ENGAGING CLOSED SOCIETIES THROUGH INTERNATIONAL ARBITRATION: LESSONS FROM THE CUBAN EXPERIENCE

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I. INTRODUCTION

IN 1982, the Cuban National Council promulgated Decree Law 50, which authorized foreign investment on the island for the first time since the 1959 nationalizations.[1] At the time, the Foreign Investment Law went unnoticed by most and had little bearing on the flow of foreign investment in Cuba.[2] By the early 1990s, however, the business landscape in Cuba had drastically changed. As a result of the collapse of the Soviet Union, the Cuban National Assembly moved to amend the national Constitution in 1992,[3] which at the time created many obstacles to investment, to give assurances to potential foreign investors that it was safe to invest in Cuba.[4] Additional changes followed in 1995 in the form of statutory law that created the institutional infrastructure for foreign direct investment.[5] Commentators in the late 1990s hailed these developments as a major transformation in Cuba's engagement in the international business world that would have revolutionary effects on the closed society. As of 2009, nearly fifteen years after the most "groundbreaking" laws were instituted, however, those effects have yet to manifest.

This Article argues that Cuba's so-called "internationalization revolution" was ill-predicted because it was based on a faulty premise: that the foreign investment laws of the 1990s constituted a marked shift in Cuba's engagement in the global marketplace. While there is no doubt that in-

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1. Decree Law 50, ON ECONOMIC ASSOCIATION AMONG CUBAN AND FOREIGN ENTITIES, enacted Feb. 15, 1982 (now codified as Chapter 11 of Decree Law No. 77, *infra* note 28).
2. *About Foreign Investment in Cuba*, Ministry of Foreign Affairs, Republic of Cuba, 2003, http://www.cubaminrex.cu/english/look_cuba/economy/economy_about%20foreign%20investment.htm (last visited July 21, 2010).
3. *See* Claes Brundenius, *Whither the Cuban Economy after Recovery? The Reform Process, Upgrading Strategies and the Question of Transition*, 34 J. LATIN AM. STUD. 365, 373 (2002).
4. *Id.*
5. *Id.*

vestment in Cuba has increased since the implementation of the international investment laws, the laws contain little more than a natural outgrowth of ideas from Cuba's longstanding commitment to commercial arbitration in both the domestic and international contexts. This Article reviews the evolution of Cuba's engagement in international arbitration spheres to demonstrate that the changes of the 1990s could not have had a major impact on Cuba's political economy. The principal point this Article makes is that aesthetic changes in the domestic legal landscape did not and could not alter the course of Cuba's external relationships in such a way as to effect the anticipated major social reform and development. Recognizing this limitation provides counsel for other closed societies and transitional economies as to what is important for development.

In Part II, the Article describes the unacknowledged Janus-faced Cuban engagement that far pre-dates the current regime. It contextualizes this duality in the larger discourse of international commercial and investment arbitration within the scholarly and practitioner communities. Part III analyzes the changes of the 1990s and their limitations. Finally, Part IV provides two comparative case studies to illustrate further alternate routes Cuba could pursue. The Article's focus on Kosovo—a conflict-ridden transitional economy that has recently pursued a course of action similar to the Cuban moves of the 1990s in order to procure investment—as well as Vietnam, which, like Cuba, remained a closed society long after the major geopolitical transformation of the 1940s and subjected foreign investors to waves of privatization and nationalization through the end of the century.[6] This Article concludes that Cuba's foreign engagement rhetoric of the 1990s was just that: rhetoric lacking the necessary commitment or transformative power to effect the major transformation expected.[7]

II. IRONY OF THE CUBAN POSTURE

Cuba's engagement with international arbitral institutions began long before the wave of legal developments in the 1980s and 1990s. Certainly, foreign investment was commonplace in Cuba before the revolution of 1959. In 1959, North American investments in Cuba were valued at 700 million dollars.[8] Also, contrary to impressions gleaned from the scholarly work on foreign investment on the island, Cuba established an early tra-

6. *See generally* Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995).

7. A brief note about methodology: this paper grows out of a research trip to Cuba in March 2009. The interviews which inform the conclusions drawn herein were carried out at the Cuban Jurists Association between March 18 and 20. Those interviewees who were not comfortable with any citation are cited simply as "Interview" along with their profession and the date of the interview. Additional information about these interviews is on file with the author.

8. James Petras & Robin Eastman-Abaya, *Cuba: Continuing Revolution and Contemporary Contradictions*, Aug. 13, 2007, *available at* http://dissidentvoice.org/2007/08/cuba-continuing-revolution-and-contemporary-contradictions/.

dition of arbitration that helped create a framework on which to build a foreign investment and commercial legal infrastructure.

