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Rafael Cox Alomar

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# Investment Treaty Arbitration in Cuba

Rafael Cox Alomar\*

*Not since the fateful days of the 1962 Missile Crisis, has Cuba commanded as much global attention as it does today. The 2014 diplomatic rapprochement between the United States and Cuba, not only did away with the last vestiges of the Cold War in Caribbean waters, but more importantly has coincided with a period of acute ideological effervescence in Havana. Even in the face of President Raúl Castro's resolute commitment to the principles of the 1959 Revolution, it is more than evident that Cuba is in the midst of a transformational moment. And perhaps in no other area of the island's institutional life are the winds of change as noticeable as in Cuba's new ordre public with respect to Direct Foreign Investment ("DFI").*

*Cuba's immediate uncertainties, compounded by the rather piecemeal unfolding of its economic negotiations with the United States, places even more weight on the island's capacity to attract and maintain a seamless stream of DFI. The quantity and quality of such inflow will, no doubt, depend on the credibility and cogency of Cuba's legal superstructure.*

*It is precisely against this background, that this Article proposes an innovative reading of Cuba's bilateral investment treaties ("BITs"), grounded on a comparative legal analysis*

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*that brings to the fore the intense, yet often unexplored, interactions between Cuban law, public international law and investment treaty arbitral jurisprudence.*

*Part I delineates the substantive elements of Cuba's Foreign Investment Act of 2014, and more generally traces the evolution of Cuba's legal superstructure since the emergence of the empresa mixta. Part II explores the penumbras of the dispute settlement mechanisms available in Cuban BITs. Part III provides a comprehensive analysis of the standard safeguards available to foreign investments and foreign investors operating in Cuban territory under the protection of a BIT. Part IV weighs in, both from a legal and policy perspective, on the normative lacunas and structural challenges besieging Cuba's investment treaty landscape.*

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## I. INTRODUCTION

### *A. A Transformative Moment*

Not since the fateful days of the 1962 Missile Crisis, has Cuba commanded as much global attention as it does today. The 2014 diplomatic *rapprochement* between the United States and Cuba,<sup>1</sup> not only did away with the last vestiges of the Cold War in Caribbean waters,<sup>2</sup> but more importantly has coincided with a period of acute ideological effervescence in Havana. Even in the face of President Raúl Castro’s resolute commitment to the principles of the 1959 Revolution,<sup>3</sup> it is more than evident that Cuba is in the midst of a

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<sup>1</sup> President Eisenhower cut off diplomatic relations with Cuba on January 3, 1961. *United States severs diplomatic relations with Cuba*, HISTORY, <http://www.history.com/this-day-in-history/united-states-severs-diplomatic-relations-with-cuba>.

<sup>2</sup> *Statement by the President on Cuba Policy Changes*, WHITE HOUSE (Dec. 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>. President Obama announced that in changing its relationship with Cuba, the United States “will end an outdated approach that, for decades, has failed to advance our interests . . . the relationship between our countries played out against the backdrop of the Cold War, and America’s steadfast opposition to communism.” *Id.*

<sup>3</sup> On December 17, 2014, in his response to President Obama’s speech, President Castro said the following words, “since my election as President of the State Council and Council of Ministers I have reiterated on many occasions our willingness to hold a respectful dialogue with the United States on the basis of sovereign equality . . . [t]his stance was conveyed to the U.S. Government both publicly and privately . . . stating the willingness to discuss and solve our differences without renouncing any of our principles.” Foreign Staff, *Speech by Cuban President Raul Castro on Re-establishing U.S.-Cuba Relations*, WASHINGTON POST (Dec. 17, 2014), <https://www.washingtonpost.com/world/full-text-speech-by-cuban-pr>

transformational moment. And perhaps in no other area of the island's institutional life are the winds of change as noticeable as in Cuba's new *ordre public* with respect to Direct Foreign Investment ("DFI").

It is no secret that Cuba's sustainability is wholly contingent on the decisive expansion of its economy; so far one of Latin America's most sluggish due in no small measure to the United States' unbending blockade. During the last decade, Cuba's GDP has only grown 1.8% *per annum*—half the Latin American average.<sup>4</sup> Jumpstarting the Cuban economy, however, will necessarily require annual growth rates of at least 5% to 7%.<sup>5</sup> Against this background, no growth strategy will succeed in Cuba in the absence of a significant and constant inflow of DFI, to the tune of \$2.0 and \$2.5 billion *per annum*.<sup>6</sup>

The recent months, moreover, have brought to bear a renewed sense of urgency. Venezuela's tragic implosion, which in turn has forced authorities in Caracas to stop delivering Havana 99,000 daily barrels of crude oil, has sent Cuba into a downward spiral.<sup>7</sup> During

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esident-raul-castro-on-re-establishing-us-cuba-relations/2014/12/17/45bc2f88-8616-11e4-b9b7-b8632ae73d25\_story.html.

<sup>4</sup> *Cuba Foreign Trade*, Chamber of Commerce of the Cuban Republic, January 2015.

<sup>5</sup> Note that the 5% to 7% growth figure was suggested at the extraordinary session of the National Assembly of People's Power where Cuba's new Foreign Investment Act was approved on March 29, 2014, available at [http://www.granma.cu/file/pdf/2014/04/16/G\\_2014041609.pdf](http://www.granma.cu/file/pdf/2014/04/16/G_2014041609.pdf). Mark P. Sullivan, *Cuba: Issues for the 114<sup>th</sup> Congress*, CONGRESSIONAL RESEARCH SERVICE (July 17, 2015), available at <https://cri.fiu.edu/us-cuba/policy/cuba-issues-for-114th-congress.pdf>.

<sup>6</sup> Carmelo Mesa-Lago, *Can Cuba's Economic Reforms Succeed?*, AMERICAS QUARTERLY, <http://www.americasquarterly.org/content/can-cubas-economic-reforms-succeed>. It is essential to note, however, that the available empirical data appears to show that there is no direct causal link between a capital importing country's success in attracting high levels of DFI and the sheer number of investment treaties it signs. An aggressive treaty-signing agenda is but one of a myriad of elements impacting a sovereign's effectiveness in importing foreign capital. For an illuminating analysis of these dynamics see Lisa E. Sachs & Karl P. Sauvart, *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS* (Oxford University Press, 2009).

<sup>7</sup> Franz Von Bergen, *Venezuela Cuts Oils Shipments to Cuba Forcing Castro to Consider Veering to U.S.*, FOX NEWS (July 27, 2016), <http://latino.foxnews.c>

the first semester of 2016, Cuba's GDP only grew by 1%—half of what the Cuban government had initially projected.<sup>8</sup> Not surprisingly, President Raúl Castro has warned the National Assembly of People's Power of tough times ahead.<sup>9</sup>

Cuba's immediate uncertainties, compounded by the rather piecemeal unfolding of its economic negotiations with the United States, places even more weight on the island's capacity to attract and maintain a seamless stream of DFI. The quantity and quality of such inflow will, no doubt, depend on the credibility and cogency of Cuba's legal superstructure.

### *B. The Roadmap*

It is precisely against this background, that this Article proposes an innovative reading of Cuba's bilateral investment treaties ("BITs"), grounded on a comparative legal analysis that brings to the fore the intense, yet often unexplored, interactions between Cuban law, public international law, and BIT arbitral jurisprudence. Part I delineates the substantive elements of Cuba's Foreign Investment Act of 2014 ("FIA"), and more generally traces the evolution of Cuba's legal superstructure since the emergence of the *empresa mixta*. Part II explores the penumbras of the dispute settlement mechanisms available in Cuban BITs. Part III provides a comprehensive analysis of the standard safeguards available to foreign investments and foreign investors operating in Cuban territory under the protection of a BIT. Part IV weighs in, both from a legal and policy perspective, on the normative lacunas and structural challenges ingrained in Cuba's investment treaty landscape.

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om/latino/news/2016/07/27/venezuela-cuts-oils-shipments-to-cuba-forcing-castros-to-consider-veer-to-us/.

<sup>8</sup> *Raúl Castro: El pueblo cubano crecerá frente a las dificultades*, YOUTUBE (July 8, 2016), <https://www.youtube.com/watch?v=jOA2vZCBVwo> (last visited Apr. 15, 2017).

<sup>9</sup> *Id.*

## II. CUBA'S FOREIGN INVESTMENT ACT OF 2014

### A. *The Geopolitical Jigsaw Puzzle*

Cuba's DFI policy has undergone significant, yet slow, change throughout the last 40 years. Driven more by sheer necessity than choice, the tortuous evolution of Cuba's approach to DFI cannot be divorced from the wider geopolitical imperatives shaping Cuban life with ferocious intensity ever since the fall of the Berlin Wall and the concomitant demise of the Soviet Union. The island's 2014 FIA is but the most recent stride, in a long continuum of discontinuous steps, aimed at inserting Cuba to the global economy. Cuba's obvious intention to articulate an autochthonous market-economy premised on the Chinese and Vietnamese hybrid models adds, then, a considerable degree of complexity to a process fraught with significant uncertainty.

### B. *An Evolving Legal Framework*

The first conspicuous attempt at easing the normative rigidity of the 1976 Constitution<sup>10</sup> came to life with the enactment in 1982 of Decree-Law No. 50,<sup>11</sup> which brought to life the Cuban *empresa*

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<sup>10</sup> Article 1 of the 1976 Constitution makes it plain clear that "Cuba is a Socialist State of workers, independent and sovereign, organized by all and for the good of all, as a unified and democratic republic, for the enjoyment of political freedom, social justice, individual and collective welfare and human solidarity." More specifically, Article 14 establishes that in Cuba "the economic system is based on the people's socialist ownership of all fundamental means of production and on the suppression of all forms of human exploitation." Article 15, for its part, forbids natural or legal persons from holding an ownership interest on land, except for small farmers. Such constitutional provision insists that the Cuban subsoil, mines, all natural resources, forests, waterways, sugar mills, factories, modes of transportation, all nationalized banks, as well as scientific, cultural and sports installations belong to the Cuban Republic and title over them cannot be transferred to natural or legal persons. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA arts. 1, 14, 15 (1976), as amended (2002) (CUBA CONST.).

<sup>11</sup> DECRETO-LEY No. 50 (Cuba 1982). Decree-Law 50 entered into full force and effect in Cuba on February 15, 1982 ("*Sobre asociación económica entre entidades cubanas y extranjeras*").

*mixta*, or “joint venture.”<sup>12</sup> The unveiling of the *empresa mixta* resulted from Cuba’s strategic calculus, at the time, to buttress its sagging export and tourism sectors.<sup>13</sup> This notwithstanding, the birth of the *empresa mixta* did not do away with the principle of non-transferability of Cuban property to foreign hands entrenched in the 1976 Constitution. At most, the Cuban partner of the *empresa mixta* could only convey proprietary rights to its foreign counterparts by means of a lease or usufruct.<sup>14</sup>

Soon thereafter, the colossal fall of the Communist bloc and the brutality of the so-called Cuban special period<sup>15</sup> led to a second wave of institutional tinkering. This time the reform was of constitutional magnitude.<sup>16</sup> It led, *inter alia*, to the incorporation in 1992 of both the *empresa mixta* and the *asociaciones económicas* into the Cuban Constitution.<sup>17</sup> Under the newly ratified Article 23,<sup>18</sup> the Cuban Republic openly recognized the proprietary rights inherent to the *empresa mixta* and the *asociaciones económicas*.<sup>19</sup>

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<sup>12</sup> Natacha Mesa Tejeda, “*Modalidades de la Inversión Extranjera: La Empresa Mixta*,” *Inversión Extranjera*, LA HABANA: INSTITUTO CUBANO DEL LIBRO 1 (2015) (Cuba).

<sup>13</sup> Emilio Marill, “*Respaldo Constitucional a las Inversiones Extranjeras*,” *REVISTA CUBANA DE DERECHO* 10, 41 (Dec. 1995) (Cuba).

<sup>14</sup> Juan Vega Vega, *Comentarios a la legislación cubana sobre asociaciones económicas con empresarios extranjeros*, *REVISTA CUBANA DE DERECHO* 5, 29-30 (Mar. 1992) (Cuba).

<sup>15</sup> Cuba’s special period occurred from 1989 until the late 1990s when Venezuela’s President Hugo Chávez agreed to supply Cuba’s fuel needs. During these years Cuba saw, for example, an alarming collapse of its import activity. In 1993 alone Cuba imported 75% less than in 1989. Alarming rates of inflation and a massive exodus of young Cubans brought economic growth to a halt.

<sup>16</sup> On October 10, 1991, the Communist Party’s IV Congress opened the door for amending the 1976 Constitution. The Party’s directive led the National Assembly of People’s Power to ratify, on July 12, 1992, the above-referenced amendments to the constitutional text. See *Elections and Events 1991-2001*, UC SAN DIEGO, <http://libraries.ucsd.edu/collections/about/collections-of-distinction/latin-american-elections-statistics/cuba/elections-and-events-19912001.html> (last visited Mar. 30).

<sup>17</sup> CUBA CONST. (amended 2002).

<sup>18</sup> CUBA CONST. art. 23. (2002) (“El Estado reconoce la propiedad de las empresas mixtas, sociedades y asociaciones económicas que se constituyen conforme a la ley.”).

<sup>19</sup> *Id.* Note that the parties entering into an *asociación económica* do not lose their independent legal personality, as is the case in the *empresa mixta* model.

Both the enactment by Cuban authorities of the 1995 Foreign Investment Act<sup>20</sup> and their unleashing of an aggressive BIT-drafting strategy, which took off in 1993 with the signing of the Cuban-Italian treaty, stand as the progeny of the 1991-92 unfinished agenda. The 2014 Foreign Investment Act,<sup>21</sup> thus, is the culmination of a long-winded evolutionary process.<sup>22</sup>

### C. Cuban Foreign Investment Law Today

Enacted close to nine months before President Obama's December 2014 speech,<sup>23</sup> Cuba's FIA is in many respects a more refined and user-friendly statute than its predecessor.

As a threshold matter, it is essential to note that the definition of "foreign investment" under Article 12 of the FIA includes both direct and indirect investments.<sup>24</sup> Thus, indirect ownership of shares in a local subsidiary constitutes a "protected investment" under the Cuban legislation. Article 13.1, for its part, identifies the three modalities of foreign investment recognized under Cuban law, namely, the joint venture (*empresa mixta*), the international economic association agreement (*contrato de asociación económica internacional*), and the totally foreign capital company (*empresa de capital totalmente extranjero*).<sup>25</sup>

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<sup>20</sup> LEY 77 (1995) (Cuba). This statute was enacted on Sept. 5, 1995.

<sup>21</sup> The 2014 Foreign Investment Act was passed by the National Assembly of People's Power on March 29, 2014, and published in a special issue of the Official Gazette of the Cuban Republic on April 16, 2014. It entered into full force and effect in Cuba on June 28, 2014. Luis M. Alcalde, *Cuba's New Foreign Investment Law*, KEGLER, BROWN, HILL & RITTER (Aug. 8, 2014), <http://www.keglerbrown.com/publications/cubas-new-foreign-investment-law/>.

<sup>22</sup> By the end of 2014, Cuba was attracting a constant stream of DFI in the following sectors: tourism and real estate (52%), energy and mining (11%), industry (10%), food (5%), transportation (5%), agro-sugar (5%), construction (4%) and others (8%). *Cuba: Portfolio of Opportunities for Foreign Investment*, LA HABANA: MINISTERIO DEL COMERCIO EXTERIOR Y LA INVERSIÓN EXTRANJERA, 12 (2015) (Cuba).

<sup>23</sup> *Statement by the President on Cuba Policy Changes*, *supra* note 2.

<sup>24</sup> LEY 118 art. 12(b) (2014) (Cuba). Article 12(b) reads as follows, "investments in equities or other securities or bonds, either public or private, which do not fall under the definition of direct investment."

<sup>25</sup> At the close of 2014, 50% of all foreign investment in Cuba was organized as a joint venture or *empresa mixta*, 45% as an international economic association

The *empresa mixta*, as suggested earlier, is a corporation controlled by foreign and domestic shareholders. The *empresa mixta* will have no legal personality until the filing of its constitutive public deed with the Cuban Business Register.<sup>26</sup> The FIA also requires the public deed include the corporation's bylaws and copy of the government's authorization to proceed with the given project.<sup>27</sup>

Contrary to the 1995 legislation, the FIA does extend the radius of action of the *contrato de asociación económica internacional* to new economic sectors such as hotel administration and professional services.<sup>28</sup> The *empresa de capital totalmente extranjero*, while also required to file a public deed with the Cuban Business Register, has no local partners.<sup>29</sup>

The FIA explicitly guarantees that the benefits granted to foreign investors and their investments in Cuba shall remain unchanged for the duration of the period for which they were conceded.<sup>30</sup> The FIA explicitly authorizes the totally foreign capital company to establish offices, branches, and subsidiaries both on Cuban soil and abroad.<sup>31</sup>

Similar to the substantive safeguards available in BIT's, the FIA also guarantees the protection and security of the foreign investment.<sup>32</sup> Likewise, the FIA extends foreign investments on Cuban soil protection against wrongful expropriations,<sup>33</sup> while safeguarding the free transfer of the dividends or profits derived from them.<sup>34</sup> The free transfer protection is further strengthened by the FIA's banking and tax provisions. On the one hand, Article 25.1 establishes that foreign investors shall be entitled to open bank accounts

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agreement and 5% as a totally foreign capital company. *Cuba: Portfolio of Opportunities for Foreign Investment*, *supra* note 22, at 12.

