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Economic Regulation in Cuba: The State
Arbitration System*

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I. INTRODUCTION

The First Congress of the Cuban Communist Party in 1975 announced a sweeping reorganization of economic planning and management in Cuba, signalling a new direction in Cuba's approach to the transformation from capitalism to socialism. The program approved at the Congress introduced the new "System of Economic Management and Planning" (SDPE)¹ and adopted Cuba's first five-year economic plan. Central to the new approach was the decentralization of production management from central state entities to state enterprises,² and the introduction of a system of contracts³ to enforce ac-

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1. Sistema de Dirección y Planificación de la Economía (System of the Direction and Planning of the Economy). The SDPE is modelled in large part, at least in form, after the systems adopted in the Soviet Union and numerous Eastern European Socialist Countries. See Zimbalist, *Cuban Economic Planning: Organization and Performance*, in CUBA: TWENTY-FIVE YEARS OF REVOLUTION 214-17 (S. Halebsky & J. Kirk eds. 1985). Zimbalist suggests that while the form may have been adopted from the Soviets, the new system is in practice distinctly Cuban, particularly with respect to broad popular participation in the planning process. *Id.*

2. All production enterprises are owned by the state and regulated by Decreto-Ley Numero 42 (1979) (Reglamento General de la Empresa Estatal) [hereinafter Decreto-Ley is written as Decree-Law]. Private enterprise in Cuba, on the other hand, is limited to proprietary service units, such as repair services, hair cutting, street vendors, photographers, gardeners, plumbers, etc. Such people who "work for themselves" must obtain a license from the state for which they pay a monthly fee ranging from ten to sixty pesos depending on the type of

countability among the enterprises. Cuba adopted a system of state arbitration in 1977 to assure compliance with the national economic plan and to resolve contract and commercial conflicts between enterprises.⁴

During the first fifteen years of the revolution, Cuba had instituted a system of central budgetary accounting under which market mechanisms were rejected,⁵ economic planning and management were centralized and all production units were financed out of a central budget.⁶ Management of individual enterprises was not accountable for balancing costs and revenues or for profitability.⁷ Material incentives were eschewed.⁸ The system was dedicated to radical egalitarianism, relying on moral incentives to promote discipline and productivity.⁹ The failure of the system of central budgetary accounting to achieve economic progress was painfully apparent in the early 1970s.¹⁰

In 1975, the government apparently recognized the need for the introduction of material incentives and the decentralization of the economy to improve efficiency, but did not propose a total shift. Thus, fundamental features of the SDPE included both the strength-

service performed. Resolución Conjunta No. 15 de los Comites Estatales de Finanzas y de Trabajo y Seguridad Social, 1984. Independent farmers may sell produce in "free markets"; they are charged a tax on gross sales. M. BENJAMIN, J. COLLINS & M. SCOTT, NO FREE LUNCH 77 (1985) [hereinafter cited as NO FREE LUNCH].

3. See *infra* notes 34 & 48 and accompanying text.

4. Decree-Law 10 (1977) granted the Council of Ministers authority to establish a state arbitration system. Council of State, Decree-Law 10 (1977) (Disposición autorizante) reprinted in LEGISLACIÓN ECONÓMICA (1984).

5. Economists have noted that Cuba in the mid-1960's relied less on market mechanisms than any other socialist country. See, e.g., L. HUBERMAN & P. SWEEZY, SOCIALISM IN CUBA 164 (1969).

6. *Id.* at 163-68.

7. *Id.* at 164.

8. *Id.* at 164-66.

9. *Id.*

10. See Edelstein, *Economic Policy and Development Models*, in CUBA: TWENTY-FIVE YEARS OF REVOLUTION 187-89 (S. Halebsky & J. Kirk eds. 1985); Fuller, *Production Quotas and Profits*, 3 CUBATIMES 5-7 (1982). For a general discussion of the changes in economic policy in Cuba, see Edelstein, *supra* at 180-92; E. BOORSTEIN, THE ECONOMIC TRANSFORMATION OF CUBA (1968); see generally L. HUBERMAN & P. SWEEZY, *supra* note 5; C. MESA-LAGO, THE ECONOMY OF SOCIALIST CUBA (1981); A. MACEWAN, REVOLUTION AND ECONOMIC DEVELOPMENT IN CUBA (1981).

The "errors" in the budgetary accounting system were expressly pointed out in the Main Report of the First Congress of the Communist Party of Cuba. Specifically cited as problems were the over-centralization of management and the lack of market mechanisms, norms of commercial transactions and material incentives. *Informe Central*, PRIMER CONGRESO DEL PARTIDO COMUNISTA DE CUBA 102-05 (1976) [hereinafter cited at *Informe Central I*].

ening of centralized planning and the decentralization of production management through semi-autonomous state enterprises which were to be self-managing, self-financing, and profit maximizing. Reliance on moral incentives to stimulate workers was augmented by a system of material incentives and bonuses¹¹ in order to increase productivity.¹² Although the adoption of material incentives indicated an acceptance of some degree of economic inequality,¹³ introduction of the new economic system was accompanied by an expansion of popular participation in decision-making which favored political equality.¹⁴

The system also envisioned participation in economic planning at all levels of the economy including the ultimate consumer,¹⁵ worker

11. The new economic policy introduced material incentives for both workers and management. Bonuses are paid either to individual workers or to entire collectives in addition to salary for surpassing of determined guidelines. Funds for bonuses come from the earnings of the enterprise. In the case of unprofitable enterprises which produce necessary social goods, the state provides a subsidy from which bonuses can be paid. See EL SISTEMA DE DIRECCIÓN Y PLANIFICACIÓN DE LA ECONOMÍA EN LAS EMPRESAS 159-68 (1981) [hereinafter cited as SISTEMA ECONÓMICA]. The bonus system creates incentive for efficient production, with a minimum of waste. In addition, housing allocations and distribution of large appliances such as washing machines and refrigerators are distributed by work centers to workers based on productivity and need. See Zimbalist, *supra* note 1, at 219-20. Although expensive, these items are not beyond the reach of production workers and can also be purchased in stores.

12. Worker disciplinary procedures were also strengthened. See 2nd Congress of the Communist Party of Cuba, Documents and Speeches 34-35 (1981) [hereinafter cited as 2D CONG. PCC]. Worker absenteeism had been a major problem compounding the inefficiency of production under the old system. A major change in labor law occurred in 1980, giving the enterprise administration the authority to impose disciplinary measures. Council of State, Decree-Law 32, art. 1 (1980) (Sobre la Disciplina Laboral de los Trabajadores). Previously, disciplinary decisions were made by worker councils. For a discussion of the reasons for the change as well as the resulting impact, see Perez-Stable, *Class, Organization, and Conciencia: The Cuban Working Class after 1970*, in CUBA: TWENTY-FIVE YEARS OF REVOLUTION 139-212 (S. Halebsky & J. Kirk eds. 1985).

13. One study of income distribution in Cuba suggests that even with the initiation of incentives, Cuba continues to narrow the gap between the highest and lowest paid workers and has achieved a redistribution of wealth unequaled in the hemisphere. Brundenius, *Growth With Equity*, in CUBA: TWENTY-FIVE YEARS OF REVOLUTION 193-212 (S. Halebsky & J. Kirk eds. 1985).

14. The first Congress approved for ratification by popular referendum a draft of the new National Constitution. *Informe Central I*, *supra* note 10, at 153-58. The Constitution, which was ratified in 1976 after discussion in mass organizations nationwide, provided for the reorganization of political processes and institutions, thus broadening participation in decision-making and institutionalizing the political structure. For example, the reorganization expanded the number of political and economic units by creating fourteen provinces to replace the six existing provincial jurisdictions. Popular Assemblies were created at the municipal, provincial and national level to provide broader participation. See Ritter, *People's Power and the Communist Party*, in CUBA: TWENTY-FIVE YEARS OF REVOLUTION 273-75 (S. Halebsky & J. Kirk eds. 1985).

15. The government has established the Institute of Internal Demand which regularly

assemblies on the shop floor,¹⁶ the municipal and provincial assemblies, as well as the national planning and political institutions.¹⁷ Such participation, particularly at local levels, required the development of new economic divisions and mechanisms for participation.¹⁸ In addition, the strengthening of the trade unions¹⁹ and development of trained cadres of enterprise management personnel has been important to the process.²⁰ The combination of centralized planning by the State, which relies on broad based input, and decentralized management of production is, in the words of one Cuban commentator, a manifestation of the Leninist principle of "democratic centralism."²¹

Implementation of reforms of the magnitude embodied in SDPE would challenge even developed economies. In the case of Cuba, the task was particularly difficult because many basic economic structures and systems essential to implementation of SDPE either did not exist or were insufficiently developed for rational economic planning.²² For example, Cuba had not developed an adequate system for collecting,

surveys supplies, inventories and consumer tastes and opinions throughout the country. The Institute also publishes an extremely popular monthly magazine through which Cubans sell and trade items like televisions, cars, services, etc. Zimbalist, *supra* note 1, at 225.

