

1-1-1996

# The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: An Initial Analysis

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## Recommended Citation

Saturnino E. Lucio II, *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: An Initial Analysis*, 27 U. Miami Inter-Am. L. Rev. 325 (1996)

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# THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996: AN INITIAL ANALYSIS

SATURNINO E. LUCIO, II\*

I. INTRODUCTION .....	326
II. CODIFICATION OF ECONOMIC EMBARGO AGAINST CUBA .....	327
III. PROTECTION OF PROPERTY RIGHTS OF U.S. NATIONALS .....	328
IV. EXCLUSION FROM THE UNITED STATES OF FOREIGN PERSONS WHO TRAFFIC IN CONFISCATED PROPERTY OF A U.S. NATIONAL .....	336
V. PROHIBITION ON INDIRECT FINANCING OF CUBA .....	338
VI. PROHIBITION ON ASSISTANCE TO COUNTRIES AND INTERNATIONAL ORGANIZATIONS WHICH PROVIDE ASSISTANCE TO CUBA .....	339
VII. MISCELLANEOUS .....	340
VIII. SUMMARY .....	340

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## I. INTRODUCTION

Whether one agrees or disagrees with the purpose, provisions, or probable consequences of the newly-enacted Cuban Liberty and Democratic Solidarity Act<sup>1</sup> (Cuban Liberty Act) is beside the point.<sup>2</sup> 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.<sup>3</sup> The substantial support for the Cuban Liberty Act makes it highly unlikely that 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 recent attack by Cuban warplanes of two small civilian aircraft piloted by "Brothers to the Rescue," a Miami-based humanitarian organization.<sup>4</sup> This incident appears to have triggered the overwhelming congressional support for the Cuban Liberty Act, signaled by the dropping of objections previously raised by the Clinton Administration. While a discussion of these political matters would surely make fascinating reading, that is not the purpose of this Article. Rather, this Article will focus on the key provisions of the Cuban Liberty Act affecting those persons and companies currently doing business in Cuba or considering doing so.

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1. The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, Pub. L. No. 104-114, 110 Stat. 785 (1996) [hereinafter Cuban Liberty Act].

2. For a criticism of the U.S. embargo of Cuba, see Eduardo Galeano on the Internet at: (<http://spin.com.mx/%7Ehvelarde/Galeano/pesares.html>). For a decidedly contrary view, see the article written by Adolfo Leyva de Varona which can be found at: ([http://www.canfnet.org/canf-lib/embg\\_eng.txt](http://www.canfnet.org/canf-lib/embg_eng.txt)).

3. The Helms-Burton bill (HR927), which became the Cuban Liberty and Democratic Solidarity Act, was approved by the U.S. Senate on March 5, 1996 by a vote of 74-22 and was approved by the House of Representatives the next day by a similar overwhelming vote of 336-86. See 142 CONG. REC. S1511 (daily ed. March 5, 1996); see also 142 CONG. REC. H1749 (daily ed. March 6, 1996).

4. Cuban Liberty Act § 116.

## II. CODIFICATION OF ECONOMIC EMBARGO AGAINST CUBA

Prior to the adoption of the Cuban Liberty Act, the U.S. economic embargo against Cuba was largely a creature of executive orders promulgated by past Presidents ranging from John F. Kennedy to Bill Clinton.<sup>5</sup> Section 102(h) of the Act codifies into law all of the restrictions in effect as of March 1, 1996, subject to Section 204. This means that all prior restrictions, imposed at the discretion of past U.S. Presidents, now become settled legislation which can be revoked only with congressional consent or a judicial declaration of unconstitutionality.

