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Cornell Hospitality Report

Cuba's Future Hospitality and Tourism Business

Opportunities and Obstacles

by John H. Thomas, J.D., Miranda Kitterlin-Lynch, Ph.D.,

and Daymaris Lorenzo Del Valle

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Cuba's Future Hospitality and Tourism Business:

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EXECUTIVE SUMMARY

Resumption of diplomatic relations between the United States and Cuba may open opportunities for hospitality and tourism industry investors in the island, which is the largest in the Caribbean. Although the U.S. economic embargo continues (and can only be removed by an act of Congress), executive actions could ease some travel and trade restrictions. Although Cuba offers considerable potential for hospitality and tourism investors, economic, legal, and practical questions and barriers remain, starting with the central control maintained by the Cuban government. Foreign hospitality and tourism companies seeking to do business in Cuba must navigate the requirements of the Cuban authorities, while operating in the shadow of the U.S. embargo. The following four issues may hamper international investors: (1) finance and banking availability is lacking; (2) the Cuban government must be a partner in every foreign enterprise; (3) labor availability and terms are controlled by the government; and (4) the nation lacks credible dispute resolution entities (courts or arbitration).

Key words: Cuba, hospitality, tourism, U.S. embargo, law

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Cuba's Future Hospitality and Tourism Business: Opportunities and Obstacles

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The resumption of diplomatic relations between the United States and Cuba opens the prospect of a tourist boom to the Caribbean's largest island. Cuba has many advantages to support investment, as the island is rich in land and water resources, has an educated and welcoming population, and offers myriad development opportunities. Weighing against those favorable prospects are the continued U.S. trade embargo (independent of diplomatic relations) and the Cuban government's central control and continued regulation of foreign investment—including the possibility of unexpected changes in government policies.

This report examines the prospects for investors in Cuba's hospitality and tourism industry. Although Cuba remains a communist nation with central economic control, the Cuban government has gradually reduced the restrictions on foreign direct investment over the past twenty-plus years, following the demise of its former trading partner, the U.S.S.R. Shortly after the Soviet Union disbanded in 1991, Cuba revised its constitution to recognize investors' property rights. After that initial step, the government enacted Investment Law No. 77, which we discuss at length later in this paper. The law defines the privileges and guarantees for foreign investors, labor and tax regimes, possible investment venues, and the different forms of permissible foreign-owned business.¹

As we discuss in this report, before entering into an investment in Cuba, investors must consider issues relating to at least four key areas: finance, personnel, government partnership, and dispute resolution. These areas contain substantial risk for investors. In brief, progress in banking has been dilatory, and until secure international banking relations are established in Cuba, there will be uncertainty in ordinary financial transactions such as deposits and fund transfers.² Additionally, a foreign business may neither bring its own personnel to Cuba nor hire employees directly, but must hire only through Cuban government employment offices.³ The Cuban government also requires a partnership interest with foreign entities, and we cannot yet identify a commercially reasonable mechanism for resolving business disputes.

In this report, we build on information presented by other analysts regarding the issues facing foreign companies doing business in Cuba.⁴ We update these issues and provide guidance for foreign companies interested in establishing hospitality and tourism businesses in Cuba.

Current Status

Relations between the two nations have been strained primarily due to political differences stemming from the 1959 overthrow of the corrupt Batista regime by commu-

nist forces led by Fidel Castro. The subsequent U.S. economic blockade prohibits U.S. citizens and corporations from trading with citizens or businesses of Cuba, with the exception that Cuban-Americans are allowed to travel to Cuba and carry on private business transactions with Cuban businesses.⁵ However, the U.S. political climate has changed sufficiently to allow diplomatic relations with Cuba, if not economic trade.

For its part, Cuba's political governance relies on comprehensive central control of businesses in Cuba by the state. This model of comprehensive government control was significantly amended on April 18, 2011, when the Cuban government changed policies, allowing more than 300 private sector initiatives for Cuban citizens.⁶ By 2012, newly seated President Raul Castro had removed or arrested every director, minister, and vice minister of the Cuban government involved in all major government-owned businesses.⁷ The transition from comprehensive government control to an entrepreneurial model mirrors that of other countries that have followed a similar path, notably, China.⁸

Even before the diplomatic changes in the U.S. and Cuba, several authors have offered roadmaps to resume normalized relationships between the two nations, together with recommendations for "bridge building" specifically for the Cuban tourism industry.⁹ Despite the prospect of normalized diplomatic relations, foreign

⁵ The embargo was established under provisions of the Helms-Burton Act (22 U.S.C. 6021-6091). See: Crane, Linda R. 2014. "Cuba Revisited; From Revolution to Evolution." *Seattle Journal for Social Justice* 12 *Seattle J. for Soc. Just.* 873.

⁶ Crane, *op.cit.*; Forero-Nino, L. 2011. "The Cuban Government Approves Guidelines to Reform Cuba's Economic Model and Develops an Implementation Strategy." *Law and Business Review of the Americas* 17 L. & Bus. Rev. Am. 761; M. Whitefield, 2014. "Building the New Cuban Economy." *The Miami Herald*, December 13.