16. The "Resolution on Economic Planning and Management System" adopted by the Second Congress of the PCC states:

The collective workers in each work center should always help to draw up the enterprise's plan and participate in economic and social management. In support of this, all the workers should be trained in the principles of the Economic Planning and Management System, by means of the mass media, bulletin board displays, seminars, training courses and any other measures that are effective.

2D CONG. PCC, *supra* note 12, at 394.

17. See Zimbalist, *supra* note 1, at 222-23.

18. Certain economic activity has primary significance at the municipal and provincial levels, particularly with respect to services. The introduction of SDPE brought local control over such economic activity which had previously been subordinated to central state ministries. Thus, economic management and planning now takes place at all three levels: municipal, provincial and national. *Id.* at 223; see also SISTEMA ECONÓMICA, *supra* note 11, at 20. The municipal and provincial Assemblies of Peoples' Power, established by Chapter IX of the 1976 Constitution, are authorized in Article 102 to:

establish and [direct economic entities of] . . . production and service[s] . . . which are directly subordinated to them and carry out the activities required in order to meet the [economic] needs . . . for the collective in the territory under the jurisdiction of each.

They also aid in the development of activities and the fulfillment of plans of those units in their territory which are not subordinate to them.

CUBA CONSTITUCIÓN art. 102 (English edition published by Center for Cuban Studies, New York).

19. See Zimbalist, *supra* note 1, at 218-19; Perez-Stable, *supra* note 12, at 206-303.

20. See 2D CONG. PCC, *supra* note 12, at 37.

21. Marill, *Sobre los Contratos Económicos y el Arbitraje Estatal*, 2 BOLETÍN INFORMATIVO 28, 30 (1983).

22. See Zimbalist, *supra* note 1, at 223.

organizing and analyzing statistics and data essential to central economic decision-making.²³ Thus, from 1976-80 numerous new institutions were created to manage information essential to the new system, including the State Committee for Statistics,²⁴ a national accounting system,²⁵ state committees to regulate prices and standards,²⁶ and a restructuring of the banking system.²⁷

Moreover, if enterprises were to become self-managing and self-financing, a system of regulating inter-enterprise transactions and assuring accountability had to be developed. At the time the SDPE was introduced, however, Cuba had developed neither a system of contracts applicable to implementation of a central plan²⁸ nor a legal system to govern the execution, validation and enforcement of such contracts.²⁹

For the first time since the revolution, Cuba looked to law as a tool to help build a socialist economic system.³⁰ In 1977, the Council

23. *Id.*

24. 2D CONG. PCC, *supra* note 12, at 35.

25. *Id.* at 36.

26. *Id.*

27. *Id.* Law No. 930, February 23, 1981 conferred new authorities and responsibilities on the National Bank of Cuba. Article 3(b) stipulates that the Bank assumes financial control of the national production and becomes provisionally the exclusive organ which guarantees and effects adjustments and payments between enterprises and economic organs. For a report on recent changes in banking policy and the development of consumer savings banks in Cuba, see Fuller, *New Developments in Cuban Banking*, 5 CUBATIMES 3 (1985).

28. Under the system of budgetary accounting, state enterprises did not contract with each other for supplies and services but fulfilled directives from central agencies. Thus, no system of inter-enterprise commercial contracts existed until 1978. See generally Marill, *supra* note 21.

29. Cuba has yet to create a new civil code reflective of the changes brought about by the revolution. Although the civil code had undergone piecemeal change from 1959 to 1975, the law of contract had not been revised to correspond to the new economic system introduced in 1975. The first law establishing basic principles for economic contracts was passed in 1978. Council of State, Decree-Law 15 (1978) (Normas Básicas para los Contratos Económicos), reprinted in LEGISLACIÓN ECONÓMICA (1984).

30. The 1970's marked the institutionalization of the revolution when Cuba not only expressly articulated its governmental, judicial, party and economic structure but also adopted several other important laws which profoundly affected social relations. See generally Azicri, *Socialist Legality and Practice*, in CUBA: TWENTY-FIVE YEARS OF REVOLUTION 318-27 (S. Halebsky & J. Kirk eds. 1985) The foundation of the institutionalization was the Cuban Constitution which was adopted in 1976. *Id.* Other important laws codified the norms of the revolutionary society. *Id.* The Family Code which was adopted in 1974 declared the nuclear family as the primary cell of the socialist society and also articulated the equality of men and women in the marital relationship. Cuban Family Code, preamble, § 1289 (1976) (English edition by Cuban Ministry of Justice). A new penal code was enacted in 1979. CODIGO PENAL DE LA REP. DE CUBA (1979).

of State³¹ empowered the Council of Ministers to organize an arbitration system to investigate and resolve conflicts of an economic character, pre-contractual and contractual, resulting from monetary-mercantile relationships involving state enterprises and other various national economic entities.³² The Órgano de Arbitraje Estatal (OAE), as the state arbitration system of Cuba is called, was formally established by the Council of Ministers in Decree No. 23 in 1978.³³ Simultaneously, the Council of State established a system of economic contracts.³⁴

Since the economic system it was created to regulate was itself in the initial stages of development, the task of the OAE has not been simply to resolve inter-enterprise contractual disputes, but also to elaborate and regulate a system of economic accountability in its entirety.³⁵ Thus, from commencement of its operations in 1980, the

31. The Council of State is the supreme executive branch of the Cuban government. Since the reforms introduced in the political structure in 1975, the Council of State is elected by the National Assembly. All laws must be approved by the National Assembly. CUBA CONSTITUCIÓN ch. VII, art. 73(b). The Council of State has legislative authority to promulgate laws when the National Assembly is not in session. *Id.* art. 88(c). Such laws promulgated by the Council of State are denoted *Decreto-Ley* (decree law) and can be revoked by the national assembly. *Id.* art. 73(ch). Laws initiated by the National Assembly or other bodies and approved by the National Assembly are denoted simply *ley* (law). The Council of Ministers, the administrative body of the government, may issue "decrees" pursuant to specific legislative authorization granted by the Council of State or the National Assembly. *Id.* art. 96(j), (k). In addition, administrative bodies, such as the OAE, may be authorized under specific legislation to issue regulations relevant to its jurisdiction. *See, e.g.*, Council of Ministers, Decree 60 (1979) (Reglamento Orgánico de los Organos del Sistema de Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984). Decree 60 grants the OAE authority to issue regulations. *Id.* art. 35.

32. Council of State, Decree-Law 10, art. 1. (1977) (Competences de los Organos), *reprinted in* LEGISLACIÓN ECONÓMICA (1984). In 1962, the government had created Arbitration Commissions to resolve disputes between state enterprises, government entities and the private sector which existed at that time. The law, however, had substantial deficiencies which made it ineffectual; arbitration was not compulsory and had no mechanism to assure completion of decisions. Also, there was no legislation dealing with contractual relations between enterprises. The commissions were disbanded in 1967. Reyes Salia, *El Sistema de Arbitraje Estatal en Cuba*, 20 REV. CUBANA DE DERECHO 73, 78 (1982).

33. Council of Ministers, Decree 23 (1978) (Del Sistema de Arbitraje Orgánico), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

34. Council of State, Decree-Law 15 (1978) (Normas Básicas para los Contratos Económicos), *reprinted in* LEGISLACIÓN ECONÓMICA (1984) sets forth the definitions and principle regulations governing inter-enterprise contracts.

35. Among the objectives of the arbitration system specified in the legislation establishing the system is "to contribute to the perfection of the SDPE and the strengthening of the method of economic accountability on which the system rests." Council of Ministers, Decree 23, art. 2(d) (1978) (Del Sistema de Arbitraje Orgánico), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

OAE has served multiple functions: adjudicating disputes, promulgating regulations, providing consultation and advice to enterprises and economic institutions, investigating specific economic problems, and supplying information and making recommendations to national economic planning units.³⁶

In general concept, the OAE is based on models found in the Soviet Union and other Eastern European socialist countries.³⁷ Like many Cuban economic institutions which take their form from existing socialist models, however, the OAE has been shaped by decrees and regulations which reflect the specific circumstances and experiences of Cuba.³⁸ This article will describe and analyze the development of the Cuban state arbitration system, its procedures, functions and place in the Cuban legal system.

II. THE FUNCTION OF STATE ARBITRATION

State arbitration in socialist economies is as fundamentally different from arbitration in capitalist systems in its purpose and function as is the economic system it supports.

