

Rivero Silva, Sebastián

**Article**

## Joint ventures of foreign investment in dictatorial contexts: the case of the hotel industry in Cuba

Atlantic Review of Economics (ARoEc)

**Provided in Cooperation with:**

Economists Association of A Coruña

*Suggested Citation:* Rivero Silva, Sebastián (2022) : Joint ventures of foreign investment in dictatorial contexts: the case of the hotel industry in Cuba, Atlantic Review of Economics (ARoEc), ISSN 2174-3835, Colegio de Economistas de A Coruña, A Coruña, Vol. 5, Iss. 1, pp. 1-16

This Version is available at:

<https://hdl.handle.net/10419/282289>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*



ATLANTIC REVIEW OF ECONOMICS – AROEC

ISSN 2174-3835

[www.aroec.org](http://www.aroec.org)

*5th Volume – nº 1, 2022 – June*

*Reference: Received: october 2021 | february 2022 |*

## **Joint Ventures of foreign investment in dictatorial contexts: the case of the hotel industry in Cuba**

**Sebastián Rivero Silva**

Lawyer (Rivero & Gustafson Abogados)

## Summary

This article studies the particularities of the creation and operation of foreign investment Joint Ventures in dictatorial regimes, with special emphasis on the relationship between dictatorship and investors. The hotel business in Cuba is studied in depth as a case study, since it is a paradigmatic example that shows the crossed interests in this type of operations. Thus, the dictatorial government seeks access to foreign currency to operate in the international market and exercise political control over the foreign business and its local workers. On the other hand, the foreign investor will want to develop his business without bureaucratic obstacles and to easily return the profits of the business to the parent company in the country of origin.

Likewise, this article shows the legal structure of Joint Ventures from a technical point of view, bringing clarity to the creation and development of these operations, generally unknown due to their confidentiality and complexity.

## Resumen

El presente artículo estudia las particularidades de la creación y explotación de Joint Ventures de inversión extranjera en regímenes dictatoriales, haciendo especial énfasis sobre la relación entre dictadura e inversionistas. Se profundiza sobre el negocio hotelero en Cuba como caso de estudio, por ser un ejemplo paradigmático que muestra los intereses cruzados en este tipo de operaciones. Así, por parte del gobierno dictatorial, se busca tener acceso a divisas para operar en el mercado internacional y ejercer control político sobre el negocio extranjero y los trabajadores locales del mismo. Por otro lado, el inversionista extranjero querrá desarrollar su negocio sin trabas burocráticas y facilidad para retornar los beneficios del negocio a la sociedad matriz en el país de origen.

De igual modo, se muestra la estructura jurídica de las Joint Ventures desde un punto de vista técnico, aportando claridad al funcionamiento de éstas, generalmente desconocido por cuanto a su confidencialidad y complejidad.

**Key words:** Foreign investment, dictatorship, Cuba, Joint Venture, Hotel Industry, Inversión extranjera, dictadura, Cuba, Joint Venture, Industria Hotelera.

**JEL classification:** A12, B14, F50

## **I. Introduction and state of the art**

Answering the question: **What impact does the dictatorial nature of a local government have on the establishment and development of foreign investment businesses in the country?** Throughout this paper, we will present the general scheme of operation of the so-called Foreign Investment Joint Ventures and the circumstances of establishment and development in countries under dictatorial rule, taking as a case study the hotel industry in Cuba, as a paradigmatic example of interventionism in terms of foreign business. The objectives of interventionism in foreign business would be both political and economic: (i) capturing foreign currency that allows the dictatorial government to operate in international markets and (ii) preventing the country's citizens from having access to payers/employers other than the Government and thus maintain greater control over the population.

On the other hand, as we will see below, companies entering into this type of business in regimes with dictatorial distortions will essentially seek (i) cheap labor, with little or no union representation, (ii) to take advantage of the partnership with the government to reduce competition in the specific market, (iii) easy return of profits to the country of origin of the capitalist partners and (iv) elimination of bureaucratic and administrative obstacles.

This paper, in addition to answering a research question of relevance in terms of the relationship between politics and business, is intended to be of practical use in order to provide information on (i) business operation schemes that are generally unknown due to their technical complexity and (ii) review the practices that both dictatorial governments, (Santana, 2018), and foreign investors accept and promote when generating private sources of income in a context of international permissiveness.

As a secondary objective, the aim is to reflect on whether there are sufficiently rigorous and effective corporate social responsibility plans to avoid the extraction of wealth to the detriment of the social and labor rights of local employees in countries with low levels of freedom, and whether the states that regulate foreign Joint Ventures do enough to avoid their collaboration with dictatorial governments, as is the case in Cuba with the hotel industry.

