

IMPACT OF THE HELMS-BURTON LAW (THE CUBAN LIBERTY ACT) ON CUBAN TOURISM

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Whether one agrees or disagrees with the purpose, provisions, or probable consequences of the Cuban Liberty and Democratic Solidarity Act (the Cuban Liberty Act also popularly known as the Helms-Burton Law, particularly in Cuba) is beside the point. On March 12, 1996, President Clinton signed the Cuban Liberty Act into law, having previously been approved by the U.S. Congress by wide margins. The substantial support for the Cuban Liberty Act makes it highly unlikely that the U.S. policy towards Cuba will change in the foreseeable future absent some significant political changes in the Cuban Government. The Cuban Liberty Act is a reality and those persons affected by the new law will have to come to grips with its provisions and with how the new legislation will work in practice.

Numerous provisions contained in the Cuban Liberty Act condemn the government of Cuba for past and present violations of human rights and international norms of good conduct. One provision specifically condemns the attack by Cuban war planes of the two small civilian aircraft piloted by "Brothers to the Rescue," a Miami-based humanitarian organization. This incident appears to have triggered the overwhelming presidential and congressional bipartisan support for the Cuban Liberty Act.

The purpose of this paper is to analyze the Cuban Liberty Act in view of the tourism industry in Cuba. By necessity, other provisions which are not related to tourism are not discussed.

PROTECTION OF PROPERTY RIGHTS OF U.S. NATIONALS

The Cuban Liberty Act seeks to protect the property rights of U.S. nationals by making any person who "traffics" in the "property" of a "U.S. national" which was "confiscated" by the Cuban government liable in U.S. federal court. This provision of the Cuban Liberty Act takes effect on August 1, 1996, unless its operation is suspended for a six-month period by the President, which has occurred several times.

To "traffic" with respect to confiscated property of a U.S. national is a broadly defined term for purpose of Title III of the Cuban Liberty Act. It includes a person who "knowingly and intentionally" and "without the authorization of any U.S. national who holds a claim to the property": (i) sells, transfers, distributes, dispenses, brokers, manages or otherwise disposes of confiscated property; (ii) purchases, leases, receives, possesses, obtains control of, manages, uses or otherwise acquires or holds an interest in confiscated property; (iii) engages in a commercial activity using or otherwise benefiting from confiscated property; or (iv) causes, directs, participates in or profits from trafficking in confiscated property by or through another person.

Numerous limitations exist on this new "civil remedy," including the eight discussed below. It should be noted that some of the following "civil remedies," at the time of publishing this paper, are already a matter of the past.

First, there is a three-month grace period for anyone who is currently engaged in trafficking in confiscated property within which to discontinue such activities. In other words, past conduct by the persons involved in trafficking is immaterial.

Second, the amount in controversy has to exceed \$50,000 and cannot, except in certain cases, involve Cuban residential property.

Third, only U.S. nationals with claims that have been certified by the Foreign Claims Settlement Commission (FCSC) may commence an action after August 1, 1996 unless this date is extended by the President; other types of U.S. nationals must wait two years before going to court.

Fourth, the claim must have existed in the hands of the claimant prior to the enactment of the Cuban Liberty Act, or, in those cases where the confiscation occurs after the date of the Cuban Liberty Act, the claimant must not have given value to acquire such claim.

Fifth, the claimant must show evidence of ownership of the property confiscated by the Cuban government. A court is required to accept as conclusive proof a claim that has been previously certified by the FCSC. That should not be a problem for the lawsuits that may be brought under the Cuban Liberty Act in the first two years, since only U.S. nationals who hold certified claims will be allowed to sue during that period of time. If a claim has not been previously certified by the FCSC, the federal court handling the lawsuit “may appoint a special master, including the FCSC, to make determinations regarding the amount and ownership of the claim. It is not mandatory that a special master be appointed by the federal court, and there is no guarantee that the FCSC will agree to act special master in connection with each case filed under the Cuban Liberty Act (or at what cost its services will be made available to the litigants). Also, there are no criteria to govern the determination of the special master, and it is not clear that any special master will relay on any special procedures customarily used by the FCSC in resolving claims.

Sixth, the claimant must pay a “uniform filing fee” in connection with the filing of the action, in a “level sufficient to recover the cost to the courts of actions” brought under the Cuban Liberty Act (whatever that is).

Seventh, the Cuban Liberty Act contains a statute of limitations period which provides that an action under Section 302 may not be brought more than two years after the trafficking giving rise to the action has been ceased to occur. It may be difficult in certain cases to determine when the “trafficking” has ceased for purpose of this limitation.

