

REALITY OF LABOR IN CUBA AND THE SOCIAL RESPONSIBILITY OF FOREIGN INVESTORS

Jesús R. Mercader Uguina¹

I. Foreign investments in Cuba: Background

Economic data show that starting in 1994 Latin America became the main destination for direct investments from Spain's most important service companies in its internationalization strategies. In a few years, Spain attained leadership positions in some of the main Latin American markets. As a result, investments in Latin America between 1991 and 1999 accounted for nearly 50 billion dollars. It is evident that Spanish companies have gone from being marginal investors in the international realm to having a growing importance in the services sector. Thus, while some of the most important transnational companies in the world attempted to increase their efficiency through investors in Spain, Spanish companies were seeking to access Latin American markets in an attempt to grow in size and to be able to compete, under the best possible conditions, with leading companies in increasingly globalized international markets.²

Within this framework, Spanish investments in Cuba have, throughout these years, played a noticeable part, totaling 150 million dollars in 1998. Of the 600 foreign companies doing business there that year, around 150 were Spanish companies, including Argentaria, BBV, Tabacalera, and Sol Meliá. At that same time, Spain was ranked the number one desti-

nation for exports from Cuba's Free Trade Zones. The Cuban Ministry for Foreign Investment stated that by the end of 2002 there were 412 international joint ventures in Cuba. Fifty percent of the capital involved came from the European Union. Of those joint ventures, 336 operate on the Island and 76 operate abroad. Spain, Canada, Italy, and France were the first four countries to have companies of this kind in Cuba.³ The current regulatory framework of foreign investments in Cuba deserves to be evaluated in light of its recent history.

Following the expropriations of the 1960s, foreign investments disappeared in Cuba for over 30 years.⁴ In 1972, Cuba automatically became a member of the Council for Mutual Economic Assistance under the category of "developing country special member" (COMECON: USSR-Eastern Europe common market),⁵ and, therefore, in the so-called international socialist division of labor and in the system of economic dependence existing in that complex structure.

Years later, Legislative Decree No. 50 of February 15, 1982, on Joint Ventures between Cuban and Foreign Entities, revived investments in Cuba since the government considered that in certain sectors, such as tourism, "socialist countries did not possess

1 Professor of Labor Law and Social Security, Universidad Carlos III of Madrid.

2 Data are from E. GIRALDEZ PIDAL, *La internacionalización de las empresas españolas en América Latina [Internationalization of Spanish companies in Latin America]*, Madrid, CES, 2002, p. 14.

3 As summarized by L. VENACIO in *La inversión extranjera directa y la crisis económica cubana [Direct foreign investment and the Cuban economic crisis]*. The full digital version of the text is accessible at www.eumed.net/libros/2005/lv/.

4 For an analysis of this period L. VENACIO, *La inversión extranjera directa y la crisis económica cubana [Direct foreign investment and the Cuban economic crisis]*, cit.

5 C. MESA-LAGO, *Breve historia económica de la Cuba socialista. Políticas, resultados y perspectivas [Brief economic history of socialist Cuba. Policies, results and perspectives]*, Madrid, Alianza América, 1994, p. 99.

Reality of Labor in Cuba and the Social Responsibility of Foreign Investors

the state-of-the-art technologies required for development, which led to the conviction that, in order to enjoy a comparative edge, in other words to diversify and increase the volume of exports and income in currency, it was necessary to associate with Western companies.”⁶ The actual application of the Law posed numerous problems, so that the first project developed with foreign funds did not materialize until 1990,⁷ the year of the first joint venture between a state entity and a foreign firm (the Spanish hotel chain Sol Meliá, owner of 50%) which resulted in the opening of a hotel in Varadero in 1990.

As a result of the fall of the socialist block in the first years of the 1990s, Cuba suffered various shocks. The Cuban economy as a whole “was reduced between 35 and 50%. Before 1991, the USSR used 63% of Cuban sugar, 73% of its nickel, 95% of its citrus and 100% of its electricity exports. In turn, Cuba received from the USSR 90% of its machinery and other equipment and 98% of its fuel. In less than 4 years, Cuba lost 80% of its exchange capacity.”⁸ These circumstances led the Cuban State to seek out larger investments for the long term, although still in limited sectors of the economy. In order to facilitate this new strategy, the State included in the new Constitution, promulgated in August 1992, certain important changes in the system of property in Cuba; in particular, Article 23 of the Constitution establishes that: “The State recognizes the ownership of mixed companies, corporations and joint ventures incorporated pursuant to the law.” The use, enjoyment, and disposal of assets belonging to the patrimony of the

above entities are governed by the law and the treaties, as well as by their own bylaws and regulations that govern them.

From 1992 to 1995, the system of foreign investments had been characterized by the following features:⁹ the possibility for the investors to be owners of up to 49% of the shares of the company, except in the case of tourism, the mining industry, or investments in Latin American companies in which they are permitted to own up to 51% or more of the shares of the company; exemption of taxes on gross income and individual income, and of the tax on the transfer of the company or its assets; elimination of customs duties on imports of equipment necessary for the company; repatriation, without restrictions and in hard currency, of the dividends and profits and the salaries of the foreign employees of the company, establishing in labor matters the freedom to contract foreign personnel for executive and technical positions, although only through the state companies that supply personnel; and, finally, governmental support in technical areas such as legal, economic, accounting, and computer services.

Once the path had been selected, which was to attract this investment,¹⁰ the Cuban government adopted several measures. Specifically, the *Ministry for Foreign Investment and Economic Collaboration* (MINVEC) was created on April 21, 1994, by means of Legislative Decree No. 147 of the Council of State. Its functions include promoting Foreign Investment in Cuba and establishing the legislation governing the negotiation process for the constitu-

6 M. FIGUERAS, *Las Inversiones Extranjeras en Cuba [Foreign Investments in Cuba]*, Cuba, MINVEC, 1997.

7 For an analysis of the shortcomings of this Law, see J. F. PEREZ LOPEZ, *Odd Couples: Joint Venturing Between Foreign Capitalists and Cuba Socialists*, North-South Agenda Papers, 1995, n. 16.

8 S. BASDEO and H. N. NICOL, *Canada, the United States, and Cuba. An Evolving Relationship*. The North-South Center Press at the University of Miami, 2002, p.15.

9 M. F. TRAVIESO-DIAZ, J. F. PEREZ-LOPEZ, *La inversión extranjera en Cuba: Pasado, presente y futuro [Foreign investment in Cuba: Past, present and future]*, in M. MARTIN, M. GARCIA, F.J. SAEZ (Eds.), *La actual economía cubana a debate. Homenaje a Julián Alienes Urosa [Current Cuban economy under debate. Homage to Julián Alienes Urosa]*, Granada, Universidad, 2001, p. 129.

10 M. DE MIRANDA PARRONDO, *Estado, Mercado y Reforma de la Economía Cubana. Alternativas de Política Económica [State, Market and Reform of the Cuban Economy. Economic Policy Alternatives]*, in AA.VV., *Ponencia en el Simposio Internacional del Proyecto de Investigación “Reforma económica y cambio social en América Latina y el Caribe (cuatro casos de estudio: Colombia, Costa Rica, Cuba y México)” [Speech at the International Symposium of Investigation Project “Economic reform and social change in Latin America and the Caribbean (Four case studies: Colombia, Costa Rica, Cuba and Mexico)”, Cali, Colombia, 1999, pp. 22-23.*

tion of Joint Ventures or other forms of Foreign Investment participation. At the end of 1994, it was officially declared that the Cuban economy would be totally open to foreign investment, with the exception of health, education, and the armed forces. As of this date, a new wave of mixed companies arose, principally in the provision of services, housing construction, real estate projects, and telecommunications.

