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U.S.-Cuba relations: what is next for U.S. investors?

Nahila Cortes (Allende & Brea) · Friday, January 15th, 2016

More than one year has passed since the U.S. and Cuba started to rekindle their relationship and restore economic ties. The Cuban government is opening the country to foreign investment, the U.S. is relaxing the sanctions imposed on Cuba, and both countries reopened their embassies after half century of frosty relations.

Despite U.S. sanctions, Cuba has not been closed to the world. Australian (MEO Australia), Spanish (Melia Hotels, Iberostar Hotels, NH Hotels, and Altadis), Canadian (Sheritt International Corp), and French (Nouvelles Frontières, Pernod-Ricard Group) companies have been trading with the island in different fields including tourism, oil, banking, airlines industries among others. Moreover, Cuba has 40 bilateral investments treaties (“BIT”) in force (out of 60 BITs signed) with countries from around the globe including [Austria](#), [Argentina](#), [Germany](#), [France](#), and [Cambodia](#).

Yet, for U.S. investors the situation is still complex and much work remains to enable straightforward and protected investment in Cuba. Nowadays, before investing in Cuba Americans need, first, to sort out the actual U.S. sanctions, and later evaluate Cuba’s own legal framework applicable to its investment in particular. Can U.S. investors invest in Cuba now? And if the U.S. Congress ceases the embargo, what is next?

The economic embargo and the new tide in U.S.-Cuba relations

Although President Obama’s announcement on December 17, 2014 promoted a new course in U.S. relations with Cuba, the U.S. embargo is still in force. In 1992 the [Cuba Democracy Act](#) strengthened the embargo and in 1996 the [Helms-Burton Act](#) codified the embargo which still remains in place.

As a general rule, persons subject to U.S. Jurisdiction are prohibited from doing business or investing in Cuba unless they are authorized by the [Office of Foreign Assets Control](#) (“OFAC”) of the U.S. Department of Treasury. The OFAC has jurisdiction over all U.S. persons, including (a) U.S. citizens, (b) U.S. permanent resident aliens regardless of where they are located, (c) corporations organized under U.S. law (includes foreign branches and representative offices abroad), and (d) individuals and entities within the United States. The Helms-Burton Act also extends the sanctions to any person trafficking U.S. confiscated property by the Cuban Government. The term trafficking applies when a person knowingly and intentionally engages in a commercial activity with a U.S. confiscated property without the authorization of any U.S. national who holds a claim.

In addition to the OFAC's jurisdiction, the [Department of Commerce's Bureau of Industry and Security](#) ("BIS") administers export and re-export restrictions on Cuba consistent with U.S. policy. All the items that are subject to the Export Administration Regulations require a license for export or re-export to Cuba unless they are authorized by a license exception.

Notwithstanding this framework, there are options to invest in Cuba and also there has been a relaxation of some prohibitions. First, the Rule 49/49, which originated from a letter of the Director of the OFAC in response to an investor's inquiry in 1994, states that a U.S. company or individual may make a secondary market investment in a third country company doing business in Cuba provided that the investment does not result in *control in fact* of the company by the U.S. investor.

Second, the initial restrictions have been relaxed granting more licenses or expanding the scope of exceptions to facilitate the engagement between the U.S. and Cuba. Recently, on [September 21, 2015](#) there were important modifications to the Cuban Assets Control Regulations ("CACR") and the Export Administration Regulations that eased sanctions related to travel, telecommunication, inter-based services, business operations in Cuba, and remittances. The Treasury regulations and the BIS regulations can be found in the Code of Federal Regulations.

Although there have been important improvements, the sanctions still exist and only the eventual lift of the embargo will truly make a difference and open a new era. For this to occur, the U.S. Congress' approval is required and Cuba needs to have a democratically elected government in power that should have made demonstrable progress in returning to U.S. citizens the confiscated property or providing full compensation, as provided in Sections 203 and 204 of the Helms-Burton Act.

Safe Trade without the embargo?

A hypothetical lift of the embargo and the termination of U.S. sanctions against Cuba would only be the first step towards a trade-friendly relation between both countries. Yet, it is not a guarantee that U.S. investors will enjoy legal certainty and standard protections for their investments. Currently there is no BIT between the U.S. and Cuba, however, Cuba has recently modified its Foreign Investment Act (Law No.118, 2014) which became more appealing for investments but the standards of protection are still low.

The Foreign Investment Act, among other features, authorizes foreign investment in all sectors except in health, education, and armed forces, other than their system of enterprises. The investment requires the approval of the Council of Ministers (art. 11.1), and it shall operate in the context of the country's sustainable development, which means that during all the term of the investment, the authorities will pay special attention to the introduction of technology, the protection of the environment, and the rational use of natural resources (art.54).

The Act permits the foreign investment under three modalities: joint venture, international economic association agreement, or totally foreign capital companies (art. 13.1) and it establishes a chapter for guarantees for investors that includes (i) full protection and security, (ii) safeguard for unlawful expropriation (it will be considered lawful provided that there are reasons of public or social interest stated by the Council of Ministers in accordance with the provisions of the Cuban Constitution, international treaties and legislation in force, and appropriate compensation) (art. 4.1), (iii) transfer of rights provided that a previous agreement is reached between the parties or an authorization is granted (art 7.1), (iv) free transfer abroad of dividends in freely convertible

currency, free from taxes, or any other associated fees (art. 9.1), and (v) protection to foreign investment against third parties legal claims or the extraterritorial application of other State's laws, according to the Cuban laws and the decisions of the Cuban Courts (art 5).

