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About the Cover

Freedom Tower is a collage by César Santaló, art director for the Entertainment division of Univision Network. Santaló is known for his outdoor and indoor collages that contain photographs, found objects and mosaic tiles. He is an adjunct professor at the Art Institute of Pittsburgh, Miami-Dade Magic and the University of Miami (Florida). Santaló's illustrations, designs and paintings have been published in magazines and periodicals from New York to Tokyo. Several of them are in collection at the Library of Congress. Learn more at cesarsantalo.com.

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Message From the Chair

Opportunities and Risks in This New Era of U.S.-Cuba Relations

A. LINDSAY

As a past editor of the *International Law Quarterly*, I'm especially pleased to be writing my first message as chair for this special edition on Cuba.

We in the International Law Section are well aware of the important, evolving and often difficult issues that relate to Cuba. As a long-time Miami resident whose wife's family lost everything under the Cuban revolution, I know firsthand the important political issues involved and am pleased that our section has a strong track record of advocating for human rights in Cuba. While doing so, we have always focused on what the state of the law actually is, and where it is likely to progress. Only with such a clinical focus can we support our members with the most clearheaded insights into the present and future state of the relevant international law.

As such, we are very proud to welcome the *International Law Quarterly's* new editor-in-chief, **Rafael Ribeiro**, who, along with his editorial staff, has done a superb job of publishing this edition on Cuba that will no doubt become the quintessential reference on the subject for some time. Once again, the *International Law Quarterly* demonstrates clearly that it is one of the world's leading journals covering all areas of international law.

Of course, the lawyers in the International Law Section come from a number of different backgrounds and areas of focus. Since my installation as chair of the section this past June, I have spent many hours working with our committee chairs to ensure we are meeting all of our members' needs.

We have recently added all-new International Law Section committees for arbitrators, white-collar crime and construction law. Our women-in-international law committee is being revamped to become a real tool for the recognition and advancement of the women in our section who continually provide leading edge work for the ILS and the law in general.

And I am pleased to report that our other committees, including those for the section's foundational events like the soon-to-be-renamed annual conference on international dispute resolution and transactions and the Florida pre-Vis moot competition, are in very good hands and running on all cylinders. Should you wish to get more involved with the ILS through work on any committee, please don't hesitate to reach out to me or the relevant committee chair directly. Check regularly with our website, internationallawsection.org, for more information.

Finally, I welcome our members who will be in attendance at our retreat at the Boca Raton Resort & Club from 30 September to 2 October 2016. The section has held retreats in the past, and the strong opinion of everyone I speak with has been that we want to make this a tradition. So we are! Moreover, we're working to make this the most exciting and fun retreat ever. Highlights will include the new TED-inspired ILS^{Talks} that are designed to educate, motivate and inspire our members, as well as a number of social events that will provide an opportunity for our members and their families or significant others to mix, mingle and bond. Having been active with the ILS for well over a decade, I know that we are a formidable and truly collegial membership who will make this retreat one not to miss.

Safe travels,

Al Lindsay
Chair
International Law Section of The Florida Bar

From the Editors . . .

EDITORS JAVIER PERAL, RAFAEL RIBEIRO AND LOLY SOSA DISCUSS CONTENT FOR THE ILQ SPECIAL EDITION ON CUBA.

We are excited to bring our readers this *International Law Quarterly* special edition on Cuba.

Few topics elicit stronger reactions from international law practitioners as the United States' recent rapprochement with Cuba. And for many of these attorneys practicing in Florida, New York and other centers of Cuban immigration, the topic oftentimes is more than academic—it is personal. Individual and often heart-wrenching experiences color these practitioners' reactions to the recent events involving Cuba, and circumstances must meaningfully change on the island before these practitioners can contemplate returning to a place that, for them, still harbors difficult and painful memories.

Nevertheless, as practitioners of international law, we must forge ahead and prepare ourselves for a future that inevitably will see Cuba playing a more central role in commerce and trade with the United States. In this edition of the *ILQ*, we are proud to bring you a slate of articles that will be a veritable reference guide on the subject.

To give context to our readers, we begin this special edition on Cuba with **Yine Rodriguez Perez's** discussion of the historical relationship between the United States and Cuba. As a Cuban attorney, Yine provides us with a unique perspective into the genesis and progression of our relationship with the Pearl of the Antilles.

Stephen F. Propst and **Timothy J. Ford** then provide us with additional context by setting forth the basis for the Obama administration's authority to implement the changes to U.S.-Cuba policy. Stephen's ground-breaking legal analysis, which was released at a forum at The Brookings Institution in 2011 and presented to senior U.S. government officials, provided the support for President Obama's historic changes to the U.S. embargo against Cuba announced in December 2014.

As with all opportunities, there are risks, and **Professor Jaime Suchlicki**, director of the University of Miami's Institute for Cuban and Cuban-American Studies, discusses the challenges that U.S. investors and legal practitioners will face in doing business in Cuba.

James M. Meyer and **Sofia Falzoni** then present us with an overview of the legal issues that practitioners should consider before advising their clients. In light of Cuba's history of expropriation of private property, **Emil R. Infante** and **Harout Jack** provide our readers with the legal framework in place to protect investors who ultimately decide to invest in Cuba. Along similar lines, **Rolando Anillo** provides us with additional insight for those who wish to invest in real estate.

Claims and private judgments also are issues to consider,

and **Arthur M. Freyre** provides us with context into the U.S. Certified Claims against Cuba, while **José M. Ferrer** and **Yasmin Fernandez-Acuña** discuss the effect of private judgments that have been entered against the Cuban government.

Rounding out the discussion of the legal framework governing trade with the island, **Attilio M. Costabel** provides us with an analysis of the issue of international sales of goods in Cuba under the CISG Convention.

Since any initial investments may require partnering up with a Cuban government-controlled company, **Osvaldo Miranda**, a Cuban attorney, discusses the principle of corporate independence under Cuban law. **Christopher Palomo** complements this analysis by providing us with insight into the private sector in Cuba.

Focusing on a key driver of change in the island nation, **Barbara P. Alonso** provides us with a forward-looking discussion of Cuba's access to information and communications technology and how they can assist Cuba with its economic and social development.

No *ILQ* would be complete without a **World Round-Up** section, and we thank our contributors for keeping us apprised of the important international law developments from around the globe.

Finally, we would like to thank the Cuban-American artist **César Santaló** for allowing us to use his artwork *Freedom Tower* for this special edition, which graces our cover. (Read more about César in our "About the Cover" section.)

We hope you enjoy our special edition on Cuba, and do not forget to check out our spring 2017 *ILQ*, which will focus on international internal investigations.

Sincerely,

Rafael R. Ribeiro – Editor-in-Chief
Javier Peral – Articles Editor
Loly Sosa – Articles Editor

The Development of the Cuba-United States Relationship

By Yine Rodriguez Perez, Miami

Cuba's relationship with the United States goes back to the end of the eighteenth century when the Spanish Crown opened its territories, including Cuba, for trade, and Cuban ports became major places of business for American merchants.[1] Later, in 1898, Spain and the United States signed the Treaty of Paris, through which Spain relinquished all claim of sovereignty over Cuba and transferred Cuba to the United States after losing the Spanish-American war.[2]

Following this transfer, Cuba's destiny remained uncertain until it was defined in the 1901 Platt Amendment, a treaty between the United States and Cuba "embodying the provisions defining the future relations of the United States with Cuba."[3] This treaty gave the United States effective control over Cuba by prohibiting the Cuban government from entering into any treaty with any foreign nation that would impair Cuba's purported independence. It also gave the United States the right to intervene in Cuban affairs in order to preserve this "independence," and provided for the establishment of U.S. military bases within Cuba. After more than thirty years of Cuba existing under this arrangement, the Platt Amendment was abrogated in 1934, and for the next 25 years Cuba entered into a republican period that was interrupted by the 1952 coup d'état of Fulgencio Batista, who had fostered a favorable relationship between Cuba and the United States.

This climate started to change in 1959 with the Cuban Revolution. Soon after the Cuban Revolution and Fidel Castro being named president of Cuba, the revolutionary government started implementing programs that created controversy in the United States. Among these were programs that cut the prices of the Cuban Electric Company (then majority-owned by the United States) and nationalized the U.S.-owned subsidiary of the International Telephone and Telegraph Corporation. But the most controversial measure was the Agrarian Reform Law of 1959 that prohibited latifundia, limited landholding to thirty *cabellerías* (approximately ninety-five acres) and expropriated all larger estates—redistributing them in sections to private owners and small cooperatives. The law also stated that effective one year after its enactment, U.S.-owned sugar companies operating within Cuba had to be registered and owned by Cubans. In general, all businesses owned and operated by U.S. citizens or companies were nationalized, and taxes on imports from the United States were increased. Thus began more than fifty years of weakened

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and eventually nonexistent diplomatic relations between the two countries.

The 1960's was a decade of particular conflict between the two countries as the United States pursued several attempts to overthrow the Cuban government. The first of these attempts was the Bay of Pigs Invasion in 1961, a military invasion of Cuba launched by the U.S. Central Intelligence Agency. The invasion, which was intended to be a secret, failed quite publicly less than twenty-four hours after it began. One year later, in 1962, the revolutionary government sought assistance from the Soviet Union, and by the summer of that same year, the Soviets started placing missiles in Cuba. After tense negotiations between Moscow and Washington, D.C., Moscow offered to remove the missiles from Cuba if the United States promised not to invade Cuba again; the United States agreed. History would call this thirteen-day confrontation between the United States and the Soviet Union the Cuban Missile Crisis. Between 1961 and 1965, at least eight assassination attempts against Fidel Castro were planned under the administrations of U.S. presidents Kennedy and Johnson. As could be predicted, diplomatic ties between the two countries continued to deteriorate, and by the end of the 1960's, they were finally severed.

It was not until 1977 that a rapprochement was considered. These efforts by U.S. President Jimmy Carter did not last long, however, and by 1980 the United States had returned to its former policies of diplomatic and economic isolation and containment.

The 1990's were no different. In fact, the U.S. policy against Cuba was strengthened with the Cuban Democracy Act in 1992, which prohibited travel to Cuba by U.S. citizens, family remittances to Cuba and foreign-based subsidiaries of U.S. companies from trading with Cuba.[4] These restrictions did not seem to be enough, however, and in 1996 Congress enacted the Cuban Liberty and Democratic Solidarity Act, which essentially extended the territorial application of the Cuba Democracy Act.[5] Foreign companies were prohibited from trading with Cuba, and foreign companies trading in property previously owned by U.S. citizens, but confiscated by Cuba after the Cuban Revolution, would be penalized.

It was in the 1990's, however, that Cuba signed most of its bilateral investment treaties.[6] Cuba had prohibited foreign investment in the island in the 1960's, and it was not until 1982 that Cuba enacted new legislation allowing foreign investment through joint ventures between Cuban enterprises and foreign entities. This new legislation did not generate the foreign investment the island needed. So, in September 1995, Cuba adopted Law No. 77 on Foreign Investment allowing the signing of more than forty foreign investment treaties from 1995 to 1999, which in turn resulted in significant foreign investment in Cuba.[7]

On the political side, Cuba had to wait until 2009 to experience some ease in the economic sanctions against it, with the lifting of all restrictions on family remittances and family travel to Cuba.[8] Two years later, in 2011, other types of restrictions on travel, including travel related to religious, educational and people-to-people exchanges were lifted, and not only Cubans in the United States but any U.S. citizen was allowed to send remittances to individuals in Cuba. Still, it was not until 17 December 2014 that President Obama and President Raúl Castro announced that both countries would restore full diplomatic relations. As a result, after more than fifty years, the United States and Cuba reopened their embassies in each other's countries. But major changes were still to come. During 2015 and 2016, Cuba was removed from the U.S. Department of State's list of state sponsors of terrorism, the U.S. Treasury Department's Office of Foreign Assets Control lifted more restrictions[9] and President Obama made a historic visit to Cuba, the first visit of a sitting U.S. president since 1928. These changes were prompted by the Obama administration's intention to "end our outdated approach, and to promote more effectively change in Cuba."[10]

Although these changes in the relationship between Cuba and the United States have received many different, and sometimes opposing, reactions among the Cuban and American people, the majority of people, not only in Cuba but also in the United States and Latin

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America, support the lifting of the restrictions and support the ongoing reestablishment of diplomatic ties.

***Yine Rodriguez Perez**, a lawyer in the Miami, Florida, office of Hogan Lovells, is knowledgeable about a range of project finance matters, including cross-border commercial transaction work in Latin America. She is experienced working on corporate governance issues related to mergers and acquisitions and corporate transactions in Europe and the United States.*

Endnotes

1 *Cuba, Relations with*, *Relations with Cuba, Dictionary of American History,* (27 June 2016), http://www.encyclopedia.com/topic/Relations_with_Cuba.aspx.

2 The Treaty of Paris officially ended the Spanish-American War.

3 The Platt Amendment was passed in 1901 as part of the Army Appropriations Bill, and was executed in 1903.

4 Cuban Democracy Act (CDA), 22 U.S.C. §§ 6001-6010 (1992), *available at* https://www.treasury.gov/resource-center/sanctions/Documents/cda.pdf.

5 Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act), 22 U.S.C. §§ 6021-6091, *available at* https://www.treasury.gov/resource-center/sanctions/Documents/libertad.pdf.

6 For a complete list, *see* http://investmentpolicyhub.unctad.org/IIA/CountryBits/52.

7 Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, *The Contribution of BITs to Cuba's Foreign Investment Program*, 32 Law & Pol'y Int'l Bus. 456, 456-80 (Spring 2001), *available at* http://www.ascecuba.org/c/wp-content/uploads/2014/09/v10-plandtravieso.pdf.

8 Mark P. Sullivan, Cong. Research Serv., RL31139, Cuba: U.S. Restrictions on Travel and Remittances (2016), *available at* https://www.fas.org/sgp/crs/row/RL31139.pdf.

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10 Press Release, The White House, Fact Sheet: Charting a New Course on Cuba, (17 December 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba.

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Finding Authority and Taking Action: The President's Easing of Sanctions Against Cuba

By Stephen F. Propst and Timothy J. Ford, Washington, D.C.

On 17 December 2014, President Obama announced his intention to restore diplomatic relations with Cuba and to ease the U.S. economic embargo against the island. Since that dramatic policy shift, the Obama administration has pumped out five rounds of revisions to the Cuba sanctions and export control regulations, the U.S. and Cuban embassies have reopened, Cuba has been removed from the U.S. State Department's list of state sponsors of terrorism and President Obama has completed his historic visit to Cuba. Relative to the status quo of the past fifty years, these changes have been very significant and have dramatically expanded opportunities for U.S. companies and individuals to engage with Cuba. Yet President Obama enacted these changes without action or approval from Congress, and U.S. federal law continues to mandate the embargo. At the same time, legal and economic conditions on the Cuban side continue to pose significant barriers to entry into the Cuban market, and a number of complex issues, including expropriated property claims, have yet to be resolved. As a result, despite the significant improvements in relations between the two countries, the United States and Cuba remain a long way from normal trade and investment relations.

President Obama and General Castro during their March 2016 meeting in Havana. (Anthony Behar-Pool/Getty Images)

This article examines the president's authority to modify economic sanctions against Cuba without congressional action. It then reviews the changes enacted since the president's December 2014 announcement. While the changes have expanded opportunities to engage with Cuba, the statutory and regulatory framework remains complicated. U.S. companies and individuals should proceed carefully.

Presidential Authority to Modify Cuba Sanctions

Through a complex series of federal statutes, Congress has codified the comprehensive U.S. economic sanctions against Cuba. These statutes culminated in the Cuban Liberty and Democratic Solidarity Act of 1996 (Libertad or Helms-Burton).[1] Helms-Burton requires that the "economic embargo of Cuba," as in effect on 1 March 1996, including all restrictions under the Cuban Assets Control Regulations (CACR) at that time,[2] must remain in effect until the president determines that a transition government or a democratically elected government is in power in Cuba.[3]

After Helms-Burton, the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA)[4] imposed additional mandatory sanctions against Cuba, including:

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- Prohibitions on the provision of U.S. government assistance to Cuba, including any U.S. government foreign assistance, export assistance and any U.S. credit or guarantees.[5]
- Prohibitions on the financing of exports of agricultural commodities or products to Cuba by any U.S. person. Any such exports must be made on the basis of payment of cash in advance or financing by third country financial institutions.[6]
- Prohibitions on the issuance of general or specific licenses by the Treasury Department for travel to, from or within Cuba for "tourist" activities. For purposes of this provision, the TSRA defines tourist activities to be any activity with respect to travel to, from or within Cuba that is not expressly authorized under Section 515.560 of the CACR, as in effect on 1 June 2000.[7]

Notwithstanding the framework of successive federal statutes mandating sanctions against Cuba, the president maintains broad authority and discretion to significantly ease specific provisions of the Cuba sanctions regime in support of particular U.S. foreign policy objectives recognized by Congress, including the provision of humanitarian support for the Cuban people and the promotion of democratic reforms. This executive authority to modify the Cuba sanctions is grounded in constitutional, statutory and regulatory provisions that empower the president and the responsible executive branch agencies to grant exceptions to the sanctions through executive actions, regulations and licenses.

The constitutional, statutory and regulatory provisions supporting the president's authority to modify the Cuba sanctions include the following:

- Article II, Section 2 of the United States Constitution, which vests broad powers in the president to conduct the foreign affairs of the United States.[8]
- Section 602(a) of the Foreign Assistance Act of 1961 and Section 5(b) of the Trading with the Enemy Act (which was the statutory authority for the CACR), which grant broad authority and discretion to the president to establish and make changes to embargoes established thereunder.[9]
- Paragraph 2 of Proclamation 3447, which explicitly grants authority to the secretary of the treasury to make such exceptions by license or otherwise to the prohibition on imports from Cuba as he determines to be consistent with the effective operations of the embargo.[10]
- Paragraph 3 of Proclamation 3447, which explicitly authorizes the secretary of commerce to "continue, make, modify or revoke" exceptions to the prohibition on all exports to Cuba.[11]
- Section 515.201 of the CACR that was in effect in March 1996, which prohibits dealings in property in which Cuba or Cuban nationals have an interest, but explicitly references the authority of the secretary of treasury to establish exceptions to the prohibitions by means of regulations, rulings, instructions, licenses or otherwise.[12]
- Section 515.533 of the CACR that was in effect in March 1996, which provides a "general license" authorizing exports to Cuba that have been specifically licensed or otherwise authorized by the Department of Commerce (but subject to certain conditions on the financing of such export transactions).[13]
- Section 515.801 of the CACR that was in effect in March 1996, which sets forth the authority of the secretary of treasury to grant general and specific licenses for transactions otherwise prohibited under the CACR.[14]
- Section 1703 of the Cuban Democracy Act of 1992 (CDA), which states the U.S. government's policy of seeking a peaceful transition to democracy and resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people.[15]
- Section 1705 of the CDA, which further elaborates upon the policy of providing support for the Cuban people through specific types of authorized activities.[16]
- Sections 2 and 3 of Helms-Burton, which reaffirm the objective of providing support for the Cuban people.[17]
- Section 102(h) of Helms-Burton, which codified the CACR as it existed in March 1996, including the authority of the secretary of treasury to exercise licensing authority.[18]

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Challenges for Investors in Cuba

By Jaime Suchlicki, Miami

President Obama's recent visit to Cuba encouraged many in the United States to expect that economic relations would bring about major changes in the island. There is a strong belief among U.S. policymakers that economic considerations can influence Cuban policy decisions and that an economically deteriorating situation will force the Castro brothers to move Cuba toward a market economy and, eventually, political reforms.

This is not happening. General Raúl Castro introduced limited economic reforms in an attempt to muddle through a difficult situation. Yet the reforms are not structurally profound, nor are they propelling Cuba toward a free market. In Cuba, economic decisions are determined by political and ideological considerations.

The changes introduced by General Castro are not liberalizing foreign investment regulations, as most Cubans cannot partner with foreign investors. Investments in Cuba are only allowed with joint ventures controlled by military leaders or in partnerships with *Grupo Gaesa*, a large military group of state businesses directed by General Castro's son-in-law, General Luis Alberto López Calleja.

Investors in Cuba face a maze of difficulties. These include the inability of bureaucrats to make decisions at the local level. Fearful of making mistakes, they tend to seek permission from higher authorities. Widespread corruption and cronyism make it difficult to navigate the island's investment requirements.

These are not the only problems U.S. investors will face after the embargo is terminated. American businesses will be competing with European, Asian and Latin American companies already established in the island. With a bankrupt economy, Cuba will need substantial international credit in order to purchase U.S. goods. A corrupt and government-controlled legal system, where judges and lawyers are appointed by the state, will complicate legal transactions and limit access to courts to litigate commercial issues.

From the Cuban government's point of view, the critical challenge facing General Castro is to balance the need to improve the economy and satisfy the needs of the population while maintaining continuous political control. Rapid economic reforms may lead to a loosening of political control, a fact feared by General Castro, the military and other government allies bent on remaining in power. The Cuban regime welcomes American tourists while limiting U.S. trade and investments and maintaining an anti-U.S. posture. Indeed, Cuba is a close ally of Iran, Russia, Syria and North Korea. The Castro brothers are strong supporters of Hamas and other enemies of Israel.

Cubans are forced to take extraordinary measures every day to subsist with low pay and inadequate government rations. (EsHanPhot/Shutterstock.com)

Under the current, slow reform scenario, only limited political and economic changes can take place. While a significant number of U.S. citizens are expected to visit Cuba if the U.S. travel ban is lifted, investment is likely to be on

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a small scale. If the U.S. embargo is modified or lifted, U.S. companies will attempt to enter the Cuban market and claim market share, as some Canadian, Asian and European companies have already done.

Given Cuba's need for many products and consumer goods, the potential for trade with the United States is significant. Yet demand alone is not sufficient. Cuba must have the ability to pay for foreign goods and services. These resources will initially come from tourist dollars spent on the island. Eventually, Cuba must sell its products, primarily tobacco, agricultural goods, seafood and nickel, in the U.S. market. Trade will flourish only with massive U.S. tourism and large-scale U.S. purchases of Cuban products.

Investments will be limited, however, given the lack of an extensive internal market, the uncertainties surrounding the long-term risk to foreign investment, an uncertain legal system and the opportunities provided by other markets in Latin America and elsewhere. Modest initial investments will be directed primarily to exploiting Cuba's tourist, mining and other primary resources.

Unless major reforms take place, it is unlikely that the U.S. government or corporations will be willing to commit significant investment funds in Cuba. The U.S. government may provide limited financial aid, but it will not grant Cuba other benefits such as North American Free Trade Agreement (NAFTA) membership. Foreign investment will be limited in scope as U.S. firms wait for Cuban measures to assure investors that the reforms taking place are irreversible and that they represent a major step toward a comprehensive transformation of the economy.

Under any scenario, however, post-Castro governments will face significant challenges, including massive economic reconstruction. Cuba's economy became addicted to an unnatural and immense subsidy inflow for nearly five decades, first from the Soviet Union and, more recently, from Venezuela. Cuba does not have a viable economy of its own. As nearly every category of exports and imports continues to decrease, a vicious cycle of poverty has descended on the island.

Cuba has a weak internal market. Consumption is limited by a strict and severe rationing system. Many transactions take place in the illegal black market, which operates with dollars and merchandise stolen from state enterprises or received from abroad. The Cuban peso

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The Embargo and Beyond: Legal Hurdles to Doing Business in Cuba

By James M. Meyer and Sofia Falzoni, Miami

Introduction

Over the past fifty-five years, there has been a complex spider-webbing of U.S. laws relating to Cuba. These laws include executive orders, statutes and laws in the Code of Federal Regulations and Federal Register Notices, as well as the most recent amendments to the Cuban Assets Control Regulations, starting in December 2014.

While, until recently, there was a prior policy in place discouraging relations between the United States and Cuba, more recently we have seen a shift toward a new policy of encouraging interaction. Already existing opportunities include the sale of agricultural goods and medicine for humanitarian reasons.[1] New policies include more relaxed export controls and general authorization for acquiring licenses, particularly in the categories of civil aviation safety, telecommunications, agricultural items and commodities.

Some non-U.S. businesses have been doing business in Cuba since the 1990's. For example, Spain has more than 250 Spanish firms operating in Cuba, with an estimated bilateral trade of $1.07 billion per year.[2] [3] Another example is Canada, which conducts business in the areas of pharmaceuticals, mining and hotels in Cuba.[4] Finally, Brazil has been another player that has invested in Cuba: Brazil's investment in the Mariel port project amounted to almost $700 million.[5]

As a result of the complicated relationship between the United States and Cuba, U.S. businesses encounter certain impediments to doing business in Cuba. The main impediments include the U.S. embargo on Cuba, the Libertad (Helms-Burton) Act of 1996, the unsettled claims worth billions of dollars and the country risk and rule of law issue under the current Cuban legal regime. This article offers a U.S. business and legal point of view regarding the principal legal hurdles to doing business in Cuba and examines the importance of the resolution of the claims, as well as the principal legislative laws and regulations related to the U.S. embargo and its codification in the Libertad Act of 1996.

New Policy and Amendments to OFAC

On 17 December 2014, the Obama administration announced new policy measures and amendments to the Office of Foreign Assets Control (OFAC). These amendments self-proclaimed that they were intended to "further engage and empower the Cuban people."[6] The amendments facilitated travel to Cuba for U.S. persons;

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The Embargo and Beyond, continued

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expanded U.S. sales/exports to Cuba; allowed U.S. financial institutions to open correspondent accounts at Cuban financial institutions to facilitate authorized transactions; authorized additional imports and certain transactions with Cuban nationals located outside of Cuba; and allowed a number of other activities related to telecommunications, financial services, trade and shipping.[7]

On 16 January 2015, the Bureau of Industry and Security (BIS) and the OFAC published changes to the licensing policy and license exceptions in the Export Administration Regulations. On 21 September 2015, the BIS increased the number of license exception provisions, created a new Cuba licensing policy to help ensure the safety of civil aviation and the safe operation of commercial passenger aircraft and made the deemed export and deemed re-export license requirements for Cuba consistent with other sanctioned destinations.[8]

Most recently, on 27 January 2016, new amendments to the OFAC removed financing restrictions for most types of authorized exports. These amendments also increased support for the Cuban people and facilitated the export of authorized goods, facilitated carrier service by air and with Cuban airlines and expanded authorizations within existing travel categories to facilitate travel to Cuba.[9]

Another complex issue evolving from the rapprochement is the de minimis U.S. content rule. Pursuant to 15 CFR 734.4, companies are subject to pay a fee on re-export items that contain a certain percentage of U.S.-origin controlled content. In 2015, the BIS removed Cuba from the list of state sponsors of terrorism; consequently, Cuba was moved from the category of E:1 countries to the E:2 category, altering its status as it applies to the de minimis U.S. content rule.[10] Previously, re-exports containing more than 10% of U.S. content were subject to the de minimis rule; as an E:2 country, the new threshold for U.S. controlled content is 25%, equivalent to the level imposed on other countries.[11] This change only affects the de minimis rule as it applies to re-export, when third countries export non-U.S. products containing controlled U.S. content to Cuba. At first glance, this would seem to ease the limitations on importing U.S.-content items to Cuba. It is important to note, however, that all U.S. content is controlled for export to Cuba. As a result, products that may otherwise qualify for export to other countries may not be exported to Cuba, even under the new threshold.[12]

Despite the recent shift toward opening relations with Cuba, U.S. businesses wanting to invest in the island nation still face unique challenges.

