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Exploring Cuba’s New Role in the World Economy: Paths and Perils

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EXPLORING CUBA'S NEW ROLE IN THE WORLD ECONOMY: PATHS AND PERILS

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With the normalization of relations with the United States and other countries, Cuba is ushering in a new era with unprecedented opportunities in a globalized world. Participating in the world economy, however, is a risky proposition. It requires policymakers to carefully weigh the pros and cons of each development path and choose the one that best suits Cuba. It also requires policymakers to be prepared for the perils, both economic and legal, that may arise from Cuba's participation in the world economy.

This Article explores Cuba's new role in the world economy and the perils that accompany this new role. The article examines three development models that have been utilized by other developing countries: import substitution, export-oriented growth, and domestic market-oriented growth. It argues that Cuba's best development path is likely a combination of the three, with different focuses in different stages of development. The article then analyzes the perils of Cuba's greater role in the world economy. It focuses on three such perils: challenges posed by Cuba's protection of foreign investment through investor-state dispute settlements, World Trade Organization (WTO) rules' constraints on Cuba's use of domestic support measures, and foreign trade barriers that

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may be erected against Cuban exports by its trading partners. Cuba will be better off if policymakers could anticipate such perils and devise policy responses accordingly.

I. CUBA'S CURRENT ROLE IN THE WORLD ECONOMY

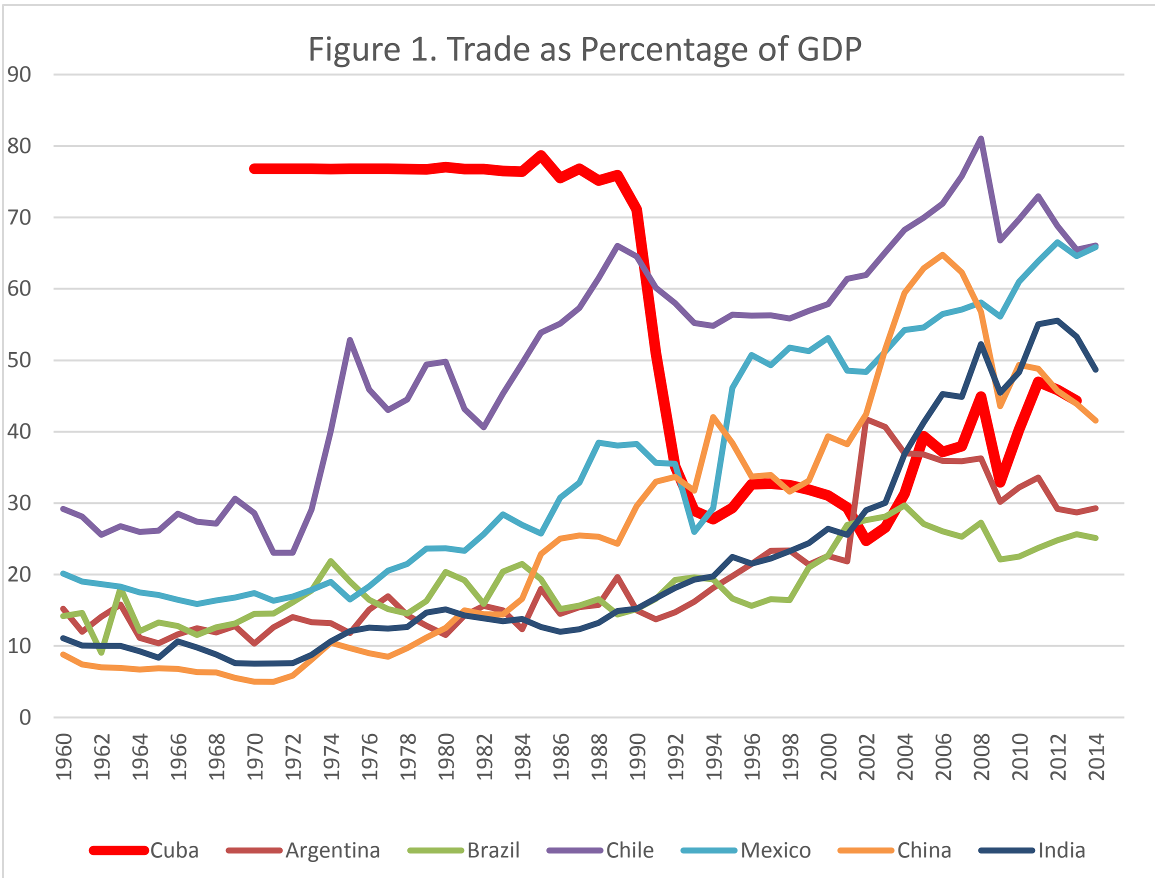
Unlike other former socialist countries that were isolated from the rest of the international community before their transition to market economies, Cuba has maintained an extensive network of international commercial relationships through today. Cuba was a founding member of the General Agreement on Tariffs and Trade (GATT) and is a member of the GATT's successor organization, the WTO. Since 1975, Cuba has been a member of the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations created in 1967 to promote intellectual property protection throughout the world. In 2000, Cuba joined the African, Caribbean, and Pacific Group of States (ACP), an organization aimed at facilitating trade and cooperation between its member countries and the European Union. Cuba is also a member of the Latin American Integration Association (ALADI) and the Bolivian Alliance for the Peoples of Our America (ALBA), both of which promote the economic integration of Latin America through trade and investment. Finally, Cuba is a party to sixty bilateral investment treaties (BITs) with a wide array of countries, including Western countries such as the United Kingdom, Spain, and Italy.[1]

