

FOREIGN INVESTMENT IN CUBA: PROSPECTS AND PERILS

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One of the few sources of foreign capital available to Cuba is direct foreign investment. Cuba receives virtually no aid from foreign governments or international organizations.² Cuba is also unable to borrow from multinational lending institutions because of its history of defaults on foreign loans and other factors.³ The loans that Cuba is able to obtain are in the nature of pre-financing of crops (mainly sugar and tobacco), are secured by the crops, and are granted for short periods of time and at very high rates of interest.⁴ Cuba derives significant amounts of foreign currency by way of remittances from individuals

abroad to relatives and friends in Cuba. However, remittances do not provide the benefits in employment, asset development and transfer of technology and know-how derived from foreign investment.⁵

Thus, the most important means within the control of the Cuban government to obtain foreign capital is foreign direct investment (“FDI”).⁶ Even though firmly adhering to a socialist political and economic framework, Cuba has taken a series of measures to promote FDI in the country, and representatives of the Cuban government express frequently the national interest in attracting foreign capital to boost

1. This paper is based in part on information gathered by Mr. Trumbull during a research trip to Cuba in December 2001. All interviews cited in the text were conducted by Mr. Trumbull. Some of the material in this paper appeared in Matías Travieso-Díaz and Jorge Pérez-López, *La Inversión Extranjera en Cuba: Pasado, Presente y Futuro*, in *La Actual Economía Cubana a Debate*, Universidad de Granada, 2001 (hereinafter “Debate”).

2. The Central Intelligence Agency (“CIA”) reports that the total aid received by Cuba in 1997 was only 46 million dollars. CIA, *The World Factbook 1999—Cuba*, <http://www.odci.gov/publications/factbook/cu.html/#econ>.

3. The unwillingness of international lending institutions to make credit facilities available to Cuba is due in part to the effects of the “Helms-Burton Law,” Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785, *codified at 22 U.S.C. Chapter 69A*. Section 104(b) of the Helms-Burton Law requires that the United States reduce its contributions to international organizations such as the World Bank or the InterAmerican Development Bank in the same amount as any loans or other forms of credit or aid that these institutions grant Cuba. In addition, Cuba is not currently a member of the International Monetary Fund.

4. Carmelo Mesa-Lago, *The Cuban Economy in 1997-98: Performance and Policies*, in *Cuba in Transition—Volume 8* 1, 3-4 (Aug. 1998) (hereinafter “Mesa Lago 1998”).

5. Information from the annual reports from the Cuban Central Bank indicates that remittances from abroad (mostly from Cuban Americans) amounted to U.S. \$820 million in 1998. Banco Central de Cuba, *Informe Económico 1998* (Havana, April 1999).

6. FDI is defined as the establishment of a permanent relationship between an actor (the investor) and his object (a commercial operation) in which the actor seeks to exert direct influence in the behavior of the object. Through FDI, the actor acquires a direct financial interest in some aspect of the economy of a foreign nation, with the intention of controlling the management of the acquired interest. Lars Oxelheim, *Introduction*, in *The Global Race For Foreign Direct Investment* 11 (Lars Oxelheim ed., 1993) (hereinafter “The Global Race For Foreign Direct Investment.”)

the economy and continue coping with the economic crisis that has afflicted the country since the disappearance of the Socialist bloc.⁷

Cuba's efforts to attract foreign investment have resulted in the inflow of substantial amounts of foreign capital by way of FDI. However, as will be discussed below, foreign investment has been affected by the country's political and economic program, which serves as a constant brake to the possibility of capital influx.

TYPES OF FOREIGN INVESTMENT CURRENTLY ALLOWED IN CUBA

An important step towards the development of a foreign investment regime took place on September 5, 1995, when Cuba's National Assembly approved the current Foreign Investment Law, Law No. 77 of 1995 ("Law 77").⁸ Law 77 retained many of the restrictions and impediments to FDI imposed by its predecessor.⁹ However, a number of the changes instituted in Law 77 represented steps forward that liberalized somewhat the investment regime in the country.¹⁰

Law 77 identifies three permissible types of foreign investment: joint ventures ("*empresas mixtas*"), international economic associations, and companies with totally foreign capital.¹¹ On December 6, 2000 the Executive Committee of Cuba's Council of Ministers officially recognized two new forms of FDI: produc-

tion contracts ("*contratos de producción cooperada de bienes o la prestación de servicios*") and management contracts ("*contratos de administración productiva*").¹² Although all forms of FDI are often lumped together in discussions on foreign investment in Cuba, it is important to keep in mind the attributes, structure and purposes of each.

Joint Ventures

A joint venture is a legal entity consisting of one or more Cuban parties and one or more foreign investors. The contributions of each participant and the breakdown in stock ownership are agreed upon before governmental approval is granted, and are reflected in the joint venture agreement and the decree approving the joint venture. The Cuban party generally supplies real estate and labor, while the foreign investor provides capital, technical resources, and know-how (both technical and managerial). The joint venture is legally independent from the investing entities, and must register with the Cuban Chamber of Commerce to attain official status.¹³ Profits earned by the joint venture are distributed to the investors according to their respective ownership share.

The following true example illustrates how joint ventures are formed. Community Bicycle Network ("CBN") is a Canadian non-profit organization that specializes in bicycle skills training, bicycle repair,

7. As is well known, Cuba's need to attract FDI is a direct consequence of the disappearance of Socialism in Eastern Europe. Prior to 1990, Cuba depended on the Socialist bloc (mainly the Soviet Union) for 81% of its exports and 85% of its imports, and for the financing of the economy through loans and subsidies. The demise of the Socialist bloc had a catastrophic impact on Cuba, which suddenly lost its markets, its sources of supply, and its credit and financing mechanisms.

8. *Ley Número 77 de la Inversión Extranjera*, Gaceta Oficial, September 6, 1995. For an online English translation of Law 77, see <http://www.latintrade.com/newsite/content/cprofiles/data-ext.cfm?d=2001&c=9>.

9. Decree-Law 50 of February 15, 1982 ("Law 50").

10. Law 77 has been analyzed in a number of studies, see e.g., René Burguet Rodríguez, *Ley de la inversión extranjera en Cuba* (Madrid: Consultoría Jurídica Internacional, 1995); Juan Vega Vega, *Cuba: Inversiones extranjeras a partir de 1995* (Madrid: Ediciones Endymion, 1997); Dídac Fábregas i Guillén, *La Ley de la inversión extranjera y la situación económica actual de Cuba* (Barcelona: Viena, S.L., 1998); Debate.

11. Law 77, Art. 12.

12. Foreign Trade No. 4/2001: Cuba (hereinafter "Foreign Trade"). These forms of investment were officially endorsed because they were shown in practice to provide "favorable economic results for each of the contracting parties," thus meriting legal recognition. *Id.*

13. Resolution No. 26 of the Cuban Chamber of Commerce, issued on December 5, 1995, created a Registry of enterprises with foreign participation. Being listed in that Registry is a prerequisite to doing business in Cuba. Resolución No. 26—Reglamento del Registro de Inversiones Extranjeras, Cámara de Comercio de la República de Cuba, Gaceta Oficial (Dec. 15, 1995), p. 504-506.

and cycling promotion.¹⁴ CBN decided to invest in Cuba and contacted the Cuban firm Fénix, which provides transportation in the historic section of Havana. CBN and Fénix agreed to form a joint venture under the name Bicicletas Cruzando Fronteras (“Bicicletas”). CBN would own 49% of the joint venture and Fénix would own 51%. The joint venture agreement stipulates that Fénix will provide the building and workspace for Bicicletas (valued at \$100,000), the manual labor (15 workers, each valued at \$500/month) for one year, and \$10,000 cash. Thus, the total Cuban initial investment is \$200,000. CBN is obliged to invest an equivalent amount (minus 1%) in hard currency, bicycle parts, specialists, and tools. After both parties agree on the terms of investment, the Executive Committee of the Council of Ministers must approve the joint venture. Only then will Bicicletas be able to start operations.¹⁵

Economic Associations

The formation of international economic associations (“IEAs”) does not require the establishment of a legal entity separate from the contracting investors. IEAs are normally established because the contracting parties can meet a common objective through cooperation. Each party agrees to make specific contributions to the IEA, but no capital is set aside. The parties must, however, agree to a profit sharing arrangement and a tax payment plan. The two most common forms of IEAs are production contracts and management contracts (the two forms of FDI formally sanctioned by the Cuban government in December 2000).

