

US Sanctions Against Cuba: Outlook Under President Trump

By Simeon M. Kriesberg, Mayer Brown LLP

Law360, New York (December 23, 2016, 2:13 PM EST) -- The results of the recent U.S. presidential election cast a shadow of uncertainty over the future of U.S.-Cuba relations. President-elect Donald J. Trump's stance regarding this historically fraught relationship has varied over the years. However, despite inconsistencies, Trump has repeatedly stated that an agreement with the Castro regime is "fine," albeit on terms different from those reached by the Obama administration thus far. The regulatory changes that have propelled increasing cultural and economic engagement with Cuba for the past two years have been made through executive action. With a Republican Congress seemingly lacking the political will to ease or strengthen the Cuba embargo, the Trump administration's initiatives on Cuba will be decisive for U.S. business interests in Cuba.



Simeon M.
Kriesberg

The President-Elect's Past Statements Regarding Cuba

On Nov. 11, 1999, in a speech at the Cuban American National Foundation, Trump called then Cuban president Fidel Castro "a murderer" and expressed his belief in the effectiveness of the embargo as a means to overthrow the communist regime.[1] Almost 16 years later, in September 2015, when asked his opinion of President Obama's Cuba policy, Trump said that 50 years were enough and added that "[t]he concept of opening with Cuba is fine," although the United States "should have made a stronger deal." [2]

In March 2016, during a presidential primary debate in Miami, Trump reiterated that he "would want to make a strong, solid, good deal, because right now everything is in Cuba's favor." Specifically, Trump referred to Cuba's reparations claims of several hundred billion dollars against the United States for human and economic damages caused by the U.S. embargo as one of the terms he would negotiate to prevent Cuba from suing the United States "after the deal is made." [3]

A "stronger deal" purging Cuba's reparations claims was the voiced backbone idea of Trump's Cuba policy throughout his campaign until Sept. 16, 2016. Then, at a rally in Miami, Trump told a cheering crowd that he would reverse President Obama's executive orders unless the Castro regime met the Cuban-American community's demands of religious and political freedom for the Cuban people, as well as freed political prisoners. Trump shouted, "We'll do it with democracy." [4] At a subsequent rally in Miami, a few days before the election, Trump threatened to "cancel Obama's one-sided Cuban deal" if the Cuban people and the Cuban-Americans did not get the deal they deserved, "including protecting religious and political freedom." [5] Vice-presidential candidate Mike Pence went so far as to say, also in

Miami, “Let me make you a promise: When Donald Trump is president of the United States, we will repeal Obama’s executive orders on Cuba.”[6]

As fate would have it, Fidel Castro died a little over two weeks after Donald Trump became president-elect of the United States. Trump responded to the news with exclamation points and stark condemnation of Fidel Castro’s regime. Trump subsequently promised that his “administration will do all it can to ensure the Cuban people can finally begin their journey toward prosperity and liberty.”[7] The word “hope” was repeatedly used by Trump and Pence in their statements regarding Castro’s demise.

Is There “Hope” for US-Cuba Relations?

Since President Obama announced on Dec. 17, 2014, that his administration would chart a new course with Cuba, the United States and Cuba have re-established diplomatic relations.[8] Furthermore, five sets of regulatory changes have been issued by the U.S. Department of the Treasury and the U.S. Department of Commerce. These regulatory changes have allowed increased travel between the United States and Cuba and have authorized business activities across numerous sectors, including telecommunications, technology, health and pharmaceutical, travel and cargo, and construction and infrastructure. They have also made it easier for U.S. companies to export their products to Cuba.[9]

If Trump maintains his campaign vows, no further loopholes will be carved out to the Cuba embargo. Instead, the existing pathways to engagement opened by the Obama administration will be shuttered unless the Cuban government acknowledges the political and religious rights of the Cuban people and forgoes its reparations claims against the United States. How likely the Cuban government is to accommodate the United States on these core issues remains to be seen.

However, there are several factors that raise some hope for the future of U.S.-Cuba relations. On the U.S. side, despite some pro-embargo hardliners joining his team, Trump is a pragmatist and, from a pragmatic standpoint, neither has the Cuba embargo benefited the U.S. business community nor has it fulfilled its stated purpose of bringing democracy to the Cuban people.

