

**BEFORE THE INTERNATIONAL TRADE COMMISSION  
INVESTIGATION NO. 332-552  
OVERVIEW OF CUBAN IMPORTS OF GOODS AND SERVICES AND  
EFFECTS OF U.S. RESTRICTIONS**

**STATEMENT OF EDUARDO R. GUZMAN  
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**INTRODUCTION**

My name is Eduardo Guzmán, and I am Partner at the Washington D.C. office of Drinker Biddle & Reath LLP. For the last 13 years, my practice has focused on advising and representing telecommunications companies on regulatory issues and dispute resolution, with particular experience in the Puerto Rico market. I also have experience representing clients in international arbitration both generally and in the telecommunications market.

My interest in Cuba—and particularly the development of its telecommunications infrastructure and the possibility of a role by U.S. companies in that development—is threefold. First, my experience with the telecommunications market in the Caribbean naturally draws me to explore and understand developments and new opportunities in the largest island in the Caribbean. Second, clients in the telecommunications space are curious about opportunities in Cuba and how they will develop—and as lawyers we need to be ready to provide answers and guidance. Third, and on a more personal note, I am of Cuban descent and have studied U.S.-Cuban relations for more than 20 years.

I was asked to address whether and how opportunities in the Cuban telecommunications market may arise in light of the new U.S. policy towards Cuba. I thank the Commission for this kind opportunity. I also emphasize that the views in this statement are my own—they are not the views of my clients.

**TELECOMMUNICATIONS IN CUBA: WHAT DOES IT MEAN?**

It would be helpful to start by clarifying the scope of my statement and attempt to better define what falls under the broad of concept of opportunities for U.S. companies in Cuban telecommunications. The latter can mean many things in the context of business opportunities in Cuba. It can cover the export and sale of devices such as smartphones and mobile telephones to the Cuban population. It can cover the export and sale of network equipment that could be used by Cuba's incumbent telecommunications carrier to upgrade its network facilities—for example, routers, switches, and fiber optic equipment. It can also cover video, voice, and data services provided via satellite directly to individual customers in Cuba without relying on a network within the island.

But the concept that has captured the most attention in the press—and the one that could have the biggest impact in Cuba—is the one involving U.S. telecommunications carriers investing in and building telecommunications networks in Cuba to provide voice and data

services to the Cuban population. My statement focuses on this scenario, which is the one that presents both the biggest potential and the more serious challenges.

## **HISTORY AND CURRENT STATE OF CUBA'S TELECOMMUNICATIONS SECTOR**

Understanding the history and current state of Cuba's telecommunications sector is a precondition to understanding not only the opportunities that may be available in Cuba, but the challenges ahead for those looking to make significant investments in that sector. It is a subject that, not surprisingly, lends itself to a lengthy discussion—and one is provided in an article that I authored a few months ago, which I have attached to my statement today. That said, a few key points are worth highlighting for the benefit of the Commission and its investigation:

- A single entity controlled by the Cuban government—Empresa de Telecomunicaciones de Cuba S.A. (ETECSA)—has a monopoly over all telecommunications and data services provided in Cuba—both mobile and landline.
- The landline component of ETECSA's network is essentially the old Cuban Telephone Company that was confiscated after the Revolution and in which the International Telephone & Telegraph Company (which today is known as ITT) had a majority interest.
- By the 1990s, Cuba's telecommunications network was on its way to inoperability. As a result, the Cuban government sought joint partnerships with foreign entities in what was, at the time, the first privatization since the Revolution. Telecom Italia became the joint venture partner on the landline side, while Telecomunicaciones Internacionales de Mexico S.A. and later Sherritt International Corp. (a Canadian entity that had other investments in Cuba) became joint venture partners on the wireless side.
- This injection of foreign investment improved Cuba's telecommunications infrastructure significantly, but the era of foreign investment came to an end by 2010 with the forced exit of the foreign investors and the consolidation of the landline and wireless networks into a renationalized ETECSA under the control of the Ministry of Communications (which for years has been controlled by members of the Cuban military).
- As a result of this limited exposure to foreign capital and continued reliance on a government-controlled monopoly, the state of Cuban telecommunications still leaves much to be desired, particularly as to its wireless and broadband capabilities:
  - ✓ Cuba still has one of the lowest wireless penetration rates in Latin America.
  - ✓ The cost of making and receiving wireless calls in Cuba is still very high.



- ✓ Cuba's wireless network still relies on second-generation wireless technology that does not support high-speed Internet service.
- ✓ Landline residential Internet access in Cuba is among the slowest in the world and whatever service is offered is not available to the vast majority of Cubans.