## **II. Joint Ventures of foreign investment, a first approach to the corporate vehicle:**

Although there are currently various and undoubtedly increasingly complex forms of joint foreign investment, technically known in commercial law as "Joint Ventures", this paper will focus on the most widespread formula, due to its simplicity and versatility, which is the joint corporate vehicle and more specifically its applicability in dictatorial

regimes, establishing as a case study the Joint Ventures of hotel investment in the Republic of Cuba.

In terms of joint ventures of shared risk, and more particularly in the subsection of foreign investment, the commercial operation will necessarily involve - as a general rule - three actors: The at least two companies involved, which, being different in their legal personality, wish to operate in the legal traffic in a temporarily joint manner (De Miguel, 2018), and also a third actor, the authority of the country that, foreseeably, will host the business devised and developed by the first two, being that the joint business must necessarily be respectful with the legislation of this third country in which it will be developed and exploited.

Thus, the most common operation requires that the companies involved constitute what is called a "corporate vehicle", that is, a company under the laws not of the country in which the investors operate, but of the country that will host the business, and which may have one or another corporate form - joint stock company, limited liability company, limited joint-stock company...etc - depending on the local legislation. Likewise, the share capital will be distributed precisely among the original companies wishing to develop the business abroad. For these purposes, as indicated by Chulia Vincent and Beltran Alandete, the European Commission maintains the definition of this corporate vehicle as "Company subject to the control of two or more companies that are economically independent of each other". (Chulia Vincent & Beltran Alandete, 2001)

Special emphasis must be placed on the importance of the governance related to the corporate vehicle, since it will be this new company created *ad hoc* and owned by the original investing companies that wish to start up the business, who will hold the ownership of the referred business in the foreign country. Consequently, this corporate vehicle will also generate the eventual income derived from the foreign business, being that this income will be subsequently distributed, in the corresponding proportion, to the original promoters. (Casado Román, 2012).

In this sense, corporate planning is undoubtedly the key word that will be repeated in the mouth of every investor. There are essentially two paths that must necessarily be addressed in order to clearly and simply agree on the form of corporate governance of the corporate vehicle:

- (i) **Bylaws:** Every company, regardless of its nationality, which is determined by the laws under which it was created, requires bylaws. These will regulate in a technical manner the essential aspects of corporate governance, in relation to the freedom allowed by the local law. Thus, we can find particular formulas for the convening and holding of the Shareholders' Meeting or the operation of the Board of Directors, the need for reinforced majorities to reach certain preset agreements or formulas for corporate arbitration and mediation, aimed at avoiding possible blockages of the corporate governing bodies at a given moment. (Sáez Lacave, 2011).

However, it is true that, beyond certain aspects, such as those mentioned above, the Bylaws are certainly limiting when it comes to establishing formulas for true control over corporate governance, and in addition, they must be registered in the corresponding public registry (in the case of Spain, the Mercantile Registry or "Registro Mercantil"), losing to a certain extent the total confidentiality that is also sought in this type of operation.

- (ii) **Parasocial agreements:** This type of agreements, also called "Partners agreements" or "Investment agreements", are undoubtedly the key formula to be able to manage corporate vehicles efficiently and complement the provisions of the Articles of Association.

Thus, in the drafting of this type of documents, which constitute a true binding contract for the signatories, we can find calendars and various investment "*timings*", which specify the different phases of the project, the associated expenses and who will assume the cost and leadership of each phase of the project, from the end of the pre-contractual negotiations to the exploitation phase and eventual withdrawal of the benefits, which will be repeated cyclically in case of success.

Similarly, it is very common to list a series of agreements that must be approved by the Shareholders' Meeting and/or the Board of Directors, as the case may be, subject to a financial penalty for the partner that does not comply with the agreement. Although it is true that the preliminary draft of the Spanish Commercial Code established some restrictions to the agreements that could instruct the Board of Directors, at present its practical use is still common, although its validity is disputed in doctrinal terms. (Fernández del Pozo, 2014), (Juan Gómez, 2015)

In short, it deals with aspects which, due to their complexity and special confidentiality, cannot be directly included in the Articles of Association, nor is it advisable for them to be in the hands of a registry or public employee beyond the Notary Public who could, for the sake of redundancy, proceed to notarize them.

Like any other contract, this Shareholders' Agreement will include the legislation on the basis of which it must be interpreted, as well as possible anti-blocking formulas and the judicial or arbitration court that will resolve any possible differences between the participants.