⁷ Crane, *op.cit.*

⁸ Hingtgen, N., C. Kline, L. Fernandes & N.G. McGehee. 2015. "Cuba in Transition: Tourism Industry Perceptions of Entrepreneurial Change." *Tourism Management* v. 50 184-193

⁹ For example, see: Brookings Institution. 2014. "Cuba's Economy in Comparative Perspective." Piccone, T. and R. Feinberg and M. Sanchez. Washington, DC; Fisk, D. and C.R. Perez. 2010. "Managed Engagement: The Case of Castro's Cuba." *University of Miami Inter-American Law Review* 42 U. Miami Inter-Am. L. Rev. 47.; Khrushchev, S, T. Henthorne & M. LaTour. 2007. "Cuba at the Crossroads: The Role of the U.S. Hospitality Industry in Cuban Tourism Initiatives." *Cornell Hotel & Restaurant Administration Quarterly*, November: 402-415.; Perez, D.A. 2010. "America's Cuba Policy: The Way Forward A Policy Recommendation for the U.S. State Department." 13 *Harv. Latino L. Rev.* 187 13 *Harv. Latino L. Rev.* 187; and Romeu, R. 2014. "The vacation is over: Implications for the Caribbean of opening U.S. -Cuba tourism." *Economia* 1-27

¹ Vidal Alejandro, P., Rerez Villanueva, O.E. & Pons Perez, S. 2012. "La Inversion Extranjera y de la Union Europa en Cuba." http://eeas.europa.eu/delegations/cuba/documents/press_corner/estudio_de_inversion_extranjera_en.pdf.

² Whitefield, M. 2015. "Banking Issues Must Be Ironed Out as U.S., Cuba Repair Relations." *Miami Herald*. Miami, Florida, January 30

³ Feinberg, R.E. December 2012. "The New Cuban Economy." Latin American Initiative at the Brookings Institution www.brookings.edu/~media/research/files/papers/2012/12/cuba-economy-feinberg/cuba-economy-feinberg-9.pdf

⁴ Cervino, J. & J.M. Cubillo. May 2005. "Hotel and Tourism Development in Cuba: Opportunities, Management Challenges, and Future Trends." *Cornell Hotel and Restaurant Administration Quarterly* v. 26, p 17; and Feinberg, *op.cit.*

EXHIBIT 1**Foreign arrivals to top three Caribbean destinations, 2012–13**

Destination	2012	2013
Dominican Republic	4,562,606	4,689,770
Puerto Rico	3,069,000	NA
Cuba	2,838,607	2,852,572

Sources: Banco Central de la Republica Dominicana (2014); ONE (2014); and UNWTO World Tourism Barometer (2013).

EXHIBIT 2**Visitors to Cuba by country of origin, 2011–12**

Countries	2011	2012
Canada	1,002,317	1,071,696
Cubans living abroad (including Cuban-Americans)	397,886	475,936
England	175,823	153,737
Germany	95,111	108,712
Italy	110,430	103,290
France	94,371	101,522
United States	73,566	98,050
Argentina	75,969	94,691
Russia	78,468	87,014
Spain	101,629	81,354
Mexico	76,327	78,289

Sources: ONE (2014); Perello (2012); and The Havana Consulting Group (2013).

hospitality and tourism businesses will face substantial hurdles to engage in the Cuban market.¹⁰

Opportunities in Cuba

Growing tourism demand. Even without formal tourism connections for U.S. travel operators, Cuba is the third most popular destination in the Caribbean basin, following the Dominican Republic and Puerto Rico (Exhibit 1).¹¹ The potential opening of the U.S. market supports

¹⁰ Sharpley, R. & M. Knight. 2009. "Tourism and the State in Cuba: From the Past to the Future." *International Journal of Tourism Research* v. 11, pp. 241-254.

¹¹ Henthorne, T.L., B.P. George and A.J. Williams. 2010. "The Evolving Service Culture of Cuban Tourism: a Case Study." *Tourismos*, Vol. 5 Issue 2, pp. 129-143.

the prospect of considerable growth of hospitality and tourism in Cuba. The embargo notwithstanding, a principal question is whether U.S. companies will be able to successfully function within the constraints of the Cuban legal and political framework. So long as the relationship between the U.S. and Cuba is based on mutual economic benefits, the likelihood is that Cuban laws will evolve to promote its economic prosperity, much as we have already observed in the Chinese model.

A significant benefit favoring development in Cuba is that U.S. businesses and professionals have been planning for many years to reenter the Cuban market. It is no secret that Miami, Tampa, Atlanta, and New York are among the centers of activity planning for development in Cuba whenever the opportunity presents itself. Many persons of Cuban-American descent, for instance, have the resources and motivation to quickly set up offices in Cuba when the time is right.¹²

Another favorable factor is that the population of Cuba is highly literate and well educated. The recent history of Cuban citizens taking advantage of the limited opportunities for private enterprise—including small cafés, bed and breakfast inns, taxis, tour guides, and even prostitution—demonstrates the presence of enterprising Cuban nationals anxious to participate in hospitality and tourism businesses.¹³

As shown in Exhibit 2, U.S. arrivals to Cuba have increased in recent years, even though Americans are not currently allowed to visit Cuba as tourists. This increase is largely due to People-to-People Educational Programs implemented by travel agencies that have obtained special licenses from OFAC (U.S. Office of Foreign Assets Control) to allow travelers to learn about the economic system, the Castro regime, and the Cuban society.

Hospitality and Tourism Industry Growth

Part of Cuba's potential arises because it is still at an early stage of exploration and development. Since the 1990s, the Cuban economy has focused on developing foreign investments and tourism, which is now Cuba's second-largest source of foreign revenue after the export of technical and professional services.¹⁴