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Back to the Future? Foreign Investment Protection in Cuba

By Emil R. Infante and Harout Jack Samra, Miami


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Few countries match the expropriatory model of revolutionary Cuba. Described by one scholar as the "largest uncompensated taking of American property by a foreign government in history," the expropriations touched virtually every industry on the island.[1] The nearly 6,000 claims filed in the United States were valued by the Foreign Claims Settlement Commission as of 1972 at US$1.9 billion.[2]

Even as the debates concerning restitution for the twentieth century expropriations continue almost two decades into the subsequent century, a new wave of U.S. investment has begun to flow into Cuba following President Obama's executive actions to encourage more commerce between the two countries. Though the congressionally enacted embargo remains a serious barrier to investment and trade, and will likely remain so well into the near future, U.S. companies are increasingly present on the island to "lay the groundwork" for future investments.[3]

Before committing resources, however, U.S. investors increasingly are exploring the current legal regime and questioning whether their investments will be safe. As we explain below, Cuba's investment protection framework is surprisingly robust, though there are serious questions about the de facto protections actually afforded to U.S. and other investors. Since 1992, the Cuban government has entered into sixty bilateral investment treaties with countries around the world.[4] Of these treaties, more than two-thirds are in force.[5] Cuba also features a newly implemented foreign investment law.[6] Despite these reforms, incremental change remains the most likely scenario.

The Cuban government remains concerned about the political consequences of investment from abroad and—perhaps true to form—seeks to maintain tight control over the flow of investment.[7] On the other hand, as the authors have argued before, the prudent approach for foreign investors, particularly in light of the enduring concerns about the rule of law in Cuba, remains to build trust through continued and close scrutiny of the government's treatment of investment in the coming years.[8]

Domestic Protection of Foreign Investments

In the months preceding President Obama's announced policy changes, the Cuban government implemented its own significant reforms directed at promoting foreign investment and adopted the new *Ley No. 118 de Inversión Extranjera*.[9] The *Ley de Inversión*'s liberalization of foreign investment has been recognized by numerous commentators.[10] Most notably, the reform explicitly authorizes foreign investment in all

sectors—subject to government approval—except education, health care and the military.[11] Among the numerous changes implemented, the *Ley de Inversión* also cuts taxes imposed on foreign investment, explicitly permits wholly owned foreign investments, recognizes intellectual property rights and streamlines registration requirements.[12]

Promisingly, the *Ley de Inversión* incorporates several fundamental investment protection standards, including "full protection and security."[13] The treatment of expropriation under the standard of full protection and security is broadly consistent with customary international law to the extent that it prohibits expropriation except if in the public interest, and it mandates the payment of compensation:

> Foreign investments in the national territory shall not be expropriated, except for a public purpose or social interest previously declared by the Council of Ministers, in accordance with the Constitution of the Republic, international treaties signed by the Republic of Cuba on investment and applicable legislation, with due compensation paid at the market value established by mutual agreement.[14]

The *Ley de Inversión* also incorporates the common, but expansive, full protection and security standard.[15]

Despite these positive steps, significant doubts remain regarding the *Ley de Inversión*'s control mechanisms. International arbitration—the most common form of dispute resolution between states and foreign investors—was explicitly avoided. Rather, the law only provides a process for determining the appropriate level of compensation due when a direct expropriation occurs, an increasingly rare phenomenon:

> In the event that the parties fail to reach an agreement on the market value, pricing shall be determined by an internationally recognized business valuation organization authorized by the Ministry of Finance and Prices and contracted for that purpose by agreement of the parties involved in the expropriation process.[16]

In effect, the reform does not provide a method of international disputes resolution for adjudicating disputed takings. Instead, it vests the appropriate Cuban Provincial Court with jurisdiction over the dispute, a wholly unsatisfactory outcome for international investors.[17] This approach, however, is consistent with the bilateral investment treaties of the former Soviet Union and China (pre-1998), which "restricted an investor's right to refer disputes to international arbitration only to those disputes concerning the amount of compensation payable."[18]

Some commentators have noted that the reform does not *prohibit* arbitration when otherwise authorized by an investment treaty, which we note below is actually a common feature of Cuba's bilateral investment treaties.[19] The significance of this absence is overstated, however, because such a provision would be unenforceable to the extent that it conflicts with a treaty obligation.[20] This has not stopped other countries in the region (e.g., Ecuador) from taking domestic measures purporting to negate international treaty obligations.[21] The Cuban government's modest departure from the neo-Calvo[22] actions and the rhetoric of its ideological allies in the region is itself notable.

Cuba's Bilateral Investment Treaty Network

Though notable, the *Ley de Inversión* is the most recent initiative in what has become a multi-decade effort to open Cuba to foreign investment. As noted above, Cuba has entered into sixty investment treaties since 1993, of which the vast majority is in force. Cuba's first bilateral investment treaty, signed in 1993, was with Italy. Its most recent bilateral investment treaties, signed in 2002, were with Uganda and San Marino (though neither has entered into force).

Cuba's treaty network, described by commentators as "geographically widespread,"[23] is particularly well-developed in Europe and Latin America. European states with bilateral investment treaties in force with Cuba include Italy, Russia, Spain, German, Greece, France, Portugal, the Netherlands, Switzerland and the United Kingdom. In Latin America this list includes Argentina, Ecuador, Panama, Chile, Mexico, Guatemala, Paraguay and Venezuela. China has had a bilateral investment treaty in force with Cuba since 1996.

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What Is the Legal Framework for Real Estate Investments in Cuba?

By Rolando Anillo, Miami

Introduction

When examining the Cuban real estate legislation, the 1976 Constitution conceived the possibility of doing business only with the Cuban state. As observed by the still in force Cuban Civil Code (Law No. 59 of 1987), "the real estate and facilities belonging to the Cuban State may not be transferred to natural or juridical persons."[1]

Despite the above, the need for attracting foreign capital to Cuban real estate investments required additional guarantees to foreign investors. As a result, the Cuban National Assembly of Popular Power amended the 1976 Socialist Constitution of Cuba in 1992.

Some of these amendments eased restrictions on the transfer of real property belonging to the state. For example, Article 15 of the amended Constitution allows the state to transfer property rights, in exceptional cases, for the development of the country subject to the approval of the Council of Ministers. The article also states that "the transfer of property rights to state enterprises and other entities authorized to fulfill this objective will be prescribed by law," and Article 23 of the Cuban Constitution, as amended, states: "The State recognizes the right to legal ownership of joint ventures, domestic companies and economic associations which are created as prescribed by law." It follows: "The use, enjoyment and disposal of the assets belonging to the former mentioned entities are ruled by what the Law and treaties established, as well as by their statutes and regulations."

Cuban Foreign Investment Act of 2014 – Real Estate Investments

The 1992 amendments to the Cuban Constitution created a framework to allow for the inclusion of Cuban real estate in the sectors opened for foreign investments. The Cuban Foreign Investment Act (Law No. 118 of 2014), in Article 11, states that "foreign investments may be authorized in all sectors, excluding health and education for the population and the armed forces institutions, with the exception of the latter's commercial system."

This building houses the Cuban Legislature. Since 1976, the Cuban Legislature has structured the principle of independence of the government and Cuban companies. (Krechet/Shutterstock.com)

Chapter 6 of the Cuban Foreign Investment Act specifically deals with real estate investments. Article 17 states that investments in real estate shall be authorized and the ownership of the real estate or other property rights shall be obtained. Such investments must be made by one of the modalities established in this Act (joint

Legal Framework, continued

venture, international economic association agreement or totally foreign owned capital company).[2]

These investments in real estate can be destined to housing and buildings, either for private or tourist-related purposes, to housing or offices of foreign juridical persons or to real estate development for tourism purposes.[3]

Real Estate as a Cuban Contribution to a Joint Venture

The Cuban Foreign Investment Act also considers real estate as a contribution in a joint venture agreement between a foreign entity and a Cuban entity. Article 18.1 (d) includes as contributions to the investment "property rights over movable and immovable properties and other property rights thereon, including usufruct and surface rights." As such, the Cuban party in a joint venture may include land, buildings, usufruct rights and surface rights as part of his, her or its contribution to the joint venture.

Right of Usufruct in Cuban Legislation

According to the Cuban Civil Code, the right of usufruct establishes the right to the free enjoyment of the property of another, with the obligation to preserve its form and substance, unless the title constituting it or the law provides otherwise. The rights and obligations of the usufruct holder (usufructuary) are determined by the title document of usufruct.

The usufructuary is obligated to use the property that is the object of the usufruct in accordance with its purpose, and may make such improvements, facilities or installations necessary for its adequate maintenance, conservation and enjoyment. Article 210 of the Cuban Civil Code establishes that "the right of usufruct is nontransferable and may be encumbered, unless the title provides otherwise."

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Cuban Companies and the Principle of Independence

By Osvaldo Miranda, Miami

There has been an assumption for decades that Cuban companies are controlled by the Cuban government. The question is how the so-called Cuba Inc. is regulated under Cuban law. A deep assessment of the issue is required.

Since 1976, the Cuban Legislature has structured the principle of independence of the government and Cuban companies. Nevertheless, the judiciary has moved in a different direction in the last five years.

There is a factual control by the government of Cuban companies, but a legal independence. It is a difficult challenge to pierce a corporate veil in Cuban companies. The piercing of the veil is not regulated under Cuban law, and no judicial practices have been held.

Only an international forum of alternative dispute resolution might increase the possibility of raising the issue of whether Cuban companies are controlled by the government. Under Cuban law, parties of an international contract can agree to solve their differences in an international forum and under foreign law.[1] Nevertheless, Cuban companies are persistent in keeping the local jurisdiction and law governing the contract.

The International Arbitration Court in Havana belongs to the Cuba Chamber of Commerce, but is deemed an international arbitration court. The court has no jurisdiction on local arbitration between Cuban companies.[2] Cuban companies usually prefer the International Arbitration Court instead of local courts.

In 1976, the Cuban Constitution was amended to establish the independence of the Cuban government from Cuban companies.[3] The obligations of the government are not companies' obligations, and the government is not liable for companies' liabilities.[4]

Two years later, the statute for the Cuban state-owned company was enacted. The principle of independence

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Principle of Independence, continued

was maintained in this statute, in which companies were not legally liable for the government's liabilities, and the government was not liable for companies' liabilities.[5]

After a decade of institutional socialism, the state companies were the only subjects in the market, except for farmers. Farmers maintained a sort of private independence from the government, considering they were the owners of the land, but in the end, production, price and sometimes the destiny of the crops were planned and regulated by the government.

As state companies developed, they began to merge and created a holding called *Uniones o Grupos Empresariales*. In 1988, a new statute was enacted for the state companies and the new state holding. The principle of independence was incorporated into the new Act.[6]

After the collapse of the Soviet Union in 1989, Cuba found itself subject to total bankruptcy. With the loss of the largest supporter of its economy and regime, Cuba needed to open up to the world. In 1992, Cuba made the first reform to the Socialist Constitution of 1976, and regulated the possibility of receiving foreign investment.[7]

Until this time, the import and export transaction was exclusively reserved for the government. With the 1992 revision, import and export transactions were decentralized. The government retained control of international trade, but the Constitution empowered the government to authorize entities or individuals the right of import and export.[8]

In 1995, the Cuban Legislature enacted the Foreign Investment Law, creating the necessary framework to receive foreign investments in Cuba. The government created a foreign investment structure where international investors were more likely to partner with a Cuban company for the development of a project or business.[9]

Partnering entities mostly organized under the structure of a corporation or a limited liability corporation with a Cuban state-owned company proved to be a difficult task. In 1999, the Foreign Trade Ministry enacted Resolution 260 as a regulation for Cuban incorporated companies. The new business association structure allowed the Cuban government to strengthen the principle of independence.

The new Cuban corporation stock is now fully Cuban capital. Obviously the holder of the shares is the government, which might yet be evidence for a cause of action against the Cuban government based on the piercing the veil doctrine, but only in an international forum. Notwithstanding, there is no mention in Cuban law about the origin of the capital.

The Foreign Trade Ministry has the power to create and control Cuban corporations.[10] This is evidence that these corporations have as their purpose to serve as the Cuban government's instrument for international trade and foreign investment.

Today, international trade in Cuba is performed by Cuban corporations, not by Cuban state-owned companies. In 2001, the Foreign Trade Ministry enacted the Rules for Import and Export,[11] and in 2014, these rules were abrogated and substituted by Resolution 50/2014, which did not introduce any substantial change.

Under Resolution 260/99, the Foreign Trade Ministry created a new Cuban corporation, and under Article 18 of the Constitution established the license to import and export from the Cuban market.

Foreign investors or international traders are more likely to negotiate with Cuban corporations.

Different Approach: Are Cuban Criminal Courts Piercing the Veil?

It is a crime under Cuban law, punishable by imprisonment of three to eight years, to take actions with the purpose of affecting the economy or the credit of the Cuban state or knowing that such actions could produce such results. Specifically, criminal actions include:

- Altering reports or presenting or using economic plans in any form that contain false information; and
- Failing to comply with the regulations established

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Canary in the Coal Mine: An Overview of the U.S. Certified Claims Against Cuba

By Arthur M. Freyre, Coral Gables

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The United States' certified claims against the Cuban government are an important but often forgotten element in the debate of whether or not the embargo should continue or be lifted. How the United States and Cuba negotiate and resolve this matter will provide us with a glimpse of what the relations between these two countries will look like in the initial stages of the reestablishment of trade relations. To understand the resolution of the U.S. certified claims process, one must have a working knowledge of not only the U.S. Certified Claims Program against Cuba, but also the history of the program. This article will provide an overview of the U.S. certified claims against Cuba. It will focus on the following topics:

1. An overview of the Foreign Claims Settlement Commission of the United States;
2. The U.S. Certified Claims Program against Cuba; and
3. Possible scenarios involving negotiations between the United States and Cuba over the certified claims.

The degree of progress between the United States and Cuba to negotiate and resolve this matter will indicate how serious and willing Cuba is to pursue better relations with the United States.

U.S. Foreign Settlement Claims Commission

The International Claims Settlement Act[1] (hereinafter, the Act) authorized the formation of the U.S. Foreign Settlement Claims Commission (hereinafter, the Commission). President Dwight Eisenhower explained in a letter to Congress that the Commission would be the merger of two different agencies—the War Claims Commission and the International Claims Commission. President Eisenhower envisioned one agency that would handle compensation for claims of U.S. citizens whose property was taken during war and "losses sustained through the nationalization of properties."[2] The Commission would be under the Department of Justice, but as a separate, independent agency.[3] As a former commission chairman, Mauricio Tamargo recently testified before Congress that the Commission has been adjudicating American claims for over sixty-six years, during which fifty-two different claims programs have

commenced. These claims programs have been against twenty-three different countries, and all have been settled except for the Cuba programs.[4]

The Commission consists of three individuals, a chairman and two part-time commission members. The president, pending Senate confirmation, appoints all three members. The chairman and the two members each serve three-year terms and can continue in office until replaced by a successor.[5]

The Commission can only hear matters authorized through an act of Congress, "or by treaty or by referral of a category of claims by the Secretary of State."[6] The Commission can only "receive, adjudicate, and render a final decision with respect to any claim of the Government of the United States or any national of the United States."[7]

Concerning claims, the Act does not give a formal definition of what constitutes a claim. Instead, the Act explains the analysis that the Commission will undertake. For the purposes of this article, we will focus on this analysis when discussing the Certified Claims Program as it is applied to Cuba.

In determining whether the alleged property loss is a claim, the Commission will conduct a tribunal hearing. It has the power to examine the evidence, to subpoena and even to take depositions.[8] The hearings are not adversarial, and the claimant (the one who is petitioning to the Commission) has the burden to show the loss as well as to prove that the claimant was a U.S. national at the time the claim arose, as defined under the Act.[9]

The Commission will vote on whether or not the loss meets the criteria of a claim. When the vote has been taken, the Commission will notify the claimant whether or not his or her loss will be classified as a loss and the amount of the claim. The Commission must explain its reasoning, including how it calculated the amount of the claim. The claimant has the right to appeal the Commission's initial decision if the Commission denies his or her petition or if the loss is less than what the claimant alleges. The Commission will conduct an appellate hearing and have the option to affirm, modify or reverse its previous decision.[10] Any decision made by the Commission at this stage is final and cannot be

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Update: Florida Supreme Court to Consider International Litigation and Arbitration Certification

A new International Litigation and Arbitration certification is currently pending before the Florida Supreme Court. The certification, which was proposed by The Florida Bar's International Law Section, was unanimously approved by the Bar Board of Governors at its May 2016 meeting. If approved by the Florida Supreme Court, the International Litigation and Arbitration certification will become the twenty-seventh certification in the Bar's certification program. More than 100 of the International Law Section's members have expressed interest in obtaining this certification.

Civil Procedure May Thwart Political Will

By José M. Ferrer and Yasmin Fernandez-Acuña, Miami

While journalists and pundits tend to fixate on the Castro dynasty's and the Obama administration's diplomatic overtures, there is another critical but often ignored component in this political narrative: private judgments against Cuba. Despite the recent change in political climate, the existence of these judgments poses a significant hurdle to the full normalization of relations with Cuba, further complicating any rapprochement efforts.

The King Can Do No Wrong

Historically and up to present day, a sovereign usually cannot be sued. This concept is reduced to the Latin phrase rex non potest peccare, which means "the king can do no wrong." The doctrine of sovereign immunity recognizes this principle by holding that a foreign sovereign cannot be sued, without its consent, in another sovereign's courts. It operates as a mutual understanding among nations that they will not be subject to each other's judicial systems.

The 1976 Foreign Sovereign Immunities Act[1] (FSIA) codified this principle and expressly immunized foreign states from suit in U.S. courts, unless certain enumerated exceptions apply.[2] The FSIA's exceptions are the only bases for obtaining subject-matter jurisdiction over a foreign state in a U.S. court. One of these exceptions is the terrorism exception.[3]

In 1996, Cuban fighter jets shot down two small civilian planes operated by Brothers to the Rescue, a Miami-based Cuban-exile group, during a humanitarian mission over the Straits of Florida. That same year, President Bill Clinton signed into law an amendment to the FSIA allowing civil suits by U.S. victims of terrorism against certain countries performing terrorist acts or supporting terrorism. The terrorism exception under Section 1605A of the FSIA "abrogates immunity for those foreign States officially designated as State sponsors of terrorism by the Department of State where the foreign State commits a terrorist act or provides material support for the commission of a terrorist act and the act results in the death or personal injury of a United States citizen."[4] Being listed as a state sponsor of terrorism subjects a country to U.S. restrictions on foreign aid and defense sales, and adds a stigma that often impairs the country's accessibility to international financial sources.

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The terrorism exception requires that: (1) the foreign state be designated a state sponsor of terrorism at the time the act occurred, or later so designated as a consequence of the act in question; (2) either the claimant or the victim of the act of terrorism be a U.S. national; and (3) the defendant state be given a prior opportunity to arbitrate the claim if the act on which the claim is based occurred in the territory of the defendant state.

As originally conceived, the terrorism exception did not create a private right of action. The case of Aliza Flatow, a nineteen-year-old American exchange student killed in a 1995 Gaza bus bombing by Iranian-backed militants, changed that. In response to her murder, Congress passed the Flatow Amendment, which expressly creates a private right of action against a foreign state designated as a state sponsor of terrorism.[5] The Flatow Amendment allows any party injured or killed by a terrorist act covered by the terrorism exception to sue an official, employee or agent of a foreign state designated as a state sponsor of terrorism who commits the terrorist act while acting within the scope of his or her office, employment or agency if a U.S. government official would be liable for similar actions.

Cuba as a Civil Defendant

Turning back to Cuba, on 1 March 1982, the United States designated Cuba a state sponsor of terrorism. Cuba's placement on the list resulted largely from its training and arming of communist rebels in Latin America, which the United States viewed as supporting terrorist activities in that region.

During Cuba's 33 years on the terror list, U.S. courts awarded an estimated US$4 billion in civil judgments against Cuba to U.S. citizens. Cuba chose not to appear in these suits or to defend itself in U.S. courts, so these judgments resulted from defaults. The plaintiffs include the families of the downed Brothers to the Rescue pilots. They also include Gustavo Villoldo, who claimed he was the victim of torture and that his father was forced to commit suicide by the Castro regime. Villoldo's claims of approximately US$3.2 billion including interest represent the lion's share of the private judgments against Cuba. These claims are separate and distinct from the approximately US$8 billion certified claims against Cuba by those whose lands, homes and businesses the Cuban government nationalized following Castro's revolution.

On 29 May 2015, as part of the Obama administration's efforts to normalize relations with Cuba, the United States removed Cuba from its list of state sponsors of terrorism. By removing Cuba from this list, the United States has once again cloaked Cuba with immunity from future suits. Despite Cuba's removal from the list, however, plaintiffs holding existing judgments against Cuba can continue to pursue attachments to satisfy their judgments. This means that any Cuban assets that touch U.S. soil can be seized to satisfy these judgments.

For example, because Cuban airlines are state-owned, any Cuban airplane that lands in the United States can be seized to satisfy private money judgments. This is precisely what occurred in 2003 when a Cuban airplane was hijacked and flown to Key West. Despite Cuba's protestations, the plane was sold at auction to satisfy a private litigant's claims. Therefore, as long as these private judgments remain unpaid, regular commerce between the two nations cannot take place because no Cuban plane can land on U.S. soil, no Cuban vessel can dock at a U.S. port and no Cuban good can enter U.S. commerce without risking confiscation.

Collecting From Cuba

While the certified claims against Cuba can be negotiated directly between the U.S. and Cuban governments, the U.S. government cannot negotiate or settle the private civil judgments against Cuba. These judgments were obtained by and belong to private citizens—these are *their* claims. Any attempt by the U.S. government to settle these claims would present major constitutional challenges. Thus, the question remains how to resolve these claims.

So far, the judgments represent only symbolic victories. To date, very few plaintiffs have received any money at

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Technology in Cuba

By Barbara P. Alonso, Miami and New York

There has been much excitement and speculation in the global technology and telecommunications sector about opportunities in Cuba following the easing of trade and travel restrictions between the United States and the island country. Cuba's Information & Communications Technology (ICT) sector could be a key driver of growth and economic expansion for the island country, supporting the development of other key industries, such as tourism, trade and commerce, agriculture, energy, mining and construction. History has demonstrated that technology and innovation play a key role in stimulating job growth, productivity and economic success.[1]

A steel outline of Camilo Cienfuegos' face adorns the Ministry of Informatics and Communications building at the Plaza de la Revolución in Havana. (Villorejo/Shutterstock.com)

Access to modern ICT services would offer benefits to the Cuban population, including: (1) improved flow of economic and market information; (2) creation of channels of communication to avert humanitarian disasters; (3) greater use of e-commerce/use of payment systems; and (4) expanded access to credit, through mobile banking applications, for example.[2] ICT has the power to reduce poverty and foster growth—mobile telephones provide market links for farmers and entrepreneurs; the Internet provides vital information and knowledge to hospitals and schools; and computers increase productivity.[3] Modern ICT services could be a driver of key sectors in the Cuban economy, such as tourism and agriculture, that the Cuban government has prioritized for investment and development.

Cuba's Investment in the Development of an ICT Sector

Cuba has invested resources in the development of human capital necessary for an ICT community to thrive. In 2002, the University of Information Sciences (UCI) was founded, and since then, other Cuban universities have added technology sciences to their curricula, graduating more than 5,000 ICT engineers each year in recent years.[4] The computer programming sector has the potential to flourish—many programmers who work at the UCI, or at the José Antonio Echeverría Higher Polytechnic Institute, moonlight as freelance programmers, using the institutes' broadband to transfer large files.[5]

Additionally, influential members of Cuba's government favor the development of a technology sector in Cuba. A plan prepared by Cuba's Ministry of Communications in June 2015, *National Strategy for the Development of a Broadband Infrastructure in Cuba*,[6] calls for converting the existing low-speed switched services to faster broadband. The strategy calls for 50% of households to have broadband connections by 2020 while keeping costs to 5% or less of the average salary. In July 2015, the Cuban government installed the first of sixty-five broadband hotspots, which has made it possible for Cubans to use videoconferencing to speak with relatives long distance and to send and receive assignments from

employers overseas who hire Cuban programmers on the island to do jobs for clients in Argentina, Canada, Germany and the United States.[7]

In February 2016, the Cuban government announced that it would launch residential broadband Internet service in two areas of Havana, and would allow cafes, bars and restaurants to order broadband service. The pilot program will allow residents of La Habana Vieja to order broadband through fiber-optic connections operated by Chinese telecommunications provider Huawei. ETECSA (the state-run telecommunications company) also announced that thirty more Wi-Fi hot spots would be open in the capital in 2016—adding to the sixty-five hotspots that were rolled out in 2015.[8] In addition, the state-run Internet cafes have lowered their prices, from $4.50 per hour to $2 per hour—still a very high price given monthly salaries that average $20-$25 per month.

With its investment in human capital—a highly educated population, 100% literacy rate, public investment in technology and research, and the entrepreneurial spirit of many Cuban programmers and software engineers—Cuba could transform itself into a tech start-up hub, the Silicon Valley of the Caribbean.

Challenges to Overcome

Before Cuba can transform into a tech hub, however, the country must overcome serious hurdles, including a lack of critical infrastructure, laws that limit foreign investment and government control of access to the Internet.[9] Cuba still lags behind other Latin American countries on Internet access, with one of the lowest levels of Internet penetration in the hemisphere and one of the lowest in the world.[10] Improved Internet connectivity is also a big "if," since even if the Cuban government follows through on its plan to connect 50% of Cubans to broadband by 2020, the anticipated speed would be too slow for certain functions, such as streaming video or playing games online.