Both the act of incorporation of the corporate vehicle - which necessarily includes the drafting of the Articles of Incorporation and Bylaws - and the Shareholders' Agreement of reference, must be reflected in a Public Deed, being that it does not necessarily require its registration in any registry, so the parties may simply keep an authorized copy for the purpose of having a reliable record of the content of the signed and binding provisions. Likewise, we must emphasize that the great majority of specific covenants

as regards the aforementioned, such as reinforced majorities, can also be included in the shareholders' agreement.

In any case, the foregoing does not exclude other even more complex forms of corporate governance that act in a complementary manner as an element of control and security for foreign investors. Some examples could be (i) voting syndication contracts, by virtue of which one party expressly delegates to another certain political rights associated with its own shareholdings, such as the right to vote associated with its shares or participations in the corporate vehicle, in certain circumstances. (De Carlos Beltrán, 2011), (ii) trust agreements, which expressly recognize that the shares of capital stock held by a shareholder are at the mercy of another shareholder or different party, who may recover ownership in the event of a specific circumstance, such as a breach of the Shareholders' Agreement, or (iii) Golden Shares, which imply exclusive rights associated with certain shares or participations. Of course, the first two operations, unlike the previous ones, are not usually susceptible to be recorded in a public deed, being constituted as a private contract between the parties as they are useful for the purposes of performance insurance (Rodríguez Míguez & Padros Reig, 2009).

In this way, we can say that the general idea is to express, in a more or less complex way, but in any case, with meridian clarity, the will of the parties in relation to a legal transaction that the parties enter into using the framework of economic and business freedom that a legal and democratic regime offers them, generally prevailing in international commercial law. (Symeonydes, 2019).

### **III. The role of dictatorial governments regarding the Joint Venture.**

International Joint Ventures in general, and particularly those operating in the field of foreign investment, are included in what is known as Lex Mercatoria International, as they are part of an international commercial legal business with a foreign element, which in this case is the country in which the business will be operated and the position of the local government throughout the process, of great relevance in terms of the granting of administrative licenses necessary to operate the business in that country, as well as the limits of public order that may exist regarding the business. (Mills, 2008).

These legal transactions, which are part of the Lex Mercatoria International regime, are largely explained by a concept called binomial of "*Principle of autonomy of the parties - national rules of public policy*" on which we will expand in this epigraph. Thus, the basic legal premise would be that the legal business of Joint Venture of foreign investment is largely limited (i) to the conditions freely agreed by the investors in the Joint Venture contract, and this necessarily (ii) in relation to the possibility of applying such conditions agreed in the country where the business is to be exploited and the requirements that for this purpose may be mandatorily established by the local government. In any case, the interrelation between investors' agreements and the legislation of the place of development of the investment is key (Esteban De la Rosa, 1999).

Since foreign investment is certainly desirable for any local government and particularly for those with especially low rates of economic and social development, it is usual to find the enactment of so-called foreign investment laws, so that foreign investors may know the general framework to which they must adhere if they wish to exploit the business object of the Joint Venture in a given country and thus complete a forecast of the binomial autonomy of the parties (embodied in the partners' agreement and other associated provisions) and national rules of public order (in reference to the freedom offered by the country receiving the investment to develop what has been agreed in the partners' agreement and associated provisions) (Salacuse, 2013).

This point is important insofar as, when it comes to investment in democratic regimes, in general, in the aforementioned binomial, the main thing would be that the parties agree on the contractual conditions, local legality being rather a formality to be taken into account regarding the operation of the business, but in no case would it affect the governance of the corporate vehicle or any shareholders' agreements subscribed to that effect between the parties as long as they are within the limits of what is reasonable in this type of operations.

Well, the particularity of foreign investment Joint Ventures carried out in dictatorial governments is that the above-mentioned binomial totally changes its meaning inasmuch as the local government will not limit itself to establishing and enforcing a regulation for the business operated in its territory or to examine the documentation of the same for the purpose of issuing the corresponding administrative licenses. On the contrary, according to Articles 25 et seq. of the Cuban Foreign Investment Law, it seems reasonable to assume that the dictatorial government will want to take part in the Joint Venture and participate in the share capital of the corporate vehicle, participating logically also in its profits. For such an agreement, the control formulas mentioned under (i) above will generally provide for a fixed distribution system, which will be based either on a specific dividend entitlement agreement or on a mere distribution agreement, depending on the turnover. (Zarzalejos Toledano, 2018).