## THE PROSPECT FOR BUSINESS OPPORTUNITIES IN THE CUBAN TELECOM SECTOR

Under these circumstances, how realistic is it for an investment boom led by U.S. companies to materialize in Cuba? There are two plausible ways in which U.S. companies could do this: (1) joint ventures with ETECSA to upgrade existing facilities and/or provide new services within the ETECSA umbrella or (2) concessions from the government to offer telecommunications services in competition with ETECSA. A number of considerations suggest that the prospects for both of these models are limited, at least in the short term.

- **Limits Imposed by the Embargo:** The codified provisions of the embargo still prohibit investments in Cuba's domestic network. *See* 22 U.S.C. § 6004(e)(5). This prohibition extends to making any contribution of funds or making any loans to or for such a network. Given its scope, it should not affect U.S.-Cuba telecommunications services and facilities or satellite services, but it is difficult to envision how U.S. telecommunications carrier will be able to enter into a joint venture with ETECSA or build its own network if such investments are considered unlawful under U.S. law.
- **Exposure to Confiscation Claims:** Section 6033(a) of Title 22 of the U.S. Code prohibits U.S. citizens from extending any financing for transactions involving any confiscated property subject to a claim owned by a U.S. national. *See* 22 U.S.C. § 6033(a). To avoid running afoul of this provision, U.S. carriers would need to avoid investing in or doing any business involving Cuba's landline network (which includes the old Cuban Telephone Company) or reach a settlement with the U.S. nationals that own ITT's claim, which was what Telecom Italia did when it entered into a joint venture with ETECSA. Either way, the costs and exposures could be significant.
- **Lack of Transparency:** Foreign investment in Cuba has traditionally required entering into joint ventures with the Cuban government—specifically, corporate entities created and controlled by the Cuban government. In the case of the telecommunications sector, that would very likely require entering into a joint venture with the six different corporate entities that have an ownership stake in ETECSA. The problem, however, is that little is officially known about these companies and their shareholders, which in turn makes it extremely difficult to determine who would be the real joint venture partners of any U.S. company looking at investing and/or upgrading the Cuban telecommunications network. Such arrangements could expose U.S. entities to situations where they in fact become business partners of members of the Cuban military, for instance. And it

would create significant challenges in terms of compliance with the Foreign Corrupt Practices Act and money-laundering statutes that apply to U.S. companies investing abroad. In short, the kind of joint venture that took place with Telecom Italia and Sherritt will be hard to replicate today with a U.S. telecommunications carrier.

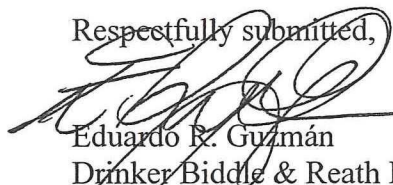
But the most critical variable at the end is the Cuban government and its policies: is it interested in attracting foreign investment to its telecommunications sector and liberalizing it? What is known today gives reason to pause:

- The Cuban government has shown little interest in attracting foreign investment to its telecommunications sector. In fact, telecommunications is not even mentioned among as one of the priority sectors in Cuba's new foreign investment law.
- The Cuban government has shown little interest in opening the telecommunications sector to competition. This is a critical point because rarely does a telecommunications investment boom take place where the telecommunications sector is controlled by a government-owned monopoly that does not allow for competition.
- Cuba still does not have an independent judicial system or a framework to protect intellectual property.
- Cuba's history with foreign investment in telecommunications is tenuous.

## CONCLUSION

The optimism as it relates to Cuba and an investment boom in its telecommunications sector is understandable. The opening of Cuba not only represents potential business opportunities for U.S. companies, but it brings with it the hope that as access to telecommunications spreads, so will change in Cuba. But the vision of throngs of ordinary Cubans connected to Twitter and Facebook or watching movies on Netflix on their iPhones requires one thing above all else that is missing today: a robust, island-wide telecommunications network. The embargo certainly still imposes some limits on the ability of U.S. companies to be players in the building of such a network. Ultimately, however, it will be up to the Cuban government to decide if it wants to allow U.S. companies to build that network. So far, there is no reason to believe that the Cuban government is interested in seeing that scenario come to fruition.

Respectfully submitted,



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## Telecommunications in Cuba and the U.S. Embargo: History, Opportunities, and Challenges

Since President Obama announced the United States' new policy to normalize relations with Cuba, talk about opportunities for U.S. telecommunications companies has flourished. That reaction only intensified when the Treasury Department and the Commerce Department published amended rules on January 16, 2015, implementing these policy changes, which authorize commercial telecommunications services linking third countries and Cuba (as well as within Cuba), services incidental to Internet-based communications, and the export of communications items.<sup>1</sup>

This is not the first time that the United States has relaxed sanctions on Cuba with the hope of expanding direct communications between the two countries and encouraging change in Cuba. The first attempt took place in 1992 when the Cuban Democracy Act allowed for telecommunications services between the two countries, but the effects were limited and short-lived.<sup>2</sup> The U.S. relaxed sanctions again in 2009, this time to allow U.S. telecom companies to establish fiber optic and satellite links with Cuba and to enter into roaming agreements with Cuban carriers.<sup>3</sup> Despite hopeful talk about an investment boom, those measures changed little.

