

ARBITRATION AND MEDIATION: IMPARTIAL FORUMS TO RESOLVE INTERNATIONAL COMMERCIAL DISPUTES IN CUBA

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Arbitration and mediation have emerged as useful alternative mechanisms to handle international commercial conflicts in Cuba. Both mechanisms are intended not only to alleviate the logjam of the Cuban courts, but also to create impartial forums where foreign investors would find alternative to litigation in Cuban courts. Arbitration and mediation offer private and confidential means of resolving efficiently and relatively quickly commercial disputes under internationally recognized dispute resolutions rules in Cuba today.

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 alternative dispute resolution systems such as arbitration, transition-era¹ investors seeking entry into the Cuban market will no doubt prefer the certainty of resolving disputes under acceptable and recognized alternative mechanisms over the risks of litigations in Cuban courts, during a time of rapidly-evolving laws and regulations.

The anticipated increase in foreign investments in Cuba, mainly from U.S. corporations, Cuban expatriates and multinationals after lifting the U.S. embargo could lead to an increase in international commercial disputes. As a result, the Cuban system of international commercial arbitration is expected to

play an important role in accommodating the effects of expanded investment.

This paper analyzes the current practice of arbitration and mediation in Cuba, its regulations, operation and governing laws, including Decree-Law No. 250 of 2007 (Cuban Court of International Commercial Arbitration or CCICA); Resolution 15 of 2009 (modifying Resolution 12 of 2007—Rules of the CCICA); Resolution 13 of 2007 (Rules of Mediation) and Decree-Law 241 of 2006 (modifying the Cuban Law of Civil Procedure or LPCALE). This paper also explores the role of arbitrators and mediators in establishing an impartial forum wherein the rule of law would prevail.

The paper begins with an overview of the Cuban arbitration practice since 1965. The next section discusses the Cuban Court of International Commercial Arbitration, its legal framework, jurisdiction, rules and procedures, as well as the choice-of-law in commercial disputes. The third analyses the relationship between arbitration and the Cuban judicial system. The fourth section examines the concept of investment in Cuba. It also analyzes key provisions of several Bilateral Investment Treaties (BITs) signed by Cuba as well as a discussion of four internationally-accepted features of the BITS—standard of treatment, expropriation and compensation, repatriation of profits and dispute resolution mechanisms. The

1. Transition-era is identified by the author as the transitional period from a centralized oriented economy to a market oriented economy. Cuba entered into a transition-era after the collapse of the socialist bloc in 1989. Later, the Cuban constitutional reform of 1992 paved the way to complementary market-oriented laws and regulations.

last section describes the practice of mediation in Cuba. The paper concludes with some observations on the role of arbitrators and mediators in a transition-era Cuba.

COMMERCIAL ARBITRATION IN CUBA

The first Cuban arbitration court was established in 1965² under the Cuban Chamber of Commerce and the Cuban Ministry of Foreign Trade. The objective of the court, known as Arbitration Court for Foreign Trade or ACFT, was to resolve disputes arising between countries regarding trade with Cuba. In the 1970s, Cuba's foreign trade was concentrated with the socialist bloc and the ACFT became primarily oriented to resolve disputes between Cuban state enterprises and state enterprises from the socialist countries that comprised the Council for Mutual Economic Assistance (CMEA) until the collapse of the socialist bloc. This court also played an important role as a vehicle to resolve disputes between foreign investors and Cuban parties in accordance with the first Cuban foreign investment legislation, Decree-Law 50 of 1982, and later reaffirmed by the Cuban Foreign Investment Act of 1995 (Law No. 77) and Bilateral Investments Treaties (BITs). Law No. 77 provides that conflicts arising in relationships between partners in a joint venture, between foreign investors and domestic investors who are parties to contracts of international economic association, or between partners of companies formed wholly of foreign capital, are resolved as provided in their founding documents.³

Jurisdictionally, the ACFT had the power to hear and resolve disputes that arose mainly between Cuba and the ex-socialist countries in their commercial contractual relationships concerning international and foreign trade, or in their economic, scientific, or

technical links, along with civil disputes that arose from those linkages or relationships. The ACFT resolved also contract disputes arising out of foreign trade, including joint ventures or other direct foreign investment contracts, as well as contracts between Cuban state-owned enterprises and their foreign suppliers, buyers, or lenders.⁴ According to Dávalos Fernández, the ACFT heard 320 arbitral cases amounting to \$60 million dollars during the period 2001 to 2007.⁵

Cuba also established a system of state or administrative arbitration in commercial disputes between Cuban state-run enterprises, namely the *Organo de Arbitraje Estatal* or OAE. It is worth noting that this state arbitration court was eliminated in 1991 and its jurisdiction was transferred to the Economic Law Chambers of the Cuban Popular Tribunals.⁶

CUBAN COURT OF INTERNATIONAL COMMERCIAL ARBITRATION (CCICA)

The Cuban Court of International Commercial Arbitration came into being with Raúl Castro's signing of Decree-Law No. 250 on July 30, 2007. Shortly thereafter, the newly-appointed arbitrators and mediators of the CCICA signed a commitment to honor a code of ethics at an inauguration ceremony. CCICA President Rodolfo Dávalos Fernández, in a speech at the inauguration ceremony, acknowledged that arbitration is of increasingly extraordinary validity. To that end, the preamble to Law No. 250 of 2007 observes that recent developments in international arbitration, conciliation, and mediation required new legislation. The title of the CCICA, according to the law, is in line with "its broader international scope."⁷

Legal Framework

Article 1 of Decree-Law No. 250 declares that the CCICA enjoys full functional independence for the

2. Arbitration Court for Foreign Trade. Law No. 1184 of 1965. Cuba Official Gazette.

3. Law No. 77 of 1995. Cuban Foreign Investment Act. Cuba Official Gazette

4. Law No. 1303 of 1976. Rules of the ACFT. Cuba Official Gazette

5. Rodolfo Dávalos Fernández, *El Arbitraje Comercial Internacional en Cuba. Arbitraje Internacional & Medios Alternativos de Solución de Litigios: Retos y Realidades*. Association Andrés Bello y UNJC. 2009

6. Decree-Law No. 129 of 1991. Cuba Official Gazette.

7. Kevin Tuininga, International Commercial Arbitration in Cuba. *Emory International Law Review*. Vol. 22, 2008, page 588.

development of its jurisdictional activity. The CCICA does not depend on any government or state agency; the court is an autonomous, non-governmental agency, with its main function being supporting Cuban foreign trade and investment, and linked to the Cuban Chamber of Commerce.⁸ The Chamber president nominates 21 arbitrators who serve two-year terms on the CCICA. The Chamber president chooses arbitrators by evaluating candidates' professional experience in law, international commerce, and other specialties required to facilitate dispute resolution. CCICA's governing law expressly does not require that arbitrators be of Cuban nationality. Currently, there are no foreign arbitrators in the roster, however.