Production Contracts: Production contracts are an increasingly common mechanism for channeling

FDI into Cuba. Their attractiveness lies in part in the fact that, as noted above, the foreign investor does not have to turn over capital to the enterprise or share its management with a potentially inept Cuban counterpart. The respective roles of the parties are specified in Resolution 37/2001 as follows:

The foreign party supplies finances, prime materials, material resources, technology, or technological assistance in exchange for a set price agreed upon by both parties, with the intention that the Cuban counterpart produce commercial goods or services for the interior or exterior of the island.¹⁶

These contracts appear to be particularly suitable for labor-intensive industries. Production contracts allow Cuban companies with a labor surplus to gain access to capital and technology and increase the productivity of their labor force.¹⁷

According to Conas,¹⁸ the government now encourages prospective investors to negotiate a production contract with a Cuban business partner before seeking to set up a joint venture. Production contracts are usually of short duration (typically a year) and allow both parties a relatively low-risk “trial run” before they commit to forming a more permanent venture. A production contract also gives the foreign investor an opportunity to familiarize himself with the business environment in Cuba prior to committing significant resources to operations in the country.¹⁹

Management Contracts: Management contracts are most common in, but not limited to, the tourism sector. Since the enactment of Law 50, the Cuban government has acknowledged that foreign firms would be more capable and efficient in the administration of hotels and other tourism facilities than the

14. CBN receives local donations, sponsorships, and grants from the Canadian government. Although CBN is a non-profit organization, the joint venture it formed in Cuba was expected to generate a profit for the Cuban government.

15. Bicicletas Cruzando Fronteras is in fact a joint venture that is preparing to begin operations in Havana. Although the company has been in negotiations with the Cuban government for over a year, to the last of the authors’ knowledge it is still waiting for permission to operate.

16. Foreign Trade.

17. Interview with Mark Frank, independent journalist living in Cuba, December 17, 2001.

18. Conas (Consultores Asociados, S.A.), a state-owned consulting firm that advises foreign investors. See, e.g., <http://www.info-com.etcusa.cu/new/conas/conase.html>.

19. Interview with Lic. Amado Guntin, Conas’ Gerente Jurídico, December 24, 2001 (hereinafter “Guntin”).

government or state-owned enterprises. Thus, management contracts have been in use since the re-introduction of FDI in Cuba.

The formation of a management contract is described in Resolution 37/2001:

A state entity contracts a foreign entity to manage one or more lines of production, service, or any part of the activity that these lines may carry out, for a determined period of time, with remuneration based on the results of the activity agreed upon.

The Ministry of Tourism must approve all hotel administration contracts. The Ministry of Foreign Investment and Economic Cooperation (MINVEC) approves contracts for Administration of Production.²⁰

According to Resolution 37/2001, the objective of management contracts is to achieve greater efficiency and earnings from the installation or activity that they are to manage. At the onset of the contract goals and indicators are set to measure the performance of the foreign administrator.²¹

Generally, the foreign administrator acts in the name of its Cuban counterpart; however, this requirement can be waived in appropriate cases. For example, the Meliá Cohiba hotel in Havana is 100% Cuban-government owned; however, it operates under Meliá's name.²²

Cuban Branches of Foreign Companies

Foreign companies (e. g., Mercedes-Benz, Castrol, Bank of Canada, Mexicana Air, etc.) are allowed to set up commercial branches in Cuba without partici-

pation or investment from a Cuban partner.²³ These branches typically operate as sales offices from which goods and services are sold in hard currency to the government, enterprises involving foreign investors, or the general population. Currently there are over eight hundred Cuban branches of international companies registered with the Cuban Chamber of Commerce.²⁴

Totally Foreign-Owned Companies

Law 77 allows the establishment of enterprises that are totally owned by foreign investors, although this modality of FDI is disfavored and is quite rare.²⁵ This type of enterprise is established through its registration with the Chamber of Commerce once its establishment is authorized by the Cuban government.²⁶

SOME FEATURES OF CUBA'S FOREIGN INVESTMENT STRUCTURE

Law 77 incorporates several features that serve to make investment more attractive to foreign investors. Following is a summary description of these features.

Establishment of an Agency to Process Investment Proposals

Law 77 created the Ministry of Foreign Investment and Economic Cooperation ("MINVEC") as the agency responsible for, inter alia, the receipt, processing and distribution among other appropriate government agencies of foreign investment applications and the ultimate submittal of foreign investment proposals to the Executive Committee of the Council of Ministers for approval.²⁷

20. Resolution 37/2001, *supra*, Art. 7.

21. *Id.*, Art. 8.

22. Interview with Cuban economist (name withheld by request), December 14, 2001 (hereinafter "Cuban Economist").

23. *Sucursales de Compañías Extranjeras Regulaciones Laborales y Permiso de Trabajo*, Colección Jurídica No. 18, Cámara de Comercio, Havana.

24. *Id.*

25. *Juventud Rebelde, entrevista a Ibrahim Ferradaz* by Marta Veloz, Apr. 21, 1999, <http://www.fut.es/~mpgp/amigos177.htm> (hereinafter "Veloz"). From the start, the Cuban government cautioned that very few enterprises would be allowed to operate based on 100% foreign ownership. Douglas Farah, *Socialist Cuba Alters Course to Spur Foreign Investment*, Washington Post, Sep. 6, 1995, p. A25.

26. Law 77, Art. 15(2).

27. *Id.*, Art. 23(6). MINVEC Resolution No. 116/95, issued on November 1, 1995, provides details on the process for submitting a foreign investment application, including the documentation that is required and the process for the negotiations between the prospective investor and the MINVEC. Resolución No. 116/95, Ministerio para la Inversión Extranjera y la Colaboración Económica, Gaceta Oficial (Dec. 11, 1995), p. 488-490.

Nominally Simplified Approval Process

Law 77 allows approval of foreign investment proposals to be delegated to an outside Commission in order to expedite the approval process. This delegation option, however, is not available for most investments of any significance.²⁸

Law 77 also requires that the approval decision be reached within 60 days of the submittal of the investment application.²⁹ No mechanisms are set forth in the Law to enforce this deadline, and the Law does not provide for default approval of the application in the case of governmental failure to act within the allotted time.

Moreover, the Law is silent on the most dilatory step of the investment approval process, which is the period of negotiations between the prospective investor and its Cuban counterpart, and between the investors and the Cuban government agencies reviewing the proposal. This negotiation and review process is well recognized as being protracted and onerous.³⁰

Ability to Import and Export

Enterprises involving foreign investors have the right to contract directly for the purchase and sale of goods abroad, a function that prior to the enactment of Law 77 was reserved for the state.³¹

Ability to Repatriate Earnings and Sale Proceeds

Foreign investors are allowed to repatriate, in freely convertible currency, earnings, proceeds from the sale of the enterprise, salaries of foreign employees, and any compensation received in the event of government expropriation.³²

Tax Regime

The tax regime for enterprises that include foreign investors was established by the 1994 Tax Code and left largely unmodified by Law 77.³³ Enterprises including foreign investors are subject to a 30% tax on net profits and a 25% payroll tax to cover employment benefits provided by the state.³⁴ There are no taxes on gross receipts or individual income by the foreign investor. The Minister of Finance, in consultation with the MINVEC, can declare an enterprise involving foreign investors temporarily exempt from some or all applicable taxes.³⁵ Law 77 also allows the Cuban customs administration to waive the applicable duties on goods imported by the enterprise in appropriate cases.³⁶

Guarantees Against Expropriation

Law 77 contains express guarantees against the uncompensated expropriation of the property of foreign investors, and commits the state to protect investors from claims by third parties founded on the expropriation of their assets by Cuba, in the event those

28. Art. 21 of Law 77 reserves to the Executive Committee of the Council of Ministers the approval decision with respect to the following types of investment: (1) those in which the total value of the investment (including the Cuban component) exceeds U.S. \$10 million; (2) enterprises with 100% foreign capital; (3) investments in public services such as transportation, telecommunications, water systems, electric power, or other public works; (4) those involving the exploitation of natural resources; (5) those requiring the conveyance of state property or state rights; and (6) those in which the Cuban participant is one of the commercial enterprises set up by the armed forces.