The question now is whether the new regulations will achieve what has been elusive for more than two decades. Interest by U.S. entities is understandable given that the newly implemented changes plainly go beyond anything that has been done before. But with the new opportunities come challenges and potential minefields for U.S. investors looking to Cuba. A more sober analysis is in order, particularly one that takes into account the history of U.S.-Cuba telecommunications relations, the state of the telecommunications industry in Cuba today, the potential limitations that come from the statutory framework that continues in effect despite the relaxation of sanctions, and, critically, Cuba's own telecommunications policy.

### HISTORY OF U.S.-CUBA TELECOMMUNICATIONS RELATIONS

The history of U.S.-Cuba telecommunications relations is long and contentious. Undersea cables supporting telegraph and telephone service connected the two countries for decades before the Cuban Revolution. International Telephone and Telegraph (ITT), a U.S.-based conglomerate, had a majority interest since the early 1900s in the Cuban Telephone Company, the dominant telecommunications provider on the island.

It all changed after the Cuban Revolution in 1959 and the imposition of the embargo a few years later. The new Cuban government led by Fidel Castro confiscated the Cuban

<sup>1</sup> See, e.g., Joan Koenig and Mollie Sitkowski, *Client Alert: OFAC and BIS Release Amendments to Cuban Embargo Regulations*, Jan. 16, 2015, <http://www.drinkerbiddle.com/resources/publications/2015/ofac-and-bis-release-amendments-to-cuban-embargo-regulations-?Section=Publication>.

<sup>2</sup> See Cuban Democracy Act of 1992 § 1705(e), 22 U.S.C. §§ 6004(e).

<sup>3</sup> See Cuban Assets Control Regulations, 74 Fed. Reg. 172 (Sept. 8, 2009).

Telephone Company. The U.S. allowed AT&T to use its undersea cable after the embargo, but only if it did not add new capacity to it. This positioned AT&T as the dominant carrier for telecommunications between the U.S. and Cuba through the late 1980s, when the cable finally became unusable and long distance calls from the U.S. to Cuba had to be routed through third parties using satellite uplinks. During that time, and as a result of the embargo, AT&T could not make any payments to Cuba for the origination and termination of long distance calls, depositing them instead in an escrow account.<sup>4</sup> The controversy over the release of these funds became another contentious chapter in U.S.-Cuba relations.

A glimmer of hope emerged in the mid-1990s after the enactment of the Cuban Democracy Act. After long negotiations, Cuba dropped its demand for the release of the AT&T escrow funds and reached an agreement with the U.S. on compensation for terminating calls.<sup>5</sup> The FCC authorized various U.S. carriers to provide direct-dial service to Cuba (via satellite) under guidelines developed by the State Department, and at least one U.S. entity presented a plan to install and operate a new undersea cable between the two countries—the first direct cable since the Cuban Revolution.<sup>6</sup> But both the plans for an undersea cable and direct dialing between the U.S. and Cuba were short-lived. The statutory prohibition on any investment in the domestic telecommunications network within Cuba, which was enacted in 1996, hindered any plans that required connecting an undersea cable to the Cuban domestic telephone network, and the U.S. ultimately did not approve the plans for a new undersea cable.<sup>7</sup> Direct dial service was shut down in 2000 when the Cuban government suspended the service after the U.S. released the long distance escrowed funds as compensation for damages arising from the Cuban air force shooting down of a Brothers to the Rescue plane in 1996.<sup>8</sup>

Little has changed since then. A U.S. company proposed and received approval under the regulations enacted after 2009 to build and operate a new undersea cable between the two countries, but to this day it has been unable to reach agreement with the Cuban government.<sup>9</sup> Instead, the Cuban government went ahead with a plan sponsored by

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<sup>4</sup> See generally AT&T Archives, *Cable to Cuba*, <http://techchannel.att.com/play-video.cfm/2012/3/2/AT&T-Archives-Cable-to-Cuba>; John Spencer Nichols & Alicia M. Torres, *Cuba*, in TELECOMMUNICATIONS IN LATIN AMERICA 29-30 (Eli M. Noam ed., 1998).

<sup>5</sup> See, e.g., Nichols & Torres, *supra*, at 29-30.

<sup>6</sup> See generally *In re IConnect Wholesale, Inc., d/b/a Telecuba*, 26 FCC Rcd. 5217, 5219-20 (Int'l Bureau, Apr. 8, 2011); Nichols & Torres, *supra*, at 30-31; *FCC to Accept Applications for Service to Cuba*, Public Notice, Report No. I-6831 (July 27, 1993).

