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"Muéstrame el Dinero": Increasing Foreign Direct Investments in Cuba with a BIT of Help

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Note

"Muéstrame el Dinero"[1]: Increasing Foreign Direct Investments in Cuba with a BIT of Help

Kevin Kitchen*

The current embargo between the United States and Cuba shows serious signs of wear and tear. It will not be long before the United States government decides that the imposed sanctions have been ineffective, and even detrimental to the government's intended purpose. Aside from politics, businesses continually seek opportunities for expansion, and Cuba finds itself in a favorable geographic location to position itself as a gateway between Mexico, Central America, South America, and the United States. However, American investors and companies may be reluctant to invest in Cuba because of the potential risks of doing so.

This Note seeks to show that a bilateral investment treaty ("BIT") between Cuba and the United States will help increase the amount of foreign direct investment ("FDI") that flows to Cuba, both from United States investors as well as from other countries. The first part of this Note will describe aspects of existing bilateral investment treaties and current economic conditions in Cuba. It will also discuss the correlation between BITs and FDI. Section two, the analysis, begins based on the presumption that BITs increase FDI flows. The first part of the analysis section will describe current investor perceptions of Cuba and reasons why American investors might be afraid to provide large amounts of capital to operations in the country. The second part of the analysis section will then address research on current Cuban conditions and will show how a BIT

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1. Spanish for "show me the money." The phrase was popularized by the movie JERRY MAGUIRE (Gracie Films 1996).

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would help allay the fears of American investors as they plan a possible endeavor in Cuba. An international treaty for the protection of investments in Cuba would lower the cost of capital and signal to the world that the country plans to uphold significant protections in order to receive desperately needed FDI.

I. BACKGROUND

A. BILATERAL INVESTMENT TREATIES

BITs are international treaties, usually between a developed and developing country, that exchange promises to treat foreign investments fairly in the host country.[2] The general characteristics of BITs and the protections they provide demonstrate how they can help improve investor relations in Cuba.

1. History of BITs

Multiple factors led to the introduction and widespread use of BITs. Because international law did not take into account contemporary investment practices, BITs emerged.[3] Companies needed a regime that focused more on their investment needs and norms of international investment. Likewise, countries engaged in expropriation of foreign investments without proper compensation to companies or investors.[4] Previous agreements between countries usually lacked effective enforcement measures for foreign investors against host countries.[5] Part of this ineffectiveness stemmed from the fact that when an investor brought an action, the possible remedies only included negotiating with the host country; suing the host country in its own courts, if the investors could get past sovereign immunity; asking the home government to negotiate diplomatically on the

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2. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 405 (2008).

3. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 68 (2005).

4. *See* David Ma, Comment, *A BIT Unfair?: An Illustration of the Backlash Against International Arbitration in Latin America*, 2012 J. DISP. RESOL. 571, 572 (2012).

5. Salacuse & Sullivan, *supra* note 3, at 69.

company's behalf; or lobbying the home government to bring a claim before the International Court of Justice.[6] Investors could not bring a case against the host country before a neutral and detached arbitration panel.

There has been a lot of progress since the 1970s. BITs now increase the protection for foreign investors because they provide a comprehensive and specific set of international rules, like the ability to bring issues to international tribunals for enforcement.[7] Before BITs, the foreign investor needed to convince its home country to bring the claim, with no guarantee that the investor would receive any of the benefits from the litigation.[8] BITs helped change this by allowing the investor to sue the host country directly. Now there are over 2,000 BITs worldwide.[9] In 1982, the United States began its BIT program.[10] Since then, the United States has only signed six BITs with Central or South American countries.[11]

2. General Characteristics of BITs

"International investment is the flow of capital, technology and personnel abroad into ventures or joint ventures that mutually benefit the foreign investor and the host country."[12] In order to protect international investments in developing countries, developed countries sign BITs with the foreign governments.[13] Generally, the agreements indicate that foreign

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6. *See* Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 343 (2007).

7. *See* Salacuse & Sullivan, *supra* note 3, at 70.

8. Eustace Chikere Azubuike, *The Place of Treaties in International Investment*, 19 ANN. SURV. INT'L & COMP. L. 155, 155–56 (2013).

9. Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 2 (2005).

10. Todd S. Shenkin, Comment, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 548 (1994).

11. *See United States Bilateral Investment Treaties*, U.S. DEP'T STATE, http://www.state.gov/e/eb/ifd/bit/117402.htm (last visited Dec. 1, 2016); *see also* J. Steven Jarreau, *Anatomy of a BIT: The United States - Honduras Bilateral Investment Treaty*, 35 U. MIAMI INTER-AM. L. REV. 429, 431 (2004) (detailing the BIT between the United States and Honduras, which is the fourth treaty between the United States and a South or Central American country).

12. Shenkin, *supra* note 10, at 567.

13. *See* Yackee, *supra* note 2, at 405. It is rare for a BIT to be signed between two developed nations as only eleven of the 1,857 BITs are between

investors will receive "nondiscriminatory" treatment, "fair and equitable" treatment, or protection from "unreasonable" or "arbitrary" treatment.[14] The BIT creates a favorable investment climate in the host state at the time of entering the treaty.[15] Overall, it provides national treatment and eliminates most restrictions on production and capital remittances.[16] Foreign investors fear discriminatory treatment, but these standards help protect investors from any discrimination.

An investment treaty can include many different agreements and covenants. "These investment treaties act like economic bills of rights, which grant foreign investors substantive protections and procedural rights to facilitate investment."[17] The protections fall into four substantive areas: admission of foreign investors, treatment of foreign investments, redress for expropriation, and settlement of disputes.[18] The core treaty rights include the right to national treatment, most-favored-nation treatment, non-discriminatory treatment, fair and equitable treatment, and the right to compensation for expropriation.[19]

While BITs technically only govern issues arising under "investments," this term is usually defined by a combination of "(i) an illustrative list of assets specifically protected with (ii) an open-ended definition of investment, including all categories of assets, rights and interests. The result is a broad definition of investment that protects everything of economic value, virtually without limitation."[20] Having a broad definition allows investors

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developed countries. Hamilton & Rochwerger, *supra* note 9, at 6. Investment relations between developed countries are usually controlled by the Organisation for Economic Co-operation and Development (OECD). *Id.*

14. *See* Yackee, *supra* note 2, at 416.

15. Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 523 (1998).

16. *See* Hamilton & Rochwerger, *supra* note 9, at 10.

17. Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS. J. INT'L L. & POL'Y 47, 48 (2005).

18. *See* Hamilton & Rochwerger, *supra* note 9, at 9; *see also* Jarreau, *supra* note 11, at 431–32.

19. *See* Hamilton & Rochwerger, *supra* note 9, at 14–16. National treatment is considered the same treatment as the host country's own nationals. *Id.* at 14. Most-favored nation treatment means providing for no less favorable treatment than any other country in the host nation. *Id.* Fair and equitable treatment encapsulates the minimum standard of protection for aliens in customary international law. *Id.* at 15.

20. *Id.* at 12 (internal footnotes omitted).

to know that almost every issue would be covered by the treaty, and therefore subject to international arbitration.

There are many benefits to signing a BIT. First, it ensures United States companies who invest abroad will be treated as favorably as competitors from other nations.[21] Second, the treaty establishes clear limits on expropriation of investments.[22] Third, it provides United States investors with the ability to transfer funds into and out of the host country immediately while using the market rate of exchange.[23]

BITs also limit the ability of a foreign government to require investors to "adopt inefficient and trade-distorting practices."[24] Most importantly for this Note, BITs provide United States "investors the right to submit an investment dispute with the treaty partner's government to international arbitration."[25] Arbitration provisions are highly important because they are the enforcement procedural rights to the substantive rights in the treaty.

These benefits, however, do not come without criticism. Much of the criticism arises from the interactions between a powerful, developed country and a weak, developing country.[26] The developed country has superior bargaining power compared to that of the developing country when it comes to concessions of regulatory rights.[27] Furthermore, some believe the treaties are drafted to benefit the developed country's investors when investing in the developing country.[28]

Specifically for arbitration, critics focus on the threat of large judgments against developing countries and general arbitration expenses.[29] Two-thirds of filed treaty claims are against developing countries.[30] Rich companies can force states

21. *Id.* at 19.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 20.

27. *See* Azubuike, *supra* note 8, at 193–94; *see also* Hamilton & Rochwerger, *supra* note 9, at 25–26 (positing that developing countries must give up too many concessions to individual companies in order to attract their investments).

28. *See* Hamilton & Rochwerger, *supra* note 9, at 20.

29. Developing countries open themselves up to great risk by waiving sovereign immunity and opening up possible liability. *See* Franck, *supra* note 6, at 346.

30. Florence Shu-Acquaye, *The Protection of Foreign Direct Investments in Developing and Emerging Markets Through the Instrumentality of Arbitration:*

into expensive arbitration by simply claiming a host country's regulation interfered with the company's investment after the investment failed.[31] And while adverse awards are rare, they can be quite large, especially in relation to the resources of small, developing countries.[32] This threat of large awards rendered against developing states essentially ties the hands of host countries, making it harder to create new policies or regulations.[33] However, the benefits outweigh the criticisms because both countries receive their respective needs, whether that is developing countries' need for foreign capital or developed countries' search for new markets.

3. Do BITs Accomplish Their Intended Goals?

The BIT movement has three main goals: investment protection; promotion of foreign investment; and promotion of economic liberalization.[34] To determine if BITs deliver on these promises this Note analyzes the investment protection and promotion of FDI that comes from the treaties. Countries have different needs, and usually developed nations sign BITs to protect investments where developing nations sign them in order to promote investments.[35] Research shows that BITs do in fact protect investments through arbitration and this extra protection creates incentive for firms to increase foreign direct investment.[36]

Fair Game?, 9 FLA. A & M U. L. REV. 47, 74 (2013).

31. *See* Hamilton & Rochwerger, *supra* note 9, at 21–22.

32. *See* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA J. INT'L L. 397, 405 (2011) [hereinafter Yackee, *Alternative Evidence*].

33. *Id.* Arbitration interferes with sovereign authority, because "permitting private parties to bring suits against national sovereigns exerts 'an undue influence over the domestic conduct of a sovereign in ways that are detrimental either to the sovereign or to the people . . . .'" Ma, *supra* note 4, at 578.

34. *See* Salacuse & Sullivan, *supra* note 3, at 79.

35. *See* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 661 (1990).

36. *See* Salacuse & Sullivan, *supra* note 3, at 77; *see also* Ma, *supra* note 4, at 584.

a. BITs Provide Investment Protection and Arbitration Provisions

The "[c]entral problématique of foreign investment: an investment, once made, cannot easily be undone, and the investor who relies on the host state's initial promises of favorable treatment risks being rudely surprised when the host state later demands to renegotiate the terms of the original deal."[37] An arbitration clause helps ease this fear by providing investors with a procedural right to enforce the substantive rights laid out in the treaty.[38] These dispute resolution provisions grant investors access to binding international arbitration against the host country.[39] BITs raise the stakes for the developing country, as a violation of the treaty is also a violation of international law.[40] This increases risk for states that may be tempted to violate an investment treaty. Without an arbitration provision in the BIT, a foreign investor must rely on host country law for protection of the investment and enforcement of rights accorded in the treaty.[41] Relying on a host country's courts further increases the risk of investing abroad.

One of the most common forums for dispute resolution under investment treaties is the International Centre for Settlement of Investment Disputes ("ICSID").[42] "ICSID's purpose was to 'provide proceedings for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting States.'"[43] For ICSID to hear the matter, the issue must first meet jurisdictional requirements. ICSID requires an investment dispute between "a Contracting State . . . and a national of another Contracting State," and it also requires that both parties agree, in writing, to settle through ICSID arbitration.[44]

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37. Yackee, *supra* note 2, at 408. This problem also parallels the underlying ideas of the obsolescing bargain.

38. *See id.* at 409; *see also* Franck, *supra* note 6, at 339–40.

39. Yackee, *supra* note 2, at 405.

40. *See id.* at 406.

41. *See* Salacuse & Sullivan, *supra* note 3, at 75.

42. Hamilton & Rochwerger, *supra* note 9, at 51. ICSID is a part of the World Bank Group. Salacuse & Sullivan, *supra* note 3, at 69.

43. Shu-Acquaye, *supra* note 30, at 65.

44. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(1), *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966); Sue-Acquaye, *supra* note 30, at 66; *see* Jarreau, *supra* note 11, at 492.