<sup>26</sup> LEY 118 art. 14.1(6) (2014) (Cuba).

<sup>27</sup> *Id.* at art. 14.1(4).

<sup>28</sup> *Cuba Foreign Trade*, *supra* note 4, at 10.

<sup>29</sup> LEY 118 art. 16.1(2) (Cuba).

<sup>30</sup> *Id.* at art. 3.

<sup>31</sup> *Id.* at art.1.1(3).

<sup>32</sup> *Id.* at art. 4.1.

<sup>33</sup> *Id.*

<sup>34</sup> LEY 118 art. 9.1 (Cuba).

in any banking institution belonging to Cuba's National Bank System.<sup>35</sup> On the other, Article 35 exempts the foreign investor from personal tax liability for profits or dividends.<sup>36</sup>

In Cuba all foreign investment projects require governmental authorization. Admittedly, this amounts to a highly centralized state-driven process conducted at the highest echelons of the Cuban Republic. Depending on the nature of the project and the economic sector involved, the foreign investor will be required to seek authorization either from the Council of State<sup>37</sup> or the Council of Ministers.<sup>38</sup>

Council of State approval is required for all foreign investment projects intending to explore or exploit non-renewable natural resources; run the most essential public services in the transportation, communications, water or power sectors; construct public works; and/or exploit a public good.<sup>39</sup>

Council of Ministers authorization, furthermore, is required whenever the foreign investment project touches upon a real estate development; the transfer of state proprietary rights; a risk agreement for the exploitation of non-renewable natural resources; the participation of a foreign company partly financed by state funds;

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<sup>35</sup> *Id.* at art. 25.1.

<sup>36</sup> *Id.* at art. 35.

<sup>37</sup> Note that the 1976 Constitution redesigned Cuba's governmental architecture, ratifying the island's definitive abandonment of the traditional republican form of government. A National Assembly of People's Power (*Asamblea Nacional del Poder Popular*) was now erected as the "supreme organ" of the Cuban Republic. Elected to 5-year terms, the deputies of the National Assembly of People's Power select from among their peers the members of the Council of State. The 1976 Constitution designates the president of the Council of State as head of state of the Republic and commander-in-chief of the armed forces. The Council of State has authority to, *inter alia*, enact decree-laws; render legally binding opinions on all applicable laws; declare war in case of aggression; ratify and denounce international treaties; and designate and remove ambassadors. CUBA CONST. arts. 69, 72 (2002).

<sup>38</sup> The membership of the Council of Ministers is chosen by the President of the Council of State, who sits as its President. Among the Council of Ministers' attributions are the following: conduct the foreign relations and the foreign trade of the Republic; sign international treaties; prepare the budget; and regulate the Republic's monetary policy. *Id.* at art. 98.

<sup>39</sup> LEY 118 art. 21.1(2) (a-b) (Cuba).

the use of renewable energy; the management of healthcare, education and defense institutions; and all other foreign investments not requiring Council of State approval.<sup>40</sup>

Of significance is the fact that the dispute settlement mechanism included in the FIA is considerably narrow in scope. Article 60.1 establishes that,

[t]he conflicts which may arise in the relationship between the partners of a joint venture or between national and foreign investors, which are parties to international economic association agreements, or between partners of a totally foreign capital company in the form of a corporation with registered shares, shall be resolved as agreed in the constituent documents, *except in the cases referred to in this Chapter*.<sup>41</sup>

Excepted from arbitration under the FIA are those disputes arising in connection to the winding up, dissolution, termination and inactivity of the governing bodies of a joint venture, an international economic association, or a totally foreign capital company.<sup>42</sup> The Economic Division of the corresponding Cuban Provincial Court has exclusive jurisdiction over these conflicts.<sup>43</sup> Similarly, disputes arising in the relationship between the partners of a joint venture, a totally foreign capital company, or an international economic association agreement with authorization to develop an investment project related to natural resources, public services, and/or public works, also fall under the exclusive jurisdiction of the Economic Division of the relevant Provincial Court.<sup>44</sup> Moreover, litigation over the parties' performance of their respective obligations under the joint venture, the totally foreign capital company, or the international economic association agreement can proceed either before the Economic Division of the corresponding Cuban Provincial Court or

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<sup>40</sup> *Id.* at art. 21.1(3) (a-h).

<sup>41</sup> *Id.* at art. 60.1 (emphasis added).

<sup>42</sup> *Id.* at art. 60.1(3).

<sup>43</sup> *Id.* at art. 60.1(3).

<sup>44</sup> LEY 118 art. 60.1(4).

before an arbitral tribunal constituted in accordance with Cuban domestic law.<sup>45</sup>

Contrary to, for instance, the Albanian or Salvadorian foreign investment statutes,<sup>46</sup> both of which openly offer consent to investment treaty arbitration, Cuba's FIA does not bestow on the foreign investor standing to elevate an international arbitral claim against the Cuban Republic.<sup>47</sup> Cuba's consent to investment treaty arbitration, as shall be seen below, is to be found in its vast corpus of bilateral investment treaties.

### III. SETTLING INVESTMENT TREATY DISPUTES WITH THE CUBAN REPUBLIC

#### A. Consent to Investment Treaty Arbitration

In the context of investment treaty arbitration, no other threshold question is as essential as the sovereign's consent to appear before the arbitral tribunal. More often than not, sovereigns offer their consent to arbitration by any of the following three channels: domestic legislation, specific contractual arrangements with foreign investors, or through bilateral or multilateral investment treaties with the foreign investors' country of origin.<sup>48</sup> While Chapter XVII (*Conflict*

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<sup>45</sup> *Id.* at art. 61.

<sup>46</sup> Law No. 7764 art. 8 (1993) (Alb.); LEY DE INVERSIONES, art. 15 (1999) (El Sal.). For a rendition on the breadth of the Albanian and Salvadorean foreign investment statutes refer to *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 173-4 (Dec. 24, 1996); and *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, 331-32 (Aug. 2, 2006), respectively.

<sup>47</sup> See Narciso Cobo Roura, *Conflictos e Inversión Extranjera: Un Comentario*, *INVERSIÓN EXTRANJERA LA HABANA: INSTITUTO CUBANO DEL LIBRO*, 155 (2015) (Cuba).

<sup>48</sup> See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* 2d edition, 254-64 (Oxford University Press 2012) (for a general discussion of the various procedural modalities for tendering consent); *Menzies Middle East and Africa S.A. et. al. v. République du Sénégal*, ICSID Case No. ARB 15/21, Award, ¶ 130 (Aug. 5, 2016) (“*un Etat souverain ne peut pas être assujetti à une juridiction internationale sans son consentement clairement exprimé et non-équivoque.*”); *M.C.I. Power Group L.C. and New Turbine, INC. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, ¶ 323 (July 31, 2007) (“Under general international law, any obligation to submit for arbitration a dispute involving a State requires the existence of an agreement. That agreement,

*Resolution*) of Cuba's FIA does contain a dispute settlement mechanism, it does not grant foreign investors *carte blanche* to sue Cuba before international tribunals.<sup>49</sup> Cuba's consent to investment treaty arbitration,<sup>50</sup> however, is found in the multitude of BITs it has entered into since 1993. The catalogue of Cuban BITs is incredibly diverse. So far, Cuba has signed investment treaties with, *inter alia*, Algeria, Argentina, Austria, Barbados, Belarus, Belize, Belgium-Luxembourg, Bolivia, Brazil, Bulgaria, Cambodia, Cape Verde, Chile, China, Colombia, Croatia, Denmark, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Guatemala,

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which may be verbal, must be proven by the party alleging it.”). Of relevance is the fact that there appears to be a discrepancy among arbitral tribunals on whether to apply the heightened “clear and unambiguous” standard or the more liberal yardstick of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (ratified by Cuba on Sept. 9, 1998) in determining the existence of an arbitration agreement. See *Quasar de Valores SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, ¶ 7 (Mar. 20 2009) (for an overview of this debate), Vienna Convention on the Law of Treaties art. 31-32, ratified by Cuba on Sept. 9, 1998, 1155 U.N.T.S. 33. Also see *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 198 (Feb. 8, 2005).

<sup>49</sup> LEY 118 Chapter XVII (Cuba).

<sup>50</sup> Cuba's legal culture is no stranger to arbitration. The 1855 Spanish Law of Civil Procedure, extended to Cuba in 1866, drew a distinction between judges and arbitrators and did enable the parties to choose arbitration as their dispute settlement mechanism. See *Ley de Enjuiciamiento Civil de España, islas de Cuba y Puerto Rico*, Madrid: Librería de la Viuda e Hijos de D.J. Cuesta, 398-412 (1867). It is essential to note, moreover, that the Spanish legislation applicable to Cuba during the colonial period was heavily influenced, *inter alia*, by the *Siete Partidas*, which as early as the 13<sup>th</sup> century did provide for the appointment of arbitrators and *comunales amigos* to resolve disputes within the terms of reference agreed by the parties. See 3d Partida art. I (*Que habla de la justicia, de cómo se ha de hacer ordenadamente en todo lugar, por palabra de juicio y por obra de hecho*). See Madaline W. Nichols, *Las Siete Partidas*, 20 CAL. L. REV. 260, 273-6 (1932) (for a relevant reading of the 3<sup>rd</sup> Partida). See DECRETO-LEY 250 (Cuba) (which established the Cuban Court of International Commercial Arbitration, the successor to the old Cuban Arbitration Court for Foreign Trade, or *Corte Cubana de Arbitraje de Comercio Exterior*, created under Law No. 1148 of September 15, 1965 as an organ of the Cuban Chamber of Commerce). See also RESOLUTION No. 15 (Cuba). Of significance is the fact that Cuba ratified the Geneva Convention on International Commercial Arbitration as early as January 7, 1964 and similarly acceded to the New York Convention on December 30, 1974 --- which entered into full force and effect on Cuban soil on March 30, 1975. European Convention on International Commercial Arbitration (Apr. 21, 1961)

Guyana, Honduras, Hungary, Indonesia, Italy, Jamaica, Laos, Lebanon, Malaysia, Mexico, Mongolia, Mozambique, Namibia, the Netherlands, Panama, Paraguay, Peru, Portugal, Qatar, Romania, Russia, San Marino, Slovakia, South Africa, Spain, Suriname, Switzerland, Trinidad and Tobago, Turkey, Uganda, Ukraine, United Kingdom, Venezuela, Vietnam, Zambia, and Angola.<sup>51</sup> With 62 BITs in full force and effect around the world,<sup>52</sup> and in light of the ever increasing volumes of DFI reaching its shores, time is of the essence for scrutinizing the legal depth and breadth of Cuba's investment treaties.

While dissimilar in linguistic structure and choice of words, the consent language included in the various Cuban treaties offers the foreign investor doing business in Cuba the possibility of elevating to the international plane his or her legal claim against the Cuban Republic. Binding and unequivocal, Cuban consent is not premised on the foreign investor's arbitrary fulfillment of conditions precedent.<sup>53</sup> Article 9(4) of the Cuba-Netherlands BIT, for instance, openly provides that "[e]ach Contracting Party hereby consents to submit investment disputes for resolution to the alternative dispute settlement fora mentioned in the preceding paragraphs."<sup>54</sup> Similarly, Article 10(2) of the Cuba-Greece BIT explicitly suggests that "[e]ach Contracting Party hereby consents to the submission of such

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<sup>51</sup> *Investment Policy Hub*, UNITED NATIONS UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/52> (last visited Mar. 30).

<sup>52</sup> According to Professor Juan Mendoza Díaz, Cuba has entered into 63 BITs, of which 62 are in force today. Only the treaty with Ecuador is no longer in effect, due to the Ecuadorian government's 2008 denunciation. Unsurprisingly, a sizeable proportion of Cuban BITs came to life during the so-called special period, following the decisive demise of the communist bloc. See Juan Mendoza Díaz, *Cuba y el Arbitraje de Inversión, Un Tema Insoslayable*, *INVERSIÓN EXTRANJERA LA HABANA: INSTITUTO CUBANO DEL LIBRO*, 167-8 (2015). See also Mendoza Díaz, *Arbitraje de Inversión: Una mirada desde Cuba*, *REVISTA CUBANA DE DERECHO* 39, 14-15 (2012).

<sup>53</sup> See generally LEY 18 (Cuba).

<sup>54</sup> Under the Cuba-Netherlands BIT, the available arbitral fora are the ICC Court of International Arbitration and an *ad hoc* arbitral tribunal under the procedural rules of the United Nations Commission on International Trade Law (UNCITRAL). Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Cuba, Cuba-Neth., art. 9(4), Nov. 2, 1999 [hereinafter Cuba-Netherlands BIT].

dispute to international arbitration.”<sup>55</sup> On equal terms, Article 9(3) of Cuba’s treaty with Romania establishes that “[e]ach Contracting Party hereby consents to the submission of an investment dispute to international conciliation or arbitration.”<sup>56</sup> Even more forcefully, Article 12(1) of the Cuba-Austria BIT states in no uncertain terms that “[e]ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration....”<sup>57</sup> Article 8(2) of the Cuban-Chilean treaty incorporates the Cuban-Austrian approach, suggesting that “*cada Parte Contratante da su consentimiento anticipado e irrevocable para que toda diferencia pueda ser sometida a este arbitraje.*”<sup>58</sup> This notwithstanding, the immense majority of Cuban BITs offer consent to arbitration by means of more succinct phrases, such as the ‘foreign investor “shall be entitled,”<sup>59</sup> “may submit,”<sup>60</sup> “*podrá remitir,*”<sup>61</sup>

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<sup>55</sup> Agreement between the Government of the Hellenic Republic (of Greece) and the Government of the Republic of Cuba on the Promotion and Reciprocal Protection of Investments, Cuba-Greece, art. 10(2), June 18, 1996 [hereinafter Cuba-Greece BIT].

<sup>56</sup> Agreement between the Government of Romania and the Government of the Republic of Cuba on the Promotion and Reciprocal Protection of Investments, Cuba-Rom., art. 9(3), Jan. 27, 1996 [hereinafter Cuba-Romania BIT].

<sup>57</sup> Agreement between the Republic of Austria and the Republic of Cuba for the Promotion and Protection of Investments, Cuba-Austria, art. 12(1), May 19, 2000 [hereinafter Cuba-Austria BIT].

<sup>58</sup> Agreement between the Republic of Chile and the Republic of Cuba for the Promotion and Reciprocal Protection of Investments, Cuba-Chile, art. 8(2), Jan. 10, 1996 [hereinafter Cuba-Chile BIT]. Roughly translates to “[e]ach Contracting Party gives its irrevocable advance consent for any dispute to be submitted to this arbitration.”

<sup>59</sup> See art. 8(2) of the Agreement between the Republic of Hungary and the Republic of Cuba for the Promotion and Reciprocal Protection of Investments, Cuba-Hung., Oct. 22, 1999 [hereinafter Cuba-Hungary BIT]; art. 8(2) of the Agreement between the Government of the Slovak Republic and the Government of the Republic of Cuba for the Promotion and Reciprocal Protection of Investments, Cuba-Slovk., Mar. 22, 1997 [hereinafter Cuba-Slovakia BIT].

<sup>60</sup> Agreement Between The Lebanese Republic and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments, Leb-Cuba. art. 7(2), Dec. 14, 1995, I.C.S.I.D. [hereinafter Cuba-Lebanon BIT].

<sup>61</sup> Agreement Between The Republic of Guatemala and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments, Guat.-Cuba., art. VIII(2), Aug. 20, 1999, I.C.S.I.D. [hereinafter Cuba-Guatemala BIT]; See also Agreement Between The Republic of Bolivia and the Republic of Cuba On The

“*podrá someter*,”<sup>62</sup> “*podrá submeter*”<sup>63</sup> the dispute to investment treaty arbitration.’ Other grammatical constructions include the use of phrases such as, the dispute “shall be submitted,”<sup>64</sup> “can be submitted,”<sup>65</sup> “*será sometida*,”<sup>66</sup> “*podrá ser sometida*,”<sup>67</sup> *il est soumis . . . à l’arbitrage*,”<sup>68</sup> “*être soumis à l’arbitrage international*,”<sup>69</sup>

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Promotion and Reciprocal Protection Of Investments, Bol.-Cuba., art. VIII(2), May. 6, 1995, I.C.S.I.D. [hereinafter Cuba-Bolivia BIT].

<sup>62</sup> Agreement Between The Republic of Mexico and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments, Mex.-Cuba., art. 4(1), May. 30, 2001, I.C.S.I.D. [hereinafter Cuba-Mexico BIT].

<sup>63</sup> Agreement Between The Republic of Portugal And the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments, Port.-Cuba., art. 9(2), Jul. 8, 1998, I.C.S.I.D. [hereinafter Cuba-Portugal BIT].