29. Law 77, Art. 23 (e)(6).

30. Gary Maybarduk, *The State of the Cuban Economy 1998-99*, in *Cuba in Transition—Volume 99* (Aug. 1999) (hereinafter “Maybarduk”); Veloz.

31. Law 77, Art. 29.

32. Law 77, Art. 3, 4, 6 & 8.

33. Law No. 74—Del Sistema Tributario, Gaceta Oficial (Aug. 5, 1994). Law 77 established a new tax on the earnings of enterprises that exploit natural resources. The tax can be as high as 50%, depending on the resource being exploited. Law 77, Art. 39(b).

34. *Id.*, Art. 39(a), (c). Other taxes that may be applicable to foreign investors include personal property and sales taxes, taxes on the use of public services, title registration and conveyance taxes, and advertising taxes.

35. *Id.*, Art. 43.

36. *Id.*, Art. 41.

claims are upheld by the Cuban courts.³⁷ The compensation to be paid under these provisions is to be in freely convertible currency, although the amount and terms of payment are left to negotiation by the parties or, in case of disputes, by an experienced international organization chosen jointly by the investor and the MINVEC.³⁸

Decrees and Regulations that Facilitate Foreign Investment

Cuba has issued several decrees and regulations which are not specifically directed at foreign investment but which tend to facilitate the foreign investment process. These include, for example, the establishment of free-trade zones³⁹ and the institution of banking reforms.⁴⁰ The banking reforms separated the functions of the central bank from those of the commercial banking system, providing a more suitable framework for the operation of commercial banks and financial institutions, thereby facilitating the operations of enterprises including foreign investors.

Investment Protection Treaties

Cuba has signed more than fifty bilateral investment treaties (“BITs”) with other countries, intended to protect foreign investment.⁴¹ The BITs address four topics: (1) conditions for the approval of foreign investments, (2) state treatment of foreign investors, (3) expropriation, and (4) resolution of disputes between the foreign investor and the host country. The BITs that Cuba has negotiated generally follow the international norms and standards for such agreements.

CURRENT STATUS OF FOREIGN INVESTMENT

A total number of 540 enterprises with foreign participation have been established in Cuba.⁴² Of those, 400 remain in operation.⁴³ Spain has the largest number of investors (97); Canada follows with 75; Italy is next with 55; and 18 enterprises have French investors.⁴⁴ Of the existing enterprises, 83 are involved in basic industry, 75 are in tourism, and 40 are in construction.⁴⁵ The total number of compa-

37. *Id.*, Art. 3, 5.

38. *Id.*, Art. 3.

39. See Decreto-Ley No. 165—Ley Sobre Zonas Francas y Parques Industriales (June 3, 1996), available online at <http://www.camaracuba.cubaweb.cu/download/D1165sp.zip>. Procedimiento para la presentación de la solicitud de otorgamiento de una concesión administrativa respecto a una zona franca y su tramitación, MINVEC (October 24, 1996); Procedimiento para la autorización del establecimiento de operadores en las instalaciones de las zonas francas, MINVEC (October 24, 1996), MINVEC Resolution No. 66/96, (October 24, 1996).

40. *Central Bank of Cuba established*, Granma International Electronic Edition, no. 25 (1997). Legislative Decree No. 172 established the Central Bank of Cuba, and Legislative Decree No. 173 set forth regulations governing the operation of commercial banks.

41. For a detailed discussion of Cuba’s BITs, see Matías F. Travieso-Díaz and Jorge Pérez-López, *The Contribution of BITs to Cuba’s Foreign Investment Program*, 32 *Georgetown L. & Pol. Int’l Bus. J.* 529 (2001). Capital-exporting countries negotiate BITs to protect the economic interests of their nationals and create mechanisms for the resolution of investment disputes, so as to reduce the possibility of arbitrary action by the host country. United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the mid-1990s* (Geneva: UNCTAD, 1998), p. 10.

42. Omar Everleny Pérez Villanueva, *La Inversión Extranjera Directa en Cuba: Evolución y Perspectivas*, Centro de Estudios de la Economía Cubana, Universidad de la Habana, 2001 (hereinafter “Pérez”).

43. Paolo Spadoni, “Foreign Investment in Cuba: Recent Developments and the Role in the Economy,” in this volume. According to Spadoni, the number of enterprises in operation may have reached 412 by the summer of 2002 (hereinafter “Spadoni”).

44. *Id.*

45. *Id.*

nies has grown slowly in the last five years, roughly at the rate of 30 per year.

As noted earlier, the amount of FDI in Cuba is relatively small. Foreign investment to date totals only \$1.9 billion.⁴⁶ In addition, most investors bring in limited amounts of capital; seventy-five percent of all investment is less than \$5 million. Potential reasons for these phenomena are examined below.

Despite the relatively small amount of foreign investment, the presence of foreign capital has benefited the Cuban economy. Between 1992 and 2000, enterprises with foreign investors exported \$757.5 million worth of goods.⁴⁷ In the past two years joint ventures have produced about 15% of all Cuban exports.⁴⁸ In 2000, the total accumulated sales of goods and services reached \$1.748 billion.⁴⁹

The tourism sector has been the greatest success story in Cuba's drive to selectively attract FDI. Until 2001, tourism in Cuba had been increasing at an annual rate of 18%. In the year 2000, 1.8 million tourists visited the island, spending about \$2 billion.⁵⁰ After disappointing tourist arrivals in 2001 and the first quarter of 2002, the Cuban government scaled down expectations, but predicts that Cuba will receive between 5 and 7 million tourists by 2010.⁵¹ If the U.S. embargo prohibitions on tourist travel to

Cuba end, tourist arrivals could easily surpass these predictions.⁵² The government promotes foreign investment in eight main tourist areas: Havana, Varadero, Santiago de Cuba, Isla de la Juventud, Costa Sur Central, Holguín, and Jardines del Rey. Potential investments include hotels, golf courses, marinas, aquatic centers, spas, and other recreational facilities.⁵³

Telecommunications is another area of potential growth for FDI. Over the past five years Cuba has placed telecommunications and information technology as top development priorities. However, Cuba does not have the capital to invest in the new technology required to improve telecommunications. Thus, the government is actively seeking foreign capital in the telecommunications sector, specifically to support the growth of information technology activities, expand and rehabilitate sensing equipment and electronic devices, develop an international phone service company, and install fiber optic cables.⁵⁴

INTERNAL OBSTACLES TO THE GROWTH OF FOREIGN INVESTMENT IN CUBA

Cuba has a number of advantages that make it potentially attractive to foreign investors. Cubans are generally well educated, and illiteracy is almost non-existent. The country has the highest percentage of

46. See Oficina Nacional de Estadísticas, *Anuario Estadístico de Cuba*, August 2001 (hereinafter "Anuario Estadístico"). Foreign investment figures vary widely, in part because many estimates include projected or proposed investments in addition to those in place. Carmelo Mesa-Lago, "The Cuban Economy in 1999-2001: Evaluation of Performance and Debate on the Future" in *Cuba in Transition—Volume 11* 1, 4 (Aug. 2001) (hereinafter "Mesa-Lago 2001"). The total amount of FDI reported by official Cuban sources in 1998 was \$2.2 billion, whereas a similar estimate given in mid-1995 was \$2 billion. Compare Mesa Lago 1998, p. 4 with, e.g., *Cuba Reports Foreign Investment Exceeding \$2 Bn*, Reuters, July 10, 1995. The lack of growth of foreign investment in the last few years is consistent with the information that is received informally from potential investors who have given up in their plans to invest in Cuba due to the difficulties encountered in trying to do so. Maybarduk, 1, 8-9.

47. Pérez.

48. *Id.*

49. *Id.*

50. Mesa-Lago 2001.

51. "Tourism Continues to Grow, but Profits Lag," Jason Freer. *Cuba Today*: Spring, 2001.