II. The current regulatory framework of foreign investments in Cuba: General principles of Law No. 77 of 1995.

1. Budgets for foreign investment in Cuba

On September 5, 1995, the Cuban National Assembly approved the *Law of Foreign Investment*, Law No. 77/1995 (Gaceta Oficial, September 6, 1995), which came to replace Legislative Decree No. 50 of February 15, 1982, *concerning the Joint Venture between Cuban and Foreign Entities* and establishes the fundamental principles governing foreign investments. Its preamble states that “it is convenient to adopt a new legislation which provides better security and guarantees to the foreign investor,” and further points out that Cuba can benefit from foreign investment after the fall of the socialist block and in view of the “fierce embargo” imposed by the United States.¹¹ Law No. 77 was completed with the enactment of various decrees and resolutions after its introduction.

Investment regulations establish a complex administrative system of management headed by the *Ministry for Foreign Investment and Economic Collaboration* (MINVEC) as the agency responsible for coordinating investment activity, receiving applications from foreign investors, processing these applications and distributing them to other agencies for review, and finally presenting them to the Executive Committee of the Council of Ministers that was created by Legislative Decree No. 147 of April 21, 1994, of the Council of State. An essential requirement for being able to operate in Cuba is for companies to register in advance in the *Register* held

by the *Cuban Chamber of Commerce*. As indicated in Article 25.5 of Law No. 77, each proposed investment must be approved by the *Executive Committee of the Council of Ministers* or the Government Commission. Furthermore, Cuban regulations establish a series of requirements for controlling and monitoring investments.

The Foreign Investment Law authorizes three different types of investments:

1. First, there are *mixed companies*, which include domestic and international investors. They are commercial companies that adopt “the form of a corporation with registered shares, with the participation as shareholders of one or more domestic investors and one or more foreign investors” (Article 2 (i) of Law No. 77). The mixed company involves the creation of a separate legal entity (“artificial person different from the parties”), which must register with the Cuban Chamber of Commerce (Article 13 of Law No. 77).

2. Second, Law No. 77 permits the *creation of companies with exclusively foreign capital*, that is, “without the concurrence of any domestic investor” (Article 2(h) of Law No. 77). This type of company can be created according to Article 15, either by registration of the entity with the Cuban Chamber of Commerce, or by the creation of a Cuban subsidiary of the foreign entity owned by it in the form of a corporation with registered shares, recording it with the Registry of the Chamber of Commerce.

3. Lastly, the Foreign Investments Law defines the “*international joint venture contracts*” as pacts between one or more domestic investors with one or more international investors in order to carry out activities together, without forming a separate legal entity (Article 2 (g) of Law No. 77).

2. The labor system of the Foreign Investment Law

2.1. General principles and applicable regulations

¹¹ The ILO Committee of Experts took note of the Government’s report for the period ending June 1996. The Government recalls that the circumstances prevailing in the country since the beginning of the decade have had a negative effect on employment. Among the measures adopted to face the labor market difficulties, it refers in particular to the reintegration of the economy into world markets by means of establishing mixed companies or joint ventures, developing activities to generate short-term income (tourism, biotechnologies, pharmaceutical industry, food products), and authorizing basic units of cooperative agricultural production and self-employment, in CEACR, *Individual Observation concerning Convention No. 122*, 1998.

Law No. 77 maintains the system implemented under Law No. 50, which indicates that the labor force of each company with foreign participation must be provided by the State through an employment agency designated by MINVEC.¹² However, in certain cases, the Law allows a company to hire all or some of its employees directly, if permitted by the authorization issued by the Government for the incorporation of the company or the development of the corporate project. Law No. 77 defines a special legal labor system in which the common labor legislation acts as a secondary regulation: “in the activity of foreign investments, the valid Cuban labor and social security legislation is implemented with the adaptations set forth in this law” (Article 30). The labor system is completed with Resolution No. 3/96 of the Ministry of Labor and Social Security, issued on March 27, 1996 (Gaceta Oficial May 24, 1996),¹³ pursuant to Article 37 of the Law.¹⁴

The subjective scope of this special labor system extends to all “workers who render services in the activities of foreign investments [...] Cubans or foreigners who are permanent residents in Cuba” (Article 31.1). However, an exception is made to the former rule for “*the management and administration entities of mixed companies or of totally foreign capital companies, or the parties to international joint venture contracts.*” In this case, they themselves would be able to decide that certain top management positions or certain technical positions would be filled by persons who are not permanent residents in the country and, in these cases, would determine the labor system to be applied and the rights and obligations of such workers. Nonetheless, the regulation makes it clear that persons who are not permanent residents in the country and are hired will be subject to the valid immigration and foreigner status provisions.

In turn, Article 32.1 of Law No. 77 establishes that

“mixed companies, the parties to international joint venture contracts and totally foreign capital companies may be authorized to create an *economic incentive fund* for Cuban workers and foreign permanent residents in Cuba who work in the activities of the foreign investments.” In any event, “the contributions to the economic incentive fund are made from the profits obtained. The amount of these contributions is decided upon by the mixed companies, the foreign investors and the domestic investors who are parties to international joint venture contracts, and by totally foreign capital companies, with the ministry for foreign investment and economic collaboration.” In turn, MINVEC Resolution No. 127/95 issued on December 15, 1995 (Gaceta Oficial of January 2, 1996), establishes, concerning the companies with foreign participation, the rules on the establishment of a workers’ economic incentive fund.

2.2. The monopoly of the Cuban State in the selection of the workers who render services to companies with foreign investment

The Foreign Investment Law authorizes three different types of investments. In each of them, full control of the hiring and firing process of the workers is reserved for entities controlled by the State. The State reserves for itself the screening and control of the human resources which, in other countries, are handled by the management of the companies, including: employee recruitment, employment decisions, application of disciplinary measures, dismissal, and the compensation of the worker for his achievements. One author has indicated that “the employment agency transforms the typical bilateral relationship into an interesting triangle, in which the worker, apparently in a condition of double subordination, actually receives better protection in his individual legal-labor

12 The ILO Committee of Experts noted that the total number of workers employed in foreign enterprises, or in mixed companies, at the end of 1997, represented less than 0.5 per cent of the total number of workers employed. CEACR, *Individual Observation concerning Convention No. 122, 2000*.

13 Resolution No. 3/96 repeals Resolution No. 18/93 of the former CETSS [State Committee for Work and Social Security] and all provisions with the same or lower rank opposed to the provisions of this regulation.

14 Under Article 37: “the Ministry of Labor and Social Security is authorized to issue all additional provisions necessary for the best application of this chapter, especially in matters of labor contracting and labor discipline, and gives certain specifications on the use of workers in the foreign capital companies that operate in Cuba.”

Reality of Labor in Cuba and the Social Responsibility of Foreign Investors

relationship.”¹⁵ Certainly, the triangular relationship is clearly assessed, but the fact that it is more beneficial for the interests of the workers is more debatable, as will be indicated further on.

