

# A SURVEY OF SIGNIFICANT LEGAL CHANGES DURING CUBA'S SPECIAL PERIOD: SETTING PARAMETERS FOR CHANGE

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When Cuba lost the former Soviet Union's economic support, the island entered what is commonly called the Special Period. Stretching now for over a decade, the Special Period has been marked by material deprivation, ongoing legal and illegal emigration, societal malaise, and government efforts to prop up revolutionary fervor.

But the Special Period has also featured domestic legal changes<sup>1</sup> aimed at implementing economic recovery and long-term development strategies based on diversified foreign and domestic investment in capitalistic ventures. While the efficacy of these legal developments and the goals and planning behind them remain hotly debated, Cuba has indeed formed significant legal structures that are fomenting economic (and perhaps, ultimately, political) change within closely guarded parameters. This paper will summarize some of the more significant of these legal developments, emphasize how they interrelate to set limits

for change, and briefly explore those limits' implications and consequences.

The most important Cuban laws passed during the Special Period are those setting the structures and boundaries for economic development. Those meriting special attention are:

- The Constitution of 1992<sup>2</sup>
- The Law of Foreign Investment<sup>3</sup>
- Decree-Law No. 165: Duty-Free Zones and Industrial Parks<sup>4</sup>
- Decree-Law No. 173: Banks and Non-Banking Financial Institutions<sup>5</sup>

This is hardly an exhaustive list, and it by no means intends to give short shrift to laws affecting civil and political rights. Rather, its length acknowledges this paper's limits in discussing what even multiple volumes could not completely cover. Secondly, it re-

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1. This paper will not explore Cuba's entry into bilateral or multilateral agreements during the Special Period. Though such agreements are certainly important, this paper looks at how domestic laws are laying the groundwork — and setting the limits — for change.

2. Constitución de la República de Cuba [hereinafter Constitution of 1992]. The full text is available on the Internet at <http://www2.cuba.cu/gobierno/cuba.htm>, accessible through Cuba's official website, <http://www.cubaweb.cu>. The Constitution was originally published in the *Gaceta Oficial de la República de Cuba*, no. 7, Aug. 1, 1992, and was printed in book format by Editora Política (1992). The 1992 Constitution is a revised version of the Constitution of 1976 and contains reforms approved by the Asamblea Nacional del Poder Popular in July 1992.

3. Ley No. 77 Sobre las Inversiones Extranjeras [Law No. 77: Foreign Investments] (1995) [hereinafter Foreign Investment Act], translated at <http://www.geo.unipr.it/~davide/cuba/economy/LAW95/law1.html>.

4. Decreto-Ley Número 165 de las Zonas Francas y Parques Industriales [Decree-Law 165: Duty-Free Zones and Industrial Parks] (1996) [hereinafter Duty-Free Zones and Industrial Parks Law], translated at <http://www.giraldilla.com/lawsDL165.htm>.

5. Decreto-Ley Numero 173 Sobre los Bancos e Instituciones Financieras no Bancarias [Decree-Law 173: Banks and Non-Banking Financial Institutions] (1997) [hereinafter Banks and Non-Banking Financial Institutions Law].

flects an admittedly subjective (and perhaps jaundiced) view that, to a large extent, economics, finance, and money flows are and will continue to be key foundational factors in Cuba's development. According to this perspective, the strong arm of corporate investment, rather than human rights campaigns, will do far more to bring structural change. Thirdly, and in any case, most laws enacted during the Special Period that touch on civil, human, and political rights have done little to advance the cause of democracy and individual liberty. In addition, such laws' reach, viability, practical application, and developmental effects are, at present, unclear.

### THE CONSTITUTION OF 1992

The Constitution of 1992 (a reformed version of the 1976 document) sets the framework for economic change within government parameters. It sets the stage for a tension — a push and pull, as it were — that has existed over the last decade between the need for economic opening and private capital on the one hand and, on the other, the desire to maintain centralized, socialist control; Cuban national sovereignty; and the sanctity of the environment and public health. Thus, while the Constitution envisions joint ventures and establishes a rationale for later-enacted laws governing limited private enterprise and wholly foreign-owned property, it lays strict ground rules and establishes the tough tone and approach Cuba has taken toward economic reforms. The result is like a scale that balances, however unevenly at times, legal and economic reforms and absolute government control.