In 1965, Cuba signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[9] indicating its willingness to participate in the global commercial arbitration community. Ten years earlier, it signed the European Convention on International Commercial Arbitration.[10] Internally, the state developed institutions that were also generally conducive to arbitration. In 1977, the Cuban government instituted a domestic administrative arbitral tribunal to relieve the backlog and heighten pressure on the state courts.[11] The arbitral tribunal was intended to address disputes between private persons and the state. Because Cuba's Constitution defines the judiciary as a department under and subservient to the executive, the creation of the arbitral tribunal added supplementary independence from state control. Also, in the 1970s, Cuba created a Foreign Trade Arbitration Court of its own to review cases between foreign companies and their Cuban counterparts.[12] After 1990, this court became particularly active: from 1990-2005 alone, it settled 478 suits.[13]

Similarly, in the decades that followed, the Cuban government gradually refined its arbitration laws and joined more regional and international networks in support of this already friendly and well-established engagement. It created a national committee of the International Chamber of Commerce and in many respects has led other Latin American countries—countries that were once reticent toward arbitration—to establish their own arbitral institutions.[14] In 1980, Cuba was the only state in the region to conduct and support arbitration (both foreign and domestic) with a comprehensive statute. By 2005, more than twenty Latin American states had adopted similar laws.[15] And in 2007, the Foreign Trade Arbitration Court became the International Trade Arbitration Court, with increased functionality, comprised of twenty-one judges and seven mediators.[16]

Although it was engaged in these arbitral and commercial arrangements throughout the latter half of the twentieth century, the Cuban state isolated itself from foreign investment during this extended period.[17] It was a situs for transnational arbitration but not a recipient of foreign at-

9. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.
10. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364.
11. Kevin S. Tuininga, *International Commercial Arbitration in Cuba*, 22 EMORY INT'L L. REV. 571, 575 (2008).
12. Interview with former prosecutor, in Havana, Cuba (Mar. 19, 2009).
13. *Cuba Establishes Arbitration Court*, CUBANEWS, Oct. 1, 2007, *available at* http://findarticles.com/p/articles/mi_hb5140/is_10_15/ai_n29380237/.
14. Interview with professor and jurist, in Havana, Cuba (Mar. 19, 2009).
15. Tuininga, *supra* note 11, at 575, n.20.
16. *Cuba Establishes Arbitration Court*, *supra* note 13.
17. Venera Gallousis, Note, *Cuba's Flirtatious Love Affair With Foreign Investment: The Evolution of Laws* 50, 77, 5 TEX. HISP. J.L. & POL'Y 81, 85 (2001).

tention in that realm. Rather, the absence of the private sector placed a burden on the state to acquire necessary goods. To fill this gap, Cuba secured favorable trade and aid agreements with the U.S.S.R. and other similarly oriented states.[18] These state-to-state relationships sustained the economy throughout the Cold War while private investment was prohibited.

The duality seen in the Cuban experience manifests a separation between two bodies of law that are often conflated in the academic literature and in practice: investment arbitration law and commercial arbitration law. International arbitrators frequently participate in investment arbitration proceedings as well as commercial arbitrations, sometimes without much distinction between the legal and customary principles they apply in either setting. Though this approach is increasingly criticized, it is rarely done so on foundational ideological grounds as demonstrated by the Cuban experience. Investment arises from distinct origins with distinct purposes that should be differentiated from those involved in commercial arbitration. Although they may be procedurally similar, the principles of law that govern each realm are derived from separate motivations and thus, the analysis of those principles should likewise remain discrete.

Further, although a state's engagement in the arbitration community may indicate a willingness to invite foreign companies to conduct business on its territory, that hypothesis again is disproven by Cuba's halfway invitation. Lucy Katz argues that participation in the arbitration community can serve as a bridge for closed or conflict-ridden societies to gain acceptance in the international community as credible and legitimate players in the global marketplace.[19] While that assertion may be true for some states (Katz cites Cuba as well), it is not a foregone conclusion, as Katz makes it out to be. Multiple ingredients are required for the type of acceptance that Katz construes, as shown by the case studies outlined in Part IV of this Article.