Furthermore, numerous U.S. companies of all sizes and across multiple sectors have made investments to enter the Cuban market, relying on the warmer relations between the two countries. Notably, the main U.S. commercial airlines are flying from American cities to Cuba; U.S. telecommunications companies have entered into direct voice and roaming agreements with Cuba; Marriott has begun managing various hotels in Havana;[10] and Cuba has become Airbnb’s fastest growing market.[11] Roswell Park, a prominent cancer institute in Buffalo, New York, is set to begin clinical trials of a groundbreaking Cuban lung cancer vaccine.[12] General Electric has signed memorandums of understanding with Cuba to sell aviation, health care and energy equipment to Cuba.[13] A Florida-based bank has begun offering credit cards for use in Cuba.[14] Three American cruise ship companies have included Cuban ports in their itineraries.[15] Just a few days ago, Google reached an agreement with the Cuban government to provide faster access to Google content in Cuba.[16]

Reportedly, nine more deals are in the works and should be inked before Trump moves into the White House. All of these American companies are likely to press the new administration to preserve or expand their investments.

On the Cuban side, improved relations with the United States and the new opportunities they could bring have likely been a fundamental premise in most agreements and investments made in Cuba by foreign and national companies since December 2014. With a struggling economy increasingly

controlled by a business-oriented military; the decline of Venezuela, Cuba's top business partner; a younger generation of Cubans alienated from the ideals of the Cuban Revolution; and Cuban President Raul Castro purportedly relinquishing power in 2018, domestic pressures may soften the Cuban government's historic intransigence. Moreover, the recent demise of Fidel Castro arguably rids the Cuban political elite of the country's most staunch anti-American symbol.

It is relevant to note that, despite Trump's campaign rhetoric, Raul Castro sent congratulations to the president-elect the day after the election.[17] Also, surprisingly, even after Trump's harsh comments in the aftermath of Fidel Castro's death, Granma — the official voice of the Cuban Communist Party — has not yet published responsive remarks. Therefore, an agreement somewhere in the middle is within the realm of possibility.

What If Things Go South?

Despite several statutory limitations, U.S. commercial relations with Cuba — the only country currently restricted under the Trading with the Enemy Act of 1917 — rest broadly within the authority of the president, mainly pursuant to the delegation made by Congress under Section 5 of said act.

While Congress sits and watches, Trump could roll back some or all of the changes made by the Obama administration by issuing one or a series of executive orders if the Trump administration and the Cuban government do not reach a "better deal." Subsequent implementation by the relevant federal agencies would follow as a matter of course without major obstacles.

If Trump were to undertake a blanket reversal of President Obama's executive actions on Cuba, only a few commercial activities previously authorized by Congress would remain available. These limited categories of activities include provision of telecommunications services,[18] exportation of medicines and medical supplies[19] and exportation of agricultural commodities.[20] The president is given, however, the power to restrict such activities under certain conditions.[21] Other statutorily authorized activities, such as donating food to nongovernmental organizations in Cuba, are non-commercial in nature. Furthermore, a potential reinstatement of Cuba as a state sponsor of terrorism would add an additional layer of export, financial and other restrictions that would further obstruct commercial engagement.

It is also possible that, as president, Trump could decide to make more aggressive use of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, commonly known as the Helms-Burton Act. The Helms-Burton Act authorizes the U.S. Department of State to bar from the United States the foreign executives of companies using property in Cuba that was expropriated from U.S. nationals (including from certain Cuban nationals who have become U.S. citizens). This provision has been sparingly and sporadically applied by the Department of State under Presidents Clinton, Bush and Obama, but President-elect Trump could wield this sanction more actively. Furthermore, the prior three presidents have all suspended, for consecutive six-month periods, the application of another Helms-Burton Act provision that authorizes claimants to expropriated property to sue in U.S. federal court those foreign companies currently using that property. It is expected that President Obama will suspend this provision one last time before he leaves office in mid-January, but in mid-July President-elect Trump will have to decide whether to suspend it again or to let the lawsuits begin.

If the new administration chooses a more restrictive approach to Cuba, most business opportunities with Cuba would be impaired, and those companies that have already spent time and money in their efforts to enter the Cuban market would stand to lose all or part of their investments. Given the

uncertainty regarding the future of U.S.-Cuba relations, U.S. companies doing business in Cuba, or planning to do so within the current regulatory framework, must closely follow the dynamics of upcoming negotiations between the representatives of the Trump administration and the Cuban government and proceed with extreme caution.

Simeon M. Kriesberg is a partner in the Washington, D.C., office of Mayer Brown LLP. For over three decades, he has helped clients in the U.S. and abroad address legal issues arising from international trade in goods, services, technology and capital. His practice encompasses counseling on corporate compliance and governance, international transactions, international litigation and trade policy.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Kurt Eichenwald, How Donald Trump's Company Violated the United States Embargo Against Cuba, Newsweek Magazine, available at: <http://www.newsweek.com/2016/10/14/donald-trump-cuban-embargo-castro-violated-florida-504059.html> (last visited November 17, 2016).