Private contract law is the fundamental regulatory device which enables competitive markets to function.³⁹ In a market economy, the contract is the medium through which buyers and sellers document their bargain and make it enforceable in a court of law. In the making and accepting of offers, the parties generally act out of self-interest and seek the most profitable bargain. Prices and allocation of resources are determined for the market as a whole through this private bargaining process. It is assumed that this process, left free of manipulation by either the government or private parties, will satisfy consumer and societal needs and yield the highest quality production at the most efficient price. Thus, the public interest is served indirectly by this private bargaining.

Under the Anglo-American system of contract law there is a

36. See *infra* notes 74-147 and accompanying text.

37. For a discussion of the Soviet state arbitration system see Hazard, *Production Discipline: The Role of State Arbitration in the USSR*, 4 REV. SOCIALIST L. 297 (1982).

38. For a discussion of the differences between the functioning of economic institutions in Cuba and the Soviet Union see generally Zimbalist, *supra* note 1.

39. While market exchanges could take place in the absence of contract law, Posner suggests that private contract law serves three primary functions in the marketplace: it provides an efficient system for holding parties to their bargain; it reduces the complexity of market transactions; and it provides information which assists rational decision-making with respect to the bargain. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 67-69 (2d ed. 1977).

legal obligation to make good on one's bargain.⁴⁰ If a corporation makes a contract which it cannot fulfill, it will be legally bound to pay damages for breach. Breach of contract may be the result of inefficiency, bad fortune or the calculation that it is more economically efficient to pay damages occasioned by the breach than to perform the contract. The law permits this calculation.⁴¹ The breaching party is not bound to *perform* a contract except in very limited circumstances where specific enforcement is awarded.⁴²

Arbitrators become involved in the contract process only if one of the parties independently brings a complaint that the contract itself is not legally binding or that it has been breached, and the parties have agreed to submit the dispute to arbitration.⁴³ In resolving the dispute, the arbitrator acts in a quasi-judicial capacity as an impartial fact finder, and has the authority to impose a binding decision.⁴⁴ The arbitrator rarely is concerned with the public impact of a particular dispute. Where important societal considerations are concerned, as in resolution of antitrust issues, public policy dictates that such disputes be adjudicated by a court of law and not by arbitration.⁴⁵

In contrast, in the present Cuban socialist economy, a contract is not the expression of an independent bargain reflecting private interests, but an instrument in the implementation of a national economic plan which attempts to allocate resources to provide the greatest and

40. See J. CALAMARI & J. PERILLO, *CONTRACTS* 581 (1970).

41. Posner argues that the law should not discourage such "economic" breaches. R. POSNER, *supra* note 39, at 88-90.

42. Under the Anglo-American legal system, specific enforcement is an equitable remedy which is granted in the absence of the availability of adequate legal remedies. See J. CALAMARI & J. PERILLO, *supra* note 40, at 581. Generally, the plaintiff can be made whole by receipt of monetary damages in which case specific performance will be denied. *Id.* The common exception has been in contracts for the sale of land because land is thought to be unique, making compensatory damages an inadequate substitute. *Id.* at 581-82.

43. Commercial arbitration is not compulsory. The parties either agree in the original contract to submit disputes to arbitration or do so at the time that the dispute arises. M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 1.01 (1968). An exception to the general rule of voluntary arbitration occurred with the functioning of the National War Labor Boards under the War Labor Disputes Act passed in 1943. The institution of mandatory arbitration within the guidelines of the war wage stabilization program was based on the requirement for resolution of disputes consistent with the war emergency. In operation, they were analogous to state arbitration systems in the character of resolution dependent on perception of public interest and not wholly dependent on the interests and legal claims of parties before board. See F. WITNEY, *GOVERNMENT AND COLLECTIVE BARGAINING* 547-80 (1951).

44. M. DOMKE, *supra* note 43, § 21.02.

45. *Id.* § 19.04. Arbitration awards may also be set aside when the awards or the arbitration agreement itself is against public policy. *Id.* § 33.03.

most equitable societal benefit.⁴⁶ The plan outlines the annual production and service goals to be achieved by state enterprises. In broad terms, the quantities and prices of goods to be produced are determined by the plan.⁴⁷ The plan is then elaborated and made more specific and implemented through the negotiation of "planned" contracts⁴⁸ entered into to implement it. Since the enterprises are self-financing, self-managing and accountable for profitability, they have the flexibility and incentive to contract with other enterprises and to negotiate terms which serve their efficiency and profit-maximizing objectives.⁴⁹

The parties to a prospective contract have a duty not only to engage in "planned" contracts, but also to demand performance of such contracts.⁵⁰ Thus, state arbitration proceedings are brought not only to resolve disputes over performance of contracts, but also to resolve disputes which arise in the formation and execution of the contract. If parties do not enter into "planned" contracts, the OAE can commence an action on its own initiative to bring the parties to an agreement.⁵¹

Similarly, since fulfillment of the national plan requires the performance of all "planned" contracts, enterprises have a duty to exe-

46. For a discussion of the role of contracts in the Cuban economy, see Marill, *supra* note 21, at 29-41. Under previous systems of economic planning and management in Cuba, directives as to production came from central state bodies, thus relieving the necessity of inter-enterprise contracts. The economy suffered from lack of discipline and accountability, and inefficiencies resulting from the inability of central agencies to oversee production. See *supra* notes 5-10 and accompanying text. The institution of SDPE and the granting of management autonomy to enterprises, made the contract the primary mechanism for the internal ordering of economic activities.

47. See Marill, *supra* note 21, at 33.

48. Council of State, Decree-Law 15, art. 4 (1978) (Normas Básicas para los Contratos Económicos), reprinted in *LEGISLACIÓN ECONÓMICA* (1984). "Planned" contracts are those which implement the national economic plan. There are also unplanned, or "nonplanificado," contracts. These are contracts which an enterprise can enter into on its own initiative with surplus supplies or services not necessary to fulfill the national plan. *Id.* art. 5.

49. Such terms would include specifications as to quality, quantities, date of delivery, terms of payment, responsibility for transport, storage, etc. See Marill, *supra* note 21, at 33.

50. The statute regulating economic contracts expressly defines "planned contracts" as those which are related to the completion of the plan and the execution of which is obligatory. Council of State, Decree-Law 15, art. 4 (1978) (Normas Básicas para los Contratos Económicos), reprinted in *LEGISLACIÓN ECONÓMICA* (1984). It also provides that if a dispute arises in the negotiation of a "planned contract," the OAE will intervene to resolve the dispute. *Id.* art. 33. The right and duty of an enterprise to demand the execution of a "planned contract" flow from this obligation. See *LEGISLACIÓN ECONÓMICA* xviii (S. Rivas ed. 1984).

51. See *infra* notes 74-80 and accompanying text.

cute and fulfill contracts, as well as bring claims for breach.⁵² Moreover, since funds for material rewards depend on profitability, enterprises have a self-interest in making claims for damages resulting from breach.⁵³ Damages alone, however, are not a sufficient remedy since the contracted for performance is not generally available from another source.⁵⁴ Thus, to enable the injured enterprise to fulfill its obligations under the plan, the breaching enterprise is obligated to perform the contract in addition to paying damages.

In theory, the interests of enterprises and the national interest in completion of the economic plan are mutually supportive. The system is designed to reinforce the fusion of the self-interest of the enterprises to maximize profitability and the societal interest in fulfillment of the plan with maximum efficiency.⁵⁵ As the juridical body charged with defending the social interest in the completion of the national economic plan, the OAE plays an essential role in balancing these interests.⁵⁶ Specifically, the OAE functions to enforce contractual obligations and to protect the interests and rights of self-managing state enterprises in their contractual relations.⁵⁷ The protection and promotion of these interests provide the criteria which guide the activities

52. See *infra* note 93; see also Marill, *supra* note 21, at 34.

53. In addition to profit incentives, the possibility of sanctions motivate enterprise managers to make claims for breach of contract. Council of State, Decree-Law 36, art. 4 (1980) (Sobre la Disciplina de los Dirigentes y Funcionarios Administrados Estables) states that:

It is an infraction of discipline on the part of the directors and the functionaries in the exercise of their responsibilities to:

. . . .

(e) be personally responsible for the incompletion of an economic contract, when it is so established by the competent arbitration organ.

. . . .

(w) not to agree to economic contracts in the time limits established by the competent authorities through negligence or other cause imputable to them.

Failure to bring an action for breach will often result in the inability of the affected enterprise to fulfill its contractual obligations. *Id.*

54. For a more detailed discussion of remedies in the Cuban arbitration system, see *infra* text accompanying notes 124-32.

55. See *infra* text accompanying notes 169-78.

56. Council of Ministers, Decree 23, art. 2(c) (1978) (Del Sistema de Arbitraje Orgánico), reprinted in LEGISLACIÓN ECONÓMICA (1984).

57. These objectives are specifically stated by the Council of Ministers in Decree 23 which established the state arbitration system:

c) To defend the social interest and to guarantee, at the same time, the interests and rights of the socialist economic enterprises and the other parties in their contractual relations.

