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Safeguards in the Cuban Legal System for the Promotion and Protection of Foreign Investment

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**SAFEGUARDS IN THE CUBAN LEGAL SYSTEM FOR THE
PROMOTION AND PROTECTION OF
FOREIGN INVESTMENT**

Marta Moreno Cruz^{*}

INTRODUCTION	197
I. GENERAL GUARANTEES.....	198
II. ECONOMIC CONTRACTING	202
III. TYPES OF CONTRACTS	208
IV. ECONOMIC DISPUTE RESOLUTION.....	209
V. COURTS OF JUSTICE	210
VI. INTERNATIONAL ARBITRATION IN CUBA.....	212
VII. INTELLECTUAL PROPERTY	217
CONCLUSION.....	221

INTRODUCTION

There are indisputable advantages in the Cuban social order that encourage foreign investors from various countries to invest money in the island. Chief among these are the general and sectoral public policies of the Cuban Government, which prepares a Portfolio of Opportunities for Foreign Investment, thereby avoiding improvised business determinations; the political and social stability of Cuba; its geographic situation that favors international commercial relations; the climate of security for foreign personnel; the high indicators for social security, health, and education in the population, the latter of which

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above all makes possible the existence of a highly qualified workforce available to participate in each modality of foreign investment that is created; the national institutions that guarantee a transparent investment process; and the existence of a basic infrastructure for the development of investment processes.

In the present study, we will analyze some elements and institutions of the Cuban legal system that represent investment security in the country. We will concentrate only on a few: basic guarantees established in the new legal regulations, economic contracting, the economic dispute resolution system, and intellectual property.

We begin by highlighting that the Draft Guidelines on the Economic and Social Policy of the Party and the Revolution, which set the tone for the current transformations in Cuba, define the strategic importance of foreign investment in the country, considering it to be an active and fundamental element in different sectors of the economy. Economic studies show that in order for foreign investment not to be merely a complement, but a strategic and decisive process for the country's development, average annual influxes of direct foreign investment are needed in the order of 2 to 2.5 billion dollars. Consequently, special attention must be paid to the promotion and protection of foreign investment in Cuba in order to achieve these goals.

The Constitution of the Republic of Cuba of 1976, as revised in 1992, in Article 23 recognizes mixed enterprises, companies, and economic associations duly formed under the law. It also provides that the use, enjoyment, and disposition of the assets of the aforementioned entities are governed as established by law and treaties, as well as by their own bylaws and regulations, which represents a complete constitutional support for the investment process in Cuba.

I. GENERAL GUARANTEES

In 2014, Law 118 was passed, the "Law of Foreign Investment," along with a body of supplementary regulations including the cited law and resolutions of central institutions like the Central Bank of Cuba (BCC), the Ministry of Economy and Planning (MEP), the Ministry of Labor and Social Security (MTSS), the Ministry of Trade and Foreign Investment (MINCEX), and the Ministry of Finance and Prices (MFP), for the purpose of the comprehensive regulation of foreign investment in Cuba.

Generally speaking, the principal guarantees established in these regulations are the following:

- Full warranty of protection and security.

- Non-expropriation except for reasons of public utility or social interest as declared by the Council of Ministers. Accordingly, the new regulation modifies the term “prior compensation” [*previa indemnización*] for “adequate compensation for commercial value” [*la debida indemnización por su valor comercial*] to make it correspond to the constitutional prescription. It also provides that, if an agreement cannot be reached as to the commercial value, price is set by an organization of international prestige in this matter authorized by the Ministry of Finance and Prices and established by agreement of the parties involved in this expropriation process. If there is no agreement on this matter, the selection of the organization will be determined, as the parties may choose, through a drawing or else it will be referred to the courts.
- Free transfer abroad, in freely convertible currency, without paying taxes or other encumbrances for the transfer, of the dividends or profits. Foreign workers in Cuba can transfer their assets. Resolution 47 of 2014 of the Central Bank of Cuba provides that they may remit abroad up to 66% of the income they receive in the national territory. The income will be deposited in an open checking account in the name of the domestic or foreign person in question, in a bank that is authorized to operate in the national territory by the BCC.
- The methods [*modalidades*] of foreign investment in Cuba may involve direct import and export activities, once authorized and created.
- Tax benefits are expanded to apply to the different categories of foreign investment.

As a result of the tax principles of generality [*generalidad*] and equality, and under the principle of economic instrumentality of the duty, as established in Lay 118/29.03/2017 “Law of Foreign Investment,” mixed enterprises as well as domestic and foreign investors that are parties to international economic partnership agreements are governed by the current provisions on the subject, that is, Law 113 of the Cuban system of customs duties, in terms of their compliance with duties obligations and their rights as taxpayers, and

will have the following special taxation system:

1. Exemption from paying Income Tax for a period of 8 years following formation; a period that can be extended by the Council of Ministers. Once this term of temporary exemption expires, a discount is established that will be 15% of the net taxable profits—less than the general rate of 35%. When natural resources are exploited—renewable or non-renewable—the tax rate may be increased to 50% at the discretion of the Council of Ministers.
2. Exemption from paying Income Tax for those net profits or other benefits authorized for reinvestment in this country, subject to the approval of the corresponding authority.
3. Exemption from paying Sales Tax during the first year of investment operations and, following this period, a discount of 50% applicable to the wholesale tax rate.
4. Exemption from paying the Labor Utilization Tax.
5. Discount of 50%, during the investment recovery period, on payment of the Taxes for the Use or Exploitation of Beaches, the Approved Dumping of Waste in Watersheds, the Use and Exploitation of Bays, the Utilization and Exploitation of Forest Resources and Wildlife, and the Right of Groundwater Use.
6. Exemption from paying Customs Duties on equipment, machinery, and other imports during the investment process, in accordance with the rules established by the Ministry of Finance and Prices; and
7. Exemption, during the investment recovery period, from paying the Territorial Contribution to Local Development.