<sup>64</sup> Agreement Between The Republic of Indonesia and the Republic of Cuba On The Promotion And Reciprocal Protection Of Investments, Indon.-Cuba., art. VIII(2), Sept. 19, 1992, I.C.S.I.D. [hereinafter Cuba-Indonesia BIT]; Republic of Spain and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments, Spain-Cuba., art. XI(2), May. 27, 1994, I.C.S.I.D. [hereinafter Cuba-Spain BIT]; Socialist Republic of Vietnam and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments, Viet.-Cuba., art. 8(2), Oct. 12, 1995, I.C.S.I.D. [hereinafter Cuba-Vietnam BIT]; The United Kingdom of Great Britain and Northern Ireland and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments Gr. Brit.-Cuba., art. 8(1), Jan. 30, 1995, I.C.S.I.D. [hereinafter Cuba-United Kingdom BIT]; Barbados and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments Gr. Brit.-Cuba., art. 8(1), Feb. 19, 1996, I.C.S.I.D. [hereinafter Cuba-Barbados BIT].

<sup>65</sup> Republic of Turkey and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments Turk.-Cuba., art. VI(2), Dec. 22, 1997, I.C.S.I.D. [hereinafter Cuba-Turkey BIT].

<sup>66</sup> Republic of Venezuela and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments Venez.-Cuba., art. 9(1), Dec. 11, 1996, I.C.S.I.D. [hereinafter Cuba-Venezuela BIT].

<sup>67</sup> Republic of Argentina and the Republic of Cuba On The Promotion And Reciprocal Protection Of Investments Arg.-Cuba., art. 9(2), Nov. 30, 1995, I.C.S.I.D. [hereinafter Cuba-Argentina BIT].

<sup>68</sup> French Republic and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments Fr.-Cuba., art. 10, Apr. 25, 1997, I.C.S.I.D. [hereinafter Cuba-France BIT].

<sup>69</sup> Swiss Confederation and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments Switz.-Cuba., art. 10(1), June 28, 1996, I.C.S.I.D. [hereinafter Cuba-Switzerland BIT].

“*essa potrà essere sottoposta a scelta dell’investitore,*”<sup>70</sup> among others.

### *B. Amicable Settlement and Notice of Claim*

Besides proving Cuba’s consent to international arbitration, the foreign investor raising a BIT claim against Cuba will also have to adhere to the various and dissimilar procedural requirements found in most Cuban investment treaties.

First and foremost, Cuba’s BITs, almost invariably, require that the foreign investor and the Cuban Republic attempt to amicably settle their dispute before resorting to domestic litigation or investment treaty arbitration.<sup>71</sup> Article 10(1) of the Cuba-Greece BIT mandates that “[d]isputes . . . shall, if possible, be settled by the disputing parties in an *amicable way*.”<sup>72</sup> Article 9(1) of the treaty with the Netherlands also directs that “[d]isputes . . . shall, whenever possible, be settled *amicably* between the parties concerned.”<sup>73</sup> Likewise, the treaties with the United Kingdom and Barbados explicitly command that only disputes “which have not been *amicably settled*”<sup>74</sup> shall be submitted to arbitration. The Cuba-Italy BIT reproduces the

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<sup>70</sup> Republic of Italy and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments It.-Cuba., art. 10(2), May. 7, 1993, I.C.S.I.D. [hereinafter Cuba-Italy BIT].

<sup>71</sup> There appears to be a consensus among international arbitral tribunals suggesting that the requirement of friendly consultations is procedural, as opposed to jurisdictional, in nature. See, for instance, *République D’Italie v. République de Cuba*, Arbitrage Ad’Hoc, Sentence Preliminaire, 15 mars, 2005, ¶ 75 (“[L]e Tribunal Arbitral estime que le non-respect par la République d’Italie de la lettre de l’Article 10(2) de l’Accord ne justifie pas que sa demande d’arbitrage soit déclarée irrecevable [ . . . ]”). Also see *Teinver S.A. et. al. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012, ¶ 108 (“The Tribunal agrees with Claimants that Article X(1) [of the Argentina-Spain BIT] can fairly be interpreted as a general ‘best efforts’ obligation for the parties to attempt to amicably settle their dispute.”) Note, moreover, that Cuba’s participation in friendly consultations with a foreign investor would not preclude it from objecting to the arbitral tribunal’s jurisdiction once the arbitration proceeding is instituted. See, e.g., *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award, August 21, 2007, ¶ 200.

<sup>72</sup> Cuba-Greece BIT, *supra* note 55, at art. 10(1).

<sup>73</sup> Cuba-Netherlands BIT, *supra* note 54, at art. 9(1).

<sup>74</sup> See Cuba-United Kingdom BIT, *supra* note 64, at art. 8(1); see also Barbados-Cuba BIT, *supra* note 64 at art. 8(1).

same principle, “[l]e controversie . . . dovranno, per quanto possibile, essere risolte amichevolmente fra le parti in causa.”<sup>75</sup>

Most Cuban BITs set specific timetables for the unfolding of the friendly consultations.<sup>76</sup> Under the overwhelming majority of these treaties, the consultation window remains open for six months from the date the foreign investor notifies the Cuban authorities of his or her claim,<sup>77</sup> although shorter periods of three months are not uncommon.<sup>78</sup> The absence of a negotiated settlement, at the end of the consultation period, triggers the treaty’s dispute settlement mechanism.

The Cuban treaties are far from homogenous with respect to the tendering of proper notice.<sup>79</sup> While some require the foreign investor

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<sup>75</sup> See Cuba-Italy BIT, *supra* note 70, at art. 9(1). Roughly translates to “[t]he dispute . . . shall, as far as possible, be settled amicably between the parties.”

<sup>76</sup> There is a long line of arbitral authority supporting the proposition that failure to comply with the friendly consultations requirement does not lead to a finding of lack of jurisdiction. See, for instance, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, September 2, 2009, ¶ 156 (“[ . . . ] even if Claimant failed to comply with the three-month period, it does not affect the Tribunal’s jurisdiction or the admissibility of the claims brought by Claimant.”) Also see to *Lauder v. The Czech Republic*, *Ad Hoc* Arbitration, Final Award, September 3, 2001, ¶ 187 (“[ . . . ] this requirement of a six-month waiting period . . . is not a jurisdictional provision . . . but a procedural rule that must be satisfied by the Claimant.”) There exists, however, arbitral authority to the contrary. See *e.g.*, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, ¶ 88 (“[ . . . ] the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement [ . . . ]. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.”)

<sup>77</sup> See Cuba-France BIT, *supra* note 68, at art. 10; Cuba-Romania BIT, *supra* note 56, at art. 9(2); Cuba-Lebanon BIT, *supra* note 60, at art. 7(2); Cuba-Bolivia BIT, *supra* note 61, at art. IX(2); Cuba-Hungary BIT, *supra* note 59, at art. 8(2); Cuba-Portugal BIT, *supra* note 63, at art. 9(2); Cuba-Germany BIT art. 11(2); Cuba-Indonesia BIT, *supra* note 64, at art. VIII(2); Cuba-Spain BIT, *supra* note 64, at art. XI(2); Cuba-Peru BIT art. 8(2); Cuba-Turkey BIT, *supra* note 65, at art. VI(2); Cuba-Argentina BIT, *supra* note 67, at art. 9(2); Cuba-Greece BIT, *supra* note 55, at art. 10(2); Cuba-Slovakia BIT art. 8(2).

<sup>78</sup> See Cuba-Switzerland BIT, *supra* note 69, at art. 10(1); Cuba-Barbados BIT, *supra* note 64, at art. 8(1); Cuba-United Kingdom BIT, *supra* note 64, at art. 8(1); Cuba-Guatemala BIT, *supra* note 61, at art. VIII(2); Cuba-Chile BIT, *supra* note 58, at art. 8(2).

<sup>79</sup> Note that a considerable number of international arbitral tribunals have found that absence of proper notice “does not, in and of itself, affect the Tribunal’s

submits the Cuban authorities a written notification,<sup>80</sup> along with a detailed report of grievances,<sup>81</sup> others remain silent as to the execution of specific formalities.<sup>82</sup>

### C. *Selecting the Proper Forum*

The uneventful expiration of the period of amicable consultations grants the foreign investor standing to formally submit the dispute to the relevant adjudicatory body. The typical Cuban BIT allows the foreign investor to select the legal forum where to litigate the claim, from among the following three choices: namely the competent Cuban domestic court,<sup>83</sup> the Court of International Arbitration of the International Chamber of Commerce in Paris (“ICC”), and an international *ad hoc* arbitral tribunal under the procedural rules of the United Nations Commission on International Trade Law (“UNCITRAL”).<sup>84</sup> The dispute settlement menu of Cuba’s BITs,

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jurisdiction.” See *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order, March 16, 2006, ¶ 7.

<sup>80</sup> See Cuba’s BIT’s *inter alia* Cuba-United Kingdom BIT, *supra* note 64, at art. 8(1); Cuba-Barbados BIT, *supra* note 64, at art. 8(1); Cuba-Italy BIT, *supra* note 70, at art. 9(2); Cuba-Vietnam BIT art. 8(2); Cuba-Lebanon BIT, *supra* note 60, at art. 7(2); Cuba-Mexico BIT, *supra* note 62, at art. 4(1); Cuba-Indonesia BIT, *supra* note 64, at art. VIII(2).

<sup>81</sup> Cuba-Turkey BIT, *supra* note 65, at art. VI(1) (“shall be notified in writing, including a [sic.] detailed information”); Cuba-Spain BIT, *supra* note 64, at art. XI(1) (“shall be communicated in writing, together with a detailed report by the investor to the Contracting Party in whose territory the investment was made.”).

<sup>82</sup> See Cuba’s BIT’s with, *inter alia*, Cuba-Venezuela BIT, *supra* note 66, at art. 9(1); Cuba-Austria BIT, *supra* note 57, at art. 11(1); Cuba-Chile BIT, *supra* note 58, at art. 8(1); Cuba-Guatemala BIT, *supra* note 61, at art. VIII(2); Cuba-Romania BIT, *supra* note 56, at art. 9(1); Cuba-Bolivia BIT, *supra* note 61, at art. IX(1); Cuba-Hungary BIT, *supra* note 59, at art. 8(2); Cuba-Portugal BIT, *supra* note 63, at art. 9(2); Cuba-Germany BIT, *supra* note 77, at art. 11(2); Cuba-Peru BIT art. 8(2); Cuba-Greece BIT, *supra* note 55, at art. 10(2); Cuba-Argentina BIT, *supra* note 67, at art. 9(2); Cuba-Slovakia BIT, *supra* note 59, art. 8(2); Cuba-Netherlands BIT, *supra* note 54, at art. 9(2).

<sup>83</sup> *Arbitration and Mediation: Impartial Forums to Resolve International Commercial Disputes in Cuba*, Assoc. Study Cuban Econ., available at [http://www.ascecuba.org/asce\\_proceedings/arbitration-mediation-impartial-forums-resolve-international-commercial-disputes-cuba/](http://www.ascecuba.org/asce_proceedings/arbitration-mediation-impartial-forums-resolve-international-commercial-disputes-cuba/), (Nov. 30, 2010) (last visited Feb. 22, 2017).

<sup>84</sup> See *e.g.*, Cuba-Netherlands BIT, *supra* note 54, at art. 9(2); Cuba-Guatemala BIT, *supra* note 61, at art. VIII(2); Cuba-Greece BIT, *supra* note 55, at art.

however, is not homogenous. Under Article 10 of the Cuba-France BIT, for instance, the only forum available to the foreign investor is an *ad hoc* UNCITRAL tribunal.<sup>85</sup> Likewise, Article 11 of the Cuba-Germany BIT makes it clear that the only option available to the aggrieved foreign investor is an *ad hoc* arbitral tribunal under the procedural rules of its own choosing.<sup>86</sup> Somewhat similarly, the Cuban-Italian treaty also offers the foreign investor the possibility of submitting the dispute to an *ad hoc* arbitral tribunal,<sup>87</sup> but differently from Cuba's agreement with Germany, it does leave the door open to domestic litigation before Cuban courts.<sup>88</sup>

Cuba's treaties with Argentina, Venezuela, Bolivia, and Peru, like their German and Italian counterparts, leave the foreign investor free to choose between a Cuban domestic court and an international arbitral tribunal, with the caveat that the former ones explicitly designate the UNCITRAL arbitration rules as the *lex arbitri*.<sup>89</sup> Interestingly, the Cuban-Lebanese and the Cuban-Romanian treaties, while also showing a distinct preference for the UNCITRAL arbitration rules, adopt a more deferential approach to the autonomy of the parties; designating them as *lex arbitri* "unless otherwise agreed upon by the parties to the dispute."<sup>90</sup> The treaty with Chile takes this approach a step further, leaving it entirely to the parties to choose be-

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10(2); Cuba-Portugal BIT, *supra* note 63, at art. 9(2); Cuba-Austria BIT, *supra* note 57, at art. 11(1); Cuba-Spain BIT, *supra* note 64, at art. XI(2); Cuba-Indonesia BIT, *supra* note 64, at art. VIII(2).

<sup>85</sup> Cuba-France BIT, *supra* note 68, at art. 10. ("*l'arbitrage d'un tribunal ad hoc établi conformément au règlement d'arbitrage de la Commission des Nations Unies pour le droit commercial international (CNUDCI)*").

<sup>86</sup> See also, Cuba-Germany BIT, *supra* note 77, at art. 10(5). ("*Im übrigen regelt das Schiedsgericht sein Verfahren selbst.*")

<sup>87</sup> Cuba-Italy BIT, *supra* note 70, at art. 10(5). ("*Il Tribunale Arbitrale stabilirà le proprie modalità di procedura.*").

<sup>88</sup> *Id.* at art 9(2)(a). ("*A tribunale competente, nei suoi, successivi gradi, della Parte Contraente sul cui territorio è sorta la controversia.*").

<sup>89</sup> Cuba-Argentina BIT, *supra* note 67, at art. 9(3); Cuba-Venezuela BIT, *supra* note 66, at art. 9(3); Cuba-Bolivia BIT, *supra* note 61, at art. IX(2)(b); Cuba-Peru BIT, *supra* note 77, at art. 8(2)(b); Cuba-Vietnam BIT, *supra* note 64, at art. 8(2)(b).

<sup>90</sup> Cuba-Lebanon BIT, *supra* note 60, at art. 7(2)(b); Cuba-Romania BIT, *supra* note 56, at art. 9(2)(b).

tween an international arbitral tribunal, under the UNCITRAL arbitration rules, and a completely *ad hoc* arbitral tribunal with authority to adopt the *lex arbitri* of its choice.<sup>91</sup>

The ICC remains, however, the preferred arbitral forum for most foreign investors operating in Cuba;<sup>92</sup> not surprisingly, a considerable number of Cuban BITs do provide for ICC arbitration.<sup>93</sup>

Of seminal significance, moreover, is the fact that despite its long-standing antipathy to the World Bank, and its organs, Cuba's BITs with Mexico<sup>94</sup> and Switzerland<sup>95</sup> do leave the door wide open, pending the agreement of the parties, to the use of the Additional Facility Rules ("Additional Facility Rules") adopted by the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID").<sup>96</sup> Equally importantly, in its treaties with Austria,<sup>97</sup> Germany,<sup>98</sup> Portugal,<sup>99</sup>

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<sup>91</sup> Cuba-Chile BIT, *supra* note 58, at art. 8(2)(b)(c).

<sup>92</sup> Professor Mendoza Díaz suggests that the immense majority of Cuban investor state arbitrations have been submitted to the ICC. Mendoza Díaz, *Cuba y el Arbitraje de Inversión, Un Tema Insoslayable, INVERSIÓN EXTRANJERA LA HABANA: INSTITUTO CUBANO DEL LIBRO*, 169 (2015). Also refer to Mendoza Díaz, *Arbitraje de Inversión: Una mirada desde Cuba*, REVISTA CUBANA DE DERECHO 39, 16 (2012) (Cuba).

<sup>93</sup> See Cuba-Greece BIT, *supra* note 55, at art. 10(3)(a); Cuba-Netherlands BIT, *supra* note 54, at art. 9(2)(b); Cuba-Spain BIT, *supra* note 64, at art. XI(2); Cuba-Indonesia BIT, *supra* note 64, at art. VIII(3)(i); Cuba-Hungary BIT, *supra* note 59, at art. 8(2)(a); Cuba-Guatemala BIT, *supra* note 61, at art. VIII(2)(c); Cuba-Mexico BIT, *supra* note 62, at Appendix art. 4(1)(c); Cuba-Turkey BIT, *supra* note 65, at art. VI(2)(b); Cuba-Switzerland BIT, *supra* note 69, at art. 10(2)(b); Cuba-Portugal BIT, *supra* note 63, at art. 9(2)(b); Cuba-United Kingdom BIT, *supra* note 64, at art. 8(2)(a); Cuba-Barbados BIT, *supra* note 64, at art. 8(2)(a); Cuba-Austria BIT, *supra* note 57, at art. 11(1)(c)(ii).

<sup>94</sup> Cuba-Mexico BIT, *supra* note 62, App. art. 4(1)(d).

<sup>95</sup> Cuba-Switzerland BIT, *supra* note 69, at art. 10(2)(a). *Mécanisme supplémentaire pour l'administration de procédures de conciliation, d'arbitrage et de constatation des faits*.

<sup>96</sup> The Additional Facility Rules, adopted in 1978 by ICSID's Administrative Council, see RUDOLF DOLZER, CHRISTOPH SCHREUER, *Principles of International Investment Law* 240 (Oxford: Oxford University Press, 2d ed. 2012). see also CHRISTOPH SCHREUER (ed.), *The ICSID Convention: A Commentary* 147-48 (Cambridge: Cambridge University Press, 2d ed. 2009).