The explanation for this circumstance, the obligation imposed to accept as a partner the local government of the country in which the business object of the Joint Venture is developed and exploited, is due to the fact that foreign investment, in the eyes of this type of regime, is certainly a double-edged sword. On the one hand, (i) it will generate jobs and in general bring wealth to the country, but on the other hand, (ii) it is an opportunity for the government to obtain foreign currency - usually difficult to access in case of devalued local currency -, and above all (iii) it is a source of instability in that, if foreigners and locals are going to manage wealth outside the State, the dictatorial government will always want to have absolute knowledge of what is happening, to avoid any opposition drift.

In any case, as is logical, introducing the dictatorial government in the share capital of the corporate vehicle implies, in general terms, being a partner of said government in the Joint Venture and as such, the obligation to give up a margin of the profits that will be withdrawn by the government itself and, of course, all that this entails, including managing an eventual joint partners' pact.



This circumstance may indeed be known in advance because it arises during the preliminary negotiations, but it may also occur through a unilateral modification of the commercial conditions by the government, knowing that it has impunity before its own courts for non-compliance.

On the other hand, we also find some advantages in the partnership with the dictatorial government, such as (i) the facility to obtain any administrative licenses related to the operation of the business, sometimes (ii) lax application of local regulations, thus allowing situations of unfair competition in favor of the foreign investor - at the time, forced partner of the local government - against the self-employed in the country and finally (iii) favorable taxation to withdraw the profits of the corporate vehicle based in the country. Currently, in the case of the Republic of Cuba, Chapter XII of Law No. 118 "Foreign Investment Law" provides a certainly friendly regime in fiscal terms for the foreign investor, compared to the usual regime that the average foreign investor must face in other countries of usual reception for this type of operations and that in any case, should be put in connection with possible Double Taxation Agreements that may exist between the countries involved (Bosch Ygualada, 2002).

In this sense, it is particularly important to address the interest of this type of companies in local labor law, since they do not only benefit from the lax application of the - usually - poor local labor legislation. In many occasions, the deficiency of the minimum wage or the prohibition of labor unionism beyond the state structures, makes this type of companies obtain guarantees of maximum productivity at the lowest economic price.

While it is true that foreign investment laws in dictatorial regimes promise various investment formulas that do not necessarily contemplate the so-called "Joint Ventures", which are not necessarily the most common (Vidal Delgado, 2017) and usually involve a joint corporate vehicle with the dictatorial government, any alternative formula is certainly infrequent, apart from foreign companies controlled by other dictatorial or authoritarian governments, as might be the case with the Chinese or Russian republics wishing to operate in certain strategic sectors such as oil or gas. These are, in any case, exceptional situations arising from intergovernmental relations, but in no case to the access of the average foreign investor (Cubadebate, 2019).

Lawyers with some experience in the sector have been able to verify how these types of regimes use the so-called "foreign investment laws" as a sort of trap for investors, promising formulas of little state intervention and companies entirely owned by foreign capital, when the reality is that any business that does not involve a joint corporate vehicle with access to international currency by the local government is certainly infrequent in this type of countries, subject to dictatorial regimes. (Strom, 2018)

In any case, precisely one of the characteristics of this type of regimes is the submission of the *Rule of Law* to the political power, which is why the foreign investor, despite having a framework of minimum guarantees included in the foreign investment law to that effect, in no case will be able to face the local government in the courts of a country, in a judicial process with the due guarantees. For this reason, the foreign investor who

decides to establish a Joint Venture under these conditions, knows beforehand that the benefits of associating with the government in the exploitation of a specific business are linked to a series of risks in terms of non-compliance by the government itself, knowing its total impunity before the country's justice system.

A formula to avoid this circumstance and to be able to have a certain guarantee of compliance by the local government consists in the inclusion of a so-called "arbitration clause" in the corresponding partners' agreement, so that an arbitration court, preferably a European one, - instead of a local court of the country under dictatorship - , will be the one to decide on an eventual non-compliance by the referred local government. (Puschmann & Geroldinger, 2018)

For this formula to be fully effective, it must be accompanied in the shareholders' agreement itself by a prior waiver by the local government - the country's representative in the document - of the benefit of non-attachability provided by its status as a public entity. Of course, this means of guarantee for the foreign investor is certainly infrequent and is not usually looked upon favorably even in the process of preliminary negotiations.