Likewise, foreign investors that are partners in Mixed Enterprises or parties to International Economic Partnership Agreements are exempt from paying the Personal Income Tax for the income obtained from the dividends or profits of the business.

As established by Law 118 of 2014, domestic and foreign investors

that are parties to International Economic Partnership Agreements are excluded from the preceding benefits if their purpose is hotel management, production, or rendering professional services; these are taxed in accordance with the provisions of the Tax System Law and supplementary regulations. Notwithstanding, foreign investors that are parties to such Agreements are exempt from Sales Tax and Service Tax.

In the same way, Wholly Foreign-Owned Enterprises are required to pay taxes in accordance with current legislation, without prejudice to tax benefits established by the Ministry of Finance and Prices, as long as it is in the interests of the country.

After hearing the opinion of the Ministry of Foreign Commerce and Investment, keeping in mind the profits and amount of investment, capital recovery, and the indications made by the Council of Ministers for the priority sectors of the economy, as well as the benefits that may result for the national economy, the Ministry of Finance and Prices can grant total or partial exemptions, on a temporary or permanent basis, or confer other fiscal benefits as established in current tax law, for any of the modalities of foreign investment recognized in Law 118 of 2014.

Additionally, the different forms of foreign investment, like any other Cuban import entity, can access the different tariff systems that favor export.

In order to encourage the participation of foreign investors in the Special Development Zone (ZEDM), to promote the Zone's development in benefit of the country's progress, as well as to promote the use of environmental technologies associated with activities taking place in it, they are exempt from the following fiscal obligations:

1. Labor Utilization Tax.
2. Income Tax during 10 years, which can be extended by the Ministry of Finance and Prices when in the country's interests;
3. Customs Duties on imported equipment and goods destined for the investment process in the Zone;
4. Sales Tax or Service Tax during the first year of operations; and
5. Territorial Contribution to Local Development.
6. In turn, foreign investors in the ZEDM are subject to the following adjustments: Income Tax rate of 12%; Sales or Service Tax rate of 1% for entities that sell goods or

offer services; and Social Security Contribution of 14%.

Cuba currently has signed agreements with the following countries to avoid double taxation in terms of income and wealth: Spain (February 9, 1999, and in force since December 31, 2000), Barbados (June 17, 1999, and in force since March 17, 2000), Italy (January 17, 2000), Portugal (October 30, 2000, in force since July 5, 2003), Russia (December 14, 2000, and in force since November 15, 2010), Lebanon (February 4, 2001), People's Republic of China (April 13, 2001, and in force since October 17, 2003), Vietnam (October 29, 2002, and in force since June 26, 2003), Ukraine (March 27, 2003), Venezuela (May 15, 2003, and in force since May 6, 2005), Austria (March 26, 2003, and in force since September 12, 2006), Qatar (November 7, 2006, and in force since November 17, 2008).

- Possibility of extension of the term authorized for the development of the operations of the different modalities of foreign investment, by the same authority that conferred it.
- The foreign investor can, with the prior agreement of the parties, sell or transfer his rights in the association to the State, to a third party, or to the parties to the association, with prior authorization in whole or in part, receiving the equivalent price in freely convertible currency.
- Current legislation allows the selection of the form of dispute resolution and the applicable law, as well as jurisdiction, a question to which we will later refer in greater detail.

II. ECONOMIC CONTRACTING

The institution of economic contracting [*contratación económica*] acquires a special relevance in matters of foreign investment, both for the formation of the different modalities of foreign investment, especially mixed enterprises and contractual partnerships or international economic partnership agreements, as well as for the need for establishing contractual relationships with the rest of the agents of the economy, domestic and foreign, for the development of productive, commercial, and service activities.

In 2012, a regulatory reform was begun in Cuba defining contractual

matters in two bodies of regulations: Decree Law 304 “Of Economic Contracting” and Decree 310 of “Contractual Types.”

The legal order in this matter is fundamentally composed, in addition to the previously mentioned legal provisions, of the Civil Code. The new regulation repeals the provisions of the Commercial Code of 1886 in commercial contract matters.¹

The present regulation was elaborated based on the UNIDROIT² principles about international commercial contracts and guiding institutional rules of the general theory of contracts, some of which were absent from our previous regulations.

For this reason, in its Fourth Final Provision, Decree Law 304 provides that: “The rules of this Decree Law, regulating general contracting principles, may be applied to other contracts, whatever their nature, in matters not provided for by their own special rules and current legislation.”

The purpose of the Decree Law is to regulate the universe of contractual relationships that are established in the national economy between different operators involved in it, whatever their property system (state, cooperative, mixed, or private). It is therefore applicable to all legal economic relationships linked to productive, commercial, or service activities involving domestic natural and legal persons as well as foreign natural and legal persons domiciled, established, or authorized to operate in the country.

Currently, with the process of economic transformations in the country, new subjects of non-state management are recognized such as self-employment and non-agricultural cooperatives. The state sector is authorized to enter into economic contracts with these subjects, to which the same regulations of economic contracting are applicable.³

The regulation is not applicable to international economic contracting, but the parties by mutual agreement can voluntarily decide that it be the applicable law of the contract.⁴

For the first time, the principles of contracting are incorporated into the legal system that must be taken into consideration by companies in the process of negotiation, signing, execution, and control of economic contracting. These principles are: free will [*autonomía de la voluntad*],

1. It also repeals Decree Law 15 “Standards for Economic Contracts”, the 11 Regulations of General and Specific Contract Conditions, and Resolution 2253 of June 8, 2005 of the Ministry of Economy and Planning.

2. International Institute for the Unification of Private Law.

3. In 2011 the Ministry of Economy and Planning (MEP) issued Instruction 7, establishing the guidelines for state entities for contracting production and services with self-employed workers. Additionally, in 2013 the MEP’s Resolution 32 authorizes payment in CUC by domestic legal persons to natural persons in the cases established in this provision.