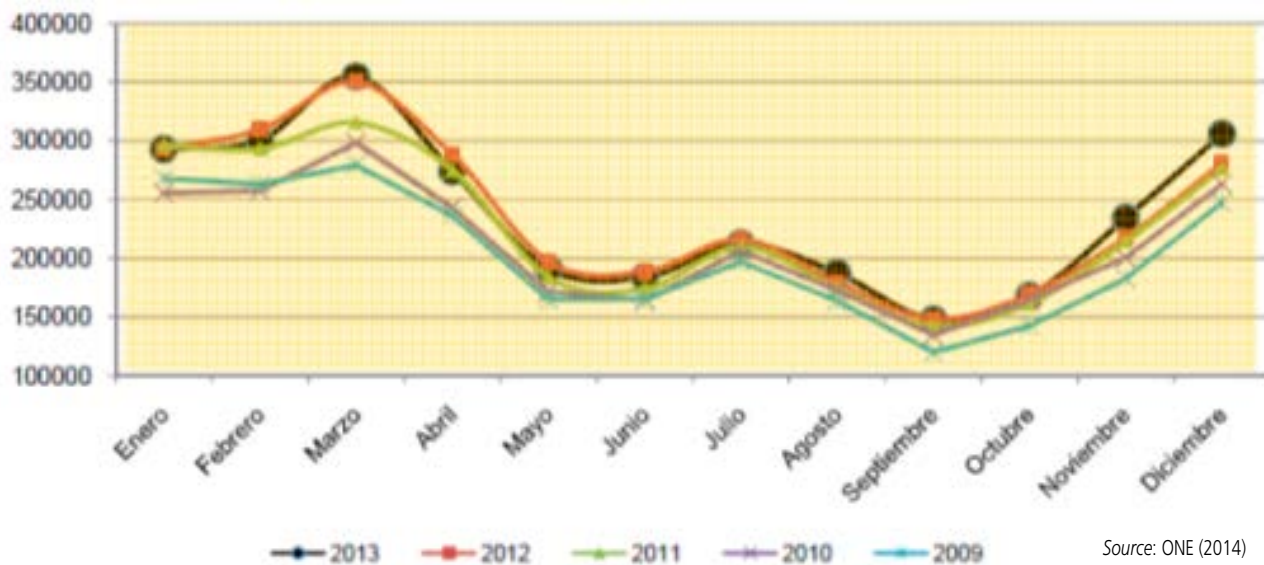
Even with the increasing foreign tourism, Cuba's hotels must rely on local guests to support occupancies.

¹² *Ibid.*

¹³ Crane, *op.cit.*

¹⁴ Luxner, L. 2013. "Cuba, Still Off-Limits to Most U.S. Visitors, Sets Ambitious Tourism Goals." *Travel Markets Insider*, 16-18; Oficina Nacional de Estadísticas de Cuba (ONE), "Turismo internacional; Indicadores seleccionados." viewed June 25, 2015. www.one.cu/; and Martin Fernandez, R. 2006. *Principles, Organization and Practice of Tourism*. Havana, Cuba: Center of Tourist Studies from the University Martin of Havana

Visitor arrivals to Cuba by month, 2009–13



Source: ONE (2014)

Foreign visitors' hotel occupancy has not exceeded 70 percent at any period of the year,¹⁵ and that percentage is augmented by Cuban nationals who stay in hotels (579,924 in 2011, according to Perello¹⁶). In 2013, Cuba received income from the global and domestic tourism industry in excess of 1.8 billion CUC.¹⁷

The bulk of Cuba's 334 hotels (71%) are beach properties, and most of the remainder (23%) are in cities. A small number (2%) are located in natural reserves. Two-thirds of the 58,434 hotel rooms (as of 2012) are in the four- and five-star categories, but the nation also has 8,530 rooms in a substantial number of private accommodations called *casas particulares*, similar to bed and breakfast inns. Relaxed government rules have allowed substantial expansion in this category, and 120 such *casas* are listed on the website www.cubacase.co.uk.¹⁸ The facilities vary widely, as some offer pools, hot tubs, massage, laundry, private drivers, translators, and dining.¹⁹ The total count of rooms in 2012 was 64,080.

¹⁵ ONE, *loc.cit.*

¹⁶ Perello Cabrera, J.L. 2012. "Turismo, migración y proyectos de codesarrollo en eo escenario turístico Cubano." Papers and Proceedings of the Twenty-Second Annual Meeting, Association for the Study of the Cuban Economy. Miami, Florida: Cuba in Transition, Volume 22. v. 22.

¹⁷ As explained in the finance section below, Cuban Universal Currency (CUC) is worth about 0.87 USD. ONE, *loc.cit.*

¹⁸ Luxner, *op.cit.*

¹⁹ Whitefield, 2014, *op.cit.*

According to Tourism Minister Manuel Marrero, Cuba plans to increase its hotel capacity by creating more than 78,000 rooms by 2020. The northern cities of Camaguey and Ciego de Avila have the potential to build more than 30,000 rooms,²⁰ and some 56 tourism projects, including golf condos and 21 new hotels, are available for foreign investment, according to the Cuban Foreign Trade Minister.²¹ To attract more tourists, Cuba is trying to diversify its appeal, for example, by constructing six golf courses to appeal to U.S. visitors, to attract high income visitors from such nations as Japan and China, and to encourage higher spending by regular visitors (e.g., Canadians, the third highest golf consumers in the world).²²

The Chamber of Commerce's 2011 list of projects involving or potentially involving foreign investors included the following joint ventures :

- Joint venture with Gran Caribe Hotel Chain for building hotels in Rancho Luna-Pasacaballos (Cienfuegos);
- Joint venture with Cubanacan Company for the construction of hotels and a golf course in Amigos del Mar, Santa Lucia (Camaguey); and

²⁰ Vidal *et al.*, *op.cit.*

²¹ Whitefield, M. 2014. "Much Unfinished Work Remains as Cuba Reforms Its Economy." *Miami Herald*, December 14.