According to published reports, in 2015 only 3.4% to 5% of Cuban households were connected to the Internet, and a mere 5% of the population had occasional access to the Web.[11] Internet access in the country of 11 million people is available primarily through shaky Wi-Fi at scattered spots, or slow dial-up service at state-regulated computer labs.[12] The Geneva-based International Telecommunications Union (ITU) ranks Cuba lowest in the Americas in telecommunications development.[13]

Cubans' Internet access is expensive and requires the purchase of a time-limited username and password from a kiosk. Cubans also pass around flash drives called *el paquete semanal* (the weekly package) filled with Netflix movies, episodes of *House of Cards*, YouTube videos, digital music, news reports, mobile apps and other content. This flash-drive network is actually a platform for digital entrepreneurship. The drives contain a kind of Cuban Craigslist called *Revolico*, which features black-market products for sale. And a digital magazine called *Vistar Magazine* is distributed almost entirely on these thumb drives. The *paquete* costs between $1 and $2 per week.[14]

Obama Administration's Support of Development of ICT Sector in Cuba

Despite incredible challenges, Cuba's nascent ICT start-up community has benefited tremendously from the reestablishment of diplomatic relations between the United States and Cuba, and from the Obama administration's regulatory changes allowing greater travel and trade to Cuba.[15]

President Obama has used his executive authority to loosen U.S. trade and travel restrictions to Cuba. The new U.S. regulations allow joint ventures with qualified Cuban tech entrepreneurs (both private individuals and cooperatives), as well as the import of their services to the United States. Such services include software coding, website design and the sale of innovation applications under development. Additionally the U.S. regulations permit U.S. companies to engage in "infrastructure creation."[16] Certain types of financing are also permitted under the new regulations unveiled by the Obama administration. One of these measures was to loosen

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International Sales of Goods in Cuba Under the CISG Convention

By Attilio M. Costabel, Miami

Preface


Leonie Fahjen/Pexels.com

The Republic of Cuba entered into the Convention on the International Sale of Goods (Vienna Convention) on 2 November 1994, and the Convention entered into force on 1 December 1995.

On 2 November 1994, the Republic of Cuba entered into the Convention on the Limitation Period in the International Sale of Goods enacted in New York on 14 June 1974.

In view of the ongoing process of opening trade between Cuba and the United States, many questions come to mind about the practical operation and availability of the norms of these conventions in the still elusive scenario of Cuban commercial law within the Cuban judicial system.

Commercial contracts in Cuba are the subject of special legislation, the *Decreto Ley* n. 304, enacted 1 November 2012 (*De La Contratacion Economica*; hereafter, DL 304) and Decreto 310, enacted 17 December 2012 (*De Los Tipos De Contratos*). This legislation modified the previous special legislation found in the Civil Code and in the *Decreto Ley* n. 15 (*Normas Basicas Para Los Contratos Economicos*).

A recent essay by Lourdes Dávalos León addresses several questions that arise from these statutes.[1] DL 304 explicitly does not apply to international contracts unless by specific agreement of the parties. León investigates the differences between economic and commercial contracts, as well as between domestic and international contracts under the revised legislation of *planificacion economica*, and concludes that business practice and jurisprudence (that is, judicial precedents) will open the way to the interpretation of this legal system.

While this is true, the trouble is that business operators may find little guidance from jurisprudence the way we know and use it. Until about a year ago, some Cuban decisions could be found online on the websites of the *Tribunal Supremo* and the *Camara Arbitral*, but presently, although the links still exist, no data is available.

It is possible to find decisions on specific legal issues through professional contacts, and in fact, this article was made possible by scouting private sources who happened to have examples of actual decisions. Some rare writings by professors and attorneys who have had cases in Cuba may also be found online, but as one of these writers alerts, the availability of judicial material remains scarce.[2]

The *Tribunal Supremo Popular* (TSP) is the highest court in Cuba, with the power to adjudicate, among other matters, claims for breach, modification, nullity, invalidity or extinction of economic contracts.

The TSP is organized into specialized chambers (*camaras*). The chamber that hears cases regarding the sale of goods is the *Camara De Lo Economico*.[3] Many studies and essays have been written about the independence, and thus the reliability, of the Cuban

judiciary.[4] These studies highlight that the judiciary is still under strict control of the Ministry of Justice, with the judges being evaluated constantly and subject to removal at will. It might be suspected, therefore, that a foreign plaintiff would be at a disadvantage against a local company with the home field advantage, under the assumption that the judge would be naturally biased.

Suspicions also abound about the fairness of the Cuban legal system, in terms of the application of laws and legal reasoning, that stems from Latin ancestry and thus is somewhat arcane to most American practitioners.

The readings from the extremely limited number of cases retrieved for this article, however, tend to show the contrary, and the same applies also to another dispute-resolution institution, the *Corte de Arbitraje de Comercio Exterior*, renamed in 2007 to *Corte Cubana de Arbitraje Comercial Internacional* (hereafter, *Corte*).

The *Corte* is competent to adjudicate contractual and non-contractual disputes of international character,[5] arising in the field of business, which are voluntarily submitted by the parties. The structure and operational mode are almost identical to any arbitration society of the world, including model clauses and mediation procedures.[6]

A very interesting rule of the *Corte* is the law that the panel should apply. The will of the parties comes first, followed by the default choice if the parties have not made a choice, which is the law that the panel finds applicable using the principles of private international law (choice of law) or the customs of international trade. For disputes that involve an *empresa mixta* or an enterprise of totally foreign capital, Cuban law applies.

Here comes one of many questions: What is Cuban law? Is it the Civil Code, the Code of Commerce or could it ever be the CISG Convention?

An article by Abogada Lourdes Avalo Leon[7] raised questions about the stance that the Cuban judiciary might take after the new regulations of the *Contratacion Economica* took effect in 2012, but few cases could be found even before 2012 that supply reassuring answers.

ETECSA v. Republic Bank[8]
Tribunal Supremo Popular (*Sala de lo Economico*)
16 June 2008

A South African telecommunications enterprise entered a contract for the international sale of goods with a Cuban telecommunication company (ETECSA). The seller assigned the credit for payment of the purchase price to Republic Bank, a domestic banking institution established under the laws of Cuba. The buyer did not pay, alleging that the goods did not conform to specifications, thus pleading fundamental breach.

The court[9] found for the bank and required the buyer to pay, on the grounds that ETECSA could withhold payment only for the part of the goods that were nonconforming, on the equitable principle of balance of the performances as found in Article 7 of the CISG and in the Civil Laws of Cuba.

The court also found that the assignee had all of the defenses that the assigned party had against the assignor, and therefore the principle of compensation applied to the demand of the bank.

The buyer appealed to the *Tribunal Supremo* (TSP), which reversed.

The TSP began with a choice of law analysis. The underlying contract being with a corporation of South Africa (also a party to the Convention), the TSP found that the CISG was applicable. In fact, the contract of sale contained an arbitration clause to the *Corte de Arbitraje de la Camara de Comercio*. The plaintiff, however, did not avail itself of the arbitration clause and sued in the *Court of La Habana*. The defendant appeared without objecting the jurisdiction, and hence the TSP found that the parties had made an implicit exclusion of the arbitration clause, but not of the applicable law. In any case, the TSP reasoned, the Convention would have applied, as the Convention is part of the Cuban law.

The TSP then considered the merits, finding that under Article 25 of the Convention, there was a fundamental breach (*incumplimento esencial*) that caused the other

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The New Cuban Private Sector: The Insufficiency of the Cuban Reforms

By Christopher Palomo, Miami

In 2008, in recognition of a growing national debt and state-labor surplus, the Cuban government announced its intention to reform and update its economic model.[1] These reforms were intended to alleviate overemployment in the state sector by expanding *trabajo por cuenta propia* (self-employment) in the private sector.[2] The Cuban government expanded the list of private-sector business licenses while simultaneously laying off surplus state labor—allowing them to be absorbed into the private workforce.[3] The government hoped that these recently released state workers would be able to take advantage of the newly expanded entrepreneurial licenses and find work in the private sector. Unfortunately, such hope ignored Cuba's continuing restrictions on market access resulting from the insufficient availability of storefront, capital, supplies and inventory. As a practical matter, these shortages have restricted workers' access to the private market and, ultimately, have caused the Cuban private sector to be unable to efficiently absorb the release of excess state labor.

Despite the unavailability of these business prerequisites, approximately 15% of the Cuban labor force has already been laid off from state employment, and another 21% is expected to follow.[4] These layoffs have increased the price and competition for already dwindling business resources—further inhibiting market access. Although Cuba's reforms have expanded entrepreneurial freedoms in legislation, they have done little to address the practical obstructions precluding workers from utilizing these new liberties. By not addressing these limitations before releasing surplus state labor, the Cuban government has essentially swept its excess workers under the rug and into a private sector that is far too restricted to allow them to be successful. This has placed these workers at great risk of labor exploitation and inequality.

SANTA CLARA, CUBA-28 JUNE 2014: Private flower stands. After the government economic reforms, citizens are conducting small business with more ease and legal peace of mind. (rmnoa357/Shutterstock.com)

Motivation for Change

Since the Castro revolution, Cuba's economy has operated as a socialist regime, with the government in control of the island's economic production.[5] Under this system, the means of production are centrally owned and operated by the state. As a result, nearly every service is provided by the government—as opposed to private businesses. Accordingly, the Cuban government is by far the single largest employer on the island, and is responsible for 95% of the island's gross domestic product (GDP).[6] Under this system, Cuba has consistently had one of the lowest unemployment rates in the world.[7]

Unfortunately, Cuba's low unemployment rate has been artificially created by the government's practice of hiring of large amounts of unneeded labor. In 2008, as much as 36% of Cuba's labor force was considered superfluous.[8] This overemployment not only has resulted in low wages but has also contributed to Cuba's growing national debt. It is this cycle of inefficient spending that has motivated the recent reforms—as well as the corresponding state layoffs. Accordingly, many believe that these reforms are just a means to reduce the Cuban national debt, and not the beginning of genuine ideological change.

The Insufficiency of the Reforms

Historically, the Cuban private sector has been heavily restricted.[9] Prior to the reforms, government regulations limited Cuban entrepreneurs (*cuentapropistas*) to only 158 lines of work and forbade them from hiring employees.[10] As a result, the contribution of Cuba's private sector has been negligible in terms of employment and production—accounting for only 5% of Cuba's GDP.[11] Although the reforms have increased the role of private business in the economy, this increase has not been significant.

The key effects of the reforms are as follows:

- Self-employed persons may now hire employees.[12]
- Health and safety standards have been extended to the private sector.[13]
- Seating allowed in private restaurants has been expanded from twelve to fifty persons.[14]
- Private employment has been expanded to 201 lines of work.[15]
- Layoffs of 1.8 million government workers are expected (approximately 36% of the labor force),[16] with a goal to increase private sector production from 5% to 50% of the GDP.[17]

Economic studies of the privatizations of Eastern Europe show that the development of a private sector in a socialist regime requires both significant legislative and practical adaptations to be successful.[18] Regardless of the publicity amassed by the recent reforms, the Cuban private sector remains restricted. Despite expanding entrepreneurial freedoms, the legislative reforms have failed to address the practical limitations on access to storefront (real property), capital, supplies and inventory that prevent workers from utilizing these new liberties. As a result, although more private business licenses are available, the lack of these business prerequisites inhibits workers from applying for these new licenses and entering the private market. Accordingly, the private sector cannot take a meaningful role in Cuba's economy, and as a result, private workers are at great risk of exploitation and inequality.[19]

Despite these inefficiencies, the expansion of the Cuban private workforce has proceeded rapidly. As of today, approximately 15% of Cuba's state labor has already been laid off, and another 21% is expected to follow.[20] Ultimately, this rapid rise in the number of workers entering the private sector has strengthened the market's barriers to entry by increasing the price and competition for already scarce business prerequisites. Accordingly, although Cuba claims to intend to promote private-sector growth, its failure to synchronize the expansion of the private workforce with the pace of legislation has, in fact, stifled its development.

Direct Restrictions on Market Access

Despite the publicity garnered by the expansion of available business licenses, entrepreneurship in Cuba remains heavily restricted. Today, private employment in Cuba is limited to 201 entrepreneurial licenses. This restriction not only limits an increasing segment of the workforce into a narrow range of employment

SANTA CLARA, CUBA-10 AUGUST 2014: Government-operated cafeteria with few supplies and customers. There is speculation that soon all these places will be rented to private entrepreneurs. (rmnoa357/Shutterstock.com)

options, but also limits the productivity of the private sector. Because 85% of the private sector in Cuba is self-employed, there is little opportunity to find work as a private-sector employee.[21] Additionally, even when such a position is available, government restrictions and taxes make hiring employees prohibitive. As a result, to find employment, many Cuban workers are forced to apply for an entrepreneurial license and go into business for themselves. Unfortunately, the majority of the 201 entrepreneurial licenses currently available are for menial and low-paying activities such as wrapping buttons, shoe-shining, cleaning spark plugs, peeling fruit, selling fruit and repairing umbrellas.[22] Limiting workers to this short list of menial labor—regardless of their education and experience—restricts their productivity and earning potential.

Indirect Restrictions on Market Access

In addition to direct market restrictions, Cuba's legal and market environment also indirectly restricts workers' access to the market by obstructing access to business necessities such as storefront (real property), capital, supplies and inventory. Finding funding and capital is often the first obstacle to any entrepreneur trying to enter the private market, and entrepreneurs in Cuba are no different. Despite the largely menial nature of private employment currently permitted, obtaining a storefront, supplies and inventory is still a prerequisite to the formation of nearly any business. Accordingly, the unavailability of these things acts as a major obstacle to entering the market.

Capital

Currently, access to financing in Cuba is grossly insufficient to support widespread private enterprise. Between 2011-2013, 218,400 loans were granted by the Central Bank of Cuba, and each averaged only US$141.[23] Additionally, only 0.2% (4,368) of these loans went to self-employed workers.[24] Capital is the lifeblood of the market, and without sufficient access to credit, businesses will fail to enter or remain in the market. As a result, many Cuban workers have been forced to rely on personal savings to supplement this lack of capital. Unfortunately, Cuban workers suffer from chronically low wages, with the average Cuban citizen earning roughly US$20 per month.[25] Yet, depending on the enterprise, starting a small business in Cuba could require an initial investment of at least US$220 to US$6,000 (excluding property rental expenses).[26] Accordingly, it could take most workers as much as twenty-five years' worth of salary (US$6,000) to begin a private business, based on savings alone.

Some workers have been able to partially circumvent this

problem by receiving funding from abroad. This funding is in the form of remittances from family members in other countries—commonly from the United States. Workers fortunate enough to receive remittances have access to a limited form of financing that is unavailable to other citizens. As a result, they can utilize these subsidies to fund their businesses. This access to foreign capital provides these workers with a tremendous competitive advantage.[27] Regulations limiting the amount and size of remittances, however, prohibit these subsidies from becoming a genuine solution to significant capital needs. This leaves some of the foreign subsidized entrepreneurs in need of additional financing.

Storefront

For those workers who are able to obtain access to capital, the expense and unavailability of storefront may still prevent them from entering the market. In Cuba, access to storefront is restricted by overbearing regulations on the transfer of real property. For years it was not possible to sell real property in Cuba at all; transfers of real property could only occur by essentially trading two properties of equal value (the *Permuta* system).[28] While reforms have alleviated this restriction—allowing regulated sales of real property for the first time—Cuban property law remains restrictive.

For example, Cuban property law limits the amount of property a citizen may own, prohibits real estate lawyers from operating on the island, prohibits foreigners from purchasing real property and requires notary approval prior to any sale.[29] Additionally, even when these hurdles can be overcome and a transaction is feasible, the majority of Cuba's property is in disrepair. A 2013 survey studying the condition of structures in Havana estimated that 58% of the city's structures were in poor or critical condition.[30] The additional expense of repairs—as well as government taxes, fees and restrictions on construction—makes useable storefront harder to acquire. As a result, despite the apparent efforts of the Cuban legislature to expand private-sector production, meaningful entrepreneurship is forced to try to flourish from homes and street carts.

Supplies and Inventory

Finally, even if an aspiring private worker is able to obtain access to capital and acquires a storefront—or decides to circumvent the problem by operating a home-based business (as the majority of private workers do)—this worker's access to the private market is still restricted by the unavailability of supplies and inventory. According to Cuban entrepreneurs, "the most significant problem facing small business on the island is the cost and availability of supplies."[31] The lack of access to wholesale markets, dismal domestic production and high import duties make acquiring necessary business inputs costly and difficult. In fact, a study by Kellogg University found that the most affordable way to acquire necessary business prerequisites is for workers to purchase their supplies at state-run dollar stores.[32] The lack of product variety and quality at these stores often causes Cuban workers to struggle to acquire the supplies they need—forcing them to look outside the island for necessities. As a result, despite the expansion of entrepreneurial freedoms, the unavailability of necessary business materials restricts workers' access to the market.

The Immediate Impacts

Despite all these obstacles, private businesses do exist in Cuba; however, the challenges of private enterprise, especially in an island with poor infrastructure and supplies, create substantial uncertainty about the success these entrepreneurs will have.[33] This is evident from the rise of income inequality since the implementation of the reforms.[34] Income inequality in the Cuban private sector arises largely from unequal access to business prerequisites. Citizens fortunate enough to receive remittances have potentially insurmountable advantages over their competitors.[35] Not only do these remittances serve as form of financing that is unavailable to other citizens, but each U.S. dollar received is worth nearly twenty-five times[36] more than the Cuban peso. As a result, inequalities in access to financing lead to inequality in access to business inputs and, ultimately, to inequality in access to the private market. As more workers are forced to trade state employment for private entrepreneurship, inequality

in access to these inputs will continue to magnify. This makes private-sector success more dependent on whether or not a business can receive support from abroad, and less on the merits of its own service.

Although the long-term goals of the Cuban reforms have yet to be achieved, it is necessary to address the immediate concerns of workers currently entering the private sector. In fact, there is already concern that the gradual pace of reform has been insufficient to prevent labor injustice.[37] The restrictions on market access and the increases in the private workforce have increased competition for employment in the private market to dangerous levels. As desperation for work emerges, private workers are placed at risk of exploitation. Cuba has long been accused of numerous international labor rights violations, even before the institution of the economic reforms.[38] Such violations are likely to worsen as a result of increases in competition in both the state and private sectors.[39] While Cuba does have a labor union to help regulate these concerns, most commentators believe it is insufficient. Labor rights in Cuba are primarily protected through the *Central de Trabajadores de Cuba* (CTC),[40] Cuba's national labor union.[41] The CTC operates very differently from unions in the United States. While unions in the United States operate as mediating institutions between the workers and employers, the CTC primarily operates as a political instrument.[42] The CTC does not engage in collective bargaining over wages, hours or terms of employment.[43] Instead, it merely reports workers' grievances, concerns and recommendations to the government.[44]

Ultimately, the labor protections developed under Cuba's socialist system are unable to function effectively within private enterprise.[45] As a result, critics of the Cuban reforms argue that the CTC—as currently constructed—will be unable to adequately protect worker rights.[46] "Increased pressure for productivity in state-owned enterprises and the possibility of generating profits in private enterprise will create greater incentives for employers to exploit workers."[47] If the CTC is to be able to adequately protect workers' rights under these new reforms, it "will need to evolve in recognition of the ways in which workers' interests diverge from the interests of the state."[48]

Conclusion

Cuba's reforms have been insufficient to support the growth of a private sector. Despite relieving the legislative restrictions on private enterprise, the Cuban reforms have failed to address the practical concerns that prevent entrepreneurs from accessing the market. The most notable restrictions are the unavailability of business prerequisites such as storefront (real property), capital, supplies and inventory. The rapid growth of the private sector—caused by government layoffs of excess labor—has increased the price of and competition for these already scarce resources. Ultimately, although Cuba claims to intend to promote private-sector growth, its failure to synchronize the growth of the private sector with the pace of legislation has, in fact, stifled its development. By shedding its excess state labor and relocating those workers to the private sector before relieving the practical barriers to market entry, Cuba has exposed its workers to exploitation and inequality.

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WORLD ROUNDUP

AFRICA

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Senegal invokes universal jurisdiction and prosecutes former President Hissène Habré of Chad on behalf of Africa.

On 30 May 2016, Hissène Habré was sentenced to life in prison in an extraordinary legal proceeding that marks the first time in history that a court in one country—Senegal—prosecuted the leader of another country—Chad—for human rights violations, including mass political killings, torture, kidnapping and sexual slavery.

Habré's eight-year reign, from 1982 to 1990, was marked by widespread torture and executions that resulted in the deaths of more than 40,000 people. Habré fled to Senegal after being ousted from power during a 1990 coup. Habré's victims waged an unyielding campaign for justice, pushing for his prosecution in Chad, Senegal and Belgium. The African Union (AU) called on Senegal to prosecute Habré "on behalf of Africa" in July 2006.

Senegal, responding to the AU's call, amended its constitution in January 2007 to allow for universal jurisdiction. The amendment provides jurisdiction for Senegal's prosecution of genocide, crimes against humanity and war crimes, even when they are committed outside of Senegal. Before the constitutional amendment, Senegal's highest court, in March 2001, upheld the dismissal of torture charges against Habré for lack of jurisdiction, noting that the criminal acts were committed outside of Senegal.

In 2008, Habré filed a complaint against Senegal in the Court of Justice of Economic Community of West African States (ECOWAS) alleging that the amendment violated his rights, including the principle of non-retroactivity of criminal law. In a highly criticized decision, the ECOWAS held that Senegal must establish a special international tribunal to prosecute Habré and that the principle of non-retroactivity would be violated if he was tried in a domestic court. Habré could not be tried by the International Criminal Court, which only has jurisdiction over crimes committed after its statute went into effect on 1 July 2002.

Senegal, with the backing of the AU, established the Extraordinary African Chambers (EAC) in 2012 for the sole purpose of bringing Habré to justice. The EAC's statute identifies its purpose as implementing the AU's decision regarding Senegal's prosecution of international crimes committed in Chad between 7 June 1982 and 1 December 1990. The EAC's judges and prosecutors were nominated by Senegal's justice minister and appointed by the chairperson of the AU Commission. Habré was tried under Senegalese law by a three-judge panel, with two judges from Senegal and one from Burkina Faso.

Habré's trial began in July 2015. The EAC heard evidence from ninety-three witnesses including former prisoners, rape victims, former military personnel and individuals whose family members had disappeared at Habré's instructions. Former prisoners vividly described the frequent rape of female detainees, being placed in jail cells with rotting corpses and other commonly used torture techniques. One witness testified that he was forced to bury the bodies of hundreds of deceased detainees in mass graves.

After more than twenty years of evading justice, Habré was sentenced to life in prison on 30 May 2016. The AU praised the EAC's decision, stating that it reinforces the AU's principle of applying African solutions to African problems.

Nigerians outraged as Senate rejects gender equality bill.

The Gender and Equal Opportunities Bill was voted down by the Nigerian Senate in March 2016. The bill sought to eliminate discrimination against women on the basis of sex and to provide women with equal rights in all forms of life including, but not limited to, employment, government and marriage.

Section seven of the bill modifies sociocultural practices so that widows will automatically become the custodians of their children, women can inherit their deceased husband's property and women and men shall have the right to inherit equitable shares of their parents' property. Section seventeen of the bill, titled rights in matters relating to marriage and family relations, ensures equal rights to women in deciding to enter a marriage and in the dissolution of marriage.

Opponents from predominately Muslim northern Nigeria argued that the bill violates the Nigerian Constitution, which recognizes the validity of Sharia law. Other opponents, including those from the predominately

Christian south, argued that the bill ran afoul of Nigeria's patriarchal customs and traditions.

Male and female supporters turned to social media to express their outrage with the Senate's vote, and supporters started a petition to bring the bill back to the Senate floor. Senator Abiodun Olujimi, the presenter of the bill, has vowed to continue her fight for gender equality and to reintroduce the bill to the Senate. Senate President Bukola Saraki has publicly supported the bill's reintroduction, stating that he believes that portions of the bill "are crucial for the development of a nation."

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ASIA

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CHINA

Foreign arbitration institutions establish offices in P.R.C.

The Hong Kong International Arbitration Centre (HKIAC) opened its representative office in the China (Shanghai) Pilot Free Trade Zone (Shanghai FTZ) in November 2015. The Singapore International Arbitration Centre (SIAC) and the International Court of Arbitration at the International Chamber of Commerce (ICC) also established representative offices in the Shanghai FTZ at the beginning of 2016. The general status of foreign arbitration institutions in China is still unclear, however. Chinese arbitration law neither explicitly permits nor prohibits the conduct of arbitration in China by foreign institutions. Questions remain as to whether these foreign arbitration institutions may administer proceedings in China, and whether such arbitral awards would be enforceable in China.

China considers amendment to P.R.C. labor contract law.

On 29 February 2016, the head of the Ministry of Human Resources and Social Security (MOHRSS), Weimin Yin, discussed whether China's Employment Contract Law (ECL) imposes too high a burden on companies and makes the labor market too rigid. He conceded that the ECL may have created a less flexible labor market, increased labor costs for companies and may not be appropriate to China's "new normal" economic situation of slower growth. Although the minister did not specify which rules the ECL would be subject to consideration for amendment, the restrictions on termination or the imposition of open-term employment contracts on companies would likely be key points of discussion. China's finance minister, Jiwei Lou, also concurred that the ECL fails to provide protection for companies and that rigid rules that could potentially have an adverse impact on the flexible labor market should be removed. These comments reflect the fact that, as China's economy is slowing, the P.R.C. government may be taking a more employer-centric approach to labor laws.

CAC issues provisions on Internet search services.

The Cyberspace Administration of China (CAC) recently issued the Provisions on Administration of Internet Information Search Services to regulate Internet information search services. Under these provisions, Internet information search service providers will be required: (1) to adopt information security management systems to enable the review and real-time inspection of the information by the relevant government agencies and to provide protection of personal information; (2) not to post or allow obscene content and other content prohibited by law; (3) to block the search results prohibited by law and report them to the CAC; (4) to provide search results that are objective, impartial and authoritative; (5) to mark paid search results and segregate them from natural search results; and (6) to establish comprehensive systems for public complaints and reports.

The provisions became effective on 1 August 2016.

KOREA

Korea tightens regulations on processing of personal information.

The Personal Information Protection Act (PIPA) was amended on 25 July 2015 and on 2 March 2016, followed by an amendment to the Act on the Promotion of IT Network Use and Information Protection on 22 March 2016. These amendments are intended to achieve more stringent regulation of and sanctions for processing of personal information and the alignment of the two laws in certain respects. Several provisions of the amendments should be noted.

Pursuant to the amended PIPA, transferees (who meet certain thresholds as provided by a presidential decree yet to be announced) that are processing personal information acquired indirectly by way of a third-party

transfer are required to notify the data subject of (1) the third-party source (transferor) from which the personal information was acquired; and (2) the intended use of the received personal information. Effective 30 September 2016, all third-party transfers received by transferees that meet the threshold under the presidential decree will be subject to such notification. Further, the amended PIPA requires that the same technical, managerial and physical security measures, as required under the PIPA for personal information, be undertaken for sensitive information. Lastly, the amendments clarify the classification of overseas transfer and add an enhanced penalty under PIPA. The concept of "overseas transfer" is further specified as to "third party provision," "processing," "entrustment" and "storage." In each case, consent of the user is required in principle. If overseas entrustment or storage is necessary for the performance of a contract relating to the principal service of the IT service provider and is necessary for the convenience of the user, the IT service provider is not required to obtain consent if certain items are disclosed in the privacy policy or otherwise conveyed to the user (by email and other means specified under the presidential decree).