Jurisdiction

The CCICA is competent to hear voluntarily submitted contractual or extra contractual matters that arise in commercial transactions of an international nature.⁹ Disputes are deemed international in nature if the parties (1) are domiciled or have their habitual residence in different states; or (2) are domiciled or have their habitual residence in the same state and (a) they are of different citizenship or nationality, or (b) the completion or performance of the contractual obligation in dispute takes place in a different state.¹⁰

A frequent objection to the jurisdiction of the CCICA in state-investor arbitrations concerns the question of whether a claimant is an "investor" within the meaning of a BIT. In the case of natural persons, most BITs define an investor as a person who is a citizen of a party to the treaty. Determination of nationality will normally be determined by the party's national laws. In cases of dual nationality (e.g., Cuban-Americans), the effective nationality prevails. In some BITs the definition of investor is broadened to include natural persons who are permanent residents.

In the case of "juridical persons" or "legal entities" (including a company), BITs commonly use different criteria to determine an "investor" under the treaty. Common law countries normally use the place of incorporation to determine nationality. Civil law countries tend to rely on the place of management or the seat, consistent with Article 25.2(b) of the Vienna Convention (formally known as the United Nations Convention on Contracts for the International Sale of Goods¹¹).

Some BITs use control of the company by nationals of a state party as the sole criterion to determine its nationality. In other BITs this is used as a possible alternative to the seat or constitution criteria.

Decree-Law No. 250 expressly delineates a jurisdictional exception for the hearing of select disputes that do not necessarily meet one of the above criteria. Pursuant to Article 11, the CCICA also has jurisdiction over contractual or extra-contractual disputes submitted to it (1) by joint ventures or entities formed completely of foreign capital in their relations among themselves or in their relations with Cuban natural or juridical persons; or (2) by parties to international economic association contracts or other forms of joint businesses with participation of foreign capital. Due to the voluntary nature of participation in disputes brought before the CCICA, the Court is authorized to hear cases with the above characteristics only where (1) the parties agree to submit the dispute to its jurisdiction; (2) the parties are contractually bound to arbitrate before it; or (3) an international treaty obligates the parties to submit to arbitration in the Court.¹²

To facilitate arbitration agreements, Decree-Law No. 250 authorizes the CCICA to develop a model arbitration clause by which the parties can voluntarily submit their dispute.¹³ The law prohibits a court of

8. Dávalos Fernández, *El Arbitraje Comercial Internacional en Cuba*, p. 56.

9. Decree-Law No. 250, art. 9. Cuba Official Gazette

10. Decree-Law No. 250, art. 10. Cuba Official Gazette

11. Cuba is a signatory of the Vienna Convention.

12. Decree-Law No. 250, art. 12. Cuba Official Gazette

13. Decree-Law No. 250, art. 14 Cuba Official Gazette

ordinary jurisdiction from hearing matters within the scope of an express agreement to arbitrate unless, on motion of a party, the court deems the agreement invalid, ineffective, or unenforceable.¹⁴ This provision is in agreement with other international arbitration conventions.¹⁵ According to Dávalos Fernández, the prohibition on ordinary court jurisdiction is limited to those cases where the parties invoke arbitration as their exclusive mode of dispute resolution.¹⁶

The power of the CCICA to rule on its own jurisdiction is consistent with the well-known doctrine of *kompetenz-kompetenz*,¹⁷ described by the CCICA's president as "the cornerstone of international commercial arbitration."¹⁸ Pursuant to the related doctrine of separability, article 13 of Law No. 250 expressly provides that the validity of a binding arbitration clause in a contract is considered apart from the remaining provisions of the contract or the validity of the underlying contract. In practical effect, this gives the Court power to hear and sustain attacks on the validity of an underlying contract and still proceed to determine the parties' respective rights, as long as the agreement to arbitrate, viewed separately, is enforceable.¹⁹

Arbitration Rules and Procedures in Cuba

The Cuban Chamber of Commerce approved Resolution 15 of 2009 to modify and replace Resolution 12 of 2007. The new procedural rules ratify the independence and impartiality of the Cuban arbitrators and the confidentiality of the process.

Disputes before the CCICA are heard by arbitral tribunals of one or three arbitrators as the parties agree

or in accordance with governing international treaties. If there is not a prior agreement, the tribunal will be composed of three arbitrators, similar to the procedure provided by UNCITRAL's 1985 Model Law on International Commercial Arbitration (UNCITRAL Model Law).²⁰ In the event that there are two or more defendants or two or more claimants, there will be only one arbitrator for each party. The parties can recuse an arbitrator if they have doubts about his or her impartiality or reasonable grounds to suspect that he or she has a direct or indirect interest in the outcome of the arbitration. In the case of such a challenge, the remaining members of the arbitral tribunal decide whether the challenged member must be disqualified. If there is only one arbitrator, or if two arbitrators are recused, the president of the Court makes the final decision about a disqualification. The recusation of the arbitrators shall be requested at the appointment of the arbitrators and prior to initiate the process. If the parties recuse after initiating the process, the own tribunal or the resident of the court would determine if the recusation prosper taking into consideration the reasons for the recusation. Individual arbitrators of the CCICA may also refuse to participate in an arbitration proceeding if they feel that they approach the standards for disqualification in the case at hand. Experts and translators involved in proceedings may be disqualified for the same reasons as referees. The tribunal decides on disqualification of these collateral participants.

14. Decree-Law No. 250, art. 15 Cuba Official Gazette

15. Cuba ratified the New York Convention and the European Convention on international commercial arbitration. Cuba has not ratified the Washington Convention (Convention on Investment Disputes—ICSID) and the Panama Convention. Cuba is member of the International Chamber of Commerce (ICC).