And **eighth**, any action commenced may be suspended or shall expire upon certification by the President that a “democratically” elected government in Cuba is in power.

Assuming one overcomes all these hurdles, a U.S. national may sue any person in federal court who has trafficked in confiscated property in Cuba which is the subject of his or her claim. That would appear to include any agency or instrumentality of the Cuban government, any Cuban official, and any other U.S. or foreign person. The amount which may be recovered by the claimant is the greater of: (i) the amount certified by the FCSC, if applicable, plus interest at the rate set forth by the law; (ii) the amount of the claim as determined by special master or by the FCSC, plus interest at the rate set forth by the law, or the fair market value of the confiscated property. Treble damages may also be recovered in certain cases.

EXCLUSION FROM THE UNITED STATES OF FOREIGN PERSONS WHO TRAFFIC IN CONFISCATED PROPERTY OF A U.S. NATIONAL

Another controversial provision is the “exclusion from the United States” of foreign persons who are involved in the trafficking of confiscated property in Cuba. The purpose of this provision is to isolate Cuba and to force foreign companies to choose between the United States and Cuba in terms of where they will be allowed to visit and do business. A related provision urges the President to enforce existing laws to deny visas to Cuban nationals who are con-

sidered by the Secretary of State to be employees of the Cuban government or the Communist Party of Cuba.

PROHIBITION ON INDIRECT FINANCING OF CUBA

The law provides that generally no loan, credit, or other financing may be extended knowingly by a U.S. national, permanent resident, or U.S. agency to any person for the purpose of financing transactions involving any confiscated property of any U.S. national (except for financing by the U.S. national owning such claim for a transaction permitted under U.S. law). This provision is simple to understand when applied to a transaction involving financing for the acquisition or improvement of a hotel in Cuba that is located on land confiscated from a U.S. national. A more difficult case is when the financing is provided for a typical trade transaction where the foreign buyer purchases products (e.g., agricultural crops such as sugar) grown and harvested in Cuba on land that was previously confiscated from a U.S. national. Equally difficult will be cases involving financing by banks in third countries of Cuban exports that bear a trade mark that in itself constitutes confiscated property. "Trafficking" is a term which is so broadly defined that it would appear to cover this indirect type of activity. Any person who violates this section may be punished by civil penalties as in the case of violations of the Cuban Assets Control Regulations, but does not appear to be amenable to suit by the owner of the claim except where a case can be established under the Cuban Liberty Act.

IMPLICATIONS

The Cuban Liberty Act does not expressly purport to prohibit a foreign person from conducting business with Cuba or traveling to that country. Similarly, the Act does not prohibit U.S. nationals from conducting business with Cuba and traveling to Cuba to the extent allowed by U.S. law. The Cuban Liberty Act permits the exclusion of foreign persons from the United States and makes U.S. nationals and foreign persons liable in U.S. federal courts if they are knowingly and intentionally: (i) trafficking in property confiscated by the Cuban government; and (ii) the property belongs to a U.S. national who does not

consent to the use of his or its property. Foreign nationals who are engaging in prohibited activities might well decide to run the risk of being sued in the United States, and if sued, to defend against any such liability on a number of grounds. Similarly, foreign nationals may take the risk that the U.S. Immigration and Naturalization Service will never seek to bar them from entering the United States.

Given the broad definition of "trafficking," it is clearly the case that many types of business dealings between Cuba and foreign nationals may be covered by the Cuban Liberty Act. The Cuban Liberty Act is directly aimed at foreign persons who currently own, manage, or otherwise make use of properties that were owned by U.S. nationals and confiscated by the Cuban government. Within that category are those properties which are the subject of certified claims before the FCSC and have been public knowledge for some time.

The Cuban Liberty Act is designed to increase the pressure on the Cuban government by restricting assistance to countries that would provide aid to Cuba, as well as forcing certain foreign persons to make a choice between doing certain kinds of business with Cuba or doing business with the United States. It is quite likely that there may be several court challenges to the Cuban Liberty Act, either based on the U.S. constitutional principles or treaty obligations previously undertaken by the United States. What may come from this jurisprudence cannot be gauged with accuracy at this point. Moreover, in the ever-changing ebb-and-flow of relations between Cuba and the United States, other incidents could arise which provoke further modifications of the embargo.