<sup>7</sup> See, e.g., Larry Press, *The State of the Internet in Cuba*, at 9 n.24 (Jan. 2011), <http://som.csudh.edu/fac/lpress/cubabiblio.htm>; see also *In re IConnect Wholesale*, 22 FCC Rcd. at 5220 (explaining that as of 2011 “there [were] no commercial submarine cables directly connecting the United States and Cuba”). The statutory prohibition on any investment in the domestic telecommunications network within Cuba was enacted as part of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub. L. No. 104-114, § 102(g), 110 Stat. 785, 793-94 (1996) (hereinafter “Helms-Burton Act”).

<sup>8</sup> See, e.g., *ETECSA Blocks Access to IP LD Sites*, BNAMERICAS, Mar. 21, 2001, [http://www.bnamericas.com/news/telecommunications/Eteca\\_Blocks\\_Access\\_to\\_IP\\_LD\\_Sites](http://www.bnamericas.com/news/telecommunications/Eteca_Blocks_Access_to_IP_LD_Sites); see also *In re IConnect Wholesale*, 26 FCC Rcd. at 5220 (explaining that no U.S. carrier provides direct dial service to Cuba).

<sup>9</sup> See, e.g., Letter from Paul A. Moore to Mindel de la Torre, IB Docket No. 10-95 (Jan. 13, 2015); *Chavez Beats AT&T to Cuban Market Over Price Dispute*, BLOOMBERG NEWS, Jan. 26, 2011, <http://www.bloomberg.com/news/articles/2011-01-26/chavez-beats-at-t-to-cuba-telecom-market-as-price-dispute-bites>.



Venezuela to lay an undersea fiber-optic cable connecting that country to Jamaica and Cuba.<sup>10</sup> This was an interesting—and revealing—move by the Cuban government, since it would have been cheaper (and it would have taken less time) to connect to any of the many international undersea cables that already pass nearby. Cuba, however chose the more expensive cable that bypasses the U.S. altogether.

## THE STATE OF TELECOMMUNICATIONS IN CUBA

### *Domestic Telecommunications*

After the confiscation of ITT's property, the Cuban Telephone Company became the Cuban Telecommunications Enterprise (EMTELCUBA) and was placed under the control of the Ministry of Communications, which from its origin and for decades afterwards has been headed by members of the Cuban military. By the 1990s, Cuba's domestic telecommunications infrastructure was at a critical level. The domestic telephone network was mostly an analog telephone network that relied on aging equipment dating to the 1930s with little to no fiber optic backbone, with only 350,000 lines for a population of more than 11 million, and on its way to inoperability.<sup>11</sup>

Change came in the mid-1990s, when the Cuban government partially privatized EMTELCUBA—a dramatic step at the time for a country that had foresworn privatization. Empresa de Telecomunicaciones de Cuba S.A. (ETECSA) was created as an entity separate from the Ministry of Communications and was granted an exclusive, long-term concession to provide telecommunications services (except for mobile service) in Cuba. Mexico's Grupo Domos Internacional was the original joint venture partner with a 49 percent interest valued at \$1.5 billion, and it was joined shortly thereafter by Telecom Italia. But a combination of financial problems (driven largely by the Mexico peso crisis) and pressure from the U.S. government after the enactment of the Helms-Burton Act led to a relatively quick exit by Grupo Domos, which left Telecom Italia controlling 30 percent of ETECSA in a joint venture with various entities Cuban state-owned entities.<sup>12</sup>

The capital injection that followed this partial privatization produced significant improvements. By 2010, switches and landlines across the island had been digitized, the number of landlines had tripled to over 1,000,000, teledensity had increased to 10 lines per 100 habitants, and fiber optic cables were installed throughout the island.<sup>13</sup> In 2011,

<sup>10</sup> See, e.g., *Cuba first high-speed internet connection activated*, BBC News, Jan. 24, 2013, <http://www.bbc.com/news/world-latin-america-21190066>; Press, *supra*, at 8-9; MANUEL CEREIJO, INSTITUTE FOR CUBAN AND CUBAN-AMERICAN STUDIES, REPUBLIC OF CUBA TELECOMMUNICATIONS INFRASTRUCTURE ASSESSMENT 91-93 (2010)

<sup>11</sup> See generally CEREIJO, *supra* note 10, at 1-4; Nichols & Torres, *supra*, at 24-25; LARRY PRESS, RAND, CUBAN TELECOMMUNICATIONS, COMPUTER NETWORKING, AND U.S. POLICY IMPLICATIONS 6-12 (July 1996).

<sup>12</sup> CEREIJO, *supra* note 10, at 8; PHILLIP PETERS, THE LEXINGTON INSTITUTE, CUBA GOES DIGITAL 4 (2001); Larry Rohter, *Mexican Conglomerate Abandons Cuban Phone Venture*, N.Y. TIMES, June 30, 1997, <http://www.nytimes.com/1997/06/30/business/mexican-conglomerate-abandons-cuban-phone-venture.html>; Maria Werlau, *Update on Foreign Investment in Cuba 1997-98 and Focus on the Energy Sector*, 8 CUBA IN TRANSITION 202, 211 (1998).

