NEWSL. 2 (1993) (identifying Canada, Columbia, Chile, France, Germany, Mexico, the United Kingdom, and Venezuela as countries, among others, that have denounced the Cuban Democracy Act).

273. See *infra* notes 294-305 and accompanying text (outlining the punishments that the foreign investor may be subjected to).

274. 22 U.S.C. § 6003(b)(1)(A) (1995) (authorizing the President of the United States to prevent countries that violate the embargo from receiving any assistance under the Foreign Assistance Act of 1961 or from receiving sales under the Arms Exports Control Act). In addition, the President is also authorized to prevent the forgiveness or reduction of debt that is owed by that country to the U. S. government. *Id.* § 6003(b)(1)(B) (1995).

275. 22 U.S.C. § 6001 (1995).

276. *Id.* § 6002.

277. *Id.* § 6003(b)(2)(A).

278. *Id.* § 6003(b)(2)(B)(i).

279. *Id.* § 6003(b)(2)(B)(ii).

280. *Id.* § 6004(c)(2).

281. *Id.* § 6004(c)(3).

282. *Id.* § 6004(c)(4).

country owes to the U.S. government.²⁸³ In addition, any water craft that has entered any Cuban port to engage in trade or services is forbidden to load or unload cargo anywhere in the United States for 180 days, unless authorized by the U.S. Secretary of the Treasury.²⁸⁴ Further, any cargo carrying ship that a Cuban national has an interest in cannot enter any port in the United States unless specifically authorized by the Secretary of the Treasury.²⁸⁵

In addition, the Cuban Democracy Act applies not only to American corporations, but also to the third country subsidiaries of the U.S. corporations.²⁸⁶ In response, many countries passed legislation to counter the effect that the Act has on U.S. owned subsidiaries that are located and operated in their country.²⁸⁷ Canada estimated that the U.S. restrictions on subsidiaries prohibited from trade with Cuba, affect \$30 million worth of trade.²⁸⁸ The Canadian law prohibits any corporations from complying with the U.S. Act.²⁸⁹ This places the U.S. owned Canadian companies in an awkward position, in that if they do not comply with the Cuban Democracy Act, they violate U.S. law, and if they comply with the U.S. Act, they violate Canadian law.²⁹⁰

In addition, the Cuban Democracy Act also stipulates that the penalties from the U.S. Trading With the Enemy Act of 1917 also apply to the Cuban Democracy Act.²⁹¹ This means that individuals who violate the Cuban Democracy Act can be subjected to very substantial criminal and civil penalties by the U.S. government.²⁹²

283. *Id.* § 6003(b)(1)(A) and (B).

284. *Id.* § 6005(b)(1).

285. *Id.* § 6005(b)(2).

286. *See id.* § 6005 (prohibiting transactions between United States firms and Cuba). Prior to the Cuban Democracy Act, U.S. owned subsidiaries that were operating in a country other than the United States or Cuba were able to import and export with Cuba. 31 C.F.R. 515.559 (1989). The Cuban Democracy Act specifically excludes 31 C.F.R. 515.559 from applying. *Id.* § 6005(a)(1). Any contracts that were in existence prior to October 23, 1992, are excluded from the new stipulation. *Id.* § 6005(a)(2). At the time the Cuban Democracy Act was passed, US\$700 million (or 18% of all hard currency imports) came from such subsidiaries. Jose de la Torre, *Times Board of Advisors: Time For Some Rational Thought About Doing Business In Cuba*, L.A. TIMES, Jan. 7, 1996, at D2.

287. *See Whisenand, supra* note 21, at 16, 24 (listing Canada, the United Kingdom, Spain, Mexico, and Argentina as countries that have enacted blocking legislation).

288. *See Trade With Cuba - Perspective From Canada; Canada Blocking Order*, 15 INT'L LAWYERS' NEWSL. 1,10,11 (1993) (predicting that the U.S. law would also restrict future potential opportunities of trade between Canada and Cuba).

289. *See id.* at 10,12 (stating that the penalty for complying with the U.S. Act is up to Cdn.\$10,000 and a prison term of up to five years).