52. As of this writing, Congress was considering legislation that would prevent the Treasury Department from using funds to enforce the existing ban on tourist travel to Cuba, although President Bush has threatened to veto any such legislation if enacted. *House Votes to End Some Cuba Restrictions*, New York Times, July 24, 2002.

53. *Cuba: Foreign Investment Opportunities*, MINVEC, Centro de Promoción de Inversiones, Havana 2001 (hereinafter "Opportunities").

54. *Id.*

university graduates in Latin America. Seven out of 100 workers hold a university degree.⁵⁵

Cuba also has a low crime rate. Although theft occurs, Cuba is virtually free of violent crime. Havana boasts one of the lowest murder rates per capita and the smallest number of unsolved murders of metropolitan cities in the world. The high degree of personal safety could provide an incentive for potential investors, particularly in comparison to other Latin American countries.

Cuba's geographic location also makes it a natural gateway for trade between Latin America and North America. The territories of both Mexico and the United States are approximately 100 miles from Cuba. In addition, Cuba has in place some of the infrastructure required for it to serve as an international trade gateway. There are 21 airports on the island, 9 of which have international terminals. José Martí Airport currently handles 17,000 tons of cargo a year and is being upgraded to handle almost three times that amount. Additionally, Cuba has a large number of harbors that can handle international maritime traffic, and a national highway system that connects one end of the island to the other.⁵⁶

Yet, as noted above, the amount of foreign investment that has actually entered Cuba is limited and the rate of investment appears to be slowing, rather than increasing. This slowdown in investment is occurring even though a resolution adopted by the Fifth Congress of the Cuban Communist Party in October 1997 called for greater promotion of foreign investment, particularly in projects that would contribute to the achievement of the national develop-

ment plans,⁵⁷ and the fact that Cuban government officials have sought to implement this resolution by actively pursuing foreign investors and extolling the advantages of investing in Cuba.

The main reason for this relative lack of success is that investing in Cuba remains an arduous, frustrating and risky proposition. Many of the problems that will be described in this section are also highlighted in a report released in the summer of 2002 by the European Programme of Cooperation, apparently sent to the Cuban government in hopes of improving the relationship between the European investors and the Cuban government.⁵⁸ This report will be referenced below as appropriate.

Government's Restrictive Approach To Foreign Investment

Foreign investment is highly regulated and only welcome in certain areas of the economy. The Center for Investment Promotion at MINVEC openly declares, "FDI is regarded as a complement for local development efforts and is, therefore, focused on the search for new external markets, competitive technologies, and financing."⁵⁹ The Minister of the MINVEC has likewise announced that Cuba will be more selective in the future in accepting foreign partners.⁶⁰

The government only allows investors who meet certain criteria. Marta Lomas, Minister of MINVEC, confirms Cuba's selective approach to FDI. She claims that "authorities first identify what foreign investment the island wants, and then who will be the investor."⁶¹ Investors must be able to contribute financial support, technology, and new markets in order to be authorized to invest.⁶² Also, the Cuban gov-

55. Timothy Ashby, *IT in the Land of Salsa, Rum, and Fidel*, World Trade: July, 2001 (hereinafter "Ashby").

56. *Id.*

57. *Resolución económica: V Congreso del Partido Comunista de Cuba* (Havana: Editora Política, 1997), p. 25.

58. European Programme of Cooperation, "The Legal and Administrative Framework for Foreign Trade and Investment by European Companies in Cuba" (July 2002), available online at <http://www.cubatraderpublications.com/euletter/index.com> (hereinafter "EU Report").

59. See Opportunities.

60. Andrew Cawthorne, *La Habana se ha Hecho más Selectiva en la Búsqueda de Inversionistas*, El Nuevo Herald, May 15, 1999.

61. Radio Habana Cuba broadcast, January 3, 2001.

62. Interview with Lic. Roberto Yebra Muñoz, Investment Promoter at MINVEC, on Dec 12, 2001 (hereinafter "Yebra").

ernment will not allow foreign investment that directly competes with state owned enterprises, but only investment that will benefit Cuban companies as well as the investor.⁶³ In short, the decision as to which investments are acceptable or desired are made entirely by the government, and not by the demands of the market.

The investment process is especially difficult for investors who have a particular project in mind. Cuban enterprises can only operate in accordance with defined “social objectives” (corporate purposes), established by the government to avoid competition between state-owned enterprises.⁶⁴ A foreign investor can only form a joint venture with a Cuban company that has social objectives compatible with the proposed investment. This is a problem for the foreign investor, who must find a Cuban company that is allowed to engage in the desired business.⁶⁵ Thus, for instance, in the CBN example discussed above, the investors from CBN were informed, after they had made the initial investment, that Fénix was not currently permitted to rent bicycles, since the rental of bicycles was not one of Fénix’s social objectives. Thus, before bicycle rental operations can begin, Fénix has to get approval from the Council of Ministers to add the rental of bicycles to its social objectives. The issue is further complicated by the fact that Habaguanex, another enterprise controlled by the Office of the Historian, has bicycle part sales as a social objective. Thus, approving Fénix’s proposal would mean allowing Bicicletas Cruzando Fronteras to compete indirectly with Habaguanex.⁶⁶

The restrictive definition of the social objective of Cuba’s state owned companies also limits the possibility of expansion of joint ventures and other arrangements with foreign investors. Assume, for ex-

ample, that CBN and Fénix decided after starting operations that Bicicletas could be more profitable if it sold refurbished bicycles to the government. Assume also that a second state-owned enterprise or joint venture already sold bicycles to the state. In all likelihood, the government would not allow the CBN-Fénix joint venture to amend its charter so that it could sell bicycles to state institutions, even if it could do so at a lower price than the enterprise currently doing so. Thus, the rigidity of the enterprise structure in Cuba would preclude a transaction in which the state derived a benefit in the acquisition of bicycles at lower prices and a state-owned enterprise increased its profit margin, again with a beneficial impact on the state. The difference in interests between the foreign investor (who is concerned with making a profit) and the Cuban government (which desires to uphold socialist objectives) creates conflicts within the operation of the joint venture. The EU Report on investment points this out as follows: “The interests in strategic objectives of the two partners often do not coincide and this results in the artificial associations and in lack of clarity in the development of the firm.”⁶⁷

Bureaucratic Impediments

The second main barrier to foreign investment is the arduous process needed to obtain the Cuban government’s authorization of any investment. Even with the help of a government-owned consultant such as Conas, this process normally takes one year and can take up to 18 months.⁶⁸ There is no guarantee that the government will accept the proposed investment even after this period of time.

The process starts with the preparation of a letter of introduction and document package that the foreign investor must submit to MINVEC. Prior to any fur-

63. *Id.*

64. Guntin.

65. *Id.*

66. Approval of the expansion of Fénix’s social purpose remained pending as of December 2001.

67. See EU Report.

68. Interview with two Cuban government officials on 12-28-01, names withheld by request (hereinafter “Two Government Officials”).

ther action, MINVEC will review the letter of introduction and decide whether the investment is in an area of the economy prioritized for investment, whether it conflicts with the business of existing state-owned enterprises or other enterprises involving foreign investors, and whether the investor is solvent and his business plan is economically feasible.⁶⁹ MINVEC will also verify that invested funds are from legitimate sources, and that the proposed investment does not put the foreign investor at risk of litigation in the United States under the Helms-Burton law.⁷⁰

If this first step is successful and MINVEC approves the presentation letter, the Cuban counterpart is authorized to begin negotiations with the foreign investor. Those negotiations can take many months. When the parties have reached an agreement, the foreign investor and its Cuban counterpart jointly prepare a feasibility study of the proposed enterprise. This study, often 100 pages long, must include every detail pertinent to the set-up and management of the company: foreign contribution, Cuban contribution, number of workers, workers' salaries, projected production rates, prices of the products, costs of inputs, type of materials used for construction, location of the enterprise, possible effects on the environment, etc.⁷¹

The feasibility study must include any information that is likely to be required by the government agencies with potential jurisdiction over the venture. The Ministry of Finances and Prices, for example, will request the prices of any goods that will be sold commercially within the Cuban market.⁷² (The Ministry

of Finances and Prices seeks this information in order to limit the enterprise's ability to compete with state-owned enterprises selling similar products.) Likewise, the Ministry of Labor will request an employment worksheet ("*plantilla de trabajo*") for any project that utilizes Cuban labor. This plantilla must specify exactly how many workers will be employed, what their functions will be, and how much they will be paid.⁷³ The Ministry of Labor regulates salaries of all national workers, and workers in joint ventures or economic associations cannot, without special permission, earn more than their counterparts in state-owned enterprises.