Under Section 204(a), the President can take steps to suspend all or part of the economic embargo against Cuba (after consultation with the Congress) "to the extent that such steps contribute to a stable foundation for a democratically elected government in Cuba," but if Congress subsequently disapproves of such actions, then the "action of the President under [Section 204(a)] . . . shall cease to be effective upon the enactment of a joint resolution [of Congress] . . ."<sup>6</sup> Thus, although the President appears to maintain his executive power to impose additional limitations or sanctions on doing business with Cuba, he may not permanently relax the embargo rules in effect as of March 1, 1996 unless he consults Congress and they do not subsequently disapprove.<sup>7</sup>

Since the Cuban Liberty Act codifies the present restrictions on doing business with Cuba, all of the restrictions which existed as of March 1, 1996, including the Cuban Assets Control Regulations,<sup>8</sup> continue in effect except to the extent that they

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5. The embargo of Cuba began on February 3, 1962, and the Cuban Assets Control Regulations, 31 C.F.R. § 515.101-901 (1996), were promulgated by the Treasury Department the following year pursuant to the Trading with the Enemy Act of 1917, 50 App. U.S.C.A. § 1.

6. Cuban Liberty Act § 204(e)(1).

7. The President can begin to relax the sanctions against Cuba only in the event there is a "democratically elected government in Cuba," as defined under § 206, or a "transitional government," as defined by § 205. § 201 then specifies what U.S. policy should be towards a transitional or democratically elected government in Cuba and § 202 specifies the types of assistance that could be made available to Cuba in such event.

8. 31 C.F.R. § 515.101-901 (1996). A good overview of the Cuban Assets Control Regulations is provided by the Office of Foreign Assets Control of the U.S. Treasury Department and is available for downloading on the Internet at: (go-

are inconsistent with the provisions of the Cuban Liberty Act. For instance, if the President desires to reinstitute the right of former Cuban nationals to make family remittances or to travel to Cuba, the Cuban Liberty Act provides that the President "should" insist on certain prior reforms occurring within Cuba.<sup>9</sup>

### III. PROTECTION OF PROPERTY RIGHTS OF U.S. NATIONALS

As is evident from many of the comments made prior to and following the adoption of the Cuban Liberty Act, the clause regarding the protection of the property rights of U.S. nationals has been controversial.<sup>10</sup> Recently, statements have been made by a number of persons ranging from the belief that this provision will unleash a massive flood of litigation in the United States and that it encroaches upon the sovereignty of other countries such as Mexico and Canada, to the belief that the impact of this provision will affect only a few companies and is being thoroughly exaggerated by critics of the Cuban Liberty Act.<sup>11</sup>

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 a U.S. federal court.<sup>12</sup> This provision of the Cuban Liberty Act takes effect on August 1, 1996, unless its operation is suspended for a six (6) month period by

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pher:/una.hh.lib.umich.edu:70/00/ebb/fac/cuba.fac). Any interested person can also contact the Office of Foreign Assets Control in Washington D.C. at telephone #(202) 622-2520. As of the date of this writing, the overview of the Cuban Assets Control Regulations needed to be updated to take into account the changes to the law brought by recent executive orders of President Clinton as well as by the provisions of the Cuban Liberty Act.

9. Cuban Liberty Act § 112.

10. See David Adams, *New Law Fuels Hope of Recovering Losses in Cuba*, ST. PETERSBURG TIMES, Mar. 14, 1996, at A1; *House Sends Cuba Economic Sanctions Bill to Clinton*, TAMPA TRIB., Mar. 7, 1996, at 2.

11. See, e.g., *Exiles Unlikely to Get Damages Any Time Soon*, MIAMI HERALD, March 6, 1996, at A15. The Secretary of State is required to report to Congress on or within six months from the date of the Cuban Liberty Act regarding an "estimate of the number and amount of claims to property confiscated by the Cuban Government," whether or not such claims have been previously certified by the Foreign Claims Settlement Commission [hereinafter FCSC]. See Cuban Liberty Act § 207. This report will probably serve as a "blueprint" for any claims which are later filed under the Cuban Liberty Act.

