

SOCIALIST CUBA—THE NULLITY OF THE FOREIGN INVESTMENT CONTRACTS DUE TO AN ILLICIT CAUSE: TO DEFRAUD THE CUBAN WORKER

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During the course of the past several years, diverse private and publicly owned foreign companies have signed contracts with Cuban government owned companies in order to establish the terms and conditions under which they invest in Cuba. Joint venture contracts regulate among other things the way that profits are shared, but parallel to these contracts, there exists another contract undertaken with a Cuban government company that furnishes the workers. The structure of both contracts is such that they are null and void from inception due to the fact that they are based on an illicit cause, namely: to make the Cuban workforce an object of commerce in bulk and to defraud the Cuban worker of most of his wages.

Present Cuban law demands that the hiring of workers be made through a Cuban government owned company and that the wages be paid to that company in convertible currency i.e., dollars. Such wages are not passed on to the worker that delivers the service. The Cuban Government company delivers to the worker a sum, in Cuban currency, that is the local going wage in pesos; but retains for itself the dollar wage.

An example shows the effects: Assume an exchange rate of 20 pesos per dollar, and a Cuban that works for a foreign company and receives 400 pesos per month as his wages. Assume for the sake of simplicity that the Cuban state charges the foreign investor the same sum in dollars i.e., \$400.00. The worker is in fact receiving only 5% of what the Cuban State

charges the foreign investor, i.e., 400 dollars or 8000 pesos. In practice the relationship is worse, as the average salary is about 250 pesos per month and the average dollar wage collected by the government is higher.

The Cuban government entity that hires the workers is a company with an illicit purpose. It has been created only to harm and defraud a third party, namely the Cuban work force. It is a sham.

Why would an investor enter into this type of agreement? Plain greed is the answer, joined to a quick return of the capital invested thereby eliminating the risk. But the investor also hopes that the Cuban state will have to honor these contracts in the future regardless of who governs. It would be argued that the present totalitarian government validly obligated the Cuban state.

Investment treaties between Cuba and the countries of origin of the foreign investor would be shown as “prima facie” support of this position and the “good faith” of the other contracting party, who will no doubt claim the status of injured and innocent third party in the event their actions are questioned. The fact that investment insurance has been granted to several investors would no doubt be used as a further complication in that the grantor of the insurance, usually a foreign government entity would attempt to claim damages from the Cuban government that succeeded Castro should it affect the investor in any way.

The validity of the traditional theory that an acting administration validly obligates a state, is seriously in question when applied to the acts of a notoriously totalitarian system that acts in the interest of a few and not of the nation. In the writer's opinion it is not a sustainable position.

However the object of this paper is not to discuss that topic, but a more focused issue, i.e., the validity of the contracts into which the parties have entered, regardless of the position that one might take *vis-à-vis* the obligations or lack thereof of the Cuban state.

Work contracts that provide for the payment of wages to a third party whose only existence is to provide a subterfuge and not pay wages fully and directly to the worker are null and void. An international labor convention ratified by Cuba and all of the investors' countries of origin prohibits specifically this type of hiring. The work contract really exists between the foreign company and the Cuban worker. The third party is a company with no business capability and a sham, in that it is a useless intermediary in the labor relationship.

The foreign investor is perfectly aware of, and accepts, the system because it allows him to obtain labor at prices substantially lower than the international market. The system also assures a compliant labor force that lacks the right to unionize and independently choose their leaders.

In spite of the attempt to create this sham, daily reality tells the truth. Diverse employer acts of a juridical nature *vis-à-vis* their employees evidence the existence of a true labor relationship. It is a general principle of labor law that contracts are interpreted to the benefit of the worker when doubts exist.

Such labor contracts are the consequence of investment contracts for joint or fully owned investments. The investment or joint venture contracts are also affected by the same vice, since it is clear that the low wage component is an essential element of the contract.

Article 39 of Cuba's foreign investment law establishes a tax "for utilization of the labor force," at a rate of eleven percent (11%). Thus, in a rather shameless

way, the Cuban government publicly acknowledges (and notifies the foreign investor) that labor is a bulk commodity owned and supplied by itself.

The civil legislation and jurisprudence of which Cuba is an heir have always considered as null and void those contracts that have an illicit and or immoral cause. This tradition goes back to Roman Law, the precursor of all modern western law, and the "Leyes de Partidas," the medieval laws of King Alfonso the Wise of Spain, traditions that are more than 2000 and 800 years old respectively.

The civil consequence of nullity is the return of the things that were the object of the contract, or the equivalent in cash if the return in kind is impossible as in the case of the work performed.