Although Cuba has maintained extensive international commercial ties, it has not fully taken advantage of the commercial opportunities afforded by those ties. As indicated in Figure 1, prior to the late 1980s, Cuba's foreign trade as a percentage of GDP hovered around 76%, in large part due to its trade with the Soviet bloc of countries. In the wake of the collapse of the Soviet Union, Cuba's trade-to-GDP ratio plummeted to about 30% in the early 1990s and recovered gradually to about 45% in recent years.[2] Although Cuba's current trade-to-GDP ratio is not particularly low in comparison with other countries in the region (*e.g.*, Brazil and Argentina), this apparently stable number masks the lack of diversity in Cuba's foreign trade sectors. Cuba's exports, for example, are primarily exports of agricultural products and natural resources or

1. *International Investment Agreements Navigator, IIAs by Economy, Bilateral Investment Treaties*, U.N. CONFERENCE ON TRADE & DEV., http://investmentpolicyhub.unctad.org/IIA/CountryBits/52 [https://perma.cc/GD9F-67GM].

2. Data for these statistics and for Figure 1 are from WORLD BANK, *World Development Indicators*, http://data.worldbank.org/data-catalog/world-development-indicators [https://perma.cc/YX4C-96Z7].

services such as tourism and medical services.[3] Cuba also relies heavily on imports of essential goods such as oil, foods, machinery and equipment, and chemicals.[4] Cuba's "[m]erchandise exports, reported at $4.6 billion in 2010, were less than 10% of national output, reflecting the low international competitiveness of much of Cuba's industry and agriculture."[5]



Cuba's lack of participation in the world economy can also be seen in the small number of WTO dispute settlement proceedings in which Cuba took part. Despite being a founding member of both the GATT and the WTO, as of July 2017, Cuba has been a complainant in only one WTO dispute settlement proceeding and has never been a respondent in a WTO

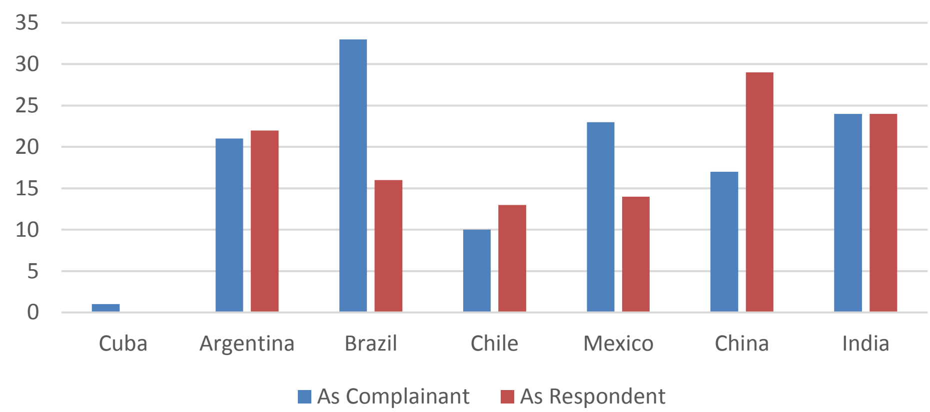
3. GARY CLYDE HUFBAUER & BARBARA KOTSCHWAR, ECONOMIC NORMALIZATION WITH CUBA: A ROADMAP FOR U.S. POLICYMAKERS Table 1.1 (2014).