290. *See id.* (describing the position of these companies as "unenviable").

291. *See 22 U.S.C. § 6009(d)* (1995) (stating that "[t]he penalties set forth in section 16 of the Trading With the Enemy Act . . . shall apply to violations of this title . . . to the same extent as such penalties apply to violations under that Act").

292. *See 50 U.S.C.S. Appx. § 16(a)* (1995) (authorizing a fine of up to US\$1 million, or if natural persons, not more than US\$100,000 and up to 10 years in prison for willful violations). This same penalty can also be applied to any corporate officer, director, or agent that knowingly violates the Act. *Id.* Additionally, the Trading With the Enemy Act also stipulates that the U.S. Secretary of the Treasury can impose a civil penalty

2. Pending Legislation

Proposed legislation that would tighten the U.S. embargo against Cuba recently passed in the U.S. House of Representatives.²⁹³ A modified version that diluted the House version was passed by the U.S. Senate on October 19, 1995.²⁹⁴ The U.S. Senate version of the bill left out a controversial Republican provision that would have allowed U.S. citizens who had property confiscated by the Cuban government to sue any foreign company that buys, leases, or uses expropriated property in U.S. courts.²⁹⁵ The intent of the eliminated provision was to dry up foreign investment in Cuba.²⁹⁶

Senator Dole and other Republicans have stated that they will try to restore the provision.²⁹⁷ However, even if the Republicans are successful, President Clinton has threatened to veto the legislation.²⁹⁸ The President reportedly does not oppose the objective of the proposed legislation, which involves removing Castro from power, but rather the Administration believes that the provisions in the new legislation would not be effective at meeting this goal.²⁹⁹

The diluted version still contains provisions that will have an effect on Cuba, and therefore foreign investment into Cuba. One provision dictates that any country that buys sugar or molasses from Cuba will be prevented from selling

up to US\$50,000. *Id.* at (b)(1).

293. See 141 CONG. REC. H9398-99 (daily ed. Sept. 21, 1995) (listing the results of the vote as 294 yeas and 130 nays). 10 representatives did not vote. *Id.*

294. See 141 CONG. REC. S15325 (daily ed. Oct. 19, 1995) (announcing the results of the vote as 74 yeas and 24 nays). Senator Biden is the only member of the Senate who abstained, citing a family emergency as the reason. *Id.* The House version of the bill was modified because Democratic stalling tactics prevented the bill in its original form from being forced to a vote. Helen Dewar, *Senate GOP Drops Toughest Cuba Limits: Clinton 'Blitz' Stops Some Cuba Sanctions*, WASH. POST, Oct. 19, 1995, at A18.

295. Dewar, *supra* note 294, at A18. Senator Dole stated "sustained lobbying" by the White House as the reason the provision was deleted. 141 CONG. REC. S15325 (daily ed. Oct. 19, 1995) (statement by Sen. Dole).

296. See 141 CONG. REC. H9397 (daily ed. Sept. 21, 1995) (statement by Rep. Kennedy) (reasoning that prohibiting the use of property seized from Americans by Castro will prevent Castro from luring foreign investment).

297. Dewar, *supra* note 294, at A18. It has been reported that the attempt to include the excluded provision will take place early in 1996. INT'L TRADE REP. (BNA), Jan. 24, 1996, at 142.

298. Tom Carter, *Cubans Seeking Tougher Embargo; Dissidents' Fax Backs Helms Measure*, WASH. TIMES, Sept. 21, 1995, at A13. *But see, Empty House*, THE ECONOMIST, Feb. 24, 1996, at 43, 44 (theorizing that President Clinton may not choose to veto the bill, as he needs the Cuban exile vote that resides in Florida to help him get reelected). In addition, the Cuban Americans claim that they have enough support in the U.S. Senate to override the Presidential veto, should the need arise. *Id.*