The foreign investor sends the feasibility study to MINVEC, which will submit the study with its recommendations to a Governmental Commission, a committee made up of all relevant government ministers and agency heads.⁷⁴ Law 77 is vague on which ministries and agencies are relevant to a proposed investment. It simply states, "Once the request is accepted by the MINVEC, it shall be submitted for consultation to all corresponding agencies and institutions, in order to obtain their report on matters pertinent to them."⁷⁵

The Governmental Commission has sixty days to accept or reject the investment proposal based on the feasibility study.⁷⁶ Proposals are rarely accepted on the first submission; the Commission may reject the proposal altogether, or may identify problems or deficiencies and send it back to the investor.⁷⁷ Any participating minister can send the feasibility study back to the investor and request that specified changes be made. If the investor addresses the problems, the

69. The EU Report points out that the Cuban government does not provide the same financial guarantee that it demands of foreign investors. This places extra costs and burden on the foreign investor, while decreasing the risk for the Cuban government. EU Report.

70. Two Government Officials, *supra*.

71. *Id.*

72. *Id.*

73. *Id.*

74. Law 77, Art. 23(e)(4).

75. *Id.*

76. *Id.*, Art. 23(e)(6).

77. Two Government Officials.

study goes back to the Government Commission, which again has sixty days to rule on the proposal.

If the Commission accepts the investment proposal, it forwards the proposal and a recommendation of approval to the Executive Committee of the Council of Ministers which includes President Fidel Castro, Armed Forces Minister Raúl Castro, the First Vice President (Carlos Lage), and any members of the Council of Ministers appointed by Fidel Castro.⁷⁸ The Executive Committee has the ultimate power to accept or reject the proposed investment. If the Executive Committee accepts the investment, it drafts an official decree authorizing formation of the enterprise.⁷⁹ The foreign investor, the Cuban counterpart, and a representative of the Executive Committee then sign a document establishing the enterprise. The enterprise is registered with the Chamber of Commerce and is then able to begin operations.

This cumbersome process, which involves the approval of numerous ministries and agency heads, up to President Castro himself, impedes investment process and discourages all but the most determined investors.

Labor Regime

As noted above, Law 77 allows a foreign investor to hire foreign personnel to fill managerial and technical positions. On the other hand, the Cuban labor force

may not be hired directly by the investor or by the enterprise formed by the investor and its Cuban counterpart. Law 77 retains the system, established under Law 50, which requires that Cuban labor be provided by the state through a contracting agency designated by the MINVEC.⁸⁰ The law, however, allows in exceptional cases that an enterprise with foreign participation contract with all or some of its employees directly, if the decree approving formation of the enterprise so specifies. There is also a residual clause in the labor provisions of Law 77, which states that the decree authorizing formation of the enterprise may establish a labor regime that differs from that established in the law.⁸¹ This provision could, if so desired, provide further flexibility than that granted by the law itself. However, neither of these two clauses appears to have been invoked to date.

Law 77 and its regulations are currently being implemented as follows.⁸² During the preparation of the feasibility study, the foreign investor and its Cuban counterpart of a joint venture determine the number of workers needed. They then contact an employment agency designated by the MINVEC. This employment agency is often a subsidiary of a state-owned enterprise in the sector of the economy that is the subject of the foreign investment, possibly the same enterprise that is partnering with the foreign investor. Cubanacán, for example, is a Cuban armed

78. See <http://www.cubagob.cu> for a listing of the members of Cuba's Council of Ministers.

79. Law 77, Art. 24.

80. See *id.*, Art. 31-35. The provisions of the law are further elaborated in Resolution No. 3/96 of the Ministry of Labor, issued in March 1996, which established regulations for the employment of workers in enterprises with foreign participation operating in Cuba. *Resolución No. 3/96, Ministerio de Trabajo y Seguridad Social—Reglamento sobre el régimen laboral en la inversión extranjera*, Gaceta Oficial (May 24, 1996), p. 266-272.

81. Law 77, Art. 33(1), states: "Workers in joint ventures who are Cuban or permanent residents in Cuba, with the exception of the members of the management or administration, are contracted by an employing entity proposed by the Ministry of Foreign Investment and Economic Cooperation, and authorized by the Ministry of Labor and Social Security."

82. The following description of the implementation of the labor provisions of Law 77 is based on a number of interviews held in Cuba and abroad in December 2001. See n.2, *supra*. The interviewees included employees of joint ventures, employees of state-owned enterprises, foreign investors, government officials, Cuban economists, and independent journalists. Mr. Trumbull had no acquaintance with most of the workers interviewed, and none of the interviews were set up by state officials. Interviewees were told that the interviews were confidential and would only be used for academic purposes. Interviews with investors included one investor who is enjoying moderate success, one who is frustrated with the investment process, and one who has completely pulled out of Cuba. Two of the government officials interviewed requested that their names and affiliations not be revealed. While the total number of interviews (20) was relatively small the views expressed were generally consistent with other sources of information available to the authors. In addition, there was substantial uniformity in the factual information provided by the interviewees, which included workers, journalists, other independent observers, foreign investors, government officials, and members of the public.

forces enterprise engaged in tourism activities.⁸³ Over the past decade, Cubanacán has formed a number of joint ventures with foreign companies.⁸⁴ Cubanacán has also set up a number of smaller, specialized companies serving specific aspects of the tourism industry. One of these smaller companies is an employment agency. This agency supplies labor to all joint ventures formed by foreign investors that enter into contracts with Cubanacán.

The MINVEC-designated employment agency and the joint venture determine a monthly wage in U.S. dollars for each worker category to be paid to the agency. In the CBN example discussed above, CBN agreed to pay the employment agency \$460/month for each mechanic, \$500/month for a sales representative, and \$550/month for a general manager.⁸⁵ This wage is increased by a 25% payroll tax, which is to be paid directly by the enterprise (in reality, by the foreign investor) to the employment agency, also in U.S. dollars. The employment agency pays the workers a salary in Cuban pesos that is comparable to the national average for that type of work set by the Labor Ministry. Thus, each mechanic receives about 200 pesos/month, a sales representative gets 300 pesos/month, and the general manager receives 400 pesos/month.⁸⁶

The employment agency is responsible for all aspects of the hiring, employment conditions, and termina-

tion of the Cuban worker. Each employment agency has a “*bolsa de trabajo*,” or employment register listing available workers. Whenever an enterprise with foreign investor participation needs Cuban workers, the employment agency sets up interviews between the management of the joint venture and selected workers from the pool of available workers listed in the *bolsa de trabajo*. The foreign investor and the Cuban counterpart make the ultimate decision on who, among the workers selected from the pool, they want to have hired.⁸⁷ It is unclear how large the pool of potential workers is or how it is established. However, based on an earlier arrangement established in 1990 for workers in the tourism sector, workers are selected for incorporation into the pool on the basis of their “moral qualities” as much as, if no more than, their ability to perform the required work tasks.⁸⁸

The enterprise can also hire workers that are not part of the pool in the *bolsa de trabajo*. If a foreign investor wishes to hire a Cuban who is not associated with the employment agency, the investor must contact the employment agency and notify it that he wants to contract a particular worker. The employment agency will run a background check on the worker to determine that he does not have a serious criminal record and is in “good moral standing.”⁸⁹ Then, the employment agency will hire the worker and the en-

83. Information on Cubanacán is available at <http://www.cubanacan.cu>.

84. The Sol Palmeras hotel, for example, is operated by a joint venture between Cubanacán and a Spanish conglomerate. María Dolores Espino, *Cuban Tourism During the Special Period* in *Cuba in Transition—Volume 10* 360, 362 (Aug. 2000).