In a Cuba-United States relationship, the United States would seek to protect rather than promote American investments in Cuba. BITs protect investments through rules the host country must follow regarding the foreign investment and provide processes for enforcing those rules, usually through international arbitration.[45] A BIT provision that is coupled with enforcement mechanisms constitutes an external check on governments' behavior.[46] While a dispute between a foreign investor and host nation is only covered if it falls under the definition of investment, BITs provide for a very broad definition of investment, thereby allowing almost any conflict to fit under the arbitration provision.[47]

The right to arbitrate is the most significant right provided by BITs.[48] BITs changed the previous dispute resolution system by allowing companies to bring a suit against the government without regard for the home country's political interests.[49] It allows the investor to bypass sovereign immunity and arbitrate against the host country.[50] Further, investor-state arbitration differs from traditional international commercial arbitration because the basis of the dispute comes from treaties between states rather than private agreements.[51] International arbitration has risen to become the preferred mechanism for resolving international investment conflicts.[52] Arbitration enhances protection because it is separate from political interests and shields against any possible discrimination within the host country's courts. The number of investor-state disputes has risen sharply to a point where more than half of all the cases ICSID has heard have started within the last five years.[53] The

45. *See* Salacuse & Sullivan, *supra* note 3, at 79.

46. *Id.* at 89.

47. *See id.* at 80. A broad definition of investment allows for more issues to be brought under the treaty and therefore resolved through international arbitration; s*ee also* Hamilton & Rochwerger, *supra* note 9, at 12. However, sometimes the definition of investment relies on the host country's definition, i.e. it must fall under that country's definition in domestic property law. Stephen R. Halpin III, Note, *Stayin' Alive?:* BG Group, PLC v. Republic of Argentina *and the Vitality of Host-Country Litigation Requirements in Investment Treaty Arbitration*, 71 WASH. & LEE L. REV. 1979, 1989 (2014).

48. *See* Ma, *supra* note 4, at 575.

49. *See* Salacuse & Sullivan, *supra* note 3, at 88; *see also* Ma, *supra* note 4, at 575.

50. Halpin, *supra* note 47, at 1981.

51. Hamilton & Rochwerger, *supra* note 9, at 44.

52. Halpin, *supra* note 47, at 1980.

53. Hamilton & Rochwerger, *supra* note 9, at 43, 55.

growth of BIT arbitration demonstrates the increasing reliability of ICSID and the stability of the arbitration mechanism.

BITs help separate foreign investments from possibly corrupt governments, because the applicable law typically includes the BIT, the domestic law of the host country, and general principles of international law.[54] In terms of procedure and enforcement, the arbitration state's laws govern.[55] Sometimes the investor is allowed to choose the governing law, but usually the parties decide this issue before signing a treaty.[56] The investor normally chooses the forum for arbitration,[57] which typically results in the selection of international arbitration from either an organization like ICSID or a third-party nation.[58]

Despite the benefits of the arbitration system, it is still subject to some criticism. The first major point of contention is the inconsistency in decisions. Critics believe this inconsistency has impacted the stabilizing effect of BITs, making investors less confident in arbitration systems.[59] As Franck explains:

> For example, in the *SGS* cases, SGS provided customs services to governments, such as Pakistan and the Philippines, under service contracts. There were problems under those contracts. SGS brought a claim against Pakistan under the Swiss/Pakistan treaty alleging a violation of the so-called "umbrella clause;" likewise, SGS brought a claim against the Philippines for a violation of a textually similar "umbrella clause" in the Swiss/Philippines BIT. The issue for both tribunals was whether the "umbrella clause" transforms a breach of

54. *See generally id.* at 49 (explaining that arbitral tribunals will significantly rely on public international law in adjudicating the dispute because the "typical treaty rights" at issue have been "the subject of considerable doctrine and jurisprudence in public international law").

55. *See* Halpin, *supra* note 47, at 1983–84, 1992. In *BG Group, PLC v. Republic of Argentina*, the U.S. Supreme Court held that if parties chose the United States as the seat of arbitration to enforce an award under a BIT, then the courts of the United States should assume that the treaty members expected United States law regarding enforcement of awards to control. *Id.* at 1983–84.

56. Hamilton & Rochwerger, *supra* note 9, at 52.

57. *See id.* at 51.

58. *See* Franck, *supra* note 17, at 54.

59. *See* Ma, *supra* note 4, at 576–77.

> contract into a breach of treaty. Essentially, one tribunal said "yes" and the other said "no."[60]

Arbitration awards do not technically have official precedential value; however, arbitrators often consider previous decisions when faced with a similar issue.[61] This can affect the later analysis of whether BITs increase FDI because "[l]egal inconsistencies in the area of investment arbitration affect foreign investment decisions, economic development, and foreign relations."[62] Even though decisions have the possibility of inconsistency, the international fora are still the preferred method of dispute resolution.

The second criticism of arbitration under BITs is whether the protection is actually needed. Most BITs are signed with countries that already have a favorable investment climate that includes protection and regulation of foreign investments.[63] Similarly, some countries that signed BITs without arbitration rights or protections still have large amounts of FDI.[64] Essentially, these critics argue that the BIT is not the cause, but rather just correlates with investment-friendly environments. However, research shows that investment flows are higher for countries with a BIT and a strong institutional capacity as compared to countries with a BIT alone; therefore, a BIT complements rather than substitutes strong domestic institutions.[65]

The third criticism is that BITs are not impactful because companies may be investing abroad regardless of the risks in order to gain a place in the market, if the conditions are stable enough, or the substantive and procedural rights are sufficient

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60. *See* Franck, *supra* note 17, at 59, n.48.

61. *Id.* at 56–57.

62. *Id.* at 57. Inconsistency would lower FDI because it detracts from the stabilization effect BITs are intended to have. Franck also notes that inconsistency may signal error or create perception of unfairness. *See id.* at 57–58. However, in her research she found that arbitration is fair overall after comparing how the level of development for each country affects the arbitration outcome. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 473 (2009).

63. *See* Azubuike, *supra* note 8, at 191. If a host country only provides the protection required by the BIT then it is probably not a country with a climate fostering investments, so the exporting country should likely not sign a BIT with the host country. Vandevelde, *supra* note 15, at 523.