A final ingredient for international engagement that Katz neglects to identify is a willingness on the part of the state to follow through with its international commitments. The creation of a successful flow of foreign direct investment (FDI) is premised not simply on the legal pieces falling into place. Although participation in arbitral schemes may signal that a state has the *capacity* to support the intricacies of the global market, it is far from a demonstration of the internal infrastructure necessary to protect and develop foreign investment. There are a variety of push and pull factors, as we will see in this Article's subsequent Parts, that influence the volume of the incoming investment. Cuba has failed, or elected not to activate its pull levers; it has not taken the necessary assertive steps to attract investment in the areas that are important to the island's residents

18. *Id.*
19. Lucy V. Katz, *How International Arbitration Bridges Global Markets in Transition Economies*, 22 ALTERNATIVES TO HIGH COST LITIG. 145, 145 (2004).

or to its longer-term development. The key is to actively promote the new infrastructure as it is being developed. Cuba, on the other hand, uses state sovereignty rhetoric, not uncommon among developing states, as a justification for maintaining strict state control.[20] State control over investment is still possible at the level of on-the-ground negotiations, though a state's primary contribution—and where the Cuban state falls short—should be in the preliminary stages of attraction and cultivation of potential business relationships.

III. THE FALL OF THE U.S.S.R: NON-SOVIETS COME TO CUBA

Needless to say, the collapse of the U.S.S.R. and the conversion of the new countries into capitalist states had an upsetting impact on the Cuban economy. Before that conversion occurred, Cuba's relationship with the U.S.S.R. and Eastern Europe prevented any investments from private investors in other states. Their system altered the pricing of everyday items and major commodities.[21] As Johns notes, "In the absence of standard prices, Cuba could not integrate its markets with other trading partners."[22] At the time, eighty-one percent of Cuba's exports and eighty-five percent of its imports came from the U.S.S.R. and its affiliates.[23] In the early 1990s, suddenly cut off from these sources, three-quarters of the Cuban market disappeared.[24] As a result, the Cuban government took steps to facilitate private investment from abroad.

The groundwork had been laid in 1982 when "Decree Law 50 became the first Cuban law since the revolution to welcome foreign economic interests."[25] Decree Law 50 expressed Cuba's intention that its financial system not be isolated: "[T]he economic development of the country requires this type of [foreign] association in certain activities of the country where the financial resources, prime materials, technology and markets are not within our reach."[26] Even with the legalization of foreign investment on the island, it was not until the fall of the U.S.S.R. in 1988 that external capital began to arrive.

The law with the biggest impact, Decree Law 77, was next approved by the Cuban National Assembly on September 5, 1995.[27] This law authorized foreign investment in all sectors, excluding the mainstay areas of health and educational services and the Armed Forces, where the state

20. *See* Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 647 (1998).
21. *See* Melissa Johns, *Foreign Investment in Cuba: Assessing the Legal Landscape*, 106 BOLETÍN MEXICANO DE DERECHO COMPARADO 35, 43 (2003), *available at* http://www.juridicas.unam.mx/publica/librev/rev/boletin/cont/106/art/art2.pdf.
22. *Id.* at 43.
23. *Id.* at 38.
24. *Id.*
25. *Id.* at 43.
26. Interview with jurist, in Havana, Cuba (Mar. 20, 2009) (quoting JUAN VEGA, CUBA: INVERSIONS EXTRANJERAS A PARTIR DE 1995, 10 (1996)).
27. ROBERTO RIVERO, LEGAL PROFILE OF FOREIGN INVESTMENT IN CUBA 70 (2001).

maintained control.[28] Decree Law 77 institutionalized the components of an investment infrastructure, the space for which emerged from the constitutional amendments.

According to Article 12 of Decree Law 77—now the governing law on these matters—foreign investment is permitted in one of the following forms: (a) a joint venture, (b) an international economic association contract, or (c) a 100% foreign capital company.[29] Article 3 of Decree Law 77 grants foreign investors full protection from expropriation, except where permitted by the Constitution. The amended Constitution requires that the Cuban state recognize foreign property (excluding Cuban land, as discussed *infra*) belonging to joint enterprises, foreign corporations, and economic associations and that these entities may use and dispose of property in accordance with Cuban law. Both the Constitution and Decree Law 77 authorize expropriation of assets only for "public or social interest" (left undefined) and only with compensation to the investor.[30]

In addition to the limited protection on expropriation, Decree Law 77 places restrictions on the range of movement of the investor. All foreign investments must be authorized by the Executive Committee of the Council of Ministers or a Commission of the Executive Committee by way of a formal resolution.[31] Since the head of the Council of Ministers was Fidel Castro and is now Raúl Castro, the decision to privatize has always come from the top. The law also provides that foreign investment should be directed to areas where a real necessity for foreign assistance exists, such as fields of emerging technologies.[32] Further, a foreign investor or joint venture cannot buy land nor hire its own personnel: both of these activities are monopolized by the state.