4. Decree law 304 “De la contratación económica.” Artículo 2.

good faith, equality between the parties, confidentiality, relativity, intangibility of the contract, and general interest.⁵

The regulation is inspired by the principle of contractual freedom, which marks a notable difference from its predecessor,⁶ since the parties during the period of contract negotiation can determine the processes for hiring and determine the content, duration, and procedures for modifying and terminating the contract. Only the principle of general interest is a limit on contractual freedom, as it provides that in the formation, interpretation, and execution of a contract, the parties must comply with administrative regulations and not contravene or harm the public interest, national economy, environment, and social order; all of which we consider pertinent to the social function that a contract should perform in our model of social and economic development.⁷

The form of contract formation is novel. Provision is made for preliminary agreements and pre-contractual responsibility. Likewise, everything related to contractual offer, its basic content, modification, revocability, and enforcement is regulated, as well as the perfection of the contract.

The inclusion of unfair terms in economic contracts has special relevance in the case of Cuba, due to the asymmetries of our economy, where companies occupying the privileged position of being the only producers or providers of a service attempt to impose certain conditions on the other party in the contract formation process, which can constitute an abuse of their dominant position. In this way, clauses that breach the necessary equality by limiting the rights of one of the parties, imposing excessive burdens, or unilaterally attempting to exclude or limit liability, are susceptible to being challenged in the judicial process.⁸

The rule includes regulations about subcontracts and the intervention of third parties in the contract, which are of great importance because of the insufficient regulation of these topics in the Civil Code. The possibility of designating third parties for the execution of benefits is provided for, so that they assume the contractual position, for the assumption of an obligation and for conferring a right.⁹

Other new regulations of the law we are examining are those related to the interpretation and integration of the contract. Interpretation defines the prevailing intention of the parties. To determine the intention, the nature and purpose of the contract, the scope of prior negotiations, and the established practices between the parties must be

5. Decree law 304 “De la Contratación Económica” of 2012, Articles 2 to 8.

6. Decree law 15/78 “Normas Básicas sobre los contratos económicos.”

7. Decree law 304 “De la Contratación Económica.” Article 8.

8. Decree law 304 “De la Contratación Económica.” Article 4.1 and 4.2.

9. Decree law 304 “De la Contratación Económica.” Chapter III.

taken into account. Other principles established in the norm about this institute are the prevalence of particular conditions, favoring the party that not write the clause, as well as the achievement of conservation and the effects of the contract.¹⁰

The sources for a complete contract are mandatory rules, the will of the parties, default rules, and commercial uses and practices. This process takes into consideration the intention of the parties, the nature and purpose of the contract, good faith, fair dealing, and common sense.¹¹

In terms of form, the contract can be verbal or written. As a rule, it should be written, whether as a manuscript, a printed document, or in electronic format. For their part, verbal contracts are subject to the same general rules for the formation of contracts.

The regulation of the general content of the contract has been stripped of excessive regulations with the goal of favoring the autonomy of the parties in the definition of the principal contractual terms, but requiring them to act efficiently.

Such content should include as essential conditions the object of the contract and the benefits derived from it; the deadlines for compliance with the essential obligations, after which the obligation to accept the contracted benefit ceases, without prejudice to the liability arising from non-compliance; the use of international terms of rules where appropriate,¹² the prices and rates as established in current legislation related to the bodies empowered to fix those prices and the methods for determining them; the form and methods of payment, observing also the regulations currently in effect in the country on this subject,¹³ the effects of non-payment, the quality parameters of the merchandise or service, as well as the methods to employ for their verification; the commercial guarantee and its deadlines, insurance,¹⁴ alternative solutions to guarantee fulfillment of the obligations with the goal of guaranteeing the conservation of the contract; exclusivity, which must be expressly agreed upon as it is not presumed;¹⁵ the forms of notice in the potential

10. Decree law 304 “De la Contratación Económica.” Chapter VII. First Section, articles 55 to 52.

11. Decree law 304 “De la Contratación Económica.” Chapter VII. Second Section, Article 63.

12. For example, the Incoterms, the “Training Manual on Technology Transfer” (UNIDO), Principles of International Commercial Contracts (UNIDROIT), among others.

13. Resolution 101 of 2011 of the Central Bank of Cuba, “Banking Rules for Collections and Payments.”

14. In our country, there is a special regulation of insurance contracts in Decree law ley 263/2008.

15. The exclusivity clause is very typical in agency, distribution, and licensing contracts in the various categories of intellectual property.

case of breach of contract;¹⁶ limitation or exemption of responsibility and how to proceed in appropriate cases,¹⁷ the form of dispute resolution;¹⁸ the causes that must give rise to the modification and termination of the contract; the duration of the contract, as well as other matters agreed upon by the parties, as long as they do not contradict the current legislation.

In terms of guarantees, current regulations provide the possibility of employing any of the guarantees recognized by existing legislation,¹⁹ as well as any other valid source agreed upon by the parties.

Decree Law 304 regulates safeguards including financial penalties and guarantees issued by financial institutions.

The regulation of financial penalties is set out in the Civil Code.²⁰ We conclude that it fulfills a liquidating function, as it predetermines the extent of damages and harms; a penal function, as it punishes the offending debtor by imposing heavy consequences upon him; and a coercive function, as it encourages the debtor to comply with the threat of having to make additional compensation.

The amount of the financial penalty should be agreed upon by the parties in the contract for each type of breach, as well as the court or arbitration body that may adjust it if it is found disproportionate or abusive. The payment of this penalty does not excuse the offender from fulfilling the obligation, unless expressly agreed otherwise.

The financial penalty, unless otherwise agreed, is a substitute for the repayment of harm and damages resulting from the breach, in which case the parties may agree to indemnification only in the amount not covered by the financial penalty. It is also provided that the payment of default interest on pecuniary obligations excludes the financial penalty.

Sources of contractual modification include the agreement of the parties, relevant legal provisions or judicial decisions.²¹

16. This contractual clause is an express of the principle of good faith expressly regulated in article 3.1 of Decree law 304.

