

INTERNATIONAL COMMERCIAL ARBITRATION IN TRANSITION-ERA CUBA

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With Fidel Castro's transfer of dictatorial powers to his brother and second-in-command Raúl Castro in July 2006 and the continuing uncertainty as to the permanence or degree of the transfer, the international political and business communities continue analyzing and planning for possible political and economic changes in Cuba. The question at the heart of the possibility of true change in Cuba is whether the Castro regime will successfully craft a succession of power while retaining a totalitarian system in Cuba to ensure continued political dominance or whether succession attempts will give way, either intentionally or unintentionally, to a transition to a democratic form of government that will recognize property rights and encourage foreign investment in the crumbling and outdated Cuban infrastructure.

Under a "transition" scenario in Cuba, leading to the emergence of a democratic government and free market economy, Cuban law and legal institutions will be transformed in order to conform with internationally-accepted standards of democracy, recognition of human rights, the independence of the judiciary, due process, and property rights. For a time, however, legal reform will lag behind the economic necessity and pressures for immediate investment in a free Cuba, which may lead to the creation of alternative dispute resolution systems to function in parallel to, or in anticipation of, the creation of appropriate legal protections to parties entering into business agreements with Cuban-based private and public entities.

As in other Latin American countries, where investor concerns over independence of the judiciary, bias, and judicial activism in economic relationships have given rise to such alternative dispute resolution systems as arbitration, transition-era investors seeking entry into the Cuban market will no doubt prefer the certainty, transparency, and efficiency of international arbitration over the risks of litigation in Cuban courts, during a time of rapidly-evolving law and lack of institutional framework for such litigation in a transition-era Cuba. This paper addresses the development and use of international arbitration as an incentive for investment in Cuba during a transition to democracy.

THE GROWING ACCEPTANCE OF INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA

Commercial arbitration is one of several alternative dispute resolution mechanisms that have been utilized by investors and states as an alternative to costly and protracted litigation, wherein contracting parties fashion a private and confidential means of resolving disputes efficiently and relatively quickly. In the international community, the United Nations has actively promoted arbitration of disputes among member states, in tandem with such international business organizations as the International Chamber of Commerce and the London Court of International Arbitration, with a resulting growing acceptance of the practice as the global economy continues to expand.

Latin American countries have historically been reluctant to fully support international commercial arbitration, suspiciously viewing it as a “foreign” means of dispute resolution, rooted in part on the shared Latin American perception of diplomatic interference by governments of investors’ countries during the 19th century.¹ This traditional suspicion of arbitration started to soften only in the latter half of the 20th century, by the ratification of such international treaties as the 1958 Convention on the Recognition and Foreign Arbitral Awards (“New York Convention”), the 1965 Convention on Investment Disputes (“Washington Convention”), and the 1975 Inter-American International Commercial Arbitration (“Panama Convention”). Latin American countries also started modifying their national legislation² on arbitration and some enshrined the concept in their Constitutions.³ The basis for the growing acceptance of international commercial arbitration in Latin America was part of a regional modification of economic policy from domestic industrialization and strong State involvement and intervention to active promotion of increased foreign investment and trade liberalization policies to transform and grow the regional economy. By increasingly adopting commercial arbitration and other alternative dispute resolution techniques, Latin American countries inherently recognized the inefficiencies, backlog, and corruption of their respective judicial systems and the role that such factors played in limiting foreign investment in the region.

ARBITRATION UNDER THE CASTRO REGIME

If Latin America’s acceptance of international commercial arbitration in law and practice has been slow and episodic, Cuba’s experience in the area has been minimal under the Castro Regime, which seized power in 1959, installed a communist form of government and entered the Cold War as a client state of the former Soviet Union, abandoning a free market

economy and imposing a state-controlled central economy by controlling all property and production in the country. These developments removed Cuba from the free market and it economically survived within the bubble of the Soviet Union and the Communist Bloc of countries, until the fall of Soviet and European communism in the late 1980s and early 1990s. An international trend that favored private resolution of disputes outside the courts was inconsistent, if not impossible, for a Cuba where the single-party State was the sole political and economical actor in all aspects of life on the island.

Although a signatory to the New York Convention of 1958, Cuba did not accede to the Convention until 1974 and it did not take effect until 1975. Under the terms of the Convention, Cuba agreed to enforce foreign arbitral awards that were entered in other states that were parties to the Convention. Unlike other Latin American countries, Cuba did not participate in international commercial dispute settlement agreements that were created after the New York Convention, such as the 1965 Washington Convention and the 1975 Panama Convention. Further, Cuba’s recognition of arbitration was limited exclusively to commercial disputes involving foreign entities. Cuba has no corresponding domestic arbitration law or practice in place.