The theory of immunity from execution, often mistakenly confused with that of immunity from jurisdiction, is developed in the field of international commercial arbitration and, according to its broad doctrinal development, indicates that assets that are subject to public use cannot be subject to seizure, which creates an obvious problem for the executor when the executing party is a State, unless the arbitration clause in question expressly waives the application of the aforementioned theory of immunity from execution. (Bouchez, 2009).

#### **IV. The Cuban model: foreign currency and devalued wages as the basis of the business.**

The Cuban model is undoubtedly a paradigmatic example that clearly shows the real interest that can move both a dictatorial regime and a foreign investor to participate jointly in a Joint Venture for the exploitation of a certain business, in this case, the hotel business.

Thus, the international hotel industry, and particularly the Spanish one, has arrived in Cuba, installing and operating government-run hotels, giving sense to the above, and the fact that as a general rule, the establishment of a Joint Venture of foreign investment in a dictatorial regime brings the origin of its business benefit irremediably in the collaboration investor - dictatorship, a circumstance that we will study below, without prejudice to the obvious ethical dilemma by contravening through the establishment of the joint business, among others, Convention No. 95 of the International Labor Organization, referring to worker protection, as well as those referring to corporate social responsibility that prevail in the countries of the European Union (Mercader Uguina, 2007).

Thus, the prevailing dictatorship-investor collaboration model in Cuba is based on the mutual benefit of these two entities, both the government and the foreign investor, both precisely to the detriment of the labor rights of local employees, as will be pointed out below. (Shleifer & Vishny, 1994)

Both Cuba and the vast majority of dictatorial regimes, in general, lack an attractive currency for the international markets, generally due to its continuous and constant devaluation, - in the Cuban case also due to the sequestering of the exchange rate of the C.U. (Cuban local currency) thus generating a major problem in that the Cuban authorities have serious difficulties in accessing the international market for imports, since without a foreign currency - dollar, euro, pound or yen - it is difficult for an international seller to accept to operate in the Republic of Cuba at reasonable prices, with the added complication of the US sanctions, essentially concretized in the application of the so-called Cuban Democratic Solidarity Act of 1996, (also known as "Helms - Burton Act"), of tremendously controversial interpretation due to its political implications (Kaufman Purcell, 2003).

The explanation for the above is that no commercial agent will accept "Cuban pesos", whether they have the official denomination of "convertible" or "non-convertible", in exchange for their own merchandise, due to the complexity to exchange them into international accepted currency or to buy back new merchandise in the international market.

For this reason, the main economic interest of this type of government is the establishment of Joint Ventures whose business is likely to generate foreign currency, that is, to provide services not to locals, who could only pay in devalued local currency, but to foreigners, who can pay in their own currency, the same currency that the government needs to make its international purchases. This is why the hotel model is perfect to substantiate the main interest of the Cuban government - and of any dictatorial government in similar circumstances - which is to obtain foreign currency with which to operate in the foreign market (Bermúdez, 2017).

But such provisioning will not only take place through the withdrawal of the corresponding profits from the corporate vehicle in which the government participates, but also and especially through the appropriation by Cuban Government of the salaries of the local workers. For these purposes, it can be seen how, apart from the investment formulas provided for in Art. 33 of Law No. 118 "Law on Foreign Investment in Cuba", (Gaceta de la República de Cuba, 2014) the control of the workers is reserved exclusively to the government. Thus, there is no direct labor relationship between the corporate vehicle and the local employee. Inclusively, Art. 33.4 expressly states the following:

*"Payments to Cuban and foreign personnel permanently residing in Cuba are made in national currency, which must previously be obtained with convertible foreign currency."*

By virtue of the above, we can affirm that another of the legal requirements and consequent sine qua non condition of dictatorial regimes such as Cuba for the exploitation of the business in question jointly with the foreign investor, is that the

workers will be paid in foreign currency, but not directly. The Cuban government receives in full from the corporate vehicle the financial mass destined to the salaries of the local workers generated by the profits from the exploitation of the business and subsequently, it will be directly the Cuban government who will pay the salary to the workers, in devaluated local currency and deducting multiple withholdings from the original amount.

In this way, the Cuban government is not only supplied with foreign currency from the profits that may accrue to it from the business, but also through the exchange of the salaries of the local workers, inasmuch as they cannot be paid directly from the corporate vehicle, but are forced to be paid by the government, which is the one who receives the salary on their behalf from the corporate vehicle in foreign currency.

In fact, it is worth mentioning that last 2014, the Cuban government put an end to the so-called "stimulus funds", which allowed, as an incentive, to pay part of the salary to workers in foreign currency. As from that date, this possibility, provided for precisely in Law No. 118, "Law on Foreign Investment of the Republic of Cuba", has been eliminated, and the government currently hoards all the foreign currency that would correspond to Cuban workers, who receive their salaries directly from the government exclusively in local currency, after withholdings.