²² Vidal, Perez, and Pons, *loc.cit.*

EXHIBIT 4**Cuba's tourist regions**

Main tourist regions	Developing tourist regions
La Habana	Viñales—Sierra del Rosario
Varadero	Peninsula de Zapata
Jardines del Rey	Norte de Villa Clara
Norte de Camaguey	Baracoa
Norte de Holguin	Granma
Santiago de Cuba	Peninsula de Guanahacabibes
Costa Sur Central	
Los Canarreos	

Source: Echarri & Salinas & Salinas (2007)

- Joint venture with Palmares Company for construction of accommodations and a golf course at Amigos del Mar, Santa Lucia (Camagüey).²³

The largest hotel chain in Cuba is Spain's Melia Hotels International, which lists 28 Cuban properties on its website. The Cuban government or military owns most of these properties, and Melia operates them by management agreement, without an equity interest. However, a few of these hotels are joint ventures between Melia and the Cuban authorities.²⁴ For their part, U.S.-based hotel companies cannot participate in such arrangements until the Congress acts to lift the trade embargo.²⁵

Offsetting seasonality. Tourism in Cuba has a marked seasonality, which might be offset if the U.S. cruise industry could operate to Cuba (see Exhibit 3, previous page). Cuba receives relatively few international visitors from May to October, which is the high season for the U.S. cruise industry. Cuba would be an attractive destination for the American cruise industry, which desires to add Cuba as a port of call. Cuba has developed four ports with infrastructure to receive cruise ships if the trade embargo is lifted (namely, Cienfuegos, Havana, Matanzas, and Santiago de Cuba). Other places on the island have the potential to become ports of entry using ship tenders.

Accessibility

Not surprisingly, most visitors to Cuba arrive by air, the bulk of them at two of the nation's ten international airports, Havana and Varadero. About 45 charter flights currently operate weekly from the U.S. to Cuba, and we

²³ *Ibid.*.

²⁴ Feinberg, *op.cit.*

²⁵ Nessler, D. 2015. "Is Cuba the Best Land of Opportunity?" *Hotel Business V. 24 Issue 9* 32-34.

expect that number to increase dramatically with the reopening of relations. More than a dozen "gateway" cities in the U.S. have been authorized to offer future direct charter air service to Cuba, including Atlanta, Baltimore, Chicago, Dallas-Fort Worth, Fort Lauderdale, New Orleans, Pittsburgh, and Tampa,²⁶ although at the moment flights are permitted only from Los Angeles, Miami, and New York.²⁷ Fast ferry boats are also planned from Florida to Cuba.²⁸ Additionally, Air China has recently announced plans for flights from Beijing to Havana.²⁹ Although the Air China routes may be planned as a means to transport cargo for sale in Cuba, this has the potential to tap into the vast Chinese tourist market.

Natural and Cultural Resources

We see Cuba as being attractive to American tourists for its natural and cultural resources, as well as for medical tourism. UNESCO has declared nine World Heritage sites and six Biosphere Reserve sites in Cuba, and the Ramsar Convention of Wetlands, intended to preserve waterfowl habitat, has established six sites on the island. Cuba's tourist regions are listed in Exhibit 4.³⁰

Cuba is already well known for its medical capabilities, and Europeans, Canadians, and South Americans come to Cuba for health care.³¹ It is possible, however, that opening Cuba may allow its physicians to leave for more lucrative employment elsewhere. Moreover, another danger is that medical facilities will focus on tourists at the expense of health care for ordinary people. We see no current mechanism in place to balance these potentially competing needs.³² In any event, we anticipate that the average salary for a physician in Cuba will increase. (It is now reportedly the equivalent of US \$25 per month.)³³

Obstacles in Cuba

Despite Cuba's remarkable potential, we note that foreign companies that seek to do business in Cuba face chal-

²⁶ 19 C.F.R. § 122.153.

²⁷ Luxner, L. 2013. "Cuba, Still Off-Limits to Most U.S. Visitors, Sets Ambitious Tourism Goals." *Travel Markets Insider Magazine*, 16-18.

²⁸ Thalji, J. 2015. "Ferries to Cuba Could Open Doors for Tampa." *Tampa Bay Times*. Tampa, Florida, May 6.

²⁹ Anand, Rohan. 2015. Air China to Montreal and Havana in 2015: a case study in Guanxi? (<http://upgrd.com/aerospace/air-china-allegedly-plans-montreal-and-havana-in-2015.html>). January 12.

³⁰ 2013. Convention on Wetlands _RAMSAR. Viewed June 25, 2015. www.ramsar.org/cda/en/ramsar-documents-list/main/ramsar/1-31-218_4000_0.

³¹ Wagner, M.S. 2006. "Medical Tourism & Group Health Plans." *Journal of Compensation and Benefits*.

³² Garrett, L. 2010. "Castrocare in Crisis." *Foreign Affairs*, 00157120, Jul/Aug 2010, Vol. 89, Issue 4.

³³ *Ibid.*

allenges in four areas, which we outline in the next section. The challenges are:

- (1) Finance and banking availability is lacking;
- (2) The Cuban government requires a partnership with every foreign investor;
- (3) Labor availability and terms are controlled by the government; and
- (4) Cuba lacks credible dispute resolution entities (courts or arbitration).

Finance and banking. Cuba uses two official currencies: the Cuban Peso (CUP) and the Cuban Universal Currency (CUC). The CUP is used to pay wages, for citizens' living expenses, and to buy certain home supplies for foreign nationals. The CUC, which is equivalent to about 24 CUP, is used to buy most of the home supplies for foreign nationals and for payments among national companies and foreign investment companies. Worth about 87 U.S. cents, the CUC is the currency for payment by hospitality and tourism guests and for payments between most foreign businesses.

Foreign businesses' transactions must be made using the CUC, and foreign investment businesses must open an account in CUC at any bank of the National Banking System.

We anticipate that U.S. and other foreign banks will be granted the right to have banking operations in Cuba, but regular banking activities are restricted to Cuban government banks at the moment. Foreign banks are allowed correspondents that assist only with foreign transactions for their foreign clients.³⁴ Financing of development will continue to be difficult due to uncertainty about political and economic stability in Cuba, but this is a matter of business risk calculation.