16. See Tuininga, *International Commercial Arbitration in Cuba*, page 592.

17. The UNCITRAL Model Law defines the principle of *kompetenz-kompetenz* as the power of "the arbitral tribunal [to] independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court."

18. See Tuininga, *International Commercial Arbitration in Cuba*, page 593.

19. See Tuininga, *International Commercial Arbitration in Cuba*, page 593.

20. U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 1985, art. 10. U.N. Doc. A/40/17 (as amended in 2006) [hereinafter UNCITRAL MODEL LAW].

Choice-of-Law

As per Decree-Law 250, article 29, the governing law to resolve international commercial disputes is the substantive law agreed by the parties. As such the parties have autonomy, *lex contractus*, to choose the substantive law applicable to their dispute.

According to Decree-Law 250 in its article 30, the CCICA does not by default apply Cuban substantive law in the absence of the parties' choice. Rather, if the parties can but have not provided for applicable substantive law, the tribunal applies the rules of private international law of the forum to decide what law applies, along with international trade custom and usage where appropriate.²¹

However, article 30 also prescribes that Cuban law applies to disputes related to Cuban foreign investments in accordance with the Cuban Foreign Investment Act (Law No. 77).²² This is apparently a bow to Cuban control over entities operating under Cuba's foreign investment laws, and one could speculate that under Cuban private international law, most or many disputes involving foreign investors would require application of Cuban law. At a minimum, the provision prevents the foreign investor from contracting or agreeing to the application of some other state's law.²³

Arbitration and the Cuban Judicial System

According to Elpidio Pérez Suárez,²⁴ Cuban Supreme Court Judge, the relationship between international

commercial arbitration and the Cuban judicial system can be summarized in five connecting points:

- **Enforceability of the arbitration clause.** According to Decree-Law No. 241 of 2006, article 739, the Cuban courts will not hear any dispute wherein the parties consent to arbitration or by treaties. Nonetheless, the judicial system is available to assist in the arbitration procedure. In the same line, Decree-law No. 250 of 2007, article 15, states that Cuban ordinary courts will not hear disputes in which there is an agreement or a treaty requiring the arbitral solution unless that court, at the request of a party, declares the agreement or treaty null, ineffective or inapplicable.
- **Provisional measures and deposits.** At the request of a party, the tribunal can order interim measures with regard to the parties' conduct or goods in the parties' possession, and can request the deposit of security if it determines such is appropriate. The parties' requests for interim measures from courts of ordinary jurisdiction before or during the arbitral process and a subsequent grant of the requests do not prevent the arbitration's continuation.²⁵
- **Evidence.** The arbitral tribunal can request that Cuba's courts of ordinary jurisdiction intervene concerning production of evidence or progress of the arbitral proceedings. Further, consistent with Cuba's obligations under the European Convention, CCICA provisions that make available the

21. See Tuininga, *International Commercial Arbitration in Cuba*, page 595. Pursuant to Article 30 of Decree-Law 250 Cuban private international law provides that "in the absence of an express or tacit submission by the parties, the contractual obligations are governed by the law of the place of execution of the contract." Código Civil [Civil Code], Law No. 59, art. 17 (1987) (Cuba). Tort-comparable suits are governed by the law of the place where the facts that gave rise to the obligation occurred. Civil Code, Law No. 59, art. 16. Cuba is a signatory to the Bustamante Code, which is a comprehensive codification of rules to govern nearly every conceivable conflicts issue. Alejandro M. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L 587, 590—92, n.17 (1992).

22. Law No. 77 of 1995, Chapter V, article 11. Cuba Official Gazette

23. Tuininga, *International Commercial Arbitration in Cuba*, page 595. Pursuant to Article 11, the CCICA also has jurisdiction over contractual or extracontractual disputes submitted to it (1) by entities that are joint ventures or entities formed completely of foreign capital in their relations among themselves or in their relations with national natural or juridical persons or (2) by parties to international economic association contracts, or other forms of joint businesses with participation of foreign capital.

24. Elpidio Pérez Suárez. "Arbitraje Comercial y Jurisdicción Estatal: Una Ponderación Necesaria." 2008.

25. Decree-Law No. 250, arts. 34 and 35. According to Narciso Cobo Roura, Vice President of CCICA, the interim measures function is shared between the arbitral tribunal and the courts of ordinary jurisdiction

assistance of courts of ordinary jurisdiction in production of evidence, interim measures, and award enforcement apply equally to ad hoc tribunal proceedings that take place in Cuba pursuant to party agreement.²⁶

- **Recognition of the arbitral award.** Arbitration decisions are issued in writing in the form of orders and awards. In general, awards are issued in cases where the merits of the arbitration are resolved. Nevertheless, the tribunal can issue interlocutory or temporary awards as well as procedural orders necessary for processing a case. Arbitral awards become final, definite, and binding on the parties ten days after they receive notification of the decision. Nevertheless, a party can ask the tribunal to correct errors or clarify an award by order within 30 days of award notification. The tribunal may also make an additional or supplementary award concerning previously omitted subject matter if a party so requests within the same 30-day period. It may receive additional evidence or conduct a hearing for that purpose if necessary.²⁷

- **Enforcement of the arbitral award.** In cases where a party fails to comply with an award, the party in whose favor the award was issued can seek enforcement in a court of ordinary jurisdiction under the applicable law and international conventions.²⁸ Arbitral awards are deemed the equivalent of a court judgment for purposes of enforcement.

According to Decree-Law No. 250, article 41, the parties can request the nullification of the award. Decree-Law No. 241, article 825, establishes the grounds for nullity:

- a. invalidity of the arbitral agreement or incapacity of the parties;
- b. improper notice of the appointment of the arbitrator or the arbitration tribunal and violation in its constitution;
- c. violation of arbitral due process;
- d. lack of subject matter jurisdiction or beyond the scope of the arbitration agreement.

CCICA awards are also presumably still subject to both the enforcement defenses available under the New York Convention²⁹ and the limits to valid

26. Decree-Law No. 250, art 33. The European Convention, art VI.4 states that a request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court.