In this case however, the matter is further complicated because we are looking at a nullity arising from a criminal act. The crime is committed by the Cuban administrative elite, using the vehicle of a company that provides workers to the foreign investors. They are joined in this act by the foreign investor. Both the persons involved and their juridical vehicles are co-authors of the crime of robbery and illegal takings.

There exists robbery because the property of a third party has been taken away with violence to persons or things, a definition that exists in all criminal codes including the Cuban code. The violence to persons consists in the violence applied to the Cuban workers by the state security apparatus. The latter incarcerates anyone that does not remain silent and accepts the status quo. Independent labor leaders have been systematically persecuted and jailed in order to provide an example to anybody that dares question this unjust system.

Contractual nullity that results from the commission of a felony has different consequences. The culpable parties that are the co-authors (in this case the Cuban rulers, their sham employment company, and the foreign investor) may not demand from each other the fulfillment of the criminal object of the contract; and the assets that are the object of the crime are seized and held to indemnify the damages caused by the commission of the crime.

The non-culpable and damaged party is the Cuban worker, who has a “de facto” unwritten labor contract with the foreign employer that has imposed abusive conditions taking advantage of the workers’ lack of alternatives and protection. This worker retains his civil action to demand damages from the party that employed him subject to abusive conditions. He may demand his back wages plus legal interest, at the rate applied by the international market for the type of work performed, plus any other punitive damages that are deemed appropriate. And the Cuban nation is also a party that can claim damages inasmuch as the system described perpetuated a tyranny and instituted an unfair system of employment that subjected its citizens to a demeaning work relationship. The venue for these actions is the Cuban court system. It is a clear jurisdictional matter, in that the contracts were perfected in Cuba and the parties either reside or are in business in that jurisdiction.

CUBA’S FOREIGN INVESTMENT LAW

Law #77 of 5 September 1995 regulates foreign investment. Article 33, which we quote, establishes the system that we have described.¹

Article 33.3. In totally foreign capital companies, the services of Cuban workers and foreign workers residing permanently in Cuba, with the exception of the members of the management and administrative body, **shall be hired through a contract between the company and an employing entity proposed by the Ministry of Foreign Investment and Economic Cooperation, and authorized by the Ministry of Labor and Social Security.**

The members of the management and administration of the totally foreign capital company shall be designated by the company and directly hired by it.

Article 33.4. Payments to Cuban workers and foreign workers residing permanently in Cuba **shall be made in national currency, which must be obtained beforehand from convertible foreign currency.**

Article 34.1. **The employing entity discussed in the previous Article individually contracts and directly**

hires Cuban workers and permanent residents. This employing entity pays those workers their wages.

Article 34.2. When a joint venture or totally foreign capital company considers that a specific worker does not meet the requirements of the job, **it can request that the employing entity replace that worker with another.** Any labor dispute shall be settled with the employing entity, which shall pay the worker, at its own expense, the indemnification to which he or she is entitled, determined by the competent authorities. In pertinent cases, the joint venture or totally foreign capital company shall compensate the employing entity for such payments, in accordance with the procedure established, and always in compliance with existing legislation.

The texts quoted leave no room for doubt. There exists an interposed company and payments to the Cuban worker are made in Cuban currency that must be obtained from the prior conversion of foreign currency. Dismissals are processed through this intermediary, who pays severance expenses. Only by exception does the foreign company pay expenses.

There is more however. The system discriminates against Cubans. Articles 33.1 and 33.3 establish that the members of the management of a company fully owned by foreign investors or those of mixed capital are designated by the general shareholders meeting and hired directly by such companies. Obviously the managers (usually foreign nationals) are not going to work for payment in worthless pesos and they are consequently authorized to contract directly with the investor.

Therefore, a regime that boasts of defending national sovereignty and the rights of workers, makes Cubans second class citizens in their own country, gives preference to foreigners and is so concerned with keeping the foreign capitalist happy that it normally pays the severance for dismissed workers! The Cuban government guarantees the “quality” of the persons it sends to work. In practice it proclaims that they are merchandise.

1. Translation issued by the Cuban government.

This abhorrent practice is motivated by a need of the system: to profit from and intimidate and control the labor force. A work relationship with an independent third party would give rise to some economic independence from the state, and perhaps unions and the possibility of negotiations. These are dangerous practices for a totalitarian regime in that they are contagious.

We mentioned before in that the workers' direct labor relation with the foreign company cannot be denied in spite of the articles of the foreign investment law. With the typical juridical incompetence of regimes that do not recognize any law except force, the law contradicts itself and creates certain direct remuneration systems that belie and vitiate its attempt to institute a sham.