In addition, the Act contemplates a special tax regime for joint ventures and foreign and national investors that are parties to an international economic association (art 10 and Chapter XII), and special regulations apply to the labor force. Employees working in activities related to foreign investment shall be Cuban citizens or foreign citizens permanently residing in Cuba, except for top management or technical positions (art 28.1), and they will be hired by a Cuban agency (not directly by the foreign investor), and paid in Cuban pesos (art 30 and 31). Moreover, investors can create an economic incentive fund for Cuban workers or permanent residents which shall be made out of the profits earned (art 29.1).

Regarding the dispute resolution provision, it establishes that (i) if a conflict arises between the partners of the different modalities of investment, it will be resolved as agreed in the constituent document, (ii) if the conflict arises in connection with the inactivity of governing bodies of the modalities of foreign investment, as well as with winding up, dissolution and termination of a joint venture, it shall be resolved by the People's Provincial Courts, (iii) if a conflict arises between the partners in an investments that was authorized to carry out activities related to natural resources, public services, and public works it will be resolved as stated in the corresponding authorization, otherwise it will be resolved by the People's Provincial Courts, and (iv) if the conflict is related to the execution of the economic agreements between the various modalities of foreign investments, or between them and a Cuban national, it could be resolved by the Economic Division of the corresponding People's Provincial Courts and *it does not preclude the possibility of submitting it to arbitration proceedings in accordance with Cuban legislation* (art. 60.1 and 61). It is worth noting that Cuba is a party to the [New York Convention](#) since 1974 and this provision could enable investors to avoid Cuban Courts.

Compared with the standards of protection that the U.S. has been negotiating in the past decade (see the [investment chapter of the TPP](#), latest FTAs, and the [2012 U.S. Model BIT](#)), the Cuban framework evidences a standard that is far from granting real and full protection to foreign direct investment. A U.S.-Cuba BIT is highly desirable to set the bar higher and allow more inflows of capital in a safe way in the island.

Final Words

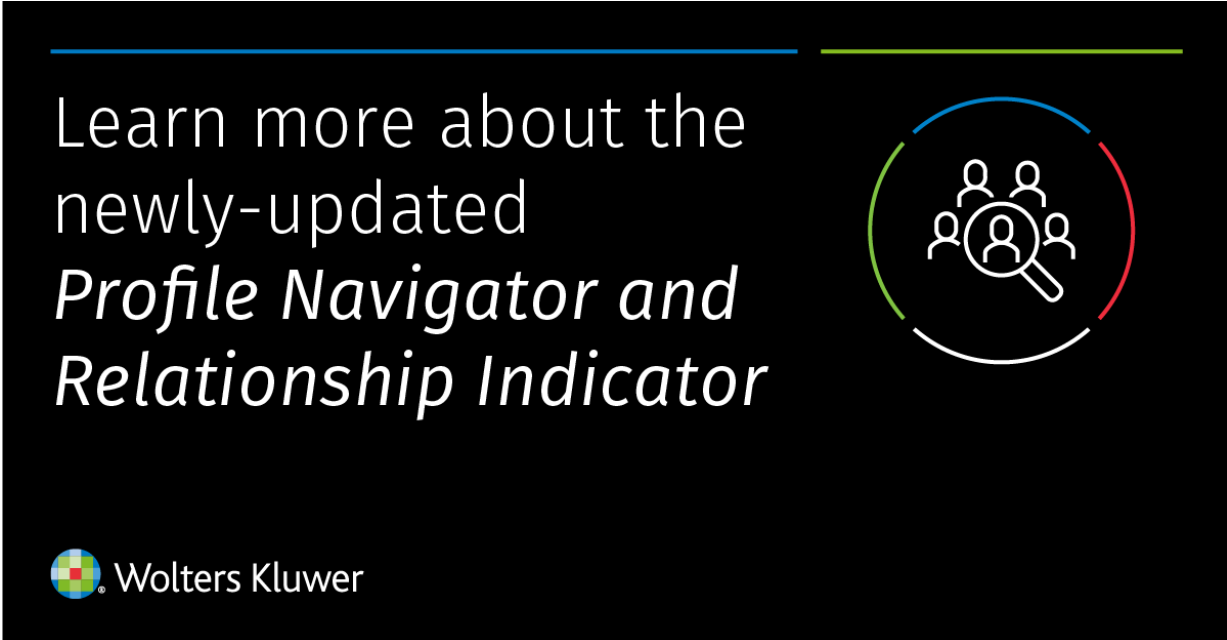
The U.S.-Cuba relationship is ever-evolving and Cuba represents an attractive market for U.S. investors. Nowadays the U.S. sanctions are still in force but are more relaxed. Still, trade will not be fully free until the embargo is lifted, and if this happens, it is desirable that the U.S. and Cuba negotiate a BIT in order to provide more legal certainty to U.S. investors when investing in Cuba.

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