17. With regard to this clause, keep in mind article 82 of Decree law 304 that establishes that the parties cannot agree to clauses of limitation, exemption, or aggravation of responsibility for breach, that are contrary to law or that are manifestly unfair in light of the purpose of the contract, except as provided by law.

18. An attempt must first be made to resolve the conflict amicably, and if this is not possible, the appropriate judicial or arbitration body must be agreed upon.

19. El Código Civil Cubano vigente (Ley 59/1987 establece como formas de garantizar el cumplimiento de las obligaciones la sanción pecuniaria, la prenda, la retención, fianza, anticipo y la hipoteca naval o aérea. Libro Tercero Derecho de Obligaciones y Contratos Título I Obligaciones en General Capítulo III Garantía del cumplimiento de las obligaciones. Artículos 266 a 288.

20. 1 Código Civil Libro Tercero Derecho de Obligaciones y Contratos Título I Obligaciones en General Capítulo III Garantía del cumplimiento de las obligaciones. Extinción de las Obligaciones Artículos 268 y 269.

21. Decree law 304 “De la Contratación Económica.” Article 64.

The termination of the contract can take place by agreement of the parties, by judicial declaration, or by any other form recognized by law. Our law currently recognizes common causes for terminating obligations such as payment, loss of the asset, impossibility of execution, confusion, compensation, forgiveness, death of a natural person, and dissolution of the entity.²²

The party causing the termination of a contract is liability for the harms and losses resulting for the other party.²³

Because of the principle of intangibility,²⁴ unilateral acts of modification and termination are not allowed, except as otherwise established by law or agreed by the parties.

Another new question is the regulation of excessive hardship. The contract may be modified or terminated if events occur that alter the balance of the contract, provided they become known after the contract has been signed, could not be foreseen at the time of signing, or are out of the control of the invoking party.²⁵

The rule also regulates contract modification by transfer of contractual position. In this way, parties with any pending performance can transfer their contractual position to a third party, unless that transference is prohibited by agreement of the parties, by the nature of the contract, or by legal provision.²⁶

The principle of strict liability applies, so that the mere breach of a contractual obligation constitutes a civil offense; the breaching party assumes the liability arising from the breach except in case of acts of God and *force majeure*. This principle corresponds with the contractual freedom conferred upon the parties by current legislation, which requires greater thoroughness in the decisions they adopt.

When confronted with a possible breach of contract, the parties should communicate immediately and adopt effective measures to diminish the effects of breach.²⁷

Universal liability is established for debts, so the debtor is liable for

22. Código Civil Libro Tercero Derecho de Obligaciones y Contratos Título I Obligaciones en General Capítulo V Extinción de las Obligaciones Articles 297 to 305.

23. Decree law 304 “De la Contratación Económica.” Article 65.2.

24. Decree law 304 “De la Contratación Económica.” Article 7. Intangibilidad del contrato: Ninguna de las partes puede unilateralmente modificar o extinguir el contrato, salvo las excepciones previstas en la ley o pacto en contrario.

25. Decree law 304 “De la Contratación Económica.” Article 76.

26. See the provisions of Decree law 304 “De la Contratación Económica.” Articles 67 to 75. Se establece asimismo la supletoriedad del Código Civil referidas al contrato de cesión de créditos y a la asunción de deudas, en lo que no se oponga a esta regulación especial. Estas disposiciones están establecidas en Código Civil Libro Tercero Derecho de Obligaciones y Contratos Título I Obligaciones en General Capítulo II Artículos 256 a 265.

27. This is another example of the principle of good faith established in article 3 of Decree law 304 “De la Contratación Económica.”

all the goods, rights, and shares that make up his assets, except for the limits established by law.²⁸

The extent of liability includes:

- Specific performance of the obligation or equivalent.
- Repair of damage.
- Compensation for damage.
- Payment of default interest in the case of financial obligations.

Liability arises from an unlawful act or omission that causes quantifiable damages.

The rule also regulates the concurrence of responsibility in the case of default, fault, or fraud by the other party, act or omission of the injured party, or recklessness of the injured party.

III. TYPES OF CONTRACTS

In addition to the previously mentioned Decree Law 304, on November 17, 2012, Decree 310 “On the Types of Contracts” was passed in Cuba.

This Decree regulates, as its name indicates, the types of contracts that can be made by the different subjects participating in the national process of economic contracting. The content of this standard is as follows.

The parties can freely determine the content of their contracts per the principle of free will. This capacity may be exercised within the limits imposed by peremptory legislation, the plan where appropriate, and public order.

Likewise, the parties may enter into contracts not regulated or expressly defined in this Decree, within the limits established above. These contract types that are not regulated in Decree 310 are subject to the stipulations established in Decree Law 304, which as we indicated is the general rule on matters of economic contracting.

Any contractual provisions that violate peremptory norms are null,

28. Regarding the responsibility of legal persons, Article 44.2 of the Civil Code is applicable, providing that state companies only respond to their obligations with their financial resources within the limits established by economic legislation. Article 138.3 of the Civil Code also establishes that state assets cannot be pledged or seized, unless as otherwise disposed by law.

and it is incumbent upon the corresponding court or arbitral body to declare the nullity and its effects.

We may classify the principal contractual types established by Decree 310, the Civil Code, or other special regulations in the following way:

- I. Involving transfer of ownership: purchase, supply, consignment, exchange, and donation.
- II. Involving transfer in use: renting, loans, leasing, and licenses.
- III. Intermediation: commission, mandate, agency, distribution, and brokerage.
- IV. Custody: deposit.
- V. Guarantee: mortgage and collateral [*prenda*].
- VI. Financing: credit and insurance.
- VII. Business collaboration: services, projects, execution of works, technical control, and transportation.
- VIII. Partnership: cooperative production, service administration, joint ventures.

IV. ECONOMIC DISPUTE RESOLUTION

The Law of Foreign Investment under study addresses the form of resolving economic disputes related to contractual relationships,²⁹ and offers the possibility of selecting in the constituent documents (partnership agreement and bylaws) the manner and place in which conflicts will be resolved, within the limits established in the law.

