Foreign Investment in Cuba: Law, Policy, and Practicalities

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Presentation for the
27th Annual Conference Association for the Study of the Cuban Economy
Miami, Florida; 28 July 2017
Introduction

Cuba’s 2014 Foreign Investment Law and the dissemination of its annual Portfolio of Opportunities for Foreign Investment are signals that Cuba is open to foreign direct investment.

While Cuba has secured a number of deals, progress on all sides remains slow due to the complexities and uncertainties surrounding legal, policy, liability, and other issues.

The U.S. appears to have loosened the sanctions regime it had imposed on Cuba signaling that the U.S. is open to permitting outbound investment.
Context

Moving toward normalization
- Death and transfiguration (changes at the top)
- The power of reaction: *Nomemklaturas* in Cuba; Cuban exile power structures in the U.S.
- The power of money (mutually beneficial)

From Normalized relations to normalization
- Economics, societal and political dimensions intermeshed.

From Revolt to Revolution to sanctions regimes

The cycles of relations 1970s-21st century

Overtures and reaction

Sabotage of reconciliation efforts

Changeable “Normalization”
- Warm normalization under Pres. Obama
- “Colder normal” under Presidents Trump and 1st Secretary Castro and Pres Diaz Canal.
What we Will Cover Today

- Legal Sources
- The issue of discretion and Corruption
- Following a Transaction
- Special Economic Zones
- The Small Transaction
“As required by statute, the United States continues to maintain a trade embargo against Cuba. Only limited categories of items may be exported or reexported to Cuba subject to authorization by Department of Commerce’s Bureau of Industry and Security. These changes implement the policy announced by the President on December 17, 2014, aimed at supporting independent economic activity in Cuba and improving communications by and living conditions for the Cuban people.”

BIS Cuba FAQs II(12).
U.S. Sources

- Sections 5 and 15 of the Trading With the Enemy Act (TWEA), 50 U.S. App. §§ 5, 16

- Code of Federal Regulations
  - 31 CFR Part 515 - Cuban Assets Control Regulations FAQs

- Federal Register Notices
  - 81 FR 71372 - October 2016 Amendments to the Cuban Assets Control Regulations
  - 81 FR 13989 - March 2016 Amendments to the Cuban Assets Control Regulations
  - 81 FR 4583 - January 2016 Amendments to the Cuban Assets Control Regulations
  - 80 FR 56915 - September 2015 Amendments to the Cuban Assets Control Regulations
  - 80 FR 34053 - Amendment to the Terrorism List Government Sanctions Regulations
  - 80 FR 2291-15 - January 2015 Amendments to the Cuban Assets Control Regulations
  - 77 FR 71530-12 - 2012 Amendments to the Cuban Assets Control Regulations
  - 76 FR 5072-11 - 2011 Amendments to the Cuban Assets Control Regulations
  - 75 FR 10997-10 - Amendments to authorize certain types of exportation
  - 74 FR 48000-09 - 2009 Amendments to the Cuban Assets Control Regulations
  - 68 FR 14141-03 - 2003 Amendments to the Cuban Assets Control Regulations
  - 66 FR 36683-01 - Exports of Agricultural Products, Medicines, and Medical Devices to Cuba, Sudan, Libya, and Iran; Cuba Travel-Related Transactions

- Export Administration Regulations (EAR) (15 CFR Parts 730-774) (Commerce Dept: Bureau of Industry and Security FAQs)
OFAC AND BIS

• The Cuba sanctions program represents the implementation of multiple legal authorities.

• Both the Department of Commerce’s Bureau of Industry and Security (BIS) and the Department of the Treasury’s Office of Foreign Assets Control (OFAC) administer Cuba sanctions.

• Regulatory sources
  • pursuant to the Export Administration Regulations (EAR) (15 C.F.R. Parts 730-774) and
  • the Cuban Assets Control Regulations (CACR) (31 C.F.R. Part 515), respectively. (Source)

• Other sources of these authorities are in the form of executive orders issued by the President.

• Other authorities are public laws (statutes) passed by The Congress.

• These authorities are further codified by OFAC in its regulations which are published the Code of Federal Regulations (CFR).

• Modifications to these regulations are posted in the Federal Register. (Source)
It’s All About Licensing

• Most export or reexport transactions require general or specific authorizations from both BIS and OFAC. OFAC has issued a general license authorizing all transactions ordinarily incident to the exportation of items from the United States, or the reexportation of 100 percent U.S.-origin items from a third country, to any person in Cuba, provided that the exportation is licensed or otherwise authorized by BIS. (Info HERE)

• According to OFAC, “[a] license is an authorization from OFAC to engage in a transaction that otherwise would be prohibited.” (OFAC FAQ)
  - **A general license** authorizes “a particular type of transaction for a class of persons without the need to apply for a license.”
  - **A specific license** “is a written document issued by OFAC to a particular person or entity, authorizing a particular transaction in response to a written license application.”