Though later laws would change the balance somewhat, the Constitution keeps the scales in favor of

the government. For example, in the Constitution, the government forcefully asserts its sovereignty and socialist orientation. We find this in several sections of the Constitution, including the passionate preamble,<sup>6</sup> the statement that Cuba is a socialist workers' state, and provisions such as the following:

Artículo 5o.- El Partido Comunista de Cuba, marxista-leninista, vanguardia organizada de la nación cubana, es la fuerza dirigente superior de la sociedad y del Estado, que organiza y orienta los esfuerzos comunes hacia los altos fines de la construcción del socialismo y el avance hacia la sociedad comunista.<sup>7</sup>

The Constitution also reserves territorial sovereignty, including over the environment and natural resources ("Artículo 11o.- El Estado ejerce su soberanía (a) sobre todo el territorio nacional, . . . [y] (b) sobre el medio ambiente y los recursos naturales del país . . ."),<sup>8</sup> while reasserting its "anti-imperialist" stance<sup>9</sup> and affirming state control over most real and commercial property.<sup>10</sup>

Although the Constitution expresses the critical need for economic development, the process is clearly meant to be closely moderated and government-controlled. Article 16, for example, assigns to the state the role of "organizing, directing, and controlling national economic activity in conformity with a plan that guarantees the country's programmed development."<sup>11</sup> Because such activity could conceivably include foreign capital, it is of course reined in through centralized controlled of economic initiatives that must meet certain criteria: "fortalecer el sistema socialista, satisfacer cada vez mejor las necesidades materiales y culturales de la sociedad y los ciudadanos,

6. Constitution of 1992, *supra* note 2, at pmb. ("Nosotros, ciudadanos cubanos, herederos y continuadores del trabajo creador y de las tradiciones de combatividad, firmeza, heroísmo y sacrificio forjadas por nuestros antecesores; por los aborígenes que prefirieron muchas veces el exterminio a la sumisión; por los esclavos que se rebelaron contra sus amos; ... [d]eclaramos nuestra voluntad de que la ley de leyes de la República este presidida por este profundo anhelo, al fin logrado, de José Martí: 'Yo quiero que la ley primera de nuestra República sea el culto de los cubanos a la dignidad plena del hombre.'").

7. *Id.* at art. 5.

8. *Id.* at art.11 (a)-(b).

9. *Id.* at art. 12 ("La República de Cuba hace suyos los principios antiimperialistas e internacionalistas ...").

10. *Id.* at art. 15.

11. *Id.* at art. 16 ("Artículo 16o.- El Estado organiza, dirige y controla la actividad económica nacional conforme a un plan que garantice el desarrollo programado del país ...") (translation in main text by author).

promover el desenvolvimiento de la persona humana y de su dignidad, el avance y la seguridad del país.”<sup>12</sup>

Similarly, while the Constitution recognizes the validity of joint ventures and other corporate entities,<sup>13</sup> this is counterbalanced by (among other things) government control over external commerce, including the authority to create commercial entities, regulate imports and exports, and determine who has legal authority to handle relevant operations and enter contracts.<sup>14</sup> Finally, Article 27 places strictures on economic initiatives by recognizing the need for development that is socially beneficial (or at least not harmful) and environmentally sound.<sup>15</sup>

None of these commercial provisions constitutes a government concession. Those would come later. Rather, the Constitution establishes a vision of controlled growth and leaves for more specific laws the task of rolling out economic reforms. The latter would open the door to foreign capital and the influence of foreign economic power.

### THE FOREIGN INVESTMENT ACT OF 1995<sup>16</sup>

In 1995, Cuba opened itself more broadly to foreign capital with passage of the Foreign Investment Act. This much-heralded law provides for:

- Direct foreign investment in the Cuban economy, though barring investments in education, health care, and noncommercial military operations.<sup>17</sup>
- Property protection guarantees through a bar on expropriations, while ensuring indemnification for expropriations valid for reasons of “the public good or in the interest of society.”<sup>18</sup>
- Establishment of joint ventures (“registered-share corporations”<sup>19</sup> having a “legal status distinct from that of any one of the parties”<sup>20</sup> and whose shareholders are both Cuban and foreign); international economic-association contracts (agreements between two or more parties, typically Cuban and foreign, without the creation of a separate legal entity);<sup>21</sup> and totally foreign capital companies (foreign-owned and capitalized companies whereby “the foreign investor manages the company, [and] enjoys all the rights pertinent to it.”)<sup>22</sup>
- Investments in and ownership of real estate (subject to restrictions).<sup>23</sup>
- Procedures for Cuban government authorization of proposed investments.<sup>24</sup>

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12. *Id.*

13. *Id.* at art. 23 (“El Estado reconoce la propiedad de las empresas mixtas, sociedades y asociaciones económicas que se constituyen conforme a la ley.”).