Employment. All Cuban employees must be hired only through the Cuban state employment agencies (e.g., ACOREC S.A. and Palco), which select the workers and negotiate wages, hours, and other employment terms. This limits a business in its selection of workers, negotiation of wages, and other employment terms.

Moreover, the state employment agencies retain a substantial overhead on employment transactions, as wages paid to employees are much less—only about 5 percent—than the employment fee paid by the employer to the agencies. The resulting pay rates are so low that foreign companies typically give workers bonuses to motivate performance and make up for inadequate pay levels. Poor compensation may be one source of reports of dissatisfaction with the level of hospitality services in

³⁴ Feinberg, *op.cit.*

Cuba.³⁵ Consequently, an increased level of professionalism in the Cuban hospitality industry is of high priority.

Tipping also helps. Gratuities are paid in CUC, which are far more valuable to the workers than CUP. For example, Melia Hotels reportedly is pleased that the employees provided by the Cuban employment service have been well educated and pleasant in dealing with guests, who, in turn, respond with appropriate gratuities.³⁶

Business relationships and capital contributions.

Foreign individuals or companies must follow certain regulations which give the Cuban government operational control of the business as a partner, similar to the business scheme in China.³⁷ Cuba's Foreign Investment Law No. 77 does not set limits on the contributions of foreign capital, but the current standard is that the Cuban side retains more than 50 percent of the capital.³⁸

Although nothing in Law No. 77 prohibits hospitality and tourism businesses from being a totally foreign capital (TFC) company, the practicality is that the Cuban authorities have approved only a handful of such entities, as we explain below. The approved businesses to date are either 50-50 joint ventures with a Cuban government entity or hotel management agreements, as in the case of most of the Melia hotels. The good news regarding those arrangements is that a study in the mid-2000s reported that the Cuban market was profitable for Melia Hotels and others.³⁹ That study also noted that some hotel operators preferred to be managers rather than to risk capital.⁴⁰

Resolution of disputes. The U.S. and Cuba do not currently recognize court judgments within the other's jurisdiction, a situation unlikely to change soon. Given that inability to resolve disputes in court is an impediment to commercial relationships, Cuba has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a development which does offer a substantial inducement to foreign investment in Cuba. This means that a commercial arbitration proceeding which takes place anywhere in the world involving a Cuban business can be enforced in Cuba. If desired, an International Trade Arbitration Court can resolve ordinary business disputes which arise between a foreign company and its Cuban partner. We should note that enforcement of arbitration awards from proceedings

³⁵ Henthorne *et al.*, *op.cit.*

³⁶ Feinberg, *op.cit.*

³⁷ Nessler, *op.cit.*; and Sharpley, R. & M. Knight. 2009. "Tourism and the State in Cuba: From the Past to the Future." *International Journal of Tourism Research* v. 11, pp. 241-254.

³⁸ Nessler, *op.cit.*

³⁹ Cervino and Cubillo, *op.cit.*; and Feinberg, *op.cit.*

⁴⁰ *Ibid.*

outside Cuba has yet to be tested.⁴¹ Cuba also offers a domestic arbitration forum to handle disputes between private persons and the state, which insulates such disputes from the influence of the state-controlled court system. These arbitration efforts by the Cuban government validate its support of commercial arbitration as a means of resolving disputes with foreign companies without resort to national courts.⁴²

Since Cuban laws generally require an agency of the state to be a joint venture partner in any hospitality or tourism business, a business dispute may necessarily involve that government agency. While a government agency is generally protected from liability by sovereign immunity, that protection is excluded when the agency is participating in a commercial enterprise.⁴³

Arbitration of business disputes can also involve two nations.⁴⁴ For example, Italy's government, on behalf of Italian businesses, brought an arbitration claim against the Cuban government several years ago, alleging that Cuba had violated terms of the treaty between the two states in not providing fair and equal business treatment to the Italian companies in Cuba. The claims in this instance were dismissed by the arbitrator.⁴⁵

Cuba also lacks other essential business and private professional services, such as banking, finance, insurance, law, development, and management.⁴⁶ Existing professionals are mainly state employees.⁴⁷ Offsetting that gap in professional services, Cuba will eventually create educational institutions and private professional associations, and in the meantime numerous private professionals from

outside countries have been planning for some time to establish offices in Cuba to provide requisite services when the political environment allows them to do so.⁴⁸

Cuba is also not immune to graft. Wherever there is major development of the scale anticipated for Cuba, there will inevitably be problems with corruption and infighting by competing interests. Many of Cuba's tourism facilities are controlled by the Cuban military through its Gaviota Company, for instance, so it will not be easy to dislodge them from this privileged position. These, however, are problems of success which can be resolved by the governing leaders. Since the present Cuban government leaders and the military are strongly linked, successful developers must negotiate through a political structure similar to many other developing countries of the world.

Corporate Legal Issues

Business entities in Cuba. While joint ventures remain the major approved structure for business in Cuba, the administration approved Agreement 5290 in 2004 that added new types of business associations to those approved under Law 77—all still under government control. Permitted businesses are a totally foreign capital company, joint venture, international economic association contract, contract for the joint production of goods or the provision of services, contract of product or services management, and hotel management contracts. Using these structures, a substantial number of firms do business in Cuba (see Exhibit 5).