• If the proposed license involves exports, BIS may participate in the process.

• Discretionary determinations;
  - OFAC broadly states that its licensing determinations are “guided by U.S. foreign policy and national security concerns” and may involve coordination with other federal agencies, including the U.S. Department of State and the U.S. Department of Commerce.

• License usually takes several weeks to several months to process and may require changes in participants or plans (OFAC Licensing, Background Briefing, March 2013).
U.S. Process

- Obtain a license from OFAC
  - Specific License
  - General License
    - 31 CFR 501.801 (b)
  - Importation
    - 31 CFR 515.204
    - 31 CFR 515.205
  - Exportation
    - 31 CFR 515.535
  - Physical Presence
    - 31 CFR 515.573

- Obtain a license from BIS
  - 50 U.S.C. 4601-4623

- Property
And Financing

• Since Normalization OFAC restrictions lifted on payment and financing terms for authorized exports and re-exports to Cuba.
  • U.S. banks will be authorized to provide financing by third-country or U.S. financial institutions
    • letters of credit,
    • Advance cash payment,
    • sales on an open account.
• Exception: Trade in Agricultural products
  • limited to cash in advance or
  • financing by third-country banks
The Office of Foreign Assets Control administers and enforces economic sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals.

A summary description of each particular embargo or sanctions program may be found in the Sanctions Program and Country Summaries area and in the Regulations by Industry area on OFAC's website.

The text of Legal documents may be found in the Legal Documents area of OFAC's website which contains the text of 31 C.F.R. Chapter V.

U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches.
Bureau of Industry and Security (BIS)

- “The Bureau of Industry and Security (BIS) implements and enforces the Export Administration Regulations (EAR). The EAR regulate the export and reexport of most commercial items, and some military items. Many items that BIS regulates are referred to as “dual-use” because they have both commercial and military or proliferation applications, but some military items, and purely commercial items without an obvious military use also are subject to the EAR.” (BIS FAQs)

- Other U.S. Government agencies have export control responsibilities for regulating more specialized exports. . . . OFAC administers and enforces economic and trade sanctions against targeted foreign countries.” (Ibid).

- BIS FAQs on CUBA

- **What is the difference between EAR99 and NLR?**

  EAR99 is a classification for an item. It indicates that a particular item is subject to the Export Administration Regulations (EAR), but not listed with a specific Export Control Classification Number (ECCN) on the Commerce Control List (CCL). While the classification describes the item, the authorization for shipment of that item may change, depending on the transaction.

- NLR is the designator of a transaction that stands for the "No License Required" authorization. NLR may be used for either EAR99 items, or items on the CCL that do not require a license for the destination in question, provided no General Prohibitions apply. (US Export Compliance FAQs)

- “However, if your proposed export of an EAR99 item is to an embargoed country, to an end-user of concern or in support of a prohibited end-use, you may be required to obtain an export license.” (BIS FAQs).

- There are various lists that may be relevant to your export or reexport transaction such as the Denied Persons List and Entity List) (Ibid).
BIS Levels of Review

• **general policy of denial**
  - There is a general policy of denial for exports and reexports to Cuba of items subject to the Export Administration Regulations (EAR), 15 CFR §746.2(b) including
    - for use by state-owned enterprises, agencies, or other organizations of the Cuban government that primarily generate revenue for the state
    - items destined to the Cuban military, police, intelligence and security services remain subject to a general policy of denial

• **EXCEPTIONS:**

• **Case by Case basis 15 CFR §740.2(b)(3)**
  - Exports to Cuban Government Agencies Meeting the Needs of the People:
    - (1) items for construction of facilities for public water treatment, electricity or other energy; (2) sports and recreation; (3) agricultural production; (4) food processing; (5) disaster preparedness, relief and response; (6) public health and sanitation; (7) residential construction and renovation; (8) public transportation; (9) wholesale and retail distribution for domestic consumption by the Cuban people; and (10) artistic endeavors.

• **General Policy of Approval 15 CFR §740.2(b)(1) and (2)**
  - (1) medicines subject to exceptions; (2) Environmental protection items; (3) Telecommunications items (4) Civil aviation and commercial aircraft safety items; (5) Agricultural items (insecticides, pesticides, and herbicides, as well as tractors and other farm equipment) not eligible for License Exception AGR; (6) Commodities and software to certain NGOs involved in regime change, (7) U.S. news bureaus in Cuba whose primary purpose is the gathering and dissemination of news to the general public.