12. Cuban Liberty Act § 302.

the President.<sup>13</sup>

A "U.S. national" means: (i) any United States citizen; and (ii) any other legal entity organized under the laws of any part of the United States which has its principal place of business in the United States.<sup>14</sup> A U.S. national therefore includes any individual who is now a U.S. citizen, whether or not such person "qualified as a national of the United States . . . at the time of the action (e.g., the confiscation of property) by the Government of Cuba."<sup>15</sup> Consequently, the Cuban Liberty Act brings within its scope every individual who, although born in Cuba or in other countries at the time that the Castro Government came into power, has become a U.S. national. Significant differences exist, however, in the treatment of U.S. nationals who have obtained certified claims before the Foreign Claims Settlement Commission (FCSC)<sup>16</sup> and other U.S. nationals (e.g., Cuban exiles at the time of the confiscation who are now U.S. nationals). The former group of U.S. nationals may bring their actions at any time after August 1, 1996,<sup>17</sup> while the latter must wait two (2) years from the date of the enactment of the Cuban Liberty Act before filing in federal court.<sup>18</sup> Certified claimants also have priorities in recovering from any "pool" of judicially administered

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13. The President may suspend the effective date if he determines the suspension is "necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." See *id.* § 306. It has been reported that the effectiveness of this provision will be extended by the President at least once. *U.S. Seeks to Reassure Allies on Helms-Burton Law*, MIAMI HERALD, April 4, 1996, at A16.

14. Cuban Liberty Act § 4(15). Apparently, it does not matter if the U.S. national is an entity incorporated in the United States but is owned and controlled by foreign persons who have acquired the claims to property confiscated in Cuba in accordance with the provisions of the Cuban Liberty Act.

15. *Id.* § 303(b).

16. *Id.* Prior to the Cuban Liberty Act, claims could be filed only by persons who were U.S. nationals at the time of the confiscation by the Cuban government. § 302(a)(5) does not allow a claim to be filed under the Cuban Liberty Act if the U.S. national was eligible to file a claim with the FCSC but failed to do so in a timely fashion. Further, if the FCSC in fact considered and denied the claim, then the federal court "shall accept the findings of the Commission on the claim as conclusive of the action under this section." In essence, if someone was a U.S. national at the time of the confiscation, but either failed to file a claim or such claim, if filed, was denied, the Cuban Liberty Act offers no additional recourse. Hence, only U.S. nationals who have certified claims and U.S. nationals who were previously ineligible to file claims with the FCSC now have the right to commence actions in federal court to determine their rights under the Cuban Liberty Act.

17. This date may be extended by the President. *Id.* § 302(a)(5)(C).

18. *Id.* It is not clear whether this date for filing actions may also be extended by the President.

assets.<sup>19</sup> In addition, it appears that the latter group of claimants must provide thirty-day notice to the possible defendants pursuant to Section 302(a)(3)(B) if the claimants desire to sue for treble damages under Section 302(a)(3)(C).

The term "property" means any tangible and intangible property, including future and contingent rights, and encompasses everything ranging from real estate to intellectual property rights like patents and trademarks, but does not include, for purposes of Title III of the Cuban Liberty Act, "any real property used for residential purposes,"<sup>20</sup> with two exceptions.<sup>21</sup> The exceptions are for: (i) residential real property occupied by an official of the Cuban government or the ruling political party in Cuba ("Cuban Officials");<sup>22</sup> and (ii) residential real property the subject of a claim of a U.S. national which has already been certified by the FCSC.<sup>23</sup> Hence, in the case of Cuban exiles who are now considered U.S. nationals but were not eligible to file claims before the FCSC, they will not be able to sue for the loss of their former homes in Cuba if the occupants of these residential properties at the relevant time were persons other than Cuban Officials on the date of the enactment of the Cuban Liberty Act, even if Cuban officials occupy the property

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19. *Id.* § 302(f)(2)(B).