Cuba has only six TFC companies: three in the oil and energy industry, two in maritime transport, and one in financial activities. In contrast, 70 percent of the foreign capital businesses are international economic association (IEA) entities.⁴⁹ Approximately 16 percent of the total of IEA entities are within the tourism industry, plus 82 percent of all businesses under Agreement 5290 (with 69 hotel management contracts).⁵⁰

As shown on the next page in Exhibit 6, Spanish interests represent the largest percentage of foreign investors in Cuba, with significant investments in tourism and in almost all economic sectors. Canada follows with mining, oil, and tourism ventures; Italian firms are involved in tourism, construction, and real estate; firms from France are involved in tourism and beverages among other ventures; and Venezuela's oil firms operate in Cuba.⁵¹

⁴¹ An extensive review of the procedures and practicalities of international commercial arbitration in Cuba is presented in: Tuininga, K. 2008. "International Commercial Arbitration in Cuba." *Emory International Law Review* 22 *Emory Int'l L. Rev.* 571.

⁴² Claussen, K.E. 2011. "Engaging Closed Societies through International Arbitration: Lessons from the Cuban Experience." *Law and Business Review of the Americas* 17 *L. & Bus. Rev. Am.* 11.

⁴³ See: *First National City Bank v. Banco Para el Comercio de Cuba*, 1983, 462 U.S. 611., in which the U.S. Supreme Court denied sovereign immunity in an arbitration proceeding.

⁴⁴ The issues in arbitration of a dispute involving a state party are discussed in: Renata Brazil-David Brazil-David, R. 2011. "International Commercial Arbitration Involving a State Party and The Defense of State Immunity." *American Review of International Arbitration* 22 *Am. Rev. Int'l. Arb.* 241

⁴⁵ Potesta, M. 2012. "Republic of Italy v. Republic of Cuba. Interim Award. At <http://italaw.com>. Ad Hoc Arbitral Tribunal, March 15, 2005. Republic of Italy v. Republic of Cuba. Final Award. At <http://italaw.com>. Ad Hoc Arbitral Tribunal, January 15, 2008." *American Journal of International Law* 106 *Am. J. Int'l. L.* 341.

⁴⁶ Whitefield, M. January 30, 2015, *op.cit.*

⁴⁷ Zamora, Antonio R., interview by Moderator Peter Quinter. 2015. Cuba: Legal and Business Perspectives; International Law Section, *The Florida Bar* (February 18).

⁴⁸ Whitefield, M. 2015. "Cuba's Open for Some American Business - So Here Come the Lawyers." *Miami Herald*. Miami, Florida, May 25.

⁴⁹ Vidal *et al.*, *op.cit.*

⁵⁰ *Ibid.*

⁵¹ Vidal *et al.*, *op.cit.*

Although real estate cannot be transferred to a foreign party, a Cuban national may hold property for the benefit of a foreign investor, similar to many other countries which protect the sovereignty of their real estate.⁵² The government also allows contracts to be negotiated for a short period of time, for the fulfillment of specific goals.⁵³

According to estimates, European Union interests operated 169 companies in Cuba in 2011, 89 of them in the tourism industry. Of those, 65 involve hotel management contracts, 22 are joint ventures, just one is an international economic association contract, and one other is a contract of products or services management. Current negotiations regarding investment projects with the European Union are directed toward oil, sugar, tourism, golf (six projects), agriculture, and construction materials.⁵⁴

Although Melia is the largest hotel operator, other firms are also involved in the tourism industry, as shown in Exhibit 7. Tourist companies are owned either by the Ministry of Tourism (MINTUR) or the military through its Gaviota Companies. Cuban firms also operate numerous hotels.⁵⁵

The pathway for foreign companies to establish businesses in Cuba is a lengthy and tedious struggle. We suggest that this process be streamlined to promote access for private developers. Proposals to benefit private businesses are as follows.

Real estate. Although foreign individuals and corporations cannot acquire permanent rights on any Cuban land, Law No. 77 guarantees the temporary acquisition of properties, such as housing for non-resident individuals, housing and offices for legal entities, and real estate availability for tourist purposes. A recent addition to Law No. 77 allows foreign entities a surface right to build and use the properties on state-owned land for a time period of 75 to 99 years. Since the Cuban authorities granted the right for private persons who are Cuban citizens to transfer real estate interests, there has been an active real estate market in Cuba, though it is chaotic and disorganized.⁵⁶

Overhanging the real estate business is the long-ago expropriation of private properties when the Castro regime came to power. This remains an unresolved issue that is included in negotiations for normalizing relations between the U.S. and Cuba. Counterclaims include those by Cuban-Americans who claim losses from alleged Cuban expropriations of private and commercial properties,

⁵² Law 77; Agreement 5290.

⁵³ *Ibid.*

⁵⁴ Vidal et al., *op.cit.*

⁵⁵ Feinberg, *op.cit.*

⁵⁶ Zamora, *op.cit.*

EXHIBIT 5

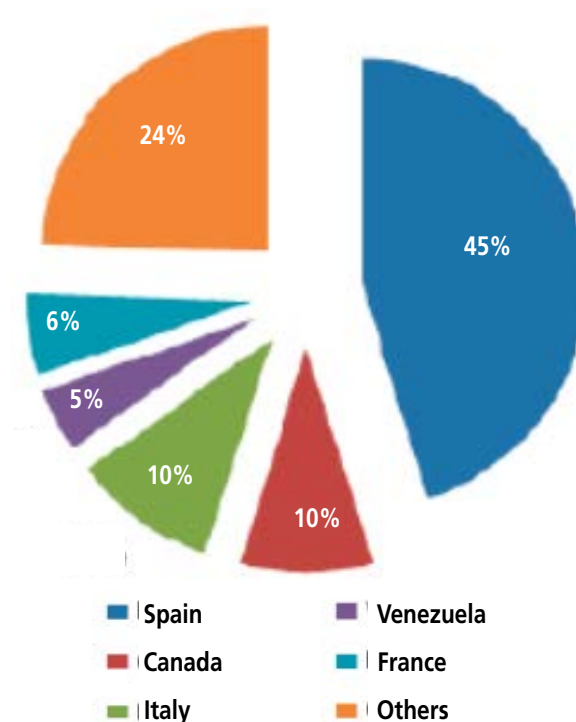
Number and type of foreign companies in Cuba