SINGAPORE

New guidelines establish expectations concerning labor reductions.

On 24 May 2016, new Tripartite Guidelines on Managing Excess Manpower and Responsible Retrenchment were released by the Singapore tripartite partners (Ministry of Manpower (MOM), the National Trades Union Congress and the Singapore National Employers Federation (SNEF)). These revised guidelines contain a significant number of new recommendations concerning reductions in force (RIF). The new recommendations: (1) establish objective criteria in selection of employees for retrenchment; (2) provide advance notification to the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP); (3) provide detailed communications to employees; (4) establish a longer retrenchment notice period (and employers are also encouraged to make severance payments in lieu of such longer notice period); (5) recommend retrenchment benefits computation methodology; and (6) provide outplacement assistance beyond advisory assistance, including the provision of supporting documentation, or working with employment/placement agencies, unions and the SNEF.

Although the revised guidelines are not legally binding, they establish the expectations for employers effecting a reduction in their labor force.

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RUSSIA

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Russia imposes taxes on foreign mortgages.

In its June newsletter, the Russian federal tax service, *Federalnaya Nalogovaya Slugba* (FNS), announced its decision to levy taxes on Russian residents who have bought property abroad using a mortgage loan from a foreign bank.

A tax liability to the Russian treasury arises when a Russian resident takes out a loan from a foreign bank with an interest rate that is lower than the "base rate." Currently, the base rate of the Russian Central Bank for national loans is 11%. Meanwhile, in many countries of the world, housing loans are available to residents at a much lower rate. For example, mortgages are available at 4% and 1.75% per annum in the United States and Switzerland, respectively.

For Russians who take advantage of lower mortgage rates abroad, the Russian Tax Code (Art. 212) requires paying tax on the difference in percentages. The threshold for foreign currency loans is 9%. According to the Russian legislation, the difference is considered a profit. Thus, every Russian who takes a mortgage in a foreign currency bank is required to pay income tax of 13% on the difference between the actual interest rate and 9% per annum.

A mechanism of foreign capital amnesty discussed below may be another means to control the purchase of real estate abroad and subsequent payment of taxes in Russia. To purchase real estate in most countries, it is necessary to have a local bank account. The account is also required for payment of utility bills, association fees and other expenses. Foreign capital amnesty, in which Russian citizens were required to declare all of their unreported accounts in foreign banks, was in effect for one year.

30 June 2016 ends Russian amnesty on offshore capital.

The law on amnesty of foreign capital came into force in June 2015. It provided a special opportunity to declare unreported assets and accounts abroad under guarantees of no criminal, administrative and tax liability as well as not having to pay taxes on those assets for previous periods.

30 June 2016 was the deadline for receiving applications for amnesty of capital returns. The greatest surge of interest in the declaration came a month before the end of the campaign, which might be related to Russia's joining the system for automatic exchange of information on financial accounts pursuant to the Convention on Mutual Administrative Assistance in Tax Matters and based on the USA Foreign Account Tax Compliance Act (FATCA) implementation agreements.

Russian Federation has joined the automatic exchange of information.

On 12 May 2016, Russia signed a declaration to the Berlin agreement on automatic exchange of information on financial accounts. In 2018, the FNS will be able to receive the first data for 2017 related to payments, account balances, interest, income from investments and the sale of shares. Fines for illegal financial transactions on these accounts may be up to 100% of their amount. Through automatic exchange of information, the Russian tax authorities will be able to receive comprehensive information about Russians who own assets abroad from the more than eighty countries that are signatories of this declaration.

The EU agrees on the extension of sanctions against Russia for six months.

On 21 June 2016, the Committee of Permanent Representatives of EU countries agreed on the extension of the economic sanctions against Russia for six months. The sanctions were extended due to the actions of Russia in Ukraine, considered destabilizing according to a new evaluation of the implementation of the Minsk agreements. The EU extended the sanctions until 31 January 2017.

Restrictive measures against the Russian Federation were introduced in 2014 in connection with the events in Ukraine and Crimea's reunification with Russia. Since then, the EU has repeatedly extended and expanded the sanctions. In total, the "black list" includes 151 physical and 37 legal entities. The restrictions apply to commercial, financial and military sectors of the Russian Federation, as well as to twenty Russian oil and defense entities.

EU sanctions will also continue to apply to imports of Crimean goods to European countries as well as investments in real estate on the peninsula. The restrictions will affect the goods and equipment used in the transport, telecommunications and energy sectors of Crimea. The restrictive measures will be in effect until 23 June 2017.

Vladimir Putin orders cancellation of anti-Turkish sanctions.

At a meeting with government members on 29 June 2016, President Vladimir Putin ordered the start of the process of normalization of trade and economic relations with Turkey. This decision was preceded by a telephone conversation between Putin and President Recep Tayyip Erdoğan of Turkey, who offered an apology for the downing of a Russian Su-24 military plane on 24 November 2015, after which the anti-Turkish sanctions were imposed. In addition, Putin ordered to lift restrictions on Russians' travel to Turkey.

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SOUTH AMERICA

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Internal investigations increase in South America.

Amidst political uncertainties and moral and cultural questions affecting the lives of citizens in South American countries, it is possible to extract some good news: the search for compliance professionals is increasing each day. This increased demand shows that society and private entities are concerned with repressing acts of corruption.

In Brazil, enforcement activities carried out by the federal police along with the judiciary, such as Operation Car Wash, Sand Castle and Radioactivity, have brought paradigm changes to Brazilian culture. Acts of corruption are no longer seen as intrinsic and essential to economic activities, or as a subject that should be ignored.

From the moment that politicians and powerful businesspeople were investigated and punished with arrests and heavy fines, in line with the provisions

set forth by the Foreign Corrupt Practices Act (FCPA) and Brazil's Clean Company Act (Federal Law No. 12.846/2013), a feeling of anger and outrage awakened in society with respect to recurrent acts of corruption. For this reason, more and more companies are undertaking internal investigations as well as hiring compliance professionals. The main role of such professionals is to guarantee that the company and its employees comply with applicable conventions, laws and regulations.

Hundreds of operations are being conducted to combat impunity and to decrease acts of corruption. In response, companies in markets such as financial, pharmaceutical and energy have a growing demand for compliance professionals capable of preparing diagnostics on a company's internal rules, mitigating risks, as well as guaranteeing transparency of procedures, in accordance with applicable law and corporate policies.

Another example of progress against corruption occurred in Argentina in June 2016. The Chamber of Deputies approved a bill to apply plea agreements to cases of corruption. Typically, plea agreements are applied to cases of terrorism, drug trafficking and, by extension, money laundering. The bill approved by the deputies expands this tool to help combat corruption. It does not allow a total exemption from sanction, only a reduction of the sentence. The bill approved by the Chamber of Deputies must also be approved by the Senate to become law. Legal experts predict that the penalties for acts of corruption will increase in the event that this bill becomes law.

Brazilian Supreme Court allows imprisonment after first appeals court's judgment.

This year the Brazilian Supreme Court (STF) changed its understanding and jurisprudence with regard to imprisoning a convicted person after judgment of his or her first appeal of the conviction. Through a February 2016 ruling that has been simultaneously praised as the way to end impunity and criticized for redrawing defendants' rights, the STF affirmed that the Brazilian Federal Constitution allows for enforcement of imprisonment after the first appeal. The vote was seven to four.

By denying Habeas Corpus 126.292, the STF held that executing a sentence after its confirmation by an appeals court does not offend the constitutional principle of presumption of innocence. The previous Supreme Court ruling, from 2009, was that presumption of innocence prevented imprisonment until after all applicable appeals had been completed.

The reporting judge, Minister Teori Zavascki, opined that the confirmation of the penal sentence by the appeals court effectively closes the examination of facts and evidence that confirmed the defendant's guilt, which authorizes the sentence to be executed. Zavascki stressed in his vote that the defendant shall be presumed innocent until his or her sentence is confirmed by an appeals court, after which the principle of non-culpability comes to an end since appeals to decisions from the appeals court, ruled by the Court of Justice (STJ) or the STF, do not discuss facts and evidence, only matters of law.

This shift in the STF's understanding is positive in that it will end impunity, a practice commonly known to be an obstacle to the execution of sentences. The ability to execute a sentence after its confirmation by an appeals court will help to eliminate the abusive filing of appeals to postpone incarceration.

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UNITED STATES

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Indiana appeals decision granting preliminary injunction to Syrian refugee assistance group.

Indiana officials have appealed the decision of the U.S. District Court for the Southern District of Indiana granting a preliminary injunction to Exodus, a Syrian refugee assistance group. The injunction prohibits Indiana from withholding federal funding from Exodus and implicitly other Syrian refugee assistance groups. Indiana's policy of denying funds to Exodus, ostensibly in support of protecting Indiana residents from terrorism, was admittedly designed to deter voluntary agencies from resettling Syrian refugees in Indiana. The federal court, while not ruling on the merits, noted that Indiana's policy likely constituted unconstitutional discrimination in violation of the Equal Protection Clause. The decision is on appeal in the Seventh Circuit. Indiana is the most recent of more than two dozen states to take judicial or legislative action to prevent the resettlement of Syrian refugees within their state borders.

United States eases economic sanctions on Burma (Myanmar).

On 17 May 2016, the Department of the Treasury's

Office of Foreign Assets Control issued regulation 31 CFR Part 537 amending the Burmese (Myanmar) sanctions. The new regulation eases U.S. sanctions in response to recent elections in the country, which ended five decades of direct military rule. The new regulation authorizes certain transactions incident to exports to or from Burma; certain transactions incident to the movement of goods within Burma; and certain transactions related to U.S. persons residing in Burma. U.S. sanctions have been in place since 1997, and despite the recent relief, most of the U.S. sanctions remain in place.

International accord targets illegal, unregulated and unreported fishing.

On 5 June 2016, the Port State Measures Agreement (PSMA) became the world's first binding international accord specifically targeting illegal, unregulated and unreported (IUU) commercial fishing operations. The PSMA is intended to prevent illegally caught fish from entering into global commerce by reducing the number of ports willing to accept an illegal catch. Accordingly, the PSMA regulates the entrance of commercial vessels into ports, requiring countries to deny entry or to inspect vessels known to engage in IUU fishing. Additionally, the international regulation also requires foreign vessels to use designated ports in an effort to facilitate regulation. The United States is the twentieth nation to ratify the agreement. This ratification comes on the heels of U.S. promulgation of its own domestic IUU accord (the Illegal, Unreported, and Unregulated (IUU) Fishing Enforcement Act of 2015). Ultimately, these regulations promote globally sustainable fisheries and make it harder for bad actors to profit from illegal practices.

Second Circuit will rule on federal court recognition of ICSID arbitration awards.

An impending Second Circuit decision will shed light on federal court recognition of arbitration awards issued pursuant to the Convention on the Settlement of Investment Disputes (ICSID) in federal court. In *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, the U.S. District Court for the Southern District of New York ruled that ICSID awards may be recognized and converted into federal court judgements in ex parte proceedings. This decision conflicts with those of other district courts in the Second Circuit that permitted federal court recognition of ICSID arbitration awards only after proper service of process on the award debtor. The requirements of personal jurisdiction, venue and service under the Foreign Sovereign Immunities Act (FSIA) often present significant challenges for judicial enforcement of ICSID awards, however, especially in proceedings such as *Mobil* that involve sovereign states and state entities. The Second Circuit will consider these procedural hurdles and whether converting an ICSID award into a federal court judgment should be an all but automatic process.

Supreme Court makes US$2 billion in frozen Iranian assets available as compensation for 1983 attack on U.S. Marines in Beirut.

In *Markazi v. Peterson*, the U.S. Supreme Court upheld legislation—passed after a district court ruling—directing courts to make US$2 billion in frozen Iranian assets available as compensation to U.S. families of Americans killed in the terrorist attack on a U.S. Marine base in Beirut in 1983. The court made clear that "Congress may amend the law and make [changes] applicable to pending cases, even when the amendment is outcome determinative." Victims were awarded US$2.65 billion in compensation in 2007, but uncertainty remained regarding if or when Iran would pay the judgment. To resolve this uncertainty, Congress passed 22 U. S. C. § 8772. The legislation and the Supreme Court ruling made US$2 billion in frozen Iranian funds available for seizure and reemphasizes Congress's role in settling international disputes.

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WESTERN EUROPE

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Brexit: The UK votes in favor of leaving the European Union.

On 23 June 2016, the United Kingdom (UK) voted 52% to 48% in favor of leaving the European Union (EU), precipitating an unprecedented crisis in Europe. Some have qualified it as "more existential than the Greece and migration crises taken together."[1] While the referendum is not binding, the EU members' leaders, including Chancellor Angela Merkel and President François Hollande, have called upon the United Kingdom to invoke without any delay Article 50 of the Lisbon Treaty, which sets forth the procedure to leave the EU.

Pursuant to Article 50, the UK must formally notify the European Council of its intention to withdraw. The EU

will then negotiate and conclude an agreement with the UK, setting out the arrangements for its withdrawal and the framework for its future relationship with the Union. The European Council will conclude this agreement on behalf of the Union, acting by a qualified majority, after obtaining the consent of the European Parliament. The remaining member states do not need to ratify the withdrawal. The member states, however, must consent to any amendment of the current treaties and international agreements, including the free trade agreement.

The first legal effect of the withdrawal is that all European treaties will cease to apply to the United Kingdom when the withdrawal agreement goes into effect or no later than two years after the formal notification. It is unknown whether the withdrawal negotiations will or can be completed within the two-year timeframe. The European Council, acting unanimously and in agreement with the UK, may decide to extend this period, although it is unlikely that the members would want to prolong the legal uncertainty brought on by the exit negotiations. The second effect is that the UK will need to amend or repeal its internal legislation adopted to implement or transpose the European Union law. The third effect is that the United Kingdom will need to negotiate bilateral or multilateral treaties to replace those that are currently conducted through the EU, including free trade agreements. Currently, the EU has negotiated twenty-two bilateral trade agreements and five multi-lateral agreements, involving fifty-two countries.

How the UK will negotiate its exit remains unclear, especially vis-à-vis the free market. The UK could enter into an agreement to access the free market without being a member, like Norway, but the UK may not want to abide by the EU rules without having a vote. Additionally, since one of the main arguments in favor of the exit is cutting costs and controlling immigration, the UK may want to avoid the free movement and the financial contributions the EU market entails. The UK could also follow the Swiss model, i.e., join the European Free Trade Association and negotiate agreements to participate in the EU market. Some proponents of Brexit have suggested that the UK could rely on the World Trade Organization rules, but in this case the UK would need to renegotiate the terms of its membership. No matter what route the UK decides to take, the negotiations, and especially the trade negotiations, will be long and arduous.

To complicate these negotiations further, Scotland and Northern Ireland voted against the Brexit and intend to protect their place in the EU. Scotland voted to remain in the EU by 62% to 38% and Ireland by 55.8% to 44.2%. As a result, the question of a partial withdrawal of the UK has been raised. Arguably, however, only a sovereign state can be a member of the EU. Since it is unlikely that Scotland and Northern Ireland can be members of both the EU and the UK, Brexit raises the prospect of the independence of Scotland and the unification of Ireland.

Alice Férot *focuses her practice primarily on complex commercial litigation, including international litigation. She is a former federal district court judge clerk, has obtained legal degrees from French and U.S. law schools, is a member of The Florida Bar and is fluent in English, French and Italian.*

Endnote

1 European Commissioner Neven Mimica, *Brexit and Me*, (29 June 2016), http://ec.europa.eu/commission/2014-2019/mimica/blog/brexit-and-me_en.

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SECTION SCENE

ILS Executive Council Meeting
17 June 2016

Al Lindsay, chair of the ILS, presents a plaque to Eduardo Palmer, the departing ILS chair, recognizing Eduardo's outstanding achievements during his tenure.

Robert Becerra discusses next year's ILS annual conference on international dispute resolution and transactions.

Al Lindsay, current chair; Eduardo Palmer, past chair; Arnoldo Lacayo, secretary; and Carlos Osorio, treasurer, hard at work

Yine Rodriguez Perez updates ILS members on recent changes to the Foreign Legal Consultant Rule.

Al Lindsay, current chair, with Eduardo Palmer, past chair

SECTION SCENE

William H. Hill, Jr., a former ILS chair, shares his insights with members of the ILS.

Robert Becerra, Ana Barton, Kristin Drecktrah Paz, Jim Robinson and Arnoldo Lacayo discuss next year's ILAT.

Ryan Reetz, a former ILS chair, provides his insights to ILS members.

ILS members discuss future projects over lunch.

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- Section 109(a) of Helms-Burton, which authorizes the president to "furnish assistance and provide other support for individuals and independent nongovernmental organizations to support democracy-building efforts for Cuba.[19]

When Congress intended to prohibit the executive branch from authorizing particular categories of transactions with Cuba, it included explicit statutory provisions for that purpose.[20] The absence of such explicit statutory provisions in other areas suggests that Congress did not intend to prohibit the executive branch from issuing general or specific licenses to authorize transactions with Cuba when such licenses were deemed to be appropriate and consistent with U.S. policies.

Although the scope of the president's authority to modify the Cuban sanctions by executive action was not well understood prior to the Obama administration, both President Bill Clinton and President George W. Bush used this authority to make more modest changes to the regulatory framework.[21] President Obama, however, has used this authority more aggressively with the objective of easing the sanctions and export control restrictions as much as possible under the existing statutory framework.

Presidential Actions to Ease Cuba Sanctions

Since President Obama's December 2014 announcement, his administration has issued an unprecedented five sets of rules in a fifteen-month period exercising his authority to ease specific provisions of the Cuba sanctions regime in support of U.S. foreign policy objectives recognized by Congress. With successive rounds of regulatory changes, the Obama administration has removed restrictions and created larger and larger openings for U.S. entities and individuals to engage with Cuba. These actions include the removal of Cuba from the State Department's list of state sponsors of terrorism. The most recent rules, issued by the U.S. Department of Treasury Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce Bureau of Industry and Security (BIS) on 16 March 2016, came days before President Obama made his historic visit to Cuba. As a result of these regulatory changes, U.S. entities, individuals and other persons subject to U.S. jurisdiction are now authorized to engage in a number of travel and trade-related activities involving Cuba.

Travel and Travel Services

Beginning in January 2015, the OFAC established and expanded broad "general licenses" authorizing travel-related transactions in twelve existing categories, most of which previously required specific licenses from the OFAC:

1. Family visits;
2. Official business of the U.S. government, foreign governments and certain intergovernmental organizations;
3. Journalistic activity;
4. Professional research and professional meetings;
5. Educational activities;
6. Religious activities;
7. Public performances, clinics, workshops, athletic and other competitions, and exhibitions;
8. Support for the Cuban people;
9. Humanitarian projects;
10. Activities of private foundations or research or educational institutes;
11. Exportation, importation or transmission of information or information materials; and
12. Certain export transactions that may be considered for authorization under existing regulations and guidelines.[22]

The OFAC and the BIS later expanded the authorizations for travel to Cuba for certain activities and broadened the types of activities in which U.S. persons may engage while there. These authorizations include travel and related transactions directly incident to educational and cultural exchanges;[23] professional media or artistic productions of information or informational materials, including the filming of movies and television programs;[24] the organization of professional meetings or conferences, including marketing;[25] the organization of amateur and semi-professional international sports competitions and public performance, competitions and

other exhibitions, including marketing;[26] and the conduct of contract negotiation and leasing of items authorized for export or re-export to Cuba.[27]

Travel for tourism, however, remains prohibited by statute.[28] U.S. individuals traveling to Cuba under a general license should also keep records and maintain a full schedule of approved activities pursuant to the license. But the OFAC has eliminated the requirement for a third-party organization to sponsor people-to-people travel to Cuba. Instead, individuals are authorized to travel for people-to-people educational exchanges even if not part of a sponsored group. Individuals must still comply with the conditions for authorized activities in Cuba.

OFAC and BIS regulations also provide new authorizations for arrangements related to travel and other carrier services. OFAC regulations establish a general license authorizing the transportation of authorized travelers to and from Cuba by aircraft and vessel.[29] Such carrier services previously required a specific license. In complementary changes to the Export Administration Regulations (EAR), BIS regulations authorize the temporary exports to Cuba of the vessels used for such carrier services.[30] (Civil aircraft on temporary sojourn to Cuba already were eligible for a license exception under the EAR.[31])

U.S. companies that provide carrier services by vessel are now authorized to provide lodging services on board such vessels to authorized travelers, including when docked at a port in Cuba.[32] Moreover, under the amended OFAC regulations, vessels that have engaged in authorized trade with Cuba are no longer subject to a 180-day prohibition on entering U.S. ports, which may include vessels used to provide carrier services.[33] The BIS no longer requires a license for the export of certain vessels on temporary sojourn to Cuba, including passenger vessels for hire for use in the transportation of authorized passengers or items, or recreational vessels used in connection with travel licensed by the OFAC.[34] Such vessels may not remain in Cuba for longer than fourteen consecutive days, however, before departing for the United States or a third country to which the vessel could be exported without a license.[35] Similarly, aircraft may not remain in Cuba for longer than seven consecutive days.[36]

U.S. entities may now enter into blocked space, code-sharing and leasing arrangements to facilitate the provisions of air carrier services for persons, baggage or cargo from the United States to Cuba including entry into such arrangements with Cuban nationals.[37] Complementary revisions to BIS regulations adopted a general policy of approval for license applications to export or re-export items necessary to ensure the safety of civil aviation and the safe operation of commercial aircraft engaged in international air transportation, including exports of aircraft leased to state-owned enterprises.[38] License applications to export these items were previously subject to review on a case-by-case basis.

Exports of Goods and Services to Cuba and Export Financing

The new BIS rules significantly expand the categories of U.S.-origin products that may be authorized for export or re-export to Cuba on a case-by-case basis. Most notably, the Obama administration has created a new license exception, SCP (Support for the Cuban People).[39] Export licenses may now be granted case by case for new categories of items that meet the needs of the Cuban people, including exports to state-owned enterprises, agencies and other organizations of the Cuban government that provide goods and services for the benefit of the Cuban people.[40] The new regulations also include a very broadly worded provision authorizing the licensing of items for "wholesale and retail distribution for domestic consumption by the Cuban people."[41] The change in policy applies to license applications to export or re-export items used for the following activities:

- Agriculture production;
- Artistic endeavors (including the creation of public content, historic and cultural works and preservation);
- Education;
- Food processing;
- Disaster preparedness;

Finding Authority and Taking Action, continued

- Relief and response;
- Public health and sanitation;
- Residential construction and renovation and public transportation;
- Wholesale and retail distribution for domestic consumption by the Cuban people;
- Construction of facilities for treating public water supplies;
- Construction of facilities for supplying electricity and other energy to the Cuban people;
- Construction of sports and recreation facilities;
- Other infrastructure that directly benefits the Cuban people; and
- Items necessary for the environmental protection of U.S. and international air quality, waters or coastlines.[42]

Previously, export license applications for such items were subject to a general policy of denial. Licenses issued under the new policy generally will prohibit re-exports from Cuba to other destinations.

New OFAC regulations remove the restrictions on payment and financing terms for nonagricultural exports from the United States or re-exports of 100% U.S.-origin nonagricultural items from a third country that are licensed or otherwise authorized by the Department of Commerce.[43] Prior to the issuance of the new rule, financing for authorized exports to Cuba was restricted to payment of cash in advance or financing by banking institutions that are not U.S. persons and that are located in third countries. Due to statutory requirements imposed by Congress, agricultural items and commodities continue to be subject to the export financing restrictions requiring use of specific payment and financing terms.[44]

The OFAC also issued an authorization for banks and other depository institutions to provide financing for exports and re-exports of nonagricultural items or commodities to Cuba. The financing activities covered by this new general license include issuing, advising, negotiating, paying or confirming letters of credit (including letters of credit issued by Cuban banks); accepting collateral for issuing or confirming letters of credit; and processing documentary collections.[45]

Financial Transactions

The OFAC eased restrictions on financial transactions for both individuals and banks. The first set of regulations allowed the use of U.S. credit and debit cards in Cuba by U.S. travelers.[46] The OFAC later clarified that such transactions may also be processed or facilitated by online payment platforms.[47] The OFAC also allowed U.S. travelers to open bank accounts in Cuba.[48]

U.S. banks are also allowed to process a number of financial transactions in which Cuban nationals hold interests:

President Obama, the First Lady, Malia and Sasha greet dignitaries upon arrival in Havana, Cuba, Sunday, 20 March 2016. (Official White House Photo by Pete Souza)

Finding Authority and Taking Action, continued

- U.S. financial institutions are permitted to open correspondent accounts at Cuban financial institutions.[49]
- Unlike other sanctions regimes, new OFAC rules applicable to Cuba authorize U.S. financial institutions to process "U-turn" transactions, in which U.S. dollar-denominated payments originating outside the United States may be cleared through the U.S. correspondent accounts as part of a transfer to another party outside the United States. Neither the originator nor the beneficiary of the payment may be subject to U.S. jurisdiction, but they may be Cuban nationals.[50]
- In addition, U.S. banks can now process monetary instruments (such as travelers checks, personal checks and money orders) denominated in U.S. dollars, as long as they are presented indirectly by Cuban financial institutions. Cuban financial institutions can undertake these transactions through correspondent accounts in third countries, but the regulations still do not permit Cuban financial institutions to open correspondent accounts in the United States.[51]
- Finally, U.S. banks may open accounts in the United States for Cuban nationals to receive authorized payments in U.S. dollars in the United States and to remit the authorized payments to Cuba.[52]

The OFAC has also removed the dollar limits on remittances that may be sent to Cuban nationals other than prohibited members of the Cuban Communist Party,[53] and has issued a new general license authorizing the unblocking and return of certain remittances that were previously blocked for exceeding the quarterly limits, provided that the remittances would have been authorized under the new regulations.[54] The dollar limit on authorized remittances that travelers may carry to Cuba has also been removed.[55]

Physical and Business Presences in Cuba

New regulations now authorize a number of categories of U.S. entities to engage in all transactions necessary to establish and maintain physical presences in Cuba, and to export or re-export items for use in such activities. The entities authorized to establish a physical presence include:

- News bureaus;
- Exporters of goods that are licensed or otherwise authorized under OFAC and BIS regulations (such as certain telecommunications equipment, consumer communications devices, building materials, medical products and agricultural products);
- Entities providing mail, parcel or cargo transportation services authorized by the OFAC;
- Providers of telecommunications services;
- Entities organizing or conducting certain educational activities;
- Religious organizations engaging in certain religious activities;
- Providers of travel and carrier services;
- Providers of certain Internet-based services;
- Humanitarian projects;
- Authorized noncommercial activities intended to support the Cuban people; and
- Private foundations and educational and research institutions for certain authorized activities.[56]

The authorized activities under the amended OFAC regulations related to establishing a physical presence include:

- Leasing physical premises, including office space, warehouses, classrooms and retail outlet space, and securing related goods and services (arguably including insurance as well);
- Marketing related to the physical presence;
- Employment of Cuban nationals in Cuba; and
- Employment of individuals who are persons subject to U.S. jurisdiction.[57]

The new regulations also allow telecommunications services subject to U.S. jurisdiction to establish a "business presence" in Cuba, including establishing a subsidiary or joint venture in Cuba. The authorization to establish a business presence in Cuba has also been expanded to include exporters authorized to export goods into Cuba, entities providing mail or parcel services into Cuba and carrier and travel services.[58]

Entities authorized to establish an office in Cuba and other facilities may export items necessary for such physical business presence—such as computers to

telephones—and are authorized to assemble in Cuba goods sent to Cuba consistent with U.S. law. To establish and maintain physical and business presences in Cuba, the BIS has provided a license exception for the export of EAR99 items and items controlled only for terrorism to be exported to Cuba.[59]

Telecommunications, Internet and Software

The new OFAC and BIS regulations include a number of provisions intended to expand the scope of authorized exports of telecommunications products and services to Cuba in order to facilitate the free flow of information to, from and within Cuba. In addition to telecommunications companies' ability to establish a business presence in Cuba:

- The OFAC is authorizing persons subject to U.S. jurisdiction to enter into licensing agreements related to the range of telecommunications and Internet-based services authorized under the CACR, and to market such services.[60]
- U.S. companies are now permitted to provide services related to a broader range of telecommunications equipment and devices lawfully exported to Cuba under Commerce Department licenses and license exemptions, and to provide services related to all such items exported to Cuba from third countries. This provision eliminates the need in some cases to obtain specific licenses from the OFAC for the provision of services.[61]
- U.S. companies may also employ Cuban nationals to develop mobile apps and may import Cuban-origin mobile apps and software into the United States.[62]

The new BIS rules adopt a general policy of approval for license applications to export or re-export telecommunications items that would improve communications to, from and among the Cuban people.[63] Additionally, the rules implement a general policy of approval for license applications to export commodities and software to (1) human rights organizations or individuals and nongovernmental organizations that promote independent activity to strengthen civil society in Cuba and (2) U.S. news bureaus in Cuba whose primary purpose is gathering and disseminating news to the general public.[64] License applications to export these items were previously subject to review on a case-by-case basis. These changes create opportunities for telecommunications and Internet services companies, as well as for companies in the news and media industries.