Cuban legislation does not contain rules regulating labor under subcontracting, nor does it define the concept of brokerage in employment, since Cuba does not have placement agencies. The employment function, as explained earlier, is filled by each entity in its human resources area, through territorial Employment Offices, or through the information given by the Offices of the Municipal Labor Departments of the People’s Power. In the case of foreign investments, the law indicates with limitations that the employer must be a state entity and cannot be an individual. In turn, each investment may have an employer or may establish that there be one in a sector or branch that serves several entities with foreign investment. Concerning personnel, the public entity is the employer because each of its workers signs an employment contract with it.¹⁶

Both mixed companies and totally foreign capital companies must use a government employment entity to hire employees and negotiate their contracts (Articles 33.1 and 3.33). Indeed, in accordance with Article 33.1, “*The workers in mixed companies who are Cuban or foreign permanent residents in Cuba, with the exception of the members of the management or*

administration, shall be contracted by an employing entity proposed by the Ministry for Foreign Investment and Economic Collaboration and authorized by the Ministry of Labor and Social Security.” Equally, Article 33.3 establishes that, “*In totally foreign capital companies, the services of Cuban workers and foreign workers residing permanently in Cuba, with the exception of the members of the management and administrative body, shall be hired through a contract between the company and an employing entity proposed by the Ministry for Foreign Investment and Economic Collaboration, and authorized by the Ministry of Labor and Social Security.*” The entities will be proposed by MINVEC and approved by the Ministry of Labor and Social Security. The agency designated in most cases is ACOREC, S.A. (Agencia de Contratación a Representaciones Comerciales, S.A.), even though CUBALSE, S.A.¹⁷ (Empresa de Servicios al Cuerpo Diplomático, S.A.), sometimes appears as the contracting agency designated by the government.¹⁸

Cuban subsidiaries of multinational companies follow a slightly different process. They must obtain personnel from a certain agency.¹⁹ The Agency for Contracting Commercial Representations (ACOREC), which hires about 2,000 workers in more than 600 companies and which charges a little more from these multinationals, but pays exactly the same to the workers. In this case, the foreign company may establish a trial period of up to two

15 L. GUEVARA RAMIREZ, *Tendencias del derecho laboral cubano en los umbrales del siglo XXI [Trends in Cuban labor law on the threshold of the 21st century]*, Unión Nacional de Juristas, at www.uniondejuristasdecuba.cu/paginas/index_cubalex.htm.

16 L. GUEVARA RAMÍREZ, *Agencias transnacionales y la mundialización del empleo [Transnational agencies and employment globalization]*, Cubalex, 2001, No. 14, at www.uniondejuristasdecuba.cu/paginas/index_cubalex.htm.

17 Cubalse, whose name comes from *Cuba al servicio del extranjero* [Cuba in the service of foreign countries], is a Cuban state corporation made up of a group of companies with various corporate functions. It offers certain products and services to its domestic and foreign clients who have dollars. The corporation employs 6,200 workers in Cuba, controlling a network of over 170 stores and service units – business centers, supermarkets, boutiques, restaurants, a golf club, photo and video stores, laundry and dry cleaning stores, cafes, and veterinary clinics – which mainly serve the members of the diplomatic corps, businessmen, foreigners who live in Cuba, tourists, and Cubans with access to dollars. It also operates in real estate, automobiles, the financial sector, the legal sector, and land and maritime transportation, and offers special services of photography, design, and advertising. Data are from A. CARMONA BAEZ, *State resistance to globalisation in Cuba*, London, Pluto Press, 2004, pp. 168-171.

18 M. F. TRAVIESO, C.P. TRUMBULL IV, *Foreign investment in Cuba: Prospects and Perils*, George Washington International Law Review, 2003.

19 M. F. TRAVIESO, C.P. TRUMBULL IV, *Foreign investment in Cuba: Prospects and Perils*, cit. Law No. 77 and its regulations in the labor field are currently applied according to the following procedure: While the feasibility study is being prepared, the foreign investor and its Cuban partner determine the number of workers needed. Afterward, they contact an employment agency designated by MINVEC. This agency is usually a subsidiary of a State company in the activity sector in which the business will be conducted, possibly the same company as the investor’s partner. The employment agency is fully responsible for all the aspects of hiring, employment conditions, and termination of the Cuban worker’s contract. Each employment agency has a “labor exchange” with the available workers. When a foreign capital company needs Cuban workers, the agency schedules interviews with the management of the joint venture and the prospective employees, and the companies have the last word on selecting the workers. It is not clear how broad the list is from which they can choose or how people are co-opted into the list. The investor can also hire people who are not in the labor exchange. In this case, the businessman contacts the agency and explains that he has decided to hire a worker who is not on the list. After that, the agency prepares a dossier on the worker to establish that he does not have a serious criminal record and has “sound principles.” In this case, the employment agency will contact the worker to hire him on the above terms. The company can never hire him directly.

months with the worker. If the foreign company is satisfied with him, it may hire him for more than five years. The foreign company may decide the position, responsibility, etc.

In the case of “*international joint venture contracts*,” the workers would be hired by the “Cuban party” according to the terms analyzed above. Since the Government does not allow private investment, it is the Cuban investors controlled by the State (Article 2 (a) and (g) of Law No. 77) that are finally responsible for hiring employees. All this takes place in the precise terms of Article 33.2, which establishes that “*the persons who render their services to the parties in international joint venture contracts are contracted by the Cuban party, in accordance with the current legal provisions in matters of labor contracting.*”

The rules governing selecting and hiring workers are discussed in Resolution No. 3/96. They establish that foreign companies must sign “Labor Supply Contract(s)” with the employer and with the competent labor union (Article 7 of Resolution No. 3/96). A feature of the Cuban system or legal system with employment entities is that “there is no double payroll in the user entity,”²⁰ because it submits its needs to the employment entity and the supply contract establishes the details of the supply of each of the workers. This contract contains all the clauses for the performance of its object and is executed with the participation of the union, which also participates in the signing of a tripartite collective bargaining agreement, in which the employment entity and the user company also participate. Article 8 of Resolution No. 3/96 indicates that the employer entity is to find and screen personnel for the company from workers who have the qualification, ability, skill, professionalism, and experience required, for the efficient work in the profession in question, in accordance with current legislation in the matter.

Consequently, it is important to remember that there is no labor relationship *per se* between the workers and foreign capital companies. Thus, the State operates as a “Temporary Employment Agency” that transfers to the foreign user company the workers in its service. The mandatory use of Government-controlled employment agencies leaves workers without the ability to directly negoti-

ate with the business entity their salaries, benefits, reasons for promotion, and the duration of the trial period. The official employment entities take on each of these functions, without allowing the employees to be freely contracted by foreign investors (Articles 9, 12 and 14 of Resolution No. 3/96).

From the various reports of international organizations, it would appear clear that the fact that the State entity can choose the workers of the foreign capital companies means that, through it, there is an ideological screening of the candidates selected. This is categorically stated by the written statement submitted to the United Nations Economic and Social Council by *Pax Christi* (International Catholic Peace Movement, a non-governmental organization in special consultative status) dated January 31, 2001, which indicates that “and like all Cuban workers, they must be members of the state-controlled Cuban labor union CTC (Confederation of Cuban Workers). Those workers who belong to or even associate with the independent and thus illegal unions are expelled from their jobs.” Certainly, the government could, in this way, “reward” the employees it considers politically more loyal, placing them in projects with foreign capital. It is necessary to remember, notwithstanding a more detailed study afterwards, that the powers given to the government entity under Law No. 77 and Resolution No. 3/96 concerning the screening of the workers by their political affiliation is similar to the norms established in 1990 for the employment of workers in joint ventures in the tourist sector; these norms stressed the personal qualities and the conduct of the individual instead of his work performance.

Another international human rights organization, *Human Rights Watch*, indicates in its report on Cuba that “under these laws [...] the Government plays a prominent role in the selection, payment, and firing of workers, thus effectively barring most employees from forming unions or even from entering into independent, direct discussions of labor rights with their employers. These restrictions on labor rights—Cuba’s virtual guarantee that no investor will face any independent union organizing in the workplace—were created to attract foreign investors.”²¹

20 L. GUEVARA RAMÍREZ, *Agencias transnacionales y la mundialización del empleo [Transnational agencies and employment globalization]*, cit.