20. It is not clear what is meant by the term "real property used for residential purposes." The exclusion appears to be designed to avoid problems with Cuban nationals who reside in real properties owned by persons who have departed from Cuba (even if these persons are now U.S. nationals). The \$50,000 limitation is also intended to discourage small lawsuits involving relatively minor properties (particularly since accrued interest is disregarded for purposes of this calculation). It is not clear, for example, whether an agricultural property which is used for both residential and farming purposes would be considered residential real property. It is left for case law to determine whether the "residential" use must be a primary one, or whether it can be one of several uses of the real property.

21. Cuban Liberty Act § 4(12).

22. This term is defined to mean any member of the Council of Ministers, Council of State, central committee of the Communist Party of Cuba, or the Politburo of Cuba, or their equivalents. *See id.* § 4(10). Presumably, former members of these organizations or mere members of the Communist Party (who are not members of the central committee) or local neighborhood watch groups are not included within this definition. It is not clear what level of proof will be required to establish that a Cuban Official occupied certain residential real property. For instance, how can a claimant establish that the subject property was occupied on the date of the Cuban Liberty Act by a Cuban Official — with eyewitness testimony? The key date for determining the prohibited occupation appears to be the date of the enactment of the Cuban Liberty Act, not the date of the filing of the suit in federal court or some point thereafter. *See id.* § 4(12)(B)(ii).

23. *Id.* § 4(12).

at the time suit is brought.<sup>24</sup> No limitations exist on the size or value of the residential real property that is exempted from suit, except that any claims filed in federal court have to comply with the jurisdictional requirement that the "amount in controversy" be in excess of \$50,000, exclusive of accrued interest, costs, and attorney's fees.<sup>25</sup>

It is essential that the U.S. national filing the claim in federal court have ownership of the claim prior to the enactment of the Cuban Liberty Act, but it is not required that such ownership have existed at the time of the confiscation.<sup>26</sup> On the other hand, if the confiscation occurs after the date of the enactment of the Cuban Liberty Act, then a U.S. national may not acquire ownership of the claim by an assignment for value.<sup>27</sup>

"Confiscated" means the nationalization, expropriation, or other seizure by the Cuban government of ownership or control of any property on or after January 1, 1959:<sup>28</sup> (i) without the property being returned<sup>29</sup> or adequate or effective compensation

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24. For example, residential real property occupied by a foreign diplomat on the date of the enactment of the Cuban Liberty Act (or by any other person who does not come within the definition of Cuban Official, even if the property was leased or licensed from the Cuban government) could apparently not be the subject of any lawsuit in the United States, except where the claim of the U.S. national was previously certified by the FCSC.

25. See Cuban Liberty Act § 302(b). Treble damages are also not included in the calculation of the amount in controversy. It is open to question whether a "class action" by a group of U.S. nationals holding a number of minor claims, which in the aggregate exceed \$50,000, can commence a lawsuit pursuant to the Cuban Liberty Act. Further speculation of this issue is beyond the scope of this Article, but class action claims will probably fail to evade the threshold limitation contained in § 302(b).

26. *Id.* § 302(a)(4). The Cuban Liberty Act discusses the ownership of the "claim" regarding the confiscated property; a U.S. national could own a "claim" (e.g., by acquisition) even though he was not the original owner of the subject property. See *id.* § 302(a)(1).

27. The purpose of this restriction seems to be to limit speculation on claims; the federal courts are required to deny recognition to any claims which are traded after the date of the enactment of the Cuban Liberty Act. Presumably this would still allow the transfer of claims to U.S. nationals as a matter of inheritance, such as when a former holder of the claim has died and passes the claim to a U.S. national as part of a will or bequest.

28. Thus, the treatment of claims based on the confiscation of property by the government of Cuba prior to January 1, 1959, is not addressed by the Cuban Liberty Act.