Media and Informational Materials

The OFAC's new regulations broaden the authorization for transactions relating to informational materials by authorizing creation of informational materials for export and import to and from Cuba. This includes the artistic or substantive alteration, or enhancement, of such materials, in contrast to the previous rule that did not permit any substantive alterations and required that materials be preexisting.[65] Also newly authorized is the hiring of Cuban nationals and the remittance of royalties or other payments in connection with these transactions.[66] Marketing of the informational materials is authorized.

Educational Activities

The amended OFAC regulations also expand existing general licenses to cover a broader range of educational activities:

- Persons subject to U.S. jurisdiction, including academic institutions, faculty, staff and students, are now authorized to attend, sponsor and cosponsor noncommercial academic seminars, conferences, symposia and workshops related to Cuba or global issues involving Cuba.[67]
- U.S. researchers are now authorized to participate in academic exchanges and joint noncommercial academic research projects with universities or academic institutions in Cuba.[68]
- U.S entities are now authorized to provide services to Cuba to support standardized testing and Internet-based courses, including massive open online courses.[69]
- Provision of educational grants is now authorized.[70]

Other Activities

In addition, President Obama has used executive authority to ease sanctions against Cuba in a number of other areas:

- *Easing of Extraterritorial Sanctions Applicable to Third Countries:* General licenses now authorize: (1) U.S.-owned or -controlled entities in third countries to engage in transactions with Cuban individuals in third countries;[71] (2) U.S. banks to unlock the accounts of Cuban nationals who have relocated outside of Cuba;[72] (3) U.S. persons to participate in third country professional meetings and conferences related to Cuba;[73] and (4) foreign vessels to enter the United States after engaging in certain humanitarian trade with Cuba.[74]
- *Independent Cuban Entrepreneurs:* U.S. persons are now authorized to import certain goods and services produced by "independent Cuban entrepreneurs."[75] The State Department maintains and periodically updates the "Section 515.582 List," which enumerates the list of goods authorized under the provision.[76] Even if a good is identified on the Section 515.582 List, the goods must nonetheless be produced by an independent Cuban entrepreneur.
- *Deemed Exports:* A license from the BIS is no longer required to release EAR99 technology or source code to a Cuban national in the United States or a third country.[77]
- *Personal Consumption in Third Countries of Cuban-Origin Merchandise:* The acquisition and personal consumption in third countries of Cuban-origin merchandise, including alcohol and cigars, are now authorized.[78]

Conclusion

Relative to the status quo of the past fifty years, executive branch changes to sanctions against Cuba have been significant and have dramatically expanded opportunities for U.S. companies and individuals to engage with Cuba. Executive branch officials have indicated that there may still be opportunities to ease sanctions with Cuba. But given the statutory framework enacted by Congress, new legislation or a transition to democracy in Cuba will be needed to fully lift the embargo.

In the interim, U.S. companies seeking to take advantage of new opportunities in Cuba must take adequate steps to ensure that all transactions and activities are in compliance with existing U.S. sanctions, laws and regulations. Companies also will need to consider legal requirements on the Cuban side and will need to obtain all required authorizations from the Cuban government. The fact that the United States has authorized certain transactions under U.S. law does not necessarily mean that the activities will be permitted under Cuban law, or supported by the Cuban government. In this regard, U.S. companies should consider initiating discussions with the Cuban Embassy as early as possible. While U.S. and Cuban relations have come a long way since December 2014, the two countries still have a long way to go to resolve remaining differences, including issues related to expropriated property claims, before they can return to full, normal trade relations.

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to the U.S. House of Representatives Ways and Means Committee.

Endnotes

1 Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021 *et seq.*).

2 Cuban Assets Control Regulations, 31 C.F.R. pt. 515.

3 22 U.S.C. § 6064.

4 Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549 (codified at 22 U.S.C. §§ 7201 *et seq.*).

5 22 U.S.C. §§ 7207(a)(1)-(3).

6 *Id.* § 7207(b)(1).

7 *Id.* § 7209(b).

8 U.S. Const. art. II § 2; *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

9 22 U.S.C. § 2370; 50 U.S.C. app'x § 5(b).

10 Presidential Proclamation No. 3447 ¶ 2 (3 February 1962).

11 *Id.* ¶ 3.

12 31 C.F.R. § 515.201 (1996).

13 *Id.* § 515.533.

14 *Id.* § 515.801.

15 22 U.S.C. § 6002.

16 *Id.* § 6004.

17 *Id.* §§ 6021, 6022.

18 *Id.* § 6032(h).

19 *Id.* § 6039(a).

20 For example, Section 1706(a) of the CDA specifically prohibits the Department of Treasury from issuing a license authorizing foreign subsidiaries of U.S. companies to engage in certain trade with Cuba. *Id.* § 6005. Similarly, Section 103 of Helms-Burton prohibits U.S. persons and U.S. agencies from knowingly making a loan, extending credit or providing other financing for the purpose of financing transactions involving property confiscated by the Cuban government, with an exception only for financing by a U.S. national owning a claim to the property in connection with a transaction permitted under U.S. law. Section 515.208 of the CACR implements this statutory prohibition, without any language granting the secretary of treasury the authority to grant further exceptions to this prohibition. 31 C.F.R. § 515.208.

21 *See* Stephen F. Propst, Presidential Authority to Modify Economic Sanctions Against Cuba 10-13 (15 February 2011) (legal analysis prepared at the request of the Cuba Study Group and released by Hogan Lovells US LLP in connection with a forum on U.S.-Cuba relations at The Brookings Institution).

22 31 C.F.R. § 515.560; *see also id.* §§ 515.533, 515.545, 515.559, 515.561-515.567, 515.574-515.576.

23 *Id.* § 515.565.

24 *Id.* § 515.545.

25 *Id.* § 515.564.

26 *Id.* § 515.567.

27 *Id.* § 515.533(d).

28 *See, e.g.*, 22 U.S.C. § 7209(b).

29 31 C.F.R. § 515.572.

30 15 C.F.R. § 746.2(a)(1)(x).

31 *Id.* § 740.15(a).

32 31 C.F.R. § 515.572(a)(4).

33 *Id.* § 515.550.

34 15 C.F.R. § 740.15(d)(6).

35 *Id.* § 740.15(d) note.

36 *Id.* § 740.15(a) note.

37 31 C.F.R. § 515.572(a)(2)(ii).

38 15 C.F.R. § 746.2(b)(2)(v).

39 *Id.* § 740.21.

40 *Id.* § 746.2(b)(3).

41 *Id.* § 746.2(b)(3)(B).

42 *Id.* § 746.2(b)(3).

43 31 C.F.R. § 515.533(a).

44 22 U.S.C. § 7207(b)(1).

45 31 C.F.R. § 515.584(f).

46 *Id.* §§ 515.560(c)(5), 515.584(c).

47 *Id.* § 515.421(b)(2).

48 *Id.* § 515.560(c)(6)(i).

49 *Id.* § 515.584(a).

50 *Id.* § 515.584(d).

51 *Id.* § 515.584(g).

52 *Id.* § 515.584(h).

53 *Id.* § 515.570(b).

54 *Id.* § 515.570(h).

55 *Id.* §§ 515.560(c)(4)(i), 515.560(d)(2).

56 *Id.* §§ 515.573(c), (d).

57 *Id.* § 515.573(a).

58 *Id.* § 515.573(c).

59 15 C.F.R. § 740.21(e)(1).

60 31 C.F.R. §§ 515.542(e), 515.578(c).

61 *Id.* § 515.578.

62 *Id.* §§ 515.578(d), (e).

63 15 C.F.R. § 746.2(b)(2)(i).

64 *Id.* §§ 746.2(b)(2)(ii), (iii).

65 31 C.FR. § 515.545(a).

66 *Id.*

67 *Id.* § 515.565(a)(7).

68 *Id.* § 515.565(a)(8).

69 *Id.* § 515.565(a)(9).

70 *Id.* § 515.565(a)(11).

71 *Id.* § 515.585.

72 *Id.* § 515.505.

73 *Id.* § 515.581.

74 *Id.* § 515.550.

75 *Id.* § 515.582.

76 "The State Department's Section 515.582 List," *U.S. Dep't of State* (22 April 2016), http://www.state.gov/e/eb/tfs/spi/cuba/515582/237471.htm.

77 15 C.F.R. § 746.2(a)(2).

78 31 C.F.R. § 515.585(c).

Challenges for Investors in Cuba, from page 15

The role of the military will be partly determined by social conflicts that may emerge in a post-Castro period. (Albin Hillert/Shutterstock.com)

has depreciated considerably, and its purchasing power has decreased. According to the Cuban Statistical Office, the average salary of Cubans is the equivalent of US$22 per month.[1] The absence of virtually any stabilizing fiscal and monetary policies has accelerated the downward spiral of the economy.

Production of sugar, Cuba's mainstay export, has dropped to levels comparable to those of the Great Depression era, and prices of other Cuban commodities continue their downward trend in international markets. With low prices, a decline in worldwide consumption, an increase in alternative, competitive producers and the widespread use of artificial sweeteners, sugar is a losing commodity with dire future prospects.

In addition to these vexing economic realities, there will be a maze of legal problems posed by the issue of the legality of foreign investments and the validity of property rights acquired during the Castro era. Some Cuban nationals, Cuban-Americans and Americans whose properties were confiscated during the early years of the revolution will want to reclaim them or will ask for fair compensation as soon as this becomes feasible. The United States and other countries whose citizens' assets were seized without compensation stand ready to support their nationals' claims. Cubans living abroad await the opportunity to exercise their legal claims before Cuban courts.[2] The Eastern European and Nicaraguan examples are good indications of the complexities, delays and uncertainties accompanying the reclamation process.

Cuba's severely damaged infrastructure is also in need of major rebuilding. The outdated electric grid cannot supply the meager needs of consumers and industry; transportation services are totally insufficient; communication facilities are obsolete; and sanitary and medical facilities have deteriorated so badly that contagious diseases of epidemic proportions constitute a real menace to the population. In addition, environmental concerns such as contaminated water and pollution of bays and rivers are in need of immediate attention.

Creating a new society where human rights and freedom are respected will be a complicated endeavor. First, the issue of confiscated properties must be resolved. Without respect for property rights, it will be difficult to construct a fair and prosperous society. Property rights are part of a human rights process. Few investors will put their money in Cuba unless there is respect for property rights. Second, abuses of the past must be ended and a legally tolerant society established. Third, street protests are a daily occurrence. Known troublemakers are jailed or placed under house arrest. Small groups that stage street protests are arrested or beaten. These practices must be terminated, and the right to dissent must be respected. Fourth, only Cuban government elites and a very limited number of Cubans have access to the Internet. It is estimated that less than 5% of all Cubans have access.[3] Fifth, all daily newspapers, radio and TV stations are censored by the state. Content is dictated by Cuba's Communist Party. Cuban bloggers are persecuted, and their market penetration in the island is very limited. A free press and Internet are indispensable tools to create a new society.

Societal, economic and legal problems are not the only

challenges in Cuba's future. One of the critical problems that a post-Castro Cuba will need to confront is the continuous power of the military. Cuba has a strong tradition of militarism. During recent years, the military has acquired unprecedented power—more than 60% of the economy is under military control. Under any conceivable scenario, the military will continue to be a key, decisive player. Not unlike Nicaragua, Cuba may develop a limited democratic system, with Cubans able to elect civilian leaders, but with the military exercising real power and remaining the final arbiter of the political process.

An immediate, significant reduction in military political power may be difficult, if not impossible, to achieve. A powerful and proud institution, the armed forces will see any attempt to undermine its authority as an unacceptable intrusion into its affairs and as a threat to its existence. Its control of key economic sectors (*i.e.*, tourism, sugar, communications, transportation) under General Castro will make it more difficult to dislodge it from these activities and to limit its role to the barracks. Reducing the size of the armed forces will be problematic as the economy may not be able to absorb the unemployed members of the military and the government may not be able to retrain them fast enough to occupy civilian positions.

The role of the military will also partly be determined by social conflicts that may emerge in a post-Castro period. For the first half-century of the Cuban republic, political violence was an important and often determining factor in society.[4] Many Cubans developed a belief in the legitimacy of violence to effect political changes. This violence will probably reemerge with a vengeance in the future. The Castro communist rule has engendered profound hatred and resentment. Political vendettas will be rampant; differences over how to restructure society will be profound; factionalism in society and in the political process will be common. It will be difficult to create mass political parties as numerous leaders and groups vie for power and develop ideas on how to organize society, what to do about the economy, what type of regime should be established and how to unravel the legacy of decades of communist dictatorship.

A free and restless labor movement will complicate matters for any future government. During the Castro era, the labor movement has remained docile and under continuous government control. Only one unified, Castro-controlled labor movement has been allowed.[5] Investors are forced to hire workers from the state. Salaries are paid to the government in hard currency and the workers receive pesos, 1/10 of the money paid by foreigners.[6] In a democratic Cuba, labor will not be a passive instrument of any government. Rival labor organizations will develop programs for labor vindication and will demand better salaries and welfare for their members. A militant, vociferous and difficult labor movement will surely characterize post-Castro Cuba.

Similarly, the apparent harmonious race relations of the Castro era may collapse within a free society. Over the past several decades, individuals of Afro-Cuban descent have accounted for a great proportion of the Cuban population. Because of greater intermarriage and the exodus of more than one million mostly white Cubans of differing socio-economic backgrounds, black and mixed-race Cubans form a larger proportion of the population. This has led to some fear and resentment among whites. On the other hand, black Cubans feel that they have been left out of the political process, as white Cubans still dominate the higher echelons of the Castro power structure. The dollarization of the economy has accentuated these differences, with black Cubans receiving few dollars from abroad. The potential exists for significant racial tension once these feelings and frustrations are aired in a democratic and free environment.

One of the most difficult problems that a post-Castro leadership will face is acceptance of, and obedience to, the law. Many Cubans violate laws every day in order to subsist with low pay and inadequate government rations: they steal from state enterprises; participate in the black market; and engage in widespread graft and corruption. They do this to survive. Eradication of these vices will not be easy, especially since many of them predate the Castro era. Graft and corruption, as well as disobedience

Challenges for Investors in Cuba, continued

of laws, have been endemic in Cuba since colonial times. *Obedezco pero no cumplo* (I will listen but not obey) is one of the most lasting and pervasive Spanish legacies to Cuba and the Latin American world.

The Cubans' unwillingness to obey laws will be matched by their unwillingness to sacrifice and endure the difficult years that will follow the end of communism. An entire generation has grown up under the constant exhortations and pressures of the communist leadership to work hard and sacrifice more for society. The young are alienated from the political process and are eager for a better life. Many want to migrate to the United States. If the present rate of requests for visas at the U.S. consular office in Havana is any indication, more than two million Cubans want to move permanently to the United States. Under the regulations, Cubans are free to visit the United States. Many come as tourists and overstay their visas. Others are claimed as legal immigrants by their relatives who are already naturalized citizens of the United States.[7] A new Cuban migration is already underway, posing additional problems for U.S. policy and immigration authorities at a time of increasing anti-immigration sentiment and legislation in the United States.

While many Cubans will want to leave Cuba, few Cuban-Americans will abandon their life in the United States and return to the island, especially if Cuba experiences a slow and painful transition period. The Institute for Cuban and Cuban-American Studies (ICCAS) estimates that less than 20% of Cuban-Americans will return to the island. Although those exiles who are allowed to return will be welcomed initially as business partners and investors, they will be resented, especially as they become involved in domestic politics. Adjusting the views and values of the exile population to those of the island will be a difficult and lengthy process.

The future of Cuba is clouded with problems and uncertainties. More than five decades of communism will surely leave profound scars on its society. As in Eastern Europe and Nicaragua, reconstruction may be slow, painful and not totally successful. Unlike these countries, Cuba has at least three unique advantages: proximity to and a long tradition of close relations with the United States; an attractive tourism sector; and a large and wealthy exile population. These three factors could converge to transform Cuba's economy, but only if the future Cuban leadership creates the necessary conditions: an open, legally fair economy and an open, tolerant and responsible political system. Unfortunately, life in Cuba is likely to remain difficult and will only improve slowly.

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Endnotes

1 Anuario Estadístico de Cuba: Empleo y Salarios, Oficina Nacional de Estadísticas (2015).

2 The U.S. government is only legally obliged to support the claims of individuals who were U.S. citizens at the time of a property's nationalization. Individuals who became U.S. citizens after their property was confiscated (*i.e.*, most Cuban-Americans) are not covered.

3 Institute for Cuban and Cuban-American Studies (ICCAS), University of Miami, Issue No. 263 (2015), Doing Business in Cuba: Investors Beware, http://ctp.iccas.miami.edu/FOCUS_Web/Issue263.htm.

4 These include the anti-Estrada Palma uprising in 1906, the uprising of black Cubans in 1916, the anti-Machado violent struggle in the 1930's, violence in the 1940's, the anti-Batista rebellion in the 1950's and numerous political assassinations.

5 Namely, the Cuban Confederation of Labor. Its elections are organized and controlled by Cuba's Communist Party. As a result, the Party selects labor leaders.

6 Foreign enterprises in Cuba are forced to hire and fire their workers through a state agency. The salaries of these workers are paid to the state, which in turn pays the workers 1/10 in Cuban non-convertible pesos (CUP). The CUP is estimated at 26 to 1 USD. The Cuban convertible pesos (CUC) is quoted at slightly higher than the U.S. dollar. Most tourists exchange their currency for CUC, paying a premium to the Cuban government.

7 Under the 1995 revision of the Cuban Adjustment Act (known as the "wet foot-dry foot policy") by the U.S. Congress, Cubans reaching U.S. shores are automatically permitted to stay in the United States. If intercepted in the ocean, they are returned to the island.

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Embargo

The major impediment to U.S. investors in Cuba is, of course, the embargo. Presently, the U.S. embargo on Cuba limits U.S. businesses from conducting business with Cuban interests. The embargo has been in effect since 1960 and is the longest trade embargo in modern history. The embargo is administered under the Cuban Assets Control Regulations (CACR), managed by the OFAC. Among other tasks, the OFAC administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction and other threats to the national security, foreign policy or economy of the United States.

Although President Obama has worked to restore ties with Cuba, lifting the embargo requires approval from Congress. It seems unlikely that the Cuban embargo will be lifted before the president leaves office since Congress has so far reacted to President Obama's historic trip to Cuba with mixed results. This could mean an ongoing challenge for doing business in Cuba, as lifting the trade embargo is a critical threshold issue in order to establish trade agreements and to achieve a good economic relationship between the two countries.[13]

Helms-Burton Act

Part and parcel of the embargo and perhaps the most significant barrier to U.S. investors in Cuba is the 1996 Cuban Liberty and Democratic Solidarity (Libertad) Act, also known as the Helms-Burton Act. The Helms-Burton Act placed stricter measures on the embargo. Under the Helms-Burton Act, the embargo cannot be lifted until the property claims against the Cuban government are resolved. Section § 207(d) of the Libertad Act states that "[s]atisfactory resolution of property claims by a Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba."[14]

Additionally, the Helms-Burton Act expanded the embargo to include non-U.S. companies trading with Cuba, penalizing them for allegedly "trafficking" in property formerly owned by U.S. citizens (and Cubans who have since become U.S. citizens) that was confiscated by Cuba after the Cuban revolution.[15] Specifically, foreign companies that do business in Cuba may be prevented from doing business in the United States, and any non-U.S. company that "knowingly traffics in property in Cuba confiscated without compensation from a U.S. person" can be subjected to fines and penalties, and may even be denied entry into the United States.[16]

The Issue of the Unsettled Claims

The issue of the unsettled claims poses yet another limitation to doing business in Cuba. The Foreign Claims Settlement Commission (FCSC), set up in 1971 to adjudicate U.S. claims against Cuba, estimates unsettled claims to have a value of over US$8 billion.[17] As of 2015, 5,913 U.S. corporations and individuals "have been awarded $1.9 billion worth of claims for factories, farms, homes and other assets."[18] With 6% annual interest, today these claims are worth approximately $8 billion. Although not recognized by the Cuban government, the U.S. State Department estimates an additional $2 billion in judgments for those who have sued the Cuban government in U.S. courts and have prevailed by virtue of default judgments due to the Cuban government's failure to appear or respond to the lawsuits in the United States.[19]

Over the years, the Cuban government has paid lump sum amounts to settle outstanding property claims to several foreign states, including Canada, France, Spain and Switzerland.[20] It has yet to settle the claims brought by the United States and by Cuban communities.

The remaining property claimants against the Cuban government consist of three groups. The first group comprises U.S. national claimants, who are covered by Title V of the International Claims Settlement Act of 1949. The second group includes Cuban claimants still in Cuba, and the third group—Cuban exile community claimants—consists of individuals who were nationals

The Embargo and Beyond, continued

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of Cuba when their property was expropriated. International law generally would not recognize Cuban exiles' right to recovery as a citizen of their new country, and jurisdiction over their claims would reside within the Cuban judiciary.

International law recognizes the right of U.S. claimants to be compensated, and resolving outstanding claims will play an important role in the normalization of the relations between the United States and Cuba. The resolution of the claims would satisfy the Helms-Burton Act's requirement of resolving the claims in order to fully reestablish economic and diplomatic relations between the two countries.[21] It remains to be seen how compensation can be effected, given Cuba's dire economic straits. But it is unlikely to be possible without outside help, in the form of loans from third countries or international organizations, or alternative methods of compensation through tax breaks, land grants and subsidies for new direct foreign investments.

In the early 2000's, the FCSC evaluated the claims and delegated the authority to settle the claims to the U.S. secretary of state. The secretary of state acts on behalf of the U.S. claimants and uses the FCSC's decisions as a basis for negotiation with Cuba.[22] The secretary of state can settle the claims for pennies on the dollar, resulting in a settlement for an amount that is a small portion of the value of the confiscated property. The claimants themselves do not participate in the proceedings, and the Department of State's negotiation agreement is binding for the claimants; they cannot "opt out" and seek other means to settle their claims.[23] Still, the secretary of state's settlement negotiations seem to constitute the claimants' only real hope for settling the claims and recovering some of their losses.

In 2007, a report funded by USAID and published by Creighton University recommended establishing a Cuba-U.S. Claims Tribunal by bilateral treaty or executive agreement.[24] Such an agreement would have

an international legal capacity, as an arbitral body, to resolve outstanding property dispute issues between Cuba and the United States and the respective nationals thereof. Alternatively, a bilateral system (such as the U.S.-Iran accords) to resolve property claims between foreign claimants and Cuba would be supported by international law.

Simply stated, compensation to the claimants must be addressed if Cuba wishes to assure potential foreign investors that their investments will be safe. Unresolved claims pose a risk to U.S. companies investing in Cuba, to Cuban companies doing business in the United States and to an increased U.S. opening with Cuba.

The Cuban Legal Regime and the Rule of Law

Another challenge to doing business in Cuba is related to the Cuban legal regime and the rule of law. The two most important Cuban laws dealing with foreign investment are laws 77 and 118. The Foreign Investment Act of 1995 (Law 77) was passed on 5 September 1995. This law allowed for limited presence of foreign capital in Cuba and limited Foreign Direct Investment (FDI), excluding sectors such as sugar and agriculture.[25] More recently, the Cuban government passed the Law of Foreign Investment (Law 118), on 29 March 2014. This law offered wider participation of FDI in Cuba and allowed FDI to participate in private legal economic structures with Cuban companies of Cuban capital.[26] The Cuban government has also instituted a Special Economic Development Zone, known as ZED (*Zona Especial de Desarrollo Mariel*), in order to encourage and promote foreign investment by allowing 100% investment.

Are These Amendments Enough?

Although the Cuban government has introduced some amendments to protect foreign investment, it is important to note that these amendments may not be enough. There is a general perception that the amended laws do not go far enough to protect foreign investment, and there are few mechanisms in place to protect foreign investors: no independent judiciary, no independent lawyers and no guaranties against expropriation. At present, the dearth of publicly available evidence of rulings in favor of foreign investors continues to shy investors away from Cuba.