On the other hand, the foreign investor maintains a certainly pragmatic perspective, inasmuch as, apart from the benefits previously mentioned that derive from associating with the local dictatorship to exploit a certain business, and that include control of competition and lax regulatory enforcement, the investor also benefits from the fact that services - in this case hotel services - are provided to foreign tourists at European market prices, but the workers are paid the local salary, which in the case of Cuba, is set at approximately 37 dollars on average (Oficina Nacional de Estadística de Cuba, 2018), which means profits that more than allow assuming the cost of sharing the revenue of the corporate vehicle with the Cuban government in the way the latter deems most convenient.

Such is the importance that the Republic of Cuba attaches, on the one hand, to the supply of foreign currency and, on the other hand, to the control of any source of foreign currency outside the Government that may be generated within the country, that Article 235.1 of the Cuban Penal Code establishes penalties of up to five years in prison for those who operate with foreign currency outside the channels legally established by the Government (Gaceta de la República de Cuba, 1978).

## **V. The legal structure of hotel management in Cuba.**

In the commercial hotel context, there are various contractual formulas for operating a hotel establishment that is not owned, or at least not exclusively owned, by the same team that manages it. For economy of space and to stick to the object of the question, we will summarize it in essentially two formulas: (i) Hotel management contract, by virtue of which a merchant operates a hotel establishment that does not belong to it,

on behalf of the owner thereof and (ii) Hotel franchise contract, by virtue of which a merchant receives a license and a specific know-how to create and exploit a business model that, although it belongs to it, is limited so long as the license granted by the hotel head office is not revoked. (DLA PIPER , 2019).

While it is true that these options (i) and (ii) are not monolithic and there are generally hybrid models that adapt to the needs of the contracting parties, as a general rule, in the case of the hotel industry based in Cuba, we can find formats closer to option (ii), related to franchising, modified in any case to better fit the interests of the Government.

Thus, the legal structure is as follows: Reputable hotel center, which certainly do not require specific mention, enter into a franchise agreement, whereby the following matters are included:

(i) The corporate vehicle integrated by the Government and foreign investors is allowed to develop and operate a hotel, according to a specific business model, known as *Know How*, (DLA PIPER, 2012) which the hotel central provides for that purpose. For the layman, we could say that it is an "instruction manual" for the management of the hotel, which the head office assigns in a limited way to the above mentioned corporate vehicle, which will be, for the legal purposes of the local Government, the owner of the new hotel.

(ii) The corporate vehicle is allowed to use not only the *know-how* developed by the hotel management company throughout its chain of hotels, but something even more important in the hotel sector: the hotel management company's brand. In this way, the vehicle will not only be able to manage a hotel as if it belonged to a specific chain, but it will also be able to name and advertise it as such, thus attracting foreign tourists who trust that brand.

(iii) Precisely in relation to the above, the hotel head office, as a general rule, will reserve certain hotel management issues that, by their very nature, should be reasonably unified for the entire hotel chain, precisely in order to protect the image of the brand licensed to the corporate vehicle. Issues such as marketing, selection of suppliers or specific policies regarding promotions and discounts will either depend directly on the hotel's head office or will require prior approval by the head office.

Finally, there is one last reservation regarding hotel management, which will be based on a mixed formula whereby it will depend technically, with the limitations of points (i), (ii) and (iii) above, on the aforementioned corporate vehicle, but in practice it will be a group of technical officers of the Cuban Government, generally in conjunction with a reviewer from the hotel head office, who will be responsible for ensuring the good name of the brand and strict compliance with the chain's know-how and general policies.

Thus, we will find that the corporate vehicle created ad hoc is essentially reduced to (i) a receiver of the assignment of rights by the hotel's head office that enables the opening and operation of the hotel and (ii) a "common fund" to which the profits in foreign currency generated by the hotel will go and which will be subsequently divided between

the Government and foreign investors, with the particularity that, as we have seen above, the Cuban Government will not only receive foreign currency from the profits of the corporate vehicle owning the hotel, but will also receive it from the salaries of the employees and through tax income when the foreign investor tries to take its profits out of the country.

Finally, special mention should be made of the project of the Government of Cuba in the so-called "Puerto Mariel" which turned in 2014 as "Special Zone of Puerto Mariel" (Dávalos León, 2014) and whose purpose was, in some way, to emulate what the People's Republic of China had arranged in the autonomous city of Hong Kong, that is, a zone whose operation was intended to be developed outside the socialist planned economy, so that investors could be encouraged to establish businesses there, preferably factories in very advantageous conditions.