It does appear that the Cuban government is very apprehensive about the impact of the Cuban Liberty Act on its economy. What may eventually occur is a subject of speculation, but the U.S. appears to have drawn a "line in the sand" against Cuba and has now explicitly required foreign persons to essentially choose between the U.S. and Cuba. The obvious conclusion of the U.S. Congress and the President is that these foreign person will prefer to maintain their ties with the United States and consequently foreign investment in Cuba will cease or substantially de-

cline. It is impossible to know whether a lack of foreign investment in Cuba will deprive the Cuban government of badly needed hard currency revenues, perhaps worsening living conditions on the island and fostering internal rebellion, or whether the Cuban Liberty Act will itself provoke liberalization towards foreign investment by the Cuban government in order to attract greater hard currency revenues. In either case, the United States is assuming that the Cuban Liberty Act may perhaps lead to the eventual democratization of Cuba.

THE REVERSE EMBARGO

Cuba's government has exploited the so-called U.S. embargo to present itself as a victim of imperialist U.S. policies. Noticeably, it has always referred to the U.S. Government as a separate entity, somehow divorced from the people of the United States. In contrast, the Cuban Government and the people of Cuba, they claim, are one and the same. There is, it is argued, a *tacit and permanent* mandate from the Cuban people to allow the Cuban Government to act on its behalf.

Perhaps this would explain the *implicit acceptance* of the deprivation of the Cuban people of any meaningful opportunity to visit the tourism installations in Cuba or to develop, invest in, own, manage, and enjoy the fruits of their work in the tourism industry. Perhaps it may also justify why foreigners and any of their foreign employees may own shares on their employers' equity and participate in their profits while the Cubans are not themselves allowed to do so. It seems that the Helms-Burton Law is used as an argument to perpetrate this inequity.

In a recent paper regarding the economic impact of tourism in Cuba,¹ the author calculates that Cuba was losing several million dollars each day of economic impact by continuing their obsolete system where "socialist state property and resources belonging to the people" are not owned by the Cuban peo-

ple themselves, but only by the Cuban Government as a whole.

The Cuban Liberty Act has also been used by foreign companies to justify their declining interest in continuing to pursue doing business in Cuba.

Some that have tried have been discouraged by the great bureaucracy and the requirement that they prepare and submit hundreds of pages with worthless information that few read and fewer understand, have decided that they cannot afford to expend more time and money pursuing doing business in Cuba. It has been reported that such are the cases, in the hospitality industry, of Occidental Hotels, Paradores Nacionales and Thomson Vacations.

FUTURE EFFECT ON CUBAN TOURISM

The Effect on the Tourist

The great majority of tourists pouring into Cuban beaches and tourism centers are lured from their place of origin, mainly Canada, Mexico, Europe and South America, by attractive, glossy literature offering packages of 7-14 days at very reasonable prices. In some cases, the cost to the tourist is lower than similar package offered by destinations closer to home and even in locations a few hours driving time from their place of residence. Most of the tourists are not aware of the ongoing politics and are just looking for a reasonably-priced vacation on a beach with good climate and where they can rest with a cool drink in hand.

The recent acts of sabotage—in the form of explosions at several tourism hotels—caused a temporary scare that will probably fade in the near future. No significant number of cancellations has been noticed in the existing arrangements. The events will probably pass and will be forgotten as almost all the events in the world are, except by those who witnessed them or suffered their consequences. However if these explosions continue and become frequent and routine, then this is a factor that will likely adversely impact tourism in Cuba.

1. Nicolás Crespo and Santos Negrón Díaz, "Cuban Tourism in 2007: Economic Impact," in this volume.

Effect on Investors/Operators of Tourism Properties

Friends and foes of the Cuban Liberty Act have made extraordinary efforts to exaggerate its consequences or effects. The rhetoric used by friendly and unfriendly politicians and media in Europe, Latin America, and even in the United States and Cuba, distort, through their interpretation, the real extent of the law.

Important investors from Canada and Europe, mainly Spain and Italy, are presently involved in joint ventures, management agreements and other contractual relations in Cuba. They are taking the position that, in spite of the risk that the law might represent, for them it is good business sense to continue operating and investing in tourism in Cuba. Some of the countries have even enacted laws (anti-Helms-Burton legislation) that are intended to protect their nationals against the effect of the Cuban Liberty Act. An area of great concern, however, is the matter of entry visas into the United States that may affect some of the top executives.

In our considered view, the opportunities around the world are so great in the tourism industry, particularly in Asia and South America, that for large conglomerates or hotel chains the Cuban Liberty Act has created a nuisance if they wish to continue to be involved in Cuba. The time and resources necessary to do so do not compensate the potential legal repercussions that might affect the foreign investor. Nevertheless, most companies keep abreast of the Cuban situation through third country nationals and sometimes participating in fully hosted visits which do not violate U.S. law.