14. *Id.* at art. 18 (“El Estado dirige y controla el comercio exterior. La ley establece las instituciones y autoridades estatales facultadas para: —crear empresas de comercio exterior; —normar y regular las operaciones de exportación e importación; y —determinar las personas naturales o jurídicas con capacidad legal para realizar dichas operaciones de exportación e importación y concertar convenios comerciales.”).

15. *Id.* at art. 27 (“El Estado protege el medio ambiente y los recursos naturales del país. Reconoce su estrecha vinculación con el desarrollo económico y social sostenible para hacer más racional la vida humana y asegurar la supervivencia, el bienestar y la seguridad de las generaciones actuales y futuras.”).

16. Foreign Investment Act, *supra* note 3.

17. *Id.* at ch. IV, art. 10.

18. *Id.* at ch. III, art. 3.

19. *Id.* at ch. V, art. 13.

20. *Id.*

21. *Id.* at ch. V, art. 14.

22. *Id.* at ch. V, art. 15.

23. *Id.* at ch. VI, art. 16.

24. *Id.* at ch. VIII, art. 20-25.

- Requirement that all three types of approved investment entities establish “accounts in freely convertible currency”<sup>25</sup> through the Cuban National Banking System.
- Strict labor requirements obligating joint ventures, international economic-association contract parties, and totally foreign capital companies to hire their Cuban employees through a Cuban “employing entity” specified by the Cuban government.<sup>26</sup> The investing company pays wages to the employing entity in “convertible foreign currency”<sup>27</sup> (typically U.S. dollars), while the employees receive their wages from that entity in Cuban pesos.<sup>28</sup> (The rub here is that employees receive the official one-to-one exchange rate. This significantly lowers their purchasing power and their ability to accumulate wealth.)
- Imposition of a 30% corporate income tax<sup>29</sup> (subject to increase for companies exploiting “renewable or nonrenewable natural resources”)<sup>30</sup> that can be reduced by a labor utilization discount<sup>31</sup>; a 14% social security tax;<sup>32</sup> “customs duties and other payments”;<sup>33</sup> a “land transportation tax”;<sup>34</sup> and a “document tax.”<sup>35</sup>
- Authorization of duty-free zones and industrial parks.<sup>36</sup> The former are “areas in which ... a special system can be established covering customs duties, exchange rates, taxation, labor, migration, public order, capital investment and foreign trade, and in which foreign investors can participate for the purposes of financial operations<sup>37</sup> and specified commercial activities.”<sup>38</sup> Industrial parks are “areas in which ... a special system can be established covering customs duties, taxation, labor, capital investment and foreign trade, for the development of productive activities with the participation of foreign capital.”<sup>39</sup>
- Submission of relevant investment proposals to determine an “investment’s suitability from the environmental point of view and [to] determine whether an environmental impact evaluation is required.”<sup>40</sup> The Ministry of Science, Technology and the Environment may institute measures to control “damage, dangers or risks for the environment”<sup>41</sup> resulting from investments. Finally, those “responsible for . . . damage or harm . . . [must] . . . reestablish the previous environmen-

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25. *Id.* at ch. IX, art. 26.

26. *Id.* at ch. XI, art. 33. It is important to note that article 31 provides that “workers in activities corresponding to foreign investments shall be, as a rule, Cubans or foreigners permanently residing in Cuba.”; *see also Id.* at ch. XI, art. 34 (1) (“The employing entity ... individually contracts and directly hires Cuban workers and permanent residents. This employing entity pays those workers their wages.”).

27. *Id.* at ch. XI, art. 33 (4).

28. Foreign Investment Act, *supra* note 3, at ch. XI, art. 33 (4).

29. *Id.* at ch. XII, art. 39(a).

30. *Id.* at ch. XII, art. 39(b).

31. *Id.* at ch. XII, art. 39(c)(1).

32. *Id.* at ch. XII, art. 39(c)(2).

33. *Id.* at ch. XII, art. 38(c).

34. *Id.* at ch. XII, art. 38(d).

35. *Id.* at ch. XII, art. 38(e).

36. *Id.* at ch. XV, art. 50.

37. *Id.* at ch. XV, art. 51(1).

38. *Id.*

39. *Id.* at ch. XV, art. 51(2).

40. *Id.* at ch. XVI, art. 55.

