CUBAN FOREIGN INVESTMENT LEGISLATION

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Legal Framework

The Constitution of the Republic of Cuba, of February 24, 1976, partially modified in 1992, in its articles 15 and 23, establishes the constitutional foundations of a new legislation applicable to foreign investment in accordance with the Cuban economic strategy. Cuba’s strategy was to open the country to a market economy that could coexist with the socialist sector of the state economy to promote the economic development of the country, in view of the collapse of the socialist economies and the disappearance of the Soviet Union.

Various laws have been enacted to provide incentives for foreign investment, laws dealing with various topics.

**Law No. 59.** July 16, 1987 (Civil Code) is a general legislative disposition of supplementary character. The Cuban Civil Code regulates all matters regarding international private law: the juridical relation and its subjects, juridical persons, the object of the juridical relation and its causes; legal and illegal actions, the juridical responsibility; the statutes of limitation, property rights, obligations and contracts. Cuban Civil Code regulates the concession of usufruct and surface rights, and in particular their duration.

**Law No. 73.** August 4, 1994 (Taxes) establishes the tax structure and general principles upon which the taxation system rests. This system is based on the principle of general application and requires complementary resolutions. Cuban taxation system consists of eleven (11) taxes, one (1) contribution and three (3) charges.

**Law No. 77.** September 5, 1995 (Law of Foreign Investment) provides and promotes incentives to foreign investment in Cuba, to carry out for profit activities which contribute to the country’s economic capacity and sustainable development, on the basis of respect to the country’s sovereignty and national independence, and the rational use of its natural resources. The law establishes the fundamental regulations that must be strictly observed by the investors. This law annulled the previously mentioned Decree–Law No. 50 of 1982 “On Economic Associations between Cuban and Foreign Entities”.

**Decree–Law No. 162.** April 4, 1996 (Customs) with the objective of promoting foreign trade, tourism, and the transportation facilities required by them, while maintaining the necessary control over the previously mentioned activities.

**Decree–Law No. 165.** July 22, 1996 (Free Zones and Industrial Parks) prescribes the norms regarding the establishment and functioning of Free Zones and Industrial Parks; it regulates, the creation and control of Free Zones, their licensees and operators and the norms to govern them; it also contains special regulations; norms on violations, conflict resolution, customs, banking, taxing, labor, immigration, and public order, in addition to incentives to foreign investment.
Decree–Law No. 172, May 28, 1997, (Central Bank of Cuba, BCC) regulates and supervises financial institutions and financial representative offices operating in the country, including the extraterritorial banking center of the Free Zones and Industrial Parks. The BCC is a legally autonomous institution, an independent juridical person, with its own patrimony; it covers its expenses from its income; it is not responsible for the State obligations, its institutions, entities, enterprises, except in those cases in which it assumes such obligations expressly. The creation of a new structure for the financial, banking, and credit systems reinforced by the formation of the Central Bank, represents a vital economic transformation.

Cuban Foreign Investment Act (Law No. 77)

Law No. 77, September 5, 1995 (Foreign Investment Law) is the fundamental law that regulates foreign investment in Cuba. It contains XVII chapters and 58 articles. It also contains one Special Provision, three Transitory Provisions and two Last Provisions. It is a very broad Law in terms of its content and very flexible, as far as its complementation by means of Decrees and Resolutions.

The objective of the Law 77 is to promote and motivate foreign investment; and to this end, it establishes the guarantees for investors, the sectors of the national economy which may receive investments, the form of these investments, the types of investment contributions, the negotiation process and authorization, the import–export mechanics, the banking, taxing, special labor systems for investments, the protection of the environment and the rational use of natural resources. A very important point of Law 77 is that it does not limit the participation of foreign capital in joint ventures, as was the case of the Decree–Law No. 50 of 1982, which established a ceiling of 49%, and only in exceptional cases, when it was authorized by the Executive Committee of the Council of Ministers (known as “CECM”), it could be larger.

Law 77 recognizes three forms of foreign investment in Cuba:

**Joint ventures:** Law 77 allows the creation of a domestic entity different from that of the parties and which takes the form of a company with nominative shares. Both parties agree on the percentage of capital to be contributed by both foreign and national investors as established in the company’s incorporation documents.

**Contract of International Economic Association:** This does not involve the creation of a new domestic entity different from that of the contracting parties. Each contracting party may contribute different funds of properties or services thus creating a common fund, provided the property belonging to each one of them is established.

**100% foreign capital companies:** This is a commercial entity with foreign capital, without the involvement of any national (Cuban) investor. In this situation, the foreign investor may be present as an individual or a corporation within Cuba. The foreigner is permitted to manage the company, enjoy all rights pertinent to it and is responsible for all the obligations described in the authorization of doing business in Cuba.

**Other Forms of International Economic Associations**

International economic associations operated in Cuba since the enactment of Law 77. However, other forms of international association also existed in Cuba without a legal base to support them. Those associations were created under contractual relationships, such as contracts for cooperative production or services and management contracts. Consequently, the CECM issued Decision No. 3827 of December 6, 2000 and Resolution No. 37 of 2001 establishing the legal framework for the development of these forms of foreign investment associations.
New regulations have been issued recently in Decision 5290 of the CECM and Resolution No. 13/07 of MINVEC establishing the methodology for the creation of those foreign investment associations. The forms foreseen in this Decision are: the contract for the cooperative production of goods or rendering of services, the production or service management contract and the hotel management contract.

**Cooperative Production Of Goods Or The Rendering Of Services**

The contract for the cooperative production of goods or rendering of services is an agreement between a Cuban state enterprise or a 100% Cuban capital company and a foreign individual or company, with the purpose of developing the specific production of goods or the rendering of services destined for the domestic market or for export. Under the terms of said contracts, the foreign party supplies technology, raw materials, equipment, semi-finished products and provides technical or financial assistance in exchange for the payment of the price agreed upon for each one of these services or goods at the time of sale of the goods.