29. This raises an interesting issue. Suppose the Cuban government were to opt to "return" the subject property to the U.S. national (admittedly a far-fetched supposition). Under present law, the U.S. national would be legally powerless to own or operate such property. In such case, do normal principles of adverse possession



being provided to the former owner of the property; (ii) or without having the claim settled pursuant to an international claims settlement procedure or other mutually accepted procedure for settling the claim;<sup>30</sup> or (iii) the default, failure to pay, or repudiation of any debt owed by the Cuban government relating to any property nationalized, expropriated or otherwise taken by the Cuban government or of any settlement obligation of the Cuban government in connection therewith.<sup>31</sup>

To "traffic" with respect to confiscated property of a U.S. national is a broadly defined term for purposes of Title III of the Cuban Liberty Act.<sup>32</sup> It includes a person who "knowingly and intentionally"<sup>33</sup> and "without the authorization of any U.S. national who holds a claim to the property."<sup>34</sup> (i) sells, transfers,

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begin to apply? That is, if the subject property is returned and the U.S. national is held at some point to forfeit his right to possess such property, will a foreign person who then deals with such property be exempt from suit under the Cuban Liberty Act?

30. The Cuban Liberty Act provides that a federal court may disregard any foreign or international finding, order, judgment, or decree that declares the value of, or invalidates a claim of a U.S. national, except where the declaration of value or invalidity of the claim occurred in binding arbitration to which the claimant or the United States submitted the claim. Cuban Liberty Act § 303(a)(3).

31. *Id.* § 4(4).

32. There is a different definition of "traffic" in § 401(b)(2) for purposes of the Title IV restrictions (which relate to the exclusion of foreign nationals from the United States). § 401(d)(2) provides that the definition of trafficking for Title IV purposes "applies only with respect to acts [which fall into the earlier definition of trafficking] . . . that occur on or after the date of the enactment of [the Cuban Liberty Act] . . ." The definition of trafficking under § 401(b)(2) also includes: (i) improving (other than for routine maintenance), investing (by contribution of funds or anything else of value), managing, leasing, possession, use or holding an interest in confiscated property; (ii) entering into a commercial arrangement using or otherwise benefitting from confiscated property; or (iii) causing, directing, participating in or profiting from any trafficking activities by another person.

33. The term "knowingly" is defined in § 4(9) of the Cuban Liberty Act as having "knowledge or having reason to know." The Cuban Liberty Act does not specify whether a foreign person desiring to conduct business in Cuba in the future must conduct any due diligence investigation itself or whether it can merely rely on assertions by the Cuban government that the business does not involve any property confiscated from a U.S. national.

34. It is not clear how the "authorization" of the current holder of the claim can be obtained, and whether or not implied consent concepts, abandonment, waivers, and the like can be imputed to the owner of a confiscated property. It may be possible for a foreign person who is amenable to suit for trafficking in confiscated property to acquire the claim from the U.S. national who owns such a claim, perhaps for a small portion of the value of the subject property. Problems are likely to arise where various persons, some of which may be U.S. nationals, hold claims to the same confiscated property, which begs the question whether the authorization of

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 benefitting from confiscated property; or (iv) causes, directs, participates in or profits from trafficking in confiscated property by or through another person.<sup>35</sup>

Certain kinds of transactions are exempted even though they may otherwise fall within the definition of "trafficking." These include the delivery of international telecommunications signals to Cuba;<sup>36</sup> the trading or holding of publicly traded securities (with some exceptions) that presumably are related to Cuba; transactions and uses of property incident to lawful travel to Cuba;<sup>37</sup> and transactions and uses of property by a person who is a citizen and resident of Cuba but is not a Cuban Official.<sup>38</sup>

Numerous limitations exist on this new "civil remedy," including the eight discussed below. 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.<sup>39</sup> In other words, past conduct by the persons involved in trafficking is immaterial.<sup>40</sup> Second, the amount in controversy

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any one such person is enough.