As a part of the Castro regime’s efforts to sustain itself economically after the collapse of the Soviet Union in 1989 and the disappearance of its subsidies and favored trade relations with Eastern European communist states, foreign investment and trade were rapidly promoted, primarily in the tourism and communications sectors, through the adoption in 1995 of a Foreign investment law (Law 77), which authorized limited foreign investment, primarily through joint ventures with the Cuban state. The new emphasis on foreign investment also led to a renewed focus on other legal measures and institutional changes to mit-

1. See Donald R. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (Minneapolis: University of Minnesota Press, 1955).

2. Such countries include Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Panama, and Venezuela.

3. Colombia, Costa Rica, El Salvador, and Paraguay.

igate foreign investor concerns, given Cuba's history of uncompensated expropriations of property of Cuban citizens and foreign investors in the 1960s. Among these were participation in international arbitration and mediation, which had been enacted into law by Decree Law 1303 in 1976.

The Cuban Arbitration Court of Foreign Commerce

Under the existing legal system, international arbitration is based in the Arbitration Court of Foreign Commerce ("Corte de Arbitraje de Comercio Exterior"), which is part of the Cuban Chamber of Commerce. According to Law 1303,⁴ the Arbitration Court has jurisdiction over commercial disputes involving foreign investment and trade.⁵ Arbitral proceedings are overseen by either one arbitrator or panels of three arbitrators, but, unlike standard international arbitration norms, selection of arbitrators is limited by law to a group of fifteen arbitrators who are pre-screened by the Cuban Chamber of Commerce president and all of which hold positions in the State-controlled economy. The result is that all arbitrators in Cuba are actually state officials who are only theoretically impartial, as provided by the law. The government of Canada, which has extensive trade relations with Cuba, reports to prospective investors in its official publication regarding investment opportunities in Cuba that the Cuban arbitration system has fallen into disuse because of concerns over the independence of arbitrators. However, the impartiality and independence of the Arbitration Court in rendering arbitral awards is questionable, given that the law also expressly provides that the Executive Council of the Council of Ministers, still presided by Fidel Castro himself, may review any dispute resolution clauses in foreign investment contracts, as well as choice of law clauses.⁶ As with all Cuban Courts, the Arbitration Court lacks independence and is subject to the policy dictates of the Cas-

tro regime. Another serious flaw in Cuban arbitral proceedings recognized by foreign investors in Cuba is the fact that several companies have had difficulty proving arbitral claims, as records of state-controlled entities engaged in joint ventures are not a matter of public records and are also subject to manipulation by government authorities.⁷

In the event the foreign investor and the state enterprise disagree on the construction of arbitration clauses, any subsequent litigation, including compelling or preventing arbitration, is under the exclusive jurisdiction of the Cuban courts.⁸ Further, Cuban courts may refuse enforcement of arbitral awards on such vague and ambiguous standards as the award being "in opposition to the public order." Although this phrase may be analogous to the refusal of U.S. courts to enforce arbitration awards that are against public policy, parties in U.S. courts have the benefit of extensive case law, which defines and limits its application in the U.S. setting. In Cuba, however, there is no law or authority that clearly defines "in opposition to the public order," which is consistent with the intentional ambiguity of Cuban law in areas relating to judicial and/or state discretion.

The practical effect of investor unease and mistrust of the existing Cuban arbitral scheme has been the relative inexperience of the Cuban courts in addressing international commercial arbitration, and most arbitrations and enforcement suits result in negotiated settlements. The Cuban government itself has recognized the limited value of its existing arbitration system by becoming a member of the International Chamber of Commerce (ICC) International Court of Arbitration in 1998, which has resulted in foreign investors wisely rejecting the Cuban Arbitration Court and insisting on resolution of disputes in neutral international sites. As a member of the ICC, Cuba now has privileges to use ICC resources, including the In-

4. The official website of the Cuban Chamber of Commerce incorrectly cites the statute as Law "1302," as of August, 2007.

5. Law 1303.

6. Law 1303.

7. Canada Guide to Investment in Cuba.

8. Law 77, Foreign Investment Act, Chapter XVII, Article 58.

ternational Court of Arbitration. As a consequence of this development, foreign investors can now specify ICC dispute resolution procedures in joint-venture agreements.

However, because Law 77 still mandates the resolution of conflicts exclusively in the Cuban judicial courts, the practical ability of investors to negotiate for resolution of disputes in foreign jurisdictions or through foreign arbitration services is questionable. The foreign investor may successfully insert a clause calling for arbitration in a foreign jurisdiction, but Law 77 provides sufficient language for a state enterprise to seek judicial intervention in the Cuban Court and practically annul the effect of any clause calling for foreign dispute resolution. In the event an arbitral award is entered against Cuba, a foreign investor can technically seek enforcement of the award in the Cuban courts, pursuant to Cuba's accession to the New York Convention. However, the cooperation of Cuban courts and the willingness of Cuban judges to enforce an arbitral award against Cuban state assets is unlikely, given the absence of an independent judiciary in Cuba.