299. See *Investors Would Evade Requirement of Pending Cuba Bill, Nuccio Says*, *supra* note 7, at 2059 (asserting the opinion of Richard Nuccio, special advisor to the President on Cuba). Nuccio also said that the administration felt that the current embargo was working and producing results, and that most of the positive changes in Cuba had been happening because of forces other than the Cuban government. *Id.* In addition, the President's special advisor on Cuba stated that even if the proposed legislation were to be passed, foreign investors would still be able to "get around" it, although he did not state how. *Id.*

those products in the United States.³⁰⁰ In addition, aid to Russia will be reduced by the amount that Russia pays in rent to use an electronic intelligence-gathering facility in Cuba.³⁰¹ Further, the bill requires the U.S. President to seek a U.N. embargo against Cuba.³⁰²

Regardless of which version of the legislation eventually becomes law, if any, it will hamper international investment into Cuba, and the European Union has already expressed its concern.³⁰³ If the original version of the bill, with its expropriation liability provision ever becomes law, it is likely to anger countries that trade with Cuba. The Mexican government has already expressed its regret regarding this legislation and has said that it violates international norms.³⁰⁴

V. CONCLUSION

Investing in Cuba is not an easy choice, considering the many factors that can effect the long term investment.³⁰⁵ The Cuban government may eventually change to a democratic form of government, at which point the U.S. embargo would likely be lifted and U.S. investment allowed.³⁰⁶ However, this potential change may be harmful to the foreign investor, as they would be forced to compete with powerful U.S. firms.³⁰⁷ It is also possible that the Cuban government will remain the same and that the U.S. embargo will not be removed, but rather become more restrictive.³⁰⁸ Foreign investors in Cuba may find themselves in U.S. courts because they are using property that was expropriated by Castro over

300. *Senate Passes Cuba Sanctions Bill; Overwhelming Majority After the Bill is Weakened*, S. F. CHRON., Oct. 20, 1995, at D1.

301. *See* H.R. 927, 104th Cong., 1st Sess. §107(d)(2) (1995) (identifying the location of the intelligence gathering facility as being Lourdes, Cuba). Congress, through this provision is "expressing its strong disapproval" of the Russians extending the Cuban government US\$200 million in support of the intelligence facility at Lourdes. *Id.* at §107(d)(1).

302. *Id.* at §101(2).

303. *Senate Passes Cuba Sanctions Bill; Overwhelming Majority After the Bill is Weakened*, *supra* note 300, at D1.

304. *Government Criticizes US Helms-Burton Bill on Cuba* (Brit. Broadcasting Corp. Sept. 23, 1995).

305. *See supra* notes 199-210 and accompanying text (commenting on Cuba's current energy limitations), *supra* notes 262-69 and accompanying text (discussing Cuba's potential political instability), *supra* notes 270-304 and accompanying text (outlining the punishments that may be suffered due to the current and proposed U.S. embargo); and *supra* notes 286-90 and accompanying text (discussing the situation that many foreign subsidiaries of U.S. corporations face if they comply with the U.S. legislation).

306. *See supra* note 267 and accompanying text (predicting what the U.S. response would be if a democratic government were to come to power in Cuba); *see also supra* note 276 and accompanying text (giving the stated purpose of the current U.S. embargo against Cuba).

307. *See* Whisenand, *supra* note 21, at 17 (stating that investment in Cuba is unique, in that it may be the only place in the world where foreign investors can operate without U.S. competition).

308. *See supra* notes 293-303 (discussing the punishments that may be suffered due to the proposed, but as yet unapproved, U.S. embargo).

thirty years ago.³⁰⁹ In addition, even if foreign investors decide that they wish to invest in Cuba, they may have to expend money and time to improve the transportation infra-structure to suit their investment needs.³¹⁰ Because of these and other unforeseeable possibilities and expenses, the foreign investor must be willing to accept or heightened level of uncertainty and hope that the benefits to be gained from investing in Cuba outweigh the current and future risks.

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309. See *supra* notes 293-302 (discussing the punishments that may be suffered due to the proposed, but as yet unapproved U.S. embargo).

310. See Alligood, *supra* note 211, at 66, 73 (stating that the condition of the seaports and airports are deteriorating and that this is to the detriment of future investment by U.S. investors); *supra* note 215 (reporting that the passenger railroad system needs more modern equipment to be effective); and *supra* note 216 and accompanying text (stating that the trucks used for cargo distribution needs to be replaced).