35. Cuban Liberty Act § 4(13).

36. The Cuban Liberty Act now explicitly prohibits investment by U.S. nationals in domestic telecommunication services in Cuba. See *id.* § 102(g), which was considered unclear under prior law.

37. This raises the question, for example, of whether or not staying at a hotel in Cuba which is located on confiscated property is permitted if it is "incident to lawful travel to Cuba" and such use of the property is "necessary to the conduct of such travel." In other words, must the person using the hotel have some obligation to stay at other hotels which are not confiscated or built on confiscated property? Also, there is the issue of whether this exception is so broad as to permit a foreign company to "manage" a hotel in Cuba situated on confiscated property as a use of property incident to lawful travel to Cuba. Given that the purpose of the Cuban Liberty Act is to restrict trafficking in confiscated properties of U.S. nationals, this latter interpretation is doubtful.

38. Cuban Liberty Act § 4(13). Cuban nationals who are not Cuban Officials may not be sued under the Cuban Liberty Act even for trafficking in confiscated property.

39. *Id.* § 302(1)(A). Thus, the Act targets future trafficking — conducted on or after June 12, 1996.

40. This does not mean that a claimant cannot sue on a basis other than the Cuban Liberty Act (e.g., for violation of human rights), but the "election of remedies" provision provides that the claimant cannot then maintain a separate action under

has to exceed \$50,000<sup>41</sup> and cannot, except in certain cases, involve Cuban residential real property. Third, only U.S. nationals with claims that have been certified by the 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.<sup>42</sup> Fourth, the claim must have existed in the hands of the claimant prior to the date of 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.<sup>43</sup>

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.<sup>44</sup> 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 which 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."<sup>45</sup> 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 as special master in connection with each case filed under the Cuban Liberty Act

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§ 302(f) of the Cuban Liberty Act. If a U.S. national owns a claim already certified by the FCSC and he sues and recovers under the Act, then: (i) if the recovery is equal to or exceeds the amount of the certified claim, then the claimant loses all right to participate in any recovery between the United States and Cuba; (ii) if the recovery is less than the amount of the certified claim, then the claimant preserves the right to participate in any government-to-government settlement to the extent of any deficiency. *See id.* § 302(f)(2). If the claimant does not recover in the action commenced under the Cuban Liberty Act, however, the claimant still preserves the right to participate in any government-to-government settlement.

41. Exclusive of accrued interest, costs, attorney's fees, and treble damages.

42. Such nationals cannot avail themselves of the Cuban Liberty Act until after March 12, 1998.

43. Presumably, claims for post-Cuban Liberty Act confiscations can be donated or given to others, such as for charitable purposes, so long as this transfer is not considered an "assignment for value." This raises the question of whether charitable contributions which are later deducted from the income tax declaration of the donor constitute an assignment "for value."

44. Cuban Liberty Act § 303(a)(1). There is a presumption that the amount for which a defendant is liable is the amount that has been certified by the FCSC, but this presumption can be rebutted by "clear and convincing evidence." *Id.* § 302(a)(2).

45. *Id.* § 303(a)(2).

(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 rely on any special procedures customarily used by the FCSC in resolving claims.<sup>46</sup>

Sixth, the claimant must pay a "uniform filing fee" in connection with the filing of the action, in a "level sufficient to recover the costs to the courts of actions" brought under the Cuban Liberty Act.<sup>47</sup> 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 ceased to occur.<sup>48</sup> It may be difficult in certain cases to determine when the "trafficking" has ceased for purposes of this limitation. Finally, any action commenced under Title III may be suspended or shall expire upon the certification by the President that a "democratically elected government in Cuba is in power."<sup>49</sup>

Assuming one overcomes all of 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 claim. That would appear to include any agency or instrumentality of the Cuban government,<sup>50</sup> any Cuban Official, and any other U.S. or foreign person.<sup>51</sup> 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 in Section

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46. Even if the special master is the FCSC and it establishes the ownership of the subject property by a U.S. national, such determination does not add the claim to those claims which have been previously certified by FCSC. *Id.* § 303(a)(2).

