

2 de Julio de 1998

Re: Estado Actual de la Implementación de la "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996" y Posibles Efectos del Acuerdo EE.UU./U.E. de Mayo de 1998

A. INTRODUCCION

Como es bien sabido, el presidente norteamericano Bill Clinton firmó y puso en vigor el 12 de marzo de 1996 la llamada "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996," también conocida como la "Ley Helms-Burton" en referencia a sus principales proponentes en el Senado y la Cámara de Representantes. Este reporte tiene como fin resumir el estado actual de implementación de la Ley Helms-Burton por el gobierno norteamericano y discutir los posibles acuerdos ultimados el pasado 18 de mayo de 1998 entre los EE.UU. y la Unión Europea (UE) con respecto a la aplicación de dicha ley a los ciudadanos de las naciones de la comunidad europea. Se asume que el lector está al tanto de los detalles de la Ley Helms-Burton; de no ser así, el autor recomienda que se estudie el trabajo por él preparado el 18 de abril de 1996 analizando la legislación, copia del cual se adjunta como Anexo A.

Es importante destacar de entrada que el poder ejecutivo norteamericano se opuso vigorosamente a la Ley Helms-Burton cuando el anteproyecto de ley estaba en vía de consideración por el Congreso. Sin embargo, el clima político que creó el derribo de dos aviones civiles piloteados por exilados cubanos por la fuerza aérea de Cuba el 24 de febrero de 1996 causó que el presidente decidiera apoyar la legislación.¹ El presidente obtuvo como concesión única del congreso la facultad de mantener en suspenso por períodos consecutivos de seis meses la entrada en vigor de la facultad que el Título III de la ley le otorga a individuos y entidades norteamericanas cuyas propiedades en la isla fueron expropiadas por el gobierno de Cuba la facultad de plantear demandas judiciales en los tribunales norteamericanos contra ciudadanos de terceros países que "trafiquen" (un término de acepción extremadamente amplia) en dichas propiedades. Esta facultad se extiende también a individuos que, aunque ciudadanos de otros países en el momento de la expropiación, son ahora ciudadanos norteamericanos.

B. ESTADO ACTUAL DE LA IMPLEMENTACION DE LA LEY

¹ Al firmar la ley, el presidente manifestó que la misma era una "respuesta justificada" al derribo de los aviones. Declaración Presidencial, 12 de marzo de 1996.

Denotando en parte la falta de convicción del poder ejecutivo sobre los méritos de la Ley Helms-Burton, el presidente ha hecho uso repetidamente de su autorización a mantener en suspenso la habilidad de plantear demandas bajo el Título III² y ha anunciado su intención de continuar haciéndolo hasta el fin de su gestión presidencial en enero de 2,001. Como justificación parcial de sus acciones, el presidente se ha referido repetidas veces a los esfuerzos de la comunidad internacional en presionar a Cuba para que adopte reformas hacia la democracia.³ Las iniciativas de la UE han sido señaladas como un aspecto principal de las gestiones internacionales en ese sentido.⁴

El Título IV de la Ley Helms-Burton requiere a las dependencias del gobierno norteamericano (particularmente el Departamento de Estado y las oficinas de Inmigración) que impidan la entrada a los Estados Unidos a los altos funcionarios, directores, accionistas principales, o propietarios de empresas de terceros países que "trafiquen" en propiedades confiscadas a ciudadanos norteamericanos en Cuba; la prohibición de ingresar al país se extiende también a los cónyuges e hijos menores de edad de tales personas, así como a los "agentes" (entendiéndose quizás a los abogados, contadores, representantes legales, etc.) de tales personas. A diferencia del Título III, el Título IV ha estado en efecto desde que la Ley Helms-Burton entró en vigor, y el poder ejecutivo--especialmente el Departamento de Estado--está obligado legalmente a implementarlo, sin tener ninguna potestad para desviarse de sus requerimientos.

A pesar de los requisitos legales, la implementación del Título IV hasta la fecha ha sido escasa (en términos del número de firmas afectadas) y muy selectiva. En más de dos años de vigencia de la ley, a sólo tres empresas de las muchas haciendo negocios en Cuba se le han aplicado sanciones: la empresa minera canadiense Sherritt International; la compañía de comunicaciones mexicana Grupo Doms; y la empresa Grupo BM, una empresa de Israel dedicada a transacciones en bienes raíces. Ninguna compañía europea ha sido sancionada o ni siquiera amenazada con sanciones. Esto es interesante porque ha habido casos en que hubiera sido lógico esperar que empresas europeas fueran sancionadas dado su bien sabida participación en negocios que involucraban a propiedades confiscadas. El caso más notorio de esta situación

² Véase Declaración Presidencial, 16 de julio de 1996; Declaración Presidencial, 3 de enero de 1997; Declaración Presidencial, 16 de julio de 1997; Declaración Presidencial, 16 de enero de 1998.