27. Decree-Law No. 250, arts. 36–38. Cuba Official Gazette

28. Decree-Law No. 250, art. 40. Cuba Official Gazette

29. Under the Convention, an arbitration award issued in any other state can generally be freely enforced in any other contracting state (save that some contracting states may elect to enforce only awards from other contracting states - the “reciprocity” reservation), only subject to certain, limited defenses. These defenses are:

- 1) a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
- 2) the arbitration agreement was not valid under its governing law;
- 3) a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- 4) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (subject to the proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those matters not so submitted);
- 5) the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the “lex loci arbitri”);
- 6) the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement;
- 7) the subject matter of the award was not capable of resolution by arbitration; or
- 8) enforcement would be contrary to “public policy.”

grounds for enforcement refusal under the European Convention.³⁰

Investment Arbitration in Cuba

According to Yves Derains, arbitrator and previous General Secretary of the International Arbitration Court of the International Chamber of Commerce (ICC) in Paris, France, before talking about investment arbitration, it is necessary to define investment. Furthermore, investment arbitration requires the existence of an arbitral agreement.

According to Law No. 77,³¹ foreign investments are defined as: (a) direct investments, and (b) investments in stocks or other securities or bonds, either public or private, which do not fit the definition of direct investments.

Cuba has also signed some bilateral treaties (BITs) that provide examples of types of investments as follows:

For the purpose of the present Agreement:³²

1. The term “investment” means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other

Contracting Party in the territory of the latter, and in particular, though not exclusively, includes:

a) movable, immovable property and other property rights such as mortgages and pledges; (b) shares, stock and any kind of participation in companies; (c) claims to money or to any other performance having an economic value; (d) copyrights, industrial property, know-how and technological process; (e) concessions conferred by law, including concessions to search for or exploit natural resources.

Cuban investment treaties follow the international arbitration doctrine of: standard of treatment; expropriation and compensation; repatriation of profits and dispute resolution mechanisms.³³

- **Standard of treatment** includes national standard of treatment, fair and equitable standard and the most-favored-nation-treatment. National treatment requires that foreign investors be treated the same as nationals in similar circumstances; however, this principle is often excluded from the Cuban BITs. Cuban officials argue that there are some exceptions to this principle based on public health, moral, interior order, national security and strategic development and social policies. In reality, foreign investors have a most

30. The European Convention provides as follows:

Article IX - Setting Aside of the Arbitral Award

1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:

(a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

(b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

31. Cuban Foreign Investment Act, Chapter V, article 11. Cuba Official Gazette

32. Agreement on the Promotion and Protection of Investment between China and Cuba, article 1.

33. The author reviewed the BITs with Viet Nam, United Kingdom, Trinidad & Tobago, Spain, China and Venezuela.

favorable treatment than Cuban nationals mainly with respect to property rights.³⁴ Cuban BITs refer to fair and equitable treatment by each contracting party with respect to investments made by investors of the other contracting party in its territory. According to the BITs, each contracting parties shall guarantee that no discriminatory or unjustified measures be taken against the procurement, maintenance, utilization, transformation, termination or liquidation of the investments made in its territory by investors of the other contracting party. Cuban BITs also guarantee the most-favored-nation-treatment principle with some exceptions: (1) any existing or future customs union or similar international agreement to which either of the contracting parties is or may become a party and (2) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

- **Expropriation and compensation:** Cuban BITs provide full protection and safety of the foreign investments and returns in its territory and guarantee that investments and returns shall not be directly or indirectly nationalized, expropriated

or subjected to measures having similar effects unless such measures are made for public benefit, national or public interest with proper compensation in a non discriminatory³⁵ manner pursuant to the law in force. Such compensation shall be made in freely convertible currency. However, the amount and time of compensation vary in Cuban BITs. For instance, some BITs mention that the amount of the compensation would be the effective market value, the genuine market value, the actual market value or just the equivalent value of the expropriated investment at the time of the expropriation is proclaimed. Some BITs elaborate in how to estimate the basis of the valuation, but there is not uniformity in the calculation. The time of payment also varies in the Cuban BITs; some agreements declare that compensation would be made without unjustifiable delay, prompt or immediate without defining any of the terms. There are BITs that allow the addition of a commercial interest rate to the amount of the compensation from the expropriation date until the date of payment. The BITs indicate different forums to resolve disputes related to expropriation and compensation includ-

34. According to Law No. 77, a foreign investor is an individual or corporation with foreign domicile and foreign capital. Law No. 77, article 16, permits investment in Cuban real estate and other property rights over real estate by persons who are not permanent residents in Cuba. Cuban nationals do not enjoy the same rights with respect to real estate investments. The BIT between the UK and Cuba recognizes the national treatment, but only applicable to nationals under the national foreign investment legislation and only applicable to the specific BIT agreement.

35. Discriminatory actions by a State against the nationals of a foreign country are a violation of international law. *Banco Nacional de Cuba v. Sabbatino*, Receiver U.S. Supreme Court, 376 U.S. 398 (1964). In response to a US sugar quota, Cuba expropriated *Compañía Azucarera Vertientes-Camagüey de Cuba (C.A.V.)*, in which mostly US citizens held stock. Its fully-owned subsidiary had contracted to sell sugar to Farr, Whitlock & Co., a U.S. commodities broker. Farr, Whitlock made a second contract with the Cuban government, then refused to take payments from its customers and refused to accept the sugar. Banco Nacional de Cuba had been assigned the Cuban government's rights under the second contract and sued Farr, Whitlock in US District Court. The Cuban government invoked the Act of State Doctrine, urging the US not to review its sovereign expropriation of property. The District Court gave summary judgment in favor of Farr, Whitlock deeming the expropriation invalid because it was motivated by a retaliatory and not a public purpose; it discriminated against American nationals; and it failed to provide adequate compensation. Should the Act of State Doctrine be invoked? Held Harlan, Warren, Black, Douglas, Clark, Brennan, Stewart, Goldberg: Yes. Precedent says that the Act of State doctrine applies, even if international law has been violated. International law does not require application of the Act of State doctrine. The interests of the state in dealing with international disputes are best addressed by the executive, not the judicial. The judicial branch does not negotiate with foreign countries, and judicial decisions might alter the flow of trade. Judicial decisions would not protect investors by enhancing trade in, for example, newly independent developing countries because judicial decisions are so sporadic. Dissent White: The Court should wait for the State Department to give an opinion and, if there is no objection, the Court should examine the case on its merits. The majority should not create new precedent by deciding (1) the examination of international law is for the executive branch and outside the realm of the courts; (2) that acts of a foreign state regarding property of aliens domestically is beyond the reach of the domestic courts; and (3) the courts must adjudicate a claim regarding foreign law if the claim is properly before it, and is thereby forced to rule and validate any lawless act.

ing judicial authority, arbitration and international courts. In the case of Spain-Cuba BIT, the expropriated party or its assignees have the right to reacquire the expropriated property if following the expropriation; the property acquired for that purpose has not been fully or partially utilized as intended.