Whether the Castro regime has fully accepted the value of international arbitration conducted outside of Cuba remains to be seen. As recently as May 25, 2007, the official state publication *Granma* railed against participation in international arbitration courts like the International Centre for Settlement of Investment Disputes (ICSID), citing as its grounds that ICSID "rulings tend to be in favor of transnational corporations while ignoring the judicial authorities of the countries in which these entities invest."⁹

Bilateral Investment Treaties

In addition to a renewed emphasis on the potential use of the Cuban Arbitration Court in the 1990s as part of a strategy to attract foreign investment in Cuba, the Cuban government also entered into Bilateral Investment Treaties ("BITs") with foreign governments.¹⁰ The Cuban BITs generally include provisions for resolution of state-to-state disputes and investor-state disputes via ad hoc arbitration.

As to state-to-state disputes, the Cuban BITs call for initial dispute resolution attempts via diplomacy or "friendly consultations" for a period of up to 6 months.¹¹ If such efforts prove unsuccessful, either of the parties may request the creation of an ad hoc arbitral panel as set forth in the provisions of the relevant underlying BIT. Generally, the panel is composed of three members, two of which are selected by the respective parties, with each designating an arbitrator.¹² Once selected, the arbitrators select an arbitrator from a third country, who will lead the arbitration panel, subject to approval of the parties.¹³ In the event the parties are unable to agree to the composition of the arbitral panel, either party can request that the President of the International Court of Justice (ICJ) appoint the arbitral panel. If the President of the ICJ at the time is a national of either party, or is unable to appoint the panel, the Vice President of the ICJ will assume responsibility for the task, followed by senior members of the ICJ who are not nationals of either party. Once the panel is appointed, decisions are made via majority vote and are binding on the parties.¹⁴

With respect to investor-state disputes, Cuban BITs follow the general international practice of initial discussions, followed by referral to an international dis-

9. Nidia Díaz, Granma International Staff Writer, Peru and the FTA: The party that will end in tragedy, *Granma Digital International*, May 25, 2007.

10. See Jorge Pérez-López and Matias Travieso-Díaz, The Contribution of BITs to Cuba's Foreign Investment Program, 32 *Georgetown L. & Pol. Int'l Bus. J.* (2001), for a detailed analysis of the use of BITs as a component of Cuba's foreign investment strategy.

11. Portugal BIT, art. 8, par. 1; United Kingdom BIT, art. 8, par. 1; Colombia BIT, art. 13, par. 1; Italy BIT, art. 10, par. 1.; Chile BIT, art. 9, par. 1; Spain BIT, art. 10, par. 1

12. *Supra* note 10.

13. Portugal BIT, art. 8, par. 4; Chile BIT, art. 9, par. 5.

14. *Supra* note 10.

pute settlement body as provided under the terms of the BIT. The international dispute mechanisms vary among Cuban BITs, ranging from ad hoc arbitration constituted pursuant to the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, to referral to the International Court of Arbitration of the ICC. Issues relating to venue selection and the applicable law governing arbitration are determined pursuant to the provisions of the underlying BIT. By submitting disputes to established international dispute resolution mechanisms, current investors in Cuba rely on fairer and more effective procedures than those available via Cuba's domestic courts and arbitration court.¹⁵

RECOMMENDED REFORMS TO CUBAN LAW AND POLICY DURING TRANSITION

As noted above, Cuba's current legal system is inadequate in promoting foreign investment via assured means of fairly and effectively resolving commercial disputes. As a consequence, the Castro regime has been forced to recognize the value of international commercial arbitration as an alternative to its domestic commercial arbitration system, which has fallen into substantial disuse after foreign entities and investors have been provided the alternative of resolving commercial disputes via established international institutions and norms.

A transition government will face the monumental task of Cuba's political and economic transformation during a transition from communist dictatorship to free-market democracy, which will include changes to Cuban law, business practices and culture, economic policy, foreign investment policy, and business-related institutions. While engaged in this task, the transition government will simultaneously need to meet the needs of the Cuban people, primarily by managing and replacing Cuba's crumbling, inefficient, and antiquated infrastructure, and promoting economic activity. In the immediate short term of a transition, foreign investment and investment by Cubans abroad will provide the funds and expertise to build infrastructure in key sectors, such as education,

health, transportation, communication, agriculture, mining, energy production, environmental protection, technology, and tourism. The availability of the benefits of international commercial arbitration to foreign investors and Cuban exiles, such as cost-savings, efficiency and reduced time of resolution of disputes, will promote increased investment in the transition era, while allowing the transition government to create permanent laws and systems to benefit Cuba's long-term progress and success.