<sup>97</sup> See Ad art. 11, Protocol incorporated to Cuba-Austria BIT.

<sup>98</sup> See Ad art. 11, Protocol incorporated to Cuba-Germany BIT.

<sup>99</sup> See Ad art. 9(2), Protocol incorporated to Cuba-Portugal BIT.

France,<sup>100</sup> the Netherlands,<sup>101</sup> Hungary,<sup>102</sup> Turkey,<sup>103</sup> Guatemala,<sup>104</sup> Venezuela,<sup>105</sup> and Peru,<sup>106</sup> Cuba has agreed to the incorporation of binding protocols enabling foreign investors to submit to ICSID their investment treaty claims against the Cuban Republic, provided Cuba were to, in future, become a contracting party to the ICSID Convention.<sup>107</sup>

On the question of the foreign investor's autonomy to select the arbitral forum, Cuba's treaties with the United Kingdom and Switzerland present a rather unusual challenge in requiring the parties to agree to a forum on the basis of consensus.<sup>108</sup> Only if no agreement is reached,<sup>109</sup> within a period of three months following notification of the claim, can the foreign investor submit the dispute to an *ad hoc* international arbitral tribunal under the arbitration rules of the UNCITRAL.<sup>110</sup>

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<sup>100</sup> See Ad art. 10, Protocol incorporated to Cuba-France BIT.

<sup>101</sup> See Ad art. 9, Protocol incorporated to Cuba-Netherlands BIT.

<sup>102</sup> See Ad art. 8(2), Protocol incorporated to Cuba-Hungary BIT.

<sup>103</sup> See Ad art. VI, Protocol incorporated to Cuba-Turkey BIT.

<sup>104</sup> See Ad art. VIII(2), Protocol incorporated to Cuba-Guatemala BIT.

<sup>105</sup> See Ad art. 9, Protocol incorporated to Cuba-Venezuela BIT.

<sup>106</sup> See Ad art. 8(2)(b), Protocol incorporated to Cuba-Peru BIT.

<sup>107</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (the "ICSID Convention"). Note that Cuba has not signed the ICSID Convention. Refer to Professor Mendoza's observations in Juan Mendoza Díaz, *Cuba y el Arbitraje de Inversión, Un Tema Insoslayable*, *INVERSIÓN EXTRANJERA LA HABANA: INSTITUTO CUBANO DEL LIBRO*, 168 (2015). Also refer to Juan Mendoza Díaz, *Arbitraje de Inversión: Una mirada desde Cuba*, *REVISTA CUBANA DE DERECHO* 39, 15 (2012). Similarly, Cuba is not a signatory of the Inter-American Convention on International Commercial Arbitration signed in Panama on January 30, 1975 under the aegis of the Organization of American States (commonly referred to as the Panama Convention).

<sup>108</sup> Cuba-United Kingdom BIT, *supra* note 64, at art. 8(2); Cuba-Switzerland BIT, *supra* note 69, at art. 10(2).

<sup>109</sup> Cuba-Barbados BIT, *supra* note 64, at art. 8(2). While mirroring the language of the above-referenced provision of the Cuba-United Kingdom BIT, remains silent on how to infuse life on an arbitral proceeding where the parties cannot possibly agree on a forum.

<sup>110</sup> See, Cuba-Switzerland BIT, *supra* note 69, at art. 10(3). ("Si après une période de trois mois à compter de la notification de la prétention aucun accord n'est intervenu sur l'une des procédures susmentionnées, le différend sera soumis,

*D. The Fork in the Road*

Only a handful of Cuban BITs require the foreign investor to exhaust local remedies before submitting the claim to international arbitration. Article VI(2) of the Cuba-Turkey BIT, for instance, grants the foreign investor standing to submit the dispute to the ICC or to an *ad hoc* international arbitral tribunal under the UNCITRAL arbitration rules “provided that the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.”<sup>111</sup> All to the contrary, however, under its treaties with Austria and Chile, Cuba explicitly renounces “the requirement that the internal administrative or judicial remedies should be exhausted.”<sup>112</sup>

The uneasy cohabitation of the international and domestic legal orders, so present in investment treaty arbitration, comes to light rather prominently in the fork-in-the-road provisions of Cuba’s BITs. Although not universally adopted throughout the vast universe of Cuba’s investment treaties, the latter’s agreements with Portugal,<sup>113</sup>

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*à la demande écrite de l’investisseur en cause, à l’arbitrage selon les Règles d’arbitrage de la Commission des Nations Unies pour le droit commercial international en vigueur.”).*

<sup>111</sup> Cuba-Turkey BIT, *supra* note 65, at art. VI(2).

<sup>112</sup> Cuba-Austria BIT, *supra* note 57, at art. 12(2); *See also* Cuba-Chile BIT, *supra* note 58, at art. 8(2)(c). (“[L]as partes renuncian a exigir el agotamiento de recursos judiciales internos.”).

<sup>113</sup> Cuba-Portugal BIT, *supra* note 63, at art.9(3) (“Uma vez submetido o deferendo a um dos procedimentos referidos no número anterior, a selecção será definitiva.”).

Bolivia,<sup>114</sup> Peru,<sup>115</sup> Venezuela,<sup>116</sup> Guatemala,<sup>117</sup> Chile,<sup>118</sup> and Argentina,<sup>119</sup> among others, do contain explicit fork-in-the-road clauses. The linguistic structure of the typical Cuban fork-in-the-road provision, as reproduced in Article 9(2) of the Cuba-Argentina BIT, stands as follows:

Once an investor has submitted the dispute either to the jurisdiction of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.<sup>120</sup>

Admittedly, the effectiveness of these fork-in-the-road clauses will depend on whether the international arbitral tribunal is persuaded that the claims and parties present before the Cuban domestic court are identical to those before it.<sup>121</sup> Otherwise, the foreign inves-

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<sup>114</sup> Cuba-Bolivia BIT, *supra* note 61, at art. IX(3) (“Una vez que el inversionista haya remitido la controversia al tribunal competente de la Parte Contratante en cuyo territorio se hubiese efectuado la inversión o al tribunal arbitral, la elección de uno u otro procedimiento será definitiva.”).

<sup>115</sup> Cuba-Peru BIT, *supra* note 77, at art. 8(3) (“Una vez que se haya sometido la controversia al tribunal competente de la Parte Contratante en cuyo territorio se hubiera efectuado la inversión o al arbitraje internacional, bajo alguno de los foros indicados, la elección de tal procedimiento será definitiva.”).

<sup>116</sup> Cuba-Venezuela BIT, *supra* note 66, at art. 9(2) (“El inversor que haya optado por someter la controversia a los tribunales de la Parte Contratante, no podrá luego recurrir al arbitraje.”).

<sup>117</sup> Cuba-Guatemala BIT, *supra* note 61, at art. VIII(3) (“Una vez que el inversionista haya remitido la controversia al tribunal competente de la Parte Contratante en cuyo territorio se hubiera efectuado la inversión o al tribunal arbitral, la elección de uno u otro procedimiento será definitiva.”).

<sup>118</sup> Cuba-Chile BIT, *supra* note 58, at art. 8(3) (“Una vez que el inversionista haya remitido la controversia al tribunal competente de la Parte Contratante en cuyo territorio se hubiera efectuado la inversión o al tribunal arbitral, la elección de uno u otro procedimiento será definitiva.”).

<sup>119</sup> Cuba-Argentina BIT, *supra* note 67, at art. 9(2) (“Una vez que un inversor haya sometido la controversia a las jurisdicciones de la Parte Contratante implicada o al arbitraje internacional, la elección de uno u otro de esos procedimientos será definitiva.”).

<sup>120</sup> *Id.*

<sup>121</sup> In the words of Professor Jan Paulsson, “[t]he key is to assess whether the same dispute has been submitted to both the national and international fora.” *Pan-techniki S.A. Contractors and Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, ¶ 61 (July 30, 2009). For arbitral authority finding no identity

tor will be allowed to elevate the dispute against Cuba to the international plane—even after having appeared before the local court.<sup>122</sup>

### *E. Choice of Law*

In similar fashion to the fork-in-the-road *problématique*, another issue that brings to the surface the natural tension between the international and domestic legal systems is the choice of law question. More often than not, the run-of-the-mill foreign investment project in Cuba (or elsewhere) will touch upon elements of local corporate, tax, property, administrative, monetary, and even constitutional law,<sup>123</sup> while at the same time implicating issues arising under customary international law such as the rules of treaty interpretation.<sup>124</sup>

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of claims and parties, in the context of the fork-in-the-road clauses of the U.S.-Argentina and Oman-Yemen BITs respectively, see *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/08, Decision on Jurisdiction, ¶ 80 (July 17, 2003) (“[A]s contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration”) and *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award ¶ 138 (February 6, 2008) (“In sum, the settlement of the Claimant’s contractual claims in the Yemeni Arbitration does not bar the Arbitral Tribunal from having jurisdiction in the present case, since the claims formulated by the Claimant here are capable of constituting violations of the BIT if they are upheld.”).

<sup>122</sup> As Professors Rudolf Dolzer and Christoph Schreuer have observed, “[o]nly rarely did tribunals find that the fundamental basis of the claim before them was the same as before the domestic courts.” Dolzer and Schreuer, *Principles of International Investment Law* 2d edition (Oxford: Oxford University Press, 2012), 267-268. Note that one of the very few arbitral authorities precluding the submission of an international investment claim on the basis of a foreign investor’s transgression of a fork-in-the-road clause is the above-referenced *Pantechniki v. Republic of Albania* Award. (“Having made the election to seize the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.”) *Pantechniki*, ICSID Case No. ARB/07/21 at ¶ 67.

<sup>123</sup> Note that issues as consequential as what constitutes a “protected investment” and who is a “protected investor” under Cuba’s BITs is left, almost universally, to the dictates of Cuban domestic law. Wayne Sachs, *The New U.S. Bilateral Investment Treaties*, 2 INT’L TAX & BUS. LAW. 192, 203 (1984).

<sup>124</sup> Note that the Vienna Convention on the Law of Treaties codifies the rules of treaty interpretation found in customary international law. See, for instance, *Methanex Corporation v. United States of America* NAFTA, 14 44 I.L.M. 1345, Final Award, ¶ 29. (Aug. 3, 2005). See also *CME Czech Republic B.V. v. Czech*

The complexities surrounding the interactions between these parallel legal orders clearly encapsulates the relevance of the choice of law question all throughout the life of the investment treaty arbitration --- from the jurisdictional stage all the way to the liability and remedies' phases of the dispute settlement proceeding.

Cuba's BITs, however, offer no standard blueprint with respect to the choice of law formulation. A fairly significant number of Cuban investment treaties, for instance, fail to include a choice of law clause designating the substantive law governing the arbitral procedure. In those cases where Cuba and the other contracting party to the bilateral investment treaty have remained silent as to the choice of law selection while consenting to the jurisdiction of the ICC or to the use of the arbitration rules of the UNCITRAL, the answer to the choice of law inquiry is to be found in Articles 21 and 35 of the ICC's and the UNCITRAL rules, respectively; both of which establish that in the absence of an explicit choice of law designation "the arbitral tribunal shall apply the law which it determines to be appropriate."<sup>125</sup>

Interestingly, under Article 22 of the widely used rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") and Article 22.3 of the rules of the London Court of International Arbitration ("LCIA") the result would be the same, since pursuant to both provisions the arbitral tribunal enjoys ample authority to, in the absence of a designation by the parties, apply "the law(s) or rules of law which it considers appropriate."<sup>126</sup>

Along similar lines, a tribunal presiding an investment treaty arbitration involving Cuba under the Additional Facility Rules must, in the absence of an explicit choice of law clause, apply "the law

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*Republic*, UNCITRAL, Separate Opinion on the Issue at the Quantum, ¶¶ 15-16 (Mar. 14, 2003).

<sup>125</sup> UNCITRAL Arbitration Rules, art. 35 (2010). Article 21 of the ICC Rules uses almost identical language: "In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate." *For in-depth analysis of these two provisions See, e.g.,* SCHÜTZE, INSTITUTIONAL ARBITRATION 109-14, 1209-118 (Munich: C.H. Beck, Rolf ed. 2013).

<sup>126</sup> LCIA Arbitration Rules art. 22.3 (1998). Article 22 of the SCC Rules equally establishes that in the absence of a choice of law clause, the arbitral tribunal shall apply "the law or rules of law, whichever it considers to be most appropriate." *See also* SCHÜTZE, *supra* note 118, at 473-74, 835-37.

determined by the conflict of laws rules which it considers applicable and such rules of international law as the Tribunal considers applicable.”<sup>127</sup>

In the context of a purely *ad hoc* investment arbitration, devoid of any institutional trappings where the contracting parties have failed to select the dispute’s governing law, the choice of law determination would squarely befall on the arbitral tribunal as a derivation of its inherent adjudicative authority.

Cuba’s investment treaties with, for instance, Mexico,<sup>128</sup> Austria,<sup>129</sup> Lebanon,<sup>130</sup> and Greece<sup>131</sup> stand for the opposite approach. Each of these treaties contains an explicit choice of law provision designating, almost invariably, the relevant BIT together with the “applicable rules and principles of international law” as the governing law of any dispute arising between Cuba and an investor of the other contracting party to the agreement.

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<sup>127</sup> ICSID Additional Facility Rules, art. 54, (Apr. 10, 2016), *available at* [https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_II/CMS%20GtA\\_Vol%20II\\_3\\_11\\_ICSID%20Additional%20Facility%20Rules.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_II/CMS%20GtA_Vol%20II_3_11_ICSID%20Additional%20Facility%20Rules.pdf). Note that Article 42(1) of the ICSID Convention mirrors this language: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”)

<sup>128</sup> Cuba-Mexico BIT, *supra* note 62, at app. 4 art. 7(1) (“*Cualquier tribunal establecido conforme a este Apéndice decidirá las controversias que se sometan a su consideración de conformidad con las disposiciones del presente Acuerdo, a las reglas aplicables y a los principios del Derecho Internacional.*”).

<sup>129</sup> Cuba-Austria BIT, *supra* note 57, at art. 15(1) (“A tribunal established under this Part shall decide the dispute in accordance with this Agreement and applicable rules and principles of international law.”).

<sup>130</sup> Cuba-Lebanon BIT, *supra* note 60, at art. 7(3) (“The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law.”).

<sup>131</sup> Cuba-Greece BIT, *supra* note 55, at art. 10(4) (“The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law.”).

Cuba's BIT's with Argentina,<sup>132</sup> Spain,<sup>133</sup> and China,<sup>134</sup> moreover, incorporate an additional feature to their respective choice of law provisions, and that is a *renvoi* clause<sup>135</sup> affording the arbitral tribunal sufficient flexibility to import legal constructs from other legal systems by applying Cuba's own conflict of laws rules.<sup>136</sup>

Although the vast majority of Cuban BITs establish no hierarchical or pyramidal order in the application of either domestic or international law,<sup>137</sup> it is safe to conclude that international law

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<sup>132</sup> Cuba-Argentina BIT, *supra* note 67, at art. 9(4) ("El órgano arbitral decidirá en base a las disposiciones del presente Acuerdo, al derecho de la Parte Contratante que sea parte en la controversia, incluidas las normas relativas a conflictos de leyes, a los términos de eventuales acuerdos particulares concluidos con relación a la inversión, como así también a los principios del derecho internacional en la materia.").

<sup>133</sup> Cuba-Spain BIT, *supra* note 64, at art. XI(3) ("The decisions of the arbitral tribunal shall be based on: The provisions of this Agreement and those of other agreements between the Contracting Parties; The widely accepted norms and principles of international law; The domestic legislation of the Contracting Party in whose territory the investment was made, including the rules on conflicts of law.").

<sup>134</sup> Cuba-China BIT art. 9(7) ("The tribunal shall adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law accepted by both Contracting Parties."). Note that this is the language used in the old generation Cuba-China BIT, signed on April 24, 1995 and renegotiated in 2007. For an analysis of China's old generation BITs see, e.g., Ko-Yung Tung and Rafael Cox Alomar, *The New Generation of China BITs in light of Tza Yap Shum v. Republic of Peru*, 17 AM. REV. INT'L ARB. 461 (2007).

<sup>135</sup> Note that Article 42(1) of the ICSID Convention also includes a *renvoi* clause. For relevant commentary see CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 601-02 (Cambridge University Press, 2001).

<sup>136</sup> For an illuminating treatise, in 2 volumes, on Cuban private international law refer to Rodolfo Dávalos Fernández, *Derecho Internacional Privado: Parte General* (La Habana: Editorial Félix Varela, 2006) and Rodolfo Dávalos Fernández, Taydit Peña Lorenzo and María del Carmen Santibáñez Freire, *Derecho Internacional Privado: Parte Especial* (La Habana: Editorial Félix Varela, 2007). While deserving careful and thoughtful analysis in a separate writing, it is worth pointing out that the rules of Cuban private international law amount to a complex, and rather asymmetrical, web of positive law provisions found for the most part in the so-called Bustamante Code (1928) and the Cuban Civil Code.

<sup>137</sup> On the absence of a choice of law hierarchy, see the observations made by the arbitral tribunals in *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, ¶ 400 (Mar. 14, 2003) ("The Tribunal's analysis is that

would govern the overwhelming majority of investment treaty arbitrations involving Cuba.