Were we to apply what in law is known as the doctrine of the "piercing of the veil," it would not be difficult to demonstrate that this "employment company" is nothing but a subterfuge. Presumably this anti-juridical "stew" was cooked to find a way to reward the faithful party members and the *nomenklatura* that work in middle and upper management in the mixed capital enterprises. The text of Article 32 illustrates our assertion.

Article 32.1. Joint ventures, the parties to international economic-association contracts and totally foreign capital companies may be authorized to create an economic stimulus fund for Cubans or permanent residents in Cuba who are working in activities corresponding to foreign investments.

Article 32.2. The contributions to the economic stimulus fund shall be made out of earned profits. The amount of these contributions shall be agreed upon between the joint ventures, foreign investors and national investors who are party to international economic-association contracts, and totally foreign capital companies, on the one hand, and the Ministry of Foreign Investment and Economic Cooperation, on the other hand.

Communism's "new man" is not so new after all. He wants his share and wants it now. Apparently, "bourgeois cupidity" again raises its ugly head. What would Marx and Lenin have to say!

Completing the picture of unscrupulous exploitation, working hours for the tourist industry (where the most important investments are concentrated) have been extended to 64 hours a week for ordinary jobs and 72 hours for certain specific ones. Further, workers are to donate "spontaneously" the lion's share of their tips to the State.

Finally at the request of hotel investors, the resolution of 5 September 1995 of the CETSS (State Committee on Labor and Social Security) granted said companies and their managers ample powers to suspend, transfer or dismiss any employee. A "commission" headed by the manager of the company, always a foreigner, must confirm such measures. If any doubts remained as to with whom the actual labor relationship exists, these rules clarify the issue.

THE INTERNATIONAL LABOR CONVENTIONS

We have described above the damages inflicted on the Cuban worker and how the system works. As we mentioned, Article 39 of the Foreign Investment Law shamelessly considers the work force a commodity owned by the government of Cuba, available to be exploited at will and grants a "discount" on a tax imposed on the "use" of the work force.

Article 39. For the purpose of this Act, the payment of taxes by the persons and companies mentioned in the previous Article carries the following characteristics: ...

c) In regard to the tax on utilization of the labor force and social security contributions, the following is established:

1. For utilization of the labor force, a discount is granted in the current taxation rate, to a rate of eleven percent (11%). ...

It is notable that all of this is taking place in flagrant violation of International Labor Conventions ratified by Cuba and the countries of origin of the investors.

International Labor Convention No. 95 of the International Labor Organization (ILO), of June 8, 1949, refers to the protection that should be accorded to the workers' salary. Cuba ratified this Convention on

September 24, 1959. Article 9 of that Convention regulates withholdings. This Article reads as follows:

Article 9. Any deduction from wages with a view to insuring a direct or indirect payment for the purpose of obtaining or retaining employment, made by a worker to an employer or his representative or to any intermediary (such as a labor contractor or recruiter) shall be prohibited.

The article almost appears written for Cuba's present situation. There exists an intermediary imposed by the government that the worker tolerates because it the only way that he or she can obtain or hold employment in this type of company. The choice is stark: either hold on to your job or live in abject poverty.

Article 6 of the Convention reinforces the concept by saying: "employers shall be prohibited from limiting in any manner the freedom of the worker to dispose of his wages." What can be a worse limitation than to impose a confiscatory wage rate!

Let us continue. International Labor Convention No. 111, of June 4, 1958, ratified by Cuba on September 15, 1960, prohibits discrimination in employment. Article 1 of this Convention defines the term discrimination as follows:

For the purpose of this Convention the term **discrimination** includes any distinction, exclusion or preference made on the basis of race, color sex, religion, **political opinion, national extraction** or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

We have shown that members of management may contract directly with the company without going through the Cuban government hiring company. But, management is composed of two forms of persons: foreigners or Cubans that agree with the party ideology. Clearly, there is discrimination for reason of national origin or political ideology. It should be mentioned that the ILO has already brought the issue of labor discrimination to the attention of the Cuban government, asking questions as to whether Cuba is violating the Convention. The issue was that labor preferences were granted to party members. As

was to be expected, Cuba responded with mind-numbing memorandums that "interpreted" the local law and promised to look into matters later on, while the forbidden practices continue.

International Labor Convention No. 87 refers to freedom of association and the protection of the right to unionize. Cuba ratified it in 1952. Freedom to unionize is regulated by Article 3 of the Convention, which we reproduce below:

Article 3.1. Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.