4. *Id.*

5. RICHARD E. FEINBERG, THE NEW CUBAN ECONOMY: WHAT ROLES FOR FOREIGN INVESTMENT? 8 (2012), https://www.brookings.edu/wp-content/uploads/2016/06/cuba-economy-feinberg-9.pdf [https://perma.cc/HFX7-NA5V].

dispute settlement proceedings.[6] This contrasts with the experience of other major developing countries, which, as shown in Figure 2 below, have played an active role in litigating trade disputes before the WTO. In particular, China, which did not become a WTO member until 2001, has already initiated seventeen WTO dispute settlement proceedings and has been targeted in thirty-nine proceedings.[7]

Figure 2. Number of Distinctive WTO Dispute Settlement Proceedings (as of July 2017)



II. EXPLORING CUBA'S NEW ROLE IN THE WORLD ECONOMY

Since the collapse of the Soviet Union, the Cuban government explored new ways to participate in the world economy. Cuba's first step was to attract foreign direct investment (FDI). In 1992, Cuba amended its constitution to allow private property ownership and the transfer of state-owned property to joint ventures with foreign investors.[8] In 1995, Cuba enacted the Foreign Investment Act, which, among other things, allowed foreign investment in all economic sectors except defense, health care, and education, gave foreign investors the ability to own businesses in Cuba, and guaranteed transfer of capital and compensation for

6. WORLD TRADE ORGANIZATION, DISPUTES BY MEMBER, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm [https://perma.cc/PAG7-RZFT] [hereinafter DISPUTES BY MEMBER].

7. *Id.*

8. HUFBAUER & KOTSCHWAR, *supra* note 3, at 86.

expropriations.[9] In 2014, Cuba renewed its efforts to attract FDI by passing a new foreign investment law that provided tax incentives to foreign investors investing in joint ventures in Cuba.[10]

Cuba's current FDI plan, however, is far from being an integral part of a comprehensive roadmap for reinvigorating its economy. Instead, the plan heavily focuses on addressing the short-term needs of the Cuban economy. The Portfolio of Opportunities for Foreign Investment, which the Cuban government publishes every year to indicate the number and types of business projects in Cuba open to foreign investment, clearly demonstrates this limited focus. In the 2015 Portfolio, for example, the Cuban government listed the number of foreign investment projects available in each of the major economic sectors as follows:

Table 1. Business Opportunities by Sector (Cuba Portfolio of Opportunities for Foreign Investment 2015)[11]

Sector	# of Projects
Mining	15
Agro-food	40
Tourism	94
Renewable Energy	22
Oil	86
Industrial	21
Transportation	15
Biotechnology and Medicine	9
Health	3
Construction	14
Business	4
Audiovisual	3
Total	326

While the above list covers a diverse set of sectors, it demonstrates that the government's priorities lay in tourism (94 projects, representing approximately 29% of the total projects), oil (86 projects, 26%), and agro-food (40 projects, 12%). The government's reasons for these priorities

9. Mireya Navarro, *Cuba Passes Law to Attract Greater Foreign Investment*, N.Y. TIMES, Sept. 7, 1995, http://www.nytimes.com/1995/09/07/world/cuba-passes-law-to-attract-greater-foreign-investment.html [https://perma.cc/SVM3-SS8Z].

10. Daniel Trotta, *Cuba Approves Law Aimed at Attracting Foreign Investment*, REUTERS (Mar. 29, 2014, 12:08 PM), http://www.reuters.com/article/us-cuba-investment-idUSBREA2S0EJ20140329 [https://perma.cc/QUT9-UUZJ].

11. MINISTRY OF INDUS., INV. & COOPERATION DIRECTION, *Cuba Portfolio of Opportunities for Foreign Investment 2015*, at 18–19, http://havana.be.mfa.gov.tr/images/localCache/12/56712fb7-7b3c-4f0e-b597-e9f48e51d64c.pdf [https://perma.cc/2TZL-4RNM].

are obvious: given Cuba's traditional strength in tourism, that sector offers an immediate source of hard-currency earnings. And investments in the oil and agro-food sectors will reduce Cuba's dependence on imports of those essential products.

Beyond these priority sectors, however, Cuban policymakers do not appear to have reached a consensus on the country's development path. As an example, look at Cuba's industrial sector, specifically within Cuba's Special Economic Development Zone of Mariel. As shown in Table 2 below, of the nine projects specifically identified for Mariel, five are being developed solely to replace imports, three will serve both the domestic and export markets, and only one covers just the domestic market. This fairly balanced list gives no hints as to the focus of Cuba's economic development strategy, if there is any.