41. *Id.* at ch. XVI, art. 56(1).

tal situation, repair the material damage and indemnify the injured parties.”<sup>42</sup>

The Foreign Investment Act brings to fruition the Constitution of 1992's validation of certain commercial enterprises and its presaging greater foreign commercial ties. Article 23 of the Constitution, for example, clearly states that the government “recognizes joint ventures, companies and economic associations.”<sup>43</sup> This was later confirmed by Ricardo Alarcón who noted in the Foreign Investment Act's introductory text that “the Constitution ... [of 1992] ... recognizes ... joint ventures, companies and economic associations ... [and] provides for the partial or total transference of ownership of economic objectives.”<sup>44</sup>

In addition, the 1995 law concretizes the Constitution's arguably subtextual references to coming foreign investment. Such references can be inferred in articles that, for example, reassert government oversight over foreign trade<sup>45</sup> and that recognize joint ventures.<sup>46</sup> Of course, the Constitution also reminds us that such trade is subject to the preemptive assertion that the “state organizes, directs, and controls the nation's economic activity.”<sup>47</sup>

While the Foreign Investment Act is the realization of constitutionally legitimated corporate activity, it is also another example of the moderated, modulated approach Cuba takes toward development. Even as the act opens the doors to capitalist ventures in Cuba, its provisions and accompanying documentation restate the government's intention of balancing capitalistic development measures against centralized control. That intent is expressed in the Presentation

of the Draft of a Law on Foreign Investment, a document accompanying the law when the latter was submitted to the National Assembly of the People's Power:

This process [i.e., opening the economy to foreign investment] has been carried forward in an orderly way, with negotiations examined one by one, based on the criterion of what is beneficial for the country, without permitting the interests of sectors, territories or institutions to take precedence over those of the nation. In every phase of the process, the economic and social development of the country is present and holds first place.

We speak with complete clarity to the entrepreneurs of other countries with whom we associate. We are a socialist country that has been and is respectful of the agreements to which we have committed and will commit ourselves.

The aim of this Law is to promote and provide incentives for foreign investment within our territory. ... This Law confirms the seriousness with which Cuba is pursuing its policy of opening up to foreign investment within the context of its socialist principles...<sup>48</sup>

In his statement of the law's approval by the National Assembly, Ricardo Alarcón confirms the intent to maintain the balance between foreign commercial engagement and sovereign control:

WHEREAS: In today's world, without the existence of the socialist bloc, with a globalizing world economy and strong hegemonistic tendencies in the economic, political and military fields, Cuba, in order to preserve its accomplishments despite the fierce blockade to which it is subjected[,] ... can benefit from foreign investment on the basis of the strictest respect for

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42. *Id.* at ch. XVI, art. 56(2).

43. Constitution of 1992, *supra* note 2, at ch. I, art. 23 (“El Estado reconoce la propiedad de las empresas mixtas, sociedades y asociaciones económicas ...”) (translation in main text by author).

44. Foreign Investment Act, *supra* note 3, at introductory text (*The Aim of the Law Is to Promote and Provide Incentives for Foreign Investment Within our National Territory*).

45. Constitution of 1992, *supra* note 2, at ch. I, art. 18 (“El Estado dirige y controla el comercio exterior.”).

46. *Id.* at ch. I, art. 23 (“El Estado reconoce la propiedad de las empresas mixtas, sociedades y asociaciones económicas ...”).

47. *Id.* at ch. I, art. 16 (“El Estado organiza, dirige y controla la actividad económica nacional ...”).

48. *Presentation of the Draft of a Law on Foreign Investment*, 5<sup>th</sup> Ordinary Period of Sessions, National Assembly of the People's Power (Sept. 4, 1995), translated at <http://www.geo.unipr.it/~davide/cuba/economy/LAW95/intro1.html>.

national independence and sovereignty, given that such investment can ... reinforce the efforts the country must undertake for its economic and social development.<sup>49</sup>

The law's own text then clearly confirms this goal: "This Act has the purpose of promoting and encouraging foreign investment in the territory of the Republic of Cuba ... on the basis of respect for the country's sovereignty and independence and the protection and rational use of natural resources ..."<sup>50</sup> The law attempts to ensure that sovereignty through provisions (discussed *supra*) such as those restricting the hiring of Cuban employees<sup>51</sup> and others requiring environmental impact studies before granting approval of investment proposals.<sup>52</sup>

#### DECREE-LAW NO. 165: DUTY-FREE ZONES AND INDUSTRIAL PARKS<sup>53</sup>

The 1996 Duty-Free Zones and Industrial Parks Law sets guidelines according to which foreign investors can pursue their Cuba-based economic ventures under advantageous circumstances. This law is the "special legislation"<sup>54</sup> referred to in Article 53 of the Foreign Investment Act of 1995 and is the product of the 1995 Act's authorization of "the establishment of duty-free zones and industrial parks, in delimited areas of national territory."<sup>55</sup>

The law's introductory text lays out the reasoning behind this legislation:

The creation and development of Free Zones and Industrial Parks in the national territory offer new opportunities for foreign investment, as the investors established therein enjoy a special regime as to customs, banking, taxation, labor, migration, public order, capital investment and foreign trade, and this will mean the generation of new jobs, a source of hard currency and technological, economic and social progress for the country.