47. *Id.* § 302(i). This fee is in addition to the normal filing fee for commencing an action in federal court, and is intended to adequately compensate the federal court for the costs of handling an action under the Cuban Liberty Act. Moreover, there is no provision for covering the expenses of the special master (including the FCSC, which makes determinations as to the issues of ownership of the subject property that is the basis of the claim, as well as of the value of said property).

48. *Id.* § 305.

49. *Id.* § 302(H).

50. Any judgment obtained in any such lawsuit will not be enforceable against any agency or instrumentality of the Cuban government if there is a determination that a "transitional" or "democratically elected government" is in place in Cuba. *Id.* § 302(d). Further, under § 302(e), property of a foreign state (including the Cuban government) is exempt from attachment and execution in an action brought under Title III of the Cuban Liberty Act "to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes."

51. *Id.* § 4(11).

302(a)(1)(B); (ii) the amount of the claim as determined by a special master or by the FCSC pursuant to Section 303(a)(2), plus interest at the rate set forth in Section 302(a)(1)(B); or (iii) the fair market value of the confiscated property.<sup>52</sup> Treble damages may also be recovered in certain cases pursuant to the Cuban Liberty Act.<sup>53</sup>

The applicability of concepts such as *in personam* jurisdiction over foreign defendants<sup>54</sup> or service of process are not specifically provided for in the Cuban Liberty Act.<sup>55</sup> One clause invalidates the "Act of State" defense to justify the actions of the Cuban government, but the Cuban Liberty Act does not contain any special waivers of sovereign immunity.<sup>56</sup>

#### IV. 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.<sup>57</sup> As in the case of the Title III cause of action, the purpose of Title IV is to isolate Cuba and to force foreign companies to choose between the Unit-

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52. *Id.* § 302(a)(1)(A). "Fair market value" means the higher of (i): the value of the property on the current date; or (ii) the historical value of the property on the date of its confiscation plus interest accruing from such date at the rate set forth in § 302(a)(1)(B). No rules relate to offsets on the part of the person being sued for any improvements which may have been made on the property since the date of its confiscation ("improving" property is part of the definition of trafficking). Finally, determining the current fair market value of property in a socialist economy with no historical data or comparable sales of property to examine will be difficult.

53. *Id.* § 302(a)(3)(C)(ii).

54. For instance, assume a Mexican company has acquired and is using confiscated assets in Cuba. A U.S. national which desires to sue the Mexican company must establish the basis for *in personam* jurisdiction over the Mexican company. Nothing would preclude the Mexican defendant from contesting jurisdiction over its person (or arguing *forum non conveniens*) when the company does not otherwise have sufficient contacts with the United States to satisfy due process.

55. Cuban Liberty Act § 302(c)(1). § 302(c)(2) provides that service of process may be made upon an agency or instrumentality of a foreign state in the conduct of its commercial activities, and upon foreign individuals who "act under color of law" pursuant to 28 U.S.C. §1608.

56. *Id.* § 302(a)(6). Consequently, it may be difficult to sue an instrumentality of the Cuban government unless one could show, under the Sovereign Immunities Act, 28 U.S.C. §1601, that sovereign immunity has been waived for some reason, such as that the trafficking activity is "commercial" in nature. See generally JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* (1988).

57. Cuban Liberty Act § 401.

ed 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 considered by the Secretary of State to be employees of the Cuban government or of the Communist Party of Cuba.<sup>58</sup>

Not only can the Secretary of State, presumably acting through the Immigration and Naturalization Services, deny foreign persons who violate the Cuban Liberty Act entry into the United States, but such foreign persons can also presumably be deported from the United States if they are already here.<sup>59</sup> No provisions detail how such denial or exclusion is to be determined, applied, enforced, or appealed. Consequently, such procedures must be determined by reference to general immigration law. Furthermore, it is not clear how aggressive the Immigration and Naturalization Service will be in enforcing this provision, nor what additional resources it will need to enforce this law.