21 HUMAN RIGHTS WATCH, *Cuba’s Repressive Machinery: Human Rights Forty Years after the Revolution*, 1999, at www.hrw.org.

In this context, we should remember Convention No. 111 that was already analyzed at length. Article 1 establishes that the term “discrimination” includes: “*any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.*” For these purposes, the ILO Committee of Experts on the Application of Conventions and Recommendations pointed out that under Article 1.2 of the Convention, only distinctions, exclusions, or preferences based on the requirements of a particular job are not deemed to be discrimination. Moreover, in the above-mentioned General Survey, the Committee recalls in paragraph 126 that, “although it may be admissible, in the case of certain higher posts which are directly concerned with implementing government policy, for the responsible authorities generally to bear in mind the political opinions of those concerned, the same is not true when conditions of a political nature are laid down for all kinds of public employment in general or for certain other professions.”

2.3. The control exercised by the Cuban State on the labor conditions of the workers in the service of foreign investment companies

As we have been saying, it is clear from Article 34 of Law No. 77 that the employment relationship is established between the worker and the State entity, and not with the foreign participation company. The legal rule makes several specifications as to the following areas: the return of the workers because they do not meet work requirements; the forms of compensation; discipline and resolution of labor conflicts; vacations, social security and labor protection; and drafting of internal regulations.

The trial period for workers contracted to serve a mixed or totally foreign capital company is 30 to 180 days, corresponding to the initial stage of the labor relationship. It allows workers to demonstrate their ability to do the job under company condi-

tions and characteristics. The employment entity, in agreement with the union organization and the company, determines, within the limits indicated, the duration of the trial period for each profession or job, depending on its complexity and characteristics. During that period, the company may return the worker to the employment entity. In turn, Article 13 of Resolution No. 3/96 indicates that the employer and the company are obligated to instruct the worker during the trial period in aspects such as objectives and duration of the trial period, importance, duties, and obligations of the job or profession he will fulfill. The worker must also be told about the amount and payment period of the salary; work status; and protection and hygiene rules and the means to be used. The worker also needs to know the internal regulations and other necessary aspects. Article 10 of Resolution No. 3/96 indicates that the company may give, when needed, training or retraining to its personnel, or agree upon it with the employment entity.

The state entity is responsible for firing and replacing workers whose performance is deficient and, finally, possible claims must be presented to the state entity, even though the company has the financial responsibility concerning the cost of resolving the labor relationship: “*When mixed or totally foreign capital companies consider that a certain worker does not meet their requirements at work, they may request the employment entity to replace him by another. Any labor claim is resolved by the employment entity, which pays at its own expense to the worker the indemnities to which he is entitled, as established by the competent authorities; when applicable, the mixed or totally foreign capital company compensates the employment entity for the payments, according to the procedure established, all in agreement with current legislation.*”

Workers may be fired if they engage “in improper conduct, criminal or otherwise, affecting his/her prestige as a company employee and contrary to the standards of conduct” annexed to the resolution (Article 29 of Resolution No. 3/96). The standards require workers to maintain social conduct worthy

of his/her fellow citizens' respect and trust, by not allowing any conspicuous signs or privileges, and by keeping a lifestyle in line with society. (The law also requires workers to act "according to the best interests of our society"; "to subordinate his/her acts and decisions to the best interests of our people"; and "to neither accept from, nor ask the persons above or around him/her for any payments, gifts, handouts or preferential treatment contrary to the adequate labor and personal behavior expected from our cadre and workers)."²²

2.4. Form of compensation for workers and its flagrant contradiction with ILO Convention 95

The protection of the freedom of workers to dispose of their wages constitutes one of the central aspects of International Labour Organization Convention No. 95 of June 8, 1949, which was ratified by Cuba on September 24, 1959. Article 5 of the Convention requires that wages be paid directly to the worker concerned except as may be otherwise provided by national laws or regulations, collective bargaining agreement or arbitration award, or that with the agreement of the worker involved, differ-

ent procedures be adopted. Article 6 categorically prohibits employers from limiting in any manner the freedom of the worker to dispose of his wages and, on the other hand, Article 9 reads textually: "Any deduction from wages with a view to ensuring a direct or indirect payment for the purpose of retaining employment, made by a worker to an employer or his representative or to any intermediary (such as a labor contractor or recruiter), shall be prohibited." Article 6 of the Convention reinforces the concept when it reads: "Employers shall be prohibited from limiting in any manner the freedom of the worker to dispose of his wages." In short, there is no merit to guaranteeing that the workers receive all their salaries in legal tender and at regular intervals if they cannot dispose of these gains as they wish.

This is the context in which we must place Article 33.4 of Law No. 77 which establishes: "Payments to Cuban workers and foreign workers residing permanently in Cuba shall be made in national currency, which must be obtained beforehand from convertible foreign currency." This limitation is practically unrestricted if we take into account that, if Cuban investors wish to pay their workers in hard currency, they must first obtain approval from the Ministry of Labor, as established in Article 18 of Resolution No. 3/96.²³

22 *Standards of Conduct Applicable to Cuban Staff in International Joint Ventures*, cited by Human Rights Watch, 1999, at www.hrw.org. Workers can be disciplinarily sanctioned if they fail to comply with the resolution's provisions. If a worker commits an infringement, then he or she could face a penalty such as public censure or the loss of 25 percent of the monthly wage. Other possible sanctions include transfer to a lower-paying post or dismissal. The employing entity is charged with applying the penalty after considering factors including the personal qualities of the worker, which potentially grant it authority to penalize workers for expression or activities completely unrelated to their jobs (Articles 47 and 48, Resolution No. 3/96). Under the personnel law, any Cuban who independently contracts with foreign representatives risks government fines ranging from 1,000 to 10,000 Cuban or convertible pesos (Articles 10, 11 and 12, Decree Law No. 166). If the individual cannot pay the fine in cash or property, he or she could face criminal charges (Article 34, Resolution No. 3/96). Foreigners violating these regulations, such as using workers not legally hired, changing the legally authorized forms of payment, or giving non-authorized material incentives, face the same consequences (with all fines due in convertible pesos) (Articles 6, 10, 11, 12 and 34, Resolution No. 3/96).

23 In July 1999, the Cuban Committee for Human Class Representation Rights, Inc., and the Federación Sindical de Plantas Eléctricas, Gas y Agua, two Miami-based organizations, filed a petition with the Court of the Eleventh Judicial Circuit in Miami-Dade County, State of Florida, against 20 foreign companies with investments in Cuba, accusing the companies of colluding with the Cuban government in violation of the human rights of Cuban citizens, including the system of indirect contracting of workers. The case was set aside because the court did not have jurisdiction over all the defendants. The text of the petition is reproduced at <http://www.cubanet.org/ref/dis/demanda>. Although a possible lawsuit in Spanish labor courts against these companies should not be able to be rejected *in limine litis* for lack of jurisdiction because Article 19 of Regulation 44/2001 allows the plaintiff worker to choose whether to sue businessmen domiciled in Spain in Spanish labor courts, or to do so in another Member State if circumstances that are not found in this case exist, there are serious difficulties for such a lawsuit to prosper in Spain. In this regard, the *case of Sol Meliá Group*, which was ruled on by the Balears Superior Court of Justice on November 26, 2002 (R 376/2002), is paradigmatic: the lawsuit brought by a Spanish worker hired in Florida to provide services there for the company domiciled in Miami, "The Sol Group Corporation" (subsidiary fully owned by Spanish parent company "Sol Meliá, SA") was dismissed in connection with the North American company due to lack of jurisdiction of Spain's courts of law and in connection with the Spanish company because it was not a "subject in the work relationship or liable for its outcome" (see also the Ruling of the Balears Superior Court of Justice of October 24, 2002, Rec. No. 377/2002, in a virtually identical case, and the Ruling of the Balears Superior Court of Justice of December 5, 2003 (R 733/2003), also involving the Sol Meliá Group, although this time involving its Moroccan subsidiary, "Sol Meliá Marroco SARL").