... Cuba offers great attractions for the development of Free Zones and Industrial Parks, through foreign investment, because of its facilities for international maritime and air communications due to its geographic position, its sociopolitical stability and the availability of skilled labor, among other favorable factors.<sup>56</sup>

By establishing duty-free zones and industrial parks, the law is seen to "contribute ... to economic and social development ... [and] stimulate ... international trade[,] and, besides attracting foreign capital, ... [it will] ... (a) generat[e] new jobs and rais[e] ... workers' skills; ... (b) incorporat[e] a greater domestic industrial value added, making use of the country's resources; and (c) develop ... new national industries through the assimilation of advanced technologies and the export of national products."<sup>57</sup> The law attempts to accomplish this through "regulations of a special customs, banking, tax, labor, migratory and public order regime, which imply facilities and incentives for foreign investment."<sup>58</sup>

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49. Foreign Investment Act, *supra* note 3, at introductory text (*The Aim of the Law Is to Promote and Provide Incentives for Foreign Investment Within our National Territory*).

50. *Id.* at ch. I, art. 1 (1).

51. *Id.* at ch. XI, art. 30-37.

52. *Id.* at ch. XVI, art. 54-56.

53. Duty-Free Zones and Industrial Parks Law, *supra* note 4.

54. Foreign Investment Act, *supra* note 3, at ch. XV, art. 53.

55. *Id.* at ch. XV, art. 50.

56. Duty-Free Zones and Industrial Parks Law, *supra* note 4, at introductory text.

57. *Id.* at ch. I, art. 1.3 (a)-(c).

58. *Id.* at ch. I, art. 1.4.

The Duty-Free and Industrial Parks law defines a Free Zone as “a space within the national territory, duly delimited, without any residing population, with free import and export of goods, not linked to the customs demarcation, where industrial, commercial, technological and service-rendering activities are carried out with the application of a special regime.”<sup>59</sup> That regime consists of the “rules related to customs, banking, taxation, labor, migratory and public order systems, less onerous and rigid than common or ordinary ones, applicable to grantees and operators of Free Zones as an incentive for investment.”<sup>60</sup> An Industrial Park, however, is defined as a “space within the national territory with similar characteristics to those of the Free Zone, but where industrial activities and those service-rendering activities that serve to support them are predominantly carried out.”<sup>61</sup>

The law provides that the Cuban government must grant a concession in order for a person or entity “to develop and exploit a Free Zone.”<sup>62</sup> Authorized actors within a Free Zone are either grantees or operators. A grantee is “[t]he natural or legal person, with a foreign domicile and foreign capital, or the national legal person which, in the exercise of the corresponding concession and with its own resources, promotes and develops the necessary, sufficient infrastructure for the establishment and functioning of the Free Zone and subsequently assumes the government and management of it.”<sup>63</sup> An operator is “[t]he natural or legal person, with a foreign domicile and foreign capital, or the national legal person which the Ministry

for Foreign Investment and Economic Cooperation, at the grantee’s proposal, authorizes to establish itself in the Free Zone to conduct one or various activities comprised within the legal framework of this occupation.”<sup>64</sup>

The Duty-Free Zones and Industrial Parks Law sets logistical and legal parameters for these types of foreign commercial activity within Cuba by providing for:

- Authorization of the Executive Committee of the Council of Ministers to govern the establishment of Free Zones,<sup>65</sup> while authorizing the Ministry for Foreign Investment and Economic Cooperation to regulate and control Free Zone activities,<sup>66</sup> to propose concession grants to the Executive Committee,<sup>67</sup> and to regulate and monitor Free Zones to ensure compliance with conditions imposed on grantees and operators.<sup>68</sup>
- Creation of a Free Zone Commission which advises the Ministry for Foreign Investment and Economic Cooperation.<sup>69</sup> The commission is comprised of the Minister for Foreign Investment and Economic Cooperation and a representative from the Ministries of Economy and Planning; Finance and Prices; Foreign Trade; Labor and Social Security; the Revolutionary Armed Forces; the Interior; Science, Technology, and the Environment; and Transportation, as well as a representative from the National Bank and the General Customs House.<sup>70</sup>

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59. *Id.* at ch. II, art. 2.2.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at ch. III, art. 3.