64. Franck, *supra* note 6, at 357.

65. *See* Salacuse & Sullivan, *supra* note 3, at 104.

without the treaty.[66] However, Cuba does not fall into any of these listed categories, and therefore a BIT is needed as an extra incentive or protection for investors.

b. BITs Help Developing Countries Increase FDI

Competition among developing countries to attract foreign capital encourages BITs.[67] BITs are tools for promoting and legally protecting foreign investments.[68] Some studies have suggested that, in general, states benefit from entering into BITs in that they enjoy larger amounts of foreign investment states.[69] FDI in turn influences the world economy by promoting the transfer of capital, technology, and managerial skills.[70] The correlation between BITs and FDI is noticeable because, while the number of investment treaties increased from 1973 to 2000, global FDI also increased from $25 billion to $1.1 trillion in that timeframe.[71] Industrialized countries are more likely to be the source of foreign capital while developing countries receive investment flows.[72]

The major assumption underlying the relationship between BITs and FDI is: a "[b]ilateral treaty with clear and enforceable rules to protect and facilitate foreign investment reduces risks that the investor would otherwise face and that such reductions in risks, all things being equal, encourage investment."[73] BITs reduce risk both by stabilizing a host country's existing investment environment and fortifying weak domestic laws and institutions.[74] Signing a treaty says a lot about a country's

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66. *See* Franck, *supra* note 6, at 357–64 (explaining the "Place Holding Model" and the "Political and Economic Reality Model" for why investors may be willing to launch endeavors in developing countries).

67. *See* Yackee, *supra* note 2, at 406; *see also* Andrew T. Guzman, *Why Do LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 670–71 (1998).

68. *See* Hamilton & Rochwerger, *supra* note 9, at 1.

69. Yackee, *supra* note 2, at 407; *see also* Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567, 1582 (2005).

70. Jarreau, *supra* note 11, at 429.

71. *See* Salacuse & Sullivan, *supra* note 3, at 71; *see also* Franck, *supra* note 6, at 338 (explaining how FDI increased from $200 billion in 1990 to over $1 trillion in 2000).

72. Salacuse & Sullivan, *supra* note 3, at 95.

73. *Id.* at 77; *see also* Ma, *supra* note 4, at 584.

74. Shu-Acquaye, *supra* note 30, at 74.

commitment to protecting foreign investment.[75] Signing a BIT raises the standards of the relationship between the country and investor to be consistent with international law, making it harder for the host country to detrimentally change regulations.[76] These assumptions impact FDI flows in three key ways: first, overall FDI increases in the developing country by signing a treaty with any country; second, a United States BIT increases the amount of United States investments flowing into the developing country; and third, a United States BIT increases the amount of overall FDI flowing to the developing country from other countries.

According to research, the idea that signing a BIT with any country generally increases overall FDI inflow is the least certain. While a United Nations Conference on Trade and Development ("UNCTAD") study showed a correlation between BITs as determinants of FDI flows,[77] another study performed by the U.N. in 1988 found there was no apparent relationship between the number of bilateral agreements and volume of FDI.[78] One possible explanation could be that the UNCTAD study occurred after the U.N. study, and especially at a time when BITs were gaining momentum.[79] BITs did not have much popularity until the late 1980s and early 1990s. Another possible explanation in the discrepancy between studies is the availability or emphasis on international arbitration provisions. In a study by Tobin and Ackerman, the results showed that a BIT could create a negative effect for risky countries initially, but once they achieved a minimally low level of political risk, BITs became important tools for attracting FDI.[80]

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75. Signing is a way to "credibly commit" to the promise of treating investors fairly. Yackee, *supra* note 2, at 408. "However the existence of an investment treaty is an important variable that may affect decision to invest internationally." Shu-Acquaye, *supra* note 30, at 55.

76. *See* Salacuse & Sullivan, *supra* note 3, at 96.

77. *See id.* at 101. In fact, the UNCTAD study found in one regression that for each BIT signed in 1993 there was an associated $162 million USD increase in FDI flows in 1995. *Id.* at 102.

78. *Id.* at 100; *see also* Yackee, *Alternative Evidence*, *supra* note 32, at 409–10 (discussing the Aisbett study, which found that when corrected for endogeneity, autocorrelation, and omitted variables, the correlation between BIT and FDI inflows disappeared).

79. *Contra* Salacuse & Sullivan, *supra* note 3, at 102 (explaining some of the signal power of signing a BIT may have weakened in the 1990s because investors began to see BITs as a normal feature of the investment structure).

80. Franck, *supra* note 6, at 351; *see also* Yackee, *Alternative Evidence*, *supra* note 32, at 410 (describing Kerner's study showing that BITs induced a $600 million increase in FDI).

While the broad statement that BITs increase overall FDI has researchers on both sides of the fence, the research shows a stronger relationship between a United States BIT and the promotion of United States investments.[81] "[A] U.S. BIT is correlated with a major increase in (at a 1% significance level) U.S. FDI outflows to a given country, ceteris paribus, compared to U.S. flows to a country without a U.S. BIT . . . ."[82] A separate study conducted by Egger and Pfaffermayr found that a BIT is associated with a 30 percent increase in outflows from the exporting country.[83] Therefore, signing a United States BIT has a high likelihood of increasing the amount of foreign investment the host country would receive from American investors.

A United States BIT is more likely than not to have a positive role in promoting overall investment, or increasing FDI inflows from other countries.[84] One study found that a United States BIT correlates with an additional billion dollars per year in FDI not only from the United States, but also from all countries.[85] United States BIT coefficients range from .77 to .85, meaning that a BIT with the United States results in an increase in FDI for a host country in a given year by 77 percent to 85 percent.[86] Finally, a BIT with the United States has shown to relate to an increase in FDI in the developing state from Organisation for Economic Co-operation and Development ("OECD") countries compared to FDI flows from OECD to countries without a BIT with the United States.[87] A United States BIT creates a compounding effect because, not only does a developing country receive an increase in FDI from United States investors, but it also paves the way for more investors from OECD countries.

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81. Salacuse & Sullivan, *supra* note 3, at 105.

82. *Id.* at 109.

83. Yackee, *Alternative Evidence*, *supra* note 32, at 408.

84. *See generally* Salacuse & Sullivan, *supra* note 3, at 111 (detailing the multiple ways a United States BIT promotes investment).