#### *F. Remedies*

It is well settled that arbitral tribunals do possess inherent authority to award both pecuniary and non-pecuniary remedies,<sup>138</sup> including restitutionary,<sup>139</sup> declaratory,<sup>140</sup> injunctive, and interim relief.<sup>141</sup> This notwithstanding, a number of Cuban BITs limit the ar-

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the application of the four sources of law as provided for in art. 8 (6) of the [Netherlands-Czech Republic] Treaty have no ranking according to the wording of the Treaty.”); *National Grid, P.L.C. v. Argentine Republic*, UNCITRAL, Award, ¶ 82 (November 3, 2008) (“This provision points to the application of the Treaty itself, Argentine law including its rules on conflict of laws), and “*the applicable principles of international law.*” Although the Parties do not disagree that these are the relevant sources of law applicable to this dispute, they note the absence of specific guidelines under the Treaty as to which aspect of the dispute is governed by one source or the other and how those sources interact in case of conflict *inter se.*”

<sup>138</sup> See, e.g., *LG&E Energy Corp. et. al v. Argentine Republic*, ICSID Case No. ARB/02/1, ¶ 32 (Award, July 25, 2007) (“Reparation can thus take the form of restitution or compensation.”) Article 34 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001) establishes that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction either singly or in combination [ . . . ]”), available in *Yearbook of the International Law Commission* Vol. 2 (New York: United Nations, 2001), available at [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_2001\\_v2\\_p2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf).

<sup>139</sup> See *Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, ¶ 700 (July 28, 2015) (“[I]t is beyond doubt that non-pecuniary remedies, including restitution, can be awarded in ICSID Convention arbitrations under investment treaties.”). The same maxim applies to investment treaty arbitrations involving Cuban BIT’s even without the ICSID radius.

<sup>140</sup> See *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, ¶ 560 (Sept. 16, 2015) (“The fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate. Moreover, this is also a power inherent to the Tribunal’s mandate to resolve the dispute.”).

<sup>141</sup> See *Paushok et. al. v. Government of Mongolia*, UNCITRAL, Order on Interim Measures, ¶ 45 (Sept. 2, 2008) (“It is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures. They are (1) prima facie jurisdiction, (2) prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality.”) Of singular importance in the Cuban context are UNCITRAL’s

bitral tribunal's remedial authority to the rendering of money damages. Both the old Cuba-China BIT<sup>142</sup> and, more importantly, the Cuba-Venezuela BIT<sup>143</sup> explicitly limit the tribunal's jurisdiction to the assessment of pecuniary remedies. Yet, such limitation is rendered useless, for instance, within the context of an illegal expropriation claim --- where under the so-called *Chorzów* rule, the standard of compensation is to be found not in the *lex specialis* (i.e. the applicable Cuban BIT), but rather in customary international law.<sup>144</sup>

Similarly, while most Cuban BITs remain silent as to the nature of the remedies available under them,<sup>145</sup> there is an overwhelming consensus in international arbitral authority to the effect that "the right to compensation for breaches of international law follows from general principles of international law as supplemented by general principles of law recognized by civilized nations."<sup>146</sup> Thus, in the event an international arbitral tribunal finds Cuba in violation of its obligations under an investment treaty, the arbitrators would possess ample authority to articulate an award consisting of both pecuniary and non-pecuniary remedies, even in the face of a silent BIT.

Admittedly, complex issues of sovereign immunity and international comity will make non-pecuniary remedies utterly impractical

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Article 26, ICC's Article 28, LCIA's Article 25 and SCC's Article 32 on interim and conservatory measures.

<sup>142</sup> See Cuba-China BIT, *supra* note 134, at art. 9(3) (renegotiated in 2007), which limited China's and Cuba's consent to international arbitration only for the purpose of determining "the amount of compensation for expropriation."

<sup>143</sup> See Cuba-Venezuela BIT, *supra* note 66, at art. 9(4) (La jurisdicción del tribunal arbitral se limitará a determinar si la Parte Contratante de que se trate ha incumplido [ . . . ] y si tal incumplimiento ha ocurrido y ha causado daños al inversor, a fijar la suma que deberá pagar la Parte Contratante al inversor como indemnización de tales daños.').

<sup>144</sup> Rafael Cox Alomar, "Compensation in the Context of Unlawful Expropriations," in IAN A. LAIRD, INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 235 (New York: Juris, 2016).

<sup>145</sup> It is worth noting, however, that Article 16(1) of the Cuba-Austria BIT explicitly establishes that declaratory and restitutionary relief is available under the treaty. Similarly, Articles V(3) and VI(1) of the Cuba-Spain BIT also provide for restitutionary relief both in the context of a claim for expropriation or for losses resulting from war, armed conflict and states of emergency.

<sup>146</sup> *SwemBalt AB, Sweden v. Republic of Latvia*, UNCITRAL, Award, ¶ 38 (Oct. 23, 2000).

or unviable under certain circumstances.<sup>147</sup> However, there is no bright line rule in customary international law precluding an international arbitral tribunal from awarding non-pecuniary relief to an aggrieved foreign investor if the factual and legal realities surrounding the claim warrant it.<sup>148</sup> The opposite is true of punitive damages against a sovereign state, which are unavailable as a matter of customary international law.<sup>149</sup>

The rendering of the award, once the remedies stage of the arbitral proceeding has concluded, leads the foreign investor to the more momentous phase of recognition and enforcement of the tribunal's decision.

### *G. Recognition and Enforcement*

Cuba's BITs refer the party seeking recognition and enforcement to the domestic legal order of the jurisdiction where enforcement is sought. The language used in the recognition and enforcement clauses of Cuba's BITs is not identical. While most Cuban BITs explicitly refer the moving party to the "domestic" or "national" law of the jurisdiction where recognition and enforcement is

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<sup>147</sup> Note, for instance, that Article 54 of the ICSID Convention only mandates the enforcement of "the pecuniary obligations imposed by [the] award as if it were a final judgment of a court in that State." Thus, non-pecuniary awards are left out of the self-contained enforcement mechanism available under the ICSID Convention in no small measure due to issues of sovereign immunity and international comity. ICSID Convention, available at [https://icsid.worldbank.org/en/Documents/resources/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf) (last visited Apr. 15, 2017).

<sup>148</sup> Rafael Cox Alomar, "Compensation in the Context of Unlawful Expropriations," *The Journal of Damages in International Arbitration*, available at <https://arbitrationlaw.com/library/compensation-context-unlawful-expropriations-journal-damages-international-arbitration-vol-3>.

<sup>149</sup> See Articles on Responsibility of States for Internationally Wrongful Acts art. 37(3) and in particular Commentary 8 to the text adopted by the International Law Commission, which appears in *Yearbook of the International Law Commission* Vol. 2 (New York: United Nations, 2001). See also Cuba-Mexico BIT, *supra* note 62, at art. 8(4) explicitly forbids the rendering of punitive damages. Of interest is the fact that NAFTA also expressly precludes tribunals from awarding punitive damages. See NAFTA's Chapter 11, Article 1135(3).

sought,<sup>150</sup> some merely reiterate that the award “shall be final and binding,”<sup>151</sup> while other agreements simply remain silent.<sup>152</sup>

Despite the dissimilar language, the procedural route for recognition and enforcement under all Cuban investment treaties leads to the domestic legal plane. The recognition and enforcement of foreign arbitral awards in Cuba is governed by Articles 483, 484, and 485 of the Law of Civil, Administrative, and Labor Procedure (*Ley de Procedimiento Civil, Administrativo, y Laboral*),<sup>153</sup> as well as by the strictures of the New York Convention—which has been in full force and effect on Cuban soil since March 30, 1975.<sup>154</sup>

Article 483 of the Cuban statute provides for the recognition and enforcement of foreign arbitral awards meeting the following criteria: firstly, the underlying legal action must have been presented *in personam*; secondly, the arbitral award must have been rendered in the ordinary course not in default (*rebeldía*); thirdly, the obligations requiring performance under the award must be legal in nature per the applicable Cuban legislation; fourthly, the award, together with all other accompanying documents, must be authenticated according to the laws of the jurisdiction where it was made; fifthly, in the event

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<sup>150</sup> See, *inter alia*, Cuba-Turkey BIT, *supra* note 65, at art. VI(3); Cuba-Chile BIT, *supra* note 58, at art. 8(5); Cuba-Netherlands BIT, *supra* note 54, at art. 9(3); Cuba-Guatemala BIT, *supra* note 61, at art. VIII(4); Cuba-Bolivia BIT, *supra* note 61, at art. IX(5); Cuba-Portugal BIT, *supra* note 63, at art. 9(4); Cuba-Peru BIT, *supra* note 77, at art. 8(4); Cuba-Germany BIT, *supra* note 77, at art. 11(2); Cuba-Lebanon BIT, *supra* note 60, at art. 7(3); Cuba-Greece BIT, *supra* note 55, at art. 10(4); Cuba-Argentina BIT, *supra* note 67, art. 9(5); Cuba-Spain BIT, *supra* note 64, at art. XI(4).

<sup>151</sup> See, *inter alia*, Cuba-Hungary BIT, *supra* note 59, at art. 8(2)(b); Cuba-Slovakia BIT, *supra* note 59, at art. 8(2); Cuba-Venezuela BIT, *supra* note 66, at art. 9(5); Cuba-Indonesia BIT, *supra* note 64, at art. VIII(3).

<sup>152</sup> See, *inter alia*, Cuba-France BIT, *supra* note 68, at art. 10; Cuba-Italy BIT, *supra* note 70, at art. 9; Cuba-Switzerland BIT, *supra* note 69, at art. 10; Cuba-Romania BIT, *supra* note 56, at art. 9; Cuba-United Kingdom BIT, *supra* note 64, at art. 8; Cuba-Barbados BIT, *supra* note 64, at art. 8.

<sup>153</sup> Refer to Dávalos Fernández, Taydit Peña Lorenzo and María del Carmen Santibáñez Freire, *Derecho Internacional Privado: Parte Especial*, LA HABANA, 260 (2007) (Cuba). Note, moreover, that the *Ley de Procedimiento Civil, Administrativo y Laboral* was enacted by the National Assembly of People’s Power during the ordinary session taking place on July 12-14, 1977.

<sup>154</sup> United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the “New York Convention”).

the award was issued in a non-contracting state to the New York Convention, it must also come with a declaration from the ministry of foreign affairs of the country of origin, certifying that an award rendered in Cuba would also be afforded recognition and enforcement therein on a reciprocal basis;<sup>155</sup> and sixthly, the moving party must identify with particularity the Cuban domicile of the person (natural or juridical) against whom recognition and enforcement is sought.<sup>156</sup>

Article 484, moreover, designates the Cuban Supreme Court as the forum where the petition for recognition and enforcement must be presented, unless an international treaty ratified by Cuba provides otherwise.<sup>157</sup> The petition, moreover, along with its Spanish translation, shall be served on the person (natural or juridical) against whom recognition and enforcement is sought.<sup>158</sup> The Cuban Supreme Court shall hear the respondent within 10 days from the service of notice, at which point the Court will either grant or deny the petition without the possibility of further review.<sup>159</sup>

The Cuban statute, however, must be read in tandem with the New York Convention. It is well settled that non-ICSID investment arbitration awards against Cuba or its instrumentalities fall under the scope of the New York Convention,<sup>160</sup> and, hence, are susceptible

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<sup>155</sup> Note that in acceding to the New York Convention, Cuba made the reservation that with respect to non-contracting parties it would only enforce the Convention on the basis of reciprocity. New York Arbitration Convention, *available at* <http://www.newyorkconvention.org/countries> (last visited Feb. 17, 2017).

<sup>156</sup> *See* LEY DE PROCEDIMIENTO CIVIL, ADMINISTRATIVO Y LABORAL art. 483 (Cuba).

<sup>157</sup> *See Id.*, at art. 484 (Cuba).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*, at art. 485 (Cuba).

<sup>160</sup> Cuba-Switzerland BIT, *supra* note 69, at art. 13 provides, in part, that “[c]laims submitted to arbitration under this Part shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention.” Cuba-Mexico BIT, *supra* note 62, at art. 9(5) mirrors this language, “Para los efectos del Artículo 1 de la Convención de Nueva York, se considerará que la reclamación que se somete a arbitraje conforme a este Apéndice, surge de una relación u operación comercial.” For a robust analysis showing that sovereign states and public entities fall under the New York Convention’s rubric of “persons,” *see* REINMAR WOLFF, *NEW YORK CONVENTION*, 69-70 (Munich: C.H. Beck, 2012).

to challenge on the basis of the various escape hatches provided under Article V of the Convention.<sup>161</sup>

#### *H. The MFN Clause*

A most relevant feature of a growing number of Cuban BITs is the expansive reach of their most-favored-nation (“MFN”) provisions. Under Cuba’s bilateral investment treaties with, for instance, the United Kingdom,<sup>162</sup> Germany,<sup>163</sup> Slovakia,<sup>164</sup> Barbados,<sup>165</sup> Peru,<sup>166</sup> Bolivia,<sup>167</sup> and Turkey,<sup>168</sup> the language of the MFN clause explicitly suggests that MFN treatment extends to dispute settlement; which means that “if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.”<sup>169</sup>

This notwithstanding, most Cuban MFN provisions remain silent as to their applicability to dispute settlement. Thus, it would

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<sup>161</sup> Besides challenges on the basis of sovereign immunity, lack of arbitrability, procedural due process and public policy, non-moving parties have often challenged recognition and enforcement when the arbitral award has been set aside by a court in the jurisdiction where the award was made. *See, e.g., Corporación Mexicana de Mantenimiento Integral, S. De R.L. de C.V. v. Pemex*, 832 F.3d 92 (2d Cir. 2016), where the U.S. Court of Appeals for the Second Circuit affirmed the U.S. District Court for the District of New York’s recognition and enforcement of an arbitral award rendered in Mexico against Pemex despite the fact that a Mexican court had vacated it. *See generally*, Radu Lelutiu, *Managing Requests for Enforcement of Vacated Awards under the New York Convention*, 14 AM. REV. INT’L ARB. 345 (2003).

<sup>162</sup> Cuba-United Kingdom BIT, *supra* note 64, at art. 3(3).

<sup>163</sup> Cuba-Germany BIT, *supra* note 77, at art. 3(5).

<sup>164</sup> Cuba-Slovakia BIT, *supra* note 59, at art. 3(3).

<sup>165</sup> Cuba-Barbados BIT, *supra* note 64, at art. 3(3).

<sup>166</sup> Cuba-Peru BIT, *supra* note 77, at art. 3(6).

<sup>167</sup> Cuba-Bolivia BIT, *supra* note 61, at art. III(2).

<sup>168</sup> Cuba-Turkey BIT, *supra* note 65, at art. II(3).

<sup>169</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 56 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

typically befall on the arbitral tribunal to decide whether to read into the MFN clause the inclusion of dispute settlement.<sup>170</sup>

#### IV. STANDARDS OF PROTECTION UNDER CUBA'S BITS

##### *A. Protected Foreign Investment*

Substantively, Cuba's BITS offer the foreign investor the typical assortment of legal protections and safeguards available in most international investment treaties. More specifically, Cuban BITS almost universally provide overly broad definitions of what constitutes a "protected investment" under the applicable investment agreement. Article 1(a) of the Cuba-Barbados BIT, for instance, establishes that:

For purposes of this Agreement:

(a) 'investment' means *every kind of asset* and in particular, *though not exclusively*, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

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<sup>170</sup> Note that far from homogenous, arbitral tribunals have shown themselves in disagreement as to whether a silent MFN provision should be read as expansively as to allow the bypassing of the basic treaty's dispute settlement mechanism. See *Sanum Inv. Ltd. v. Gov't of the Lao People's Democratic Republic*, PSA Case No. 2013-13, Award on Jurisdiction, ¶ 358 (Dec. 13, 2013), (Perm. Ct. Arb. 2013). ("[T]o read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the State Parties' consent to arbitration beyond what may be assumed to have been their intention.") *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 167 (Dec. 8, 2008), available at [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C39/D C1492\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C39/D C1492_En.pdf). ("Ordinarily, an MFN Clause would not operate so as to replace one means of dispute settlement with another . . . the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself.").

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.<sup>171</sup>

The language of the Cuba-Barbados BIT, premised on an expansive asset-based concept of what amounts to a “protected investment” under the treaty, is also present in Cuba’s BITs with, for instance, the United Kingdom,<sup>172</sup> Slovakia,<sup>173</sup> Germany,<sup>174</sup> Peru,<sup>175</sup> Bolivia,<sup>176</sup> Turkey,<sup>177</sup> Austria,<sup>178</sup> Mexico,<sup>179</sup> Indonesia,<sup>180</sup> Vietnam,<sup>181</sup> Romania,<sup>182</sup> France,<sup>183</sup> Hungary,<sup>184</sup> Greece,<sup>185</sup> Lebanon,<sup>186</sup> the Netherlands,<sup>187</sup> Spain,<sup>188</sup> and China.<sup>189</sup> In construing the

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<sup>171</sup> Cuba-Barbados BIT, *supra* note 64, at art. 1(a).

<sup>172</sup> Cuba-United Kingdom BIT, *supra* note 64, at art. 1(a) (“every kind of asset”).