85. One criticism included in the EU Report is that the Cuban employment agencies sometimes overstate the position of Cuban workers in order to overcharge the foreign investor. Thus, a “storekeeper” becomes the “head of store.”

86. These numbers are rough estimates based on conversations with Cuban workers.

87. Interviews with various foreign investors as well as Lic. Roberto Yebra at the MINVEC Center for Economic Promotion and Lic. Amado Guntin at Conas.

88. “*Resolución No. 15/90 del Comité Estatal de Trabajo y Seguridad Social*,” Gaceta Oficial (September 15, 1990). See Jorge F. Pérez-López, *Cuba’s Thrust to Attract Foreign Investment: A Special Labor Regime for Joint Ventures in International Tourism*, *Inter-American Law Review* 24:2 (Winter 1992-93), p. 221-279, for a comparative analysis of the labor regime established for the tourism sector against the provisions of the Cuban Labor Code.

89. The Vice President of Cuba’s employment agency ACOREC (“Agencia de Contratación a Representaciones Comerciales”) stated that an employment agency does not consider whether a worker is a member of the Communist party when deciding if a worker is in good moral standing. (Interview 12-24-01). However, the charge is often made that party loyalty is a virtually indispensable prerequisite to obtaining employment in enterprises involving foreign participation. Thus, employment is granted on the basis of loyalty to the government rather than personal merit, in violation of Convention 111 of the International Labor Organization (“ILO”), which guarantees non-discrimination in employment. Pax Christi Netherlands, *Cuba: A Year After the Pope* (Utrecht: Pax Christi Netherlands, February 1999), p. 23. The politically based discrimination in which the Cuban government engages in the training and employment of workers has been the subject of frequent condemnation before the Experts Committee on the Application of Conventions and Recommendations of the ILO. See <http://www.ilo.org>.

terprise can contract for his services with the agency. In no event can the enterprise contract directly with a worker.⁹⁰

Employers' opinions vary regarding the usefulness of the employment agencies. David McMillan, president of Venezia Hospitality International, writes, "my general experience with employment agencies has been positive."⁹¹ Employment agencies can help foreign investors who are not familiar with the Cuban economy or Cuban labor force find employees who are, at least, adequate and dependable.

On the other hand, many foreign investors have discovered that the workers obtained through the bolsa de trabajo are not always the most qualified for a particular job. For example, the CBN investors that set up the Bicicletas Cruzando Fronteras enterprise claim that none of the workers interviewed through the bolsa de trabajo had any previous experience working with bicycles, and none were eager to work as bicycle mechanics. However, all workers interviewed were unemployed and needed work. The investor decided to hire the workers out of the bolsa de trabajo because he did not have the time or connections to find better workers.⁹²

Nevertheless, it is possible to circumvent this restriction. One foreign investor who owns a small travel agency in Havana has chosen to hire all workers outside of the employment agency's bolsa de trabajo. He has been traveling to Cuba for over twenty years, has many Cuban friends, and is familiar with the socialist

ways of doing business. He initially had to register his company with HAVANATUR, the state enterprise that controls tour operator activities in Cuba, and get his labor through that agency. Subsequently, he was able to hand-pick seven employees whom he knew and trusted. He gave their names to HAVANATUR's employment agency, which then hired them and leased them back to the investor.⁹³

These examples illustrate that the more experience a foreign investor has in Cuba, the more likely it is that he will be able to secure a qualified and dependable work force by looking outside the bolsa de trabajo to meet its labor needs.

Branches of foreign companies operating in Cuba have slightly different requirements regarding the supply of Cuban labor. Branches of foreign companies are required by labor regulations to obtain labor through the Cuban employment agency ACOREC, which specializes in providing labor to foreign company branches operating in Cuba.⁹⁴ The foreign firm office has an initial 1-2 month trial period in which it is free to ask for termination of the new employee without notice. If the firm decides to keep the worker, it can contract with ACOREC for that worker for a period of up to 5 years.⁹⁵ The foreign firm must designate what each worker's job will be, the hours of employment, and his responsibilities.

Unlike other employment agencies that are willing to negotiate employee contracts with the joint venture, ACOREC has an established, non-negotiable list of

90. Art. 34 of Law 77 provides that: (1) the employment relationship is between the worker and the state employment agency, and the enterprise with foreign participation is not a party to that relationship; (2) the state agency is responsible for paying the worker's salary; (3) the state agency is responsible for firing and replacing those workers whose performance is deficient; and (4) any labor grievances are to be raised before the state agency, although the enterprise utilizing the worker's services is financially responsible for the costs associated with the resolution of such grievances. Under this arrangement, the enterprise's only recourse against inadequate workers is to return them to the employment agency if their work is unsatisfactory.

91. David McMillan, *Cuban Workers in the Tourism Sector*, Cuba Today, National Policy Association, Spring 2001.

92. Interview with CBN representative, 12-20-01.

93. Interview with foreign investor on 12-14-01. The Report includes this complaint. "The system of staff selection is controlled by the employment agencies who try to impose their candidates (frequently not suitable professionally) and make it difficult to hire candidates identified by the foreign investor."

94. Resolución No. 32/99 1998, *Sucursales de Compañías Extranjeras: Regulaciones Laborales y Permiso de Trabajo* (hereinafter "Sucursales").

95. *Id.*

charges for different categories of workers.⁹⁶ ACOREC charges from \$425/month for a general laborer to \$1000/month for a legal consultant, supervisor, engineer, or vice-president. Workers employed by ACOREC receive a salary, in pesos, equivalent to the national average for that category of worker. Thus, Cuban branches of foreign firms may have to pay more for each worker than enterprises including foreign investors do, yet the workers in those branches may not get paid as much as their counterparts working in joint ventures or economic associations, since the salaries of the latter are to some extent negotiable and may be higher than the official rate.⁹⁷ Another state agency, CUBALSE, S.A. (“Cuba al Servicio de Extranjeros, S.A.”) provides Cuban personnel to foreign entities, particularly foreign embassies and other offices of foreign governments and international organizations.

Whatever agency is used to obtain workers for the enterprise, one feature is common: the foreign investor has to pay the employment agency in U.S. dollars for the labor of Cuban workers. The employment agency pays each worker a salary in pesos based on the average national salary for the worker’s profession. Often, even applying the official 1 dollar equal to 1 peso rate, the Cuban worker receives even less in pesos than what the foreign investor pays the employment agency in U.S. dollars. Thus since the actual rate of exchange is 26 pesos to a dollar, the worker may receive less than 4 cents out of each dollar of his salary paid by the investor.

Criticisms Leveled Against Cuba’s Labor Regime for Enterprises Including Foreign Investors: Cuba’s labor policy has been called exploitative by inde-

pendent organizations within Cuba as well as international organizations such as the UN Human Rights Watch and the International Labor Organization (“ILO”).⁹⁸ According to labor rights organizations, Cuba violates the standards of labor established by the ILO and ratified by the Cuban government. Article 2 of Convention 87 of the ILO, adopted in 1948, declares, “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.” Cuba’s practices have also been denounced by Cuban American labor organizations.⁹⁹

Cuba is also in violation of Convention 95 of the ILO.¹⁰⁰ Article 5 of this convention, adopted in 1949, states, “Wages shall be paid directly to the worker concerned except as may be otherwise provided by national laws or regulations, collective agreement or arbitration award or where the worker concerned has agreed to the contrary.” Article 9 declares, “Any deduction of wages with a view to insuring a direct or indirect payment for the purpose of obtaining or retaining employment, made by a worker to an employer or his representative or to any intermediary, shall be prohibited.” Contrary to this Convention, the Cuban government prohibits direct employment by foreign firms. As discussed above, foreign investors must contract Cuban workers through a state employment agency. The investor pays the worker’s salary to the employment agency in US dollars, and the employment agency pays him or her a small fraction of this money in Cuban pesos. This “confiscation” of wages is done without the

96. ACOREC employs over 2000 Cubans working in over 600 foreign companies. Interview with Vice President of ACOREC, December 23, 2001 (hereinafter “ACOREC VP”).