- **Repatriation of profits:** Cuban BITs guarantee the free transfer of the investors' returns and other payments resulting from their investments upon the payment of all taxes and charges stipulated under its laws, including, although not exclusively, of the following: (a) investment returns, (b) compensation for expropriation, damages or losses due to war, state of emergency or other similar circumstances; (c) the amount resulting from the total or partial sale or liquidation of an investment. The payments shall be effected at the exchange rates prevailing on the date of the transfer pursuant to the exchange regulations in force. Cuba is currently facing a severe economic and financial crisis and the foreign investors do not have the resources to mitigate a potential devaluation of the Cuban Convertible Currency (CUC) or just to hedge against that currency exchange risk. Foreign investors are also suffering a *corralito*.³⁶ Cuba has frozen the bank accounts of the foreign investors due to the lack of hard currency (Dollars or Euros). Cuban government is trying to negotiate with the investors and their countries different payment plans. The Cuba-Spain BIT establishes that the transfers will be made without undue delay or restrictions in accordance with the practices of the international financial centres. In particular, the Cuba-Spain BIT states that no more than three months shall elapse between the time when the investor duly submits the necessary application for the transfer and the time when the transfer is made. Cuba and Spain are

negotiating a solution of the *corralito* at highest diplomatic levels.

Cuban BITs also contain a subrogation clause, whereby a contracting party (State) may assume the rights of an investor if the party, or an agency of the state, has made one or more payments to an investor to compensate for a non-commercial risk.

Dispute resolution mechanisms: Cuban BITs go further in the area of the resolution of the disputes arising from the foreign investment by specifying arbitration in a neutral forum as the method of resolution of the dispute.

Investor-Host State Dispute: Involves a Contracting Party (Host State) and a national company or company of the other Contracting Party (Investor), concerning an obligation of the former under a BIT in relation to an investment of the latter. Cuban BITs provide different forums to resolve these disputes as shown below:

- **Cuba-Spain:** The parties to the dispute shall, insofar as possible, endeavor to settle their differences amicably. If the dispute cannot be settled in this way within six months of the date of the written notification, it shall be submitted to one of the following tribunals, as the investor chooses: (a) The appropriate tribunals of the Contracting Party in whose territory the investment was made; (b) The ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); (c) The arbitral tribunal of the International Chamber of Commerce in Paris.
- **Cuba-China:** The parties shall, as far as possible, settle disputes amicably through negotiations. If a dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the

36. *Corralito* was the informal name for the economic measures taken in Argentina at the end of 2001 by Minister of Economy Domingo Cavallo in order to stop a bank run, and which were fully in force for one year. The *corralito* almost completely froze bank accounts and forbade withdrawals from U.S. dollar-denominated accounts. The Spanish word *corralito* is the diminutive form of *corral*, which means "corral, animal pen, enclosure"; the diminutive is used in the sense of "small enclosure" and also "a child's playpen." This expressive name alludes to the restrictions imposed by the measure.

competent court of the Contracting Party accepting the investment. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations, it may be submitted at the request of either party to an ad hoc tribunal. Such arbitral tribunal shall be constituted for each individual case in the following way: each party to the dispute shall appoint an arbitrator, and these two shall select a national or a third State which has diplomatic relations with the two contracting parties as Chairman. The tribunal shall determine its own procedure. However, the tribunal may in the course of determination of procedure make as guidance the UNCITRAL rules.

- **Cuba-United Kingdom of Great Britain and Northern Ireland:** The BIT calls, first, for an amicable solution and if the dispute remains unresolved within three months from the date of the written notification of the dispute, the dispute shall be submitted, at the investor's choice, to: (a) the Court of Arbitration of the International Chamber of Commerce (ICC); (b) an international arbitrator or (c) an ad hoc arbitration court established under the arbitration rules of UNCITRAL.
- **Cuba-Viet Nam:** The BIT calls, first, for an amicable solution and if the dispute remains unresolved within six months from the date of the written notification of the dispute, the dispute shall be submitted, at the investor's choice, to: (a) the competent arbitration court in the territory of the Contracting party where the dispute takes place; or (b) an ad hoc arbitration court established under the arbitration rules of UNCITRAL.
- **Cuba-Venezuela:** The BIT calls, first, for an amicable solution and if the dispute remains unresolved it can be referred, at investor's choice, to either the local court where the dispute has taken place or arbitration. If the investor has opted to use local courts then he/she would not be able to use arbitration (fork in the road provision). If ar-

bitration is chosen, it would be submitted to an ad hoc arbitral tribunal constituted in accord with the UNCITRAL Arbitration Rules or the parties can agree on other forms of resolve the dispute.

- **Cuba-Trinidad & Tobago:** In the event of an investment dispute, the Parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably within six months from the date of written notification of a claim, the national or company that is a Party to an investment dispute may submit the dispute for resolution under one of the following alternatives: (a) to the courts or administrative tribunals of the Contracting Party that is a Contracting Party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) to international arbitration. Where the dispute is referred to international arbitration, the national or company concerned may submit the dispute either to: (a) the Court of Arbitration of the International Chamber of Commerce (ICC); or (b) an international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law; (c) to any other arbitration institution or in accordance with any other arbitration rules agreed to by both parties to the dispute.

State-to-State Disputes: Cuban BITs provide that disputes between the parties regarding the interpretation and implementation of the agreement should be resolved, to the extent possible, through diplomatic means. If after the period determined in each particular BIT from the date when one of the contracting party has notified in writing the other, the dispute shall, upon request of either contracting party, be submitted to an ad hoc arbitral panel following the rules set out in the agreement.