• **License Exceptions 15 CFR § 740.1**
  - an authorization contained in this part that allows you to export or reexport under stated conditions, items subject to the Export Administration Regulations (EAR) that would otherwise require a license under General Prohibition One,
  - BIS, Support for the Cuban People License Exception 15 CFR § 740.21(b)
Changes in U.S. Trade Policy

• the Remarks by the President on the Policy of the United States Toward Cuba (delivered in Miami June 16th);

• White House Background Briefing of June 15, 2017;

• Department of the Treasury Office of Foreign Assets Control (OFAC) Frequently Asked Questions on President Trump’s Cuba Announcement;

• National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba,
National Security Presidential Memorandum

Section 1 Objectives
- Encourage regimes change
- Protect national security

Section 2 Policy
- Ending "economic practices that disproportionately benefit the Cuban government or its military, intelligence, or security agencies or personnel at the expense of the Cuban people"
- Tourism: "Ensure adherence to the statutory ban on tourism to Cuba" AND "Amplify efforts to support the Cuban people through the expansion of...lawful travel"
- (1) advancing Cuban human rights; (2) encouraging the growth of a Cuban private sector independent of government control; (3) enforcing final orders of removal against Cubans in the U.S.; (4) protecting U.S. national security and public health and safety through proper engagement on criminal cases and the return of fugitives from American justice; (5) supporting U.S. agriculture and protecting plant and animal health; (6) advancing the understanding of the U.S. regarding scientific and environmental challenges; and (7) facilitating safe civil aviation.

Section 3 Implementation
- "adjust regulations
- "identify the entities or subentities, as appropriate, that are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel (such as Grupo de Administracion Empresarial S.A. (GAESA), its affiliates, subsidiaries, and successors), publish a list of those identified...with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba." and prohibit direct financial transactions with those entities or subentities UNLESS a waiver is granted by SecCom.
- Travel: For education or to "support the Cuban people"
  - shall keep full and accurate records of all transactions related to authorized travel, regardless of whether or not effected pursuant to license, and such records shall be available for examination for at least 5 years after the date they occur.
- "SDN List" broadened
- Project internet and info access
The New Regs

- 8 November 2017,
  - OFAC) and (BIS) publish amendments to
    - the Cuban Assets Control Regulations (CACR) and
    - Export Administration Regulations (EAR).
  - BIS has published a final rule amending the licensing policy for Cuba and three license exceptions
    - Gift Parcels and Humanitarian Donations (GFT)
    - Consumer Communications Devices (CCD) and
    - Support for the Cuban People (SCP).

- The State Department implemented the policy changes by releasing a “Cuba Restricted List” identifying Cuban military, intelligence, and security entities.
  - US persons are prohibited from conducting “direct financial transactions” with these entities, meaning that an entity listed cannot be the originator or the ultimate beneficiary of a transfer of fund, while a US person is at the other end of the transaction.
BIS Licenses

• BIS will now generally deny license applications for exports and re-exports to Cuba of items for use by certain entities or subentities of the Cuban government, as identified on the State Department’s List of Restricted Entities and Subentities associated with Cuba (the so-called “Cuba Restricted List”),
  • unless determined to be consistent with the Cuba NSPM.
  • The rule further amends the list of ineligible Cuban government officials in License Exceptions GFT (§ 740.12), CCD (§ 740.19) and SCP (§ 740.21). BIS has published updated FAQs and a Joint Fact Sheet explaining the measures implementing the Cuba NSPM.

• OFAC Travel

• Prior Travel grandfathered

• Return of restrictions on individual people-to-people travel by US persons. Individual people-to-people nonacademic educational travel will no longer be authorized.

• Travelers relying on the educational activities license will also be subject to similar restrictions.

• Travelers under the “support for Cuban people” license, now required to engage in a full-time schedule of activities that “result in meaningful interaction with individuals in Cuba.”
“Cuba’s beaches and historic towns may be ready for travelers, but its economy isn’t quite open to U.S. businesses. Even if the U.S. trade embargo were to fall tomorrow, it could be awhile before CEOs find the country a welcoming place for a profit-driven entity.” [Craig Guillot, “Cuba May Be Ready for Tourists, but Not for U.S. Business,” The Chief Executive (August 1, 2017).]
Cuba Legal-Ideological Sources: What Is Covered