Although Decree Law 77 opened many avenues to foreign investment, as in any state, the domestic legal framework shaping the foreign commercial and investment regulations serves only the limited purpose of creating access to domestic courts and guidelines for treatment that can be enforced by those domestic courts.[33] To the intended audience—a foreign corporation—such laws only get it so far. The corporation is limited to adjudication within the state's parameters. In many states, including Cuba, access to the domestic courts may not provide much assurance at all. Where domestic courts are known for their corruption or their bias in favor of the state, a statutory framework adds little incentive for a foreign investor.

28. Law on Foreign Investment, Decree Law No. 77, Ch. IV, Art. 10 (Sept. 4, 1995) (Cuba), *available at* http://www.cubaindustria.cu/English/law_77.htm.
29. *Id.* Ch. V, Art. 12.
30. *Id.* Ch. III, Art. 3.
31. RIVERO, *supra* note 27, at 70.
32. Decree Law 77, *supra* note 28, Ch. VII.
33. Of course, the law is not able to address other exogenous factors such as those identified by Jorge Pérez-López, including a weak economy and foreign sanctions. *See* Jorge F. Pérez-López, *Foreign Investment in Socialist Cuba: Significance and Prospects*, 31 STUD. COMP. INT'L DEV. 3 (1997).

The real teeth of the foreign investment framework on behalf of any state can be found in the bilateral and multilateral agreements the state concludes with other states. These agreements provide a means by which a foreign corporation can protect its rights in an independent arbitral institution such as the International Center for the Settlement of Investment Disputes, the American Arbitration Association International Dispute Resolution Center, the International Chamber of Commerce, or the London Court of International Arbitration, among others.

Since the early 1990s, Cuba has carried out forty-two bilateral investment treaties (BITs) with states on four continents.[34] These treaties ensure protection for investors against expropriation and unfair treatment in their interactions with Cuba's extensive regulatory system.

Not unsurprisingly, the majority of Cuba's foreign investors come from states with which Cuba maintains a BIT.[35] And although most commentators have traced a general rise in investments on the island since the FDI laws of the early 1990s and have attributed the rise to the laws themselves, the more interesting and more telling correlation can be derived from comparing the timing of investments with the timing of the BITs carried out by the Cuban government with foreign states. In 1988, only one foreign investor was reported by the Cuban state, by 1993, that number increased to 31; by 1997, there were over 260 and by 2000 there were over 400.[36] Most of the Cuban BITs currently in force were concluded during the second half of the 1990s.

The BITs do not wholly protect the investor from expropriation. Most of the Cuban BITs authorize the state to expropriate for the "public utility and social interest."[37] One professor and foreign investment law scholar at the University of Havana has called this expropriation clause "nothing new or strange."[38] Rather, he and other Cuban jurists argue, such a right is derived from the sovereign right of a state and exists in all world governments.[39] Indeed, recently concluded BITs by other states, including the one concluded by the United States, include similar lan-

34. The states are: Algeria, Argentina, Barbados, Belize, Belgium, Bulgaria, Bolivia, Brazil, Cape Verde Islands, Colombia, Chile, China, Dominican Republic, Ecuador, France, Germany, Ghana, Greece, Guatemala, Guyana, Hungary, Indonesia, Italy, Jamaica, Laos, Lebanon, Malaysia, Mongolia, Namibia, the Netherlands, Panama, Portugal, Romania, Russia, Slovakia, South Africa, Spain, Suriname, Switzerland, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, Venezuela and Vietnam. *See* International Database of Investment Treaties, Cuba, http://icsid.worldbank.org/ICSID/FrontServlet (last visited Aug. 7, 2010).
35. Among the major contributors, as of 2000, twenty percent of Cuban foreign investment came from Spain, nineteen percent from Canada (a non-BIT state), nine percent from Italy, four percent from France, 3.5% from the UK, and 3.5% from Mexico (a second non-BIT state). Tuininga, *supra* note 11, at 579.
36. Interview with professor and jurist, *supra* note 14.
37. Agreement between the United Mexican States and the Republic of Cuba for the Promotion and Reciprocal Protection of Investments, Mex.-Cuba, May 30, 2001, 2281 U.N.T.S. 40599, *available at* http://untreaty.un.org/unts/144078_158780/7/5/14361.pdf.
38. Interview with professor and jurist, *supra* note 14.
39. *Id.*

guage authorizing expropriation "for a public purpose," as long as other conditions are also satisfied.[40]

The investments that have grown out of the BITs have focused on particular industries. Although it is nowhere codified, it is a widely understood practice among those who invest on the island that investment is restricted to key areas. The government has embraced projects that meet its concerns. In turn, the way is smooth for those investments. The result has been sharp rises in telecommunications investment, mining, and tourism.[41]