The compositions of the arbitral panel will be as follows:³⁷

37. Jorge F. Pérez-López and Matías F. Travieso-Díaz, *The Contributions of BITs to Cuba's Foreign Investment Program, Cuba in Transition*. ASCE 2000, page 469.

- the panel will be composed of three members
- each of the parties will designate one member of the panel
- the two members will select a national of a third country³⁸ who will be proposed to the parties as the head of the arbitral panel and will assume such role if accepted by the parties
- the designations by the parties of the first two arbitrators will be made within 2 months³⁹ of the request for the formation of the panel.
- the designation of the head of the panel will be made within 3 months of the designation of the other panel members⁴⁰.
- if the parties are unable to agree on the composition of the panel within the specified time limits, either party can request that the President of the International Court of Justice to make the necessary appointments;
- in the eventuality that the President of the International Court of Justice is of the nationality of one of the contracting parties or is unable to fulfill the responsibility of making the appointments, the task shifts to the Vice President of the Court, to the senior member of the Court who is not a national of one of the parties, and so on.

The decision of the arbitral panel will be made by majority vote and will be binding on both parties. The panel will determine its own procedure. Each of the parties will be responsible for the costs of its own member of the panel and its representation before it, and will share equally the costs of the Chairman and other costs.

Contribution of BITS to the Practice of Arbitration in Cuba

Cuban BITS provide additional protection to foreign investors of the signatory country by providing dispute settlement procedures within the host state under international recognized ADR principles. For disputes between investors and the host state, Cuban BITS give the investor the choice of whether to submit the dispute to domestic or international arbitration in the majority of the Cuban BITS. As such, Cuban BITS provide access to international dispute-resolution mechanisms in lieu of risky litigation in Cuban ordinary courts. Finally, the signing of a BIT signals recognition of the practice of international arbitration in Cuba.

U.S.-Cuba BIT—A Step in Reestablishing Trade Relations

There will come a time when the United States and Cuba will sit down to negotiate a settlement of the expropriation claims of U.S. nationals in Cuba. The expected conditions under which the settlement will be negotiated will greatly restrict the remedies that Cuba will be able to offer to the U.S. claimants. Therefore, both the Cuban government and the U.S. claimants should be prepared to exhibit flexibility in working toward as fair and reasonable a resolution of the claims.

The entering into a BIT or a similar bilateral agreement between U.S. and Cuba will imply the prior resolution of pending expropriation claims which will add credibility to the Cuban BITS. A U.S.-Cuba BIT may present other issues as long as Cuba's eco-

38. Some BITS require a third country that has diplomatic relations with both parties.

39. Some BITS indicate 3 months

40. Some BITS have different terms for the selection of the panel members.

conomic interests in a transition-era does not coincide with US investors interests mainly in the area of local protectionism, export quotas and reinvestment of profits into the local economy. The U.S. BIT model⁴¹ limits the ability of host government to require a party's investors to adopt inefficient and trade distorting practices. Those issues shall be addressed prior to the execution of the BIT. The benefits of reestablishing trade with U.S. and the guarantees offered in a future U.S.- Cuba BIT will provide additional stimulation for foreign investment in Cuba. Cuba will be inserted into the international financial community, primarily the International Monetary Fund, the World Bank and the Inter-American Development Bank.

Cuban State Corporations and State Responsibility

According to Cuban Foreign Investment Act (Law No. 77), a Cuban national (Cuban party) may be either a Cuban state enterprise or a Cuban domestic company or another Cuban national entity whose address is in Cuban territory and which becomes a shareholder of a joint venture or is a party to an international economic association contract. As per Cuba's legislation, a Cuban State Enterprise is a state

enterprise created by a government agency (Cuban Ministry) after receiving approval of the Ministry of Economy and Planning and/or the Ministry of Foreign Trade. The State enterprise is an independent legal entity created according to the Constitution of 1976, amended in 1992, and complementary legislation that regulates its formation and operations. The enterprise is registered in the Registry of State Enterprises and Budgeted Entities. A Cuban domestic company (100% Cuban Capital Company) is a non-governmental commercial company with nominative shares. The company is capitalist and operates entirely in the free-currency market. This company could be owned by a Cuban Ministry or a Cuban state enterprise.

Cuban entities (corporations or state enterprises) are the principal agents through which the Cuban government engages in international trade. The functioning of state entities ensures that the sectors in which operate remain monopolies. Since Cuban foreign investment legislation mandate the creation of joint ventures, it becomes inevitable that foreign investment entry into many sectors has to be made in association with these state entities. In a joint venture, the motives of multinationals and the state enti-

41. US Model BIT. The U.S. bilateral investment treaty (BIT) program helps to protect private investment, to develop market-oriented policies in partner countries, and to promote U.S. exports. The BIT program's basic aims are:

- to protect investment abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements);
- to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and
- to support the development of international law standards consistent with these objectives.

U.S. BITs provide investors with six core benefits:

1. U.S. BITs require that investors and their "covered investments" (that is, investments of a national or company of one BIT party in the territory of the other party) be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country. The BIT generally affords the better of national treatment or most-favored-nation treatment for the full life-cycle of investment -from establishment or acquisition, through management, operation, and expansion, to disposition.
 2. BITs establish clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation when expropriation takes place.
- US BIT Model, cont...
3. BITs provide for the transferability of investment-related funds into and out of a host country without delay and using a market rate of exchange.
 4. BITs restrict the imposition of performance requirements, such as local content targets or export quotas, as a condition for the establishment, acquisition, expansion, management, conduct, or operation of an investment.
 5. BITs give covered investors the right to engage the top managerial personnel of their choice, regardless of nationality.
 6. BITs give investors from each party the right to submit an investment dispute with the government of the other party to international arbitration. There is no requirement to use that country's domestic courts.

ty will often be in conflict. The synergy that is essential for the success of the joint venture will be lacking in such an association and the potential for conflict is great.