Council of Ministers, Decree 23, ch. 1, art. 2(c) (1978) (Del Sistema de Arbitraje Orgánico), reprinted in LEGISLACIÓN ECONÓMICA (1984).

and decisionmaking of the OAE.⁵⁸

III. THE STRUCTURE OF THE OAE

State arbitration in Cuba functions at three levels: national, provincial and ministerial.⁵⁹ The national OAE (OAEN), which has seven arbitrators appointed by the Council of Ministers,⁶⁰ has jurisdiction to hear certain cases of national significance and controversies involving the Ministry of Armed Forces, the Ministry of the Interior and enterprises engaged in foreign trade.⁶¹ The OAEN also reviews decisions of the provincial bodies under special circumstances.⁶² In addition, it is responsible for the administration of the entire arbitration system, the promulgation of regulations pertaining to arbitration procedures and the supervision of provincial and ministry level bodies.⁶³ Finally, the OAEN coordinates and performs most of the research and development projects of the OAE.⁶⁴

58. The fusion of the interest of the enterprise with the social interest is discussed *infra* text accompanying notes 170-77.

59. Council of Ministers, Decree 23, arts. 5-15 (1978) (Del Sistema de Arbitraje Orgánico), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

60. One of the arbitrators is designated by the Council of Ministers to be the principal arbitrator or director of the management council of the OAEN. *Id.* art. 6. The OAEN also has a Secretary whose staff serves a function analogous to that of a court clerk. *Id.*; *see also infra* notes 100-06. There are also several other departments including the Department of Planning, Department of Inspection, and Department of Research. Regarding the role of these departments *see infra* text accompanying notes 136-48.

61. Council of Ministers, Decree 119, art. 3 (1983) (Reglas para Determinar la Competencia de los Órganos de Arbitraje Estatal), *reprinted in* BOLETÍN INFORMATIVO (1984). Decree 119 modified the jurisdiction of the national OAE as set forth in Decree 47 (1979). Originally, jurisdiction was based on the peso value of the contract. Thus, the national body would hear pre-contractual disputes where the total value of the contract was over 250,000 pesos or claims for damages where the amount claimed was over 25,000 pesos. Council of Ministers, Decree 47, art. 1 (1977) (Disposición Autorizante), *reprinted in* LEGISLACIÓN ECONÓMICA (1984). By 1983, the number of cases system-wide had grown from 539 in 1981 to well over 14,000. Interview with Miguel Reyes Salia, Principal Arbitrator OAEN, Havana, Cuba (May 23, 1984) [hereinafter cited as Reyes Interview]. The national body could not handle this load and also fulfill its other responsibilities. *Id.* Moreover, in the three years since the system was inaugurated, provincial bodies had gained sufficient expertise to hear more cases. As a result, the jurisdictional provisions were modified to give the provincial bodies jurisdiction over all cases with the exception of those which are reserved to the OAEN by Decree 119 and those which arise within ministries which have their own internal arbitration body. Council of Ministers, Decree 119, arts. 4-6.

62. Council of Ministers, Decree 89, art. 111 (1981) (Reglas Procedimiento del Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984). *See also infra* text accompanying notes 131-34.

63. Council of Ministers, Decree 60, art. 12 (1978) (Reglamento Orgánico de los Órganos del Sistema de Arbitraje Estatal).

64. *See infra* notes 136-47 and accompanying text.

Each of the fourteen provinces has an OAE unit, Órgano de Arbitraje Estatal Territorial (OAET), which has jurisdiction to hear disputes not heard by the national body or by the ministry level arbitrators.⁶⁵ The provincial bodies have three arbitrators appointed by the OAEN with the exception of Havana Province which has five.⁶⁶

There are sixteen state entities and ministries which are so large that they require their own internal arbitration systems.⁶⁷ The Sugar Ministry (MINAZ), for example, has a staff of three arbitrators who resolve disputes between the various enterprises within the ministry.⁶⁸ A dispute between a ministry such as MINAZ or one of its enterprises and an outside enterprise or another ministry, however, would be taken to the provincial or national OAE.⁶⁹ Ministry arbitrators are selected by the director of the respective ministry.⁷⁰

The various bodies of the OAE also draw on a pool of experts who assist in the resolution of disputes.⁷¹ These consultants are loaned by ministries or other institutions to the OAE to assist in specific conflicts.⁷² They receive a salary from the entity which employs them and no additional payment from the OAE.⁷³

IV. INTERVENTION AT THE PRE-CONTRACTUAL STAGE

Since no system of economic contracts existed to regulate com-

65. Council of Ministers, Decree 119 Cuarto (1983) (Reglas Para Determinar la Competencia de los Órganos de Arbitraje Estatal) (repealing Council of Ministers, Decree 47 (1979) (Competencia de los Órganos), reprinted in *LEGISLACIÓN ECONÓMICA* (1984)).

66. Interview with Dr. Benito Besada, Vice President of the OAEN, in Havana, Cuba (May 23, 1984) [hereinafter cited as Besada Interview]. Council of Ministers, Decree 60, art. 75 establishes a minimum staff for territorial organs of three arbitrators and a secretary. Council of Ministers, Decree 60 (1977) (Reglamento Orgánico de los Órganos del Sistema de Arbitraje Estatal), reprinted in *LEGISLACIÓN ECONÓMICA* (1984).

67. The ministries which have internal arbitration systems are: Heavy Industry, Light Industry, Sugar, Fishing, Agriculture, Interior Commerce, Construction, Armed Forces, Nutrition, Transportation, Interior, Basic Industry, and Public Health. In addition, the Institutes of Tourism and of Radio and Television have their own arbitration systems as does the State Committee of Technical Material Supply. Reyes Interview, *supra* note 61.

68. Although integrated vertically into a single ministry, the various enterprises must enter into formal planned contracts with each other. Arbitration may be required to resolve disputes between enterprises at different levels of sugar production: cultivation, processing and distribution.

69. Council of Ministers, Decree 119, (1983) (Relas Para Determinar la Competencia de los Órganos de Arbitraje Estatal).

70. Council of Ministers, Decree 60, art. 96 (1977) (Relamento Órgánico de los Órganos del Sistema de Arbitraje Estatal), reprinted in *LEGISLACIÓN ECONÓMICA* (1984).

71. Besada Interview, *supra* note 66.

72. *Id.*

73. *Id.*

mercial transactions between enterprises prior to 1975,⁷⁴ few management personnel understood the requirements of economic contracts or had experience in the drafting and negotiation of contracts.⁷⁵ In fact, enterprise managers did not fully appreciate the new economic system.⁷⁶ Decree-Law 15 governing the general nature of contractual obligations between enterprises was issued in 1978,⁷⁷ but its implementation was impeded by the lack of experience and understanding among enterprise management. The Main Report to the Second Congress of the Communist Party noted this in 1980:

The system of economic contracting is being established and developed, even though difficulties have arisen due to lack of full understanding of the importance of such contracts in carrying out the plan.⁷⁸

Because inexperienced management posed a significant impediment to implementation of the new system, the OAE, when it began functioning in 1980, emphasized providing technical assistance to management of the state enterprises, especially in the drafting of contracts.⁷⁹ Regional seminars were organized by the OAE staff to teach management personnel and their legal advisors the importance of contracts in the new economic system, as well as how to draft and negoti-

74. The government is currently in the process of drafting a new civil code to replace the existing pre-revolutionary law. Although the civil code which existed in 1975 contained provisions pertaining to contracts, the law was based on principles consistent with free enterprise and did not satisfy the requirements of a socialist economy. See Marill, *supra* note 21, at 29. Therefore, it could not be applied to inter-enterprise relations under the restructured organization of the economy.

75. Dorticos, *Discurso*, 1 BOLETÍN INFORMATIVO 4, 5-6 (1982). This speech, which was published by the OAE in its first volume of the Boletín Informativo, was given on November 17, 1980 at the inauguration of the jurisdictional activity of the OAE. Dorticos is the vice-president of the Council of State. It is important to keep in mind that a substantial portion, if not most, of the corporate managers before 1959 were either North Americans or Cubans who left after the revolution.

76. *Id.*

77. Council of State, Decree-Law 15 (1978) (*Normas Básicas para los Contratos Económicos*), reprinted in *LEGISLACIÓN ECONÓMICA* (1984). The preamble to the Decree Law explains the necessity of establishing a system of contracts which imposes legal obligations on the parties to fulfill agreements and answer for nonperformance. *Id.*

78. 2D CONG. PCC, *supra* note 12, at 35. Among the resolutions passed at the Second Congress were several calling for the issuance of regulations pertaining to the form and special requirements for economic contracts and for the development of contract legislation, including sanctions for failure to comply, applicable to all sectors and branches of the national economy. *Id.* at 193.