Policy Recommendations

Cuba should fully accept international commercial arbitration and other means of alternative dispute resolution to promote investment and reduce the burden of prolonged litigation of complex commercial disputes on its court system. The transition government should promote and authorize the establishment of private commercial arbitration centers in Cuba, which has been the successful trend in other Latin American countries, such as Mexico. Such centers will provide training to arbitrators, while allowing for resolution of disputes according to international rules and practice. In the immediate short term of transition, Cuban parties may also take advantage of the convenience and ample experience of international arbitration entities in nearby Miami, which already possess years of experience in arbitrating claims involving Latin American entities. Cuba should build on its current membership in the ICC by joining other international arbitration entities, such as ICSID, while opening Cuba to the presence of such international arbitration institutions as the International Centre for Dispute Resolution (of the American Arbitration Association), which may collaborate with Cuban institutions to grow the practice domestically and internationally.

In addition to formal acceptance of international arbitration, the transition government should similarly promote arbitration of domestic commercial disputes. During the transition, entrepreneurs and newly-established private businesses will face the same challenges of engaging in litigation as foreign inves-

15. *Supra* note 10.

tors. By providing or promoting such alternative dispute resolution mechanisms, the transition government will support domestic economic growth while preventing new courts from being overwhelmed with litigation. For example, state universities, law schools, or private institutions should provide training to arbitrators and practitioners, to foster the development of alternative dispute resolution mechanisms in Cuba.

Legal Reform

Cuba's participation in the New York Convention, recognizing and enforcing foreign arbitral awards, can be expanded to full participation in the international arbitration system already operating in the Western Hemisphere. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("U.N. Convention"), the Inter-American Convention on the International Commercial Arbitration ("Inter-American Convention") and the ICSID Convention are among the frameworks that establish substantive law and procedures for international arbitration in the Americas. The Inter-American Convention provides the mechanism to administer international commercial arbitrations in the Americas and provides rules of procedure. The U.N. Convention provides a similar mechanism, but it is more expansive, as it applies to arbitrations involving signatories from around the world. The ICSID Convention applies exclusively to disputes between the state and the investor. As the Cuban economy transitions to the free-market model, Cuban government entities may continue to enter into joint ventures and commercial relationships with foreign investors, and Cuba becoming a party to the ICSID Convention would provide additional assurances to investors that commitments will be honored and investors will be treated fairly. In sum, Cuba's accession to any or all of these Conventions will help create a functional dispute resolution mechanism to handle foreign investor claims during a transition to a market economy.¹⁶

Similarly, the transition government should authorize and promote BITs in setting up dispute settlement procedures with individual countries. Cuba should also enact arbitration legislation and, like other Latin American countries, can adopt the UNCITRAL Model Law on Arbitration (1985) as a baseline for both domestic and international arbitration law. As part of its overhaul of arbitration law in Cuba, the transition government should clearly define the limits of Cuban court intervention in arbitration, such as limiting it to: recognition and enforcement of arbitral awards, referral of claims to arbitration, constitution of arbitral tribunals, enforce provisional measures (such as anti-suit injunctions), assist in obtaining evidence in aid of arbitration, determine allocation of costs, and setting aside arbitral awards in very limited circumstances (as set forth, for example, in the New York Convention).

The Central American-Dominican Republic Free Trade Agreement (CAFTA-DR), modeled on the North American Free Trade Agreement, seeks to promote economic growth by eliminating trade barriers and tariffs. Should the transition government opt to participate in such agreements to boost its economy, the agreements include mechanisms to resolve disputes with the state through binding arbitration. Following a general trend in treaty-arbitration practice, the CAFTA-DR provides for public arbitral hearings, while allowing for disputing parties to protect confidential information from disclosure. Cuba's accession to such a system will also reassure the general public in Cuba that disputes with foreign investors will not be kept "secret," a contrast the Castro regime's approach to such issues.

CONCLUSION

Cuba's transition to a free market economy will be possible only with massive investment and both political and institutional support from the international community. As international trade and foreign investment have expanded globally, international commercial arbitration has emerged as a useful alterna-

16. See also Recommended Features of a Foreign Investment Code for Cuba's Free-Market Transition, Matias F. Travieso-Díaz and Alejandro Ferraté, 21 *N.C. J. Int'l L. & Com. Reg.* 511 (1996).

tive to the risks inherent in litigation in U.S. or foreign courts. Latin America's increasing acceptance of this alternative mechanism of dispute resolution has resulted in increased foreign investment and economic growth in the region. Cuba should follow this

hemispheric trend, to allow for maximum investment and accelerated economic growth while new Cuban laws and institutions are created and solidified.