<sup>13</sup> CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, CUBA (2014); CEREIJO, *supra* note 10, at 31, 39; PETERS, *supra*, at 5.

however, Cuba renationalized ETECSA and a state-owned company with ties to the Cuban military, Rafin S.A., bought Telecom Italia's stake for more than \$700 million.<sup>14</sup> After that transaction, the Cuban government effectively owned the totality of ETECSA, as it continues to do so today.

## *Mobile Telephony*

Mobile telephone service dates back to the early 1990s, when Cubacel was created as a joint venture between the Cuban government and a private entity from Mexico, Telecomunicaciones Internacionales de Mexico S.A. (TIMSA).<sup>15</sup> By 1998, Sherritt International Corp, a Canadian company, had acquired a 37.5 percent stake in Cubacel, leaving TIMSA as a minority stakeholder.<sup>16</sup> Because Cubacel used TDMA technology, the government created a separate state-owned entity, C-Com, to offer mobile service using GSM technology.<sup>17</sup> By 2003 the Cuban government had bought back Sherritt's stake to take complete control of Cubacel, which it then folded into ETECSA (along with C-Com) to consolidate all telecommunications services under a single, wholly state-owned monopoly.<sup>18</sup>

Even with this infusion of foreign capital and the subsequent consolidation under ETECSA, Cuba's mobile telephone infrastructure lags behind that of most of its neighbors. The mobile network has expanded throughout the island and the number of subscribers has increased dramatically, especially since 2008, when the Cuban government lifted the ban on the purchase of mobile devices and reduced sign-up costs and per-minute rates.<sup>19</sup> But Cuba still has one of the lowest mobile penetration rates in Latin America.<sup>20</sup> The cost of receiving and making phone calls is still very high, particularly given the limited disposable income of most of the Cuban population. And the service available to the general population is mostly based on second-generation technology that does not support Internet service (with the more advanced networks limited to tourists, foreign business executives, government officials, diplomats, and foreign news agencies).<sup>21</sup> In other words, significant additional investment, particularly

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<sup>14</sup> See FREEDOM HOUSE, FREEDOM OF THE NET 2013 215, 219 (Sanja Kelly et al. eds. 2013); Larry Luxner, *Sherritt sells its 40% stake in Cubacel back to government*, CUBANEWS, Oct. 2003, [http://www.luxner.com/cgi-bin/view\\_article.cgi?articleID=1167](http://www.luxner.com/cgi-bin/view_article.cgi?articleID=1167); see also *Cuban State Buys Out Telecom Italia*, CUBA STANDARD, Jan. 31, 2011, <https://www.cubastandard.com/?p=3650>.

<sup>15</sup> Nichols & Torres, *supra*, at 28; REUTERS, *FACTBOX: Big potential in mostly untapped Cuba telecom market*, Sep. 10, 2009, <http://www.reuters.com/article/2009/09/10/us-cuba-usa-telecoms-idUSTRE58957K20090910>; PETERS, *supra*, at 6; PRESS, *supra*, at 4.

<sup>16</sup> REUTERS, *supra*; PETERS, *supra*, at 6; Werlau, *supra* note 12, at 210.

<sup>17</sup> PETERS, *supra*, at 6-7

<sup>18</sup> See REUTERS, *supra*; Phil Anderson, *Govt. buys back 50% of Cubacel for US\$43mn*, BNAMERICAS, Sept. 5, 2003, [http://www.bnamericas.com/news/telecommunications/Govt\\_buys\\_back\\_50\\*\\_of\\_Cubacel\\_for\\_US\\*43mn](http://www.bnamericas.com/news/telecommunications/Govt_buys_back_50*_of_Cubacel_for_US*43mn); *Telecom Italia invests US\$50mn in Etecsa*, BNAMERICAS, Apr. 20, 2004, [http://www.bnamericas.com/news/telecommunications/Telecom\\_Italia\\_invests\\_US\\*50mn\\_in\\_Etecsa](http://www.bnamericas.com/news/telecommunications/Telecom_Italia_invests_US*50mn_in_Etecsa).

<sup>19</sup> See FREEDOM HOUSE, *supra*, at 219; CEREIJO, *supra* note 10, at 65.

<sup>20</sup> CEREIJO, *supra* note 10, at 60

<sup>21</sup> Alexandre Grosbois, *Internet in Cuba only for the rich -- or resourceful*, BUSINESS INSIDER, Dec. 5, 2014, <http://www.businessinsider.com/afp-internet-in-cuba-only-for-the-rich---or-resourceful-2014-12>; Setephen Lawson, *As the U.S. frees its service providers to invest, Cuba may not play ball*, COMPUTERWORLD, Dec. 18, 2014, <http://www.computerworld.com/article/2860995/us-cuba-break-through-is-no-slam-dunk-for-internet.html>; Ellery Roberts Biddle, INTERNET MONITOR RATIONING THE DIGITAL: THE POLITICS AND POLICY OF INTERNET USE IN CUBA TODAY 3 (2013).



in mobile broadband will be necessary in the ETECSA network for Cuba to catch up and for wireless broadband services to become widely available.