Article 3.2. The public authorities shall refrain from any interference, which would restrict this right or impede the lawful exercise thereof.

The ILO has also formulated observations to Cuba having to do with the violation of this Article, and made specific reference to the "interference of the Communist Party of Cuba in the election of labor leaders." Other observations made to Cuba have to do with the violation of several other Conventions, for example:

- The conventions dealing with the prohibition of forced labor (International Labor Convention No. 105 of 1957, ratified by Cuba in 1958, and International Labor Convention No. 29 of 1930, ratified by Cuba in 1953).
- The convention dealing with employment policy (International Labor Convention No. 122 of 1964, ratified by Cuba in 1971).
- The convention on paid vacations, that incredibly Cuba also violates (International Labor Convention No. 52 of 1936, ratified by Cuba in 1953).

We are, then, facing a situation wherein basic workers rights are ignored by the Cuban regime, and this is a matter of public record, given the fact that the ILO files are open to the public. Ignorance cannot be used as an excuse. **The foreign investor contracts with a tyrannical regime and is complicit with it in the illegal exploitation of workers.** The intention to

take advantage of the situation in order to effect personal gain is evident.

As an aggravating circumstance we should mention that many of these conventions were ratified by Cuba many years ago (more than 60 years in some cases), all of which proves the labor vocation of the Cuban worker who is not unaware of his rights but only sees them repressed. The dissident press in Cuba has published articles referring specifically to the abuse of rights under International Labor Convention No. 95. The international press and the Internet have picked up these denunciations. Therefore the employer not only has access to public records but also to widely disseminated information.

NULLITY AND ITS CONSEQUENCES

There is no doubt that an illicit and immoral cause exists in these contracts. A service is contracted against all international norms and conventions. An investment is made and companies are created in order to operate under this system. The motive is transparent: to obtain an attractive profit through the payment of an inferior wage, even after including in the computation the amount that the foreign investor pays the government hiring company. Indeed the literature and websites of promoters paid by the Cuban government to solicit investors describe Cuba as “the opportunity of the century.”

The most important investments are concentrated in the tourist and extractive industries. The meager circumstances of the Cuban people and economy require that tourists be attracted by bargain prices, in spite of which the rate of repeat visits is very small. In the case of the extractive and agricultural industries, price is also a paramount requirement in order to compete in world markets. In both cases this competitive price is borne by the back of the Cuban worker, as he or she makes it possible by performing work that is remunerated at a fraction of its market value.

The Cuban administration directly and through its employment agent participates in this scheme with one condition: share in the spoils. Its share consists in a portion of the profits and the wage differential that

it keeps in dollars. It acts sometimes directly and sometimes through others, but its responsibility is the same. It does not act as government responsible for the welfare of a nation, it acts as a criminal enterprise intent on maintaining its power, privileges and economic advantages.

To take with violence somebody else's property is defined as robbery by criminal legislation around the world. There exists violence, because the government intimidates and incarcerates anybody that dares to protest against the status quo. The unions are not independent, as the ILO points out. Its leaders are dependent on the Cuban Communist Party, who imposes its hand picked candidates. Thus the pattern of violence is complete, affecting the worker and the unions that are supposed to defend and represent him.

An association to deprive somebody else of his property and obtain an unjust enrichment is what defines the felony and the contractual nullity. Legal systems around the world regulate nullity in similar terms, i.e., by denying validity to the acts involved. From a legal standpoint the contract never existed and since it never existed its defects cannot be cured nor can the contract be confirmed.

The Spanish Civil Code of 1889, applied in Cuba for almost one hundred years, regulates the matter in its Article 1275. This Article stated: “Contracts without cause or with an illicit cause do not produce any effects. The cause is illicit when it is contrary to the laws or to morals.” (The Spanish Civil Code of 1889 was replaced by the actual one, the legality of which is not acceptable, even if it shares the same principles.)

Later on, the Spanish Civil Code of 1889 declares in Article 1305: “When nullity results from an illicit cause or an illicit object, if the actions involved constitute a felony, committed by both parties, then they shall not have any action to sue each other. Proceedings shall be instituted against the parties, giving to the things or moneys object of the contract the disposition that the penal code establishes for the assets or instruments involved in the felony.”

In any case, regardless of the choice of law, we are dealing here with a general principle of Civil Law that has been in place for 2000 years.

The juridical consequences established by all penal codes (including the communists) are the same: seizure of the assets and the profits obtained (notwithstanding the conversions that may exist) and their sale, applying the product so obtained to cover the civil responsibilities of the culprits. These responsibilities would be the back wages at market rates due to the Cuban work force plus interest, in addition to the damages that the court may determine.