IV. THE SIGNIFICANCE OF THE MOVE FROM MAKING ARBITRATION AVAILABLE TO ACTIVE SOLICITATION OF INVESTMENT

Cuba is not the only state of its kind. While unique in many respects, it shares certain features with other post-Soviet socialist political economies. The experience it is undergoing to broaden its investment portfolio is common among developing countries. In particular, newly minted democracies and emerging markets are particularly apt for a comparison with the Cuban experience. In this Part of the Article, I have chosen to focus on two case studies: Kosovo and Vietnam. Although vastly different in many respects, they each have undergone the transition to open their doors to international investment as Cuba has since the 1980s. From this comparison we can take away lessons for how to interpret and make use of observations in Cuba for future transitional economies, as well as for how Cuba might accelerate its own transition in light of others' experiences.

A. Kosovo

The history of the Kosovar conflict is well known. When the conflict ended in 1999 and the United Nations Mission in Kosovo (UNMIK) formally took over governance responsibilities,[42] there was little to sustain the battered Kosovar economy. It was expected that it would take another decade before the state could rebuild and recreate the rule of law.[43]

Beginning in 2006, the international territorial administration in Kosovo began to create avenues for the region to pursue foreign investment even before it became a state. The April 2006 Law on Foreign Investment pre-dated the 2008 Declaration of Independence, but it constituted the first step in a series allowing Kosovo to cultivate investment, it was hoped, in order to increase the quality of life and bring the region out of

40. *See, e.g.*, Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment, Feb. 18, 2008.
41. Johns, *supra* note 21.
42. *See* S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999).
43. At the time, no one knew what the fate would be, although in retrospect many American politicians have argued that the answer was clear from the start: Kosovo would eventually become an independent state.

conflict.[44] Juxtaposing the story of Kosovo with the Cuban experience provides some clues regarding what the critical elements of a transitional economy in a globalized marketplace might be.

Kosovo and Cuba differ in many respects—but not enough to render the comparison futile. Although Cuba is about ten times the size of Kosovo in both area and population,[45] their distinct approaches to inducing foreign investment are shaped more by factors other than the differences in their demographics. It is striking that even though the resources are far richer in Cuba than in Kosovo (*e.g.*, oil exploration prospects are very high off the Cuban coast), and even though Cuba is a recognized state, it is less sought after as a situs for investment although both economies are equally weak.[46] Investment in Kosovo is slow as well, but the acceleration in just two years far exceeds the progress made in Cuba since 1995. What else makes Kosovo distinct? Two key features: (1) location and (2) marketing, have contributed significantly to the success of investment there.

Regarding location, Kosovo is part of Europe and is eager to reassert itself in its neighborhood. The long-troubled history and geographic isolation of Cuba, on the other hand, leaves it seemingly homeless when it comes to a natural regional affiliation. Kosovo's investment partners all come from its European neighborhood: Germany, the United Kingdom, Slovenia, France, Greece, Italy, Austria, the Netherlands, Belgium, Switzerland, and Norway. Even without being a universally recognized state, Kosovo has been given a special status allowing it to participate in regional partnerships such as the one created by the Central European Free Trade Agreement ("CEFTA").[47]

Second, the marketing campaign surrounding Kosovo's development and investment opportunities has been the most marked difference from the Cuban approach to investment. Beyond carrying out BITs, Cuba has remained a passive player in the investment sphere. Kosovo, on the other hand, has an aggressive marketing campaign—not carried out by the quasi-state, but rather by independent, nongovernmental organizations.[48] Conferences, RFPs, mass media—the nongovernmental community has rallied foreign investors in the region. Further, the European Union and its affiliates have mobilized additional support in order to permanently bring the larger Balkan region into the Union and stabilize them gener-

44. Søren Jessen-Petersen, Regulation No. 2006/28, UNITED NATIONS INTERIM ADMINISTRATION MISSION IN KOSOVO, Apr. 28, 2006, *available at* http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_28.pdf.

45. Central Intelligence Agency, *The World Factbook: Kosovo*, https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html (last visited July 24, 2010).

46. Central Intelligence Agency, *The World Factbook: Cuba*, https://www.cia.gov/library/publications/the-world-factbook/geos/cu.html (last visited July 24, 2010).

47. Central European Free Trade Agreement, Dec. 21, 1992, *available at* http://www.worldtradelaw.net/fta/agreements/cefta.pdf.