There is also a well-publicized and seemingly heavy-handed treatment of foreign investors in Cuba. The cases of Canadian investors Cy Tokmakjian and Sarkis Yacoubian serve as cautionary tales for potential foreign investors in Cuba. For over 20 years, Tokmakjian had a business that brought in $90 million per year importing vehicles and transportation equipment to Cuba. In 2011, Tokmakjian was arrested and ultimately convicted of bribery charges and sentenced to 15 years in prison. During the trial, Tokmakjian was not allowed to call expert witnesses to testify in his favor.[27] On the orders of Raúl Castro, all of Tokmakjian's assets were seized, including $100 million worth of company assets.[28] [29] In a similar case, Yacoubian, who also had a company that supplied transportation equipment for 15 years, lost all of his assets to the Cuban government. He spent two years in jail before being formally charged, and in 2013, a Cuban court sentenced Yacoubian to nine years in prison and fined him $7 million for corruption and tax evasion.[30]

Although Cuba has made some strides toward allowing some types of private businesses on the island, the Cuban military continues to run business in Cuba. Any foreign operations in Cuba must first pass through Cimex Corporation and the *Grupo de Administración Empresarial* (GAESA), both of which are state funded and managed by the Ministry of the Revolutionary Armed Forces (MINFAR).[31] Interestingly, GAESA is run by Raúl Castro's son-in-law, General Luis Alberto Rodriguez.[32]

Neither Cimex nor the GAESA releases its financial information (revenues, profits, investments or a payments record), but it is estimated that the GAESA's companies make up anywhere from 50% to 80% of all business revenue produced in Cuba.[33] The GAESA owns the majority of retail chains in Cuba as well as hotel and restaurant chains. Moreover, General Rodriguez manages the 465-square-kilometer foreign trade zone in Mariel.[34]

Cuban Court of International Commercial Arbitration (CCACI)

Lastly, another factor to consider in doing business with

Cuba is the role of the Cuban Court of International Commercial Arbitration (CCACI). The CCACI was established in 2007 through Decree-Law No. 250 signed by Raúl Castro. The law claims that the CCACI is independent and impartial and that its main function is to support Cuban foreign trade and investment. The CCACI is a signatory to both the New York and Geneva conventions. Although the CCACI allows non-Cuban arbitrators, currently there are no foreign arbitrators.[35]

Regarding jurisdiction, the CCACI can hear voluntarily submitted contractual or extra-contractual matters related to international commercial transactions.[36] Because CCACI rulings are not made in public, however, it has been difficult to gauge its performance and impartiality. Lack of transparency—including the inability to verify which awards have been respected, what has been paid, in what amounts and via what types of transactions—has made investors hesitant to invest. In short, investors fear a bias of the CCACI in favor of Cuban state entities and are concerned over successfully collecting on awards should they prevail.

It is standard practice of foreign investors to insist on governing law from entities other than Cuba and to call for an international arbitration forum. Oftentimes, the agreed-upon jurisdiction depends on the negotiation leverage of the foreign investor and the importance of the subject matter of the investment to the Cuban government.

Conclusion

President Obama's policy amendments and politics toward Cuba have begun to pave the way for the full restoration of diplomatic relations and commercial trade with Cuba. Still, there are a variety of legal issues that present important obstacles to investing in the island. While U.S. and Cuban claimants await proper compensation for their confiscated property claims, U.S. investors should remain cautiously optimistic that future resolution of these claims will lead to lifting the embargo and mutually beneficial business opportunities.

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Investment Protection, from page 19

Cuba's investment treaties, by and large, include many of the key investment protections common to bilateral investment treaties around the world. These include full protection and security, fair and equitable treatment, national treatment, most-favored nation treatment, umbrella clauses and protections against expropriation. The UK-Cuba BIT, among the most expansive of Cuba's bilateral investment treaties, includes *all* of these protections.[24]

Perhaps most significant, particularly in light of the *Ley de Inversión*'s restrictive dispute resolution regime, many of Cuba's bilateral investment treaties include recourse to international arbitration. The most common methods of dispute resolution adopted by Cuba's investment treaties include recourse to domestic courts where the investment was made, ICC arbitration and ad hoc arbitration under the UNCITRAL rules. The options, however, are not uniform among Cuba's bilateral investment treaties. Rather, they are available in varying permutations. For example, the UK-Cuba BIT permits investors, after an initial notification and conciliation period, to submit claims to either the ICC or to ad hoc arbitration under the UNCITRAL rules.[25] On the other hand, the Lebanon-Cuba BIT permits recourse either to the domestic courts or to ad hoc arbitration under the UNCITRAL rules.[26] Cuba's bilateral investment treaties with Spain,[27] Vietnam,[28] Romania,[29] Argentina,[30] Greece,[31] Slovakia,[32] Barbados,[33] Germany,[34] Chile,[35] the Netherlands[36] and Venezuela follow the same pattern.[37] In some notable cases, including China, the bilateral investment treaties do not provide for any investor-state dispute resolution at all.[38]

Cuba is not a party to the ICSID Convention, and recourse to ICSID is not available in nearly all of Cuba's bilateral investment treaties. Even this general rule, however, is prone to exception as ICSID arbitration is expressly authorized as an option—along with ICC and ad hoc arbitration—in the Switzerland-Cuba BIT.[39] While both the Mexico and Venezuela BITs include the possibility of ICSID arbitration, they explicitly require that both states be parties to the ICSID Convention.[40]

A notable exception from Cuba's bilateral investment treaty network, of course, is the United States. A direct remedy is not available in the near term because bilateral investment treaties can take many years to negotiate and, subsequently, enter into force. The historically complex relationship between the United States and Cuba and the continued presence of the Cuban embargo add layers of complexity, which go far beyond the subject of this article. In the event that direct investment is eventually permitted, U.S. investors may be able to benefit from the existing treaty structure through structured investments. Among the states with existing bilateral investment treaties are several that are commonly employed in international investment structures, including the Netherlands and Panama. For example, to qualify as an investor under the Netherlands-Cuba BIT, a legal entity needs only to be "constituted under the law of that Contracting Party."[41] Notably, the Netherlands-Cuba BIT does not include a denial of benefits clause or other provision requiring domicile or other operations in the Netherlands. As a consequence, U.S. and other foreign investors operating in Cuba through Dutch subsidiaries could benefit from the investment protections of the Netherlands-Cuba BIT.

Broadly speaking, Cuba's efforts related to investment treaties and willingness to accede to international dispute resolution are confidence-building. Addressing exactly this question, commentators have pointed specifically to the following two benefits: (1) to set out more clearly the standard for compensation in potential expropriations of foreign investment; and (2) to give foreign investors the right to take disputes to international tribunals outside the jurisdiction of the Cuban arbitration system in those instances in which the constitutive documents of a joint venture may not already provide this venue.[42]

To these should also be added the astonishing breadth of the protections provided by many of Cuba's bilateral investment treaties.

Lingering Doubts

Despite Cuba's extensive investment protection network and domestic reforms, significant doubts remain.

Investment Protection, continued

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This should not come as a surprise, given the history described above and the Cuban government's dubious commitment to the rule of law and human rights. One commentator recently observed that investors question "the Cuban government's commitment to foreign investment, state control on the economic activities and on the operation of the enterprises and finally the inability of foreign investors to hire directly and to pay workers in convertible currency."[43] These concerns are not new and cannot be quickly or easily remedied.

Even nearly two decades ago, commentators assessing the impact of Cuba's investment treaty network observed that the protections newly recognized by the Cuban government through its bilateral investment treaties were "not likely by themselves to have much influence on Cuba's ability to attract foreign investment in the near future, although their existence probably has an intangible positive impact on the investment climate."[44]

Despite the sea change in U.S. policy toward Cuba, little has changed with regard to the investor's confidence in Cuba's government and its willingness to protect and promote investment in practice. Confidence-building remains a priority, and this will occur as the Cuban government demonstrates that it takes its legal obligations to foreign investors seriously. While it appears that events are moving in a positive direction, investment will only begin to flow as many hope when the Cuban government's conduct matches its intentions.

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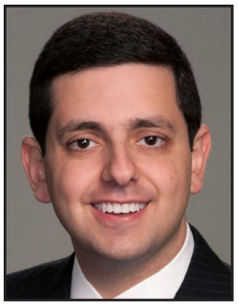

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Article 211 of the Cuban Civil Code prescribes that "the State may grant in usufruct state-owned property to individuals or corporations in the cases and with the formalities provided under applicable law. When granting the right of usufruct, the State may establish conditions different from those indicated in the Cuban Civil Code as long as they do not contravene the nature of the usufruct as an institution."

Farms maintained a sort of private independence from the government, considering they were the owners of the land, but in the end, production, price and sometimes the destiny of the crops were planned and regulated by the government. (Kamira/Shutterstock.com)

According to the Cuban Civil Code, usufruct in favor of individuals may not exceed their lifetime. Usufruct granted in favor of corporations (including joint ventures) may not exceed the term of twenty-five years. This term may be extended by an equal term at the request of the usufructuary made prior to its expiration date.[4]

Surface Rights in Cuban Legislation

According to Article 218 of the Cuban Civil Code, "the State may grant to natural or legal persons surface rights over state-owned lands for the construction of housing or to carry out other constructions. Surface rights may also be granted in order to use the land for other specifically determined activities. Surface rights may not be granted over lands considered personal property such as residences and vacant land."

Surface rights may be granted by onerous or gratuitous title. It is worth noting that the holder of a surface right becomes the owner of whatever is built on the land. Article 225 indicates, however, that when the surface right is extinguished (ended), the improvements or facilities built on the land will revert in favor of the state, which is the owner of the land.[5]

The surface rights given to the Cuban partner, that is to say, the Cuban party in a joint venture, may also represent a capital contribution, but if the surface right is given directly to the joint venture, the joint venture will have to pay the value of the surface right to the Cuban state.

Decree-Law No. 273 of 2010 modified Articles 221 and 222 of the Cuban Civil Code, which contain the terms and conditions under which the state may grant surface rights to foreign developers. The objective of the amendment is described in its preamble: "to expand and facilitate the process by which foreign investors can participate in international tourism" and "provide great legal certainty and guarantees to foreign investors in the Cuban real estate transactions." Pursuant to these modifications, the state can now grant surface rights for a period of up to ninety-nine years, and if the rights are granted for a shorter period of time, the period can be extended to ninety-nine years at the request of the holder of the right. In addition, the state may grant perpetual surface rights over state-owned land, prior payment of the value or price of the right to Cuban companies or Cuban societies for the construction of tourism homes or apartments. Previously, surface rights could only be granted for a term not exceeding fifty years and could be extended for half of the original term, at the request of the holder of the surface rights,

if made before the date of expiration. Surface rights are transferable, except when the law or the title document provides otherwise.

Cuban Real Estate Complementary Laws

The demand for Cuban real estate investments exceeded initial expectations and required additional changes to the Cuban real estate legislation. As a result, the Cuban Council of State approved several laws during the period from 1998 to 2007. The new regulations included: Decree-Law No. 185/98 (Cuban Property Registry Law), Decree-Law No. 214/2000 (Structuring of Mortgages) and Decree-Law No. 233/03 (Modified Cuban Housing Law). As a complementary regulation, the Cuban Ministry of Justice (MINJUS) approved Resolution No. 114/07 (Procedures of the Cuban Property Registry).

Cuban Property Registry

Cuba inherited one of the most efficient registry systems the world knows (from Spain), and Cuba's decision to institutionalize its property registry system will guarantee the chain in title and the recognition of property rights that affect all Cubans and foreign investors.

The Cuban Property Registry provides transparency to the real estate investment process by keeping records of all real estate transactions. The Registry also provides additional guarantees to foreign investors and to prior owners of Cuban real estate (American and Cuban nationals) whose properties have been affected by prior expropriations or confiscations.

Currently, interested parties may be able to search the Registry for the following documents: declarations of expropriations and confiscations of properties in favor of the Cuban state; transfers of state-owned properties to Cuban companies; joint ventures or individuals (foreign or nationals); rights of usufruct, surface rights, leasing agreements or other real estate contracts; warranty deeds; notary documents; judicial decisions affecting a real estate property; recorded mortgages or other recorded encumbrances; assessments; and declarations.

Decree-Law No. 185/98 modified Law No. 65/88 and designated the Cuban Ministry of Justice as the state organ in charge of implementing the regulations of the Cuban Property Registry. As a result, the MINJUS approved Resolution No. 114/07, which provides the rules and procedures of the Registry.

According to MINJUS Resolution No. 114/07, the following documents shall be recorded: new transfers of title or property rights; prior transfers of property or titles to recognize the rights of the current title holder; new construction; and real estate properties that constitute capital contributions to joint ventures.

The Registry is a government agency with the unique function of keeping records of legal documents affecting property rights. The registrar is a public officer in charge of the Registry. The Registry is required to be made public by way of the issuance of informative notes, the issuance of certifications and the direct search of the recording documents in the Registry.

The real estate recording process starts with a request to the registrar. The registrar examines the documents to determine if the request includes the documents contemplated in Article 4 of Resolution No. 114/2007 or if the request includes titles or other legal documents enumerated in Article 5.

According to Article 3 of the Spanish Mortgage Law of 1893, only notarial deeds, authenticated private documents or titles issued by a judicial authority, the state or its agencies are recordable with the formalities prescribed by applicable laws.

The registrar may inquire about additional documents to support the request. According to Articles 14.1 and 25 of Resolution 114/2007, the registrar shall examine the documents for errors or omissions.

The registrar may suspend the recording of the documents until the errors have been corrected. The registrar may also deny the recording when there is an illegality or if the title contains defects. As such, the registrar acts as a title examiner.

Decree-Law No. 114/2007 also contemplates an administrative procedure against the registrar's decisions before the director of the Provincial Justice (a

government agency). There is also a subsequent right to appeal an adverse decision made by the director through an administrative process pursuant to the Cuban Civil Procedure Law (known as LPCALE or Law 7/77).

Currently, the MINJUS has been involved in creating the legal formalities to reorganize the real estate market in Cuba. Such legal formalities have been focused on four main areas:

1. Complete the legalization of real estate properties in favor of the Cuban state, which has stagnated since the 1960's, causing a loss of the chain in titles;
2. Registration of all of the properties owned by the state in the Cuban Property Registry;
3. Registration of the property rights granted in favor of Cuban entities including usufructs, surface rights and concessions; and
4. Registration of property rights granted in favor of joint ventures (including foreign investors).

Cuban Mortgage Legislation

The revival of the real estate mortgage as a vehicle for the development of the Cuban real estate market is a pending issue in the opening of Cuban real estate to foreign investors.

The laws promulgated after the Cuban Revolution of 1959 limited and almost eliminated the mortgage institution from the Cuban legislation. As a result, the Cuban Civil Code of 1987 only recognizes the ship and aircraft mortgage institution. The old and obsolete Spanish Mortgage Law of 1893, which is the only existing mortgage law in Cuba, is practically a dead letter.

After the promulgation of Law No. 77/95 (the prior Cuban Foreign Investment Law), foreign investors demanded more flexibility in the real estate investment process. At the same time, real estate lenders demanded more guarantees and security to finance real estate projects. As a result, the Cuban Council of State approved Decree-Law 214/2000, which brought to life the possibility of filing mortgages in Cuba. It is worth noting that one of the purposes of Decree-Law No. 214/2000 was to allow foreign financial institutions to finance real estate investments in Cuba.

The Cuban legislation interprets the mortgage as a legal contract and applies Article 312 of the Cuban Civil Code (Law No. 59/87) to classify the mortgage contract as a real estate contract of guaranty, which is unilateral, onerous, accessory and formal. In addition, the mortgage is a property lien that needs to be recorded in the Cuban Property Registry to offer protection, guaranty and security to the mortgage holder.

Decree-Law No. 214/2000, known as the Cuban Structuring Mortgage Law, recognizes the mortgage institution as a guaranty to the fulfillment of the contractual obligations and the payment of obligations and debts. Cuba limited the capacity to mortgage real estate properties to corporations or other economic entities registered in Cuba. According to Cuban law, all of the companies created in Cuba are considered Cuban corporations regardless of the nationality of their shareholders.

Article 2 prescribes that the legal regime of mortgages in Cuba is based on the still in force Mortgage Law of 1893 and its complementary regulations. Thus the "old" Spanish Mortgage Law has acquired validity in the Cuban foreign investment strategy.

It is clear that Decree-Law No. 214/2000 was aimed at promoting external financing, but Cuban financial institutions or mixed financial entities (joint ventures) are not excluded from financing real estate properties in Cuba.

The regulation of financial institutions in Cuba is established by Decree-Law No. 173/97, which defines financial institutions as "legal entities established pursuant to Cuban or foreign laws with the purpose of providing financial intermediation. This activity may be carried out by banks or other non-banking financial institutions."

The first special provision of Decree-Law No. 214/2000 prescribes that any filing of a mortgage in Cuba requires prior and express authorization of the Cuban Executive Committee of the Council of Ministers (CECM).

The second special provision of Decree-Law No. 214/2000 prescribes that the Cuban state has a

preference right to acquire mortgage titles by paying its value in the event the mortgage holder (lender or intermediary) decides to sell, assign or transfer the mortgage.

As a result, the Cuban state reserves its right of first refusal and option to purchase mortgages. If the Cuban law provides that the state has a preferential acquisition right, it is understood that such right includes both the right of preemption and the right of retraction. According to the Cuban Civil Code, the right of retraction may not be exercised by a person that, having been notified of the proposed sale, did not exercise the right of preemption.

In a case where the transfer of an immovable property right requires the prior authorization of the state and, at the same time, the state is granted a right of preemption with respect to such property right, the term to exercise such right is calculated from the moment that the authorization request is filed.

The third special provision indicates that the solution of disputes derived from the registration or execution of any mortgage in Cuba is determined in accordance with the Cuban Civil Procedure Law (LPCALE or Law 7/77). The Economic Chamber of Cuban Popular Tribunal has jurisdiction over any mortgage dispute related to foreign investment companies as prescribed in Decree-Law 223/2001 (Jurisdiction of the Economic Chamber of the Provincial Tribunals of Popular Power in Cuba). Such decree-law was later replaced by Decree-Law 241 of 2006 (Modified Cuban Civil Procedure Law).

Sale and Purchase of Dwellings

Decree-Law No. 288 of 2011 eliminated the restrictions regarding the transfer of dwellings between individuals. A fundamental limitation remains in that a person can be the proprietor of one dwelling as a permanent residence and one other as a vacation home. Decree-Law No. 288 modified Chapter V of the General Housing Act, which refers to the transfer of ownership of dwellings through sales, donation, swapping and adjudication, the latter referring to instances in which the owner dies or definitively leaves the country or in the event of an uncontested divorce.

Among other objectives, Decree-Law No. 288 was designed to ensure that proprietors who want to dispose of a dwelling can do so as they wish, without the need for any authorization from the Municipal Housing Authority, as had been the case prior to the new law. This is relevant because the state does not have the rights of preemption and retraction regarding the sales of dwellings in Cuba.

Decree-Law No. 288 seems to set out that property transfer transactions are to take place in the presence of a notary public, thus eliminating a body of administrative authorizations and legal requirements that, over the last several years, have led to corruption. The requirement of paying the Transfer of Property and Inheritances Tax is maintained while a Personal Income Tax specifically for income based on the sale of a dwelling has been incorporated into the law. Both taxes represent 4% of the value of the dwelling. The following are highlights regarding the application of Decree-Law No. 288:

- *Requirements to Transfer Ownership of a Dwelling:* (1) For a person to transfer ownership of a dwelling, he or she must be the rightful owner of the dwelling and reside in Cuba; (2) the property must be registered in the Registry of the municipality where it is located; and (3) the property title must be up-to-date, including the tax assessment.
- *Government Authorization:* Prior authorization from the Municipal Housing Authority is no longer required, as previously mentioned, and the concept of disproportional value of the dwellings exchanged, given their differing value or characteristics, is also eliminated. If the parties involved so decide, they may declare a monetary compensation to accompany the swap, which will be recognized by law and must be established in Cuban pesos (CUP), in the presence of a notary public, in order to guarantee legal protection in the event of future problems. Again, with the purpose of offering greater security, as in the case of a sale, a cashier's check issued by a local bank will be used. In the case of a swap transaction, each party must pay taxes on the Transfer of Property and Inheritances based on the value of their new homes. If one of the parties receives compensation, this amount will be

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added to the value of the dwelling acquired for the purpose of calculating the tax.

- *Price of the Property:* It is not required that the price of the dwelling necessarily coincide with the value indicated in the tax assessment. The price is agreed upon by the parties involved in the sale and is set by them. The value reflected in the tax assessment is used to calculate the taxes to be paid, if the price declared by the buyer and the seller is less than this amount.
- *Indebtedness:* When a sale is completed, the seller is expected to show that all debts related to the purchase of the home have been paid in full.
- *Closing:* The buyer is obliged to inform the notary that he or she is not the proprietor of another dwelling as a permanent residence. The form of payment required to complete the transfer of funds is established by the buyer and the seller. The buyer is obliged to deposit the amount of money agreed upon in a local bank, in exchange for a cashier's check, which is then delivered to the buyer in the presence of a notary public, to formalize the sale. The notary, in turn, records the number, the date and the name that appear on the check. The purpose of using a cashier's check is to provide parties with legal protection and to eliminate the need to handle large sums of money.
- *Taxation:* Both the buyer and the seller must pay a 4% tax on the amount agreed upon as the price for the dwelling. The former pays the tax in the form of a Transfer of Property and Inheritances Tax while the latter pays Personal Income Tax. In the case of donations, the transaction is also taxed accordingly.

With these new legal provisions coming into effect, individual citizens will have more flexibility in making decisions about the sale and purchase of dwellings, but they will also have more responsibility for them. State institutions, for their part, are charged with ensuring that the regulations are fully respected and that real estate transfer activities outside of the law are ended.

Conclusions

The Cuban government has introduced a number of economic and legal reforms in the last few years and is expected to implement additional legislation to create a more favorable and transparent environment to develop the real estate sector in the island.

The need to attract external financing to the development of the real estate market in Cuba brought about the resurgence of the Property Registry and of the legal figure of the mortgage as additional guarantees to foreign investors in Cuba. The mortgage instrument has a very limited scope, however, due to the restrictions of applying mortgage laws within a socialist property system. The inability of Cuban nationals to use a mortgage as a means of improving their housing and living conditions requires additional laws and modifications to existing laws, including the Cuban Constitution. Furthermore, there is still a lack of a comprehensive Cuban real estate law that addresses condominium, cooperatives (co-ops), timeshares, residential mortgages, liens, titles and other property issues.

Recent modifications to the Cuban Civil Code are in line with the guidelines approved by the VI Communist Party Congress and are an important step in updating the country's economic model. They seek to develop a coherent policy to simplify real estate transactions and to limit existing prohibitions that over the years have been conducive to violation.

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Endnotes

1 Law No. 59, Article 138.1 (1987).
2 Law No. 118, Article 13.1 (2014).
3 *Id.*, Article 17.1
4 Law No. 59, Articles 214-17.
5 *Id.*, Article 225.

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for economic management or execution, control or liquidation of the state budget, or those relating to contract, the issuance or use of financing documents.

If, as a result of the acts described above, injury or significant damage is caused, the punishment is imprisonment of eight to twenty years.[12]

The Cuban government has used Article 140 of the Penal Code to bring public cause of action under criminal jurisdiction against foreign investors for alleged commercial misconduct that resulted in damages to Cuban companies, such as breach of contract, violation of administrative regulations that deprives the Cuban government of profits or poor negotiation of a contract with a Cuban company, where the bargaining was not favorable to the Cuban company.

Under Article 140, the court must meet the elements of (1) a violation of any commercial law, statute or regulation, with (2) the purpose of damaging the national economy of the Cuban state.[13]

It is purely a subjective crime, considering it is not necessary to show actual damages, but only the intention of bringing damages. Nevertheless, the Attorney General's Office is more motivated to bring a cause of action when actual damages have occurred.

Whether damages to a Cuban company can be prosecuted under Article 140 is a link that might show the real "Cuba Inc." Considering that within Cuban law there has been a history of implementing and defending the principle of independence of the Cuban government and its companies, Article 140 should be used only when the damage is directly to the government and not to a Cuban company.

The Cuban Criminal Court has not interpreted Article 140 or the principle of independence as described above, and in recent years tried an important case, considered by most to be one of the more important cases in Cuban jurisdiction in the last few decades. Case 23/14, Second Penal Chamber of Havana Provincial Court is also known as the *Tokmakjian* case, named for the main defendant, a Canadian investor in Cuba for more than 20 years.[14]

In this case, the court found that a group of Cuban companies had suffered damages because of the defendants' violations of commercial regulations in Cuba.

Verdict 205, 22 September 2014, Case 23/14, Second Penal Chamber of Havana Provincial Court

The September 2014 verdict awarded the following damages:

ZERUS S.A., 272 mil 288.42;[15]

Empresa de Ingeniería y Servicios Técnicos Azucareros (TECNOAZÚCAR), 1 millón 399 mil 454 USO;

Sociedad Comercial Caribbean Nickel S.A., 508 mil 266.29 USD;

Empresa Mixta Ferroníquel Minera S.A., 177 mil 588.55 USD;

Empresa "Comandante René Ramos Latour," 545 mil 322.08;

Empresa "Comandante Ernesto Che Guevara," 111 mil 739.26 EUR;

Unidad Básica Empresarial "Oro Barita" de la Empresa Geominera Oriente, 4 millones 157 mil 212.30;

Empresa Importadora y Abastecedora del Níquel (CEXNI), 13 mil 94.40 USD;

Empresa Importadora y Comercializadora de la Construcción (IMECO), 14 mil USD;

Comercializadora Internacional Trading House (ITH), 18 mil 314.49 USD; and

Agencia de Contratación a Representaciones Comerciales (ACOREC) S.A., 166 mil 213 USD.[16]

Note that the felony "Acts to the Detriment of National Economy" is included in Title II of the Penal Code, which is addressed to punish the offenses against the government and the judiciary.[17]

As an example of the rationale of the court, in awarding damages to Ferroniquel Minera S.A. (FMSA), the court found evidence of a contract signed between Tokmakjian Inc. and FMSA on 28 September 2009 for the purchase

Principle of Independence, continued

of thirty-three mining machines. The value of the goods was US$10,522,598. FMSA made a down payment of 15%, and on 12 December 2009 made a payment of US$8,726,183.30.[18]

Tokmakjian Inc. allegedly breached the contract because delivery of the machinery was delayed according to the schedule agreed to in the contract.[19]

The contract entitled FMSA to a penalty of US$300,000 against the seller for delay of goods. The parties settled the penalty for US$82,689, and the amount was to be discounted on the consecutive purchase of spare parts, with a limit of 10% of the value of each contract until complete payment of the settlement.[20]

By the time the case was resolved, the remaining payment was US$58,188.55. In addition, two of the machines allegedly did not meet the quality agreed to in the contract, bringing a damage to FMSA of US$119,400. The court added both amounts and granted damages to FMSA of US$177,588.55 USD.[21]

The court held that because there was a breach of a contract, the contract law was violated. With both elements of Article 140 met, damages and violation of a commercial law, the court found the presidents of both companies, Tokmakjian Inc. and FMSA, guilty of Acts to the Detriment of National Economy.[22]

ACOREC is a Cuban company with the purpose of providing job placements for foreign companies in Cuba.[23] The court found evidence that the defendant Tokmakjian directly hired his personal driver, which was a violation of Resolution 277/07 of the Ministry of Finance and Prices. Under this regulation, foreign companies must hire Cuban employees through a job placement company.[24]

In addition, the office of Tokmakjian Inc. in Havana used its accountant, who was hired through ACOREC, to perform certain activities of accounting for a subsidiary of the company.[25]

The court held that the defendant Tokmakjian violated

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Principle of Independence, continued

Resolution 277/07, and awarded damages to ACOREC in the amount of the driver's salary that Tokmakjian was required under law to pay to ACOREC instead of to the driver directly. The court also held that the work done by the accountant for the subsidiaries of Tokmakjian Inc. was not covered in the salary agreed upon with ACOREC for the employee, and the deficiency of the salary was a damage to the Cuban company. Hence, the elements of Article 140 were met.[26]

Another interesting rationale of the court was in regard to three defendants who held the position of seller agents of Tokmakjian Inc. in Havana. Tokmakjian Inc. was a licensee of Hyundai in Cuba and had on its staff three sales agents to sell cars in the Cuban market. The company paid 0.6% as a commission on sales to its agents. The court held that the 0.6% was a damage to Cuban companies that purchased cars from these sellers because they increased the price by 0.6% of the value.