85. *Id.* at 109. *Contra* Franck, *supra* note 6, at 351 (detailing the study by Tobin and Ackerman, which found that signing a BIT with the United States does not increase FDI inflows).

86. Salacuse & Sullivan, *supra* note 3, at 105.

87. *See id.* at 104. A study by Hallward-Driemeier argued that bilateral FDI flows from OECD countries to developing countries is insignificantly correlated, or even negatively associated with FDI, yet the study considered bilateral FDI flows rather than the FDI inflows to developing countries. Yackee, *Alternative Evidence*, *supra* note 32, at 407.

B. BACKGROUND ON CUBA

Cuba has a unique economic history. This section will describe that history, as well as the nation's governmental structure. It will then detail how Cuba is in need of foreign investors to help grow its economy.

1. History of Foreign Investment in Cuba and Political Backdrop

Cuba once had an established and stable economy. During the Soviet Union era, Cuba exported large amounts of sugar and low-cost primary goods.[88] The country received subsidies from the Soviet Union totaling around four to six billion dollars a year.[89] However, when the Soviet Union fell, Cuba suffered severe shortages of necessary supplies while its GDP dropped 40 percent from 1989 to 1993.[90] Exports dropped by 79 percent and imports fell by 75 percent during this same time period.[91] Since that time, compounded by the United States embargo, Cuba has suffered from instability in its markets.[92]

Cuba's constitution ("The Socialist Constitution of 1976") established Cuba as a socialist state and created an economic system with state ownership of the means of production.[93] Slowly, the country has opened its economy to foreign investment. In 1992, Cuba amended its constitution to allow ownership of property by foreign investors.[94] Two years later, it opened the entire economy to foreign investment except for the public health, education, and armed forces sectors.[95] One of the largest remaining barriers to furthering FDI inflows in Cuba is the bureaucratic structure of the government and process for

88. *See* Lucy V. Katz, *Arbitration as a Bridge to Global Markets in Transitional Economies: The Republic of Cuba*, 13 WILLIAMETTE J. INT'L & DISP. RESOL. 109, 124–25 (2005).

89. *Id.* at 124.

90. *See id.* at 125.

91. *Id.* at 124–25.

92. *See id.*

93. *See id.* at 127.

94. *See* Matias F. Travieso-Diaz & Armando A. Musa, *Cat on a Hot Tin Roof: The Status of Current Foreign Investors in a Post-Transition Cuba*, 37 GEO. WASH. INT'L L. REV. 885, 887 (2005).

95. *Id.*; *see also* Matias F. Travieso-Diaz & Alejandro Ferrate, *Recommended Features of a Foreign Investment Code for Cuba's Free Market Transition*, 21 N.C. J. INT'L L. & COM. REG. 511, 519 (1996).

approving foreign investment.[96] For years this idea of socialism has stood in opposition to the capitalist ideals of United States investors.

The most notable difference between Cuba and other transitioning economies is evidenced by its current embargo. Before the embargo, trade between the United States and Cuba exceeded one billion dollars, amounting to 70 percent of Cuba's foreign investment inflows.[97] However, after a series of expropriations amounting to 2.25 million acres and two billion dollars in property, the United States responded with an embargo against all exports.[98] The embargo currently prohibits direct and indirect transactions, both imports and exports, between Cuba and the United States, except for certain medical and agricultural goods.[99] Further restrictions added under the 1992 Cuban Democracy Act ("Torricelli Bill") prohibited foreign subsidies of United States companies from trading with Cuba, United States citizens from travelling to Cuba, and family remittances to the country.[100]

Most recently, the United States' Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995 ("Helms-Burton Act") solidified the executive orders pertaining to the embargo, making it so only Congress can modify or lift the embargo.[101] Regarding investors, Title III of the Helms-Burton Act places foreign investors at risk of lawsuit for violating the embargo.[102] The United States-Cuba embargo has led to shortages in food, medicine, and necessary supplies in Cuba.[103] Even though the United States is the only country that has implemented an embargo with Cuba, the United States actively discourages other countries from allowing investments in Cuba.[104] Now,

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96. *See* Matias F. Travieso-Diaz & Charles P. Trumbull, *Foreign Investment in Cuba: Prospects and Perils*, 35 GEO. WASH. INT'L L. REV. 903, 923 (2003).

97. *See* Christine Zack, Comment, *Globalization's Unlikely Opportunist: Castro's Cuba Shapes the Paradigm for Economic and Political Stability in Latin America*, 11 TUL. J. INT'L & COMP. L. 355, 358 (2003).

98. *Id.* at 358–59.

99. Katz, *supra* note 88, at 123–24.

100. *See* Zack, *supra* note 97, at 360.

101. *Id.* at 363.

102. *See id.*; *see also* Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995, 22 U.S.C. § 6082 (2014).

103. *See* Katz, *supra* note 88, at 125.

104. Travieso-Diaz & Trumbull, *supra* note 96, at 920.

many investors are unsure of the current landscape, especially when attempting to judge the risk of a potential investment.

2. Cuba's Desperate Need for Foreign Capital

As the increase in interdependence of national economies continues, a nation must participate in international markets to reach an acceptable level of economic growth.[105] To participate in these international markets, Cuba and other communist nations have been forced to liberalize their economies.[106] Cuba's economy is unique not only because it is transitioning into a free-market economy, but also because it continues to impose constraints on foreign investments during this transition.[107] Continued liberalization is necessary to have a completely flourishing economy.

The Cuban government has taken a series of steps to liberalize its economy. First, Law 50 allowed foreign investors to form associations, or joint ventures, with state-owned enterprises.[108] Law 50, however, did not end up promoting FDI because the legislation included a number of restrictions.[109] Second, in 1995 the legislature passed Law 77, which was a large step towards liberalizing Cuba's investment regime.[110] In an attempt to align its economy with international norms, Cuba partially opened its economy in the 1990s by allowing some

105. *See* Katz, *supra* note 88, at 109.

106. *Id.* at 109–10. Economic liberalism means the market, rather than the government, controls economic decisions. *See* Salacuse & Sullivan, *supra* note 3, at 90. BITs help liberalize the economy by facilitating the entry of foreign investment and establishing conditions favorable for such investments. *Id.* at 76.