48. Economic Initiative for Kosovo, www.eciks.org/english/invest.php?action=total_invest&main_id=11 (last visited July 24, 2010).

ally.[49] The result: substantial capital entering the area and regenerating entrepreneurship in the region. The establishment of a handful of investors sets a tone of stability and support for additional investors to follow. Many of the investments instituted in Kosovo are directly supported by the governments themselves. In this way, investment in Kosovo is not only a business endeavor, but is also a governmental aid operation to enrich a conflict-ridden zone. Cuba marshals no such aid movement.

B. VIETNAM

Halfway around the world and far larger than Kosovo's 10,000 square kilometers of area, is the 329,000 square kilometers of Vietnam.[50] With a population of eighty-seven million inhabitants, it dwarfs Cuba's eleven million.[51] This study is not the first to compare features of Vietnam with those of Cuba; however, it draws a distinct lesson from previous work. Vietnam, like Kosovo, though on a lesser scale, has distinguished itself as a player in the global marketplace and therefore a country safe for investment from abroad.

By the late 1980s, Vietnam had already begun efforts toward economic reform: "Since first promulgating a relatively liberal foreign investment law in 1987, Vietnam has been very successful in attracting FDI inflows into this developing, transitional economy."[52] Prior to both Kosovo and Cuba, Vietnam took measures to market its reform and joined regional free trade associations. As a result, beginning in the early 1990s, FDI picked up as Vietnam instituted the legal modifications necessary to accommodate an investment regime.[53]

As Freeman notes, "By the end of the 1990s, although foreign-invested companies employed less than one percent of the total workforce in Vietnam, they cumulatively accounted for around twenty-seven percent of the country's (non-oil) exports and thirty-five percent of the country's total industrial output."[54] Foreign investors constituted almost thirteen percent of Vietnam's GDP and contributed around twenty-five percent of total tax revenues.[55] Thus, it is unsurprising that FDI is regarded as one of the most prominent elements of Vietnam's economic transition.[56]

Within Vietnam, foreign investor appetite was stimulated by the potential of the transitional economy and its market of over seventy million

49. *See generally* European Stability Initiative, http://www.esiweb.org/ (last visited Aug. 17, 2010).
50. Central Intelligence Agency, *The World Factbook: Kosovo*, *supra* note 45; *The World Factbook: Vietnam*, https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html (last visited July 24, 2010).
51. *The World Factbook: Cuba*, *supra* note 46.
52. NICK J. FREEMAN, FOREIGN DIRECT INVESTMENT IN VIETNAM: AN OVERVIEW, 3 (2002), *available at* http://www.jcvietnam.com/ForeignDirectInvestmentVietnamOverview.pdf.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

people. But these alone did not carry the day; like the European support shown for Kosovo, the stable regional configuration in which Vietnam is situated created an understanding of safety and reliability in the Asian market. As FDI increased around the world and money was injected into emerging markets, Southeast Asia was a major beneficiary of this capital flow.[57]

The days of the FDI upswing are long gone and even Vietnam is now encountering diminishing returns for its legal and regulatory reforms.[58] Even before the turn of the century, the United Nations Conference on Trade and Development noted that, "diminishing returns ha[ve] set in [for the liberalization of FDI frameworks] and liberal FDI policy is increasingly losing its effectiveness as a locational determinant of FDI."[59] The laws create a platform in which these previously closed or conflict-ridden societies could entertain foreign investment, but they are not enough. Across the world, "adequate core FDI policies are now simply taken for granted."[60] At the same time, "international business activity, including global patterns of foreign investment activity, has been undergoing . . . significant transformation": companies are becoming increasingly specialized in what they produce, which means that there are fewer entrepreneurial investments or large scale greenfield projects—once the backbone of developing country economies—where new production capacity is created.[61] Indeed, conventional greenfield FDI activity was formerly the most popular type of investment in all three areas studied here—Vietnam, Kosovo, and Cuba. It has not been vigorous in recent years in any of the three, as "global over-capacity" has made companies reluctant to enact new projects.[62] Instead, "cross-border merger and acquisition activity has become a new engine of FDI flows in recent years, as companies seek to grow."[63]

By describing the tapering off of FDI flows in this way, I do not mean to suggest that all FDI is positive for transitional economies by any means. In fact, FDI can play the role of a substitute private sector, akin to a gray market, for a transitional economy. In this way, the flows of capital channeled through the "foreign" sector could distort development and strong foreign investment could become undesirable. Some industries, such as the tourist industry, have had this effect on emergent democracies in attractive places. In both Cuba and Vietnam, tourism has been both a blessing and, in some respects, a curse.[64] It has led to major