The parties may agree upon Cuban courts or international arbitration. They may also elect consensual methods like negotiation, mediation, and conciliation.

Parties may select the Cuban Court of International Trade Arbitration, the International Chamber of Commerce (ICC) in Paris, the Permanent Court of Arbitration (PCA) in The Hague, or ad hoc arbitration, among others.

29. See Article 60.1 and 60.2 of Law 118 “Ley de la inversión extranjera.”

The free will of the parties in this area is limited by the requirement that domestic courts take charge of conflicts involving the exploitation of natural resources, services, the execution of public works, those arising from the inaction of government bodies, or in the dissolution, termination, and liquidation process for joint ventures.³⁰

The law also provides that lawsuits arising between the different modalities of foreign investment, and between these and Cuban natural or legal persons, involving the execution of economic contracts, can be resolved by the economic division of the provincial courts [*Salas de lo Económico de los Tribunales provinciales*] or can be submitted to arbitration per Cuban law, as the parties may choose.³¹

We will next examine the basic characteristics of the regulations for the organization and functioning of arbitration in Cuba and courts linked to the economic sphere.

V. COURTS OF JUSTICE

Starting with the promulgation of Decree Law 129 in 1991, Cuba has had a specialized body in this sphere, the economic division of the courts of justice [*salas del económico de los tribunales de justicia*].

In 2006, a new procedure for economic matters was approved for these courts of justice with the adoption of Decree Law 241, modifying the Law of Civil, Administrative, and Labor Procedure. As a result, current Cuban procedural law is called “Law of Civil, Administrative, Labor, and Economic Procedure.”

The jurisdiction of the Economic Division is the following:

- Resolution of disputes between natural or legal persons, whether Cubans or foreigners with representation, assets, or interests in Cuba, that involve their contractual relationship, unless they involve matters of public consumption, which belong to the civil division [*sala de lo civil*]. Also removed from the jurisdiction of the economic division are cases that have submitted expressly or tacitly, or by provision of law or international agreements, to international commercial arbitration.
- Disputes arising from events or acts related to maritime

30. See Article 60.3 y 60.4 of Law 118 “Ley de la inversión extranjera.”

31. See Article 61 of Law 118, “Ley de la inversión extranjera,” in relation with with Decree law 250, “De la Corte Cubana de Arbitraje Comercial Internacional.”

transport or traffic, occurring within the internal waters or the territorial sea, or that, taking place outside these areas, involve Cuban-flagged vessels.

- Disputes arising from the noncompliance with regulations for the protection of the environment and natural resources, or related to environmental damages.
- Non-contractual disputes arising from damages caused to third parties in their economic activity by a legal or natural person, whether Cuban or foreign, as part of the development of their production, commercial, or service activities in the national territory.

Economic jurisdiction is exercised by the Economic Division of the Supreme Court [*Sala de lo Económico del Tribunal Supremo Popular*], the Economic Divisions of the People's Provincial Courts [*las Salas de lo Económico de los Tribunales Provinciales Populares*] and of the Special Court [*Tribunal Especial Popular*] for Isla de la Juventud. This type of court does not exist at the municipal level.

The standard of reference clearly and precisely details the procedural questions of the parties to the proceedings and their representation, as well as the inclusion of third parties, court costs, and the requirements for service of process and answer.³²

The tribunal is empowered to take preparatory actions, including holding a preliminary hearing for trial consolidation and determining the subject-matter of the dispute. The possibility of conciliation is provided for at any stage of the trial. In the event of conciliation, if the parties come to a conclusive agreement, the Court will verify the terms of the transaction and approve it by issuing a final order to bring the process to an end.³³

The Court has the exclusive power to compel appearance of the parties to a lawsuit. The court may dispense with the hearing if it considers the documents in the file, derived from the preparatory actions, can resolve the merits of the matter under consideration.

The topic of preventative measures occupies a special place in our regulations, as incorporated by Decree Law 241 of 2006, to which we already referred and which has been extended to non-economic procedures.

Available preventative measures include: freezing assets, seizure of

32. See Chapters II, III and IV of “Ley de Procedimiento Civil, Administrativo, Laboral y Económico.”

33. See Chapter V of “Ley de Procedimiento Civil, Administrativo, Laboral y Económico.”

assets in litigation, preventive annotation in the public registers, temporary deposit of goods, securing evidence, suspension or abstention from specific conduct or activities, or any other measure designed to guarantee the efficacy of the trial.

Economic trials are regulated in a supplementary degree by applicable provisions related to civil procedure.

VI. INTERNATIONAL ARBITRATION IN CUBA

In Cuba, Law 1184 of September 15, 1965, created the Court of Foreign Trade Arbitration as a body attached to the Chamber of Commerce of the Republic of Cuba. This regulation was repealed by Law 1303 of May 26, 1976, “Of the Court of International Trade Arbitration.” In 2007, Decree Law 260 “Of the Cuban Court of International Trade Arbitration” (CCACI) was passed, which is the effective law in Cuba today in this sphere. In addition to this regulation, the legal framework of international trade arbitration in Cuba also incorporates the series of resolutions passed by the Chamber of Commerce of the Republic of Cuba, adopting and putting into effect the Rules of Procedure of the CCACI, their Statutes, the respective Codes of Ethics for Arbitrators and Mediators, Mediation Rules, and Regulation of Arbitration Rights, Procedural Costs, and Parties’ Costs.³⁴

Cuba has signed the principal international conventions regarding International Trade Arbitration. It is a signatory of the European Convention on International Commercial Arbitration (Geneva, 1961), as established by the Presidential Proclamation of August 8, 1965, which entered force on November 30 of the same year. Cuba is also party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), as established by the Presidential Proclamation of February 3, 1975, which entered force on March 30 of the same year.