In any case, we can affirm that, to date, only a few companies have made use of this system, which continues to be actively promoted by the Cuban government, but in no case has it fulfilled the enormous expectations generated and, for the purposes of this study, has had practically no effect on the country's hotel industry.

## **VI. Conclusions**

By virtue of the above, we can conclude that foreign investment Joint Ventures are complex legal operations in which, in addition to key elements such as the initial contribution of each investor or the corporate governance system, there is a fundamental element which is the local legislation and its treatment in relation to the business to be developed. The weight of the local element in these operations is completely overturned in the case of businesses in a dictatorial government, since the latter will not limit itself to issuing the appropriate licenses, but will want to enter the business by force.

Thus, the dictatorial government intends, in one way or another, to partner with the investor(s) for the operation of the business in that country and also share in the profits, which has several disadvantages among which we highlight the impunity of the "government partner" before the courts of its own country in case of non-compliance, but also several advantages such as the ease of obtaining administrative licenses and a context that facilitates unfair competition of the foreign investor against self-employed citizens in the country.

Similarly, the company that lends itself to this type of joint venture is interested in developing a business with the approval of the local dictatorship, which will facilitate a regime of limited competition, with access to very low wages and, in the case of Cuba, the impossibility of unionizing other than through Cuba's own communist party, which will prevent by all means inconveniences for the development of its business.

The interest of the dictatorial government, and particularly in the case of the Government of Cuba, is not simply to obtain a share of the profits, but underlies an even greater complex tangle of interests, which we can focus on (i) political interest, which is to maintain knowledge and control over any entry of foreign capital into the country and (ii) economic interest, insofar as, in general and in the case of the Republic of Cuba, the example fits perfectly, this type of country usually has very difficult access to foreign currency, which is a clear disadvantage when it need to imports, since no commercial agent wishes to sell goods in exchange for devalued Cuban currency. Thus, this type of foreign business is a perfect way to access foreign currency, such as dollars and euros, which do allow the dictatorial government to operate in the international market.

The legal business involved in the management of the hotels in Cuba is a hybrid between what would be a franchise and a state-owned company, which in local Cuban terminology is known as "Mixed Enterprise", which will be based on a difficult balance involving a hotel manager who has the approval of the foreign investor and a political committee of the Communist Party of Cuba that will watch over the interests of the regime in the management and distribution of the profits of the hotel in question.

Thus, finally, it would be interesting to consider as "lege ferenda" for future regulation:

- (i) An update of the Corporate Social Responsibility standards, including at the European Union level, precisely to avoid that some companies, in order to gain ground in their own sector, end up commercially associating with governments of dubious legitimacy.
- (ii) The elaboration and implementation of coercive plans that could sanction those countries that, being part of the International Labor Organization, actively or passively allow their companies to take economic advantage of non-compliance with worker protection, as occurs in the Cuban model the violation of Convention No. 95 of the International Labor Organization, which prohibits states from intervening in workers' salaries to return them in local currency.