57. LE DONG DOANH, FOREIGN DIRECT INVESTMENT IN VIET NAM: RESULTS, ACHIEVEMENTS, CHALLENGES AND PROSPECTS, 2-4 (2002), *available at* http://www.imf.org/external/pubs/ft/seminar/2002/fdi/eng/pdf/doanh.pdf.
58. FREEMAN, *supra* note 52, at 11.
59. UNCTAD, WORLD INVESTMENT REPORT 1998, xxvi-xxvii, (1998), *available at* http://www.unctad.org/en/docs/wir98_en.pdf.
60. *Id.*
61. FREEMAN, *supra* note 52, at 9-10.
62. *Id.* at 101; Interview with professor and jurist, *supra* note 14.
63. FREEMAN, *supra* note 52, at 10.
64. Interview with jurist, *supra* note 14; DOANH, *supra* note 57, at 7-8.

distortions in each of their economies and caused their otherwise incremental development paths to become erratic and dependent on uncontrollable variables influencing the tourism industry.[65]

What remains constant in each case is the way in which foreign investor *sentiment* has proved to be the key determinant of FDI flow. During the 1990s, as investor perception steadily increased in Vietnam as a result of its strategic marketing and regional placement, it flourished.[66] Investor sentiment in Kosovo has plateaued somewhat as progress toward independence remains halted by Russian and Chinese opposition to the idea that it would set a precedent for other breakaway regions. This stalemate has stymied marketers' efforts to engage a broader range of global actors in business projects in the province. Cuba's investor sentiment has always been low for the reasons discussed above. While undoubtedly the history and political situation in Cuba has contributed to this low esteem, the lack of engagement by the Cuban government or any intermediary agent or advocate on its behalf has exacerbated and perpetuated its underperformance.

V. IMPLICATIONS FOR TRANSITIONS OF ALL TYPES

The aforementioned case studies teach many lessons about what has and has not worked for states transitioning from conflict or different forms of government to a more open capitalist model market. At the same time, some lessons are limited to the unique experience and history of one particular place and are subject to the whims of international currents. Worldwide, FDI has grown at an unprecedented rate. Andrew Guzman notes that between 1986 and 1990 alone:

> [T]otal world FDI flows increased from $88 billion dollars to $234 billion, representing an average rate of increase of twenty-six percent in nominal terms and eighteen percent in real terms. From 1980 to 1993, the stock of foreign investment increased at an average annual rate of eleven percent in real terms, reaching a total of $2.1 trillion in 1993.[67]

A significant proportion of FDI is directed at developing countries (as much as $90.3 billion in 1995),[68] though among these states, competition is rigorous and some states, or sectors within states, that have failed to be assertive have lost their opportunity to benefit.

One example of a missed opportunity is that of Cuba's renowned sugar industry, which—in theory and according to Cuban law—has been open

65. Interview with jurist, *supra* note 14.
66. Nick J. Freeman, *Foreign Direct Investment in Cambodia, Laos, and Vietnam: A Regional Overview*, conference paper, Int'l Monetary Fund Conference on Foreign Direct Investment, Hanoi, Aug. 16-17, 2002, 1, 7, *available at* http://www.imf.org/external/pubs/ft/seminar/2002/fdi/eng/pdf/freema.pdf.
67. Guzman, *supra* note 20, at 640-41.
68. *Id.* at 641.

to direct investment since the 1990s.[69] "In practice, however, there has been no interest up to now on the government's part except in a few derivatives and mechanical ventures."[70] The Cuban government shut down and dismantled seventy-one of 156 state-owned mills in 2003 when raw sugar prices were down; the state needed to make a sharp turn to take advantage of the rise in the price by 2006.[71] A year later, out of necessity, news reports announcing that Cuba may accept more foreign investment in agriculture to reduce food imports led U.S. agriculturalists to lobby the U.S. Congress to support a removal of the ban on trade between companies in the United States and Cuba.[72] This active recruitment of investment in a critical sector ("Cuba imports hundreds of thousands of tons of rice, soy products, wheat, corn and other bulk foods annually"–up to two billion dollars worth)[73] led to new ventures from investors in "Argentina, Venezuela and other Latin American [countries] as well as European countries."[74]

Lacking the extensive economic advising provided to Kosovo, Cuba has had a difficult time catalyzing its economy into productive realms. "Cuba owes over $9 billion to international private lenders and has defaulted on its loan obligations."[75] Cuba also owes Russia about thirty billion dollars in loans outstanding from the 1990s and even earlier.[76] Only Spain and France give Cuba export credits.[77] Because it is not a member of the International Monetary Fund (IMF), Cuba's ability to secure credit from the world's financial institutions is severely limited. This restricts both the number of investors that can work with Cuba on investment projects and the scope of the projects that can be undertaken. Further, Cuba's agricultural dependency on foreign capital, as noted above, could present many opportunities for engagement; but beyond the limited sectors where pleas for investment have been issued in times of crisis, the government has not taken the necessary non-legal steps. There are both old and new industries where this assertiveness will be (some would say already is) essential: agriculture, manufacturing, and applied information systems.