Of course, because Cuba is excluded from the Organization of American States (OAS), it has not signed any of the Inter-American Conventions on International Commercial Arbitration, neither that of Panama (1975) nor that of Montevideo (1979). Neither is Cuba a signatory of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, 1965), which created the International Centre for Settlement of Investment

34. Resolution 15 of 2009 Anexo “Reglas de Procedimiento de la Corte Cubana de Arbitraje Comercial Internacional”; Resolution 13 of 2007 Reglamento de Mediación de la CCACI, repealed by Resolution 21/2015 that enacts Reglamento de Mediación de la CCACI, Resolution 11 of the 2007 Anexo I Estatutos de la CCACI and Resolution 19 of 2007 Anexo II Reglamento de los Derechos de Arbitraje, Gastos de Procedimiento y Costas de las Partes.

Disputes (ICSID), whose system, because of its link to the global financial system, such as the World Bank or the International Monetary Fund, has been rechecked by our country.

Notwithstanding, we must point out that Cuba has signed several bilateral investment agreements, known as Agreement on the Promotion and Reciprocal Protection of Investments (APPRI). Currently, 42 bilateral investment treaties are in effect with a wide array of guarantees for the investor.

Despite the differences between the various Bilateral Investment Treaties signed by Cuba, their main identifying elements are the definition of the concept of investment and the incorporation of the standards of fair and equitable treatment, most favored nation status, and complete protection and security.

A study of the APPRI signed by Cuba shows that the investor can choose the dispute settlement forum. The arbitration bodies selected by Cuban agreements are generally the Permanent Court of Arbitration in The Hague, the Court of Arbitration of International Chamber of Commerce in Paris, ad hoc Arbitration Courts, per the United Nations Commission on International Trade Law (UNCITRAL). We consider that the solutions provided by the parties obey the result of the process of negotiation preceding the signing of the treaties.

With the principal international conventions signed by Cuba in this matter defined, we turn our attention to the internal regulations in the sphere of International Commercial Arbitration.

Our current legislation defines the Court's jurisdiction as the resolution of contractual and non-contractual disputes with an international character,³⁵ arising from business activities, that are voluntarily submitted by the parties.

Additionally, the new regulation empowers the Court to hear other disputes previously subject to the mandatory jurisdiction of the tribunals.³⁶ Notwithstanding, this does not mean that the freedom of choice [*autonomía conflictual*] of the parties is expanded, as they remain subject to Cuban law as the only law applicable to such cases, as established in the second paragraph of Article 29 of Decree Law 250.³⁷

The Court also hears the disputes parties are required to submit to its

35. According to article 10 of Decree law 250 of 2007, an international dispute is one in which the establishment or habitual residence of the parties is located in different countries, or one involving natural or legal persons with different citizenships or nationalities, or the place of the conclusion or fulfillment of the obligation is in a different State.

36. Article 11 of Decree law 250 extends the jurisdiction of the Court to hearing contractual or non-contractual disputes submitted by mixed enterprises or other forms of foreign investment, in their relationships with each other or with a legal or natural person with Cuban citizenship.

37. Article 29 of Decree law 250, second paragraph: En los casos de los litigios a que se contrae el artículo 11 del presente Decreto ley es de aplicación la legislación cubana.

jurisdiction as provided by international treaties, as established in the second paragraph of Article 12 of Decree Law 250.

The *kompetenz-kompetenz* principal is defined in Article 13 of Decree Law 250, which establishes that the arbitral court may rule on the validity of the arbitration agreement or convention, and resolve questions about its own jurisdiction.

The existence of an arbitration agreement or convention is an essential condition for the Court's action; hence Article 13 of Decree Law 250, as previously analyzed. Accordingly, any arbitration agreement, contained in a contract or a separate document, is considered independently from the other clauses of the agreement. Parties may also submit tacitly to International Commercial Arbitration, provided the parties demonstrate interest through appropriate legal proceedings.

Accordingly, Article 15 of Decree Law 250 provides that the courts of ordinary jurisdiction will refrain from hearing contractual or non-contractual matters about which there is an agreement or convention expressly submitting them to arbitration, unless it provides that at the request of a party said agreement or convention is null, ineffective, or inapplicable.

Our procedural rule is consistent with this position. Article Three defines the mandatory jurisdiction of the Cuban courts, and the second paragraph establishes an exception for conflicts arising in international commerce that are expressly or tacitly submitted, whether by provision of law or international agreements, to arbitration courts.

Thus, we see that in Cuban law "the arbitration exception" is considered an exception for lack of jurisdiction, and according to procedural law it may be declared at any stage of the proceedings.³⁸

The appointment of the arbitrators of the Cuban Court of International Trade Arbitration has an honorific character, since they do not receive any remuneration for their work.³⁹ They are appointed by the President of the Chamber of Commerce for a term of two years, and may be appointed for successive terms.⁴⁰

Independence and impartiality are indispensable prerequisites for the nomination of arbitrators. Both are requirements that govern the Rules of Procedure and are contained and formalized in the Code of Ethics for Arbitrators of the Court, to which all arbitrators are subject in performing their duties. The Code calls upon them to act with complete independence of judgment and impartiality, and any circumstance that affects their performance will be grounds for the rejection of their nomination.

38. See Article 4 of the LPCALE of 1977.

39. Statutes of the CCACI.

40. Article 4 of Decree law 250.

The List of the Court comprises 21 arbitrators, all Cuban nationals. Nothing in the law prohibits appointing a foreign arbitrator; neither does the law provide for neutrality.

The principle of confidentiality is established in Article 1 of the Rules of Procedure of the CCACI.⁴¹ This principle has been observed strictly by the Cuban court in all its arbitrations. It is also reinforced by the Statutes of the Court, which establish the private nature of the disputes submitted to it.⁴²

Since its foundation, the Court has been located in the headquarters of the Chamber of Commerce of the Republic of Cuba. There the arbitration court holds session. Decree Law 250 authorizes it to hold sessions in different places, if the parties agree, without affecting the nationality of the ruling to be made.⁴³

As with any court of law, the arbitration court is independent and owes obedience only to the law. The rules establish that the court be composed of one or three arbitrators, as the parties may agree, and in the absence of agreement the number will always be three.⁴⁴

Each party appoints an arbitrator, and both of these arbitrators appoint a third to act as Chief Arbitrator. The Chief Arbitrator will fill any vacancies in the court due to a party's failure to make an appointment.