³ Por ejemplo, en su declaración más reciente suspendiendo el inicio de las demandas judiciales, el presidente manifestó : "I said last January and reaffirmed last July that I expected to continue suspending this provision of the LIBERTAD Act so long as our friends and allies continue their stepped-up efforts to promote a democratic transition in Cuba." Declaración Presidencial, 16 de enero de 1998.

⁴ "The European Union (EU) has reaffirmed its historic Common Position that, consistent with Europe's traditional democratic values, binds the 15 member nations to promote human rights and democracy in Cuba. The EU and its member states have strongly urged the Cuban government to release imprisoned dissidents and stop the harassment of those who seek peaceful democratic change. Recently, they have gone further and created an EU Working Group on Human Rights among their embassies in Havana. This will help coordinate the EU's human rights efforts in Cuba." *Id.*

es el de Stet, la empresa italiana de telecomunicaciones que estaba en sociedad con Grupo Domos en la inversión en la compañía de teléfonos de Cuba. Es injustificable desde todo punto de vista el haberle impuesto sanciones bajo el Título IV a Grupo Domos y no a Stet.

En resumen, la aplicación del Título IV de la ley Helms-Burton es un proceso arbitrario y altamente político. Más allá de toda consideración de tipo legal, los principales factores que han influido las decisiones tomadas en el proceso han sido por una parte las presiones ejercidas por ciertos miembros del Congreso en el poder ejecutivo hacia una aplicación más diligente de la ley, y por otra parte el acto de malabarista del Departamento de Estado que intenta limitar lo más posible las dificultades internacionales que la aplicación de la ley le crea al gobierno norteamericano sin sufrir demasiadas consecuencias políticas dentro del país.

C. INFLUENCIA DEL ACUERDO EE.UU. - UE EN LA FUTURA APLICACIÓN DE LA LEY

ANEXO "A"

April 18, 1996

Re: Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996

On March 5, 1996 the U.S. Senate passed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the "Act") by a vote of 74 to 22. The House of Representatives passed the Act by a vote of 336 to 86 the following day. Despite having expressed in the past strong reservations about the Act, President Clinton signed it into law on March 12, 1996.

The Act contains provisions that should be of concern to most non-U.S. companies that engage in any kind of business transactions in Cuba. As summarized below, the Act, inter alia, authorizes a private right of action against persons who "traffic" in confiscated U.S. property in Cuba and requires the exclusion from entry into the United States of such persons, their agents, and the members of their immediate family. If the person is a corporate entity, its officers, principals, and controlling shareholders are excludable.

1. Financing Provision

Section 103(a) of the Act prohibits any "United States national, a permanent resident alien, or a United States agency" from knowingly extending any "loan, credit, or other financing" to any person for the purpose of "financing transactions involving any confiscated property the claim to which is owned by a United States national as of the date of enactment of this Act." This section defines a particular type of property in Cuba, i.e., "confiscated property" which, on the date of enactment of the Act, was subject to "a claim owned by a United States national." Some of the terms involved in this definition are further defined in the Act, but others are not.

Section 4(4) defines "confiscated" to include "the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of the property, on or after January 1, 1959 -- (i) without the property having being returned or adequate and effective compensation provided; or (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure." Section 4(12) defines property as "any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." A

United States national, according to Section 4(15), is "any United States citizen," or "any other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has its principal place of business in the United States."

The Act, however, does not define what constitutes a "claim" or what it means to "own" such a claim. Because of this lack of definition, lending institutions to which Section 103(a) may apply will need to develop means for determining whether any property in Cuba that might in the future be involved in one of their lending transactions was subject, on the date of enactment of the Act, to an expropriation claim by a U.S. national. If the property at issue is included in one of the expropriation claims certified by the FCSC under the Cuban Claims Program, the determination by the lending institution is relatively straightforward. However, there are potentially hundreds of thousands of individuals who were not U.S. nationals when their properties were seized by the Cuban Government and who therefore did not qualify for certification by the FCSC under the Cuban claims program, for the program was only open to those who were U.S. nationals at the time their properties were expropriated. Those uncertified claimants have never had the opportunity to assert their claims in a public forum and their identity is not generally known. If those individuals are deemed to "own claims" to these properties as of the date of enactment of the Act, then any property in Cuba could be subject to an undisclosed expropriation claim by a United States national.