--Investment Climate; Political ideology of economic planning
--Ideological Elements
--Strategic Themes
--General Principles of Foreign Investment
--Cuba Legal Sources
--Legal Framework for Investing
--Investment Opportunities managed by the State
--The Issue of Discretion, Chilling Effects and Transaction Costs, and Corruption
--Following a Transaction
--Special Economic Zones
--The Small Transaction
Investment Climate: Political Ideology of Economics

- 7th Cuban Communist Party Congress
  - Conceptualización del modelo económico y social Cubano de desarrollo socialista: Plan nacional de desarrollo económico y social hasta 2030: Propuesta de vision de la nación, ejes y sectores estratégicos
    - Political foundations of economic planning
    - Economic plan through 2030

- 6th PCC Congress
  - Lineamientos de la Política Económica y Social del Partido y la Revolución (2011) (Tabloide (Commentary))
    - Blueprint for reform
Ideological Elements

• All investment must protect and develop the socialist system of Cuba under the leadership of the Communist Party

• State to state and state to enterprise relations are prioritized; investments in non state sector tightly controlled

• Markets and markets culture are rejected in favor of planning where the state substitutes its judgments for market

• Economic development must serve to develop political and societal objectives.

• El sistema de planificación socialista continuará siendo la vía principal para la dirección de la economía nacional, y debe transformarse en sus aspectos metodológicos, organizativos y de control. La planificación tendrá en cuenta el mercado, inuyendo sobre el mismo y considerando sus características.

• Lineamientos 2011
Strategic Themes Cuba Vision 2030

• 1) efficient and social government and social integration (¶¶49-77),

• 2) transformation and internationalization of production (¶¶ 78-101),

• 3) infrastructure development (¶¶ 102-129),

• 4) developing human potential through science, technology and innovation (¶¶ 130-157),

• 5) development of natural resources and environmental concerns (¶¶ 158-184), and

• 6) human development, equality and justice (¶¶ 185-220).

These are meant to serve as the qualitative categories through which development will be structured (¶ 46).

Around these six strategic themes, PNDES establishes 22 general objectives and 106 specific objectives (¶ 47) that constitute the bulk of the rest of the Plan.

All of these are tied to the Lineamientos (¶ 46) and the efforts at modernization and preservation that has marked the policies of the Cuban state since the elevation of Raul Castro as First Secretary of the PCC.

General Principles of Foreign Investment

• Political Principles
  • To conceive of foreign investment as a source for the country’s short, mid and long-range economic development.

• Objectives that should be proposed in order to attract foreign investment
  • Access to state-of-the-art technologies,
  • securing managerial methods,
  • diversifying and broadening export markets,
  • replacing imports, access to foreign financing,
  • creating new job sources and
  • securing greater incomes on the basis of production linkage with the domestic economy.

• To prioritize massive promotion for the Special Economic Development Zones starting with the work by the Special Economic development Zone of Mariel.

• FDI Principles
  • Guided toward export sector
  • Guided toward prioritized sectors
  • Utility as complements to national development
  • Foster technology transfer or food security
  • Market guarantees for exports of goods and services
  • Cuban majority participation in certain sectors
  • Infrastructure
  • FDI partner to assume cost overruns
  • Foreign investment may be directed selectively towards development of non-state ownership forms with juridical personality, prioritizing the cooperative sector.

• 2018 Projections down:
  • Cuba’s Minister of Economy and Planning, Ricardo Cabrisas, referred to the need to prioritize “support for production levels and investments linked to exports, substitutes for imports, development programs and infrastructure to meet the needs of the tourism sector; food production and imports; an increase in producing building materials and agricultural supplies; and assuring education, health care, and other basic services for the Cuban people.”

“Cuba Announces Economic Re-Adjustments” (May 2017)
Cuba Legal Sources

• Legal Regime for Foreign Investment
  • Law No. 118/2014: “Law of Foreign Investment”. [English version]
  • Decree No. 325/2014: “Regulations of the Law of Foreign Investment” of the Council of Ministers
  • Resolution No. 46/2014 and No. 47/2014 of the Banco Central de Cuba
  • Resolution No. 128/2014 and No. 129/2014 of the Ministry of Foreign Commerce and Investment
  • Resolution No. 16/2014 and No. 42/2014 of the Ministry of Labor and Social Security
  • Resolution No. 535/2014 of the Ministry of Finance and Prices
  • Resolution No. 920/2014 of the Ministry of the Economy and Planning
  • Agreement No. 7567 of the Council of Ministers.