According to the International Law Commission of The United Nations (ILC's articles and commentaries), the general law of state responsibility provides for the possibility of attribution to a state for the acts committed by its corporate nationals in violation of international law giving rise to international responsibility in two situations; first, where a state empowers a corporation to exercise elements of public authority and second, where a corporation acts on the instructions of or under the direction or control of a state. In addition, where the state through aiding and assisting corporate activity is complicit in the commission of an internationally wrongful act committed by another state or by the corporation itself, then the state will be internationally responsible. In all of these cases, such acts will be attributable to the state even where they are committed outside the territory of that state.

There is a considerable question, however, whether a Cuban entity entering into a joint venture with a foreign investor will be deemed to be an extension of the Cuban state such that a dispute between the foreign investor and its Cuban partner becomes a dispute between a foreign investor and the State such as to trigger the dispute resolution provisions of the BIT.⁴²

It is evident that Cuban government has considerable control over foreign investment which arises from its sovereignty. Foreign investment takes place within the state, and it is the prerogative of the state to control as it pleases. But, that is not the fact that sits easily with the notion of foreign investment as the states

of foreign investors as well as foreign investors themselves are considerable bases of power and have an interest in ensuring the protection of foreign investment. Many BITs make significant progress in the area of the resolution of the disputes arising from the foreign investment by specifying arbitration in a neutral forum as the method of resolution of the dispute.⁴³

Observations

In the absence of an agreement to the contrary an investment dispute between a state and a foreign investor would normally have to be settled by the host state's courts. From the investor's perspective, this is not an attractive solution. Rightly or wrongly, the investors will fear a lack of impartiality from the courts of the state against whom it wishes to pursue a claim. On the other hand, an agreement on forum selection for investment disputes in a state other than the host state is unlikely to be accepted by the latter and it is supported by the rules of state immunity. In addition to sovereign immunity, other judicial doctrines are likely to stand in the way of lawsuits in domestic courts. The act-of-state doctrine enjoins courts from examining the legality of official acts of foreign states in their own territory as it was referred in the *Sabbatino* case in which the U.S. Supreme Court stated that it would not examine the validity of a taking of property by a foreign government in its territory even if its illegality under international law is alleged. Further obstacles to lawsuits against host states in domestic courts of other states would be related to doctrines of non-justifiability, political questions, and lack of a close connection to the local legal system.⁴⁴

It is mainly for these reasons that alternative methods have been created for the settlement of disputes between states and foreign investors. Arbitration, in a

42. Pérez-López and Travieso-Díaz, *The Contributions of BITs to Cuba's Foreign Investment Program*, page 469. According to the authors, in the United States, there is a presumption of separate juridical status by a state instrumentality from the State itself; this presumption can be overcome under two circumstances: when the corporate entity is so extensively controlled by the State that a relationship of principal and agent is created, and when to recognize the separation would work fraud or injustice or defeat overriding public policies. *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629–30 (1983); *Alejandro v. Telefónica Larga Distancia de Puerto Rico*, 183 F. 3d 277, 1284–95 (11th Cir. 1999). The party claiming that the instrumentality is not entitled to separate recognition bears the burden of proving so. See *Alejandro*, supra; 905 F.2d 438, 447 (D.C. Cir., 1990).

43. Wolfgang Peters, *Dispute Settlement Arrangements in Investment Treaties*. 1991

44. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*. Oxford University Press. 2008, page 215

neutral forum, has been the most successful method of securing justice for the foreign investor. Where a BIT backs the foreign investor up by creating an obligation on the host state to submit to any arbitral proceeding brought against it by the foreign investor, a major step could be said to have taken forwards investment protection.⁴⁵

MEDIATION SERVICES IN CUBA

Mediation is a well recognized effective and economical mean of dispute resolution and it plays an important role in the orderly growth and encouragement of international investment and trade. Increasingly, arbitration and mediation, instead of litigation in national courts, have become the preferred means of resolving international commercial disputes.

The use of mediation, a nonbinding process where the parties submit their dispute to an impartial third person who assists them in reaching their own settlement can be utilized for the resolution of all types of private commercial disputes arising in investment and trade, construction, employment, financial services, franchising, intellectual property, manufacturing, oil and gas, and many other areas.

The first regulation about mediation services in Cuba was established by a resolution of the Cuban Ministry of Justice in 2005, which approved the creation of an organization to provide legal services known as Consultores y Abogados Internacionales (CONABI).

The resolution indicates that the attorneys can act as conciliators and mediators and represent clients in extra-judicial forums. The following year, Decree-Law No. 241 of 2006 which modified Cuban Civil Procedure Law 7/77, included conciliation as a solution of the disputes with independence of the method use to settle the dispute. As such, the mediation was included as an alternative dispute resolution (ADR) by Cuban judicial system in Cuba prior to the creation of the mediation services of the CCICA. Decree-Law No. 250 established the Cuban Court of International Commercial Arbitration (CCICA) and Resolution No. 13 established the Rules of Mediation for the CCICA in 2007.

According to Resolution No. 13, the Court's mediation services must be requested by the parties to a dispute.⁴⁶ Application is made in writing to the Secretariat with copies sent to the other parties. Once the Court becomes aware of the parties' desire to mediate, it invites them to an initial mediation session at a time specified by the Court. If the parties do not designate a mediator, the Court appoints a mediator, considering the nature and circumstances of the dispute. The mediator code of ethics and mediation procedural rules allow for co-mediators in appropriate cases.⁴⁷

If the parties express an interest in having representation at the mediation, they must provide the names and addresses of the representatives to be invited.

45. M. Sornarajah, *The International Law on Foreign Investment*. Cambridge University Press. 2007, page 250

46. Reglamento de Mediación de la Corte Cubana de Arbitraje Comercial Internacional [Mediation Rules for the Cuban Court of International Commercial Arbitration], Res. No. 13, art. 4 (2007). The rules most analogous to the CCICA's mediation provisions are those promulgated by the U.N. Commission on International Trade Law. UNCITRAL, UNCITRAL CONCILIATION RULES, G.A. Res. 35/52 (1980), available at <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf> [hereinafter UNCITRAL CONCILIATION RULES]; UNCITRAL, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION, G.A. Res. 57/18 (2002), available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf> [hereinafter UNCITRAL MODEL CONCILIATION LAW]; see also ICC, ICC ADR RULES (2001), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf [hereinafter ICC ADR RULES]. In contrast, the International Centre for Settlement of Investment Disputes' (ICSID) Conciliation Rules provide for a much more rigid and formal proceeding than that provided for under the CCICA law or either set of UNCITRAL conciliation rules. See ICSID, ICSID Rules of Procedure for Conciliation Proceedings, in ICSID, ICSID Convention, Regulations and Rules, at 81, ICSID Doc. ICSID/15 (Apr. 2006), available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. 321 Res. No. 13, art. 4. A request for mediation must include: (a) the names, addresses and telephone numbers—or any other reference—for the purpose of ensuring the necessary communication with people involved in the conflict submitted for mediation; (b) a brief explanation of the facts giving rise to the conflict in question and, where appropriate, alternative proposed solutions; and (c) the proposal or request for appointment of a mediator. Id.