Reality of Labor in Cuba and the Social Responsibility of Foreign Investors

The employment agency designated by MINVEC and the joint venture establish a monthly salary in U.S. dollars for each category of workers, which will be paid to the agency. In the example cited by M. F. TRAVIESO and C.P. TRUMBULL IV in their rigorous investigation entitled *Foreign investment in Cuba: Prospects and Perils*, they mention the case of a company that agreed to pay to the employment agency US \$460 monthly for each mechanic, US \$500 for each sales agent, and US \$550 for the general manager. This salary is increased by 25% in employment taxes, which are paid directly by the company to the agency, also in U.S. dollars.²⁴ The employment entity pays the salary of the Cuban workers in Cuban pesos, at a ratio similar to the equivalent salary in Cuba for each category. Thus, each mechanic receives about 200 pesos monthly, the commercial agent about 300 pesos, and the general manager about 400 pesos. In any case, regardless of the form of contracting, the Cuban worker receives in pesos less than 4 cents on the dollar paid by the investor.

The practice of the Cuban government is “harmful,” it has been said, “not only because it confiscates the salary of the workers, but also because it negatively affects the economic performance of the companies with foreign capital.” The salary “is one of the crucial factors affecting the productivity of the workers. A worker who is not paid enough is unhappy and must spend his time trying to improve his economic condition. Inadequate salaries tend to cause, among other evils, unjustified absenteeism, lack of punctuality, theft of products or supplies

and unauthorized use of equipment or other goods of the company.” Equally, it has been indicated that “the use of salary supplements in convertible currency – be it in cash or in kind – helps increase productivity.” However, “the capacity of the companies to grant this additional compensation is limited, because the Cuban government requires the payment of relatively high salaries for the labor force, in addition to social benefits, which raises the cost of the operation, reduces profits and makes the products of the companies less competitive in the market.”²⁵

The use of this form of payment has been criticized by certain International Organizations. As indicated in the already cited report of *Pax Christi*: “The Cuban State also dictates the wages of the local personnel employed by foreigners and retains 90% of their salaries, leaving the Cuban worker with a minimum salary in Cuban currency. This is a clear violation of the right of workers to dispose freely of their salaries.” In turn, *Human Rights Watch* has indicated that “although Cuban workers receive peso salaries from state-controlled employment agencies, the jobs often offer access to dollar tips or bonuses and scarce consumer goods, such as shampoo and soap. The Cuban government profits from this arrangement as well, not only from the long-term value of international investment, but also because the state-controlled employment agencies receive convertible foreign currency payments for all workers’ wages. The government has not revealed what percentage of a worker’s wages ulti-

24 The work cited in the text indicates that a Canadian investor said that his investment project was rejected because he insisted on paying a mechanic 250 pesos/month, instead of the established 129 pesos/month. It also states that one of the criticisms against this system is that sometimes the Cuban employment agencies exaggerate the position of Cuban workers in order to raise the salary to be collected from the investor. Thus, a warehouse employee becomes “warehouse director.”

25 Quotes added are from M. F. TRAVIESO-DIAZ, J. F. PEREZ-LOPEZ, *La inversión extranjera en Cuba: Pasado, presente y futuro [Foreign investment in Cuba: Past, present and future]*, cit., p. 148.

mately reach him—in Cuban pesos—and what portion remains in government coffers.”²⁶

These and the previous circumstances involved in this particular legal system have made a certain author affirm the nullity of the investment contract executed under these conditions. Thus, it has been said, with arguments that were rather weak legally, that “the investment contract is null. The investor, the Cuban State and/or the company designed by the Cuban State to create a simulation, do not have standing to sue each other. The party that has standing to sue is the worker, since he is the innocent party. Even though the employment contract with the Cuban worker (intended to be covered through the brokerage company) is also null, the innocent party has the right to claim what he delivered, in other words his work, at a fair price.”²⁷ The situation, as explained, may be more than questionable from the viewpoint of international legality, but in our opinion this contradiction does not impact in any way the legality of the contract executed by the foreign investor.

3. Labor peculiarities of the labor system in Free Trade Zones

3.1. Free Trade Zones in Cuba: General Ideas

Law No. 77 created a framework for the Executive Committee of the Council of Ministers to designate locations in the national territory where it was possible to establish Free Trade Zones or industrial parks and stipulated that tax benefits would be given to the companies established in them. By Legislative Decree No. 165 of June 3, 1996, the Council of State approved the establishment of these zones in Cuba. On October 24, 1996, MIN-

VEC regulated the process for applying to establish companies with foreign capital in the Free Trade Zones and for creating a register of Free Trade Zones and companies located in them. In turn, MTSS Resolution No. 10/1997 establishes the Regulations of labor relations in Free Trade Zones and industrial parks.

Free Trade Zones are considered “those in which, by decision of the Executive Committee of the Council of Ministers, it is possible to apply a special system in customs matters, exchange, tax, labor, immigration, public policy, capital investment, and foreign trade, and where foreign investors may participate for the purposes of financial operations, importing, exporting, storage, productive activities or re-exporting.” Free Trade Zones allow foreign investment “for the purposes of financial operations, importing, exporting, storage, productive activities or re-exporting.” Industrial parks allow “the development of productive activities with the participation of foreign capital.” (Articles 51.1 and 2 of Law No. 77). The law creates an executive committee of State institutions -- including the Ministry of the Revolutionary Armed Forces and the Ministry of the Interior -- charged with granting free zone concessions and recommending measures to develop the zones and industrial parks (Articles 6.2 and 4 of Decree Law No. 165).

3.2. Special features of the legal labor status in Free Trade Zones

In terms similar to those set forth in Law No. 77, Article 43 of Legislative Decree No. 165 of June 3, 1996, establishes the principle of territoriality as the main principle of contracting workers in these zones. “Workers who render services to the concessionaires and operators in free zones would be, in

26 An example of the benefit that the Cuban State may obtain is found in M. F. TRAVIESO-DIAZ, J. F. PEREZ-LOPEZ, *La inversión extranjera en Cuba: Pasado, presente y futuro [Foreign investment in Cuba: Past, present and future]*, cit., p. 149: “Assuming, for example, that the average salary collected from a business is that of the sales assistant identified in the table, i.e., \$382.01 per month, the Cuban government receives income of more than \$21 million net per month, or approximately \$256 million per year, which is more than the average annual flows of new foreign investment on the island during the 1993-1998 period (approximately \$225 million). In other words, the Cuban State profits more from the salaries paid by the foreign investors to the Cuban workers than from the value of the new investments that enter the country.” Another example of this plan can be found in J. BRITO, *La inversión extranjera en Cuba características de una forma de discriminación [Foreign investment in Cuba, characteristics of a form of discrimination]*, at www.cubasindical.org/grsc. “The maximum salary paid by foreign companies is 700 Cuban pesos, and the investor must pay an average of 2.3% of the payroll scale salary for the personnel it will use. 2.3% of the salary is itemized as follows, according to the Salary Department of the Ministry of Labor and Social Security: 100% scale salary; 30% additional payments, industry coefficient, travel and nighttime work allowance; 30% for the intensity of the work; 60% social benefits received by the labor force; and 10% for the service rendered by the Cuban employment entity = 230%. To understand in essence the method of calculation of the salary to be paid by the foreign partner in dollars, suffice it to apply 2.3% to any scale salary on a payroll approved for the company which will work with foreign capital.”