• Tax Treaties
  • Spain, Barbados, Italy, Russia, Portugal, Qatar, Lebanon, China, Vietnam, Austria, Ukraine, and Venezuela

• BITs and TIPs
  • Fifty Eight (58 states) plus 3 Treaties with Investment Provisions
Framework for Investment

• Law No. 118
  • Objectives
    • Diversification and expansion of export markets, substitution of imports, development of high technology
    • Health, education, and armed forces are the only sectors exempt from investment
  • Modalities of investment
    • Joint enterprise.
    • International economic partnership agreements
      • including, among others, contracts for hotel management, production or services, contracts to provide professional services, risk contracts to explore non renewable natural resources, for construction and agricultural production.
    • Enterprises with 100% foreign capital:
      • Natural persons acting on their own behalf;
      • Juristic persons constituting a Cuban affiliate of the foreign entity which they own; or
      • Juridical persons setting up a branch of a foreign entity
  • Operating a business in Cuba (opening a bank account, hiring labor, sourcing production materials, registering your business with relevant authorities
  • Labor must be purchased from the state (Ley 118 ¶ 30.1).
    • Reglamentos Obre Régimen Laboral En La Inversión Extranjera
  • No Expropriation; “unless such action is executed for reasons of public or social interest as previously stated by the Council of Ministers, in accordance with the provisions of the Constitution.”
Cuba Investment Opportunities

- “Portfolio of Opportunities for Foreign Investment for 2016-2017
- includes 395 business opportunities, up from 326 projects floated in 2015 and 246 projects in 2014
- Emphasis on activity in Special Economic Zones (Mariel)

<table>
<thead>
<tr>
<th>Sector</th>
<th>2015</th>
<th>2016-2017</th>
</tr>
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<tbody>
<tr>
<td>Tourism</td>
<td>94</td>
<td>114</td>
</tr>
<tr>
<td>Oil</td>
<td>86</td>
<td>87</td>
</tr>
<tr>
<td>Renewable Energy</td>
<td>22</td>
<td>23</td>
</tr>
<tr>
<td>Agro-foods</td>
<td>40</td>
<td>76</td>
</tr>
<tr>
<td>Sugar industry</td>
<td>--</td>
<td>13</td>
</tr>
<tr>
<td>Mining</td>
<td>15</td>
<td>13</td>
</tr>
<tr>
<td>Biotech and Medicine</td>
<td>9</td>
<td>15</td>
</tr>
<tr>
<td>Other</td>
<td>60</td>
<td>54</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>326</td>
<td>395</td>
</tr>
</tbody>
</table>

Source: Feinberg, Analysis: *Cuba’s Call to Foreign Investors* (2017)
It’s All About the Application

- The Foreign Investment law is effectively administered through the process of considering, negotiating, and operationalizing applications for inbound investment. Much of the administrative regulations deal with the multi-form applications and their content.
“Paperwork” for the Application

• Ley 118, Resolution 129 (2014)
• El Decreto №325 (9 April 2014) “Reglamento de la Ley de la Inversión Extranjera”
  • establece el procedimiento para la presentación de solicitudes y evaluación de las propuestas de negocios con inversión extranjera en Cuba [Establishes the procedure for the submission of applications and evaluation of business proposals with foreign investment in Cuba].
• RESOLUCIÓN Nº 129 de 2014 establishes the content of the forms submitted
  • Annex 1 (Source pp. 210 et seq.) Bases Metodológicas Para La Presentación De Oportunidades De Inversión Extranjera Y La Elaboración de Estudios de Pre O Factibilidad Técnico-económica, Para Oportunidades, Propuestas De Negocios Con Inversión Extranjera Y Modificación De Negocios En Operaciones, Según Corresponda, Así Como Para La Presentación Del Informe Anual Por Las Distintas Modalidades
    • Application form
    • Technical pre-feasibility study
    • Foundations of Economic Organization of Investing Party
      • Different content for service providers
• Annex 2: Tablas Para La Presentación Del Estudio De Prefactibilidad Y Factibilidad Técnico-económica [Tables For Presentation Of The Study Of Pre-Feasibility And Technical-Economic Feasibility]
  • 22 Tables related to investment planning
• Annex 3 Annual Reporting Form
Los Formularios

- Application form
  - General description of the project
- Technical pre-feasibility study
  - A complex and quite detailed study of feasibility
  - Connection between the investment and the objectives to be served in the interests of the Cuban state
  - Includes the information from the 22 tables of annex 2
- Foundations of Economic Organization of Investing Party
  - Detailed information about the investment vehicle
The Tables (Annex 2) (Original Spanish)