[2] Jeremy Diamonds, Trump Shifts on Cuba, Says He Would Reverse Obama's Deal, Daily Caller, available at: <http://www.cnn.com/2016/09/16/politics/donald-trump-cuba/> (last visited December 16, 2016).

[3] Capitol Hill Cubans, Point of Clarification: Donald Trump on Cuba Policy, available at: <http://www.capitolhillcubans.com/2016/07/point-of-clarification-donald-trump-on.html> (last visited November 17, 2016).

[4] Donald Trump, Rally in Miami, September 16, 2016, available at: <https://www.youtube.com/watch?v=mZRdTBCGbJc> (last visited November 17, 2016).

[5] Ramon Espinosa, Cloud of Uncertainty Hangs Over US-Cuba Relations With a Trump Presidency, Miami Herald, available at: <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article113898263.html> (last visited November 17, 2016).

[6] Joseph Weber, Trump, Pence Seek Cuban American Vote, Vow to Repeal Obama's Cuba Deal, Fox News, available at: <http://www.foxnews.com/politics/2016/11/05/trump-pence-seek-cuban-american-vote-vow-to-repeal-obamas-cuba-deal.html> (last visited November 17, 2016). Note that President Obama has not issued executive orders on Cuba, except for the Presidential Policy Directive of October 14, 2016, which is a form of executive order.

[7] Cleve R. Wootson, Jr, How Donald Trump Responded to the Death of Fidel Castro, 'a Brutal Dictator,' The Washington Post, available at: https://www.washingtonpost.com/news/the-fix/wp/2016/11/26/here-is-donald-trumps-reaction-to-fidel-castros-death/?utm_term=.53c94e0dce61 (last visited December 12, 2016).

[8] The White House, Presidential Policy Directive – United States – Cuba Normalization, available at: <https://www.whitehouse.gov/the-press-office/2016/10/14/presidential-policy-directive-united-states-cuba-normalization> (last visited November 17, 2016).

[9] US Department of the Treasury, Resource Center, available at: <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/cuba.aspx> (last visited November 17, 2016).

[10] Alan Gomez, What's Changed in 2 Years Since Cuba Opening, USA TODAY, available at: <http://www.usatoday.com/story/news/world/2016/12/15/cuba-two-year-anniversary-whats-changed/95438430/> (last visited December 19, 2016).

[11] Mimi Whitefield, A Trump Attempt to Reverse Obama's Cuba Policies Could Be Complicated and Costly, The Miami Herald, available at: <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article114076713.html> (last visited November 18, 2016); The White House, Presidential Policy Directive – United States – Cuba Normalization, available at: <https://www.whitehouse.gov/the-press-office/2016/10/14/presidential-policy-directive-united-states-cuba-normalization> (last visited November 17, 2016).

[12] Stephanie Barnes, FDA Approves 'CimaVax' Trial at Roswell Park, WGRZ, available at: <http://www.wgrz.com/news/local/buffalo/cuomo-in-wny-for-roswell-park-announcement/342116074> (last visited November 18, 2016).

[13] Paul Davidson, GE Aims to Sell Power, Medical Gear to Cuba, USA Today, available at: <http://www.usatoday.com/story/money/2016/03/22/ge-aims-sell-power-medical-gear-cuba/82113456/> (last visited November 18, 2016).

[14] Mimi Whitefield, Stonegate Bank Begins Offering Credit Cards That Will Work in Cuba, The Miami Herald, available at: <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article83936817.html> (last visited November 18, 2016).

[15] Gene Sloan, Approved! Royal Caribbean, Norwegian Are Going to Cuba, USA TODAY, available at: <http://www.usatoday.com/story/travel/cruises/2016/12/07/royal-caribbean-cuba-cruises/95096336/> (last visited December 19, 2016).

[16] Brian Latimer, Google Signs Internet Deal with Cuba, NBCnews.com, available at: <http://www.nbcnews.com/news/latino/google-signs-internet-deal-cuba-n695056> (last visited December 19, 2016).

[17] Granma, Raul Sends Message of Congratulations to President-Elect Trump, available at: <http://en.granma.cu/mundo/2016-11-10/raul-sends-message-of-congratulations-to-president-elect-trump> (last visited November 17, 2016).

[18] Cuban Democracy Act of 1992 (CDA), 22 U.S.C. § 6004(e).

[19] Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), 22 U.S.C. § 7202; CDA, 22 U.S.C. § 6004(c).

[20] TSRA, 22 U.S.C. § 7202.

[21] TSRA, 22 U.S.C. § 7202; CDA, 22 U.S.C. § 6004(c).