79. Educational programs were also implemented to train management personnel. *Id.* at 37. Enterprises also have staff legal advisors which are increasingly important to improvement of the quality of drafting contracts. Reyes Interview, *supra* note 61.

ate contracts.⁸⁰ Seminars are still conducted today to explain new regulations and to discuss problems which have been identified by arbitrators and management.⁸¹

Increasingly, enterprises have managers or legal advisors who possess training and expertise in the contract process.⁸² Where such expertise is lacking, the trained arbitrator may be asked by one of the parties to intervene to assure that a contract is executed and that it contains the necessary legal clauses.⁸³ Further, if the parties are not able to agree, or one party refuses to sign a proposed contract, one or both may request OAE intervention to resolve the dispute.⁸⁴ In the event a planned contract is not executed and neither party seeks intervention by the OAE, the OAE may initiate a proceeding on its own, "de oficio," to require execution of the contract.⁸⁵ The function of the OAE is not to impose terms on the parties, but to get the enterprises to agree on fundamental provisions necessary to fulfill their obligations under the national plan.⁸⁶

Initially, enterprises did not readily execute contracts or bring claims against enterprises which failed to do so. The problem was noted by the Principal Arbitrator Miguel Reyes Salia at the First Plenary Session on Arbitration and Contracts in 1981.⁸⁷ This failure to make claims was attributed to inexperience, inertia and passivity.⁸⁸ According to Dr. Reyes, almost 69 percent of the cases handled by

80. Dorticos, *supra* note 75, at 8.

81. Besada Interview, *supra* note 66.

82. 2D CONG. PCC, *supra* note 12, at 37.

83. Besada Interview, *supra* note 66.

84. Council of Ministers, Decree 89, art. 7 (1981) (Relas Procedimiento del Arbitaje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984) authorizes the OAE to resolve disputes in the pre-contractual stage. Decree-Law 15, art. 33, sets forth not only the norms for inter-enterprise contracts, but also provides for intervention by the OAE if the parties to a proposed contract do not reach an agreement. Council of State, Decree-Law 15 (1978) (Normas Básicas para los Contratos Económicos), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

85. Council of Ministers, Decree 89, arts. 106-07 (1981) (Reglas Procedimiento del Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984). The OAE may learn of failures of enterprises to execute required contracts by means of a third party who is affected by the situation, other state reporting mechanisms, or by means of the OAE's own inspection procedures. In the initial years of its existence, the OAE frequently sent arbitrators to visit enterprises, to discuss the system and to review contracts executed by the enterprises. Besada Interview, *supra* note 66.

86. The arbitrator does, however, have authority to nullify provisions if they are not lawful. Council of Ministers, Decree 89, art. 8(c) (1981) (Reglas Proceimiento del Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

87. Address by Dr. Miguel Reyes Salia, First Plenary Session on Arbitration and Economic Contracts, (Sept. 1981), *reprinted in* 2 BOLETÍN INFORMATIVO 7 (1982).

88. *Id.* See also Reyes Interview, *supra* note 61.

the OAE in 1981 involved the "de officio" process.⁸⁹ As a result, regulations promulgated by the OAEN the following year gave arbitrators discretion to impose pecuniary sanctions on enterprises which were negligent in fulfilling their obligation to execute planned contracts.⁹⁰ By 1983, the number of "de officio" proceedings dropped to less than 40 percent. Dr. Reyes attributes the decline to two reasons: 1) the imposition of monetary sanctions; and 2) greater familiarity with improved understanding of the system.⁹¹

Thus, one of the OAE's important functions is to prevent problems which might arise in the formation of contracts either from the failure of enterprises to execute a required contract or from contracts which are incomplete or poorly drafted. As enterprise management personnel have become more experienced, this aspect of the OAE's work has decreased, but it still remains significant to the development and functioning of the economic system.⁹²

V. DISPUTE RESOLUTION

Breach of a "planned" contract not only has consequences for the affected enterprise, but also for the economy as a whole. It causes a breakdown in the implementation of the economic plan. Thus, enterprises have a legal right and obligation to make a claim to the OAE for any breach of a required agreement.⁹³ In this way, the system relies on decentralized enterprises and not on centralized agencies to enforce obligations under the plan. Because of the significant societal interest in the fulfillment of contractual obligations, the OAE, as in the case of non-execution of a required contract,⁹⁴ may act "de officio" to require enterprises to answer for nonfulfillment of a contract when

89. *Id.* Not all of these *de officio* proceedings, however, involved pre-contractual problems. The procedure is also used to bring parties to arbitration when a contract is not fulfilled. *See infra* note 95 and accompanying text.

90. Instruction No. J-34, (Oct. 13, 1982) 3 BOLETÍN INFORMATIVO 66 (1984). Fines imposed pursuant to this regulation are to be paid to the Department of Revenue of the municipality where the entity or entities are domiciled. *Id.*

91. Reyes Interview, *supra* note 61.

92. *Id.*

93. Although not explicitly stated in the regulations, this obligation is implicit in the duty to fulfill one's obligation under the plan and in the power of the state arbitrators to bring the parties to the OAE in the event a party fails to seek reclamation for breach of a "planned" contract. *See generally* Marill, *supra* note 21, at 34. The inherent duty is also mentioned in Instruction No. J-14, which gives the OAE authority to impose sanctions for negligent failure to bring a claim for breach. *Id.* (Nov. 27, 1981) 3 BOLETÍN INFORMATIVO 33 (1984).

94. *See supra* note 85.

the injured enterprise fails to bring a claim on its own.⁹⁵

Nonperformance of a single contract may have an immediate effect on other sectors of the economy. To minimize the impact, instances of nonperformance must be identified and rectified as quickly as possible. By law, claims for breach of contract must be brought within a short period of time, ranging from five to forty-five days after the breach occurs, depending on the nature of the claim.⁹⁶ The law and regulations do not bar claims or set forth any penalty for bringing claims after the specified time periods elapse. Clearly, it serves the interest of the system to have the claim brought even if it is not timely. The OAE does have the discretion, however, to assess costs, and therefore, it may be likely that in cases where claims are not timely made, the claimant will have to pay all or a portion of the costs.⁹⁷ Claims are processed quickly and generally decided by the OAE within 45 days of filing.⁹⁸

Rules of procedure elaborated by OAEN regulations⁹⁹ reinforce

95. Such cases come to the attention of the OAE through various sources including random site visits to enterprises or third parties who are affected by the non-fulfillment. Besada Interview *supra* note 66. In instances of *de officio* proceedings, where failure to bring the action is not excused, damages assessed are paid into a state account and are not awarded to the enterprise injured by the breach. This rule serves to give added incentive to management to identify breaches and make claims promptly. Instruction No. J-14, (Nov. 27, 1981) 3 BOLETÍN INFORMATIVO 33 (1984).

96. Statutes setting forth the requirements of specific kinds of contracts, for example supply contracts, transport contracts, or investment contracts, contain regulations pertaining to the time in which claims must be brought to the attention of the breaching party. See, e.g., Council of Ministers, Decree 53, art. 87 (1978) (Reglamento de las Condiciones Generales del Contrato de Suministro), reprinted in LEGISLACIÓN ECONÓMICA (1984). In addition, the OAE has issued instructions which detail the required time limits for bringing a claim to the OAE. Instruction No. J-12, issued by the National State Arbitration Organ on July 10, 1981 to clarify Decree 53, Chapter VI (pertaining to claims) provides time periods for filing claims. For example, a claim for non-delivery or partial delivery must be made within 20 days of the date promised. Instruction No. J-12, § 1(a), (July 10, 1981) 3 BOLETÍN INFORMATIVO 21 (1984). Similarly, a claim for damaged goods must be made 20 days after receipt of the goods. *Id.* § 1(c). More time, 40 days, is allowed for claims based on non-conforming quality or specifications. *Id.* § 1(ch). Damages can also be claimed for delivery before the agreed upon delivery date, if the claimant can show it incurred additional costs such as warehousing, due to the early delivery. Such claims must be made within five days of receipt of the goods. *Id.* § 1(b).

97. Council of Ministers, Decree 89, arts. 58-59 (1981) (Reglas Procedimiento del Arbitraje Estatal), reprinted in LEGISLACIÓN ECONÓMICA (1984).