<sup>173</sup> Cuba-Slovakia BIT, *supra* note 59, at art. 1(1) (“every kind of asset”).

<sup>174</sup> Cuba-Germany BIT, *supra* note 77, at art. 1(1) (“toda clase de bienes”).

<sup>175</sup> Cuba-Peru BIT, *supra* note 77, at art. 1(1) (“toda clase de activos”).

<sup>176</sup> Cuba-Bolivia BIT, *supra* note 61, at art. I(1) (“toda clase de bienes o derechos relacionados”).

<sup>177</sup> Cuba-Turkey BIT, *supra* note 65, at art. 1(2) (“every kind of asset.”).

<sup>178</sup> Cuba-Austria BIT, *supra* note 57, at art. 1(2) (“every kind of asset”).

<sup>179</sup> Cuba-Mexico BIT, *supra* note 62, at art. 1 (“cualquier tipo de activo”).

<sup>180</sup> Cuba-Indonesia BIT, *supra* note 64, at art. 1(1) (“any kind of asset”).

<sup>181</sup> Cuba-Vietnam BIT, *supra* note 64, at art. 1(1) (“any kind of assets”).

<sup>182</sup> Cuba-Romania BIT, *supra* note 56, at art. 1(2) (“every kind of assets”).

<sup>183</sup> Cuba-France BIT, *supra* note 68, at art. 1(1) (“*tous les avoirs*”).

<sup>184</sup> Cuba-Hungary BIT, *supra* note 59, at art. 1(1) (“every kind of asset”).

<sup>185</sup> Cuba-Greece BIT, *supra* note 55, at art. 1(1) (“every kind of asset”).

<sup>186</sup> Cuba-Lebanon BIT, *supra* note 60, at art. 1(2) (“every kind of assets”).

<sup>187</sup> Cuba-Netherlands BIT, *supra* note 54, at art. 1(a) (“every kind of asset”).

<sup>188</sup> Cuba-Spain BIT, *supra* note 64, at art. I(2) (“any kind of assets”).

<sup>189</sup> Cuba-China BIT, *supra* note 134, at art. 1(1) (“every kind of asset”).

definition of “protected investment” under a Cuban BIT, an international arbitral tribunal ought to look, not at the strictures of Cuban domestic law, but rather at international law.<sup>190</sup>

It is well settled, moreover, that an investment fraught by illegality does not qualify for protection under any Cuban BIT.<sup>191</sup> Unsurprisingly, a significant number of Cuban BITs explicitly limit the treaty’s protection only to those foreign investments made “in conformity with” the laws of Cuba and those of the other contracting state to the investment treaty.<sup>192</sup>

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<sup>190</sup> Refer, for instance, to *République D’Italie v. République de Cuba*, Arbitrage Ad’Hoc, Sentence Preliminaire, ¶¶ 80-81 (Mar. 15, 2005) (“Les dispositions de cette loi ne peuvent être utilisées pour définir la notion d’investissement au sens de l’Accord. [ . . . ] [l]a notion d’investissement ne doit pas pouvoir varier et fluctuer en fonction des législations nationales de chacun d’entre eux et de leurs évolutions respectives. [ . . . ] Il appartient donc au Tribunal Arbitral de rechercher dans la jurisprudence internationale et dans la doctrine une définition de la notion d’investissement compatible avec les dispositions de l’Accord, son objet et ses objectifs.”). See also, *Saipem S.P.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 82 (Mar. 21, 2007) (“[T]he Tribunal cannot depart from the general rule that treaties are to be interpreted by reference to international law. It is thus not prepared to consider that the term “investment” in Article 1(1) of the BIT is defined according to the law of the host State.”). See *id.* at ¶ 120 (“Accordingly, the question is whether Saipem made an investment within the meaning of Article 1(1) of the [Bangladesh-Italy] BIT, without reference to the law of Bangladesh.”).

<sup>191</sup> The ancient legal principle of *ex delicto non oritur actio* (“an unlawful act cannot serve as the basis of an action in law”) has been widely incorporated to international investment law. *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 56 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002). See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, ¶ 332 (Dec. 10, 2014) (“As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.”). See also *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, ¶ 706 (Dec. 17, 2015), available at [http://www.italaw.com/sites/default/files/case-documents/italaw7238\\_2.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf) (“The Arbitral Tribunal agrees . . . that an investment may not qualify for protection under a BIT, where such investment was made in breach of relevant laws and regulations, including international treaties but also national law of the host State.”).

<sup>192</sup> See Cuba-Venezuela BIT, *supra* note 66, at art. (2)(e) (“y otros derechos otorgados conforme al Derecho Público”); Cuba-Greece BIT, *supra* note 55, at

### B. Protected Foreign Investor

Under Cuban BITs, a “protected foreign investor” is defined as a natural or legal person having the nationality of one of the contracting states entering into the BIT.<sup>193</sup> Standing, thus, is conditioned to whether the natural or legal persons raising the claim meet the nationality requirements of the specific BIT under which protection is sought.

In order to enjoy standing to sue Cuba under most Cuban BITs, the foreign investor, if a natural person, must be a national of the other contracting state to the BIT--- as defined by the latter’s nationality laws.<sup>194</sup> If a legal person, it must have been constituted in

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art. 1(1)(f) (“in conformity with its laws and regulations”); Cuba-Lebanon BIT, *supra* note 60, at art. 1(2)(d) (“in accordance with the law”); Cuba-Austria BIT, *supra* note 57, at art. 2(1) (“according to its laws and regulations”); Cuba-Romania BIT, *supra* note 56, at art.1(2) (“in accordance with the laws and regulations of the latter”); Cuba-Turkey BIT, *supra* note 65, at art. 1(2) I(2) (“in conformity with the hosting Party’s laws and regulations”); Cuba-Slovakia BIT, *supra* note 59, at art. 1(1) (“in accordance with the laws and regulations of the latter”); Cuba-Argentina BIT, *supra* note 67, at art. 1(1) (“de conformidad con las leyes y reglamentaciones de la Parte Contratante”); Cuba-Italy BIT, *supra* note 70, at art. 1(1) (“in conformità delle leggi e dei regolamenti di quest’ultima”); Cuba-Guatemala BIT, *supra* note 61, at art. I(2) (“de conformidad con las leyes y reglamentos de la Parte Contratante”); Cuba-Indonesia BIT, *supra* note 64, at art. I(1) (“in conformity with the laws and regulations of the latter”); Cuba-China BIT, *supra* note 134, at art. 1(1) (“in accordance with the laws and regulations”); Cuba-Chile BIT, *supra* note 58, at art. 1(2) (“de conformidad con las leyes y reglamentos de la Parte Contratante”); Cuba-Vietnam BIT, *supra* note 64, at art. 1(1) (“pursuant to the laws and regulations in force”); Cuba-Hungary BIT, *supra* note 59, at art. 1(1) (“in accordance with the laws and regulations”); Cuba-Bolivia BIT, *supra* note 61, at art. I(1) (“efectuado de conformidad con las leyes y reglamentos”); Cuba-Portugal BIT *supra* note 63, at art. I(1) (“nos termos da respectiva legislação aplicável sobre a matéria”); Cuba-Spain BIT, *supra* note 64, at art. I(2) (“acquired in accordance with the legislation of the country in which the investment is made.”).

<sup>193</sup> Clearly, a Cuban national or legal person has no standing to sue Cuba under any bilateral investment treaty. Note that “[i]nvestment treaties confer rights to foreign investors, which are unavailable to nationals of the host country. Legitimate policy reasons justify this differential treatment.” See *Gallo v. Government of Canada*, PCA Case No. 55798, Award, ¶ 331 (Sept. 15, 2011) available at [http://www.italaw.com/sites/default/files/case-documents/ita0351\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0351_0.pdf).

<sup>194</sup> Note that with respect to Cuban investors doing business in the territory of the other contracting party to the BIT (besides Cuba) some Cuban BITs require both Cuban nationality and permanent domicile in Cuba for protection under the

accordance with the laws of the other contracting state to the BIT.<sup>195</sup> Under most Cuban BITs, however, a foreign legal person's standing to bring a claim against Cuba will depend on its compliance with additional treaty specific requirements.

Besides incorporation in accordance with the laws of the other contracting state to the bilateral investment treaty, foreign legal persons seeking protection under Cuba's BITs with, for instance, Turkey,<sup>196</sup> Spain,<sup>197</sup> Portugal,<sup>198</sup> and Lebanon,<sup>199</sup> must also have their "headquarters," "main office," "*sede*," or "seat" in either Turkish, Spanish, Portuguese, or Lebanese territory. Comparatively, under Cuba's BITs with Bolivia,<sup>200</sup> Mexico,<sup>201</sup> Chile,<sup>202</sup> Romania,<sup>203</sup> and Guatemala,<sup>204</sup> the standing of a foreign legal person raising a claim against Cuba depends not just on the place of incorporation and the geographic location of its corporate seat, but also on whether that corporate entity conducts significant business in Bolivian, Mexican, Chilean, Romanian, or Guatemalan territory.

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bilateral investment treaty. *See e.g.*, Cuba-Austria BIT, *supra* note 57, at art. 1(1); Cuba-Mexico BIT, *supra* note 62, at art. 1; Cuba-Guatemala BIT, *supra* note 61, at art. 1(1); Cuba-Netherlands BIT, *supra* note 54, at art. 1(b).

<sup>195</sup> *See e.g.*, Cuba-Greece BIT, *supra* note 55, at art. 1(3); Cuba-Barbados BIT, *supra* note 64, at art. 1(d); Cuba-United Kingdom BIT, *supra* note 64, at art. 1(d); Cuba-Indonesia BIT, *supra* note 64, at art. I(2); Cuba-Austria BIT, *supra* note 57 at art.1(1).

<sup>196</sup> Cuba-Turkey BIT, *supra* note 65, at art. I(1)(b) ("[ . . . ] and having their headquarters in the territory of that Party").

<sup>197</sup> Cuba-Spain BIT, *supra* note 64, at art. I(1)(b) ("[ . . . ] and having their main office in the territory of that Contracting Party").

<sup>198</sup> Cuba-Portugal BIT *supra* note 63, at art. 1(3) ("que tenham sede no território de uma das Partes Contratantes.").

<sup>199</sup> Cuba-Lebanon BIT, *supra* note 60, at art. 1(1)(b) ("have their seat in the territory of that same Contracting Party.").

<sup>200</sup> Cuba-Bolivia BIT, *supra* note 61, at art.I(2)(b) ("asimismo como sus actividades económicas sustanciales en el territorio de dicha Parte contratante.").

<sup>201</sup> Cuba-Mexico BIT, *supra* note 62, at art.1) ("que desempeñe actividades económicas o comerciales en el mismo.")

<sup>202</sup> Cuba-Chile BIT, *supra* note 58, at art. 1(1) (b) ("así como sus actividades económicas efectivas.").

<sup>203</sup> Cuba-Romania BIT, *supra* note 56, at art. 1(1)(b) ("together with real economic activities in the territory of that same Contracting Party.").

<sup>204</sup> Cuba-Guatemala BIT, *supra* note 61, at art. (1)(b) ("así como sus actividades económicas efectivas, en el territorio de dicha Parte Contratante.").

Interestingly, under Cuba's BITs with France,<sup>205</sup> Switzerland,<sup>206</sup> the Netherlands,<sup>207</sup> and Venezuela,<sup>208</sup> the place of incorporation, the location of the corporate seat, or even the significance of the legal person's entrepreneurial presence in French, Swiss, Dutch, or Venezuelan territory is not dispositive of the standing question. Rather, direct or indirect control at the hands of a French, Swiss, Dutch, or Venezuelan natural or legal person is sufficient to render standing to a company doing business in Cuba with no substantive legal connection to France, Switzerland, the Netherlands, or Venezuela.

### C. Fair and Equitable Treatment

The Cuban Republic, moreover, extends to all foreign investments made in the island, under the aegis of a Cuban BIT, fair and equitable treatment protection. Article IV(1) of the Cuba-Spain BIT, for example, provides that “[e]ach Contracting Party shall guarantee *fair and equitable treatment in its territory for investments made by investors of the other Contracting Party.*”<sup>209</sup> Despite the obvious absence of consensus among international arbitral tribunals on the exact content of the fair and equitable treatment protection,<sup>210</sup> it is universally agreed that “conduct that is arbitrary, grossly unfair, unjust

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<sup>205</sup> Cuba-France BIT, *supra* note 68, at art. 1(3) (“ou contrôlée directement ou indirectement par des nationaux de l’une des Parties contractantes, ou par des personnes morales possédant leur siège social sur le territoire de l’une des Parties contractantes et constituées conformément à la législation de celle-ci.”).

<sup>206</sup> Cuba-Switzerland BIT, *supra* note 69, art. 1(1)(c) (“lorsque plus de 50 pour cent de son capital social appartient en pleine propriété à des personnes de cette Partie Contractante; ou lorsque des personnes de cette Partie Contractante ont la capacité de nommer une majorité de ses administrateurs, ou sont autrement habilitées en droit à diriger ses opérations.”).

<sup>207</sup> Cuba-Netherlands BIT, *supra* note 54, at art. 1(b) (“[ . . . ] legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.”).

<sup>208</sup> Cuba-Venezuela BIT, *supra* note 66, at art. 1(1)(b) (“o efectivamente controlada por inversores de esa Parte Contratante.”).

<sup>209</sup> See Cuba-Spain BIT, *supra* note 64, at art. IV(1).

<sup>210</sup> See e.g., *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶ 256 (May 22, 2007), available at <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> (“The Tribunal notes that the Respondent is right in arguing that fair and equitable treatment is a standard none too clear and precise. This is because international law is not too clear and precise either on the treatment due to foreign citizens,

or idiosyncratic or that ‘involves a lack of due process leading to an outcome which offends judicial propriety’<sup>211</sup> runs counter to the fair and equitable protection arising under Cuba’s BITs.

#### *D. Full Protection and Security*

In a significant number of Cuban BITs, the fair and equitable treatment protection is accompanied by yet another substantive safeguard, namely the so-called full protection and security standard.<sup>212</sup> Article 3(1) of the Cuba-Austria BIT, for instance, establishes that “[e]ach Contracting Party shall accord to investments by investors of the other Contracting Party . . . *full and constant protection and security*.”<sup>213</sup> Contrary to the fair and equitable treatment safeguard, the full protection and security standard is far more specific, and less abstract, than the former one.<sup>214</sup> Under the full protection and security standard, Cuba is, thus, bound by treaty to adopt all necessary

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traders and investors or with respect to the fact that the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development.”).

<sup>211</sup> *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, December 27, 2010, ¶ 110 (Dec. 27, 2010), <http://www.italaw.com/sites/default/files/case-documents/ita0868.pdf>.

<sup>212</sup> In the following Cuban BIT’s, the fair and equitable treatment clause and the full protection and security provision appear side by side, in the same section of the treaty (this list is non-exhaustive): Cuba-Austria BIT, *supra* note 57, at art.3(1); Cuba-Slovakia. BIT, *supra* note 59, at art. 2(2); Cuba-Hungary BIT, *supra* note 59, at art. 2(2); Cuba-Lebanon BIT, *supra* note 60, at art. 3(1); Cuba-Barbados BIT, *supra* note 64, at art 2(2); Cuba-United Kingdom BIT, *supra* note 64, at art. 2(2); Cuba-Indonesia BIT, *supra* note 64, at art. II(2); Cuba-Greece BIT, *supra* note 55, at art. 2(2); Cuba-Mexico BIT, *supra* note 62, at art. 4(1); Cuba-Switzerland.BIT, *supra* note 69, at art. 4(1); Cuba-Netherlands BIT, *supra* note 54, at art. 3(1); Cuba-Venezuela BIT, *supra* note 66, at art. 4(1); Cuba-Argentina BIT, *supra* note 67, at art. 3(1); Cuba-China BIT, *supra* note 134, at art. 3(1). In Cuba’s BIT’s with France and the Netherlands, the full protection and security clauses appear under the section on expropriation. *See* Cuba-France BIT, *supra* note 68, at art. 5(1) (“Les investissements effectués . . . bénéficient . . . d’une protection et d’une sécurité pleines et entières.”), and Cuba-Italy BIT, *supra* note 70, at art. 5(1) (“Gli investimenti di capitali degli investitore di una delle Parti Contraenti godranno di piena protezione e sicurezza nel territorio dell’altra.”).

<sup>213</sup> *See* Cuba-Austria BIT, *supra* note 57, at art.3(1).

<sup>214</sup> Note that there appears to be a dissonance among international arbitral tribunals on whether the full protection and security standard, besides the physical

measures to defend the physical integrity of the foreign investment from aggression.<sup>215</sup>

### *E. Force Majeure*

Along similar lines, Cuba's BITs almost invariably include a *force majeure* clause. The typical *force majeure* provision reads as follows:

Investors of one Contracting Party, whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement. The treatment shall not be less favourable than that which the latter Contracting Party accords to its own investors or investors of any third state, whichever is more favourable to the investors concerned. Payments shall be made without delay and in the freely convertible currencies agreed upon by the parties.<sup>216</sup>

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integrity, also extends to the stability of the legal superstructure applicable to the foreign investment. *See BG Group Plc. v. Republic of Argentina*, Final Award, Dec. 24, 2007, ¶ 326 (Dec. 24, 2007), available at <http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf> (“The Tribunal is mindful that other tribunals have found that the standard of ‘*protection and constant security*’ encompasses stability of the legal framework applicable to the investment. [ . . . ] However . . . the Tribunal finds it inappropriate to depart from the originally understood standard of ‘*protection and constant security*.’”).