27 A. LUZARRAGA, *La nulidad de los contratos de inversión extranjera por causa ilícita: defraudar al trabajador cubano [The nullity of the foreign investment contracts due to an illicit cause: defrauding the Cuban worker]*, at <http://www.futurodecuba.org>.

general, Cubans or foreigners who are permanent residents in Cuba.” Since the regulation on foreign investments also exempts from the above rule the “technical occupations or top management positions,” in these cases free zone concessionaires and operators are able “to contract directly individuals who are not permanent residents in the country, and in these cases, determine the applicable labor system and the rights and obligations of these workers, after first obtaining the corresponding work permit.”

Article 44 entrusts to the Ministry of Labor and Social Security the determination of the minimum salaries for jobs to be drawn by Cuban workers and foreigners who are permanent residents in the country and who render services to free zone concessionaires or operators.

Pursuant to Article 45.1, “*the concessionaire with Cuban or mixed capital* contracts directly Cuban workers and foreigners who are permanent residents in the country and also works as an employment entity concerning the workers required by the operators.” Such employment entity “contracts individually the workers in question, pays them their salaries and maintains the labor relationship with them” (Article 45.2). In any event, it is the task of the Ministry of Labor and Social Security to establish the rules to be followed by the concessionaire, in its capacity of employment entity (Article 45.3).

The law obligates investors with full foreign capital to contract employees through the employment entities approved by the competent ministries. For these purposes, Article 45.4 establishes that “in the case of the Cuban workers and foreigners who are permanent residents in the country, they render their services to *free-zone concessionaires and operators*

whose capital is fully foreign, through a contract executed by them with an employment entity proposed by the Ministry for Foreign Investment and Economic Collaboration and approved by the Ministry of Labor and Social Security.”

In addition, the law allows the Executive Committee to ignore other labor rules and to establish special labor regulations. Thus, Article 46 establishes that “notwithstanding the provisions contained in the preceding sections of this chapter, the Executive Committee, in the decision ordering the creation of a free trade zone, may determine to establish special labor regulations concerning it and exceptionally.”

Resolution No. 10/97 of the Ministry of Labor and Social Security, currently in force,²⁸ completes the content of Legislative Decree No. 165 of June 3, 1996, and establishes various specific rules concerning the labor system in the Free Trade Zones.²⁹

4. Codes of conduct and ethics: Special features of the labor system in the tourist sector; Resolution 10 of 2005 of the Ministry of Tourism

4.1. Ethical control of workers in the tourism sector: Background

For Cuba, analyzing the globalization process in the realm of tourism takes on a special meaning: first, because some of the strongest worldwide tour operators immersed in this globalization process are present in the development of Cuban tourism; and second, because tourism currently constitutes and will continue to constitute in the long-term, according to forecasts, the main economic activity on the island and an essential factor for reviving other

²⁸ The text is found at <http://www.cubaminrex.cu>.

²⁹ The first action consists of the labor supply contract signed between the concessionaire and the operators. To contract workers, an agreement is entered into with the employment entity and the union organization. Personnel are obtained from among those with qualifications, skill, professionalism, and experience required for the efficient performance of the job in question, in accordance with current legislation in the matter. Legislation indicates the compensation, the signing of an individual employment contract to establish the work relationship, and the causes for its termination. The workers contracted in the Free Trade Zones earn their salary based on the rates in national currency approved centrally and referring to a daily work schedule of 8 hours and 190.6 hours as a monthly average. The annual paid vacation, social security, and labor protection are also regulated matters, so that these workers will be subject to the current legislation of the country. If necessary, aside from the salary per unit of time, payment systems may be applied in accordance with the results of the production or services, as well as payment for overtime. As to labor discipline and conflict resolution, the precepts of the labor code and internal regulations are taken into account, and complaints in this matter and concerning labor rights are resolved by the employment entity, according to the current procedures of labor justice. In each free trade zone and industrial park, the employment entity and the parties to the contract, along with the corresponding union organization, sign collective bargaining agreements and their internal regulations, according to current legislation.

economic sectors.³⁰ By the end of 2000, there were 29 mixed companies, with a capital of over 1 billion dollars. They include 26 hotel companies with 15,600 rooms, of which 3,700 are operating, and the remaining are in project or construction phase; 17 foreign managements from 8 countries with 52 hotels under foreign administration, with 16,120 rooms; 93% of the hotels are 4- and 5-star. In five-year tourist projections until 2010,³¹ “there are three possible scenarios in which the number of visitors would be between 5 and 10 million tourists.”

The economic relevance of the tourist sector for the Cuban economy has brought with it intense control by the State as employer over the workers who render services in said activity sector. The powers granted to the government entity under Law No. 77 and Resolution No. 3/96 to select workers who work for companies with foreign capital reached its highest degree with the norms established in 1990 for the employment of workers in joint ventures in the tourist sector; these norms stressed the personal qualities and conduct of the individual instead of his performance at work. By Resolution No. 15/90 of September 5, 1990, of the State Labour and Social Security Committee (Gaceta Oficial September 15, 1990),³² which appeared in the heat of the first legislation on foreign investments, a clear and defined choice was made in favor of a type of worker ideologically defined. In short, it is legislation that stresses personal qualities and the conduct of the individual instead of the assessment of his work. The resolution gave broad powers to foreign investors to suspend, transfer, or fire the employee who was not satisfactory. In a certain way, the Cuban state takes responsibility for the quality of the persons it sends to work.

4.2. Resolution No. 10 of February 19, 2005: Control over the moral and social image of the workers in international tourism

The above ideas have again come up in Resolution No. 10 of February 19, 2005, which establishes the

“*Regulation for the Relations with Foreign Personnel in the Tourism System.*” The interest of the company to maximize the control and the efficiency in the operation of the organization has been supported, as we indicated, in the duty of fidelity of the worker to the company. The work relationship appears, in this Resolution, as an eminently personal relationship, based on mutual trust and loyalty, which unites all collaborators of the company in a community of interests and purposes, all of them feeling solidarity in a common work of national and collective interest. This leads to the understanding of the employment relationship as a fiduciary relationship in which there is no room for an opposition of interests between employers and workers.

With regards to the Resolution under analysis, the loyalty and fidelity owed by the worker to the company where he works cannot be reduced to the narrow limits of a simple execution of the task entrusted, since it represents a true moral obligation requiring rectitude towards the employer’s interests; and outside of the workplace, in the case of approved private activities related to those that constitute the object of the employment contract, they become spiritual duties that must be enforced with even more rigor if the worker is in a trusted position, in which case there is no doubt that the ethical-legal profiles of these duties exceed the exclusively financial field. This is clearly found in Article 1 of the Resolution, which indicates: “Tourism workers in their relations with foreigners while meeting in and outside the country shall limit those relations to those that are strictly necessary, and should keep in mind the following ethical, moral, and professional principles: A) *Maintain conduct based on loyalty to the nation, respect for the Constitution of the Republic, socialist legality, and government policy.* B) *Practice austerity, refrain from seeking power and making unauthorized use of resources placed at their disposition.* C) *Always place social interest above any personal interest.* D) *Practice modesty and straightforwardness and maintain a personal and family lifestyle deserving of respect and confidence both in work and in social settings.* E) *Maintain permanent vigilance against all acts or attitudes damaging to the interests*

30 M. PEREZ MOK, A. GARCIA, *Globalización y turismo. Política de desarrollo del turismo e inserción internacional de Cuba [Globalization and tourism. Tourism development policy and international insertion of Cuba]*, in M. DE MIRANDA PARRONDO (Comp.), *Alternativas de política económica y social en América Latina y el Caribe (Cuatro casos de estudio: Colombia, Costa Rica, Cuba y México) [Economic and social policy alternatives in Latin America and the Caribbean (Four case studies: Colombia, Costa Rica, Cuba and Mexico)]*, Cali, Editorial Javeriano, 2002, p. 250.