Foreign Investment Regulation	Form of Business	Number of Businesses
Foreign Investment Law No. 77 (1995)	International Economic Associations (IEA): • Joint Ventures • International Economic Association Contract	218
	Totally Foreign Capital Company	6
Agreement 5290 (2004)	Contract for the Joint Production of Goods or the Provision of Services	14
	Contract of Product or Services Management	6
	Hotel Management Contract	69
Total		313

Source: Vidal, Perez, and Pons (2012)

EXHIBIT 6

Country of origin for foreign firms in Cuba



Organizational structure of Cuba’s tourism firms

	MINTUR (Ministry of Tourism)	Gaviota (Military)
Hotel	Cubanacan Gran Caribe Islazul	Gaviota Hotels
Food, Beverage, and Entertainment	Palmares Turarte	Gaviota Restaurants
Transportation	Transtur Cubacar REX	Transgaviota Aerogaviota
Travel Agencies	Cubanacan Viajes Cubatur Havanatur (Tour Operator)	Gaviota Tour
Navigation	Marlin S.A.	Gaviota Marina
Trade Products and Retail	ITH (importing company) Caracol Stores	AT Comercial (importing company) Gaviota Stores
Information to Visitors	Infotur	
Support Services	Publicitur Emprestur Servisa	

Source: Martin (2006)

and Cuba’s claim of losses due to what they consider an illegal trade boycott by the U.S.

Vehicles. One of the enduring images of Cuba is an automotive fleet frozen in the 1950s. The government’s control of vehicle ownership requires foreign individuals or corporations to gain government authorization to acquire vehicles (imported or not). Even with that approval, foreign interests can only purchase two vehicles for each foreign worker living in Cuba, and one vehicle for every Cuban worker. Imported vehicles are rare, due to a 100-percent tariff and the embargo. Cuba’s “classic cars” are used both as ordinary cars by Cuban citizens and as special tour vehicles for visitors.

Insurance. Personal and business insurance must be contracted to companies authorized by the Ministry of Finance and Prices to operate in the country. This limitation may be relaxed to allow foreign companies to participate in the insurance market. Due to the absence of historical stability in Cuba, however, greater risks for insurers

remain, and premiums will reflect that risk.⁵⁷ Companies doing business in Cuba will themselves have to accept some economic and political uncertainty for the foreseeable future, although we see significant incentives for the Cuban government to maintain stability for the benefits of tourism in the economy. That said, the international insurance market has proven itself capable of appropriately valuing risks in uncertain venues around the world.

Property rights. The expanded property rights for foreign investors under Law No. 77 allow foreign investors to sell or transfer their properties before the end of the authorized term. This transaction is handled directly by application to the government agency. Likewise, investors may request an extension of time to operate in the country, although this request has to be submitted before the end of the contract. This law also forbids expropriation of foreign investment within the country without mutually agreed, fair compensation, paid in CUC.

Importing, domestic sales, and transfers of profits. Although Law No. 77 permits joint ventures and totally foreign capital companies to import or export everything they need to do business (after obtaining the necessary authorizations from the Ministry of Foreign Trade, and Foreign Investment), JVs and TFCs still must contract with an importing company and with the Cuban enterprises which are the potential buyers of the products. In the case of the international economic association contract, the Cuban side is the one which has the right to import products.

If the foreign investor is not a foreign, mixed, or economic association company based in Cuba, it is necessary to have commercial representation (or a local branch) within Cuba. Law No. 77 further guarantees free repatriation of profits, as well as the earnings derived from expropriation, liquidation, or sale of the shares in the business, without tax payment or any other charges related to such transfer.

Intellectual property protections. Resolving counter claims regarding intellectual property rights may become a topic of negotiation. Since the U.S. embargo began, neither country has recognized the other’s copyrights, trademarks, or patents. U.S. courts have denied claims by two Cuban businesses that U.S.-based companies have wrongfully taken trade names well established in Cuba and sold in other markets, namely, Havana Club Rum (Bacardi) and Cohiba cigars (General Cigar Company).⁵⁸ The courts reasoned that since Cuban products are forbidden in U.S.

⁵⁷ Dana, Wiggin. 2015. American Institute of Marine Underwriters. March 2. Viewed June 13, 2015. www.aimu.org/cuba-marine-insurance-issues.html.

⁵⁸ Pava, M. 2011. “The Cuban Conundrum: Proposing An International Trademark Registry For Well-Known Foreign Marks.” *Emory International Law Review* 26 Emory Int’l L. Rev. 631.

commerce, then there is no confusion by consumers as to products with identical brand names. The courts further stated that since the erstwhile Cuban companies were wrongfully expropriated by the Cuban government, the name rights remained with the original company principals who fled Cuba and restarted their company with the same name elsewhere.

Tax considerations. Taxation of foreign countries is regulated under Law No. 73, which states that foreign companies with a permanent establishment in Cuba (including branches and representative offices) are taxed on income attributable to that establishment, not their worldwide income.⁵⁹ The current tax rate is 30 percent of net taxable income for joint ventures, and 35 percent for TFCs. Cuba also taxes the use of Cuban employees (11%) plus a contribution to Cuban social security (14% of employees' income), imposes customs duties for imported materials, and taxes vehicles and legal documents. On the other hand, foreign investors have the great advantage under Law No. 77 that they are exempt from personal income tax on their income resulting from the business, subject to the joint venture provisions and international economic association contracts. Law No. 77 does require all foreign workers to obtain a work permit issued by the Ministry of Labor and Social Security.