U.S. lending institutions are prohibited from "knowingly" extending credit for transactions involving expropriated property in Cuba as to which a U.S. national owns a claim. The requisite degree of knowledge is not defined in the statute, but could come directly from the claimant or through official notice from U.S. government agencies. The notice can also probably be imputed to the lender if, through the exercise of reasonable diligence, it could have ascertained the existence of an expropriation claim against the property.

Because the lack of specificity and broad reach of the lending prohibition, U.S. financial institution may adopt a conservative approach and either impose detailed documentation requirements on foreign borrowers who do business in Cuba, or may even deny them credit altogether, even for non-Cuba related transactions. Non-U.S. parties doing business in Cuba may therefore experience difficulties in raising capital from U.S. sources.

2. Trafficking in Confiscated U.S. Property in Cuba

Title III of the Act establishes a private right of action by any U.S. national (including a person who became a U.S. citizen after the expropriation occurred) in U.S. courts against any third-country national who "traffics" in the plaintiff's confiscated property in Cuba after the end of the three-month

period following the effective date of the Act. The Act divides the universe of U.S. nationals who could take advantage of the civil right of action provisions into three categories of parties. *First*, there are the individuals and entities whose claims were certified by the FCSC

under the Cuban Claims program. *Second*, there are the U.S. nationals who were not eligible to file claims under the Cuban Claims program. *Third*, there are the individuals and entities who were eligible to file claims under the Cuban Claims program but failed to do so, or who filed claims and had them turned down by the FCSC. Each will be addressed separately below.

The discussion that follows assumes that there is property in Cuba that falls under the above discussed definition of "confiscated property," and that the activities of the third-country national would fall under the very broad definition of "trafficking" in such property. Section 4(13) of the Act states that a person "traffics" in confiscated property if "that person knowingly and intentionally --"

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,

(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property. The definition excludes residential property unless it is subject to a claim certified by the FCSC or is occupied by an official of the Cuban government or ruling party. The Act exempts from the definition of trafficking, *inter alia*, the trading or holding of securities which are publicly traded or held unless the activity is by or with a Cuban person or entity on the Office of Foreign Assets Control's Specially Designated Nationals List.

a. Certified claimants

The Act makes it very easy for a certified claimant to sue and obtain a judgment against a third-country national trafficking in confiscated property in Cuba. A certified claimant has the right, under Section 302(a) of the Act, to bring a civil action for damages in a United States federal court against "any person" who, after the end of a 3-month period beginning on the effective date of Title III of the Act, "traffics in property that was confiscated by the Cuban Government on or after January 1, 1959" to which the plaintiff has a certified claim.

There are, however, several time periods that restrain this right of action. *First*, Title III does not become effective

until August 1, 1996. (Section 306(a).) *Second*, the statute provides a three-month waiting period after Title III becomes effective in which no liability attaches to conduct that would otherwise be considered "trafficking." *Third*, the President has authority to suspend the effective date of Title III for discrete six-month periods if the President "determines and reports

in writing to the appropriate congressional committees at least 15 days before such effective date that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." (Section 306(b)(1).) This suspension may be applied for consecutive periods before Title III goes into effect (Section 306(b)(2)), or may be imposed after Title III is allowed to become effective (Section 306(c)). The President can also, at any time, rescind any suspension of the applicability of Title III by "reporting to the appropriate committees that doing so will expedite a transition to democracy in Cuba." There is no clear guidance as of this writing on whether President Clinton intends to invoke the authority granted by the statute.

Utilization of this authority by the President may leave the ability of certified U.S. claimants to bring action against a foreign national in suspense for an indefinite period. At a minimum, a certified claimant cannot bring a civil action against a foreign party before November 1, 1996, assuming the foreign party is "trafficking" in confiscated property in Cuba at that time. The November 1, 1996 accrual date would be extended by any period during which a Presidential suspension is in effect. However, a foreign party who may be subject to suits by certified U.S. claimants cannot rely on Presidential suspensions, for they can be revoked without notice.

Once a suit is instituted, the certified claimant can recover from the defendant three times the greater of (1) the amount certified to the claimant by the FCSC plus interest, or (2) the fair market value of the property (calculated as either the current value of the property, or the value of the property when confiscated, plus interest). (Section 302(a)(3).) The claimant can also recover "court costs and reasonable attorneys fees." (Section 302(a)(1).) There is a presumption in favor of the amount certified by the FCSC as the value of the property for purposes of recovery; such a presumption can be rebutted by "clear and convincing evidence" that the fair market value is the appropriate amount of liability. (Section 302 (a)(2).)