Article 1305 continues: "This rule is applicable to the case in which there would be criminal action only on the part of one of the parties; but the innocent party may ask for the return of what he gave, and shall not be obligated to fulfill that which he had promised." In sum:

- The investment contract is null and void.
- The investor and the Cuban Administration and or its agent or sham companies have no action to sue each other.
- The worker (inasmuch as he is not complicit to the scheme) retains his actions, as he is not a culpable party.
- The employment contract with the Cuban worker (whose existence is covered up by the attempt of sham through the interposed company) is also null, but the innocent party has the right to sue and demand what he delivered, that is, payment for his labor at a fair price.
- The Cuban Nation, represented by the appropriate public advocate, has an action against the investor, its agents and the members of the Cuban *nomenklatura* and management elite that implemented this scheme.

CONCLUSION

A democratic Cuba that respects property rights and its international undertakings would never confiscate property arbitrarily à la Castro. However, it could not validate passively the rape of the Cuban labor force during the Castro years. That would not be justice, but precisely the opposite. If tolerated it would:

- Ignore the fact that a notorious and public felony has been committed.
- Reward the investors that showed no scruples, by granting them an advantage in time and in the amount of their investment.

It should be noted that present investors have come in at low asset prices, another advantage of their complicit behavior. To protect the low entry point costs of those investments would give the unscrupulous investor a competitive advantage, to the detriment of those that would wish to invest in a democratic Cuba in the future, inasmuch as new investments would be made at market prices, and labor would have to be remunerated at a higher rate from inception.

Further, from the standpoint of international law it cannot be tolerated that international conventions be scoffed at. The countries that engage in investment treaties and provide investment insurance to investors doing business with the Castro administration are going against their prior acts, as they are signatories to the international labor conventions previously mentioned. These are multilateral treaties that cannot be violated in daily practice. Such countries should have to denounce the previous multilateral labor treaties that they signed, since the breach of a multilateral treaty affects the other signatories by diminishing the value of the convention, in that it is mocked. To my knowledge no signatory of these conventions has done that for obvious political reasons.

There is ample precedent for stern action. The penal legislation of most countries already punishes crimes committed against the rights of workers. These are crimes that the investors are well aware of. For example: the largest investors in Cuba have been Spaniards. Spain's Penal Code of 1995, in its Article 311, imposes penalties that can range from six months to three years in prison to those that by "abuse of need (to work) impose on workers at their service labor conditions that harm, take away, restrict or suppress rights granted to them by legislation, collective contracts or private contracts."

The Nullity of the Foreign Investment Contracts

It goes on to apply the same penalty to those who accept those conditions when imposed by another and increases the penalty if there is violence or intimidation. Clearly then, in their own country foreign investors could not do what they do in Cuba. But apparently for many of these investors, Cubans are a different type of workers, they are fair game.

It is therefore juridically and morally correct for the future government of the island to declare the nullity of these contracts, with its attendant consequences. Cuba would not be inventing crimes or penalties. It would proceed according to the rule of law.

What we have explained, renders hollow the protests against the measures, imposed by the government and the congress of the United States, that punish those who traffic in stolen property sold or leased by the Cuban government.

The protests against the alleged infringement of rights of the persons and companies affected by said measures are usually supported by self-serving interpretations of international law. Blatant abuses of the same international law are dismissed even when they result in grave labor injustices. Unfortunately for the Cuban nation, these injustices are what make the foreign investments "attractive." The contravention of international agreements ratified by Cuba bears no contrary argument. The country has been publicly called to account for their breach. The governments

of the foreign investors who have signed the same conventions have a public record in front of them to which they choose to pay no attention.

A similar argument can be applied to those that advocate a liberalization of Cuba's commerce with the U.S. without a quid pro quo. They must ponder an essential basic issue: the Cuban worker is the one that needs freedom to contract his work and thus collect a fair wage.

Politically the arguments are even stronger. The resentment generated by the injustice is such that a future Cuba could not be governed with labor peace if the abuse is not remedied. It is the type of issue that does not go away easily. The investors that plan to take shelter in the doctrine of the acts of the state, or in international treaties signed with Cuba in order to protect investments, forget one thing: doctrines and treaties do not exist to protect acts that violate clearly established rights that exist in all civilized nations. A totalitarian and self-perpetuating administration represents itself and nobody else, notwithstanding all the legal camouflage that may be appended. The outrage is of such import that it cannot withstand a serious argument before a fair and independent tribunal.

Present investors have only one solution. Cease and desist. Otherwise they are complicit with a tyranny that exploits its own people.