66. *Id.* at ch. III, art. 4.1.

67. *Id.* at ch. III, art. 4.2(a).

68. *Id.* at ch. III, art. 5.1.

69. *Id.* at ch. IV, art. 6.1.

70. *Id.* at ch. IV, art. 6.2.

- The process by which investors apply for Free Zone grantee status and what their obligations would be as grantees.<sup>71</sup> The law also covers similar information for would-be operators.<sup>72</sup>
- The special regime under which grantees and operators may develop their investments within Free Zones.<sup>73</sup> Consisting of regulations designed to be “more appealing and less rigid and onerous than common, ordinary ones,”<sup>74</sup> the regime includes: (a) exemptions from “tariffs and other customs duties for introducing in the Free Zones products intended for carrying out . . . authorized activities”;<sup>75</sup> (b) exemptions from profit and labor use taxes;<sup>76</sup> (c) tax-free transference abroad, “in freely convertible currency,”<sup>77</sup> of Free Zone grantees’ and operators’ “net profits or dividends ... [that are] obtain[ed] from their activities”;<sup>78</sup> (d) a requirement that Free Zone grantees’ and operators’ workers “be, as a general rule, Cubans or foreigners who are permanent residents in Cuba.”<sup>79</sup> The Ministry of Labor and Social Security sets minimum salaries for each occupation.<sup>80</sup> Grantees “with Cuban or joint capital directly hire ... Cuban workers ... and also act ... as the employing entit[ies] in relation

to the workers required by the operators.”<sup>81</sup> However, grantees and operators operating with solely foreign capital must hire Cuban workers and permanent resident foreigners “through a contract ... with an employing entity proposed by the Ministry for Foreign Investment and Economic Cooperation and approved by the Ministry of Labor and Social Security.”<sup>82</sup> In this latter instance, the grantee or operator pays employee salaries to the government-owned employing entity in “convertible foreign currency,”<sup>83</sup> while the employees are paid by that entity in Cuban pesos.<sup>84</sup>

#### **DECREE-LAW NO. 173: BANKS AND NON-BANKING FINANCIAL INSTITUTIONS<sup>85</sup>**

After passing the 1997 law creating the Central Bank of Cuba,<sup>86</sup> Cuba passed Decree-Law No. 173, which establishes the Registro General de Bancos e Instituciones Financieras No Bancarias (General Registry of Banks and Non-Banking Financial Institutions), which falls under the Central Bank.<sup>87</sup> All financial institutions in Cuba, including foreign institutions with offices in Cuba, must be part of this registry.<sup>88</sup> Decree-Law No. 173 also provides the following:

71. *Id.* at ch. V, art. 7-16.

72. *Id.* at ch. VI, art. 17-27.

73. *Id.* at ch. VIII, §§ 1-6.

74. *Id.* at ch. VIII, § 1, art. 31.1.

75. *Id.* at ch. VIII, § 2, art. 32.1.

76. Duty-Free Zones and Industrial Parks Law, *supra* note 4, at ch. VIII, § 3, art. 35.1-35.2 (Note specifications in how exemptions are granted depending on the grantor’s or operator’s activities.).

77. *Id.* at ch. VIII, § 4, art. 38.1.

78. *Id.*

79. *Id.* at ch. VIII, § 5, art. 43.1.

80. *Id.* at ch. VIII, § 5, art. 44.

81. *Id.* at ch. VIII, § 5, art. 45.1.

82. *Id.* at ch. VIII, § 5, art. 45.4.

83. Foreign Investment Act, *supra* note 2, at ch. XI, art. 33 (4).

84. *Id.*

85. Banks and Non-Banking Financial Institutions Law, *supra* note 5.

86. Decreto-Ley Número 172 Sobre el Banco Central de Cuba [Decree-Law 172: The Central Bank of Cuba] (1997).

87. Banks and Non-Banking Financial Institutions Law, *supra* note 5, at ch. II, § 1, art. 11.

88. *Id.* at ch. II, § 1, art. 2.