98. Interview with Roberto Francisco, Specialist from Department of Inspection OAEN, Havana, Cuba (May 25, 1984).

99. The Rules of Procedure for the State Arbitration System are contained in Decree 89, which was issued by the Council of Ministers in May 1981, six months after the inauguration of the state arbitration system. Provisional Rules of Procedure were established by the OAEN prior to adoption of Decree 89. Reyes Interview, *supra* note 61. The rules have been elabo-

the expeditious nature of arbitration proceedings. To initiate a claim, an enterprise must submit a demand setting forth the factual allegations in writing to the OAE and send a copy to the respondent.¹⁰⁰ At the time a demand is filed, the Secretary assigns the case to one of the arbitrators¹⁰¹ who reviews the demand. The arbitrator then makes a determination that the demand satisfies all formal requirements¹⁰² and that it states a claim under the law.¹⁰³ Once a complaint is admitted, the respondent or defendant must be served in writing within three days.¹⁰⁴ The respondent must submit its answer in writing to the OAE within seven days.¹⁰⁵ The arbitrator assigned by the Secretary remains in charge of the case; parties do not have any choice with respect to which arbitrator will be assigned.¹⁰⁶

Because resolution affects the national economy directly, not simply one transaction, fact-finding must be as thorough and accurate as possible. The arbitrator has broad discretion to accept or reject proof offered by the parties.¹⁰⁷ All forms of evidence are admitted in the arbitration process including documents, declarations of the parties or their legal representatives or other witnesses, demonstrative evidence, and expert opinion.¹⁰⁸ Elaborate rules of evidence contained in Decree 89, Chapter 14, are designed to assure accuracy and reliability of evidence introduced at arbitration. In addition, an arbitrator can, on his or her own initiative, seek additional evidence. For example, an arbitrator can decide to conduct fact finding on location,¹⁰⁹ and can order production of additional evidence or witnesses consid-

rated on by regulations promulgated by the OAEN. The regulations are developed by the Planning Department of the OAEN and approved by the Council of Ministers. Interview with Clara Diaz, Planning Department OAEN, in Havana, Cuba (May 25, 1984) [hereinafter cited as Diaz Interview].

100. Council of Ministers, Decree 89, art. 74 (1981) (Reglas Procedimiento del Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

101. *Id.* art. 75.

102. The formal requirements are set forth in Decree 89, art. 74. These requirements apply to pre-contractual claims as well as for claims of breach of contract. *Id.* If the demand does not comply, the claimant has three days to amend. *Id.* art. 76.

103. *Id.* art. 76.

104. *Id.* art. 77.

105. *Id.*

106. *Id.* art. 15.

107. *Id.* arts. 85-105.

108. *Id.* art. 86. Documentary evidence must be in its original form; copies substituted for originals must be notarized. *Id.* art. 88. Objections to the introduction of specific evidence are permitted at any stage of the process. *Id.* Expert testimony (*Id.* art. 93) is limited to related issues or details and must be provided in writing. *Id.* art. 96.

109. *Id.* art. 98.

ered necessary to the resolution of the dispute.¹¹⁰

The law provides that liability for breach lies only "when there exists blame imputable to the breaching party; intentional or by negligence."¹¹¹ The regulations of the OAE, however, do not mention the burden of proof in contract disputes. One commentator suggests that the burden be on the claimant to prove the fact of a breach of contract and that the defendant be required to prove lack of culpability or responsibility.¹¹² In the present development of the system, precise specification of burdens seems unnecessary and irrelevant since the arbitrators have such wide fact-finding and decision-making powers.¹¹³ Further, since the arbitrator's primary responsibility is to serve the national economic interests, the arbitrator is presumably concerned foremost with the appropriate resolution of a dispute in the context of the national economy and not with formalistic burdens.

There remains, however, a substantial question as to what constitutes negligence. So far, the OAE has not answered this question. Some assistance in resolving this question is found in instructions issued by the Council of Directors of the OAEN which notes that the statute governing liability is silent on the issue of "fuerza mayor," or natural forces, which prevent performance.¹¹⁴ The instruction grants authority to the OAE to exonerate a party from responsibility on these grounds.¹¹⁵ Presumably, then, negligence would encompass all acts within the control of the contracting party including failure to demand performance from a third party which causes the breach.¹¹⁶

Disputes are resolved through the issuance of the arbitrator's de-

110. *Id.* arts. 100-01. For example, in a dispute between two agricultural cooperatives and a pesticide enterprise which used aerial spraying in Pinar del Rio, the arbitrator from the OAET visited the site and went up in the airplane to see how the mistake was made. The pesticide enterprise was exonerated for damage caused from spraying the wrong pesticide when it was shown that the cooperatives had used the wrong signals. Reyes Interview, *supra* note 61.

111. Council of State, Decree-Law 15, art. 40 (1978) (Normas Básicas Para Los Contratos Económicos), reprinted in LEGISLACIÓN ECONÓMICA (1984).

112. Marill, *supra* note 21, at 37.

113. See *supra* notes 108-10 and accompanying text.

114. Instruction No. J-29, (May 25, 1982) 3 BOLETÍN INFORMATIVO (1984).

115. *Id.*

116. The disciplinary code applicable to enterprise managers provides sanctions against a manager who is "personally responsible for the incompletion of an economic contract, when so established by the competent organ of state arbitration" or who does not enter into planned contract for reasons of personal negligence. Council of State, Decree-Law 36, art. 4(e), (w) (1980) (Sobre la Disciplina de los Dirigentes y Funcionarios Administradores Estatales).

cision at the end of the arbitration process (Laudo)¹¹⁷ or by procedural rulings made prior to the arbitration hearing (Auto).¹¹⁸ Settlement agreements which are mutually binding must be approved by the assigned arbitrator.¹¹⁹ When a dispute is resolved through an arbitrator's decision, and the arbitrator finds that the breach is imputable to one of the parties,¹²⁰ the arbitrator has jurisdiction to award damages, including lost profits, and to impose other pecuniary sanctions as well as litigation costs.¹²¹

Remedies also must necessarily reflect both the interests of the injured enterprise and the societal interest in completion of the economic plan. The injured enterprise is entitled to compensation for actual damages including lost profits.¹²² Execution of the judgment is automatically effected by a transfer of funds by the National Bank.¹²³ If the culpable party lacks the funds to pay the damages exacted, payment is referred to the State Committee of Finance.¹²⁴

Because fulfillment of the plan is paramount and since enterprises have a continuing duty to fulfill their obligations under the plan, imposition of damages does not relieve the breaching party from its obligation to perform the contract.¹²⁵ Thus, the contract must be fulfilled except in cases where the benefit has been lost and performance would be of no value. In instances where the plan itself must be modified because circumstances indicate that it is inadequate or cannot be fulfilled, the arbitrator has the authority to order modification

117. Council of Ministers, Decree 89, arts. 43-44 (1981) (Reglos Procedimiento del Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

118. *Id.* art. 41. Auto also refers to other decisions concluding an arbitration procedure before the hearing on the merits. *Id.* For example, an auto would issue rejecting a demand for lack of jurisdiction. *Id.*

119. Council of Ministers, Decree 23, art. 26 (1978) (Del Sistema de Arbitraje Orgánico), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

120. Decree-Law 15, art. 40 states that material responsibility for breach of contract is only found "when culpability can be imputed to the breaching party: intentional or neglect." Council of State, Decree-Law 15, art. 40 (1978) (Normas Básicas para los Contratos Económicos), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

121. Council of Ministers, Decree 89, arts. 30(f), 58 (1981) (Reglas Procedimiento del Arbitraje Estatal) (damages, pecuniary sanctions, and costs), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

122. *Id.* arts. 30, 44; Besada Interview, *supra* note 66.

123. Council of Ministers, Decree 89, art. 127 (1981), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

124. *Id.* art. 126.

125. Council of State, Decree-Law 15, art. 38 (1978) (Normas Básicas Para Los Contratos Económicos), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

of contracts dictated by changes in the plan.¹²⁶ The arbitrator, however, does not have authority to order modification of the national plan.¹²⁷ Recommendations based on the arbitrator's investigations or findings are sent to the Central Planning Board.¹²⁸ Contracts which are "nonplanificado" (unplanned) may be modified by agreement of the parties.¹²⁹

In addition to damages and specific performance, the OAE may award penalties.¹³⁰ The types and amounts of penalties are set forth in statutes regulating specific kinds of contracts. For example, the statute regulating supply contracts states that failure to deliver the contracted supplies on time results in a penalty amounting to .05 percent of the value of the supplies not delivered calculated for each day of non-delivery during the first 30 days.¹³¹ The penalty is raised to .08 percent each day for the next 30 days; .12 percent for each day over sixty days. The penalty may not exceed 8 percent of the total value of the affected goods.¹³²

Although there is no provision for appeal of an arbitrator's decision, a rehearing is available when new elements arise that could affect the outcome, or when the arbitrator has failed to appreciate a particular fact or right.¹³³ Such proceedings, known as "revisiones," are taken to the next high level in the arbitration system, not to a court. In the event that a "revision" is sought of a decision made at the national arbitration level, it is taken up by a panel of three national

126. Council of Ministers, Decree 89, art. 30(f) (1981) (Reglas Procedimiento del Arbitraje Estatal), reprinted in LEGISLACIÓN ECONÓMICA (1984). A signed "planned" contract can only be modified when the Plan it serves to fulfill has itself been modified. Council of State, Decree-Law 15, art. 35 (1978) (Normas Básicas Para Los Contratos Económicos), reprinted in LEGISLACIÓN ECONÓMICA (1984).