31 MINTUR, *Proyección de largo plazo para el turismo cubano [Long-term projection for Cuban tourism]*, 2000, p. 5.

32 See the analysis of the labor system in the tourist sector and its comparison to the Cuban Labor Code contained in J. F. PÉREZ-LOPEZ, *Cuba’s Thrust to Attract Foreign Investment: A Special Labor Regime for Joint Ventures in International Tourism*, *Inter-American Law Review*, 1992-93, vol. 2, n. 2, pp. 221-279.

of the State.”

From this perspective, it is not strange that the duty of fidelity is interpreted not as a mere duty of diligence or accuracy in performing the service, but as a specific fiduciary submission which imposes the personal adhesion of the worker and which interprets the mutual confidence and loyalty as the basis of the relationship and its possible continuation. This duty of intercommunication between the employer and the worker appears in various precepts of the Resolution, especially in connection with the possible contacts with foreign embassies: *“Invitations to foreign diplomats for social events and invitations of any type to embassies will be processed by a vice minister of Tourism and the Ministry, which will also establish the rules of behavior”; equally, it is established that “the attendance in social events at embassies or invitations for foreigners to visit Cuban officials in their homes must be the object of consultations and approved in writing.”*

The fact that the state entity may select the workers of companies with foreign capital means that the entity may select the candidates it considers most suitable from the viewpoint of their loyalty. So far, working for a foreign capital company is very much desired by the Cubans, because generally such work allows the employee to receive certain income in hard currency (such as tips) even though the salary is paid in pesos. The Resolution we just commented on submits to severe controls the receipt of any gift or accessory benefit by the worker during the performance of his services. Thus, it is established that *“the receptions or meals of personnel commissioned abroad must be authorized in writing by the minister or the head of the delegation,”* and also, *“any worker of the sector at any rank will report in writing to his superior any gift in kind received by him from a foreigner with whom he has labor relations (including checks, cash or credit cards),”* or, finally, *“institutional gifts to foreigners will be approved by the Minister.”*

As indicated above, the various manifestations of this duty of loyalty may be grouped in positive or active behavior obligations on the one hand and in negative or abstention obligations on the other hand. Among the latter, we must indicate those that limit the possibility of obtaining gifts (*when a foreigner wishes to make a gift, it must be suggested to him to give it to the health or education sectors*) or the use of vehicles of foreign citizens (*“No worker or executive may use, for work or personal purposes, vehicles owned or rented by foreigners, nor enter vehicles with diplomatic license plates.”*).

The truth is that the current labor relations in a globalized world are rather far removed from these ethical conceptions of the labor relationship which go into the professional profiles of the worker. This aspect, in addition to the fact that it has been overcome in the modern organizational structure by links or motivations of a different nature (participation, commitment, mere economic interest, or social prestige), forgets the facet of the worker as a citizen, and, when assessing the play of competing interests in this matter, it is necessary to identify the obligations assumed by the worker-citizen and those attributed by the company to the worker in order to determine which of them prevails on the others. The central dilemma in this atmosphere is not, therefore, loyalty vs. disloyalty, but loyalty to whom and under what circumstances. Indeed, when the organization violates the legal and/or moral rules of society, and when the violation may cause damage to third parties, the contractual obligation of loyalty of the employee loses its moral grounds.

On the other hand, in the Cuban tourism industry, racism in the workplace has become, as some investigations conducted in this field have concluded, a growing problem. Although Cuban laws prohibit labor discrimination for reasons of race, the great majority of Cuban employees in tourist companies are light-skinned, as pointed out by various investi-

gations. As in other foreign investment sectors, the State employment entities hire for the tourist industry.³³

III. Codes of conduct or good practices and international commitments undertaken by foreign companies investing in Cuba

The world of economy – personified in companies – must collaborate on the project of building ethics, just like real people must do. Each of us has to collaborate by paying our taxes, just as companies do, but also it appears that companies are not exempt from that obligation. Companies have the same ethical duties as real people do – the duty to be compassionate, to fight pain, to help the weak, to defend dignity, and to support justice.³⁴

Business ethics is a relatively recent event. The purpose of a company's ethical reflection is to give reason to the moral premises that make up and support the legitimacy of the company, its reason for being in the eyes of society and its claim to validity or justice. In other words, *the basic task of corporate ethics consists of dealing with the conditions for the possibility of the company having social credibility and, therefore, being trusted by all groups that contribute to or are impacted by its activity.*³⁵ It has been said that “the most effective organizations are based on communities of shared ethical values. These communities

do not require extensive contract and legal regulation of their relations because prior moral consensus gives members of the group a basis of mutual trust.”³⁶

The foregoing ideas have a specific bearing on the business activity of foreign companies in Cuba. That is why some business Codes of Conduct have been created which attempt to outline the path for business activities. In essence, they are the Arcos Principles and the Principles for the Participation of the Private Sector in Cuba.

In 1994, the Cuban Committee for Human Rights, the International Society for Human Rights, and Solidarity of Cuban Workers prepared the Arcos Principles, in honor of Gustavo Arcos, an outstanding Cuban human rights activist. The Arcos Principles also urged companies to hire workers directly, prohibit revision of the labor records, and allow affiliation to governmental or independent unions.³⁷

The Arcos Principles are intended to promote respect for and compliance with human rights and fair labor hiring and employment practices in Cuba. As such, they are not immutable. They are subject to periodic review to ascertain if, by following them, Signatories will in fact be contributing effectively to the improvement of the human and labor rights

33 As indicated in *Cuba's Special Period, Cuba Briefing Paper Series*, The Caribbean Project, Georgetown University, 1998, pp. 6-7, one manager in a tourist corporation explained, “There is no explicit policy stating that a person has to be white to work in tourism, but it is regulated that people must have a pleasant appearance (*aspecto agradable*), and blacks do not have it.” It has been indicated that increased foreign investment in tourism was worsening the job situation for Cubans with darker skin, starting from the premise that Cuban officials were conceding to the wishes of tourist operation managers who preferred lighter-skinned employees. These ideas are included in HUMAN RIGHTS WATCH, *Cuba's Repressive Machinery: Human Rights Forty Years after the Revolution*, 1999, at www.hrw.org. As indicated by J.A. ALVARADO RAMOS, *Relaciones raciales en Cuba [Race relations in Cuba]*, Cuba Transition Project, “a quick visit to the country's tourist installations shows the high representation of white people in the direct service to tourism [...], while in the indirect jobs, the presence of blacks and mestizos is more obvious” [...] “this reality is very closely related to the well-known fact of the overrepresentation of whites in managerial and control jobs in all spheres of the country, from which tourism does not escape, but rather in this sector the problem has increased. It is very rare to find among the main managers and administrators of these companies people who are not white. Everything seems to indicate that the existence of negative stereotypes and prejudice in connection with the black and mestizo population has found in this sector an outlet to become concrete acts of racial segregation and discrimination.”

34 J.A. MARINA, *La creación económica [Economic creation]*, Bilbao, Deusto, 2003, p. 123.

35 D. GARCIA-MARZA, *Ética empresarial. Del diálogo a la confianza [Corporate ethics. From dialogue to trust]*, Madrid, Trotta, 2004, p. 23.