47. Res. No. 13, arts. 3, 6; see Código de Etica de los Mediadores de la Corte Cubana de Arbitraje Comercial Internacional [Code of Ethics of Mediators of the Cuban Court of International Commercial Arbitration], Res. No. 18, arts. 20–21 (2007) (Cuba).

Such representatives must have full power to adopt agreements regarding the merits of the matter in question on behalf of the parties. The mediation is oral and governed by principles of voluntariness, balance of power, impartiality, flexibility, confidentiality, speed, procedural economy, legality, equity, and fair and just treatment.⁴⁸

In the spirit of its voluntary nature, the mediation process is controlled by the parties and can be terminated at their discretion. The parties are responsible for the agreement, which should comply with the applicable laws in force at the time of its adoption. At the conclusion of the mediation, documents are returned to those who produced them in accordance with the mediation principle of confidentiality.⁴⁹

Similar to an arbitral award, successful resolution of a dispute by mediation voluntarily ratified by both parties is deemed final and binding on the parties, and the agreement must be drawn up in written form and signed by the parties and the mediator. If no agreement is reached, the parties can attempt another form of alternative dispute resolution or resort to courts of ordinary jurisdiction.⁵⁰

The mediator informs the Secretariat of the results of the mediation at its conclusion. The Court maintains absolute confidentiality regarding the outcome of the mediation and will not divulge its existence or outcome without proper authorization from the parties. However, the Court's public compilation of statistics can include general information regarding its mediation activities without revealing the identity of the parties or the nature of their conflicts.⁵¹

Procedurally, the mediator is free to communicate with each party separately and, with their consent, decide when to meet with them jointly or separately. The mediator arranges the time and place of each

meeting and the agenda, again taking care to obtain the parties' mutual agreement. Except in the interest of—and with the prior express permission of—all parties, the mediator may not disclose any information received during the mediation process.⁵²

If the mediator discovers any illegal action by the parties, he is excused from further facilitating the mediation. The mediator must similarly excuse himself from continuing mediation if he detects any bad faith, fraud, or mockery on the part of either party during the process. Mediation rules further prohibit the mediator from acting as an expert witness or consultant in relation to the subject matter of the dispute. However, the mediator can request the assistance of an independent expert or specialist with the prior consent and at the expense of the parties when necessary to aid the process.⁵³

The mediator is liable neither for any acts or omissions relating to information offered by the parties, nor for the agreement reached in the mediation process, unless the mediator's conduct in question is shown to be negligent or intentionally wrongful. In the absence of specification by the parties, the mediator decides on the mediation language and whether documents must be translated to enhance the clarity of communications.⁵⁴

If a party to the mediation is a legal entity, it must be represented by a director or executive with authority to negotiate and agree on a solution to the conflict and commit the entity to implement the agreement. Each party is also directed to bring to the mediation documents that it deems relevant, and to submit, on a voluntary basis, other documents that the mediator or the other party requests. The documents and information provided to a party in the course of the mediation are limited to use exclusively by that party

48. Resolution No.13, arts 7, 8 and 9. Cuba Official Gazette

49. Resolution No.13, arts 9 and 10. Cuba Official Gazette

50. Resolution No.13, arts 11 and 12. Cuba Official Gazette

51. Resolution No.13, arts 14, 15 and 16. Cuba Official Gazette

52. Resolution No.13, arts 17, 18 and 19. Cuba Official Gazette

53. Resolution No.13, arts 20 and 21. Cuba Official Gazette

54. Resolution No.13, arts 22 and 23. Cuba Official Gazette

and cannot be used in any subsequent proceeding. A party can terminate the mediation at any time by reporting its decision to terminate to the mediator. Finally, the regulations authorize adjustment of the terms of the signed mediation agreement if the parties, by mutual agreement, approach the Secretariat for that purpose.⁵⁵

According to Kevin Tuininga, Decree-Law No. 250 and complementary resolutions attempt to further isolate the CCICA from political influence or the appearance of political influence by (1) stating that it is bound only by the law, (2) repeatedly affirming that arbitrators and mediators are independent and impartial, and (3) including comparatively extensive codes of ethics for arbitrators and mediators. It also contains an expanded, or at least more precise, jurisdictional provision to expressly absorb cases that might not otherwise be considered within the scope of international disputes as an assurance to foreign investors. Whether such measures will successfully resolve the doubts of investors and governments with regard to arbitration of international commercial disputes in Cuba remains to be seen.⁵⁶

CONCLUSION AND RECOMMENDATIONS

Cuba's participation in the international arbitration arena will help create impartial forums to handle domestic and international commercial claims during the transition to a market economy. Cuba should also join the International Centre for Settlement of Investment Disputes (ICSID) together with its reinsertion to the World Bank (WB) and the International Monetary Fund (IMF). Furthermore, an independent roster of arbitrators and mediators, including international arbitrators, will play an important role in the acceptance and recognition of the Cuban arbitration and mediation as impartial forums to resolve disputes in a transition-era Cuba.

The practice of international arbitration and mediation will also provide special forums to handle the flood of litigation that may follow as a result of the transition to a market economy and will provide affordable, impartial and capable forums for the resolution of international commercial and investment disputes. At a minimum, Cuba should consider establishing the private practice of mediation as an effective mean of dispute resolution for any dispute not requiring a judicial or third-party determination.

55. Resolution No.13, arts 25, 26, 27, 28 and 29. Cuba Official Gazette

56. Tuininga, *International Commercial Arbitration in Cuba*, page 620.