These contracts must fulfill the following requirements which differentiate them from the economic associations regulated in Law No. 77:

**Specific Objective:** The purpose of the contract must be the substitution of imports, promotion of exports or creation of savings for Cuba.

**No Contributions to Capital:** The parties will not make contributions nor will set up a common fund.

**Undivided Patrimony and No Profit Sharing:** Cuban state patrimony will not be shared. The business profits will not be shared.

**Eligibility / Participation / Authorization:** The foreign investor (supplier) will be selected throughout a bidding process. The condition of exclusive supplier will not be granted in any case.

**Production Or Service Management Contract**

This is the contract pursuant to which a Cuban or service facility or a part of activities specified for a certain period of time in exchange for the payment mutually agreed upon. The payment must be in line with the results achieved according to the specific objectives established in the contract.

**Hotel Management Contracts**

This is the contract between the owner of a hotel ("owner") and a professional hotel management company ("manager"). Under these contracts, the manager accepts the responsibility granted by the owner of assuming and efficiently performing the management and marketing of the services provided by the hotel in exchange for the payment of fees and without any transfer of property or any other rights.

**Guarantees to the Foreign Investor**

Law No. 77 contains guarantees to investors on the basis that they enjoy full protection and security with the foreign investment without being subjected to expropriation except for reasons of public utility or "social interest". Expropriations of this nature rarely occur. The law provides that those whose investment is expropriated will receive monetary compensation equivalent to the value of the expropriated goods.

Article 25 of the Constitution authorizes "the expropriation of property for reasons of public benefit or social interest and with due compensation". Cuban law establishes the procedure for expropriation and the basis to establish its significance and need, and the form of the indemnification taking into account the economic and social needs of the party whose property has been expropriated.
Finally, article 60 of the Cuban Constitution establishes that “the confiscation of property only applies as a sanction by the authorities and in the cases contemplated by the law”.

Another provision of Law 77 allows the foreign investor in an international economic association to sell or transfer his total or partial participation to the State or a third party (following governmental authorization) at any time and following agreement of the parties, and to receive the agreed upon price in freely convertible currency. Similarly, the foreign investor of a 100% foreign enterprise may at any time sells or transfers to the State or third party (following governmental authorization) his total or partial participation in it.

Upon expiration the term established for the operations of a foreign investment vehicle (Joint Venture Company or international economic association) such term may be extended upon agreement between the parties and with government approval.

Disputes that may arise between parties of a foreign investment in Cuba may be resolved according to three methods: 1) the Cuban judicial system; 2) International commercial arbitration in accordance with an arbitration clause, which international arbitration may take place in Cuba, in a third country or in an international arbitration court and 3) the Judicial courts of a third (neutral) country. Foreign investments are likewise protected against third party legal claims (due process of law).

Cuban laws and regulations provide theoretical guarantees to foreign investors the unimpeded, tax-free transfer or remittance abroad in freely convertible currency of the net income or dividends from the investment, and the amounts received for expropriations, termination of the investment, total or partial sale or transfer of the participants.

Cuba also guarantees the right of foreign citizens who work for these entities and are not permanent residents to transfer abroad the salaries they receive, in the amount fixed by Banco Nacional de Cuba (BNC).

**Agreements on Reciprocal Promotion and Protection of Investments**

In addition to the Cuban legal framework, the investors of foreign enterprises from countries that have signed treaties with Cuba enjoy additional guarantees. The Agreements on Reciprocal Promotion and Protection of Investments (known as “APPRIIs” in Spanish) guarantee that foreign companies in Cuba will not have less favorable conditions that those companies of other countries that are also investing in Cuba.

The APPRIIs are treaties between different countries which provide encouragement and guarantees for investors when they invest in the other contracting party. The APPRI defines interests of both States according to their respective national legislation. Its clauses should create conditions of security and legal stability.

The APPRIIs also establish the ways to solve disputes between the investor and one of the contracting parties or between both contracting parties.

Other important clauses in the APPRIIs are those referred to the remittance of the earnings and profits generated by the investment made and possible exemptions and reductions of established taxes.

The APPRIIs likewise contain clauses that allow each party to be informed prior to the investment of the treatment that its investors will receive in the territory of the other contracting party, in conformity with what is legally established for nationals and according to the norms of International Law.
GLOSSARY

Foreign capital: Capital originating outside Cuba, as well as part of the profits or dividends belonging to the foreign investor which is reinvested in accordance with Law 77.

Foreign investment: Capital input by foreign investors, in any of the forms stipulated by Cuban foreign investment legislation.

Foreign investor: The individual or corporation, with a foreign domicile and foreign capital, that becomes a shareholder in a joint venture or participates in a company with totally foreign capital, or that is party to an international economic association contract.

National investor: Cuban state enterprise or Cuban domestic company or other Cuban national entity whose address is in Cuban territory and which becomes a shareholder of a joint venture or is party to an international economic association contract.

Cuban State Enterprise: Enterprises created by a government entity (Cuban Ministry) after receiving approval of the Ministry of Economy and Planning and/or the Ministry of Foreign Trade. The State enterprise is an independent legal entity created according to the Constitution of 1976, amended in 1992 and complementary legislation that regulates its formation and operations. The enterprise is registered in the Registry of State Enterprises and Budgeted Entities.

Cuban company (100% Cuban Capital Company): The Cuban commercial company with nominative shares. The company is capitalist and operates entirely in the free-currency market. This company is usually owned by a Cuban Ministry or a Cuban state enterprise.