The most obvious—or perhaps the least obvious (depending on the political climate)—audience for simple recruitment of "foreign" investors is the broad Cuban diaspora. Although many Cubans live in the United States and therefore would be unable to invest, displaced Cubans places

69. Marc Frank, *Cuba Seeking Foreign Investment in Sugar Industry*, REUTERS, Apr. 15, 2006, *available at* http://havanajournal.com/business/entry/cuba-seeking-foreign-investment-in-sugar-industry/.
70. *Id.*
71. *Id.*
72. *Id.*
73. Marc Frank, *Cuba Eyes More Foreign Investment in Agriculture*, REUTERS, Dec. 20, 2007, *available at* http://cuba-l.unm.edu/?nid=42497.
74. *Id.*
75. Interview with professor and researcher, in Havana, Cuba (Mar. 21, 2009).
76. *Id.*
77. *Id.*

all over the world should be prime candidates to be targeted by the Cuban government and investor marketing arms. Yet, as one interviewee put it, "we want that investment to come in a way that secures our independence and maintains our sovereignty."[78] To invite investments that challenge the lifestyle and the ideology of Cuban society, including those that might bring in Cuban defectors, would put the entire enterprise at risk. "'No,' said one interviewee, 'we strive to protect the dignity of our people.'"[79]

VI. CONCLUSION

Cuba's engagement with the global marketplace is longstanding; equally was it on the front lines of the BIT movement as well. "Particularly telling is the diversity of sectors this growth represents; oil and gas have taken on new importance as exports and tourism earnings now exceed those from sugar."[80] In fact, "[d]irect employment generation and increased productivity levels from foreign direct investment have led to 140,000 new jobs since 1995."[81]

Despite criticism of Cuba for rejecting international commercialism, Cuba has actually been ahead of, or directly in step with, the curve. The international community has witnessed a fundamental change in the regulation of foreign investment over forty years.[82] BITs have become the dominant vehicle through which investment is regulated under international law. As of the summer of 1996, there were 1,010 BITs in existence around the globe,[83] more than half of which have been signed or brought into force since the start of 1990.[84] The number of countries that have signed at least one BIT has reached 149 (including some countries which have ceased to exist, such as the U.S.S.R.), leaving very few countries without any such treaties.[85] Cuba's engagement with BITs moved in lock-step with this trend. In fact, tourism—Cuba's largest industry—grew out of foreign investments that began as early as 1987.[86]

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78. Interview with former prosecutor, *supra* note 12.
79. *Id.*
80. Johns, *supra* note 21, at 8.
81. *Id.*
82. One commentator has observed that "[a]part from the use of force, no subject of international law seems to have aroused as much debate—and often strong feelings—as the question of the standard for payment of compensation when foreign property is expropriated." Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 121 (1984).
83. *See Recent Actions Regarding Treaties to Which the United States is Not a Party*, 35 INT'L LEG. MATERIALS 1130 (1996).
84. *Id.*
85. *Id.* The countries without any BITs include Botswana, Guatemala, Ireland, Mozambique, Myanmar, and Suriname.
86. At the time it was estimated that for every dollar invested, there would be a sixty-two percent rate of return. *See generally* Matias F. Travieso-Diaz & Charles P. Trumbull IV, *Foreign Investment in Cuba: Prospects and Perils*, Cuba in Transition: Association for Study of the Cuban Economy (ASCE) vol. 12, Aug. 1-3, 2002, *available at* http://lanic.utexas.edu/project/asce/pdfs/volume12/travieso.pdf.

Yet, in spite of its tempered participation, Cuba has not experienced the growth that its peers have. Other closed and transitional societies followed the same steps Cuba has, with two major exceptions. The first exceptional characteristic—strategic geographic location—is immutable; however, the second—assertive and targeted marketing—is an approach the Cuban government has not pursued, to its detriment. Thus, the promulgation of foreign investment laws that create a framework for investment is not enough. There was no reason to expect growth or social revolution from the Cuban foreign investment laws. Cuba has to "kick it up a notch" to attract the resources it needs to grow its economy. Until that time, investment may or may not continue as a mere trickle of its full potential.