107. *See generally* Travieso-Diaz & Ferrate, *supra* note 95, at 527–28 (detailing the multiple ways in which Cuba's regulatory environment places constraints on foreign investment). Cuba's government continues to only allow investments that further its economic programs and do not compete with state-owned enterprises. Travieso-Diaz & Trumbull, *supra* note 96, at 921. Also, the government restricts foreign investments to joint ventures with companies that have a social objective related to the investment, which means the investor needs to find a Cuban company allowed to conduct the proposed business. *Id.* at 922.

108. *See* Travieso-Diaz & Trumbull, *supra* note 96, at 907. Law Decree 50 of 1982 was the first foreign investment code for Cuba. Travieso-Diaz & Ferrate, *supra* note 95, at 516.

109. *See* Travieso-Diaz & Trumbull, *supra* note 96, at 907.

110. *See* Travieso-Diaz & Musa, *supra* note 94, at 888; *see also* Travieso-Diaz & Ferrate, *supra* note 95, at 521; Travieso-Diaz & Trumbull, *supra* note 96, at 909.

private ownership of business enterprises.[111] Foreign investors may now participate in joint ventures with state-owned enterprises, and foreign-owned property cannot be expropriated without compensation.[112] Law 77 allowed funding of joint ventures, international economic associations, and companies solely with foreign capital.[113] The banking reform in 1997 separated the central bank from the commercial banking system, thereby facilitating operations and foreign investments.[114] Law 77 still protects the socialist regime by requiring companies to pay the government for the workers' labor, which in turn pays the workers in pesos.[115] Liberalizing the economy allowed more foreign investors to enter the nation, further developing the economy.

Most recently, the legislature passed a new foreign investment act opening investment in all economic sectors.[116] It still restricts foreign investment in the public health, education sectors, and armed forces. Foreign investment must receive an authorization from the Council of State or another authority after submitting the business proposal to the Ministry of Foreign Trade and Foreign Investment ("MINCEX").[117] The law provides guarantees to those properly authorized, but still allows for expropriation in some instances.[118]

In 2001 FDI inflows for Cuba were $1.9 billion.[119] While this is a significant amount, it is relatively low compared to other Central American and Caribbean countries.[120] The next section will show how a BIT with the United States will help increase this amount and place Cuba among its neighbors in terms of FDI inflows.

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111. Katz, *supra* note 88, at 129.

112. *Id.* at 130; *see also* Law No. 77, Foreign Investment Act of 1995 (Cuban legislation).

113. Travieso-Diaz & Musa, *supra* note 94, at 888–89; *see also* Law No. 77.

114. *See* Travieso-Diaz & Trumbull, *supra* note 96, at 916.

115. *See* Travieso-Diaz & Ferrate, *supra* note 95, at 522.

116. Ley Número 118 Foreign Investment Act (Mar. 29, 2014), http://www.cubadiplomatica.cu/LinkClick.aspx?fileticket=IsdG-CVp5To%3D&tabid=21894. Law 118 also repealed Law 77. *Id.*

117. Raul J. Valdes-Fauli, *What Does the New Cuban Foreign Investment Act Mean?*, FOX ROTHSCHILD (Jul. 2014), http://www.foxrothschild.com/publications/what-does-the-new-cuban-foreign-investment-act-mean/.

118. Law number 118.

119. Travieso-Diaz & Musa, *supra* note 94, at 891.

120. *See id.*

II. ANALYSIS

Research shows that BITs help increase FDI in developing nations.[121] Cuba is in desperate need of foreign capital and is slowly opening itself up to foreign investment.[122] A BIT with the United States will help Cuba attract the foreign capital it needs by subduing the fears of American firms as they look to Cuba as an investment option.

A. CUBA'S INVESTMENT CLIMATE IS READY FOR HIGHER FDI FLOWS

Cuba has shown steady improvement in attempting to attract foreign investors and its regulatory framework has slowly opened to allow foreign investment.

1. Current Economic Conditions in Cuba

Cuban law is a mixture of European civil law and socialism, but as a transitional country it needs to liberalize its market to meet capitalist needs.[123] Cuba must include international business norms and provide stability and predictability in any new law intended to promote foreign investment.[124] The impetus behind this change comes from the nation's desperate need of FDI because it has no other significant source of foreign capital.[125] Cuba needs foreign investment as a source of hard currency in order to reverse the contraction of its economy.[126]

After the collapse of the Soviet Union, Cuba began making changes in foreign investment and trade regulations to attract foreign capital.[127] Law 77 account for much of the progress

121. *See* Salacuse & Sullivan, *supra* note 3, at 105–07.

122. *See generally* Travieso-Diaz & Musa, *supra* note 94, at 891 (stating that since 2001, new ventures and total amount of new foreign investment in Cuba have declined immensely).

123. *See* Katz, *supra* note 88, at 109–10, 126. Cuba is a transitional economy because it attempts to keep socialism and large parts of its domestic economy under the control of the state. *Id.* at 111.

124. *Id.* at 129.

125. *See* Travieso-Diaz & Trumbull, *supra* note 96, at 904. Cuba receives virtually no aid from foreign governments or international organizations, and it is unable to receive loans from multinational institutions due to its history of defaults. *Id.*

126. Travieso-Diaz & Ferrate, *supra* note 95, at 513.

127. *See* Katz, *supra* note 88, at 125.

during this time period. While Cuba has made progress since it cut ties with the Soviet Union, restraints on foreign investment remain. "The main reason for this failure [of attracting foreign investment] 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."[128] The largest barrier is internal, caused by bureaucratic management systems.[129] Law 77 changed the process for investment approval, but it is cumbersome and unpredictable.[130] For Cuba to attract more foreign investment, the country must loosen its control over the process, making it easier for investors to enter. However, attracting foreign investment contradicts Cuba's desire to maintain its socialist structure.

In addition to bureaucracy, other restraints on progress exist. One restraint on foreign investment is the fear that investors under the Castro regime could be in legal trouble if a new government takes over. This theory comes from the idea that foreign investors may be considered accomplices to human rights violations if they hire foreign workers.[131] Another restraint is the requirement to protect Cuba's current exports, its government imposed more barriers to foreign investment by prohibiting investments directed at developing the Cuban internal market.[132] Finally, the government can terminate joint ventures at will.[133] While most of these barriers do not pose significant risks to a foreign investment after it has commenced in the country, it does affect the investor's perceptions and willingness to even begin the endeavor.