- Tabla 1. Estado de Rendimiento Financiero
- Tabla 2. Flujo de Caja para la Planificación Financiera [cash flow for financial planning].
- Tabla 3. Flujo de Caja para el Rendimiento de la Inversión [cash flow for ROI].
- Tabla 4. Estado de Situación [context]
- Tabla 5. Gastos totales [total costs]
- Tabla 6. Capital de Trabajo [working capital].
- Tabla 7. Desglose de los Consumos Fundamentales [consumption breakdown].
- Tabla 8. Inversión Inicial [initial investment]
- Tabla 9. Presupuesto de Inversiones [investment budget].
- Tabla 10. Cronograma de Ejecución de la Inversión [implementation schedule].
- Tabla 11. Financiamientos [financing].
- Tabla 12. Aportes o Aportaciones [Capital contributions].
- Tabla 13. Fuerza de Trabajo [workforce].
- Tabla 14. Beneficios para el país [benefit of the investment for the country].
- Tabla 15. Efecto sobre las Divisas [effects on currency].
- Tabla 16. Análisis de Sensibilidad [profitability risk analysis].
- Tabla 17. Movimiento de Capital Contable para prorroga.
- Tabla 18. Estado de Situación pretérito para prorroga.
- Tabla 20. Resumen Económico del Contrato de Asociación Económica Internacional a Riego para la exploración y producción de hidrocarburos [risk analysis hydrocarbon explorations].
- Tabla 21. Costos y Gastos del Contrato de Asociación Económica Internacional a Riesgo de Minería [costs and expenses re mining risk].
- Tabla 22. Resultados proyectados por el inversionista cubano, a partir de las operaciones del Contrato de Asociación Económica Internacional para la Administración Productiva, de Servicios y Prestación de Servicios Profesionales [Results projected by the Cuban investor, based on the operations of the International Economic Partnership Contract for the Productive Administration, Services and Provision of Professional Services].
From Regulation to Negotiation

• The process of inbound investment can be understood as divided into roughly two stages.
• First: the approval of the project
• Second, the negotiation of the project investment details.
• Both are filtered through the formal application and the discussions around them.

• For U.S. Companies that requires looking forward (to compliance with Cuban rules and standards, and negotiating details), and backwards (to the effects of Cuban needs on the ability of the U.S: enterprise to meet the BIS and OFAC licensing standards).
• There are times when the incompatibility of the political agendas at the heart of two sets of rule systems might make coherent compliance difficult.
The Issue of Discretion, Chilling Effects and Transactions Costs, and Corruption

• Discretion:
  • Both the U.S. and Cuban systems are structured as ”review and approval” systems in which the exercise of administrative discretion (within the broad frameworks of law and regulation)

• Chilling Effects
  • Financing entities will err on the side of caution
  • Approval processes can add to the costs of investment (time and money)
  • In the U.S. OFAC is not bound by prior unpublished opinions or actions; great care should be taken when relying on published materials. (Source)

• Corruption (e.g., here)
  • Systemic (politics corrupts economics).
  • Quid pro quo (economic interests corrupt politics)
“a) Solicitud de aprobación de la propuesta de inversión con el aval del jefe del órgano, Organismo de la Administración Central del Estado o entidad nacional patrocinadores de la inversión correspondiente, o en el supuesto de una empresa de capital totalmente extranjero, la solicitud extendida por la máxima autoridad de la rama, subrama o actividad económica en la cual se pretende realizar la inversión;

b) certificación expedida por la autoridad competente sobre la compatibilización con los intereses de la Defensa, según lo establecido en la legislación vigente;

c) valoración del Ministerio de Ciencia, Tecnología y Medio Ambiente de los aspectos relativos al medio ambiente, la tecnología, la propiedad industrial, la normalización, la metrología y la calidad;

d) propuesta de directivos cubanos que asumirán cargos en los diferentes órganos de dirección;

e) propuesta del proyecto de nomenclador de productos de importación y exportación;

f) propuesta de entidad empleadora que suministrará la fuerza de trabajo;

g) pronunciamiento escrito de la autoridad competente del órgano, organismo de la Administración Central del Estado o entidad nacional patrocinadores, avalando el estudio de factibilidad técnico-económica, así como el nivel de certidumbre de sus proyecciones; y

h) cualquier otro documento que se establezca para regular los procesos inversionistas.”