97. A Canadian investor indicated that her feasibility study towards approval of her proposed investment had been rejected because she proposed to pay a mechanic 250 pesos/month instead of the state-mandated salary of 129 pesos. Before the feasibility study could be approved, she had to explain why the mechanic deserved to be paid almost double the national average mechanic salary. Interview with foreign investor, December 13, 2001.

98. See, e.g., <http://www.ilo.org>, http://www.hrw.org/reports/1999/cuba/Cuba996-01.htm#P392_35421.

99. See, e.g., “Report of the Violations of the International Labor Organization’s Standards and Conventions by Cuba,” Confederación Obrera Nacional Independiente de Cuba. 2000-2001.

100. Cuba ratified this convention on September 24, 1959.

consent of the worker, and is, as many critics claim, a clear violation of Convention 95 of the ILO.

The entire labor regime for enterprises involving foreign investors has been widely denounced, especially by Cuban-American scholars and academics within the United States.¹⁰¹ One analyst has written, “The Cuban government entity that hires the workers is a company with an illicit purpose. It has been created only to harm and defraud a third party, namely the Cuban work force.”¹⁰² Another points out that “Cuban workers feel exploited and resent the unjust and inhumane control of the Cuban government over their lives. They blame the deplorable contractual agreements structured by the Cuban government—with the ‘complicity’ of foreign investors—for their ignominious existence.”¹⁰³

U.S. based analysts advocate that the Cuban government commit to and implement principles of ethical investment in the country.¹⁰⁴ A number of ethical investment principles have been developed for Cuba, chief among them the “Arcos principles” first defined in 1994 and named after a well-known Cuban dissident, before U.S. enterprises are allowed to do business in Cuba. These principles call on foreign investors to: respect the dignity of the Cuban people and the due process of law; provide equal rights and non-discrimination of the Cuban people in access to and use of facilities and in the purchase of goods and services, especially those normally reserved for foreign visitors or residents; engage in equal and fair hiring and employment practices, with non-discrimination for reasons based on political considerations, sex,

race, religion or age; promote fair labor standards and the right of Cuban workers to form labor unions and to receive fair wages; and improve the quality of employees’ lives outside the work-place in such areas as: occupational safety and health, culture, and environmental protection.¹⁰⁵

Cuba’s Response to International Criticism: The Cuban government acknowledges that its indirect employment system may seem exploitative when judged in the context of a capitalist framework. However, it argues that within the socialist system it is necessary and just. There are three main arguments the Cuban government makes in support of its system for providing labor to enterprises involving foreign investors.

First, the Cuban labor code guarantees certain rights to Cuban workers, and the use of a Cuban employment agency protects these rights. All workers receive one month of paid vacation per year, paid sick leave with the guarantee to return to work, and paid maternity leave from the seventh month of pregnancy through the first six months of the baby’s life. Additionally, employment agencies guarantee equal payment for men and women, and equal opportunities for all races.¹⁰⁶ The Cuban government further cites poor labor conditions in the Caribbean and claims that the existing labor policy protects Cuban workers from similar exploitation.

Second, indirect employment helps preserve Cuba’s social welfare system. Employment agencies provide a constant source of hard currency for the Cuban

101. See, e.g., Efrén Córdoba, *Régimen laboral*, in *40 Años de Revolución: El legado de Castro* (Miami: Ediciones Universal, 1999), p. 167; Alberto Luzárraga, *Cuba Socialista—La Nulidad de los Contratos de Inversión Extranjera por Causa Ilícita—Defraudar al Trabajador*, <http://www.amigospais-guaracabuya.org/oagal004.html>.

102. Luzárraga, *supra*.

103. Guillermo Cueto, *Cuban Sweat for Sale*, Cuba Today, Fall 2000, Vol., No. 2. Cuban-American labor experts also criticize harshly Cuba’s general labor practices, claiming that the Cuban government exploits the Cuban work force. They point out that “Cuba has the lowest wages of any country in Latin America, including Haiti.” They add that Cuba has the longest workweek of any country (48 hours) and that the Cuban government has refused to abolish child labor. Efrén Córdoba and Eduardo García Moure, *Modern Slavery: Labor Conditions in Cuba*, Institute for Cuban and Cuban American Studies, University of Miami (April 2000).

104. See, e.g., “Principles for Private Sector Investment in Cuba,” National Policy Association Cuba Working Group, Summer 2000 Vol. 1 No. 1, available online at <http://www.npal.org>.

105. The complete text of the Arcos principles is available online at <http://www.sigloxxi.org/arcos-i.htm>.

106. ACOREC VP.

government. About 30,000 Cubans work in joint ventures and foreign firms.¹⁰⁷ Enterprises with foreign investment pay an average of \$500/month per worker. Thus, the government collects \$15 million per month in hard currency from the employment of Cuban workers by enterprises involving foreign investors.¹⁰⁸

Third, the Cuban government requires that each sector of the economy contribute a certain amount of money to support the social welfare system.¹⁰⁹ For sectors in which foreign investment is allowed, much of this money is collected in hard currency through the employment agencies. The government invests this money in health care, education, and other governmental purposes. Thus, the Cuban government argues, the money that the government keeps away from the worker is reinvested for the good of the entire population.¹¹⁰

Finally, the Cuban government views indirect employment as the only form of employment compatible with socialist goals. The Cuban government states that it cannot allow a system of employment that promotes inequality between Cubans working in the joint venture sector (.7% of the working population) and the public sector work force (77.5% of the population).¹¹¹ The average monthly salary paid by

the state to Cuban workers is approximately 250 pesos, less than \$10/month.¹¹² If workers under joint ventures were allowed to earn \$500/month, a great inequality would arise between the two classes of workers. This disparity could lead to discontentment among state workers, social unrest, and a decline in productivity. The government claims that maintaining wage equilibrium between the state and private sector is the only way to keep the fabric of society from tearing apart.¹¹³

Evaluation of Cuba's Position: Cuba's arguments appear unpersuasive. Regardless of the government's attempted justification, the state pockets over 95% of the value of the work provided by workers employed by enterprises with foreign investors. It is clear that such confiscation is in direct violation of international conventions accepted throughout the world, as well as Cuba's own Labor Code.¹¹⁴ While it may be true that the end of indirect employment could cause social upheaval, this result would only demonstrate the inherent flaws in the socialist system. As to the financing of social welfare programs, the state could, for example, finance social welfare by further opening the economy to foreign investment and collecting taxes on the income of enterprises involving foreign investors.¹¹⁵ The State could also privatize state-owned enterprises, and allow the ongoing *perfeccio-*

107. According to the Anuario Estadístico de Cuba, 26,800 Cubans worked in joint ventures. An additional 2000 workers worked for foreign firms.

108. According to Promoters at MINVEC all prices for Cuban labor are negotiated between the foreign investor and the corresponding employment agency. Information provided by several interviewees indicates that the average salary paid for a joint venture worker is \$375-\$475, and the average price for a worker in a foreign firm is \$500-\$700.

109. Interview with Cuban worker on 12-10-01, name withheld by request.

110. ACOREC VP.

111. Anuario Estadístico de Cuba.

112. *Informe de la Economía*, Granma (Havana), December 23, 2000.

113. ACOREC VP.

114. See ILO Convention 95 on worker salaries, Art. 5 and 6. This practice violates the principle of wage integrity against government confiscation, contained in Cuba's Labor Code.

115. It should be noted that, despite the government's boasts about providing social welfare, per capita expenditures for social services is significantly lower than those in several other Latin American countries. In 1997, Cuba spent only \$457/person on social welfare, a 26.3% decrease from 1990 levels. Argentina, Uruguay, Panama, Costa Rica, Brasil, and Chile all spent more money per capita than did Cuba. Rolando Castañeda, *Cuba y América Latina: Consideraciones sobre el Nivel de la Evolución del Índice de Desarrollo Humano y del Gasto Social en la Década de los Noventa*, in *Cuba in Transition—Volume 10* 234 (Aug. 2000). Since 1997 social welfare spending has increased, but only slightly. According to a Cuban source, the government has chosen to invest most of the earnings from joint venture enterprises back into key economic sectors rather than spend the money on increasing social welfare programs. Cuban Economist.

namiento empresarial process to become a true enterprise reform movement.¹¹⁶ In short, the state could do many things to bridge the inequality that now exists between the salaries paid in state enterprises and those involving foreign investors rather than retaining it.