The right of action by certified claimants is not limited to the parties who were certified as claimants initially but extends to any U.S. national "who acquires ownership of the claim before" the date of enactment of the Act. (Section 302(a)(4).) Thus, if any certified claimant has assigned ownership of its claim to a third party before the date of enactment, that third party -- if a U.S. national -- can bring an action in place of the certified claimant.

Suits by certified claimants against third parties are subject to a \$50,000 floor on the amount in controversy; that floor is computed on the principal value of the claim "exclusive of interest, costs, and attorneys' fees." (Section 302(b).) This section has a built-in inconsistency, because on the one hand it defines the \$50,000 minimum claim to be "exclusive of interest," but on the other it states that "[i]n calculating \$50,000 for purposes of the preceding sentence, the applicable amount under subclause (I), (II), or (III) of subsection (a)(1)(A)(i) may not be tripled as provided in subsection (a)(3)." The latter sentence, referring as it does to the amount computed under subclauses (I), (II), and (III), implies that interest is to be included in the computation.

Another limitation on the ability of certified claimants to sue is a two-year statute of limitations. Actions under Title III may not be brought more than two years after the trafficking giving rise to the action has ceased. (Section 305.)

Subject to these limitations, the Act imposes strict liability on third parties held to be trafficking in confiscated properties in Cuba against which plaintiff holds a certified claim. Assuming jurisdiction can be asserted over the defendant under the rules of United States courts, all that the plaintiff needs to establish to prove liability is that the defendant was "trafficking" in the properties at issue after plaintiff's right of action accrued under the statute, and that the last act of trafficking occurred two years or less before the initiation of the action. With regard to damages, the plaintiff can recover costs, attorneys fees and three times either the certified amount of the claim or the fair market value of the property, if it can establish that the latter is appropriate.

b. Parties who could have been certified but failed to secure a certification

The statute as enacted explicitly limits the ability of two types of potential claimants to bring civil suits under Title III: U.S. nationals who were eligible to file a claim with the FCSC under the Cuban Claims Program but failed to do so, and U.S. nationals who filed a claim with the FCSC but had their claim denied. The first type of claimant is barred altogether from bringing an action under Title III. (Section 302(a)(5)(A).) The second type of claimant is not precluded from bringing a court action against a third country national, but "the court shall accept the findings of the Commission on the claim as conclusive in the action under this section." (Section 302(a)(5)(B).) Presumably, this second type of claimant can bring an action but would have to submit additional evidence beyond that determined by the FCSC to be insufficient to prove ownership of the property in question or the amount of the loss sustained.

c. Newly identified claimants

The Act allows U.S. nationals who were not eligible to file an expropriation claim with the FCSC under the Cuban Claims Program to bring an action for damages against third-country nationals "trafficking" on the properties that were confiscated

from them by the Cuban Government. However, such actions would be subject to the conditions and limitations discussed above for certified claimants, plus the following ones:

i. The action may not be filed "before the end of the 2-year period beginning on the date of enactment of this Act." (Section 302(a)(5)(C).) This period would replace the three-month wait period applicable to certified claimants, and would be independent of any suspensions in the effective date of Title III imposed by the President. Thus, subject to successive Presidential suspensions of the right to sue, the earliest date in which actions could be brought by non-certified U.S. nationals would be mid-March 1998. At the same time, liability

by third country nationals for conduct constituting trafficking would accrue "at the end of the 3-month period beginning on the effective date" of Title III, a date that could be as early as November 1, 1996 but could be later depending on whether the President suspends the effective date of Title III. In other words, any conduct constituting "trafficking" after November 1, 1996 - or a later date, if the effective date of Title III is suspended -- could make a third-country national liable to a suit in March 1998 or thereafter by a U.S. claimant "owning" the claim to the property.

ii. In an action by a non-certified U.S. claimant, the plaintiff would have to establish ownership of the property in question and the amount of the claim. The Act allows the court to appoint a special master, "including the Foreign Claims Settlement Commission," to make determinations regarding the amount and ownership of the claim. (Section 303(a)(2).) Such determinations would not constitute certifications for purposes of the Cuban Claims Program.

iii. A non-certified U.S. claimant is not entitled to recover treble damages from a third country defendant unless, after the 3-month period following the effective date of the Act, it gives notice of its claim to the foreign national trafficking in the property at issue. (Section 302(a)(3)(B).) If the party so notified continues to traffic thirty days after receiving the notice, then the U.S. claimant can recover treble damages in its action against the foreign party. Again, assuming for example that the effective date of the Act is August 1, 1996, a non-certified U.S. claimant could give notice after November 1, 1996 of its claim to the potential defendant; thirty days after receiving such notice (i.e., as early as December 1, 1996) the foreign party could become liable to the claimant for treble damages, although as noted above a lawsuit could not be instituted until March 1998.