## *Internet*

All Internet connections in Cuba are available exclusively through ETECSA.<sup>22</sup> Because wireless Internet service is not available to the general population, landline Internet effectively is the sole means of connecting people in Cuba to the Internet. The combination of inadequate infrastructure and the government's deliberate policy of controlling access to the Internet have produced extremely slow service that is not widely available to the population. Government statistics claim that 25 percent of the population has access to the Internet, but it is estimated that only 5 percent of the population has access to the open Internet.<sup>23</sup> That is an important distinction to make when talking about access to the Internet in Cuba: while certain professionals, government officials, and tourists have access to the World Wide Web, most Cubans only have access to an intranet set up by the Cuban government that does not provide open access.<sup>24</sup> ETECSA recently started offering open access via Internet cafes, but at a prohibitive price for most Cubans.<sup>25</sup> Home connections are not available to the vast majority of Cubans, since they require permission from the Ministry of Information and Communication (which is not routinely granted).<sup>26</sup> And whatever access is available tends to be among the slowest in the world.<sup>27</sup> The undersea cable with Venezuela may help in that regard, but the impact will be limited as long as the domestic network supporting Internet access is inadequate.

## OPPORTUNITIES . . . AND CHALLENGES

What are the opportunities available to U.S. telecom companies interested in Cuba? The mushrooming of mobile telephony in Cuba points to potential opportunities in the sale of mobile devices, although its potential magnitude is an open question given that Cuba is not a huge market (with a population of 11 million, it does not approach the market size of countries like Vietnam and Myanmar, where the elimination of long-standing sanctions has opened the door to opportunities for U.S. companies) and given the income limitations of the general Cuban population. The dire need for upgrades to Cuba's wireless network and expansion of Internet infrastructure also points to potential opportunities in larger-scale investments and transactions involving telecommunications infrastructure. But the latter category of projects will come with a

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<sup>22</sup> BIDDLE, *supra*, at 2; FREEDOM HOUSE, *supra*, at 219; THEODORE J. PICCONE ET AL., BROOKINGS INSTITUTION, BRIDGING CUBA'S COMMUNICATION DIVIDE: HOW U.S. POLICY CAN HELP 4 (2010).

<sup>23</sup> See Nancy Scola, *Only 5 percent of Cubans can get on the same Internet Americans do. That could soon change*, WASHINGTON POST, Dec. 17, 2014, <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/17/cubans-might-soon-actually-be-able-to-get-on-the-real-internet/>; BIDDLE, *supra*, at 4.

<sup>24</sup> BIDDLE, *supra*, at 4; FREEDOM HOUSE, *supra*, at 217; Piccone et al., *supra*, at 4.

<sup>25</sup> Patrick Oppmann, *Internet access now a reality for some Cubans, but not cheap at \$4.50 an hour*, CNN, Aug. 6, 2013, <http://www.cnn.com/2013/08/05/world/americas/cuba-online-access>; BIDDLE, *supra*, at 5.

<sup>26</sup> See BIDDLE, *supra*, at 3. In any event, many of the digital landlines in Cuba apparently cannot handle Internet traffic. See PETERS, *supra*, at 8.

<sup>27</sup> FREEDOM HOUSE, *supra*, at 217; BIDDLE, *supra*, at 2-3.

particular set of challenges for U.S. investors:

- **Prohibition on Investments in the Domestic Network.** U.S. investors looking to Cuba will have to navigate an apparent conflict between the recently adopted rules and the statutory prohibition on domestic investment. The new rules are designed to promote not only telecommunications services between Cuba and the U.S. and other countries, but also within Cuba.<sup>28</sup> The Helms-Burton Act, however, prohibits any investment in the “domestic telecommunications network within Cuba,” which includes making any contribution of funds or making any loans to or for such a network.<sup>29</sup> This raises questions as to what qualifies as the “domestic telecommunications network” in Cuba. Is the wireless network originally developed by Cubacel a “domestic telecommunications network” for the purposes of the statute? Would a new wireless network constitute a “domestic telecommunications network”? Are all the components of the ETECSA landline network part of the “domestic telecommunications network”? Even if the term “domestic telecommunications network” is read narrowly to refer to the legacy ETECSA landline network, where does that leave the wireless network projects that will require using or leasing facilities from that network or investing in equipment to interconnect to that network? It may be difficult, if not impossible, to promote investments in telecommunications within Cuba when the law simultaneously prohibits investments in Cuba’s “domestic telecommunications network.”
- **Exposure to Confiscation Claims.** Potential U.S. investors will also have to consider the potential liability created by transactions involving confiscated property of U.S. nationals. To avoid violating 22 U.S.C. § 6033(a), any transaction or joint venture that requires investing in, or providing service through, the legacy ETECSA landline network would have to steer clear of extending any financing. Any such transaction could also open the door to future civil claims by those U.S. nationals that control portions of ITT’s confiscation claim (or the claim of other investors in what was then the Cuban Telephone Company).<sup>30</sup> This risk—and the potential additional costs involved to deal with it—was illustrated by Telecom Italia’s experience with its joint venture with ETECSA. When Telecom Italia acquired its stake from Doms in the 1990s, it entered into a separate agreement in which ITT waived claims against Telecom Italia for the use of its confiscated property in Cuba in exchange for a one-time lump sum payment.<sup>31</sup> U.S. investors will need to consider this exposure—and the potential additional costs involved—before making any investments in the legacy ETECSA landline network.