According to Article 29 of Decree Law 250, the parties to an international commercial dispute will agree upon the applicable law, except as established by Article 11 of the same law, regarding disputes arising between the parties to foreign investment contracts, which must be subject to Cuban law. In the absence of an express agreement about the applicable law for a dispute, the arbitration court will apply the private international law of the forum. In procedural matters our procedural law, the LPCAL, will be applied.

The arbitration court acts in accordance with the Rules of Procedure of the Court, as established in Article 23 of Decree Law 250. Special rules of abbreviated procedure can only be established at the request or by the agreement of the parties.⁴⁵

In particular, it takes the form of judicial assistance to International Commercial Arbitration as provided in current arbitral and procedural

41. Article 1, third paragraph of the Rules of Procedure of the CCACI: Los árbitros de la Corte se regirán por el principio de confidencialidad en toda su actuación.

42. Article 3 of the Statutes of the CCACI: Los litigios que se conocen en la Corte son de carácter privado. Tanto los documentos sometidos a la Corte o al Tribunal Arbitral en su caso, como los que estos produzcan durante el proceso arbitral, serán tratados con la necesaria confidencialidad.

43. Article 31, second paragraph of Decree Law 250 "Cualquiera que sea el lugar del Arbitraje, el laudo dictado por el tribunal arbitral se reputa como nacional."

44. Rules of Procedure, article 2.

45. See Article 25 of Decree law 250.

regulations in Cuba. This arbitration assistance is shown primarily in the following ways:

- The ordinary Court may review the arbitration agreement and rule upon its validity. Such courts may not decline jurisdiction when they consider that the arbitration agreement is null, ineffective, or impossible to execute.
- The Court of arbitration may request that the courts undertake the examination of evidence and hear the parties' requests for injunctions.
- The enforcement of the decision. In the event of noncompliance with the ruling issued by the Cuban court of arbitration, the prevailing party may request the ordinary courts enforce the decision, subject to the applicable terms of law and of international conventions.
- Nullity of the arbitration decision. Our current procedural law for economic matters assigns jurisdiction to the Economic Division of the Supreme Court [*la Sala Económica del Tribunal Supremo Popular*] to void the decisions of Cuban arbitration courts or international arbitration taking place in Cuba.

The grounds for requesting an order of annulment [*acción de nulidad*] correspond with those established in the Geneva Convention, to which as we have already indicated our country is a party. These grounds include: the invalidity of the arbitration agreement or the inability of the parties to act; violation of the constitution by the arbitration court or in the notification of its appointment, violation of procedure that makes a party unable to present and assert their allegations, and when the decision refers to a controversy that is not governed by or exceeds the terms of the arbitration agreement.⁴⁶ The party seeking the nullification of an arbitral decision can ask the court to order suspension of its performance.⁴⁷ In this case, the court will limit itself to ruling on the requested nullity, without hearing and ruling upon the merits of the case. This decision cannot be appealed or reviewed.⁴⁸

46. Article 826 of the LPCALE.

47. Article 827 of the LPCALE.

48. Article 828 of the LPCALE.

Finally, we emphasize that the ad hoc international commercial arbitration process, in accordance with the procedures agreed upon by the parties for arbitration in Cuban territory, have the same protections as institutionalized arbitration processes in the Court, including those related to judicial assistance.⁴⁹

VII. INTELLECTUAL PROPERTY

In every process of foreign investment one of the fundamental contributions is the cutting-edge technology that must be supplied by the parties and that generally enjoys protection through the different modalities of intellectual property. Developing nations like Cuba seek technology in addition to markets and capital, but this requires an accurate knowledge of how to protect it and transfer it appropriately.

Law 118 of foreign investment recognizes that one of the strategic goals of this process in our country is access to advanced technology. Its essential provisions about this topic are related to the importance of contributions of intangible goods. The chapter on Environment, Science and Technology establishes the need for evaluating the measures for the protection and management of intellectual property with the goal of ensuring the technological sovereignty of the country.⁵⁰ It is also common practice to refer to the agreement between the parties and to the provisions of current legislation on the topic.

We will therefore analyze the basic characteristics of our internal system of intellectual property that safeguard the rights of domestic and foreign investors, as well as the creators.

The constitutional charter that has been in force in Cuba since 1976⁵¹ supports and protects freedom of creation in all areas and the promotion, stimulus, and backing of the Cuban State for the educational, scientific, technical, and cultural activity of the country.⁵²

Cuba is the leading country in Latin America in membership of

49. Article 4 of the Geneva Convention of 1961, of which Cuba is a signatory.

50. See Chapter VII of Law 118, "Aportes y su valoración," article 18.1(c) subsections 2 and 4, and Chapter XV Medio Ambiente, Ciencia y Tecnología e Innovación, articles 54, 57 and 58.

51. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, proclamada el 24 de febrero de 1976, y reformada por la Asamblea Nacional del Poder Popular en el XI Período Ordinario de Sesiones de la III Legislatura celebrada los días 10, 11 y 12 de julio de 1992, Ciencias Sociales, 1999.

52. The Constitution of the Republic of Cuba of 1976, articles 9 and 39 in subsections e and f, establishes, "que el Estado estimula y viabiliza la investigación y prioriza la dirigida a resolver los problemas que atañen al interés de la sociedad y al beneficio del pueblo, así como que el Estado propicia que los trabajadores se incorporen a la labor científica y al desarrollo de la ciencia."

international Conventions on intellectual property, the majority of which it has ratified.

Since 1975 our country has been a member of the World Intellectual Property Organization (WIPO), a specialized unit of the United Nations. We are also a party to the fundamental Conventions in this field, the Paris Convention for the Protection of Industrial Property (1883; member since 1904), and the Berne Convention for the Protection of Literary and Artistic Works (1886; members since 1997).