The possibility of recovering treble damages should be a strong incentive for a potential non-certified claimant to reveal himself early in the process, perhaps as early as November 1, 1996. Such disclosure would also serve to satisfy the requirement that the foreign party engage in the activities constituting trafficking "knowingly and intentionally," for

absent such a disclosure it would be difficult for the plaintiff to establish that the foreign party had knowledge of the existence of a claim.

3. Exclusion of Aliens

The immigration exclusions in Title IV of the Act are very broad in the categories of people to which they apply, the timing of the sanctions, and the conduct that brings about the exclusion. By contrast with the Title III provisions, which do not become effective until August 1, 1996 (at the earliest) and do not lead to liability for three additional months after that date, the exclusions in Title IV are triggered by conduct taking place immediately "after the date of enactment of the Act." The conduct includes trafficking in confiscated property, "a claim to which is owned by a United States national;" being a corporate officer, principal, or shareholder with a controlling interest in an entity that has been involved in trafficking in confiscated

properties; or being a spouse, minor child, or agent of an excludable person under Title IV. (Section 401(a)(2) through (a)(4).)

Trafficking occurs, for purposes of Title IV, if a person "knowingly and intentionally" transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property; purchases, receives, obtains control of, or otherwise acquires confiscated property; improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after the date of enactment of the Act to manage, lease, possess, use or hold an interest in confiscated property; enters into a commercial arrangement using or otherwise benefiting from confiscated property; or causes, directs, participates in, or profits from, trafficking by another person, or otherwise engages in trafficking through another person, without the authorization of the U.S. national who holds a claim to the property.

In order for the immigration exclusion to take effect, a foreign national would need to "knowingly and intentionally" engage in the proscribed activities. It is difficult to see how a third-country entity could engage "knowingly and intentionally" in any conduct constituting trafficking if the confiscated property at issue is subject to a claim by a non-certified claimant whose identity and status have not been previously revealed. Therefore, the risks to a third-country national doing business in Cuba of exclusion from the U.S. on account of Section 401(a) would materialize only when the existence of U.S. nationals with expropriation claims against the property in question was revealed, or if the property was covered by a claim certified by the FCSC.

Title IV authorizes the Secretary of State to permit individuals subject to its prohibitions to enter the United States on a case-by-case basis for medical reasons or "for the purposes of litigation of an action under Title III." Unlike Title III, Title IV does not contain a provision which allows the

President to waive its requirements in the national interest. In addition, there is no provision in the Act which authorizes removal of a bar against entry into the United States once an individual has been deemed to be excluded.

Although Title IV contains a mandatory visa denial requirement, it appears to require that the Secretary of State make an affirmative determination that the person to be excluded has been involved in "trafficking" in confiscated property subject to a claim by a U.S. national. It is unclear from the text of the Act on what bases the Secretary would be able to make such a determination, or whether the Secretary would need to automatically make such determination based on the outcome of a Title III court proceeding.

As of mid-April 1996, the State Department was in the process of finalizing an initial list of "traffickers" to be excluded from the U.S. pursuant to Title IV. It is unclear whether such a determination, if made, can be appealed or otherwise reversed by the affected party.

4. Other Provisions

The Act contains a number of other provisions that do not affect directly the business community but which are generally intended to tighten the trade embargo against Cuba and set specific conditions for the embargo to be lifted or modified. The most significant of these provisions is Section 102(h) in Title I, which codifies all existing laws and regulations imposing an embargo on Cuba. The codification of all the embargo legislation, executive orders, and regulations means that Congressional approval will be required before the embargo can be modified or re-interpreted. This section is likely to have a dramatic impact on the way in which the U.S. reacts to events on the island, for it imposes considerable restrictions on the President's ability to take executive action with respect to Cuba.

Title II of the Act stipulates that the President can only provide assistance to a transition government in Cuba when that government has fulfilled eight specified requirements. In order for the President to provide aid to a democratic government in Cuba, such government must meet six additional requirements. Any assistance to be given to Cuba would be "subject to an authorization of appropriations and subject to the availability of appropriations." Thus, no particular level of aid is guaranteed to a transition government in Cuba, and whatever assistance is actually given will depend on the political and economic circumstances in both countries at the time.

Matias F. Travieso-Diaz
Shaw, Pittman, Potts & Trowbridge
Washington, D.C.
U.S.A.