Reglamento De La Ley De La Inversión Extranjera (Decree 325 Council of Ministers) Art. 11 1, pp. 189 189On investment applications materials necessary for evaluation
Cuban Process (Step 1: Plan)

Start with an Idea
- Diversify and expand export markets
- Decreasing dependence on imports
- Increase access to advanced technology
- Obtain foreign financing
- Creating new sources of employment
- Developing production chains
- Develop renewable energy

Find a Sector
- Agriculture, Forestry, and Foods
  - Sugar
  - Industry
  - Tourism
  - Energy
  - Mining
  - Transportation
  - Biotechnology and Pharmaceuticals
- Health
- Transportation
- Business
- Telecom
- Hydraulic Technology
- Finance and Banking

Choose Your Investment
- Direct investment (investor participates as shareholder)
  - Investment in equities or securities or bonds

Determine Your Contribution
- Financial (“freely convertible currency”)
- Machinery and equipment
- Intellectual property
- Property rights
Cuban Process (Step 2: Execute)

- **Joint Venture**
  - Corporation with registered shares and shareholders

- **International Economic Association Agreement**
  - No juridical persons
  - Negotiate with foreign investor

- **Totally Foreign Capital Company**
  - Commercial entity with foreign capital with no involvement of any national investor
  - Apply for targeted sector

- **Real Estate**
  - Housing and other buildings

Approval
Cuban Process (Step 3: Obtain Approval)

- Real estate developments
- Totally foreign capital companies
- Transfer of State ownership or other property rights over State goods
- International economic associations for exploitation of natural resources
- A foreign company working with public capital
- Renewable energy
- Business system of health and education sectors

- Management of public service, construction of public work, exploitation of public good
- Joint ventures, totally foreign capital company, or international economic association

Council of State
Council of Ministers
State Central Administration
Minister of Foreign Trade

Prospection and exploitation of non-renewable natural resources
And
Management of public services such as transportation, communications, water supply, electricity; the construction of a public work or the exploitation of a public good
Special Economic Zones (Source)

• REGULATORY FRAMEWORK
  • ZED Mariel has its own regulatory framework, covered in Decree-Law 313/2013 and its complementary regulations. Decree-Law 313 grants it a group of special regimes which make up a scenario that is very attractive for investments by Cuban and foreign companies. ZED Mariel tax incentives provide equal benefits for all the companies being established in the Zone.

• APPROVAL PROCESS
  • There are only 2 levels: the Director-General of the ZED Mariel Office and the Council of Ministers, for a maximum duration of 65 days from the presentation of the file.

• ONE-STOP SHOP
  • An efficient “One-Stop Shop” system is at work at ZED Mariel. It frees investors from bureaucratic charges and it processes all needed documents, permits, licenses and authorizations on their behalf.

• DEVELOPMENT AND INFRASTRUCTURES
  • Development of ZED Mariel began with Sector A, with an area of 43.7 km², located on the western edge of the Port of Mariel. The French company Bouygues Bâtiment International was in charge of the Master Plan for the urbanization of this area, applying the best environmental quality standards and concepts.
  • The Cuban government has invested over a billion USD on the development of basic and auxiliary infrastructures to ensure multi-mode connections by air, sea and land, the power supply, water supplies, sewage systems, waste treatment and info-communications, etc. which are now at the disposal of the investors.

- **Difficulties of organizational form (cooperatives)**
- **No access to corporate form (officially) (Lineamientos ¶)**
- **But: “Empresas privadas de mediana, pequeña y micro escalas, según el volumen de la actividad y cantidad de trabajadores, reconocidas como personas jurídicas. ¶ 182”**
- **No direct authority to hire labor**

- **Difficulty of direct property ownership (as that term is used in Cuba)**
- **Difficulties of formalizing relationships or access to courts**
- **Approval process**
- **Are higher risk informal arrangements the norm?**

- **Are direct sales transactions or loans (with little collateral) the best options?**
- **Does the system advantage Diaspora Cubans who can work informally through family?**
The State of Foreign Investment

### Foreign Investment Figures

At the close of 2015, joint enterprises and international economic partnership agreements were the preferred types, while hotel management contracts were very important. According to the foregoing, the most attractive sector for foreign capital has been in the tourism sector, followed by mining and activities in energy and the industrial field.

<table>
<thead>
<tr>
<th>FOREIGN INVESTMENT BUSINESS TYPES 2015</th>
<th>102</th>
<th>103</th>
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</thead>
<tbody>
<tr>
<td>100% Foreign Capital Companies</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>IEP Contacts</td>
<td></td>
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<tr>
<td>Joint Enterprises</td>
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</tbody>
</table>