127. Besada Interview, *supra* note 66.

128. *Id.*

129. Council of States, Decree-Law 15, art. 36 (1978) (Normas Básicas Para Los Contratos Económicos), reprinted in LEGISLACIÓN ECONÓMICA (1984).

130. Council of Ministers, Decree 89, art. 30(f) (1981) (Reglas Procedimiento del Arbitraje Estatal), reprinted in LEGISLACIÓN ECONÓMICA (1984).

131. Council of Ministers, Decree 53, art. 98 (1978) (Reglamento de las Condiciones Generales del Contrato de Suministro), reprinted in LEGISLACIÓN ECONÓMICA (1984).

132. *Id.*

133. Council of Ministers, Decree 89, art. 111 (1981) (Reglas Procedimiento del Arbitraje Estatal), reprinted in LEGISLACIÓN ECONÓMICA (1984). This process is different from an "appeal" in Cuba in which a party may take a case to the next higher court which will hear the evidence *de novo*. Such appeals do not require a showing of error by the lower court. Besada Interview, *supra* note 66.

arbitrators none of whom were involved in the original decision.¹³⁴ In 1984, revision proceedings constituted about 50 percent of the work of the OAEN, but the number was expected to decrease as the arbitrators gained greater expertise in resolving cases.¹³⁵

VI. RESEARCH AND DEVELOPMENT

A third function of the OAE is related to development and planning. The importance of the OAE as a source of information concerning the functioning of not only particular industries and enterprises but also the economy as a whole, has been reiterated in a number of decrees and regulations.¹³⁶ Article 10 of Decree 60 which was issued to elaborate Decree Number 23 establishing the arbitration system, states that among the principle functions of the OAE is to advise central planning agencies of whatever deficiencies the OAE detects in the system and to propose methods of correcting them.¹³⁷ Moreover, the OAE is charged with organizing a system or research and analysis concerning economic contracts¹³⁸ and with investigating the causes of litigation for the purpose of proposing measures to prevent such disputes.¹³⁹ Thus, based on its experience with various industries, particular disputes, and its own research, the OAE makes recommendations to the economic planning agencies such as the National Bank, the State Committee for Finance and others directly involved in state economic planning as well as to the management of particular enterprises.¹⁴⁰

Investigation and research is primarily carried out by the Department of Planning of the OAEN.¹⁴¹ The department has different

134. Council of Ministers, Decree 89, art. 115 (1981) (Reglas Procedimiento del Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

135. Besada Interview, *supra* note 66.

136. *See, e.g.*, Council of Ministers, Decree 23, art. 3 (1978) (Del Sistema de Arbitraje Orgánico), *reprinted in* LEGISLACIÓN ECONÓMICA (1984); Council of Ministers, Decree 60, art. 10(g)-(k) (1977) (Reglamento Orgánico de los Órganos del Sistema de Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

137. Council of Ministers, Decree 60, art. 10(i) (1977) (Reglamento Organico de los Órganos del Sistema de Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

138. *Id.* art. 10(j).

139. *Id.* art. 10(k).

140. Besada Interview, *supra* note 66. *See also* Council of Ministers, Decree 60, ch. III, sections g-k (1977) (Reglamento Orgánico de los Organos del Sistema de Arbitraje Estatal), *reprinted in* LEGISLACIÓN ECONÓMICA (1984).

141. The OAEN has a research staff of fourteen. The territorial bodies do not have research departments, but territorial arbitrators themselves often work with the OAEN on research projects. Diaz Interview, *supra* note 99.

functions: perfecting the legislation and regulations pertaining to arbitration; perfecting the internal organization of the arbitration system; and conducting research to discover the causes of particular recurrent problems.¹⁴² In addition to its own staff, the department utilizes specialists from the various industries who are, in effect, loaned by the industries and enterprises to work with the OAEN on particular projects.¹⁴³

An example of a research project conducted by the Department of Planning, is the 1983 investigation of the milk industry. In response to recurrent disputes over quality standards among milk producers, processors and distributors, the OAEN assembled a team to investigate the situation.¹⁴⁴ The team consisted of members of the planning department staff, representatives from the territorial arbitration units, specialists in the dairy industry, representatives from the relevant ministries including health, standards and planning, and representatives from the enterprises involved.¹⁴⁵ As a result of a year-long study based on a sample of enterprises from all over the country, the OAEN proposed and drafted new legislation.¹⁴⁶ In 1984, the OAEN began a study of agricultural cooperatives, specifically the economic relationships between producers and distributors of vegetables.¹⁴⁷

To fulfill its regulatory functions, the OAE must identify trouble spots in the implementation of the plan. The Department of Planning becomes aware of problems through a variety of means. Statistical data is obtained from the enterprises and ministries regarding the number of planned contracts required to be signed and the number actually signed.¹⁴⁸ Department members also select a cross-section of contracts to review in order to assess conformity to general requirements. The work plan of the department also contemplates a number

142. *Id.*

143. *Id.*

144. Diaz Interview, *supra* note 99.

145. *Id.*

146. The legislation which had governed the relationship between producer and processor dated back to 1940 when Cuba had a very small dairy industry. In 1959, Cuba imported more than 70% of its dairy products. From 1962 to 1979, milk production in Cuba increased by 300%. M. BENJAMIN, J. COLLINS & M. SCOTT, *supra* note 2, at 141. According to Diaz, the enormous expansion in the scale of production and the reorganization of agriculture in general necessitated changes in regulations. Diaz Interview, *supra* note 99.

147. Diaz Interview, *supra* note 99.

148. *Id.*

of visits to various enterprises to interview personnel.¹⁴⁹ In addition, the department organizes meetings of groups of enterprises to discuss common problems.¹⁵⁰

At this early phase in the development of the SDPE, the OAE is in a unique position to uncover existing and potential problems in the implementation of the new system. It also has almost immediate knowledge of breakdowns, or nonperformance, in particular areas which may have consequences for other sectors of the economy. Thus, its research and reporting function is critical to correcting deficiencies and in improving central decision-making in general.

VII. STATE ARBITRATION AND SOCIALIST LEGALITY

Although it has many characteristics of a court of justice, the OAE was created as an organ of the central administration of the state, annexed to the Council of Ministers.¹⁵¹ It is not administered by the Ministry of Justice as are the People's Tribunals.¹⁵² Since Article 121 of the Cuban Constitution dictates that "the function of administering justice springs from the people and is carried out . . . by the People's Supreme Court," the constitutionality of creating such a body which has jurisdictional powers separate from the court system was not initially clear.¹⁵³

Cuban jurists have resolved the potential constitutional conflict by pointing out that Article 17 of the Constitution grants the state the authority to "organize enterprises and other economic entities for the administration of the socialist property."¹⁵⁴ Article 17 further provides that the system governing their economic relations will be prescribed by law.¹⁵⁵ Thus, it is argued that since the OAE is an administrative body the essential objective of which is to regulate inter-enterprise contractual relations, its powers are derived from Article 17, not Article 121.¹⁵⁶ Moreover, since the Constitution was being

149. *Id.*

150. *Id.*

151. Council of Ministers, Decree 23, First Por Cuanto (1978) (Del Sistema de Arbitraje Orgánico), reprinted in *LEGISLACIÓN ECONÓMICA* (1984) (First Por Cuanto translates to, "Preamble").

152. *Id.*

153. *Id.*

154. *Id.*

155. CUBA CONSTITUCIÓN art. 51.

156. See Vega, *El Arbitraje Estatal y La Justicia*, 2 *BOLETÍN INFORMATIVO*, 4 (1983); Marill, *supra* note 21, at 40. Under the Cuban Constitution, only the National Assembly has the authority to declare a law unconstitutional. CUBA CONSTITUCIÓN art. 73.

prepared for ratification in 1975, the same year that SDPE was approved with the explicit recommendation that a state arbitration system be established,¹⁵⁷ the drafters of the Constitution must have assumed that the OAE was to be an administrative body created under Article 17 and not governed by Article 121.¹⁵⁸

Although many of its functions are clearly administrative,¹⁵⁹ it is not readily apparent that all such economic administrative functions—assuring the execution and fulfillment of contracts—can be wholly divorced from the administration of justice. Among the primary objectives of the OAE dictated by statute is “to defend the social interest and guarantee, at the same time, the interests and rights of the socialist economic entities and other parties, in their contractual relations.”¹⁶⁰ Certainly, the protection of rights under law is a fundamental function of courts of justice. Thus, to overcome the constitutional conflict between the dictates of Article 121 and an interpretation of Article 17 granting the state authority to organize juridical bodies to enforce economic laws, the “rights” of enterprises in their contractual relations must be considered of a different class than the “rights” of citizens which are protected by the judicial system.