<sup>28</sup> See 31 C.F.R. § 515.542(d).

<sup>29</sup> See 22 U.S.C. § 6001(e)(5).

<sup>30</sup> See generally Floyd Norris, *Market Watch; What ITT and Castro Have in Common*, N.Y. TIMES, Dec. 7, 1997, <http://www.nytimes.com/1997/12/07/business/market-watch-what-itt-and-castro-have-in-common.html>.

<sup>31</sup> See, e.g., UNITED STATES GENERAL ACCOUNTING OFFICE, CUBAN EMBARGO, SELECTED ISSUES RELATING TO TRAVEL, EXPORTS, AND TELECOMMUNICATIONS 7-8 (Dec. 1998).



- **Partnering With the Cuban Military.** From the time that ETECSA was partially privatized in the 1990s, investing in Cuba's telecommunications infrastructure has required entering into joint ventures with entities controlled by the Cuban military. ETECSA itself is owned by a number of state-owned entities, about which little is known with certainty. One of these entities, Rafin S.A., appears to be a subsidiary of Grupo de Administración Empresarial (GAE), the holding company for various corporations and other business ventures controlled by the Cuban military.<sup>32</sup> Another one of these entities, Banco Financiero Internacional, is a subsidiary of CIMEX, a financial-commercial conglomerate that also reportedly has strong ties to the military.<sup>33</sup> A joint venture involving investment in Cuba's existing telephone network would likely require teaming up with one of these entities. Even if a prospective transaction or project in Cuba's telecommunications sector does not directly involve contracts with or payments to these particular entities, it will almost certainly require a joint venture with one of the many other state-owned entities controlled by the Cuban military. And that is where the uncertainty and risk will lie for the prospective U.S. investor: the lack of transparency when dealing with state-owned entities in Cuba will likely make it daunting to determine who are the real stakeholders of the joint venture.<sup>34</sup> That uncertainty, in turn, could increase the exposure of U.S. companies to violations of the Foreign Corrupt Practices Act and the various money-laundering statutes that apply to U.S. companies in international joint ventures. Thorough due diligence on these matters will be essential to any U.S. investor thinking about taking advantage of the new rules.

The biggest challenge to potential U.S. investors may not come from U.S. rules and statutory requirements, however. It is likely to come instead from the ultimate unknown when it comes to Cuba: whether the Cuban government is actually interested in promoting U.S. investment in the telecommunications sector. A few issues for potential U.S. telecom investors to consider:

- **Barriers to Entry in the Telecommunications Market.** The threshold obstacle to any investment in Cuba's telecommunications infrastructure is that the telecommunications sector is subject to a complete state monopoly and is not open to foreign investment or competition. Significant private investment in the telecommunications sector has historically materialized in countries that

<sup>32</sup> See *Cuban State Buys Out Telecom Italia*, *supra*; see also *Reform in Cuba, Trying to make the sums add up*, THE ECONOMIST (Nov. 13, 2010) (explaining that GAE is run by Raul Castro's son-in-law and controls 40 percent of the Cuban economy), <http://www.economist.com/node/17463421>; Maria C. Werlau, *Fidel Castro, Inc.: A Global Conglomerate*, 15 CUBA IN TRANSITION 376, 379 (2005) (same). There also are unsubstantiated claims that Fidel and Raul Castro own Rafin, S.A. See DANIEL VENTRE, *Cuba: Towards an Active Cyber-defense*, in CYBER CONFLICTS: COMPETING NATIONAL PERSPECTIVES § 2.2.5 (Daniel Ventre ed. 2012); Iván García, *Telecommunications are a key piece for military businessmen*, Translating Cuba, Feb. 12, 2011, <http://translatingcuba.com/cuba-telecommunications-are-a-key-piece-for-military-businessmen-ivan-garcia>.