36 F. FUKUYAMA, *La confianza [Trust]*, Barcelona, Ediciones Grupo Zeta, 1998, p. 44.

37 R.H. CASTAÑEDA and G.P. MONTALVÁN, *Los Principios Arcos [The Arcos Principles]*, the Cuban Committee for Human Rights, the International Society for Human Rights and Solidarity of Cuban Workers, 1994.

situation in Cuba. Adjustments may be made to the Arcos Principles when and if it is felt that doing so will further encourage the government of Cuba to adhere to international human rights standards, as established in the Vienna Declaration approved by the World Conference on Human Rights on June 25, 1993, as well as workers' rights related to employment and occupation established in International Labour Organization (ILO) Convention No. 111 concerning Discrimination of the Worker for Various Reasons, Convention No. 87 concerning Freedom to Form Labor Organizations, Convention Nos. 29 and 105 concerning prohibition of work that does not arise from free contracting between workers and employers, and other relevant agreements and conventions.

In July 1997, the North American Committee of the National Policy Association published the "Principles for the Participation of the Private Sector in Cuba," which implied: a secure and healthy workplace, fair labor practices, direct contracting of the workers, the right of the workers to collective bargaining, freedom of expression in the work centers, and reinforcement of legal processes in Cuba. These principles are similar to those mentioned above and are further detailed in the Arcos Principles.

In the "*Principles for the Participation of the Private Sector in Cuba*," together with the aspects already indicated, the companies were urged, among other things, "to work to obtain the right to recruit, contract, pay and promote the workers directly, without going through government intermediaries; respect the right of the employees to organize freely in the workplace; and maintain a corporate culture which does not accept political coercion in the workplace." Under these principles, the National Policy Association constituted a task group of the international private sector, made up of persons from various origins and with various visions and opinions of Cuban reality.³⁸ The task group agreed on the need to urge investors in Cuba to voluntarily

adopt in their activities in Cuba internationally accepted socially responsible corporate practices.³⁹

On the above theoretical basis, it is possible to ascertain a series of ethical standards that are expressly manifested in the various generally accepted declarations, regulations, and guidelines we have analyzed. These principles, as we have said above, are based on four values that inspire: 1) equality of all human beings in dignity and rights; 2) right to life and safety, not to be treated in a degrading manner or subjected to inhumane punishment; 3) personal freedom; and 4) the right to economic, social, and cultural freedom as conditions for the realization of individual personality.

Cuban legislation suffers from an obvious lack of consistency with these principles. In fact, the right of union organizations to form and affiliate with federations and confederations and the right of any federation or confederation to affiliate with workers' international organizations recognized in many national regulations and in particular in *ILO Convention Nos. 87 and 98* are severely limited in Cuba. This is obvious in light of the permanent calls for attention made by qualified international entities and, in particular, an entity such as the ILO's Committee on Freedom of Association characterized by its impartiality and objectiveness.⁴⁰ In the various complaints resolved by said entity, the Cuban Government has been urged to adopt "without delay" new provisions and measures to recognize fully in law and in practice the right of workers to establish organizations that they consider necessary at all levels (in particular, organizations independent from the current union structure), and the right of these organizations freely to organize their activities, or those in which said Committee "urges the Government, in future, to comply with the principle of non-intervention or interference by the public authorities in the trade union activities embodied in Convention No. 87, Article 3." These affirmations point out the clear weakness of said fundamental right, without the possibility to use as arguments to

38 The National Policy Association has the following members: AFL-CIO American Center for International Labor Solidarity (ACILS), American Chamber of Commerce of Cuba in the United States (AmCham Cuba), Consejo Mexicano de Comercio Exterior (COMCE), Conference Board of Canada, Florida International University, Instituto Tecnológico Autónomo de México (ITAM), National Policy Association, Pax Christi Netherlands, Prince of Wales Business Leaders Forum, United States Chamber of Commerce, US Cuba Business Council, and Confederation of Netherlands Industry and Employers (VNO-NCW).

39 A.C.E. QUANTON, *Toward best business practices for foreign investors in Cuba*, Cuba on Transition, pp. 301-304.

40 In recent years, complaints have been lodged by several international union organizations with the ILO. For a more detailed study of these complaints, we refer to our study entitled *La realidad laboral en Cuba y la responsabilidad social corporativa [Reality of labor in Cuba and corporate social responsibility]*, Valencia, Tirant lo Blanch, 2006.

Reality of Labor in Cuba and the Social Responsibility of Foreign Investors

moderate the above conclusion the existence of significant external actions that may guide and support the action of independent union association, since the establishment of measures of deprivation of freedom against union members or the search of the meeting places, *inter alia*, are acts that blatantly infringe the dignity of the person.

We must add that both the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Conventions and Recommendations of the ILO have endlessly repeated the need that “the explicit reference to the ‘Confederation of Workers’ in the labor legislation should be removed to enable all workers in law and in practice to establish and join organizations of their own choosing outside the established trade union structure, in accordance with Article 2 of the Convention.” In its 2003 conclusions, the last of the entities cited firmly urged “the Government to modify national law and practice in the near future in order to recognize the right of workers to establish organizations of their own choosing in conditions of full security, including organizations independent of the established structure, if they so wished.”

We can add to the above a clearly distorted collective bargaining. This character stems from the fact that collective bargaining agreements are based on guidelines established by the government and the competent ministries, and, in the case of companies with foreign capital, the collective bargaining agreement is established between the employment agency and the corporate administration, in the presence of the state union. The above conclusion is reinforced by the ILO Committee on Freedom of Association, which urged the Government to take measures to amend legislation with regard to collective bargaining, to ensure that collective bargaining in labor centers can take place without recourse to binding compulsory arbitration prescribed by the legislation and without interference by the authorities, organizations at a higher level, or the Confederation of Cuban Workers.

Similarly, the ILO Committee of Experts on the

Application of Conventions and Recommendations has referred in various comments to a series of legal and regulatory texts under which the access to training and employment, as well as the evaluation of the workers for labor selection and placement or to define the labor merits and demerits, depend in Cuba, among other factors, on political attitude. Aspects such as the selection of administrative staff in the educational system have made the Committee express its desire that the Cuban Government take the measures necessary to eliminate all forms of discrimination, both in access to training and to employment. Equally, observations have been made, both by said Committee of Experts and by the Conference Committee on the Application of Conventions and Recommendations of the ILO, on aspects such as the requirement from the inspectors of the Ministry of Education to show political and moral conduct in line with the principles and objectives of the socialist State; the dismissal of certain members of the personnel of higher education establishments due to conduct contrary to socialist morality, including the worker’s ideological conduct among the merits in his labor file; the criteria to evaluate the performance of journalists; or, finally, the scope of the personal control file established by certain companies, including information on the moral aptitude and social conduct of the worker. It is obvious that such accumulation of premises in which ideological freedom is denied may generate a well-founded suspicion that there are situations of discrimination in the allocation of jobs for ideological reasons or other related reasons. It is clear that such actions are in obvious contradiction with the principles established by Convention No. 111 concerning Discrimination (Employment and Occupation), 1958, and by Convention No. 122 concerning Employment Policy, 1964.

In short, the ample powers of the Cuban Government over the rights of the worker in the sector of foreign investments actually frustrate the companies that support “better corporate principles,” such as the respect of the right to association of the workers and non-discriminatory hiring practices.

The complete book: “Reality of Labor in Cuba and the Social Responsibility of Foreign Investors” can be purchased at: www.tirant.com