### FOREIGN INVESTMENT BUSINESSES 2015. THE MOST ATTRACTIVE SECTORS

<table>
<thead>
<tr>
<th>Sector</th>
<th>Count</th>
</tr>
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<tbody>
<tr>
<td>MINEM</td>
<td>25</td>
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<tr>
<td>MINTUR</td>
<td>101</td>
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<tr>
<td>MINDUS</td>
<td>19</td>
</tr>
<tr>
<td>GAE-CIMEX</td>
<td>15</td>
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<tr>
<td>MINAL</td>
<td>10</td>
</tr>
<tr>
<td>MICONIS</td>
<td>9</td>
</tr>
<tr>
<td>MINAG</td>
<td>4</td>
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<tr>
<td>MITRANS</td>
<td>10</td>
</tr>
<tr>
<td>MFP</td>
<td>1</td>
</tr>
<tr>
<td>MINCOM</td>
<td>4</td>
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<tr>
<td>AZCUBA</td>
<td>5</td>
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<tr>
<td>BCC</td>
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<td>1</td>
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<tr>
<td>MINCESX</td>
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</tbody>
</table>
Summary Points

• “Bureaucratically, fifty-seven years after the revolution the Cuban state has become so multi-layered, so burdened with thick red tape, and so risk-averse that the decision making procedures are broken.” Feinberg, Analysis: Cuba’s Call to Foreign Investors (2017) noting very low rates of approval (around $200 million a year).

• There are parallels in the construction of the U.S. side of investing through its licensing system tied to political efforts at regime change.
  • Transaction costs of approval asserts downward push on profitability and feasibility
  • Both systems consider the value of the investment to their respective states and have developed elaborate systems of governmental control of investment out of the U.S. and into Cuba.

• Both the largest projects and the smallest have the greatest likelihood of moving forward
  • The largest ones because they are on the radar of both the U.S: and Ciba
  • The smallest ones because they can fly under the radar

• Lots of traps for the unwary
  • In the U.S. the interplay of control over exports, travel and finance in a fractured bureaucratic environment provides challenges
  • In Cubs the complex systems of review, negotiation and approvals provide challenges.

• The political overlay and bureaucracies with discretionary authority add to the transaction costs of economic activity.
  • That may make the more risky or lower value added investments less attractive

• Both Cuba and the United States appear still to favor commerce (trade in goods) over investment
Contacts of Interest: CUBA

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Website: http://www.camaracuba.cu
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Contacts of Interest: U.S.

• **BIS**
  - For additional information regarding BIS’s Cuba sanctions, please visit [http://www.bis.doc.gov/cuba](http://www.bis.doc.gov/cuba).
  - You may also call BIS’s Foreign Policy Division (202-482-4252).

• **OFAC**
  - For additional information regarding OFAC’s Cuba sanctions, please visit [http://www.treasury.gov/cuba](http://www.treasury.gov/cuba).
  - You may also call OFAC’s toll free hotline (800-540-6322), its local hotline (202-622-2490), or the Licensing Division (202-622-2480).
  - Or send a message to OFAC’s email hotline account ([ofac_feedback@treasury.gov](mailto:ofac_feedback@treasury.gov)).
Contacts of Interest: U.S.

• **OFAC**
  - Toll Free Hotline 1-800-540-6322
  - Local Hotline 1-202-622-2490
  - OFAC Licensing Division (Direct) 1-202-622-2480

• Post Address: Office of Foreign Assets Control, U.S. Department of the Treasury, Treasury Annex, 1500 Pennsylvania Avenue, NW, Washington, DC 20220

• **Contact Electronically**
  - [E-mail OFAC](mailto:)
  - [Submit in "in-process" wire transfers to the hotline](mailto:)
  - [Click here to appeal an OFAC designation or other listing](mailto:)

• **BIS**
  - **Ask an Export Counselor** [Eastern Region](mailto:) | [Western Region](mailto:)
  - To speak with an export counselor, you may call one of the following numbers:
    - (202) 482-4811 - Outreach and Educational Services Division (located in Washington, DC)
    - (949) 660-0144 - Western Regional Office (located in Newport Beach, CA)
    - (408) 998-8806 - Northern California branch (located in San Jose, CA)
  
• **E-mail inquiry to the Export Counseling Division of the Office of Exporter Services at:** [ECDOEXS@bis.doc.gov](mailto:)
Useful Additional References

• Cuba
  • Law 118 Foreign Investment Law ([English](English) [Original Spanish](Original Spanish))
  • Reglamento De La Ley De La Inversión Extranjera (Spanish; with annexes and resolutions)
  • “Portfolio of Opportunities for Foreign Investment for 2016-2017

• U.S.
  • U.S. Treasury, [Treasury And Commerce Announce Further Amendments To Cuba Sanctions Regulations](Treasury And Commerce Announce Further Amendments To Cuba Sanctions Regulations) Oct. 2016)
  • OFAC License Application [Website](Website)
  • Commerce Dept., [BIS Cuba FAQs](BIS Cuba FAQs) (Oct. 2016)
Thanks