Worker Views:¹¹⁷ Despite the governmental confiscation of most of their salaries, Cuban workers in enterprises involving foreign investors feel that they are still better off than workers in state-owned enterprises. Workers in joint ventures and branches of foreign companies enjoy better working conditions than in state-owned enterprises. For example, the offices of the branches of foreign companies are usually air-conditioned, a rarity in Cuba. Workers receive perks such as free clothing, food, and transportation to and from work.

Most importantly, workers receive under-the-table bonuses in dollars from foreign investors. These payments are widely made but rarely talked about because unregulated bonuses are illegal, since the government controls and dictates workers' salaries. However, the government knows that workers' salaries are inadequate. Thus, in order to keep workers productive (and often to prevent them from stealing), foreign investors commonly pay the Cuban employees a "stimulus" bonus.¹¹⁸

A foreign investor from CBN indicated that she noticed a bit of petty theft of tools and supplies in the first few months of operations in Cuba. To curb further losses, she started paying each employee a bonus of \$10/month, essentially doubling their salary. Another foreign investor paid workers in U.S. dollars for all extra or overtime work they did. (Since all employee duties and work hours must be set prior to the authorization is issued to the enterprise, the foreign

investor cannot require Cuban workers to do tasks outside of their prescribed duties.) Arrangements such as these provide an additional source of hidden costs to the foreign investor, but allow him an opportunity to enhance worker compensation by paying a dollar supplement in a quasi-legal manner. Thus, if a foreign manager wants a worker to perform work outside regular scheduled hours, it is advantageous for both the foreign investor and the Cuban worker that the worker be paid directly in dollars rather than having the dollars go to the employment agency.¹¹⁹ Workers in enterprises involving foreign investors know that they can receive stimulus payments in dollars in a number of ways, particularly if they are honest, competent, and dedicated. This understanding fuels the desire among Cubans to work in enterprises that involve foreign investors.

In reality, workers employed by enterprises with foreign participation generally receive two salaries: an official salary paid by the employment agency in Cuban pesos and an unofficial salary paid directly by the employer in U.S. dollars and in consumer goods. If one takes into account both salaries, the average joint-venture worker earns substantially more than the average worker in the state sector does. Cuban workers' opinions also vary on the fairness of the "confiscation" of their wages by the state. Some workers point out that they do not need much money each month to live on.¹²⁰ They receive rationed food, transportation, clothing, free health care and education, and subsidized prices for other goods and services.

A Cuban sailor who worked for several years on a foreign-owned boat remarked, "You cannot blindly compare salaries in Cuba with salaries in other countries. Yes, it will look like exploitation. But, one has to know the system, and the history of that system.

116. See Matías F. Travieso-Díaz, *Cuba's Perfeccionamiento Empresarial Law: A Step Towards Privatization?* 23 U. Pa. J. Intern'l Econ. Law 119 (2002).

117. The information in this section is based interviews with employees in the Bank of Canada, Cubacel, ACOREC, Sol Meliá and other enterprises.

118. Interviews with Cuban Economist and Two Government Officials.

119. Interview with a former investor in Cuba who has since stopped all investment in Cuba.

120. Interviews with employees at CubaLinda, the Bank of Canada, and Sol Meliá.

In Cuba, we have a social obligation that you don't have in other countries." A worker in a foreign owned tourist agency had a similar opinion. "As a person, I think that the system is unjust. But, as a Cuban I think it is necessary." A Cuban representative at the Bank of Canada pointed out that the majority of Cubans would like to suffer the "exploitation" to which he is subject. Although his salary is in Cuban pesos, his job provides him with many perks. He eats at the cafeteria every day for free.¹²¹ The Bank of Canada buys him clothes, and provides him a \$30,000 sports utility vehicle and a credit card to buy gasoline. He has lived all around the world, and claims that he still prefers to live in Cuba. "I am fine. I live well. I prefer to help my country than take all the money for myself. One has to have a revolutionary mentality." None of the workers interviewed said that he felt exploited by working through the employment agencies.

This attitude of workers in joint ventures may seem counter-intuitive. It is possible that these workers resent that the government confiscates 95% of their wages, but are not willing to talk for fear of losing their jobs. However, Cuban workers do not necessarily view labor economics as workers in capitalist countries do. Cuban workers are paid a nominal salary, which is not determined by the value of their output, and receive a number of subsidized goods and services that do not cover their basic necessities. Nevertheless, workers do not feel entitled to receive compensation commensurate with their contribution, possibly because no worker in the state sector receives such pay, or (less likely) because they believe that an egalitarian socialist state is fairer than a capitalist state. They also may not regard the money paid by the foreign investor for their labor as rightfully theirs.

Thus, the question of exploitation is a complex one, at least from the employees' perspective. Workers in foreign investments are better off than their state-sector colleagues. They do not have to steal, hustle, or work on the black market to make a living as do

many other Cubans. They have free education, health care, and subsidized goods and services. Yet, they do not have the freedoms that workers in other countries have, even those working under poor labor conditions. Cuban workers in joint ventures are dependent on the state. The state decides who will do what work, how much he will be paid, and how long he will work. The state rewards those who are loyal to the state, and punishes those who are not. The Cuban work force is merely a means used to further the goals of the state.

Problems Posed by Cuba's Labor Regime: Regardless of the views of the Cuban government and the workers, there is no question that the current labor regime constitutes an impediment to foreign investment in the country. First, as noted above, investors have to pay a dual salary for the right to use Cuban labor: an official salary to the employment agency, and an under-the-table payment directly to the worker. At a minimum, the need to provide a two-salary method of compensation increases operating costs for enterprises involving foreign investors and makes their enterprises in Cuba less profitable and competitive. In addition, the foreign investor is not guaranteed to get personnel who are qualified to perform in accordance with the job's requirements, and have little control over labor relations. Finally, investors are subject to international criticism as aiding and abetting the workers' exploitation, creating image concerns for some investors. Taken together, these problems translate into a disincentive to do business in Cuba. The EU Report sums up the problems by saying: "The numerous general and specific difficulties in this sphere put up the price of the labor force to a point which makes them a major hindrance to greater flows of foreign investment."¹²²

CONCLUSION: THE FUTURE OF FOREIGN INVESTMENT

Despite its initial successes in the early and mid 1990s, Cuba has not been able to secure foreign investment to the degree that the country requires and

121. The Bank of Canada pays \$3/day for each employee's lunch.

122. See EU Report.

is capable of attracting. The main reason for this failure is the contradictory attitude of the Cuban government towards investment, the obstacles and restrictions that are placed before a prospective investor, and the ominous shadow of U.S. sanctions and other external factors. In all, investing in Cuba must surely be seen by most foreign entrepreneurs as a perilous task.

On the other hand, the current environment in Cuba is not favorable to the entry of foreign investment. While some of the adverse factors are external (particularly the poor relations between Cuba and the United States), the greater and most significant obstacles to investment are internal and can be overcome by the implementation of suitable government initiatives.

Despite the current deficiencies and problems, foreign investment should continue to play an important role in the economic development of Cuba, both in the immediate future and once the country adopts a more welcoming attitude to foreign capital. For investment to realize its full potential, however, it will

be necessary that both the laws and the government attitudes change towards a regime that regulates, but at the same time fosters, foreign investment.

This is not to say that elimination of the internal obstacles to foreign investment will be easy. Some of the contradictions caused by Cuba's adherence to a socialist program while seeking to implement limited capitalistic measures cannot be remedied without re-orientation of the government's thinking of the role of the state in the country's economic activity. (This is particularly true with respect to the labor issue, as evidenced by the arguments raised by the government in support of the current framework for the use of Cuban labor by enterprises including foreign investors.) On the other hand, to the extent that the reluctance by investors to enter the Cuban market is based on the perception that Cuba raises too many obstacles and restrictions to FDI, such a perception could be ameliorated without great difficulty and in a relatively short period of time were Cuba inclined to do so.