Investment Precedents

Although the potential is great, we cannot accurately gauge the prospects for success in Cuba. At the moment, Cuba's economic and political opacity leaves us with few visible examples of the success or failure of foreign businesses. We are confident that Melia Hotels International is an example of a successful company,⁶⁰ with four brands operating under management agreements and joint ventures.⁶¹

Feinberg's study of seven foreign businesses operating in Cuba found mixed results.⁶² Balanced against the apparent success of Melia Hotels are businesses where debts went unpaid, claims of corruption were made against the company officers, and one instance where the business was expropriated by the Cuban government.⁶³

We are aware of just two specific examples where foreign companies did not do well in Cuba. A suit in U.S. court alleged labor abuses in Cuba in a shipping services

⁵⁹ Arias, N.J.M. 2009. "Cuba's Fiscal Potpourri: Past And Present." *International Law Practicum* 22-SPG Int'l L. Practicum 57.

⁶⁰ Stalker, I. 2015. "Melia Flying High in Cuba." *Canadian Travel Press*, March 20.; Cervino and Cubillo, *op.cit.*; and Feinberg, *op.cit.*

⁶¹ Feinberg, *op.cit.*

⁶² *Ibid.*

⁶³ *Ibid.*

EXHIBIT 8

Ministries and entities related to foreign investment and websites of interest

Ministries and entities related to foreign investment:

Ministry of Foreign Trade and Investment (MINCEX); www.MINCEX.cu
 Ministry of Foreign Affairs (MINREX); www.cubaminrex.cu
 Ministry of Agriculture (MINAG); www.minag.cu
 Ministry of Public Health (MINSAP); www.sld.cu
 Ministry of Justice (MINJUS); www.minjus.cu
 Ministry of Tourism (MINTUR); www.cubatravel.cu
 Ministry of Transportation (MITRANS); www.transporte.cu
 Ministry of Communications (MINCOM); www.mincom.cu
 Ministry of Finance and Prices (MFP); www.mfp.cu
 Ministry of Industries (portal of the Cuban industries); www.cubaindustria.cu
 Ministry of Science, Technology and the Environment (CITMA); www.citma.cu
 Ministry of Construction (MICONS); www.micons.cu
 AZCUBA; www.azcuba.cu/
 Ministry of Food Industry (MINAL);
 Tel.: (53 7) 873 5075; (53 7) 204 0386
 Ministry of Energy and Mines (MINEM)
 Tel.: (53 7) 877 5155/ 877 5157/ 877 5031
 Ministry of Domestic Trade (MINCIN) Tel.: (53 7) 862 5238
 BIOCUBAFARMA Tel.: (53 7) 208 4056

Web sites of interest

Government of the Republic of Cuba;
www.cubagov.cu / www.cuba.cu
 General Customs of the Republic of Cuba (AGR); www.aduana.co.cu
 Chamber of Commerce of the Republic of Cuba (CCRC); www.camaracuba.cu
 Center for the Promotion of Foreign Trade and Foreign Investment (CEPEC); www.CEPEC.cu
 Mariel Special Development Zone (MSDZ); www.zedmariel.com
 Grupo Empresarial Palco (Palco Business Group) www.cpalco.com
 National Statistics and Information Office (ONEI); www.onei.cu
 Cuban Industrial Property Office (OCPI); www.ocpi.cu
 Cuban Civil Aviation Institute (IACC); www.iacc.gov.cu
 Asistencia al Turismo, S.A. (Tourism Assistance Company, Inc.) (ASISTUR, S.A.); www.asistur.cu
 Tourist Directory of Cuba; www.dtcuba.com
 Havana International Fair (FIHAV); www.feriahavana.com

Source: Cuba Investor Guide (Guia del Inversioinista 2014)

and repair company.⁶⁴ The U.S. court judgment was \$50 million in compensatory damages plus \$30 million in punitive damages in favor of three Cuban laborers who were allegedly forced to work as virtual slaves repairing ships and oil platforms in a Cuban shipyard. The defendant here was a foreign company operating under a contract with the Cuban government. The company was required to hire workers through the government employment agency, but the employees successfully recovered for employment abuses.

Another case of a foreign business gone bad in Cuba is the case of a Canadian company, Tokmakjian Group, which provides transportation services and engine repairs as a foreign entity operating in Cuba. The company has recently been convicted in Cuban courts of acts of corruption resulting in prison sentences for its president and two managers.⁶⁵ Again, however, these two examples may not be in any way representative, due to the general lack of information about Cuba.

⁶⁴ *Rodriguez Licea v. Curacao Drydock Co.* 2008. 584 F. Supp. 2d 1355 (S.D.Fla. 2008)

⁶⁵ Weissenstein, M. 2014. "Canadian Businessman Cy Tokmakjian Gets 15-Year Prison Sentence in Cuba." *The Toronto Star*, December 24.

Conclusion

Despite the many issues to be resolved, we believe Cuba offers great potential for development of international hospitality and tourism businesses. Foreign investors must, however, take into consideration the conditions placed on businesses by the Cuban government, as it seeks to retain control over private enterprises. We anticipate that business regulations will evolve as private investors negotiate deals to provide desirable economic development, but there is currently an absence of a stable business development history in Cuba.

U.S. companies who wish to do business in Cuba have dramatically increased their activity since the recent overtures by both countries' leaders toward establishing normalized relations. Meetings between interested parties are frequent and continuing, including attorneys, financiers and developers, although there is an absence of corresponding private parties in Cuba (see Exhibit 8).⁶⁶ Prospects for engaging in hospitality and tourism businesses in Cuba continue to evolve, but the outcome is not yet clear. We see both great potential and serious pitfalls awaiting those entrepreneurs willing to take the risks. ■

⁶⁶ Zamora, *op.cit.*

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