Cuba, a founding member of the World Trade Organization as a successor to the General Agreement on Tariffs and Trade (GATT), in 1947 signed the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) (WORLD TRADE ORGANIZATION, 1994). It has since reformulated its legislation regarding intellectual property in order to make it correspond with the minimum standards of protection established in this Agreement, but always evaluating the flexibility of this regulation so that the due protection of the intellectual property rights of creators and owners corresponds with the economic and social interests of key sectors for the country's development, such as health, food, industry, and trade.

To date, Cuba has passed new legislation regarding distinctive signs, geographical indications, inventions, utility models, industrial models, plant varieties, and integrated circuit layout.

Our internal legislation was examined in the TRIPS Council in order to assess its compliance with the international commitments of the Cuban State, a process that to date has been successful.

Cuba also belongs to various international associations like the Inter-American Association of Intellectual Property (ASIPI), the International Association for the Protection of Intellectual Property (AIPPI), and the International Trademark Association (INTA).

Internal legislation currently in effect in our country comprises the following key regulatory bodies:

Decree Law 203, of December 24, 1999. Of Trademarks and Other Distinctive Signs.

Decree Law 228, of February 20, 2002. Of Geographical Indications.

Decree Law 290, of November 20, 2011. Of Inventions and Industrial Drawings and Models.

Decree Law 291, of November 20, 2011. Of the Protection of Plant Varieties.

Decree Law 292, of November 20, 2011. Of Integrated Circuit Layout Designs.

Resolution 25/2001 of the General Customs Office of the Republic. Rules for the retention of goods for infringement of intellectual property rights.

In addition to the general Conventions already described, the primary Conventions signed by Cuba in this field are the following:

Regarding distinctive signs:

- Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, since January 1, 1995;
- Madrid Agreement Concerning the International Registration of Marks, since December 6, 1989;
- Protocol Relating to the Agreement Concerning the International Registration of Marks, since December 26, 1995;
- Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, since December 26, 1995;
- Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, since July 18, 1997;
- Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, September 17, 1967.

Regarding inventions:

- Patent Cooperation Treaty (PCT), since April 16, 1996;
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, since February 19, 1994;
- Locarno Agreement Establishing an International Classification for Industrial Designs, since October 19, 1998;
- Strasbourg Agreement Concerning the International Patent Classification, since November 9, 1996.

In our country the Cuban Industrial Property Office (OCPI), part of the Ministry of Science, Technology and Environment, is the body that confers and registers the various categories of intellectual property rights.

Generally, natural persons who are Cuban citizens, or non-citizens that are domiciled or have real and effective industrial or commercial establishment in Cuba, can approach the registry office in person or through an official intellectual property agent. Legal persons that are Cuban citizens, or non-citizens that are domiciled or have real and effective industrial or commercial establishment in the Republic of Cuba, must approach the office through their legal representative, through a designated representative, or by using the services of an official intellectual property agent.

Foreign applicants that do not have domicile or real and effective industrial or commercial establishment in Cuba must be represented by an official intellectual property agent to make any transaction before the registry office.

The distinctive features of our intellectual property system are the following:

- The registry system is adopted for the acquisition of rights. The declarative system [*sistema declarativo*] or the acceptance of first use to acquire the right is applied to trade names, corporate logos, and business signs.
- Well-known trademarks [*marcas notorias*] are regulated and their recognition prevails over the registered trademark [*marca registrada*].
- The law recognizes the principal absolute and relative prohibitions adopted internationally to evaluate the concession of trademark rights. These rights last 10 years after the application, and may be renewed permanently.
- Inventions are protected by patents in accordance with the globally-recognized requirements of patentability (global novelty, inventive activity, and industrial applicability). The duration is 20 years from the filing of the application.
- Employee inventions [*invenciones laborales*] are recognized.

- There is a legally established procedure for the review of application and the granting of rights, including the publication of applications and opposition proceedings. In the event of disagreement with the registry office's decision, challenges [*procesos de impugnación*] may be made to the ordinary courts.
- The regulations define the scope of the exclusive rights for each category, as well as the primary limitations on the exercise of rights like compulsory licenses and the international exhaustion of the rights.
- There are legally established procedures in the case of the infringement of the different categories of intellectual property rights.

It is necessary to highlight that in December of 2014 the Council of Ministers approved the intellectual property policy, in order to foster the protection and management of this activity by agencies and companies in Cuba, especially by the connotation acquired in matters of foreign investment. New regulations are being evaluated and will be passed soon, such as those related to intellectual property contracts, the transfer of technology, and the protection of undisclosed information through the repression of unfair acts, to name only a few.

Finally, we stress that, through the measures that are being adopted by the governments of Cuba and the United States for the gradual restoration of relations between both countries, it is notable that the United States is currently the foreign country with the largest number of trademarks registered in Cuba, although before December 17, 2014 it occupied second place after Germany. Likewise, the number of trademark applications by U.S. natural and legal persons is expanding on a systematic basis.

CONCLUSION

It must be stressed that the political will of the country, reflected in the improvement of the Cuban legal system, to promote and encourage foreign investment in Cuba is imperative for the economic and social development of the country.

The country has organic and systematic regulations in matters of foreign investment adapted to the internal necessities of the nation, as well as modern trends in this field.

In particular, the regulatory reforms in contractual matters and in

Cuban procedural law, with the regulation of new procedures in economic matters, which is complemented by provisions of the Cuban Court of International Commercial Arbitration and its procedural rules, are additional guarantees designed to preserve the rights and interests of investors in Cuba.

The membership of Cuba in the primary international conventions regarding intellectual property, reflected in the internal regulation of this subject, as well as the existence of effective procedures for the granting of rights, are vital. As regards foreign investment, the proper protection and management of technology and trademark rights is essential in every phase of the process, from the creation to the dissolution of the business when appropriate.