<sup>215</sup> *Saluka Investments BV v. The Czech Republic*, Partial Award, ¶ 484 (Mar. 17, 2006), available at <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> (“[ . . . ] is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”).

<sup>216</sup> Cuba-Indonesia BIT, *supra* note 64, at art. V.

Almost identical *force majeure* language is found in Cuba's BITs with, for instance, the Netherlands,<sup>217</sup> Argentina,<sup>218</sup> Lebanon,<sup>219</sup> Spain,<sup>220</sup> France,<sup>221</sup> Portugal,<sup>222</sup> Germany,<sup>223</sup> Italy,<sup>224</sup> Peru,<sup>225</sup> Bolivia,<sup>226</sup> Chile,<sup>227</sup> Vietnam,<sup>228</sup> Guatemala,<sup>229</sup> and Turkey.<sup>230</sup> A significant number of Cuban BITs provide investors an additional layer of protection under their respective *force majeure* clauses. More specifically, under its bilateral investment treaties with the United Kingdom,<sup>231</sup> Switzerland,<sup>232</sup> Austria,<sup>233</sup> Greece,<sup>234</sup> Barbados,<sup>235</sup> Hungary,<sup>236</sup> and Slovakia,<sup>237</sup> the Cuban Republic has explicitly agreed to offer foreign investors from these jurisdictions outright restitution or monetary compensation where the requisition or destruction of their respective investments was perpetrated by governmental forces, not in combat action and not required to so act by the necessity of the situation.<sup>238</sup> While not strictly liable for losses under either the *force majeure* or protection and security standards,

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<sup>217</sup> Cuba-Netherlands BIT, *supra* note 54, at art. 7.

<sup>218</sup> Cuba-Argentina BIT, *supra* note 67, at art.4(2).

<sup>219</sup> Cuba-Lebanon BIT, *supra* note 60, at art.4(4).

<sup>220</sup> Cuba-Spain BIT, *supra* note 64, at art. VI(1).

<sup>221</sup> Cuba-France BIT, *supra* note 68, at art. 5(3).

<sup>222</sup> Cuba-Portugal BIT, *supra* note 63, at art. 5.

<sup>223</sup> Cuba-Germany BIT, *supra* note 77, at art. 4(3).

<sup>224</sup> Cuba-Italy BIT, *supra* note 70, at art. 4.

<sup>225</sup> Cuba-Peru BIT, *supra* note 77, at art. 6.

<sup>226</sup> Cuba-Bolivia BIT, *supra* note 61, at art. IV(4).

<sup>227</sup> Cuba-Chile BIT, *supra* note 58, at art. 6(4).

<sup>228</sup> Cuba-Vietnam BIT, *supra* note 64, at art. 4.

<sup>229</sup> Cuba-Guatemala BIT, *supra* note 61, at art. VI(4).

<sup>230</sup> Cuba-Turkey BIT, *supra* note 65, at art. III(3).

<sup>231</sup> Cuba-United Kingdom BIT, *supra* note 64, at art. 4(2).

<sup>232</sup> Cuba-Switzerland BIT, *supra* note 69, at art. 7(2).

<sup>233</sup> Cuba-Austria BIT, *supra* note 57, at art. 6(2).

<sup>234</sup> Cuba-Greece BIT, *supra* note 55, at art. 6(2).

<sup>235</sup> Cuba-Barbados BIT, *supra* note 64, at art. 4(2).

<sup>236</sup> Cuba-Hungary BIT, *supra* note 59, at art. 4(2).

<sup>237</sup> Cuba-Slovakia BIT, *supra* note 59, at art. 4(2).

<sup>238</sup> Refer to the arbitral tribunal's construction of Article 4(2) of the Sri Lanka-UK BIT, which is both stylistically and substantively analogous to the above-referenced provisions, available in *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶¶ 57-64 (June 27, 1990), 6 ICSID Rev.—FILJ 526 (1991).

Cuba bears, nonetheless, the legal duty of due diligence.<sup>239</sup> Due diligence, in this context, means that Cuba must “adopt all reasonable measures to protect assets and property from threats or attacks”<sup>240</sup> to the extent “feasible and practicable under the circumstances.”<sup>241</sup>

#### *F. Expropriation*

Cuba’s BITs, furthermore, establish with uncharacteristic clarity the framework for determining the legality or illegality of an expropriation. Article 5 of the Cuba-Greece BIT is emblematic of the traditional expropriation clause available in most Cuban treaties,

Investments by investors of either Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized *or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization*, except in the *public interest, under due process of law, on a non discriminatory basis and against payment of prompt, adequate and effective compensation*. Such compensation shall amount to the market value of the investment affected *immediately before the actual measure was taken or became public knowledge*, whichever is the earlier, [and] it shall include interest from the date of expropriation until the date of payment . . . and shall be freely transferable in a . . . convertible currency.<sup>242</sup>

Hence, absent a public purpose, due process of law, and payment of prompt, adequate and effective compensation (defined as fair market value as of the date of the taking) any expropriation or nationalization of a protected foreign investment at the hands of the Cuban Republic would stand in violation of Cuba’s own BITs, thus, making such action illegal under international law. In such case the

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<sup>239</sup> *Saluka Investment BV v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> (“The host State is, however, obliged to exercise due diligence.”).

<sup>240</sup> *Id.*

<sup>241</sup> Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 183 (2d ed. 2012).

<sup>242</sup> Cuba-Greece BIT, *supra* note 55, at art. 5.

standard of compensation is found, not in the applicable Cuban BIT, but rather in customary international law under the rubric of the widely reputed *Chorzów Factory* rule.<sup>243</sup> Of considerable significance is the fact that most Cuban BITs make no distinction between direct and indirect expropriations.<sup>244</sup> Both modalities of confiscation stand on equal footing, subject to the same legal framework.<sup>245</sup>

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<sup>243</sup> Under the eponymous *Chorzów Factory* rule “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” In so doing, international arbitral tribunals have been inclined to dis-aggregate the date of expropriation from the date of valuation for purposes of assessing compensation within the context of an illegal expropriation --- among many other measures aimed at making the aggrieved party whole. See *Factory at Chorzów* (Merits), PCIJ Rep. Ser. A (No. 17), 46-47 (1928). See also *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA227, Award on the Merits, ¶ 1765 (July 18, 2014), available at <http://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf> (“[C]onflating the measure of damages for a lawful taking with the measure of damages for an unlawful taking is, on its face, an unconvincing option.”).

<sup>244</sup> Reference to indirect expropriation in Cuban BITs usually takes the form of language along the following lines: “investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent . . . .” See, e.g., Cuba-United Kingdom BIT, *supra* note 64, at art. 5(1); For treaties containing similar language see, Cuba-Greece BIT, *supra* note 48, at art. 5(1); Cuba-Indonesia BIT, *supra* note 64, at art. IV; Cuba-Slovakia BIT, *supra* note 59, at art. 5(1); Cuba-Guatemala BIT, *supra* note 61, at art. VI(1); Cuba-Peru BIT, *supra* note 77, at art. 5(1); Cuba-Germany BIT, *supra* note 77, at art. 4(2); Cuba-Portugal BIT, *supra* note 63, at art. 4(1); Cuba-Spain BIT, *supra* note 64, at art. V(1); Cuba-Argentina BIT, *supra* note 67, at art. 4(1); Cuba-Switzerland BIT, *supra* note 69, at art. 6(1); Cuba-Barbados BIT, *supra* note 64, at art. 5(1); Cuba-Venezuela BIT, *supra* note 66, at art. 6(1); Cuba-Hungary BIT, *supra* note 59, at art. 5(1). Other treaties simply state that “[i]nvestment shall not be expropriated, nationalized or subject, directly or indirectly.” See Cuba-Turkey BIT, *supra* note 65, at art. III(1); Cuba-Austria BIT, *supra* note 57, at art. 5(1); Cuba-Italy BIT, *supra* note 70, at art. 5(2); Cuba-France BIT, *supra* note 68, at art. 5(2); Cuba-Mexico BIT, *supra* note 62, at art. 7; Cuba-Romania BIT, *supra* note 56, at art. 5(1); Cuba-Chile BIT, *supra* note 58, at art. 6(1); Cuba-Bolivia BIT, *supra* note 61, at art. IV(1); Cuba-Vietnam BIT, *supra* note 64, at art. 5(2); Cuba-Lebanon BIT, *supra* note 60, at art. 4(2); Cuba-Netherlands BIT, *supra* note 54, at art. 6.

<sup>245</sup> For a definition of indirect expropriation refer, for instance, to *Starrett Housing Corporation v. Islamic Republic of Iran*, Case No. 24, Interlocutory Award No. ITL 32-24-1, December 19, 1983, reprinted in 4 Iran-U.S. CTR 122, 154 (“[I]t is recognized in international law that the measures taken by a state can interfere with property rights to such an extent that these rights are rendered so

### G. Transfer of Funds

The critical issue of revenue repatriation, so essential to the foreign investor's short-term calculus, is amply addressed in Cuba's BITs. Cuban repatriation clauses identify with specificity a non-exhaustive list of protected transfers under the relevant treaty. Article 5 of the Cuba-Netherlands BIT, for instance, establishes that permitted transfers, include, in particular, though not exclusively:

- (i) profits, interests, dividends and other current income;
- (ii) funds necessary for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or to replace capital assets in order to safeguard the continuity of an investment;
- (iii) additional funds necessary for the development of an investment;
- (iv) funds in repayment of loans;
- (v) royalties or fees;
- (vi) earnings of expatriates working in connection with an investment;
- (vii) the proceeds of sale or liquidation of the investment; [and
- (viii) payments under the *force majeure* clause.<sup>246</sup>

Doctrinally, the litmus test for determining what constitutes a permitted transfer necessarily entails an analysis of whether it is “es-

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useless that they must be deemed to have been expropriated.”); *see also* *L.E.S.I. SpA v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award, ¶ 131 (Nov. 12, 2008), available at [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C48/DC890\\_Fr.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C48/DC890_Fr.pdf) (“En droit international, l’expropriation ne se limite pas à la confiscation de biens matériels . . . en certaines circonstances, résulter de la privation substantielle de droit contractuels. Ce type d’expropriation dite «indirecte» ou «rampante».”).

<sup>246</sup> Cuba-Austria BIT, *supra* note 57, at art. 5(1).

sentential for, or typical to the making, controlling, maintenance, disposition<sup>247</sup> of the investment. The threshold question, thus, hinges on whether the transfer is directly “related to the investment.”<sup>248</sup>

The foreign investor’s repatriation rights, however, are not without limits. In striking a delicate balance between Cuba’s (or the other contracting state’s) “monetary sovereignty”<sup>249</sup> and the foreign investors’ repatriation rights, Cuban treaties establish that transfers shall be made in convertible currency *pursuant to the laws and regulations of the contracting state where the investment was made*.<sup>250</sup> Arguably, little stands in the way of the Cuban Republic’s authority under its various BIT’s to, for instance, modify exchange rate regulations and demand foreign investors get Central Bank authorization, *ex ante*, as a precondition for repatriation.<sup>251</sup>

This notwithstanding, Article VII(4) of the Cuba-Spain BIT explicitly limits the contracting states’ radius of action, mandating that no more than three months elapse between the time the foreign investor submits the transfer application and the time when the transfer is actually made.<sup>252</sup> Perhaps the Cuban-Peruvian repatriation clause brings to the fore, more vividly than most, the absence of

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<sup>247</sup> *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 240 (Sept. 5, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0228.pdf>.

<sup>248</sup> *Id.*

<sup>249</sup> Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 213 (2d ed. 2012).

<sup>250</sup> Emphasis added. *See, e.g.*, Cuba-Romania BIT, *supra* note 56, at art. 4(3); Cuba-United Kingdom BIT, *supra* note 64, at art. 6; Cuba-Barbados BIT, *supra* note 64, at art. 6; Cuba-Guatemala BIT, *supra* note 61, at art. V(2); Cuba-Portugal BIT, *supra* note 63, at art. 6(2); Cuba-Argentina BIT, *supra* note 67, at art. 5(2); Cuba-Switzerland BIT, *supra* note 69, at art. 5(2); Cuba-Bolivia BIT, *supra* note 61, at art. V(2); Cuba-Chile BIT, *supra* note 58, at art. 5(2); Cuba-France BIT, *supra* note 68, at art. 6; Cuba-Italy BIT, *supra* note 70, at art. 6; Cuba-Indonesia BIT, *supra* note 64, at art. VI(1); Cuba-Mexico BIT, *supra* note 62, at art. 6(2); Cuba-China BIT, *supra* note 134, at art. 6(1).

<sup>251</sup> Refer to *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award, ¶ 179 (June 6, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0516.pdf> (“The Tribunal concludes that Claimants, who knew the regulations on this matter well . . . did not comply with the established procedure, which consisted of requesting authorization from the Central Bank . . . and that Argentina did not breach article 5(b) of the BIT.”).

<sup>252</sup> Cuba-Spain BIT, *supra* note 64, at art. VII(4)

treaty homogeneity as regards transferability. Under Article 4(5) of the Cuba-Peru BIT,<sup>253</sup> both contracting states have reserved their right to temporarily limit transfers in the face of a deficient balance of payments --- a prerogative not present in the text of the vast majority of Cuban BIT's.

#### *H. The Umbrella Clause*

Such textual heterogeneity becomes even more accentuated with respect to the so-called umbrella clause. As a threshold matter, it is essential to note that not all Cuban BIT's contain umbrella clauses.

Under those Cuban BITs without umbrella clauses, the question of whether a purely contractual breach rises to the level of a treaty breach --- thus constituting a transgression of international law --- will depend on whether the foreign investor's claim for breach of the BIT's substantive protections arose out of a contractual breach.<sup>254</sup> The above-referenced test appears to be inapplicable in the face of the typical Cuban umbrella clause, whereby the Cuban Republic is bound to observe any present or future legal obligation with regard to the investments covered by the BIT. Article 7(2) of the Cuba-Romania BIT is emblematic of the umbrella clause language adopted by the Cuban Republic in its treaties with the United Kingdom,<sup>255</sup> Germany,<sup>256</sup> Austria,<sup>257</sup> Lebanon,<sup>258</sup> Greece,<sup>259</sup> Venezuela,<sup>260</sup> Switzerland,<sup>261</sup> and Barbados.<sup>262</sup>

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<sup>253</sup> Cuba-Peru BIT, *supra* note 77, at art. 4(5)The original Spanish version of this provision reads as follows, (“[C]ada Parte contratante tendrá derecho, en situaciones de dificultades excepcionales o graves de balanza de pagos, a limitar temporalmente las transferencias, en forma equitativa y no discriminatoria, de conformidad con los criterios internacionalmente aceptados.”).

<sup>254</sup> Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5 THE JOURNAL OF WORLD INVESTMENT & TRADE 556, 561 (Aug. 2004).

<sup>255</sup> Cuba-United Kingdom BIT, *supra* note 64, at art. 2(2).

<sup>256</sup> Cuba-Germany BIT, *supra* note 77, at art. 8(2).

<sup>257</sup> Cuba-Austria BIT, *supra* note 57, at art. 9.

<sup>258</sup> Cuba-Lebanon BIT, *supra* note 60, at art. 9(2).

<sup>259</sup> Cuba-Greece BIT, *supra* note 55, at art. 2(4).

<sup>260</sup> Cuba-Venezuela BIT, *supra* note 66, at art. 4(5).

<sup>261</sup> Cuba-Switzerland BIT, *supra* note 69, at art. 8(2).

<sup>262</sup> Cuba-Barbados BIT, *supra* note 64, at art. 2(2).

Each Contracting Party shall observe any other obligation it has assumed with regard to investments made in its territory by investors of the other Contracting Party.

Admittedly, given the dearth of investment treaty arbitrations involving Cuba and the acute dissonance among international arbitral tribunals on their appropriate construction and application,<sup>263</sup> the reach of Cuban umbrella clauses remains rather uncertain.<sup>264</sup>

### *I. Inter-temporal Application*

Besides thoroughly understanding the substantive safeguards available to foreign investors under the wide universe of Cuban BIT's, it is essential to closely scrutinize their inter-temporal application. While clearly protecting foreign investments made on or after their date of effectiveness, Cuban BITs are also applicable to foreign investments legally existing in Cuba before their entry into force. Such is the case of Cuba's BITs with, for instance, the Netherlands,<sup>265</sup> Slovakia,<sup>266</sup> Greece,<sup>267</sup> Lebanon,<sup>268</sup> Argentina,<sup>269</sup>

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<sup>263</sup> The doctrinal divergence emerging in the wake of the jurisdictional awards in *SGS Société Générale de Surveillance, S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, Aug. 6, 2003 and *SGS Société Générale de Surveillance, S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, Jan. 29, 2004, has only widened in the ensuing years.

<sup>264</sup> Even in the face of a Cuban BIT having no umbrella clause, an international arbitral tribunal may very well find that by operation of that BIT's MFN clause Cuba is "obliged to extend [that] same Treaty protection of contractual commitments" to the foreign investor of a contracting state with whom no umbrella clause was agreed. See e.g. *Impregilo, S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 221 (Apr. 22, 2005), available at [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C224/DC642\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C224/DC642_En.pdf).