The court found evidence of the total value of the cars the defendants sold and determined that 0.6% of the value was a damage to the national economy. The three defendants were found guilty of Acts to the Detriment of National Economy.[27]

So far, as indicated by the criminal court's holdings, there is not much independence of Cuban companies from the government. Note that all of the companies involved in the Tokmakjian case were Cuban corporations.

Still, Cuban companies are totally independent from the government under Cuban law. The principle of independence has been carefully structured during decades of socialist legislation. Nevertheless, the prosecution of entities or individuals under Article 140 of the Penal Code requires the court to pierce the veil.

The formation of a contract between a foreign investor with a Cuban company is under private law, and the contract relies on the principles of contract law, assuming the equality of the parties and good faith. It is a big risk for a foreign investor given the uncertainty that Article 140 brings to the matter. A criminal court can consider a simple breach to be a damage to the national economy.

There is a commercial jurisdiction that should be the first forum in competence to solve contract disputes. The government should not use the public enforcement of law to protect companies' commercial damages.

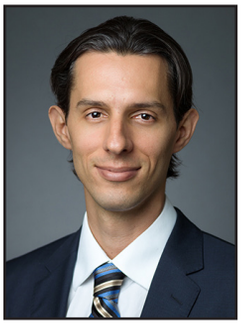
Resolution 277/07 provides enforcement rules and remedies for the violation of labor relationships between foreign entities and local employees. The resolution imposes a list of fines that differ in amount depending on the offense.

What can a foreign investor or trader do to prevent and manage the risk of Article 140? The answer is uncertain. The criminal jurisdiction seems to have become the first resource of the government to solve commercial or administrative violations.

The criminal jurisdiction allows the government to impose confiscation as a penalty. Confiscation is not a remedy under commercial rules. Neither the International Arbitration Court nor domestic commercial courts can confiscate property as part of a verdict.

In the *Tokmakjian* case, the court confiscated more than US$91 million of the company's holdings in Cuba, including accounts, assets and inventory.

In conclusion, the Cuban state-owned company and the Cuban corporation are independent of the government under Cuban law. Nevertheless, recent court cases such as *Tokmakjian* have possibly "pierced the veil," demonstrating the government's willingness to intervene on behalf of Cuban companies when foreign parties violate their commercial or civil obligations. Such interventions may overlap the companies' decisions in a matter and use the state's criminal jurisdiction and remedies such as confiscation of property as a first remedy in dispute resolution.



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Cuba, Latin America and Central America. He was a litigation attorney in Cuba, exclusively representing foreign investors. He has defended some of the most notorious corporate crime and anticorruption cases in Cuba in the last five years, such as Tokmakjian, Coral Capital, Marambio and Habaguanex.

Endnotes

1 Civil Code art. 17 and International Private Law Code art. 318.
2 Decreto Ley 250 art. 9.
3 Constitution art. 17.
4 *Id.*
5 *Bases de la Empresa Estatal art. 4.*
6 *Normas de la Unión y la Empresa Estatal art. 4.*
7 Constitution art. 23.
8 *Id.* art. 18.
9 Ley 77/95 art. 2 (a) (i).
10 Res. 260/99 (II) (1).
11 Res. 190/01.
12 Penal Code art. 140.
13 *Id.*
14 Case 23/14, Second Penal Chamber of Havana Provincial Court.
15 The damages of ZERUS S.A., Empresa "Comandante René Ramos Latour" and Unidad Básica Empresarial "Oro Barita" de la Empresa Geominera Oriente were not calculated in U.S. dollars. Instead the court made a unique value using different currencies. In the verdict the court used the term *moneda total* (whole currency).
16 Case 23/14, Second Penal Chamber of Havana Provincial Court.
17 Penal Code art. 140.
18 Case 23/14, Second Penal Chamber of Havana Provincial Court.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 Under Cuban law, foreign companies are not allowed to hire Cuban residents directly as employees. They must contract with a company that supplies the employees to the firm. The investor must pay the salary to the Cuban company, and the Cuban company pays a salary to the Cuban employee. Note that the foreign entity must pay the Cuban company in CUC, which is a Cuban currency equivalent to 0.89 U.S. dollars, and the Cuban company pays a salary to the Cuban employee in Cuban pesos, which is the second currency in Cuba. The exchange rate is 1 CUC=25 Cuban pesos. It depends on the job and each Cuban company's rates, but typically a Cuban employee receives 5% to 10% of the salary the foreign employer pays for his or her work.
24 Case 23/14, Second Penal Chamber of Havana Provincial Court.
25 *Id.*
26 *Id.*
27 *Id.*

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appealed to the Department of Justice or even to a federal court or agency.[11]

Once all claims have been certified to the U.S. State Department, the department will negotiate with the foreign government.[12] When an agreement between the United States and the foreign government has been reached, a special fund may be set up at the Treasury Department. All U.S. certified claims will be paid from this fund.[13] If the funds paid by the foreign government are inadequate to pay fully all certified claims, there will be a pro rata reduction in which all claims receive an equal percentage reduction in their award payment.

The U.S. Certified Claims Program Against Cuba

To understand the U.S. Certified Claims Program against Cuba, one needs to understand the origin of the U.S. embargo against Cuba. Following is a brief history.

The Cuban revolution ended when Fidel Castro took over Cuba on 1 January 1959.[14] The United States formally recognized the Castro government seven days later, on 7 January 1959.[15] The Cuban government passed agrarian reforms on or about 17 May 1959.[16] The reforms included the prohibition of foreign ownership of property and the confiscation of land.[17] American-owned property began to be confiscated.[18]

The relationship between Cuba and the Soviet Union was made public when a trade agreement between the two countries was entered into on 13 February 1960.[19] The diplomatic relationship between the two countries became official on 8 May 1960.[20] Now that the relationship between Cuba and the Soviet Union had been formalized, the Cuban government continued seizing more U.S.-owned property, this time oil refineries.[21] The Eisenhower administration cut the sugar quota in response to Cuba's relationship with the Soviet Union on 6 July 1960.[22] The Cuban government responded to the cut to the sugar quota by seizing U.S.-owned businesses in Cuba.[23] The Eisenhower administration responded with more restrictions on trade with Cuba, with the exceptions of food, medicines and medical supplies.[24] In response to these new restrictions, Cuba completed its seizures of American-owned businesses.[25] Cuba cut all relations with the United States on 3 January 1961, giving U.S. embassy staff 48 hours to leave the country, with the exception of essential staff. The United States terminated its relationship with Cuba in response to this expulsion by the Cuban government.[26]

President John Kennedy succeeded President Dwight Eisenhower on 20 January 1961. The Kennedy administration intensified the United States' response against Cuba. The Kennedy administration, after the Bay of Pigs failure, initiated an embargo against Cuba, pursuant to the Cuban Assets Control Regulations Act, on 3 February 1962.[27] The Office of Foreign Assets Control (OFAC) instituted the regulations to enforce the embargo.[28]

As in the case of claims programs against other countries initiated by Congress or the U.S. secretary of state, there were two completed Certified Claims programs against the Cuban government. The first program was initiated in 1964 pursuant to the Cuban Claims Act (hereinafter, Claims Act).[29] President Lyndon Johnson explained his signing of this bill, saying it was "because of the importance of making such a permanent record while evidence and witnesses are still available."[30] The Commission initially reviewed 8,816 petitions for claims. The Commission certified 5,911 claims or 67% of all claims presented. The initial program under the Cuban Claims Act was not completed until 1972, and the Commission's authority over these claims ended by act of Congress that year as well.[31]

The second program was initiated in 2005 under the referral authority of U.S. Secretary of State Condoleezza Rice. The second program focused on takings that occurred after May 1967, and were not brought forth under the initial program.[32] The second program opened the claims process for one year, from 2005 to 2006. During that time, only five claims were presented. Two of the five claims were certified.[33]

Currently there are 5,913 certified claims against Cuba. Corporations hold 300 of these claims, and individuals' or families' claims make up the remainder. The total

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principal amount of the claims is US$1.9 billion. Factoring in interest at a rate of 6% since 1959, the total amount of the claims is estimated to reach a range of US$7 billion to US$8 billion. Corporations hold 80% of the total value of the claims while individuals or families hold the remaining 20%. The top 124 claims represent US$1.6 billion in principal alone, or over 90% of the total value.[34]

The Commission described the initial Cuba Claims Program as "the most complex and challenging assignment ever delegated to the Commission from both a legal and administrative point of view, and it was the most interesting one as well."[35] The Cuba Claims Program represents the largest confiscation of American property.

Determining the validity of a certified claim against the Cuban government requires three steps. The first step in the certification process is to show whether or not the claimant was a national of the United States at the time the claim arose. The Claims Act provides the following definition of a U.S. national:

(a) A natural person who is a citizen of the United States

(b) A corporation or other legal entity that is incorporated under the laws of the United States, or any State, the District of Columbia, or the Commonwealth of Puerto Rico, if the natural persons who are citizens of the United States own, directly or indirectly, 50 percent or more of stock . . .

(c) The term does not include aliens[36]

Corporations have created some difficulties for the Commission to determine if the claimant has met the first standard. An example of this kind of difficulty arose in Claims of AOFC, Inc., Claim Nos. CU-3671 and CU 3672. AOFC was a Canadian corporation, with a presence in Cuba from 1960 to 1962. The claimant was an American citizen, who owned 50% of the corporate stock at the time of his petition. During his hearing, the claimant could not show that AOFC was under American ownership from 1960 to 1962. As a result, the Commission denied both AOFC claims.[37] Once a claimant proves that he or she is a U.S. national, the claimant can proceed to the second step.

The second step in the certification claim is to determine the property in question. Although one might be inclined to think that property claims involve only physical property, the Claims Act defines property as "any property, [as well as] right[s], or interest[s], including any leasehold interest and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba, and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba."[38] The claimant must show proof of ownership of the property in question. Once the claimant shows proof of ownership, he or she can proceed to the third and final step.

The last step is to show proof of the actual loss. The Commission is instructed to "take into account the basis of the valuation, most appropriate to the property and equitable to the claimant, including but not limited to, (1) fair market value; (2) book value; (3) going concern value; or (4) cost of replacement."[39] The Commission is instructed to apply "the applicable principles of international law, justice, and equity in determining the value of a claim . . ."[40]

The second U.S. Certified Claims program was initiated in 2005 under the referral authority of U.S. Secretary of State Condoleezza Rice. (Susan Montgomery/Shutterstock.com)

In its initial report to Congress, the Commission, applying the definition of property in the second step and the evaluation as required in the third step of the process, found loss of property, besides the seizure of physical property, in the following circumstances: (1) government regulations affecting mining rights;[41] (2) inability to exchange old currency under currency laws;[42] and (3) loss of oil rights and mineral rights due to changes in legislation.[43]

Possible Scenarios Involving the United States and Cuba Regarding Property Negotiations

Now that the claims have been certified, the next step is for the United States and Cuba to negotiate these claims. It is interesting to note that this is the first time that the United States will be negotiating with the same government that confiscated the property. In the history of foreign claims, negotiations usually have occurred when there has been a transition in government and a warming of relations between the United States and the other country. A recent example involves Vietnam. Prior to normalizing relations with the Socialist Republic of Vietnam, the United States had certified claims in the principal amount of US$99,471,983.51. The Socialist Republic of Vietnam agreed to pay the United States a lump sum of US$203,504,248.00. This lump sum amount represented the complete principal amount and 80% of the interest.[44] Here, the United States negotiated with the communist government that had transitioned from the rule of Ho Chi Minh to a new generation.[45] In the case of Cuba, the Cuban government is still under the authority and rule of Fidel and Raúl Castro.

The negotiations between the United States and Cuba could result in three possible scenarios. The first scenario would be a complete payment for all claims. If Cuba were to pay all claims without a reduction in the amount, it would signal to any and all businesses that Cuba is very much interested in integrating into the global economy and would welcome foreign investment into the island nation. This would assure foreign investors that any investment in Cuba would be relatively safe and protected.

The second scenario would be a partial payment for all claims. Here, U.S. businesses should be aware and analyze the developments carefully. A major variable in this scenario is the amount of compensation reduction. If the total pool of the settlement claims is pennies on the dollar, then U.S. companies should factor that settlement amount into their analysis of whether or not investment is a viable option and how much investment to risk. The bigger concern is determining the likelihood that the Cuban government will nationalize properties again. If the settlement pool is a minimal or nominal amount, then there is a strong likelihood that the Cuban government will have no problem with confiscating property once again. If the settlement amount is closer to full payment, then the likelihood of nationalization will be remote because of the costs involved.

The third and final scenario would be no payment for claims, or the status quo. Under this scenario, American companies would need to consider the likelihood of a government confiscation if they decided to pour capital into Cuba.

An important related factor to these claim settlement negotiations is being aware of what the Cuban government expects to receive from the United States in return for Cuba paying the certified claims. Besides lifting the Cuban embargo against Cuba, the United States is expected to pay certain counterclaims the Cubans have against the United States, such as compensation for certain violent incidents including a ship exploding in Havana Harbor and the downing of a Cuban airliner, as well as economic damages caused by the Cuban embargo. Counterclaims are part of the process, and it is up to the two countries to come out of these talks with a settlement agreement where both sides can be satisfied with the results.

Conclusion

The idiom “canaries in the coal mine” refers to “canaries . . . sent down into coal mines to test for gas leaks. An ailing or dead canary would indicate the presence of dangerous levels of carbon monoxide or other gases.”[46] The certified claims issue serves as an indicator of how

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serious Cuba's desire is to improve relations with the United States. A full or close-to-full payment would signal an interest on Cuba's part to reconcile with the United States. An offer for nominal payment toward the claims would be a signal that Cuba is not interested in pursuing better relations with the United States.

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Endnotes

1 International Claims Settlement Act, 22 U.S.C. §§ 1621-1627 (2006).

2 *See* Reorganization Plan No. 1 of 1954, reprinted in *id.* § 1622 app. at 328 (2006).

3 22 U.S.C. § 1622a (2006).

4 *Resolving Issues With Confiscated Property in Cuba, Havana Club Rum and Other Property: Hearing Before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet,* 114th Cong., 2nd sess., 11 February 2016 (statement of Mauricio Tamargo, former chairman, Foreign Claims Settlement Commission; hereinafter, *Resolving Issues With Confiscated Property in Cuba*).

5 22 U.S.C. § 1622c (2006).

6 *Resolving Issues With Confiscated Property in Cuba*.

7 22 U.S.C. § 1623 (2006). 22 U.S.C. § 1621 (2006) provides the following definition concerning who can petition the Commission:

(a) Persons: an individual, partnership, corporation, or the U.S. government;

(b) United States when used in a geographical sense shall include the United States, its Territories, and insular possessions, and the Canal Zone;

(c) Nationals of the United States: persons who are citizens of the United States and persons, who though not citizens of the United States owe permanent allegiance to the United States. It does not include aliens.

8 22 U.S.C. § 1623(c)-(d) (2006). 45 C.F.R. §§ 500-509 (2015) provides information regarding the procedures one needs to present a claim to the Commission.

9 *The Future of Property Rights in Cuba: Hearing Before the House Committee on Foreign Affairs, Subcommittee on the Western Hemisphere,* 114th Congress, 1st sess., 18 June 2015 (statement of Mauricio Tamargo, former chairman, Foreign Claims Settlement Commission; hereinafter, *The Future of Property Rights in Cuba*).

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14 Mark P. Sullivan and Suzanne L. York, *Cuba-U.S. Relations: Chronology of Key Events 1959-1999,* CRS Report, Report RL 30386, p. 2, 14 December 1999.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 2.

27 *Id.* at 31. CFR 515.101-901 (2015) addresses the Cuban Asset Control Regulations.

28 *Id.*

29 United States Foreign Settlement Claims Commission, Cuba Claims Act, 22 U.S.C. §§ 1643A-1643M (2006), (30 May 2016), https://www.justice.gov/fcsc/claims -against-Cuba.

30 Statement by the President Upon Signing Bill Relating to Claims of U.S. Nationals Against the Government of Cuba, 17 October 1964, (24 May 2016), http://www.presidency.ucsb.edu/ws/?pid=26625.

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34 *Resolving Issues With Confiscated Property In Cuba*.

35 Foreign Claims Settlement Commission of the United States, *Section II Completion of the Cuban Claims Program Under Title V of the International Claims Settlement Act of 1949*, p. 71 (1972) (hereinafter, *Section II Completion of the Cuban Claims Program Report*).

36 22 U.S.C. § 1643A(1) (2006).

37 *Section II Completion of the Cuban Claims Program Report*, p. 73.

38 22 U.S.C. § 1643A(3) (2006). 22 U.S.C. § 1643(4) (2006) defines the government of Cuba to "include the government of any political subdivision, agency, or instrumentality thereof."

39 22 U.S.C. § 1643B (2006).

40 22 U.S.C. § 1623(2)(a)(2)(B) (2006).

41 *Section II Completion of the Cuban Claims Program Report*, p. 71 (citing claim of Feliz Heyman, CU-0412 1968 FCSC Ann. Rep. 51).

42 *Id.* at 74 (citing claim of Betty G. Boyle, Claim No. CU-3473 1968 FCSC Ann. Rep. 81).

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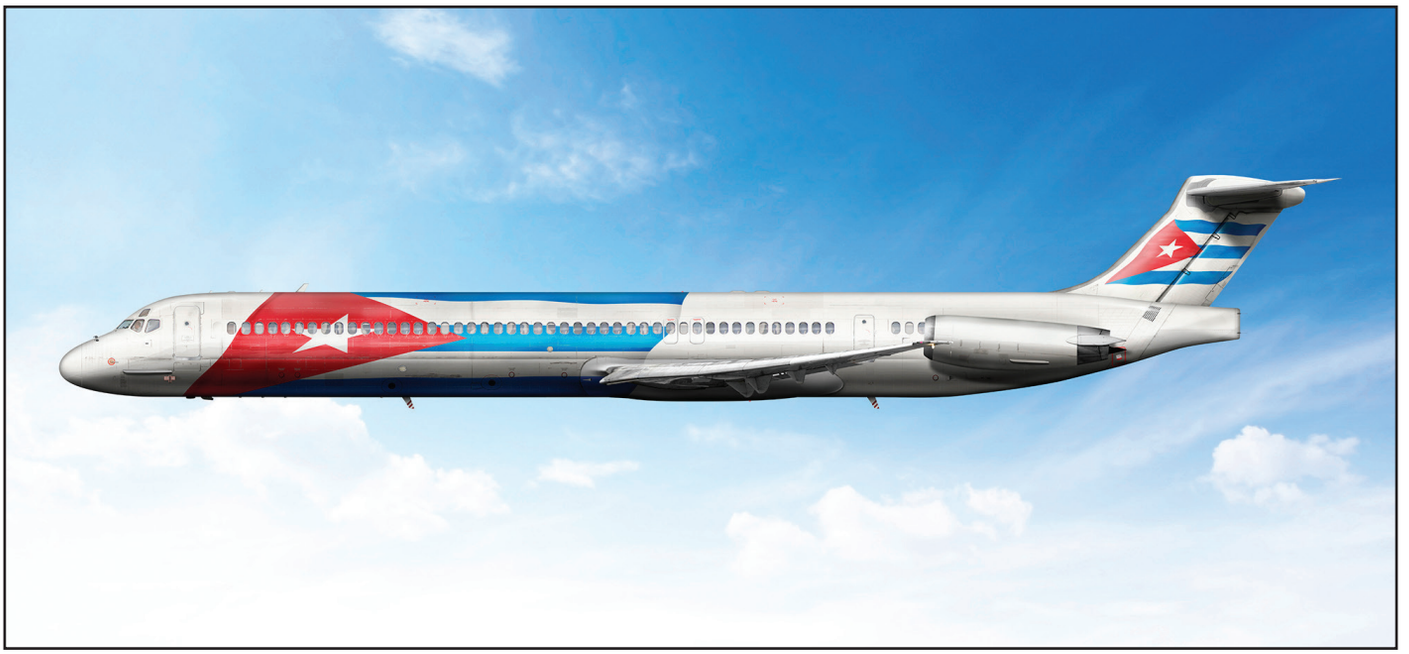

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all. Cuba will never recognize the judgments, and it is difficult to track down and seize assets that Cuba has stashed around the world. Again and again, despite judgments in their favor, plaintiffs have been frustrated by the difficulty in finding the funds to pay for them. Congress, however, may have found an unintended solution to this problem.

On 18 December 2015, President Obama signed into law a massive tax and spending bill that avoided a year-end showdown with Congress over the budget.[6] Buried deep within this robust piece of legislation are provisions intended mainly to provide compensation for victims of terrorist attacks like the bombings of American embassies in East Africa in 1998 and the bombing of the American Embassy and Marine Corps barracks in Lebanon in the early 1980's. The provisions also are intended to compensate the Americans taken hostage at the United States Embassy in Tehran in 1979. The legislation is not limited to compensating only such victims, but also provides a mechanism to compensate victims who have won judgments against state sponsors of terrorism.

The law creates a new United States Victims of State Sponsors of Terrorism Fund (the Fund) of US$1 billion, which will be funded by penalties BNP Paribas paid for violating sanctions against Iran, Sudan and Cuba. The legislation also appropriates US$1.025 billion in U.S. taxpayer funds in the Treasury. The Fund will pay up to US$20 million to victims of international terrorism (and up to US$35 million to them and their family members) who have received final court judgments against Iran, Cuba and other state sponsors of terrorism. The Congressional Budget Office projects an additional US$1.5 billion will go into the Fund over the next decade from criminal and civil fines from pending cases regarding Iran sanctions violations.

The law is not without its critics. Politicians from both sides of the aisle have widely criticized the use of American taxpayer dollars to satisfy other countries' (particularly countries associated with terrorism) civil judgments. Other critics have observed that the payments to civilians far exceed the amounts the United States pays members of the armed services (and their families) who have been killed, wounded or held as prisoners of war in armed conflict. Also, even though the law caps compensation of attorneys' fees at 25%, which is less than the typical contingency fee, it still has been criticized by some as a windfall for plaintiffs' attorneys.

Yet, in the case of Cuba, the law likely will be viewed as extremely helpful by proponents of normalization efforts who argue that engaging with Cuba will make it easier to lobby for human rights on the island.

The law requires the U.S. attorney general to appoint a special master to receive claims and make payments to holders of eligible claims, which include claims for "compensatory damages awarded to a U.S. person in a final judgment . . . issued by a United States district court under State or Federal law against a State sponsor of terrorism" under the state sponsor exception to the FSIA.

In March 2016, the attorney general appointed Kenneth Feinberg as the special master to administer this Fund. Feinberg is perhaps best known for having administered the 9/11 Victim Compensation Fund and having handled thousands of claims related to the BP oil spill in the Gulf of Mexico. As special master of the Fund, Feinberg will exercise unreviewable authority to issue awards to terrorism victims. He will make pro-rata payments within 90 days of publication of procedures that have yet to be issued.

It is unclear how many individuals hold unsatisfied court judgments against state sponsors of terrorism, or how large these judgments may be. Since Congress added the terrorism exception to the FSIA in 1996, litigants have filed and won dozens of lawsuits by default against state sponsors of terrorism. U.S. litigants have amassed more than US$10 billion in judgments against Iran alone.

Clearly, the Fund is not going to be able to satisfy every litigant's judgment in full. Still, the Fund is presently the only immediate option for resolving claims that represent an important roadblock in U.S.-Cuba normalization efforts. In a climate of rapprochement, judgment creditors who may never reasonably have expected to collect a single dollar of their judgment may be willing to accept a sizeable, multimillion-dollar payout in full satisfaction of their claims. This method of recovery may be the only way to reconcile current political objectives with judicial rulings.

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Endnotes

1 28 U.S.C. Section 1602 *et seq.*

2 Exceptions are enumerated in Sections 1605 through 11607 of the FSIA.

3 28 U.S.C. § 1605A.

4 *See Hausler v. JP Morgan Chase Bank, N.A.*, 127 F. Supp. 3d 17, 24 (S.D.N.Y. 2015).

5 Civil Liability for Acts of State-Sponsored Terrorism, codified at 28 U.S.C. § 1605 note.

6 Consolidated Appropriations Act, H.R. 2029, 114th Cong. § 404 (2015).

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trade restrictions on exports of telecommunications equipment and services, believing this would increase Cuban Internet access and freedoms.[17]

The dramatic changes to U.S. policy toward Cuba were implemented in the form of new rules issued on 27 January 2016 by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and the U.S. Commerce Department's Bureau of Industry and Security (BIS). Although the new regulations do not lift the U.S. trade embargo against Cuba, and do not allow tourists to travel to Cuba, they do ease U.S. sanctions against Cuba by easing provision of travel and carrier services to Cuba, eliminating restrictions on export financing for nonagricultural exports to Cuba and expanding existing authorizations for various activities in Cuba. The new BIS regulations adopt more favorable licensing policies for certain items, including telecommunications. Export licenses to Cuba may now be granted on a case-by-case basis for items that are deemed to meet the needs of the Cuban people, including state-owned enterprises, agencies and other organizations of the Cuban government that provide goods and services to the Cuban people.

New OFAC rules and regulations remove the restrictions on payment and financing terms for nonagricultural exports from the United States, authorize banks and other depository institutions to provide financing for exports and re-exports of nonagricultural items or commodities to Cuba and provide authorizations for arrangements related to travel and other carrier services. The new rules expand authorizations for travel to Cuba for certain activities and broaden the types of activities in which U.S. persons may engage, to include (among others): travel incident to the organization of professional meetings or conferences; travel incident to the organization of amateur and semi-professional international sports competitions and public performances; and travel and related transactions directly incident to professional media or artistic productions of information or informational materials for exportation, importation or transmission, including filming and production of media programs.