## VII. Bibliography

- BERMÚDEZ, Ángel. (16 de junio de 2017). ¿Qué es Gaesa, el consorcio empresarial de los militares de Cuba señalado por Donald Trump y cuál es su peso en la economía de la isla? *BBC News*, p. 1 - 2.
- BOSCH YGUALADA, Mario. (1999). Divulgación. La fiscalidad de la empresa internacional. Impuestos: Revista de doctrina, legislación y jurisprudencia, p. 1375 – 1403.
- BOUCHEZ, Leo J. (2009). The Nature and Scope of State Immunity from Jurisdiction and Execution. *Netherlands Yearbook of International Law*, p. 5 - 12.
- CASADO ROMÁN, Javier. (2012). Análisis del contrato de Joint Venture. *La Ley*, p. 3 - 7.
- CHULIA VINCENT, Eduardo., & BELTRAN ALANDETE, Teresa. (2001). *Consideraciones sobre el contrato de Joint Venture*. La Ley.
- CUBADEBATE. (1 de junio de 2019). Las empresas chinas tienen las puertas abiertas en Cuba. *Escambray, periódico de Santi Spíritus*, p. 1 - 2.
- DÁVALOS LEÓN, Lourdes. (2014). Régimen Jurídico de la Zona Especial de Desarrollo Mariel en Cuba. *Foro Actualidad*, p. 167.
- DE CARLOS BELTRÁN, Jose Manuel. (2011). Contratos entre accionistas. Indemnización por incumplimiento. Situación actual. Alternativas contractuales. La cláusula penal. *Diario La Ley*, p. 5 - 8.
- DE MIGUEL, Enrique. (2018). Negocios conjuntos y operaciones conjuntas como modos internacionales de personificación. *Revista Quincena* Chulia Vincent, E., & Beltran Alandete, T. (2001). *Consideraciones sobre el contrato de Joint Venture*. La Ley, p. 73 - 98.
- DLA PIPER . (2019). *Hotel Management Agreements, a multi-jurisdictional guide*.
- DLA PIPER. (2012). Hotel Franchising in Europe, p. 3 – 12.
- ESTEBAN DE LA ROSA, Fernando. (1999). *La Joint Venture en el Comercio Internacional*. Comares.
- FERNÁNDEZ DEL POZO, Luis. (2014). Acerca de la licitud de los pactos parasociales para el Consejo. La mala regulación de la cuestión en el anteproyectado Código Mercantil. *La Ley Mercantil*. p. 2 - 7.
- GACETA DE LA REPÚBLICA DE CUBA. (1978). *Código Penal de Cuba*. Artículo 235.1.
- GACETA DE LA REPÚBLICA DE CUBA. (2014). *Ley de Inversión Extranjera de Cuba*. Artículo 33.
- JUAN GÓMEZ, Mateo. (2015). Eficacia "ad extra" de los pactos parasociales. ¿Realidad o ficción? *Diario La Ley*, p. 7 - 10.
- KAUFMAN PURCELL, Susan. (2003). La Ley Helms - Burton y el embargo estadounidense contra Cuba. *Foro Internacional*, p. 704 - 714.
- MERCADER UGUINA, Jesús (2007). El marco laboral y la responsabilidad social de las inversiones extranjeras en Cuba. *Annual Proceedings*, p. 104 - 106.
- MILLS, Alex. (2008). The Dimensions of Public Policy in Private International Law. *Journal of Private International Law*, p. 4 - 5.
- OFICINA NACIONAL DE ESTADÍSTICA DE CUBA. (2018). *Salario medio en cifras 2017*. La Habana.



- RODRÍGUEZ MÍGUEZ, Jose Antonio, & PADROS REIG, Carlos. (2009). Las acciones de oro, el derecho de sociedades y el mercado interior. Reflexiones a propósito de la STJCE sobre la Ley Volkswagen. *Gaceta jurídica de la Unión Europea y de la Competencia*, p. 14 - 15.
- SÁEZ LACAVE, Maria Isabel. (2011). Blindajes, Control Minoritario, y la regla una acción - un voto. *Revista de Derecho del Mercado de Valores*, p. 1 - 5.
- SANTANA FREIRE, Orlando. (2018). Burocracia y militares, los más favorecidos en los presupuestos de 2019. *Diario de Cuba*. Retrieved from: [https://diariodecuba.com/cuba/1546257264\\_43828.html](https://diariodecuba.com/cuba/1546257264_43828.html)
- SALACUSE, Jeswald. (2013). The National Legal Framework, National Regulation of Foreign Investment. *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital*. Oxford.
- SYMEONYDES, Symeon. (2019). The Scope and Limits of Party Autonomy in International Contracts: A comparative Analysis. En Ferrari, & Arroyo, *The Continuing Relevance of Private International Law and New Challenges* p. 13 - 18, 23 - 30.
- SHLEIFER, Andrei & VISHNY, Robert (1994). The Politics of Market Socialism. *Journal of Economic Perspectives*, p. 165 – 176
- PUSCHMANN, Hendrik & GEROLDINGER Andreas (2018). ICSID Arbitration Clauses in Contracts: Time for a Revival? European and Comparative Perspectives en The Future of the Commercial Contract in Scholarship and Law Reform, p. 389 – 405.
- STROM, Zachary. (2018). A “Silk Road” for Capital: Trade Policy and Foreign Investment Laws of China’s Neighbor. *Northwestern Journal of International Law and Business*. P. 476 - 479
- VIDAL DELGADO, Rafael. (2017). El rol de las multinacionales y su estructuración a través de grupos de sociedades internacionales. En J. M. López Jimenez, *El control societario en los grupos de sociedades*, Bosch. p. 3 - 5.
- ZARZALEJOS TOLEDANO, Ignacio. (2018). Derecho de los socios a participar en las ganancias sociales. *La Ley Mercantil*, p. 2.