In a few cases, some politicians have exerted pressure on some European hotel chains to start or maintain a presence in Cuba and make announcements of upcoming investments in the island. Statistics compiled by U.S.-Cuba Trade and Economic Council from the media, other public sources, and discussions with company representatives, non-Cuban government officials, and Cuba-based enterprise managers and government officials indicate that of \$5.5 billion of new investments promised by companies in 25 countries, only \$736.9 million has actually been invested

in Cuba. Mexico, Canada, Spain and Italy account for \$562 million or 76 percent of the amount invested. So other countries appear to be insignificant investors in Cuba. Moreover, these figures refer to all types of investments and sectors of the economy, not just in the tourism industry.

Effect on the Non-Investor/Operator of Tourism Properties

Foreign companies operating under management and marketing contracts are responsible for the bulk of incoming tourism into Cuba. They make money by bringing plane loads of tourists who have bought prepaid packages in their country of origin. The printed literature and brochures are very attractive and eye-catching. They make and sell their own vacation packages or market them through Travel Agents and Wholesalers all over the world. Several major wholesalers are involved in Cuba, and Cuba depends substantially on them to market its tourism products.

As it happens in other markets, the wholesalers prefer Havana and Varadero destinations because they are easier to sell. The other destinations experience lower demand because they are not well known. Wholesalers have demanded higher commissions in order to promote and sell the less popular destinations. Parallel promotion is provided by the Ministry of Tourism and the several hotel holding companies, such as Cubanacán, Horizontes, etc. The quality of the printed material is also very good and the prices of the packages that include air transportation in Cuban Airlines are even more attractive.

In our view, the activity of the wholesalers does not seem to be affected by the Cuban Liberty Act, which does not explicitly bar the conduct of business with Cuba, but only that business which constitutes trafficking in confiscated property. Many of the same wholesalers operate also within the United States, although U.S. wholesalers are not permitted to operate in Cuba, at least directly.

Effect on Outside Operators, Travel Agencies, Consolidators, Wholesalers, Suppliers

It is the nature of the travel and tourism industries that it requires the formation of alliances, joint ventures and other type of arrangements for a more ef-

fective delivery of the product to the foreign purchaser of tourism services. Selling a service to a client may involved the participation of a string of persons and companies that perform the delivery of individual components of the service. Few worldwide organizations can afford to have an integrated organization of agents around the world who deliver all of the land services demanded and subsequently purchased by their clients.

Within the complexity of this web of persons and companies it is probable that a U.S. company may indirectly benefit from a tourism activity in Cuba. A U.S. company is not allowed to sell an airline ticket for traveling to Cuba, sell a vacation package to a resort in Cuba, or make reservations for hotels in Cuba unless licensed by the State Department. However, a U.S. company may have an equity interest in a foreign operator, agency, etc., and an agreement to deliver services in other parts of the world. The foreign operator, agency, etc., may operate in Cuba and funnel a corresponding share of its profits to the U.S. company. We are informed that it is legal if the U.S. company does not have control of the foreign operator and the foreign operator's business in Cuba does not represent a substantial portion of the parents organization's overall business.

A foreign non-U.S. supplier of products and materials to Cuba, who manufactures its own products or those of others that are not manufactured in the United States, has no problems with the Cuban Liberty Act even if it exports products to the United States. Jobbers, brokers, and suppliers who acquire products produced or licensed in the United States may encounter difficulties under U.S. law, however.

The quasi-clandestine method that Cuba employs to obtain products and materials demanded by foreign visitors has a further negative impact on the cost of delivering the tourism product. Reliable supplies are hard to obtain and sometimes only at a higher relative cost than would be available in a normally competing market. In addition, this erodes Cuba's reserves of foreign currency. Cuba is making great efforts to develop small industries to manufacture products to substitute for imports and reduce the leakage of hard currency. About \$200 million has been earmarked for this purpose. Several joint ventures made with foreign companies are yet to produce results, however.

SUMMARY

Cuba's insistence in depriving the Cuban people of the opportunity to operate in a free environment may have an impact on future generations, through an effect economists refer to as the "Bangladesh Syndrome," which is a systematic and continuous impoverishment of the people and its means of subsistence. Nevertheless, Cuba appears to be succeeding in its growth strategy thanks to the concentration of resources and efforts in this single segment of the economy, while the Cuban government is counting on it as the salvation of the regime. This strategy may, in fact, succeed unless social unrest in Cuba expands and the *espíritu de un buen revolucionario* fades away by the pressures of hunger and deprivation and the realization by the Cuban people that they face a double standard rather than an egalitarian system. Moreover, many in Cuba can see all the fruits of a free society, particularly as travel increases in Cuba and there are more foreign visitors.