Table 2. FDI Projects in ZED Mariel (Cuba Portfolio of Opportunities for Foreign Investment 2015)[12]

Manufacturing Project	Amount	Purpose
Radial tires	$223 million	Domestic market and export
Aluminum cans	$40 million	Replace imports
Air conditioning equipment	$15 million	Replace imports
Light automobiles	To be negotiated	Domestic market and export
Valves for pressurized bodies	To be negotiated	Replace imports
Glass bottles for beverages	$70 million	Replace imports
Various lines of glassware	$10 million	Replace imports
Engineering and technological products enterprise	To be negotiated	Domestic market and export
Expendable materials for medical use	$5 million	Domestic market

The lack of a clear development strategy at the outset of major economic changes is understandable. But as Cuba's economic reforms deepen, Cuban policymakers must have a clear vision of the country's role in the world economy and channel the country's collective efforts accordingly. Toward that end, Cuba should consult the development

12. *Id.* at 24–28.

models adopted by other major developing countries. Below, this article briefly discusses three development models that have been utilized by developing countries in Latin America and Asia: import substitution, export-oriented growth, and domestic market-oriented growth.

A. *Import Substitution*

Import substitution is a development model closely associated with Latin America. Also known as "Latin American structuralism," this development model advocates replacing foreign imports with domestic production.[13] Most countries in Latin America adopted it from the 1930s to the late 1980s, with some initial successes.[14] Between 1950 and 1980, Latin America's industrial output increased six-fold, well ahead of the continent's population growth.[15] Mexico and Brazil were particularly successful with this development model. By the early 1960s, domestic production supplied 95% of Mexico's and 98% of Brazil's consumer goods.[16] Between 1960 and 1979, Mexico and Brazil collectively increased their share of Latin America's industrial output from 50% to over 60% and attracted over 70% of the continent's FDI over the same period.[17] By 1981, Brazil produced a third of Latin America's GDP and became the seventh-largest industrial producer in the world.[18]

The import substitution model, however, is not without problems. First, although import substitution could successfully reduce or end imports of certain goods, it merely replaces dependence on those goods with dependence on imported capital goods, such as the heavy machinery used to manufacture the import-substituting goods. To keep the prices of imported capital goods low, the currency of the country that implements the import substitution strategy often will be artificially overvalued, which leads to slumping exports and ballooning trade deficits.

Second, although industrialization induced by import substitution requires substantial capital, it cannot generate the number of new jobs needed to absorb unemployed workers. This results in a two-tiered labor force, where one tier is employed in the new, modern industrial sector and the other tier is either unemployed or underemployed elsewhere. Income inequality often occurs as a side effect of this two-tier labor force, ultimately resulting in insufficient demand for the products of the new

13. *See generally* Kenneth P. Jameson, *Latin American Structuralism: A Methodological Perspective* (Helen Kellogg Inst. for Int'l Stud., Working Paper No. 43, 1985), https://kellogg.nd.edu/publications/workingpapers/WPS/043.pdf [https://perma.cc/LWN9-4RKY].

14. *Id.* at 5.

15. DUNCAN GREEN, SILENT REVOLUTION: THE RISE AND CRISIS OF MARKET ECONOMICS IN LATIN AMERICA 15 (2003).

16. *Id.*

17. *Id.*

18. *Id.*

industries.

Finally, import substitution shields domestic firms from foreign competition and results in inefficient, oligopolistic industrial structures. As a result, the domestic industry tends to become dominated by a few privileged companies with close nexus to the state, and consumers become saddled with expensive, low-quality products supplied by those privileged, domestic companies.

The import substitution problems outlined above eventually led to economic stagnation, inflation, and currency devaluations in Latin America. In 1982, Latin America's love affair with import substitution came to an abrupt end when Mexico's debt crisis erupted, causing Mexico to default on its debt payments to international investors.

B. *Export-Oriented Growth*

Unlike Latin America, developing countries in East Asia moved away from import substitution in the 1950s and turned to export-oriented growth. The so-called "Asian Tigers" of Taiwan, Korea, Singapore, and Hong Kong spearheaded this development model, which was then adopted by Thailand, Malaysia, and more recently, China and Indonesia. In essence, this development model manufactures and exports labor-intensive goods by combining low-cost labor from the rural sector with imported intermediate inputs and capital goods. Some Latin American countries, after the failures of the import substitution model, also turned to export-oriented growth. Mexico serves as a notable example, when, in the early 1990s, it undertook a series of economic liberalization reforms and pushed to become a member of the North American Free Trade Agreement (NAFTA).

Export-oriented growth played an important role in the economic successes of East Asian economies, particularly China. But its drawbacks are obvious, too. First and foremost, export-oriented growth leads to undue dependence on external markets. Such dependence is not a major problem when external demand is steady, but may hurt the export industries when external markets go into a long-term decline, as was the case in the wake of the 2008–2009 global financial crisis.

Second, export-oriented growth, without more, does not create conditions conducive to the upgrading of industries. When the surplus labor supply that sustains the export sector dries up, labor costs will inevitably rise, eliminating the main advantage of the export-oriented industries.