2. Investors' Perceptions and Experience in Cuba

The United States has minimal numbers of investors in Cuba. By analyzing other countries' experiences in Cuba, we can see how foreign investors perceive Cuba and are treated in the country after establishing different investments. Between 1990 and 1999, foreign investment in Cuba reached between 1.3

128. Travieso-Diaz & Trumbull, *supra* note 96, at 944.
129. *See id.* at 939.
130. Travieso-Diaz & Ferrate, *supra* note 95, at 521–22.
131. *See* Travieso-Diaz & Musa, *supra* note 94, at 885, n.3.
132. Travieso-Diaz & Ferrate, *supra* note 95, at 527.
133. *Id.* at 528.

billion and 1.7 billion dollars.[134] This coincides with the time of rapid BIT expansion across the globe. In 2002, Spain was the leading investor in Cuba, followed by Canada, Italy, and finally France.[135] In terms of overall investment money flowing into Cuba, the largest sources are Canada, Italy, Mexico, and Australia.[136] Cuba has an effective BIT with Mexico, Italy, Spain, and France, but not with Canada or Australia.[137] Eight of Cuba's top ten investing countries signed BITs with Cuba, demonstrating that most of the top sources of FDI have signed BITs with Cuba.[138]

A total of 540 enterprises with foreign investors have been established in Cuba.[139] These statistics show a significant number of countries and companies believe that the investment opportunity outweighs the inherent risk of investing in Cuba. Foreign ownership is allowed in the nation for all sectors of the economy except for education, armed forces, and private residential dwellings.[140] In fact, by the time United States trade amounted to $38.155 billion, United States companies had already entered markets for healthcare, food, and agriculture products.[141] For other foreign investors, the largest sector areas are tourism, telecommunications, and mining; with tourism the most dominant sector.[142] The country could be a prime market for investment, especially in the areas of public utilities and infrastructure.

BITs signed with Cuba follow the generally accepted norms of most BITs. By 2002, the nation had signed over 60 BITs with other countries. [143] "[C]uba has negotiated a series of bilateral

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134. Jorge F. Pérez-López & Matias F. Travieso-Diaz, *The Contribution of BITs to Cuba's Foreign Investment Program*, 32 L. & POL'Y INT'L BUS. 529, 558–59 (2001).

135. *See* Travieso-Diaz & Musa, *supra* note 94, at 891.

136. *See* Katz, *supra* note 88, at 131.

137. *See International Investment Agreements Navigator: Cuba*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, http://investmentpolicyhub.unctad.org/IIA/CountryBits/52 (last visited Apr. 5, 2016); *see also* Pérez-López, *supra* note 134, at 560 tbl.2 (depicting an individual country's amount of investment in Cuba and whether they signed a BIT).

138. *See* Pérez-López, *supra* note 134, at 560.

139. Travieso-Diaz & Trumbull, *supra* note 96, at 917.

140. *See* Katz, *supra* note 88, at 130.

141. *Id.* at 112. Investing in these markets aligns with the policies and restrictions put forth in the embargo. Note, these numbers represent trade amounts and not FDI or ownership values.

142. *See id.* at 131; *see also* Travieso-Diaz & Musa, *supra* note 94, at 892.

143. Travieso-Diaz & Trumbull, *supra* note 96, at 916.

investment treaties, or BITS. Such agreements have become a common way to reduce political risk in international investment."[144] The scope of Cuban BITs, set by the definition of "investments," is very similar to the general model for defining investments in BITs.[145] Cuba's BITs also recognize the most-favored-nation treatment and expropriation clauses calling for compensation that is immediate, adequate, and effective.[146] Finally, they have non-discrimination clauses, which provide more protection than is given under Cuban legislation.[147] Not only do these existing BITs show that the treaties provide internationally accepted protections, they also show Cuba's commitment to expanding and honoring its BITs.

Along with international investment agreements, Cuba has experience with foreign investment disputes and arbitration. Cuba has already been using a dispute resolution system with a neutral international forum and choice of law clauses, showing the nation's respect for the process; thereby reducing investment risk.[148] Its foreign trade arbitration court is quite developed as arbitrators are trained in international commercial law and participate extensively in international arbitration organizations.[149] These measures for increasing the independence of arbitration mechanisms place emphasis on how a BIT would be effective, because BITs are most effective when a country already has an existing favorable climate for investments.

Arbitration under current Cuban BITs differs slightly from Cuba's own arbitration systems. Disputes regarding the interpretation and implementation of the treaty are encouraged to be resolved through diplomatic measures and then by an ad hoc arbitral panel, if necessary.[150] Each country chooses one of

144. Katz, *supra* note 88, at 132,

145. *See* Pérez-López, *supra* note 134, at 543 ("Cuban BITs define 'investments' as every kind of asset or right accrued in accord with domestic legislation of the country where the investment took place.").

146. *See id.* at 547–48, 551. Under the most-favored-nation treatment, "each party commits to grant to investors of the other party the same treatment (i.e., no less favorable treatment) as that accorded to domestic investors, under national treatment, or to investors of a third country, under most-favored-nation treatment, engaged in similar activities." *Id.* at 547–48.

147. *Id.* at 557.

148. *See generally* Katz, *supra* note 88, at 132 (describing Cuba's close connections with the International Chamber of Commerce International Court of Arbitration (ICA)).

149. *See id.* at 134.

150. *See* Pérez-López, *supra* note 134, at 552.

the three panel members, then together the two selected members choose the third neutral member.[151] This process generates equal participation in the selection of a neutral panel. For investor-state issues, they also have a six-month period for settlement negotiations before a dispute can move to binding arbitration using international dispute settlement mechanisms (e.g. International Chamber of Commerce or the United Nations Commission on International Trade Law).[152] The framework exists in Cuba for investors to begin to fully participate in the country. A BIT coupled with the slowly liberalizing economy could exponentially increase FDI in Cuba.