<sup>33</sup> THE ECONOMIST, *supra*; Marc Frank, *Military Man to Head Cuba's Biggest Company*, REUTERS, Sept. 27, 2010, <http://www.reuters.com/article/2010/09/27/us-cuba-corporation-idUSTRE68Q54H20100927>; Werlau, *supra* note 32, at 379. At least one observer has asserted that revenues from this entity go directly to Cuban officials and are suspected of money laundering. See *id.* at 379

<sup>34</sup> Cf. Werlau, *supra* note 32, at 381-82.

have liberalized their telecommunications market. Today, Cuba is at the other extreme. Not only is the entire Cuban telecommunications sector a government-regulated monopoly with exclusive licenses and strict barriers to entry, but Cuba *renationalized* it after years of allowing some private investment. This model of complete government control over telecommunications is an anomaly today in the developed world and a barrier to the kind of boom in investment that is being widely predicted. Any realistic prospects for U.S. investment in Cuba's telecommunications infrastructure will first require some liberalization of the market, particularly as it relates to wireless services. Until that happens, opportunities beyond the sale of telecommunications equipment to individuals may be limited.

- **Tenuous History of Private Investment in Cuba's Telecommunications Sector.** The history of private telecommunications investors in Cuba should be a warning sign to U.S. entities looking at joint ventures in the Cuban telecom sector. The private joint ventures of the 1990s did not end well. The ETECSA joint venture ended in a fall out and mutual recriminations between Grupo Domos, the original investor, and the Cuban government.<sup>35</sup> By 2010, Telecom Italia was looking to pull out, which it did a year later as part of Cuba's renationalization wave. On the wireless side, Sheritt also ended up selling its stake in Cubacel to the government in a deal that was described as "the prerogative of the Cuban government."<sup>36</sup> These fall-outs and the renationalization of the telecommunications sectors were not isolated incidents. At the time foreign investors in other industries were leaving Cuba in the midst of disputes with the government and criminal crackdowns.<sup>37</sup> Since Raul Castro took over from his brother as president, Cuba's policy has been to bring the telecommunications sector under tight state control.<sup>38</sup> And in a worrisome sign, Cuba's recent revamp of its foreign investment law did not identify foreign investment in telecommunications as a priority.<sup>39</sup> Potential U.S. investors will have to navigate the challenges of investing in a country where, as one observer put it, investors "stay happy as long as arbitrary decisions of the Cuban state do not affect their best interests."<sup>40</sup> In a sector that the Cuban government is intent on controlling, that may prove to be difficult.

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<sup>35</sup> See Werlau, *supra* note 12, at 212; Maria Werlau, *Update on Foreign Investment in Cuba: 1996-97*, 7 CUBA IN TRANSITION 72, 87 (Aug. 1997).

<sup>36</sup> See, e.g., Luxner, *supra*.

<sup>37</sup> See, e.g., Marc Frank, *Cuba Crackdown Sees Foreign Companies Exit*, FINANCIAL TIMES (May 21, 2012).

<sup>38</sup> See, e.g., Susana González, *Define Cuba que las telecomunicaciones quedan en manos del estado: ex-ministro*, LA JORNADA, Mar. 21, 2011, at 27, <http://www.jornada.unam.mx/2011/03/21/economia/027n1eco>; Juan A. B. Belt and Luis Velazquez, *Cuba: Reforming the Power, Telecommunications and Water Sectors During a Transition*, 17 CUBA IN TRANSITION 59, 68 (Aug. 2007); Marc Frank, *Cuba Fires Telecom, Computing CEOs in Shake-Up*, REUTERS, Sept. 25, 2006.

<sup>39</sup> Cf. MINISTERIO DEL COMERCIO EXTERIOR Y LA INVERSIÓN EXTRANJERA, CUBA: CARTERA DE OPORTUNIDADES DE INVERSIÓN EXTRANJERA 10 (2014) (not listing telecommunications among priority sectors).

<sup>40</sup> Werlau, *supra* note 35, at 87.

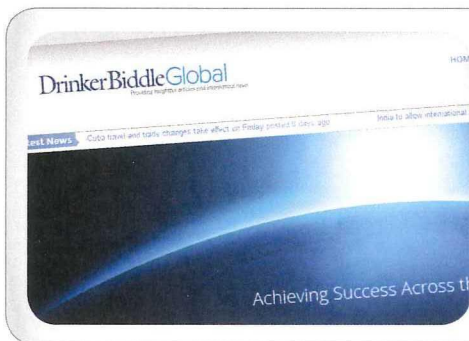


# Drinker Biddle Global

History tells us that, sooner or later, a drastic upgrade to Cuba's telecommunications infrastructure will be on the cards. And there is reason to be optimistic that, in the long run, U.S. entities will drive that upgrade. In the short term, however, the challenges and the unknowns may give them reason to pause or, at a minimum, carefully consider the risks.

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