In addition, congressional action to further ease trade and travel to Cuba has been taken. An amendment approved by the Senate Appropriations Committee on 16 June 2016 would effectively lift the U.S. embargo on American companies providing Internet service to Cuba, codifying and expanding the Obama administration's efforts to chip away at the longtime restrictions. The amendment, a version of the Cuba DATA Act, was attached to the Fiscal Year 2017 financial services appropriations bill that funds the Treasury Department, the FCC and other agencies. It passed by a voice vote.

"It behooves the United States government to permit U.S. Internet companies to get to work to help build the 21st century infrastructure which is now lacking in Cuba," said bill sponsor Tom Udall, adding, "The Cuban people will be able share information and communicate more effectively as a result of investments in telecommunications."

Proposed Policy Changes for Cuba to Connect Cuba to the World

Prior to President Obama's historic visit to Cuba in January 2016, a delegation of U.S. technology executives, led by Ambassador Daniel Sepulveda,[18] visited Cuba and learned about the Cuban government's plan for achieving its commitments to have increased connectivity and access to technology throughout the country.[19]

In a speech made at UCI during his visit, Sepulveda underscored the talent, creativity and capabilities of Cuba's young engineers, programmers and innovators, and called upon the Cuban government to consider the implementation of numerous ICT initiatives, including transparent procurement for telecommunications; encouraging competition in the industry; broader provision of Internet and mobile wireless services; new initiatives for connecting schools, health facilities and rural communities; and broadband deployment plans.[20]

Sepulveda called on the Cuban government to implement policies that have proven useful in other countries and are intended to connect Cuba to the world and to ensure that the Cuban people are not left behind.

Technology in Cuba, continued

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Such policy proposals include the following:[21]

1. **Expand the number of hotspots/public Internet access points in the island.** In 2015, the Cuban government established some fifty-eight Wi-Fi hotspots. Demand for access at these locations has been tremendous. The Cuban government was encouraged to create more Wi-Fi hotspots throughout the island.
2. **Reduce the cost of public Internet access.** The cost of Internet access remains high relative to income in Cuba, but prices are dropping. When the Cuban government established Wi-Fi hotspots in 2015, it also reduced the hourly rate from US$4.50 to US$2.00. But this effectively means that it still costs the average Cuban about 10% of his or her monthly salary to get online. Further reductions of public Internet access are encouraged.
3. **Integrate more modern technology to advance Cuba's broadband strategy**. Key components of a nation's Internet infrastructure are fiber or high-speed mobile technology, satellite service and cloud-based solutions. Policy changes in Cuba to attract foreign direct investment and joint ventures to improve its Internet infrastructure are encouraged.
4. **Upgrade mobile wireless technology.** Cuban mobile networks operate primarily on 2G technology (second generation), which was first introduced in 1992. Cuba has an opportunity to skip generations of technology and leap to 3G and even 4G networks, and Cuba is encouraged to spur investment by allowing foreign firms to build infrastructure and to deploy services on some commercially viable basis.
5. **Loosen regulations for consumer and residential Internet use.** The Cuban government continues to regulate the sale and distribution of Internet-related equipment, and residential connections are not yet freely allowed for the majority of Cubans. Cuban import regimes also prohibit phones that utilize Global Positioning Systems and require special authorization for modems and satellite dishes. Sepulveda encouraged the Cuban government to loosen these regulations.
6. **Take greater advantage of U.S. regulations.** U.S. regulations now permit a wide range of activities that would support the Cuban ICT sector. By taking advantage of these changes, Cuba can enjoy state-of-the-art communications and fast-track its entry into the global Internet community.
7. **Support new submarine cable from Miami to Havana.** Linking Cuba directly to the United States would increase capacity within Cuba and allow for more efficient routing of traffic. The additional international link would serve a vital purpose in needed network redundancy and emergency preparedness.
8. **Open Internet access in order for Cubans to reap the full economic benefit from sources of information and tools on the Internet.** Sepulveda called on the Cuban government to avoid centrally censoring or blocking voices or services.

In March 2016, eleven technology company CEOs accompanied President Obama on a historic trip to

Cuba—the first time since 1928 that a U.S. president had visited Cuba. The technology companies traveling with the president's delegation included Google, PayPal and Stripe.

During his visit, President Obama met with representatives of Merchise Startup Circle, a Cuba tech start-up that announced a deal with U.S. payments company Strip Atlas. The president made it clear that increasing Cuba's access to technology and the Internet would be the most powerful way to end the embargo, arguing that providing the Cuban people with greater access to the Internet would help build a constituency in the United States in favor of ending the U.S. embargo.[22]

Support by U.S. Investment and Technology Community

Cuban tech-starts, such as Conoce Cuba and Ingenius, have been attracting the attention of the global angel investment community. AngelSummit Americas, an annual conference that was held in Miami, Florida, in spring 2016, included the participation of Cuban tech entrepreneurs who flew in from Havana to participate in this conference as well as in Emerge Americas. 10x10KCuba, an international competition serving as an international call to innovation for Cuban entrepreneurs, was launched during the summit.

Sponsors of 10x10KCuba seek to help talented programmers and entrepreneurs integrate into the global start-up community. Sponsoring organizations are at the forefront of Cuba's growth and development and include Cuba Emprende Foundation, #CubaNow, 500 Startups, Techstars, Startup Angels, Mano and Stanford University's School of Engineering. The awards to be given to the winners of the 10x10KCuba competition include:

- servers;
- cloud credits;
- android devices;
- Dell laptops;
- online English lessons;
- cash for travel and out-of-pocket expenses;
- customized Stanford University Engineering School program; and
- experience with leading accelerators Techstars, 500 Startups and Boomtown.

More than 100 Cuban start-ups were expected to participate in 10x10KCuba, and the 10 winners will be announced in fall 2016.

Conclusion

There is a window of opportunity in Cuba for technology companies. Thanks to Cuba's 99.8% literacy rate and its huge number of engineers, Cuba could become a tech hub if it achieves better Internet connectivity.[23] With a creative and entrepreneurial ecosystem of computer programmers, software engineers, designers, photographers and video-makers, many anticipate that the Cuban technology sector is ripe for joining the global freelance economy.[24]

It is important for U.S. companies that are exploring business opportunities in Cuba to consult with attorneys who have an understanding of the ever-evolving U.S. and Cuban laws and regulations. Notwithstanding the loosening of U.S. trade and travel restrictions to Cuba, the U.S. embargo remains in place, the Helms-Burton Act has not been repealed and the Office of Financial and Assets Control (OFAC), part of the U.S. Treasury Department, which enforces sanctions against Cuba, continues to impose sanctions on U.S. persons who violate U.S. law relating to trade and travel to Cuba.

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6 República de Cuba, Ministerio de Comunicaciones, *Estrategia Nacional Para el Desarrollo de la Infraestructura de Conectividad de Banda Ancha en Cuba,* Junio 2015.

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22 *Cuba works to join*, *supra*.

23 *Next Silicon Valley*, *supra*.

24 *Cuba works to join*, *supra*.

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party a prejudice that deprived that party of what it substantially expected to reap under the contract.

The TSP also opined about the application of the general principles of the CISG and the principles of contractual good faith and the conservation of contracts.

Note that this dispute was ultimately between two Cuban entities, one acting under assignment, and it is not known if the bank had protective covenants with the assignor. The bank received no preferential treatment, by precise application not only of relevant provisions of the CISG, but also in consideration of the general principles of the Convention and of good faith, which are of universal application. Most important, in 2009, the TSP already had held that the CISG is part of the Laws of Cuba, and applies automatically whenever the choice of law calls for Cuban law.

Nelson Servizi S.r.l. v. Empresa RC Comercial[10]
Tribunal Supremo Popular, Sala de lo Economico
Decision n. 3 of 30
April 2009

An Italian company sold a plastic molding machine to a Cuban company. The contract was signed in January 2004 and provided for payment by installments. The buyer made payments through December 2006, and then failed to complete payment. The seller sued in March 2007 for the unpaid balance. The courts found the action time was barred based on the statute of limitations of one year provided by Article 116 (d) of the Cuban Civil Code.

The TSP reversed, based upon the CISG Convention and the Limitation Convention. The TSP found that under Article 20 of the Civil Code of Cuba, special laws, like the two mentioned conventions, prevail over those of the national legislation. The parties had not opted out of either convention.

Under Article 12 (2) of the Limitation Convention, the limitation period begins to run from the date when the particular breach occurred, not from the date of the original contract.

Note: the TSP did not allow interest to be added to the award because a certain agreement of the Central Bank of Cuba did not apply to the sale of goods by foreign entities.

C.I. Dental X-Ray S.A.S. v. MEDICUBA
Laudo 25, Corte Cubana de Arbitraje Comercial
23 December 2013
Arbitrators: Dr. Juan Mendoza Diaz, Lic. Valentin F. Lopez Alvarez
M. Sc. Narciso A. Cobo Roura (presiding)

This case involves a *laudo*, or arbitration award, rendered in a controversy between a Colombian seller and a Cuban company, arising out of a contract of international sale. The instrument was drafted using an official form of the *Comercio Exterior y de Inversion Extranjera*, containing clauses about place and terms of delivery, value of the contract, dates and place of delivery and ways and conditions of payment.

Under the latter condition, MEDICUBA, the buyer, opened a Letter of Credit (not confirmed) on 10 April 2008 for 328,760.15 euros, equal to US$518,126.00 at the exchange rate of 1.576 (then prevailing).

The seller loaded the consignment at Cartagena on 10 August 2008, a delay of eighty-eight days from the agreed date of shipping. (A claim for this delay was pursued by the buyer under a separate action.) At that time the rate of exchange had gone down to 1.5083.

While the seller had performed its obligation to deliver the goods, though with a delay, the buyer was in breach as it had withheld payment that should have been made on 10 April 2009. The buyer argued as an excuse for the delay its difficult financial situation, without alleging circumstances of extraordinary character. After many solicitations, the buyer finally gave orders of payment on 10 May 2010, a delay of thirteen months. The buyer applied the rate of exchange on the day of payment, $1.2497 per euro, which yielded US$400,392.34, a shortage of US$117,733.66.

In addition to paying two years after the opening of the Letter of Credit, the buyer did not wire the interest for the 240 days of financing or the penalty for delay of payment.

The seller made a claim of US$117,733.66 for the balance owed, US$49,868.78 for interest and US$47,424.64 for penalties.

The *Corte de Arbitraje* first acknowledged its jurisdiction under the arbitration clause in the contract and found that the parties had stipulated the application of Cuban law.

Such law, the *Corte* explained, is basically the Civil Code, the first Final Disposition of which provides that contractual relations of a commercial character are governed by "special legislation," which has been enshrined within two statutory instruments: the *Decreto Ley* n. 304 (DL 304) of 1 November 2012 and Decree 310 of 17 December 2012 (D 310).

Neither of these instruments contains a rule about variation of rate of exchange. DL 304, at Article 63, has a rule on gap filling, remanding to the commercial customs generally accepted. The CISG is a classic instrument of this type. The *Corte* found that the CISG was applicable because both Colombia and Cuba had ratified the Convention, because the Convention applies unless the parties opt out of it and, interestingly, because the CISG is aimed at harmonizing international commerce.

Coming now to the specific issue in dispute, the *Corte* acknowledged that the Convention has no rules about the variation of rates of exchange; however, it found that articles 57.1, 58.1 and 59 of the CISG affirm the principle of protecting the interests of the creditor who has performed, and of disallowing the party in breach to profit from its breach.

The *Corte* went on to say that, in absence of specific norms, it had to follow usages and customs of international trade, which have been systematically ordered in the UNIDROIT (International Institute for the Unification of Private Law) principles.

Such principles happen to contain a rule about exchange rates, giving the creditor the choice to ask for the rate either at the date the obligation arose or at the date of payment.

Application of this principle is also in harmony with Article 74 of the CISG that protects from damages occasioned by delay in performing.

The demand of the seller was upheld.

MEDICUBA v. C.I. Dental X-Ray S.A.S.

Laudo 4/2014, Corte Cubana de Arbitraje Comercial
Sole Arbitrator: Lic. Valentin F. Lopez Alvarez

The seller and the buyer are the same parties as in the previously reported case, *Laudo* n. 25/2013. The seller was to deliver polymerization devices for mufflers, and the buyers protested that they had received potato fryers instead. The seller admitted the mistake and pledged to remedy it. The substituted goods, however, did not conform or did not work.

The buyer, who had duly paid for the goods, claimed for penalties for nonconforming goods and for delay in arrival. In addition, the buyer inserted into this claim an additional demand for the delayed shipment of the separate consignment, which was the object of the litigation concluded by *Laudo* 25/2013 (see above). Of course, the buyer also claimed for the full value of the nonconforming goods.

The contract called for Cuban law, and the panel held that the CISG is part of Cuban law. Under the CISG, the seller made a fundamental breach by delivering goods not suitable for the required use. Even if the contract did not mention specifications, the seller, having experience and knowledge of the merchandise, could not escape the CISG principle of good faith and reasonable cooperation. The arbitrator called these principles "cardinal principles that inspire the Convention."

Article 36 of the CISG gives the buyer the remedies of specific performance, reduction of price, avoidance and damages. The arbitrator found that the specific performance would have been futile.

The buyer started its action within the Convention's four-year statute of limitations, but the seller argued that buyer did not act as swiftly as provided in the contract. The arbitrator held that the Convention cannot be contracted out on this issue.

The *Corte* found for the buyer.

International Sales of Goods in Cuba, continued

EMIAT v. C.I. AGRAPISA

Laudo 19/2013, Corte Cubana de Arbitraje Comercial
Arbitrator Appointed by Plaintiff: Dr. Juan Mendoza Diaz
Arbitrator Appointed by Defendant: Lic. Valentin F. Lopez Alvarez
Umpire: M. Sc. Narciso A. Cobo Roura

AGRAPISA, a Spanish trader, sold to EMIAT, a Cuban importer of machinery, an elevator platform manufactured by Matilsa, SA (a Spanish company). Upon delivery in Cuba, the machine was inspected and found working. The machine was transported to its inland destination, stored for a while and then put into operation without problems for a couple of months. Thereafter an accident occurred due to breakage of the welding of a bolt. A worker lost his life in the accident.

EMIAT started arbitration asking for damages caused by a "hidden defect" of the machine, consisting of restitution of the purchase price, freight and insurance, plus costs of arbitration.

The defendant denied the existence of a hidden defect, pointing rather to poor training and improper operation of the machine, and argued that only the manufacturer should be called to respond for a hidden defect, if any. Among many other defenses, AGRAPISA argued that the action sounded as if it was brought in tort while only a contract remedy in warranty should have been available (only requiring substitution of the damaged part). The defendant also objected to the plaintiff's use of Articles 74-77 of the Convention, arguing that these articles apply only in cases of "total breach" of the contract (that is, for total loss of the machine and not just of a small part).

The panel first addressed the issue of the applicable law, finding that the CISG is a law ranking over and above the Civil Code as special law that applies by default, unless explicitly contracted out by the parties. The panel held that a tacit or implied derogation is not enough under Article 6 of the Convention. When the Convention applies by default, the panel held, domestic law can be used as a supplement or a gap-filling of the Convention.

In this connection, the panel found that the Convention has rules about express warranties (Art. 35.1), implied warranties (Art. 35.2), of merchantability (Art. 35.2.a) and of fitness to purpose (Art. 35.2.b) but not about hidden defects, a gap that could be filled using principles of "Roman-French" law like Cuban law. Article 348.2 of the Cuban Civil Code has a rule on hidden defects, granting the remedy of restitution of price and expenses, the same, the panel noted, as under the law of Spain, the law of the defendant.

On the tort/contract cause of action, the panel found that damages caused by contractual breaches still give a cause of action in contract, and that it was irrelevant that the seller was not the manufacturer. Ultimately the panel unanimously found that the machinery was beyond repair and unsuitable to be restored, and granted the plaintiffs all of the damages claimed.

Worthy of note is the fact that the *Laudo* contains a concurring opinion by Dr. Lopez Alvarez. Lopez concurred in the decision but on the grounds that it was not necessary to use the domestic law of Cuba as gap-filling. Article 36 of the Convention, he wrote, is sufficient to produce the consequences otherwise found by the rest of the panel.

Partial Conclusion

After review of the above cases, it is proper to pause for reflection.

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International Sales of Goods in Cuba, continued

Although in scarce number, to say the least, the cases show remarkable features of methodology, legal logic, academic preparation, open-view approach and consistency in the finding and application of the law.

The structure of the judgments (*Fallos*) and of the arbitral awards (*Laudos*) is consistent, with variations of style. Only one judgment that we found in its original version (*Etecsa v. Republic Banc*[11]) opens with a description of the dispute and is followed by an exposition of the facts. This style mirrors that of many courts of civil law, where each finding is summarized in a separate paragraph preceded by the uppercase words *RESULTANDO* (having found) and *CONSIDERANDO* (considering). The *CONSIDERANDOs* lay out the norms of law that the court deems applicable, and the holding follows in one (sometimes a few) terse paragraphs labeled *FALLAMOS* (we decide).[12]

The *Laudos* (all found in Spanish language) are written along the same general scheme, but are much more exhaustive on the facts. The part of the *Laudo* that contains the final decision is labeled (as in the court judgments) with the word *FALLO*. Extensive reasons of law for the decision are given. In fact, the legal reasons are contained in a dedicated section called *Fundamentos de Derecho* or *Consideraciones Legales*.

In the cases found, there is hardly a hint of political influence over the decisions. In fact, the Colombian plaintiffs in *Laudo* 25/2013 and the Italian plaintiffs in *Laudo* 21/2014 and in TSP 30 April 2009 prevailed over Cuban companies. In *Laudo* 4/2014, the Cuban company MEDICUBA prevailed over a Colombian seller because of an uncontested gross breach by the latter (delivery of potato fryers instead of muffler repair machines), and in *Laudo* 19/2013, the Cuban company EMIAT prevailed over the Spanish company AGRAPISA because of careful evaluation of the facts and rigorous determination and application of principles of law to the facts. That some plaintiffs and defendants were Cuban companies involved in activities and services of public interest did not appear to make a difference.

What is most worthy of note, however, is the consistent use and interpretation of the CISG. Through all the cases found, the CISG is considered and used as a special law that is of superior rank to the Civil Code and to the recent revisions of Cuban laws of commercial contracts. This is due to a fundamental norm of the Civil Code, contained in the closing rules, the First Final Disposition (*Disposicion Final Primera*), that establishes the rank of the sources of law, declaring special laws of superior rank. On 1 November 2012, the *Decreto Ley* 304 *De La Contratacion Economica* was passed to establish fresh rules about commercial contracts, superseding the Civil Code as well as a previous *Decreto Ley* of *Normas Basicas Para Los Contratos Economicos*. Soon after, the *Decreto* 310 of 17 December 2012 established specific norms for specific types of commercial contracts (such as sale-purchase of goods, agency, etc.). This was a considerable effort to bring the commercial laws of Cuba in line with the modern world; hence one might think that the courts would have given heavy protection to these legal instruments. Instead, the arbitrators of the cases found above did not hesitate to declare that both of these statutes are subordinated to the CISG as an international agreement to be respected and carefully followed.

This open-minded approach is not always followed in the United States. In fact, it is fair to say that the Uniform Commercial Code receives more jealous attention in the United States than DL 304 and DL 310 are given in Cuba. The United States ratified the CISG with a reservation to Article 1 (1) (b), and certain precedents have raised a scholarly controversy over the method of interpretation of obscure passages of the CISG or of gap-filling methods.

Article 7 (1) of the CISG provides that the Convention be interpreted independently from the concepts of specific legal systems and against a background of international principles and concepts.[13] This point was stressed in a strong tone by Professor Franco Ferrari, who not only argued that to use cases based on the UCC to interpret "similar provisions" of the CISG is impermissible, but that to hold that the UCC and the CISG are similar is misleading.[14]

The same theme and conclusions were reached by Professor Francesco Mazzotta, who criticized a trilogy

of American cases that resorted to the UCC to interpret "similar" provisions of the CISG.[15]

The Cuban cases found above stay well clear of the American abuse cited by Ferrari and Mazzotta.

Laudo 4/2014, for example, calls for the *principios cardinales que rigen la Convencion* such as good faith, duty of collaboration and reasonable action.

Laudo 25/2013, on the issue of integration of gaps in the contract, explicitly followed "usages and customs of international trade, as collected, ordained and systematized in the UNIDROIT principles as consistently recognized by scholars for their unquestionable value of clarification."

Laudo 19/2013 alerted about the use of the domestic law for filling gaps of the Convention. The *Laudo* said it could be done, but required special attention not to "duplicate in an unnecessary or capricious way the regulatory standard offered by the Convention and without prejudice to the unifying function that it is called to achieve."

The TSP followed suit in the *Republic Bank* case. Having to fill a gap in the CISG, the TSP held that the method to use is to look at the general principles found in the Convention or, failing this test, those found through a choice of law analysis (not going straight to domestic law).

A Wrap-Up Case

Here is one more case that offers a confirmation of the judicial traits just described, and it adds one very interesting feature.

Empresa Italiana X v. Empresa Mixta Y

Laudo N. 21/2014
Dr. Julio C. Fernadez de Cossio (president of the panel)
Lic. Valentin F. Lopez Alvarez, M. Sc. Narciso A. Cobo Roura

This case has been reported with the names of the parties deleted and substituted with an X for the Italian plaintiff and a Y for the Cuban defendant.

The defendant did not make payment for goods duly received and accepted. The excuse was twofold: The defendant did not receive payments from its "only client" (thus remaining moneyless, in other words asking to be excused for hardship) and because of the new regulations on currency exchange, under which the defendant could not obtain the *carta de uso de liquidez externa* (CL).

When eventually payment could be made, the defendant denied to be bound to pay interest, arguing that the contract contained a clause by which the parties renounced to claim penalties.

The panel addressed the question of the nature of interest, concluding that interest is basically aimed at penalizing a delay, and therefore denied the demand of the plaintiff, due to the waiver of penalties in the contract.

The panel found, as in all of the cases above, that the CISG is part of the law of Cuba and that it contains the principle pacta sunt servanda, but here comes the special feature of this Laudo: a dissenting opinion.

Arbitrator Valentin Francisco Lopez Alvarez, who was also on the panel in *Laudo* 19/2013 and 25/2013, and was the sole arbitrator appointed by the court in Laudo 4/2014, did not agree with the panel and wrote his *Voto Particular* (special ballot or dissenting opinion).

Alvarez wrote that the interpretation of the Convention is to be made in observance of Article 7, which forecloses any citation, comparative view or analysis that springs from the domestic law of any state, even if that state has ratified the Convention. In that case, no recourse should have been made to Cuban domestic law.

The payment of interest, Alvarez wrote, is one of the "pillar principles" of the Convention, and he objected to the panel confusing moratory interest with penalties, and therefore, he concluded, the clause in the contract could never be interpreted as a waiver to claim moratory interest.

Conclusions

If what you see is what you get, Cuban law on the CISG appears to be sound and in good hands. The arbitral

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proceedings have unfolded in reasonable time, lasting between one and two years, especially when substantial discovery appears to have been made. *Laudo* 21/2014, dealing with the running of a statute of limitation on uncontroverted facts, lasted only six months, from April to December 2014.

But we have seen only six cases out of an unknown number. We are looking at the tip of an iceberg. What is hiding in the ice below the water? And why is the online search suddenly blank?[16]

Is it because of another subtle form of censorship (as some may suspect), or is it a protectionist measure for an up-and-coming legal profession on the island? Or is the limited number of "good looking" cases publicly (though not readily) available just a showcase for promotional purposes?

It is hard to tell, but still, the material found is of such high quality, both scholarly and professionally, that it may not have been an overnight making[17] and may well be a signal of positive things to come.

As of today, it appears that the best, if not the only way to "research" the law of Cuba is to resort to the professional help of the Cuban Bar. The Cuban Law Subcommittee of the International Law Committee of The Florida Bar is helping in this direction, with its mission of networking, knowledge and good will. After all, who said that it is the lawyers who make the law?

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Endnotes

1 Lourdes Dávalos León, *The International Contract Under the New Regulation on Economic Contracts in Cuba*, [26] REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES (2013).

2 *Id.*

3 The inferior Provincial Courts (like the one of *La Habana*) are also organized in chambers and have their own *Camaras de lo Economico*.

4 *See, e.g.*, Laura Patallo Sánchez, *The Role of the Judiciary in a Post-Castro Cuba: Recommendations for Change*, Prepared for the Cuba Transition Project (CTP) Institute for Cuban and Cuban-American Studies, University of Miami, ISBN: 0-9704916-7-0 (2003).

5 Under the rules of the *Corte*, a dispute is considered international when: (a) the establishment or habitual residence of the parties are in different countries; (b) when the parties, having domicile in the same state, are natural or legal persons of different nationality or citizenship; (c) the place of conclusion of the obligation or its performance is in a different state.

6 For the period 2015-2017, the *Corte* lists the names of 21 professional arbitrators and 6 mediators.

7 *See supra*, Fn. 2.

8 This case received an extensive commentary by Jorge Oviedo Alban, a Colombian attorney, professor of civil and commercial law at the University of La Sabana (Colombia). He holds a *maestria* in commercial law of business at the University of Buenos Ayres (Argentina). Alban is an invited researcher at the University of Basel (Switzerland) for the Global Sales Law Project and a member of ASADIP (*Asociacion Americana de Derecho Internacional Porivato*). The article is published in FORO DE DERECHO MERCANTIL, Revista Internacional, 32, July-September, 165-82.

9 *Sala de lo Economico del Tribunal Provincial Popular de La Habana*.

10 This case was taken from the online database of the United Nations Commission on International Trade Law edited by UNCITRAL under the name of CLOUT (Case Law On Uncitral Text), http://www.uncitral.org/uncitral/en/case_law.html. The case is reported only in English, digest form, and not in its original language.

11 Unpublished. Obtained courtesy of attorney Jorge Oviedo Alban.

12 This organization and style mirror that of the French courts, with the difference that the Cuban court gives reasons of law in support of the holding while the French courts do not (to give reasons is tantamount to making law, and with respect to separation of powers, the law should be made only by Congress).

13 *See, e.g.*, DANIEL CHOW & THOMAS SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, (2010 Aspen Publishers Wolters Kluwer), ISBN 978 0 7355 7065 8, 183-84.

14 Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021.

15 Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get It Right?,* 3 LOY. U. CHI. INT'L L. REV. 85, *citing to*: *Delchi Carrier Spa v. Rotorex Corporation*, 71 F.3d 1024, (U.S.C.A., 2nd Cir., 1995); *Raw Materials Inc. v. Manfred Forberich GMBH*, 2004 WL 1535839 (N.D.Ill.); *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, (U.S.C.A., 7th Cir., 2005).

16 Four of the five cases reported in this article can be found on the University of Madrid website http://www.cisgspanish.com/seccion/jurisprudencia/cuba/. The TSP decision is available on the CLOUT database.

17 The Camara Arbitral website boasts 50 years of arbitration experience.

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