The Central Bank is the governing authority over all financial institutions (in Cuba), their branches, and Cuba-based representative offices of foreign financial entities.<sup>89</sup> The Central Bank retains complete authority to supervise all financial institutions and foreign financial institutions' Cuban offices.<sup>90</sup> The Central Bank can impose fines for noncompliance with its orders and stipulations.<sup>91</sup>

Foreign financial organizations seeking to set up office in Cuba and financial institutions in general must obtain a license from the Central Bank before establishing operations.<sup>92</sup> An applicant must follow the law's procedures for obtaining the license.<sup>93</sup> Those seeking to establish state-related financial institutions must, after securing their license, receive final approval from the Executive Committee of the Council of Ministers.<sup>94</sup> Non-governmental Cuban banks, however, need only secure a license and ensure that their operations are fundamentally linked to international financial credit transactions.<sup>95</sup>

There are several types of licenses, each tailored to the scope of activities in which a given financial institution will engage.<sup>96</sup>

Those who would occupy executive positions in financial institutions must possess a solid and well-recognized moral reputation, have legal capacity to run the day-to-day business, and carry out (or have expe-

rience carrying out) important activities in the areas of economics, banking, or finance.<sup>97</sup>

Financial institutions must obtain Central Bank authorization for capital investments in national or foreign entities.<sup>98</sup> The Central Bank governs all aspects of off-shore banking as well as the operation of financial institutions in duty-free zones and industrial parks.<sup>99</sup> The bank also approves financial institutions' accounting and auditing systems to ensure legal compliance.<sup>100</sup>

Any person or entity acting as a financial intermediary must have at least a baseline amount of capital as set and required by the Central Bank.<sup>101</sup> Every financial institution must contribute a percentage of its net profits at least once a year so as to create and build a legal reserve fund to cover risks and possible future losses until such time as the fund holds an amount at least equal to the institution's capital.<sup>102</sup> No financial institution may declare or pay a dividend or pay out any profits if it has not made sufficient provision for covering possible capital losses.<sup>103</sup> The Central Bank can use reserve funds to maintain a financial institution's solvency.<sup>104</sup>

All banks may open Central Bank accounts and maintain a minimum of cash in them.<sup>105</sup> Financial institutions may, within the bounds of their licenses

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89. *Id.* at ch. II, § 1, art. 3.

90. *Id.*

91. *Id.* at ch. II, § 1, art. 4.

92. *Id.* at ch. II, § 2, art. 6.

93. *Id.* at ch. II, § 1, art. 7-8.

94. *Id.* at ch. II, § 1, art. 9.

95. *Id.* at ch. II, § 1, art. 10.

96. *Id.* at ch. II, § 3, art. 13.

97. *Id.* at ch. II, § 4, art. 20.

98. *Id.* at ch. II, § 4, art. 21.

99. *Id.* at ch. II, § 4, art. 22.

100. *Id.* at ch. II, § 4, art. 23.

101. *Id.* at ch. III, § 1, art. 24.

102. *Id.* at ch. III, § 1, art. 26.

103. *Id.* at ch. III, § 1, art. 27.

104. *Id.* at ch. III, § 1, art. 29.

105. *Id.* at ch. III, § 2, art. 33.

and the law, buy, sell, look after, and administer financial and other assets.<sup>106</sup> A financial institution with license to operate in off-shore banking, duty-free zones, and industrial parks must form a separate, independent unit dedicated exclusively to those operations.<sup>107</sup>

The Central Bank oversees the functioning of the country's payment system, dictates the system's rules and norms, and establishes the necessary supervision to ensure efficient clearing of check payments and payments of other value as between banks.<sup>108</sup> The Central Bank is also empowered to set down the regulations it deems necessary for the smooth functioning of financial institutions and representative offices of foreign entities.<sup>109</sup> Loans issued by a financial institution to one debtor may not exceed the aggregate risks relative to financial institutions' capital and reserves.<sup>110</sup>

Banks are subject to a legal reserve (i.e., hold), equal to an amount established by the Central Bank, to be applied to deposits and debts.<sup>111</sup>

The Central Bank has the authority to dictate the norms, procedures, and regulations it deems necessary for carrying out its supervisory role and its auditing and inspection of financial institutions, offices of representation, and the Central Bank itself.<sup>112</sup> The superintendent of the Central Bank is responsible for supervising, inspecting, regulating, overseeing, and

controlling financial institutions and representative offices of foreign entities.<sup>113</sup> The superintendent is authorized to examine these organizations' books and request any additional information deemed necessary to fulfilling his supervisory functions.<sup>114</sup> The Central Bank determines the amount and form in which financial institutions contribute to cover the cost of this supervision.<sup>115</sup> Finally, the Central Bank may, in order to safeguard financial institutions' stability and integrity, arrange a reorganization, assume administration, declare an intervention, and following a judicial decision, take possession of the property or proceed with a forced liquidation.<sup>116</sup>

Financial institutions whose circumstances impede their normal operation can be subjected to voluntary liquidation, intervention, or forced liquidation.<sup>117</sup> Voluntary liquidation applies to institutions that have the resources to settle their obligations with creditors so that they can proceed with liquidation or dissolution, subject to the Central Bank's prior authorization.<sup>118</sup> Intervention, permissible under specific circumstances, involves the Central Bank stepping in to take possession of the property and assuming the institution's administration.<sup>119</sup> The Central Bank then decides whether to conduct a reorganization, seek a forcible liquidation and cancel the institution's license, or withdraw from the intervention.<sup>120</sup> In a forced liquidation, the Central Bank obtains court permission to proceed with the institution's dissolu-

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106. *Id.* at ch. III, § 2, art. 38.