<sup>265</sup> Cuba-Netherlands BIT, *supra* note 54, at art. 10.

<sup>266</sup> Cuba-Slovakia BIT, *supra* note 59, at art. 11.

<sup>267</sup> Cuba-Greece BIT, *supra* note 55, at art. 13.

<sup>268</sup> Cuba-Lebanon BIT, *supra* note 60, at art. 10.

<sup>269</sup> Cuba-Argentina BIT, *supra* note 67, at art. 1.

Chile,<sup>270</sup> Hungary,<sup>271</sup> Guatemala,<sup>272</sup> Bolivia,<sup>273</sup> Peru,<sup>274</sup> Venezuela,<sup>275</sup> Switzerland,<sup>276</sup> Romania,<sup>277</sup> Portugal,<sup>278</sup> Mexico,<sup>279</sup> and Germany.<sup>280</sup> Article 10 of the Cuba-Netherlands BIT neatly encapsulates this approach,

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments that legally exist on that date, *but they shall not apply to investment disputes which arouse before its entry into force.*<sup>281</sup>

Thus, the exercise of identifying the precise point in time at which the legal dispute between the foreign investor and the Cuban Republic crystallized will become outcome-determinative with respect to the arbitral tribunal's jurisdiction *ratione temporis*. Interestingly, Article 24(2) of the Cuba-Austria BIT offers the parties a more time-specific approach, denying coverage to "claims which have been settled or dispute procedures which have been initiated prior to its entry into force."<sup>282</sup> Other Cuban BITs, while extending coverage to foreign investments made before their entry into force, remain silent as to whether disputes existing prior to that date are

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<sup>270</sup> Cuba-Chile BIT, *supra* note 58, at art. 2.

<sup>271</sup> Cuba-Hungary BIT, *supra* note 59, at art. 11.

<sup>272</sup> Cuba-Guatemala BIT, *supra* note 61, at art. II.

<sup>273</sup> *Id.* at art. X.

<sup>274</sup> Cuba-Peru BIT, *supra* note 77, at art. 11.

<sup>275</sup> Cuba-Venezuela BIT, *supra* note 66, at art. 2.

<sup>276</sup> Agreement between the Swiss Confederation and the Republic of Cuba on the Promotion and Reciprocal Protection of Investments. Cuba-Switzerland BIT, *supra* note 69, at art. 2.

<sup>277</sup> Cuba-Romania BIT, *supra* note 56, at art. 6.

<sup>278</sup> Cuba-Portugal BIT, *supra* note 63, at art. 11.

<sup>279</sup> Cuba-Mexico BIT, *supra* note 62, at art. 2.

<sup>280</sup> Cuba-Germany BIT, *supra* note 77, at art. 9.

<sup>281</sup> Cuba-Netherlands BIT, *supra* note 54, at art. 10 (emphasis added).

<sup>282</sup> Cuba-Austria BIT, *supra* note 57, at art. 24(2) (emphasis added).

covered or not under the BIT. Cuba's BITs with, for example, Turkey,<sup>283</sup> Vietnam,<sup>284</sup> Spain,<sup>285</sup> Italy,<sup>286</sup> United Kingdom,<sup>287</sup> Barbados,<sup>288</sup> Indonesia,<sup>289</sup> and China,<sup>290</sup> stand for this proposition. In particular, Article VIII(1) of the Cuba-Turkey BIT establishes in part that:

This Agreement shall be applicable to the investments which are operating legally on the date of its entry into force as well as to investments made or acquired thereafter.<sup>291</sup>

Arguably, determining the retroactive reach of those BITs adopting the above-referenced language will no doubt befall on the international arbitral tribunal itself, as it carves out the metes and bounds of its own jurisdiction *ratione temporis*. Prospective protection, following termination, is yet an additional safeguard invariably present in Cuba's BITs. Under an important number of these treaties, foreign investments made on Cuban soil prior to the termination of the relevant BIT will "continue to be effective *for a period of ten years from the date of termination*."<sup>292</sup> This is true for Cuba's BITs with, among others, Slovakia,<sup>293</sup> Greece,<sup>294</sup> Spain,<sup>295</sup> Indonesia,<sup>296</sup>

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<sup>283</sup> Cuba-Turkey BIT, *supra* note 65, at art. VIII(1).

<sup>284</sup> Cuba-Vietnam BIT, *supra* note 64, at art. 10.

<sup>285</sup> Cuba-Spain BIT, *supra* note 64, at art. II(2).

<sup>286</sup> Cuba-Italy BIT, *supra* note 70, at art. 13.

<sup>287</sup> Cuba-United Kingdom BIT, *supra* note 64, at art. 13.

<sup>288</sup> Cuba-Barbados BIT, *supra* note 64, at art. 12.

<sup>289</sup> Cuba-Indonesia BIT, *supra* note 64, at art. X.

<sup>290</sup> Cuba-China BIT, *supra* note 134, at art. 11.

<sup>291</sup> Cuba-Turkey BIT, *supra* note 65, at art. VIII(1).

<sup>292</sup> Cuba-Slovakia BIT, *supra* note 59, at art. 12(3) (emphasis added).

<sup>293</sup> *Id.*

<sup>294</sup> Cuba-Greece BIT, *supra* note 55, at art. 14(3).

<sup>295</sup> Cuba-Spain BIT, *supra* note 64, at art. XII(2).

<sup>296</sup> Cuba-Indonesia BIT, *supra* note 64, at art. XIII(2).

China,<sup>297</sup> Hungary,<sup>298</sup> Guatemala,<sup>299</sup> Peru,<sup>300</sup> Venezuela,<sup>301</sup> Turkey,<sup>302</sup> Austria,<sup>303</sup> Portugal,<sup>304</sup> Argentina,<sup>305</sup> and Vietnam.<sup>306</sup>

Likewise, Cuba's BIT's with Germany<sup>307</sup> and Switzerland<sup>308</sup> provide identical post-termination protection but for a period of 20 years following their expiration. The Cuban-Chilean<sup>309</sup> and Cuban-Dutch treaties,<sup>310</sup> for example, limit such post-termination protection to 15 years, while the Cuban-Italian treaty<sup>311</sup> further reduces it to a 5-year period. Under Cuba's BITs with Romania,<sup>312</sup> Bolivia,<sup>313</sup> and Lebanon,<sup>314</sup> all of which offer post-termination protection, the 10-year period begins to run as of the date one of the contracting states to the BIT tenders an official notice denouncing the treaty. For their part, Cuba's BITs with the United Kingdom,<sup>315</sup> Barbados,<sup>316</sup> and France<sup>317</sup> explicitly limit their 20-year post-termination protection only to those foreign investments made while the treaty was in force. The Cuba-Mexico BIT reproduces this same arrangement, but only with 10 years of post-termination protection.<sup>318</sup>

It is not uncommon for Cuban BITs to enjoy terms of maturity of 10 or even 15 years,<sup>319</sup> with the possibility of tacit extensions for

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<sup>297</sup> Cuba-China BIT, *supra* note 134, at art. 13(4).

<sup>298</sup> Cuba-Hungary BIT, *supra* note 59, at art. 12(3).

<sup>299</sup> Cuba-Guatemala BIT, *supra* note 61, at art. XI(3).

<sup>300</sup> Cuba-Peru BIT, *supra* note 77, at art. 12(4).

<sup>301</sup> Cuba-Venezuela BIT, *supra* note 66, at art. 11(3).

<sup>302</sup> Cuba-Turkey BIT, *supra* note 65, at art. VIII(4).

<sup>303</sup> Cuba-Austria BIT, *supra* note 57, at art. 26(3).

<sup>304</sup> Cuba-Portugal BIT, *supra* note 63, at art. 13(3).

<sup>305</sup> Cuba-Argentina BIT, *supra* note 67, at art. 10(2).

<sup>306</sup> Cuba-Vietnam BIT, *supra* note 64, at art. 12(3).

<sup>307</sup> Cuba-Germany BIT, *supra* note 77, at art. 13(3).

<sup>308</sup> Cuba-Switzerland BIT, *supra* note 69, at art. 13(2).

<sup>309</sup> Cuba-Chile BIT, *supra* note 58, at art. 11(3).

<sup>310</sup> Cuba-Netherlands BIT, *supra* note 54, at art. 14(3).

<sup>311</sup> Cuba-Italy BIT, *supra* note 70, at art. 15(2).

<sup>312</sup> Cuba-Romania BIT, *supra* note 56, at art. 11(2).

<sup>313</sup> Cuba-Bolivia BIT, *supra* note 61, at art. XII(3).

<sup>314</sup> Cuba-Lebanon BIT, *supra* note 60, at art. 12(2).

<sup>315</sup> Cuba-United Kingdom BIT, *supra* note 64, at art. 14.

<sup>316</sup> Cuba-Barbados BIT, *supra* note 64, at art. 13.

<sup>317</sup> Cuba-France BIT, *supra* note 68, at art. 12.

<sup>318</sup> Cuba-Mexico BIT, *supra* note 62, at art. 14(3).

<sup>319</sup> For BIT's enjoying terms of maturity of ten years *see, e.g.*, Cuba-Venezuela BIT, *supra* note 66, at art. 11(2); Cuba-Hungary BIT, *supra* note 59, at art.

periods of two,<sup>320</sup> five,<sup>321</sup> or even 10 years,<sup>322</sup> unless denounced within one-year<sup>323</sup> or six months<sup>324</sup> of their expiration dates. Cuban BITs, moreover, will usually enter into full force and effect following the exchange of ratification instruments between the Cuban Republic and the other contracting state, in accordance with their respective domestic legislations.

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12(2); Cuba-Mexico BIT, *supra* note 62, at art. 14(1); Cuba-Guatemala BIT, *supra* note 61, at art. XI(2); Cuba-Austria BIT, *supra* note 57, at art. 26(2); Cuba-Peru BIT, *supra* note 77, at art. 12(2); Cuba-Lebanon BIT, *supra* note 60, at art. 12(1); Cuba-Indonesia BIT, *supra* note 64, at art. 13(1); Cuba-Turkey BIT, *supra* note 65, at art. VIII(2); Cuba-France BIT, *supra* note 68, at art. 12; Cuba-Portugal BIT, *supra* note 63, at art. 13(2); Cuba-Barbados BIT, *supra* note 64, at art. 13; Cuba-Bolivia BIT, *supra* note 61, at art. XII(2); Cuba-Germany BIT, *supra* note 77, at art. 13(2); Cuba-Romania BIT, *supra* note 56, at art. 11(1); Cuba-United Kingdom BIT, *supra* note 64, at art. 14; Cuba-Argentina BIT, *supra* note 67, at art. 10(1); Cuba-Greece BIT, *supra* note 55, at art. 14(1); Cuba-Switzerland BIT, *supra* note 69, at art. 13(1); Cuba-Slovakia BIT, *supra* note 59, at art. 12(2); Cuba-Vietnam BIT, *supra* note 64, at art. 12(1); Cuba-Spain BIT, *supra* note 64, at art. XII(1); Cuba-Italy BIT, *supra* note 70, at art. 15(1). For BITs with terms of maturity of 15 years *see, e.g.*, Cuba-Netherlands BIT, *supra* note 54, at art. 14(1); Cuba-Chile BIT, *supra* note 58, at art. 11(2).

<sup>320</sup> *See* Cuba-Spain BIT, *supra* note 64, at art. XII(1).

<sup>321</sup> *See, e.g.*, Cuba-Vietnam BIT, *supra* note 64, at art. 12(1); Cuba-Italy BIT, *supra* note 70, at art. 15(1).

<sup>322</sup> *See, e.g.*, Cuba-Indonesia BIT, *supra* note 64, at art. 13(1); Cuba-Bolivia BIT, *supra* note 61, at art. XII(2); Cuba-Romania BIT, *supra* note 56, at art. 11(1); Cuba-Greece BIT, *supra* note 55, at art. 14(2); Cuba-Slovakia BIT, *supra* note 59, at art. 12(2).

<sup>323</sup> *See, e.g.*, Cuba-Venezuela BIT, *supra* note 66, at art. 11(2); Cuba-Hungary BIT, *supra* note 59, at art. 12(2); Cuba-Mexico BIT, *supra* note 62, at art. 14(2); Cuba-Chile BIT, *supra* note 58, at art. 11(2); Cuba-Lebanon BIT, *supra* note 60, at art. 12(1); Cuba-Indonesia BIT, *supra* note 64, at art. 13(1); Cuba-Turkey BIT, *supra* note 65, at art. VIII(2); Cuba-Portugal BIT, *supra* note 63, at art. 13(2); Cuba-Barbados BIT, *supra* note 64, at art. 13; Cuba-Germany BIT, *supra* note 77, at art. 13(2); Cuba-United Kingdom BIT, *supra* note 64, at art. 14; Cuba-Argentina BIT, *supra* note 67, at art. 10(1); Cuba-Switzerland BIT, *supra* note 69, at art. 13(1); Cuba-Slovakia BIT, *supra* note 59, at art. 12(2); Cuba-Italy BIT, *supra* note 70, at art. 15(1).

<sup>324</sup> *See, e.g.*, Cuba-Netherlands BIT, *supra* note 54, at art. 14(2); Cuba-Peru BIT, *supra* note 77, at art. 12(2); Cuba-Romania BIT, *supra* note 56, at art. 11(1); Cuba-Greece BIT, *supra* note 55, at art. 14(2); Cuba-Vietnam BIT, *supra* note 64, at art. 12(2).

### V. CONCLUSION: A LEGAL MINEFIELD?

As Cuba navigates along uncharted waters, its capacity to attract significant inflows of DFI will prove decisive.

For Cuba, there will be no sustainability without robust economic growth. In the Cuban context, however, this necessarily requires the restructuring of the island's institutional repertoire.

More specifically, Cuba's ability to attract and preserve high volumes of DFI is closely intertwined to the island's willingness to delocalize the dispute settlement mechanisms available to foreign investors doing business in Cuban territory.

The cogency of its domestic legal superstructure and, more importantly, the degree to which its domestic legal order can coherently interact with the international legal order will no doubt prove decisive in attracting DFI.

For Cuba, however, the future still looks rather uncertain. Besides the obvious complexities surrounding the deconstruction of the United States' anachronistic blockade, Cuba faces today a myriad of unanswered questions and tough policy options.

And among the more prominent policy choices facing the Cuban Republic, in its quest to woo foreign investment, is deciding whether to open itself fully to investment treaty arbitration.

On the one hand, Cuba's signing of a wide universe of BITs with countries from around the globe, if taken together with its ratification of the New York Convention and Vienna Convention on the Law of Treaties, goes to show a long-standing pro international arbitration policy that predates today's geopolitical juncture.

Yet, on the other hand, the very small number of investment treaty arbitrations involving Cuba together with the policy and legal imponderables surrounding the island's endogenous institutional repertoire, bring to the surface the long road ahead for solidifying the hold of international arbitration in Cuba's legal culture.

The first challenge facing investment treaty arbitration in Cuba is the uncertain status of treaties in Cuba's domestic law. Admittedly, Article 20 of the Cuban Civil Code<sup>325</sup> establishes that in the case of conflict between a treaty and a provision of the Civil Code,

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<sup>325</sup> Cód Civ. art. 20 (Cuba) (“Si un acuerdo o un tratado internacional del que Cuba sea parte establece reglas diferentes a las expresadas en los artículos anteriores o no contenida en ellos, se aplican las reglas de dicho acuerdo o tratado.”).

the treaty controls. This notwithstanding, it is not at all clear in the Cuban Constitution or in Decree-Law No. 191 of 1999<sup>326</sup> how and when treaties become a part of Cuban domestic law or their hierarchy relative to domestic legislation. While obviously not a monist state in the Dutch sense,<sup>327</sup> the Cuban Republic has yet to articulate with greater clarity a rule of treaty transubstantiation into domestic law.

Arguably, the second challenge besieging investment treaty arbitration in Cuba is the uncertainty surrounding the almost inevitable interactions between the Cuban and international legal orders; particularly in the context of parallel proceedings.

The recognition and enforcement of arbitral awards in Cuba will, no doubt, raise complex legal and policy questions in Cuban courts in light of Havana's disavowal of the ICSID Convention and the New York Convention's escape hatches.

Amidst the uncertainty, however, it is a foregone conclusion that Cuba's legal superstructure will undergo important transformations as it attempts to cope with ever-higher volumes of DFI. Sustainability hinges on the Cuban Republic's willingness to fully incorporate itself to the global markets. At a time when Washington and Havana attempt to chart a new geopolitical understanding that will no doubt test the vitality of Cuba's BITs, no other aspect of Cuban foreign investment law is as pertinent as its dispute settlement mechanisms. On their cogency, coherence, and predictability (or lack thereof), depends in great measure the survival of the Cuban national project.

Time is of the essence.

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<sup>326</sup> Published in the Official Gazette of the Cuban Republic on March 12, 1999, Decree-Law No. 191 stands today as the definitive norm regulating the Cuban Republic's accession to bilateral and multilateral treaties.

<sup>327</sup> THE CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS Sept. 22, 2008, art. 91(3) ("Any provision of a treaty that conflicts with the Constitution or which leads to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favor.") The Cuban Constitution, contrary to its Dutch counterpart, is clearly the supreme legal norm in Cuban territory and controls over all else, including treaties.