Third, when coupled with aggressive liberalization of the financial sector, export-oriented growth could create fertile conditions for financial crises. When used in pursuit of profits, foreign capital is highly susceptible to changes in costs of labor and capital. Such changes often spawn large-scale capital flows across national borders, which result in financial instability. Indeed, the 1997 Asian Financial Crisis may have been a direct outcome of this export-oriented growth model.

C. *Domestic Market-Oriented Growth*

A third development model used by developing countries is that of India. Unlike the import substitution model or the export-oriented growth model, both of which rely heavily on the foreign market, the India model utilizes "a combination of growing domestic market demand and investment in knowledge-intensive industry and services."[19] The India model also relies heavily on domestic capital and homegrown entrepreneurs.[20] These internal mechanisms, therefore, better insulate India's economy from tumults in global markets. As a result, India's economy is arguably more stable than other export-focused economies, with domestic consumption accounting for over 60% of India's GDP, a level approaching that of a fully developed economy.[21]

D. *Cuba's Best Development Path*

Given Cuba's economic conditions, Cuba's best development path is likely a combination of the three development models discussed above, with different focuses in different stages of development. At the outset of economic reforms, a dose of import substitution may be necessary to alleviate shortage in industrial supplies. This is essentially what Cuba is partly doing in its current efforts to attract FDI to its industrial sectors. Cuban policymakers should be aware, however, that import substitution does not provide a long-term solution to the economic problems facing the country. Cuba's small domestic market makes it unlikely that the import-substituting firms would operate on an economic scale that would justify the large capital investment in those firms, and the limited number of such import substituting firms will almost inevitably lead to low productive efficiency. Cuban policymakers should also keep a watchful eye on worsening income inequality during the implementation of the import substitution strategy.

At a certain point, Cuba's economic policy should transition from import substitution to export-oriented growth. Cuba's current economic plan already focuses on export in certain sectors, notably tourism, natural resources, and agriculture. With the exception of tourism, however, such exports are concentrated in primary commodities and will not be

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19. *See* Daniel Park, *The Growth Debate: India & China*, https://www.b2binternational.com/publications/growth-china-india-research/ [https://perma.cc/PPL4-2CV6].

20. GARY GEREFFI, NEW OFFSHORING OF JOBS AND GLOBAL DEVELOPMENT 18 (2005).

21. Park, *supra* note 19.

sufficient to drive Cuba's future economic growth. Over the long term, the prices of primary commodities tend to decline relative to the prices of manufactured goods, causing the terms of trade of the commodity-exporting countries to deteriorate.[22] At some point in the future, therefore, Cuba needs to broaden its export base to include more manufacturing industries. This will require Cuba to take initiatives to both build the infrastructure for manufacturing and prepare its labor force for manufacturing jobs. Cuba may also need to seek greater access to export markets through bilateral or multilateral free trade agreements.

As Cuba goes down the path of export-oriented growth, however, it must be mindful of the limitations of that growth model and should prepare, at the earliest time possible, to upgrade its industries from low-end manufacturing to high-end manufacturing and knowledge-intensive service industries. Cuba should heed the lessons of China, where the wealth generated from the country's manufacturing boom was funneled into real estate and other asset bubbles, rather than into the expansion of the country's innovative capacities. In this respect, Cuba should emulate India by fostering homegrown innovation and entrepreneurship. Cuba's ultimate goal should be to transition into a diverse, broad-based economy that does not overly rely on the export sector or on any particular industry or industries.

III. PERILS OF CUBA'S NEW ROLE

As Cuban policymakers explore ways for Cuba to participate in the world economy, they need to be aware of the perils of such participation. Below, this article will discuss three particular perils that Cuba may encounter in its efforts to streamline its economy: challenges posed by Cuba's protection of foreign investment through investor-state dispute settlements, WTO rules' constraints on Cuba's use of domestic support measures, and foreign trade barriers that may be erected against Cuban exports by its trading partners.

A. *Investor-State Dispute Settlement*

Protecting foreign investment is a crucial component of any economic strategy that prioritizes the attraction of foreign investment. Cuba's FDI plan is no exception. As mentioned earlier, Cuba's 1995 Foreign Investment Act guaranteed compensation for expropriation of foreign

22. This is known as the Prebisch-Singer Hypothesis in economics. *See* David I. Harvey et al., *The Prebisch–Singer Hypothesis: Four Centuries of Evidence*, 92 REV. ECON. & STAT. 367, 367 (2010).

investment.[23] The BITs Cuba has signed also offer this protection. The BIT between Cuba and Spain, for example, provides that "[n]ationalization, expropriation or any other measure having similar characteristics or effects that might be taken by the authorities of one Contracting Party against investments in its territory by investors of the other Contracting Party should be imposed only in the public interest and in accordance with the law, and should in no case be discriminatory."[24] It further provides that "[t]he Contracting Party that imposes such measures shall pay the investor or the investor's assignees appropriate compensation without undue delay and in freely convertible and transferable currency."[25] Other provisions of the Cuba-Spain BIT impose requirements commonly found in international investment treaties, including fair and equitable treatment, most-favored-nation, and national treatment requirements.[26]