B. A BIT BETWEEN THE UNITED STATES AND CUBA WOULD REDUCE THE REMAINING RISKS ASSOCIATED WITH INVESTING IN CUBA AND WOULD INCREASE FDI

While Cuba is slowly liberalizing its economy, some risks remain that would affect investors' decision to invest money in a foreign country. Investors may be weary of investment opportunities because the embargo created such a unique relationship between the United States and Cuba. A BIT will provide further protection for foreign investors from the Cuban government and it will increase the amount of FDI inflow to Cuba.

1. Protection from the Cuban Government

Trumbull argues that Cuba needs reform in order to increase investment and that new laws "[s]hould have three main characteristics: 1) it should afford equitable, non-discriminatory treatment to foreign investors; 2) it should provide adequate protection to the investors' property; and 3) it should establish a simple and effective regulatory framework."[153] A BIT accomplishes all of these measures without having to change the host state's laws or go through the lengthy legislative process, except for BIT ratification.

Furthermore, arbitration is a key factor in a transitional country for liberalizing its economy and "[o]ne of the more acute

151. *Id.* at 552.

152. *See id.* at 553. Cuba's BITs vary in regard to the dispute settlement body. *Id.* at 554–55.

153. Travieso-Diaz & Trumbull, *supra* note 96, at 939.

needs of a transitional economy seeking to increase foreign trade is a system for resolving disputes among private economic entities, as well as disputes between private entities and the host state or state-run enterprises."[154] BITs provide a separate arbitration and dispute resolution mechanism that would help a transitional economy bring its practices in line with international norms. As shown earlier, BITs increase the amount of protection provided for foreign investors. This would reduce the risk of investing in Cuba because United States investors would know they could turn to international, independent fora for a fair result.

In addition to arbitration provisions, BITs provide protection through consequences associated with failing to abide by the treaty. Even if there were no enforcement measures available, a country that fails to follow a BIT would suffer immensely from the withdrawal of FDI and investor prospects.[155] Breach of a BIT would be considered a breach of international treaty law further disrupting the relationship between a host nation and the investing nation. The treaties have "[a] signaling or reputation-building effect for governments that enact the treaties."[156] Cuba signing a BIT demonstrates its commitment to protecting foreign investors. Cuba will be strongly dissuaded from violating the treaty with the United States because doing so would result in a decrease in foreign investments from the United States and many other countries. Both these heightened consequences for violation and procedural rights granted to investors lower the risk for companies as they plan expansion in Cuba.

2. The BIT Will Increase FDI from the United States and Other Countries in General

The existence of previous foreign investments in Cuba from the United States is evidence that the nation has a high capacity for foreign investment when the proper investment climate is established.[157] BITs strengthen relations between nations, resulting in increased trade, foreign aid, security assistance, and

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154. *See* Katz, *supra* note 88, at 110.

155. Pérez-López noted that there is a consensus among developed and developing countries that protection of investments is in the country's national interest. Pérez-López, *supra* note 134, at 532.

156. Franck, *supra* note 6, at 347.

157. *See* Travieso-Diaz & Musa, *supra* note 94, at 886.

technological transfers for developing countries.[158] BIT growth in the 1990s resulted from a decrease in foreign aid for developing countries and their difficulty in obtaining foreign financing via debt.[159] Cuba suffers from an inability to obtain foreign aid or multinational bank loans. A BIT with the United States would provide a source of foreign capital, thereby stabilizing the Cuban economy.

BITs increase FDI generally, and signing a treaty with the United States increases flows from United States and other countries' investors. "[T]he less developed the country (thus with fewer overall BITs), the more apparent effect any one BIT will have."[160] Cuba must promote foreign investment to aid economic development and BITs are one way to pursue investment promotion.[161] Other transitioning states that have signed BITs have seen large increases in FDI. Also, most of Cuba's top foreign investors come from countries that have investment treaty agreements with Cuba. This shows how the United States could be included among these investors as long as the two countries can form an agreement on investments.

Finally, Cuba stands ready to become a future trading partner of the United States. [162] United States companies are incentivized to invest in Cuba due to the nation's geographic location and economic needs. The embargo shows significant signs of wear,[163] and companies are interested in expanding into Cuba. The softening of the United States' approach to Cuba is caused by multiple factors: the frustration with an ineffective unilateral economic sanction; national openness to having normal trading relations with China and Vietnam, but not Cuba; and perhaps most importantly, lobbying efforts by United States

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158. *See* Ma, *supra* note 4, at 583.

159. *See* Pérez-López, *supra* note 134, at 532.

160. Salacuse & Sullivan, *supra* note 3, at 106.

161. *See id.* at 77; *see also* Shenkin, *supra* note 10, at 578 ("[F]oreign investment is one of the best ways for developing nations to attract badly needed development capital.").

162. *See* Antonio R. Zamora, *Foreign Investment in Cuba: A U.S. Perspective*, 14 PROB. & PROP. 57, 57 (2000).

163. *Id.*; *see also* Karen DeYoung et al., *Obama Begins Historic Visit to Cuba*, WASH. POST (Mar. 20, 2016), https://www.washingtonpost.com/world/national-security/as-cubans-wait-for-obama-tension-and-excitement-on-havanas-streets/2016/03/20/78726756-eed1-11e5-89c3-a647fcce95e0_story.html; *Obama to Congress: "Lift the Cuba Embargo,"* HAVANA TIMES (Jan. 12, 2016), http://www.havanatimes.org/?p=116059 (detailing President Obama's remarks, given after the United States re-opened diplomatic relations with Cuba).

businesses that want to expand to new markets.[164] Additionally, making investments in Cuba creates a natural gateway for trade between North America and Latin America.[165] Most countries investing in Cuba have a BIT for added protection, and the United States should follow suit. Thus, entering a BIT would benefit both parties: Cuba would see FDI increases; and American businesses would expand their footprint.

III. CONCLUSION

BITs help investors feel more secure in investing in developing countries, leading to more investments. Such an increase helps developing countries generate more capital for further growth. A BIT between the United States and Cuba would serve to increase foreign investors' confidence in Cuba's treatment of foreign investments. It will also provide desperately needed capital to a country in economic transition. Investors would feel more comfortable as the BIT provides procedural rights of enforcement and Cuba's position is such that trade between the two countries would be highly, and mutually, beneficial. The only remaining question is whether they can reach an agreement after years of distaste and broken relationships.

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164. *See* Zamora, *supra* note 162, at 57.
165. Travieso-Diaz & Trumbull, *supra* note 96, at 919.