107. *Id.* at ch. III, § 2, art. 40.

108. *Id.* at ch. IV, art. 45.

109. *Id.* at ch. V, § 1, art. 46.

110. *Id.* at ch. V, § 1, art. 47.

111. *Id.* at ch. V, § 2, art. 49.

112. *Id.* at ch. VI, art. 54.

113. *Id.*

114. *Id.* at ch. VI, art. 56.

115. *Id.* at ch. VI, art. 57.

116. *Id.* at ch. VI, art. 58.

117. *Id.* at ch. VII, art. 60.

118. *Id.* at ch. VII, § 1, art. 61.

119. *Id.* at ch. VII, § 2, art. 68.

120. *Id.* at ch. VII, § 2, art. 71.

tion and then advises the institution's legal representative, shareholders, depositors, and other creditors.<sup>121</sup>

### PARAMETERS FOR CHANGE

The Constitution, the Foreign Investment Act, and the laws establishing free-trade zones and the Central Bank registry system are but a few of the important legal developments during the Special Period that have facilitated foreign investment and economic development. Others include laws governing taxation, real estate, and intellectual property. Yet the four covered in this paper have been highlighted because they are the structural building blocks that form a broad and deep foundation upon which tax, real estate, and other laws and regulations are built. In addition, they form a natural progression both chronologically and in terms of increasing specificity. Thus, while the Constitution quite rightly sets out broad provisions, the other three laws proceed from and are built upon that document. They provide the details and rubrics that aim to execute and make real the government's development vision and goals.

These four laws, however, also set parameters for — and limits on — such development in the near and far term. They and other laws, including the Law of the Environment and the Law of Mines, form a matrix of legal requirements, policy, and centralized control that moderate and modulate the pace, scope, quantity, and quality of foreign investment. The goal seems to be to allow foreign capital inflows without compromising certain national interests — in particular, government supremacy, the environment (the protection of which ensures the viability of tourism, among other things), and public health.

These goals and the built-in restrictions designed to achieve them raise serious and as-yet unanswered questions. For example, what effect will these laws have on foreign companies' willingness to invest seriously in Cuba? Furthermore, what concessions might Cuba be forced to make to attract and retain qualified investors? After all, making investment proposals' approval contingent on assurances of minimal environmental harm may dismay important sources of capital. As some companies are turned away, others will opt not to apply at all. In addition, compa-

nies face the disincentive of being barred from paying employees directly in U.S. dollars (or other freely convertible currency) and instead of having to pay workers' dollar salaries to the Cuban government. This not only stands to demoralize employees and make them resentful but also removes an important incentive for ensuring productivity and quality. Companies also confront the hurdle of financial oversight by the Central Bank. Not only must investors contribute to a risk fund, but they are also subject to forcible intervention and liquidation.

These and many other concerns raise the risk that Cuba is discouraging rather than fostering healthy investment and capital flows. Such circumstances also increase the likelihood that the most determined investors will be able to buy flexibility or nonenforcement through bribes or other perks extended to military or civilian gatekeepers of foreign investment. In addition, it is unclear whether and to what extent Cuba is prepared to resist pressure (from corporations and other sources) to make concessions in exchange for corporate willingness to invest. Cuba is a hungry and needy country; the prospect of money, jobs, and economic growth are hard to forgo on an empty stomach.

Finally, since the military is the primary shareholder in Cuban corporations investing in Cuban tourism, and since tourism is an economic staple, there is concern that Cuba's future rests in a capitalist military dictatorship. Under this scenario, the military would be the principle shareholder in and key beneficiary of key economic growth sectors. A Pinochet-style government is therefore not beyond the pale. Others speculate that even if a civilian government assumes control, the military will maintain the greatest hold on Cuba's purse strings.

All of these questions, along with reports of Cuba's recent retreat from economic reforms, raise significant concerns about the country's willingness to travel the necessary road to recovery, growth, and prosperity. The four structural legal changes discussed above were a hopeful first sign of evolution. It remains to be seen what positive, specific, and effective steps will come next.

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121. *Id.* at ch. VII, § 3, art. 78-79.