Enterprises are created by the state to administer “the socialist property of the entire people.”¹⁶¹ They are subordinated to the Central Administration of the state or to the corresponding People’s Assembly.¹⁶² The rights and obligations of enterprises adjudicated by the OAE are those which are derived from the national plan: they are the obligation to fulfill or work toward fulfillment of the plan and the right to obtain performance and/or indemnification from those who fail to fulfill contracts or otherwise interfere with the enterprise’s operation in fulfillment of its obligations under the plan.¹⁶³ The annual

157. See *Informe Central I*, *supra* note 10, at 115 (1976). The Main Report concludes: In order to successfully implement the system the following factors are necessary . . . to strengthen and develop the organs recently created and those which are necessary to create as part of the institutions required to implement the [SDPE]: Committee of Prices, Committee of Technical Material Supply, Ministry of Finance, Commissions of Arbitration.

Id. at 115-16.

158. See Marill, *supra* note 21, at 40.

159. For example, the issuance of regulations and resolution of pre-contractual problems are administrative in nature.

160. Council of Ministers, Decree 23, art. 2(c) (1978) (*Del Sistema de Arbitraje Orgánico*), reprinted in *LEGISLACIÓN ECONÓMICA* (1984).

161. CUBA CONSTITUCIÓN art. 17.

162. Council of Ministers, Decree 42, art. 15 (1979) (*Reglamento de la Empresa Estatal*).

163. See *supra* notes 84-86, 93 and accompanying text.

national plan is itself a law adopted by the National Assembly in December of each year.¹⁶⁴ Thus, the enterprises are established under the constitutional authority granted in Article 17 and have no rights beyond what the state requires to fulfill the plan. Moreover, the rights and obligations of these enterprises, which are not fully autonomous, are subject to modification by state planning bodies,¹⁶⁵ and resolution of any inter-enterprise dispute by the OAE must serve the social interest in the successful completion of the plan. Within this structure the administrative functions of regulating and controlling contractual obligations to assure accountability of enterprises under the plan are consistent with the authority provided in Article 17.

In contrast, the People's Tribunals adjudicate a wide range of cases involving domestic relations, labor disputes and other civil actions as well as criminal prosecutions;¹⁶⁶ they are not narrowly confined to contract and environmental disputes between state created economic entities. For example, in addition, the cases heard by the People's Tribunals primarily concern the interests and rights of individuals within the context of socialist law.¹⁶⁷ Moreover, Tribunals do not take an active role in regulation or intervening "de officio" as does the OAE in order to further accountability and efficiency in the implementation of the national plan.¹⁶⁸

The postulated coincidence of the rights of enterprises with the interests of the state does not mean that these "rights" are not significant and tangible to individual workers and managers.¹⁶⁹ The efficient functioning and profitability of the enterprise, as well as the material rewards for its workers, depend on the enforcement of its

164. See, e.g., National Assembly, Law 31 (Del Plan Unico de Desarrollo Economico-Social del Estado Para el Año 1981) (1981).

165. For example, an enterprise which manufactures shirts may have a quota of 1,000 one year, but half as many the next year due to perceived changes in demand. The ability to maximize profits may be limited by the quantities proposed in the plan. Enterprise management and its workers would have some say in the quantities to be produced based on their knowledge of the most efficient level of operation, but their view might not prevail in the face of other societal considerations. Moreover, although enterprises can make additional goods with excess materials not needed for "planned" production, the existence of excess materials is itself controlled to some degree by the plan.

166. CUBA CONSTITUCIÓN art. 123.

167. *Id.*

168. See Marill, *supra* note 21, at 40.

169. In a recent article on the Soviet arbitration system, Professor Hazard criticizes the Soviet system for emphasizing accountability to the national plan over protection of the rights of enterprises. Hazard, *supra* note 37. The criticism, however, overlooks the primary function of state arbitration and misunderstands the nature of the "rights" accorded enterprises under the system. See *infra* text accompanying notes 169-77.

contractual rights. Thus, decentralization and the institution of material incentives have created individual responsibility and a degree of individualization of interests.

As stated at the time SDPE was introduced, the system depends on strengthening socialist consciousness among workers and managers.¹⁷⁰ The absence of competition between enterprises and their mutual participation in the development of the national economic plan is expected to encourage a spirit of cooperation among enterprises.¹⁷¹ Further, the national plan as well as specific production targets are discussed by worker councils and management, and it is expected that through participation in the planning process, managers and workers will be committed to the plan, thus guaranteeing its fulfillment.¹⁷² The significance of contracts and their completion is part of this discussion, and management has a continuing obligation to keep workers informed of progress towards their fulfillment.¹⁷³ Thus, contracts become both the legal and moral obligation of all and take on greater significance than simply a documentation of agreement. "Contracts between enterprises . . . are very important, not only in economic terms, but in a political and moral sense as well, for our society."¹⁷⁴

Socialist consciousness and cooperation among workers and managers of state enterprises and the merging of the interests of state enterprises with that of society are all ideals sought by revolution.¹⁷⁵ Material incentives were introduced based on the premise that workers will be more productive and efficient if they have a personal, individual interest in productivity.¹⁷⁶ Thus, despite the notion that enterprises do not have rights in "profits" beyond what is established in the plan, it is possible, if not likely, that workers and managers will view their interest in profitability and the material rewards which it provides them individually as separate from, although not necessarily antithetical to, the social interest. Moreover, the process of negotiat-

170. INFORME CENTRAL, PRIMER CONGRESO DEL PARTIDO COMUNISTA DE CUBA 113 (1976).

171. Besada Interview, *supra* note 66.

172. See also Zimbalist, *supra* note 1, at 219-22.

173. Besada Interview, *supra* note 66.

174. 2D CONG. PCC, *supra* note 12, at 389.

175. Arguing for the retention of central state control over economic planning and development, Edward Boorstein observed that "[i]t should be the aim of socialist organizational arrangements to make the actions of the enterprise coincide as much as possible with the interests of society. But this is an ideal. In practice, there will always be deviations between the two—often of great significance." E. BOORSTEIN, *supra* note 10, at 277.

176. See *supra* notes 11-12 and accompanying text.

ing terms which will maximize profitability in the self-interest of the enterprise is likely to introduce some measure of adversariness in the striking of the bargain.

Whether the perception of the interests of workers, enterprises and society merge in practice is a major challenge to the system. The stated policy is to implement moral incentives along with material incentives,¹⁷⁷ but it is not yet demonstrated that a separation between perceptions of self-interest and social interests will not occur. The impressive involvement of Cuban workers¹⁷⁸ and managers in the planning process, in addition to continuing efforts to increase both groups' understanding of the new economic system through educational programs, are measures taken which may keep the gap from becoming problematic.

The state arbitration system is essential to the promotion of a collective consciousness and spirit of cooperation. The collective interests are embodied in the duty of the OAE to simultaneously defend the social interest and the rights of enterprises. Thus, adjudications before the OAE are structured to be a cooperative pursuit of resolution for the common good.

Moreover, it is through state arbitration that accountability and discipline is maintained and problems identified. Both independence and consistency are essential to instill and maintain confidence in the adjudicatory process. The OAE must be scrupulously impartial and consistent with stated regulations. Although the OAE is appended to the Council of Ministers, its exercise of jurisdiction over economic disputes is independent of supervision by the Council of Ministers. Decree 23, Article 14 states, "[t]he state arbitrators will be independent and impartial in their functions, owing obedience only to the law in the exercise of same"¹⁷⁹ Disregard for the law or facts by the OAE, in pursuit of efficiency or favoritism, would undermine the development of socialist consciousness and cooperation. Ineptitude would destroy confidence. Thus, the OAE must continue to perfect its expertise and the efficiency of its proceedings.

177. See *supra* note 11 and accompanying text.

178. Zimbalist reports that the number of workers involved in the discussion of the annual Plan has increased from 1.26 million in 1975 to 1.45 million in 1980, and that workers' suggestions were used to amend the Plan's control figures in 42% of the enterprises in 1979 and in 59% for the 1980 Plan. Zimbalist, *supra* note 1, at 11.

179. Council of Ministers, Decree 23, art. 14 (1978) (*Del Sistema de Arbitraje Orgánico*) 215, reprinted in *LEGISLACIÓN ECONÓMICA* (1984).

VIII. CONCLUSION

State arbitration has been in operation in Cuba barely five years. It has been central to the implementation of the new system of economic development and management introduced in 1975. As the system begins to function throughout the economy, the primary role of state arbitration will shift from implementation to regulation. Its effectiveness will depend not only on the expertise of the arbitrators and their consultants, but on the level of commitment and understanding of all personnel involved, including economists, managers and workers. In addition to resolving disputes between the economic entities in order to maintain discipline in the economy, the OAE must, through its work, raise the level of understanding and commitment to the system.