Not only does Cuba provide for protection of foreign investors through domestic law and bilateral investment treaties, such protection is also actionable through investor-state dispute settlement proceedings. A foreign investor from a country that has signed a BIT with Cuba can bring an investor-state arbitration proceeding against the Cuban government before an arbitral tribunal specified in the BIT. The Cuba-Spain BIT, for example, authorizes such arbitral proceedings before (1) tribunals in Cuba; (2) ad hoc arbitral tribunals "established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law;" or (3) the International Chamber of Commerce arbitral tribunal in Paris.[27]

Such investor-state arbitration proceedings represent a major peril for Cuba. As Cuba tackles difficult economic problems down the road, it may have to take measures that will frustrate the expectations of foreign investors, who could then challenge those measures as expropriation or violations of the fair and equitable treatment requirement. Such challenges decrease the policy space a developing country like Cuba would need in order to handle economic emergencies.

Argentina's experience with investor-state arbitration proceedings provides a good example of the perils that would face Cuba. In 1994, Argentina ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which confers jurisdiction over investor-state disputes on the International Center for the Settlement of Investment Disputes (ICSID), a World Bank agency

23. *Supra* Part I.

24. Agreement on the Promotion and Reciprocal Protection of Investments, Cuba-Spain, art. V, ¶ 1, May 27, 1994, 1902 U.N.T.S. 305.

25. *Id.*

26. *Id.* art. IV.

27. *Id.* art. XI, ¶ 2.

established to handle such disputes.[28] Since then, foreign investors have initiated forty-three arbitration proceedings against Argentina before the ICSID, claiming $65 billion in total damages.[29] Overall, the ICSID has "awarded claimants over $400 million."[30]

A large number of the ICSID proceedings against Argentina stem from the emergency economic measures Argentina put in place during its 1998–2002 financial crisis. During the 1990s, Argentina privatized many public services firms and put them in the hands of foreign investors. To attract foreign investment, Argentina indexed public services fees to U.S. dollars and authorized adjustments to those fees based on the U.S. consumer price index.[31] This indexation had to be scrapped during the 1998–2002 financial crisis; Argentina also abandoned its fixed exchange rate policy.[32] Foreign investors lodged thirty-three claims against Argentina before the ICSID, challenging these emergency economic measures as expropriations of foreign investment because they upset investors' expectations under the original investment contracts.[33]

The ICSID has been rather inconsistent as to the extent to which a sovereign government will be allowed to undertake emergency economic measures without being held liable to foreign investors. In two ICSID arbitration proceedings, *LG&E Energy Corp. v. Argentina* and *Continental Casualty Company v. Argentina*, the ICSID arbitral tribunals found that Argentina's actions in response to the financial crisis fell under Article XI of the U.S.-Argentina BIT, which exempts a state party from liability when its actions are necessary to preserve the public order.[34] However, in another arbitration proceeding, *Sempra Energy International v. Argentina*, the ICSID arbitral tribunal reached the opposite conclusion, holding that Argentina's emergency actions did not qualify for the necessity exemption under Article XI of the U.S.—Argentina BIT.[35] More importantly, the ICSID tribunal in *Sempra Energy*

28. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ICSID Convention, art. 25, Mar. 18, 1965, 80 Stat. 344.

29. Oscar Lopez, *Smart Move: Argentina to Leave the ICSID*, 1 CORNELL INT'L L.J. ONLINE 120, 122, http://cornellilj.org/smart-move-argentina-to-leave-the-icsid/ [https://perma.cc/N5XN-9ZK9].

30. *Id.*

31. Diego Petrecolla & Martin Lousteau, *Foreign Direct Investment in Argentina During the 1990s*, 2 LATIN AM. BUS. REV., no. 1/2, 2001, at 38–39.

32. Sebastian Edwards, *The Great Exchange Rate Debate After Argentina*, 13 N. AM. J. ECON. & FIN. 237, 239 (2002).

33. *E.g.*, LG&E Energy Corp. et al. v. Arg. Republic, ICSID Case No. ARB/02/1, Award (July 25, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C208/DC786_En.pdf [https://perma.cc/E6JS-Y7GB].

34. *Id.* ¶¶ 1–2; Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award, ¶¶ 173–74 (Sept. 5, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0228.pdf [https://perma.cc/LZ55-VXFB].

35. Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Award, ¶ 388

International held that whether a state action falls under the necessity exemption under Article XI cannot be determined by examining whether the state undertaking the action did so in good faith, but will also be subject to substantive judicial review.[36]

Although a party to sixty BITs, Cuba has not ratified the ICSID Convention and has chosen other arbitral tribunals, such as the International Chamber of Commerce, as the venues of settling investor-state disputes.[37] This allows Cuba to avoid the ICSID, which has been perceived as one of the most hostile arbitral tribunals towards developing countries.[38] But as long as Cuba participates in investor-state dispute settlements in some form, there will be a tangible risk that these settlements will compromise Cuba's sovereign policy space. Cuban policymakers should not ignore this risk.

B. *Domestic Support Measures*

Besides the risk of being challenged in investor-state dispute settlement proceedings, Cuba also faces risks of being found in violation of WTO rules if it attempts to support its domestic industries through subsidies or other favorable policies. Cuba has never been challenged before the World Trade Organization,[39] but that merely results from Cuba's lack of meaningful participation in world trade. As Cuba deepens its interactions with international markets, Cuba's domestic policy tools, particularly those related to the protection of its domestic industries, will likely be subject to WTO dispute settlement proceedings.

WTO rules have many constraints on a member country's use of policy measures aimed at supporting its domestic industries. The GATT forbids contracting states from protecting domestic production by applying internal taxes and charges and laws, regulations or requirements affecting the internal sale or distribution of products to imported or domestic products.[40] The Agreement on Trade-Related Investment Measures (TRIMs) also contains this "national treatment" requirement.[41] Particularly, TRIMs singles out local content requirements (*i.e.*, requirements that firms purchase or use products of domestic origin, as

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(Sept. 28, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8/DC694_En.pdf [https://perma.cc/85YJ-FEHE].

36. *Id.*

37. U.S. INT'L TRADE COMM'N, INVESTIGATION NO. 332-413, THE ECONOMIC IMPACT OF U.S. SANCTIONS WITH RESPECT TO CUBA 3-22 (2001).

38. Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. L. 239, 271 (2012).

39. DISPUTES BY MEMBER, *supra* note 6.

40. General Agreement on Tariffs and Trade, art. III, ¶ 1, Oct. 30, 1947, 61 Stat. A3.

41. Agreement on Trade-Related Investment Measures, Marrakesh Agreement Establishing the World Trade Organization, annex 1A, art. 2, Apr. 15, 1994, 1868 U.N.T.S. 186.

violating the national treatment requirement).[42] The Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides even more extensive constraints on domestic support measures. The SCM Agreement limits the use of countervailable subsidies, defined as a "financial contribution by a government or any public body" that are specific to an industry or a group of industries and confer a benefit on the industry or industries.[43]

The kinds of domestic support measures that could be subject to WTO challenges are wide-ranging, as demonstrated by China's experience with such challenges, summarized in Table 3 below. During the fifteen years China has been a WTO member, it has been challenged on numerous policies related to the protection of its domestic industries, including preferential tariffs, taxes, grants and loans, and restrictions on or discriminations against foreign firms. To the extent that Cuban policymakers are considering similar policies, it will be important for them to anticipate the possible WTO challenges.

Table 3. WTO Challenges of China's Domestic Support Measures[44]

Dispute	**Complaining Countries**	**Nature of Policies Challenged**	**Alleged WTO Violations**	**Outcome**
China—Value-Added Tax on Integrated Circuits (DS309)	United States	Preferential value-added tax for domestically produced or designed integrated circuits	GATT; China WTO Accession Protocol; GATS	Mutually agreed solution
China—Measures Affecting Imports of Automobile Parts (DS339, 340, 342)	European Union, United States, Canada	Preferential import tariffs for automobile parts imported for use in the manufacture of vehicles for sale in China	GATT; SCM Agreement; TRIMs; China WTO Accession Protocol	Rulings against China by both Panel and Appellate Body
China—Certain Measures Granting Refunds, Reductions, Exemptions from	United States, Mexico	Preferential tax refunds, reductions, or exemptions for firms in	GATT; SCM Agreement; TRIMs; China WTO	Mutually agreed solution

42. *Id.* annex ¶ 1.

43. Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, annex 1A, art. 1.1, Apr. 15, 1994, 1869 U.N.T.S. 14.

44. DISPUTES BY MEMBER, *supra* note 6, click Disputes by Respondent.

Taxes and Other Payments (DS 358, 359)		China on the condition that purchase domestic goods or meet export perform-ance requirements.	Accession Protocol	
China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS 363)	United States	Measures restrict-ing trading rights with respect to imported films, audiovisual products, sound recordings and publications; discriminatory policies against foreign suppliers of publications and audiovisual products.	GATS; GATT; China WTO Accession Protocol	Rulings against China by both Panel and Appellate Body
China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (DS 372, 373, 378)	European Union, United States, Canada	Discriminatory policies against foreign financial information suppliers	GATS; TRIPs	Mutually agreed solution
China—Grants, Loans and Other Incentives (DS 387, 388, 390)	United States, Mexico, Guatemala	Preferential measures offering grants, loans and other incentives to firms in China	Agreement on the Agriculture; GATT; SCM Agreement; China WTO Accession Protocol	In consultation
China—Certain Measures Affecting Electronic Payment Services (DS 413)	United States	Restrictions and discriminatory policies against foreign electronic payment services providers	GATS	Ruling against China by Panel
China—Measures concerning wind power equipment (DS 419)	United States	Preferential measures providing grants, funds, or awards to enterprises	GATT; SCM Agreement; China WTO Accession Protocol	In consultation

		manufacturing wind power equipment in China		
China—Certain Measures Affecting the Automobile and Automobile-Parts Industries (DS 450)	United States	Measures providing subsidies to automobile and automobile-parts enterprises in China contingent upon export performance	GATT; SCM Agreement; China WTO Accession Protocol	In consultation
China—Measures Relating to the Production and Exportation of Apparel and Textile Products (DS 451)	Mexico	Preferential tax, import duty, and loan policies supporting producers and exporters of apparel and textile products	Agreement on Agriculture; GATT; SCM Agreement; China WTO Accession Protocol	In consultation
China—Measures Related to Demonstration Bases and common Service Platforms Programs (DS 489)	United States	Measures providing subsidies to enterprises in several industries in China contingent upon export performance	SCM Agreement	Mutually agreed solution
China—Tax Measures Concerning Certain Domestically Produced Aircraft (DS 501)	United States	Preferential tax measures for the sale of certain domestically produced aircraft in China	GATT; China WTO Accession Protocol	In consultation

C. *Foreign Trade Barriers*

Yet another peril Cuba faces in its participation in the world economy are foreign trade barriers erected by its trading partners. In the WTO era, because tariffs cannot exceed their bound levels, the most persistent trade barriers are those based on non-tariff measures. Two common non-tariff trade barriers are antidumping and countervailing duties, special duties assessed on certain imports that constitute unfair trade practices and cause injury or threat of injury to the domestic industries of the importing country. When Cuban exports become subject to antidumping and countervailing duties, such duties will likely be high because of the extensive intervention by the state in the Cuban economy. WTO rules allow the calculation of antidumping duties using a non-market economy methodology, which uses the higher product prices from third countries ("surrogate values") as the normal value to which Cuban export prices will be compared.[45] In addition, in calculating the amount of countervailing duties, WTO member countries may use price benchmarks from third countries if they believe the in-country prices in Cuba have been distorted by government intervention.[46] Countries have used these special antidumping and countervailing methodologies to limit the export potential of China,[47] and will likely be used against Cuba if Cuba's exports reach a scale sufficient to threaten the manufacturing industries of other countries.

Some other non-tariff trade barriers may take the form of environmental laws, product safety standards, or labeling laws that have a disproportionately adverse impact on trade. WTO member countries may maintain such barriers if they meet the requirements of the general exceptions under Article XX of the GATT.[48] In addition, the Agreement on the Application of Sanitary and Phytosanitary Measures[49] and the Agreement on Technical Barriers to Trade[50] both permit such barriers and allow WTO member countries to impose restrictive measures on imports for the sake of protecting legitimate regulatory interests. Indeed, the only WTO dispute settlement proceeding Cuba has initiated thus far challenged what it argued was a non-tariff trade barrier, the plain packaging requirement Australia imposed for tobacco products.[51]

45. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 2.2, Apr. 15, 1994, 1868 U.N.T.S. 201.

46. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. VI, 1867 U.N.T.S. 187 [hereinafter GATT].

47. *See* Wentong Zheng, *Trade Law's Responses to the Rise of China*, 34 BERKELEY J. INT'L L. 109, 124 (2016).

48. GATT, *supra* note 46, art. XX.

49. Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 2 ¶ 4, 1867 U.N.T.S. 493.

50. Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, annex 1A, art. 2.5, 1868 U.N.T.S. 120.

51. *See* Request for Consultations by Cuba, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS458/1 (May 7, 2013).

IV. CONCLUSION

While starting to leave economic isolation, Cuba still faces a long road to an open, prosperous economy. A successful economic strategy for Cuba requires Cuba to find its rightful place in the global economy. Drawing from the experience of other developing countries, this article explained Cuba's options for participating in the world economy as well as the perils associated with the options. Cuban policymakers should weigh the pros and cons of each option as they map out Cuba's future development path.

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