The grounds for exclusion are set forth in Section 401(a), and refer to any "alien"<sup>60</sup> who, after the date of the enactment of the Cuban Liberty Act:<sup>61</sup> (i) traffics in property of a U.S. national which is confiscated by the Cuban government; (ii) has confiscated or has directed or overseen the confiscation of property owned by a U.S. national (whether or not the U.S. national has sued or ever sues on such account); (iii) has converted for personal gain property of a U.S. national which has been confiscated; (iv) is a corporate officer, principal, or shareholder with a controlling interest of an entity that is involved in the confiscation of property of a U.S. national or the trafficking therein; and/or (v) is a spouse, minor child, or agent of any of the persons

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58. Cuban Liberty Act § 102(e). This is a much broader definition than that of "Cuban Official." In a sense, in a communist country like Cuba, virtually everyone (except for those very few persons who are self-employed) is an employee of the Government of Cuba. Even workers for foreign investors in joint venture projects in Cuba are employed by the Cuban government, which in turn provides such employees for the use of the foreign investor. It is not clear whether this expansive definition was in the minds of the drafters of the Cuban Liberty Act. Regarding the communist party language, this does not seem to cover everyone who is a member of the party, merely those persons who are employed by the communist party.

59. *Id.* § 401(a).

60. Presumably, a permanent resident of the United States cannot be excluded from the U.S. by virtue of the Cuban Liberty Act.

61. Unlike the civil remedy provision allowing for a three month grace period, *see supra* note 39 and accompanying text, § 401(a) applies upon enactment of the Cuban Liberty Act.

listed above.<sup>62</sup> It is not clear whether this exclusion from the United States is intended to be permanent or will last during the period of time that the foreign person is considered to be engaged in the prohibited activities (regardless of whether or not the U.S. national owning the claim to the confiscated property objects to the entry into the United States of the "excluded" foreign person).

The Secretary of State can grant an exemption allowing entry into the United States for an otherwise excluded person if "necessary for medical reasons or for purposes of [participating in a] litigation" brought under Title III of the Cuban Liberty Act.<sup>63</sup> Such an exemption is not automatic, however, and even a foreign defendant in a lawsuit commenced under the Cuban Liberty Act would theoretically have to apply to the Secretary of State for an exemption.

#### V. PROHIBITION ON INDIRECT FINANCING OF CUBA

Section 103(a) 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 of Cuban exports by banks in third countries which exports

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62. In addition to the problem of determining which persons are subject to this restriction and how the Immigration and Naturalization Service will know, is the issue of the basic fairness of this provision under rights of due process. Theoretically, the wife of a junior officer of a foreign bank which is "trafficking" with Cuba can be denied entry into the United States. This language is probably intended more to have an *in terrorem* effect on foreign persons who would conduct business with Cuba, since the data required by the United States to enforce the provision will be difficult to obtain.

63. Cuban Liberty Act § 401(c).

bear a trademark 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 for violations of the Cuban Assets Control Regulations,<sup>64</sup> but does not appear to be amenable to suit by the owner of the claim except where a case can be established under Title III of the Cuban Liberty Act.<sup>65</sup>

#### VI. PROHIBITION ON ASSISTANCE TO COUNTRIES AND INTERNATIONAL ORGANIZATIONS WHICH PROVIDE ASSISTANCE TO CUBA

The Cuban Liberty Act also restricts U.S. foreign aid to countries and international organizations which provide assistance in various forms to Cuba. Section 102(a) encourages the President to apply certain sanctions against countries which provide assistance to Cuba. Under Section 111(b)(1), the President can also withhold assistance to any country which provides assistance to Cuba's nuclear facility at Jaragua (near Cienfuegos) in an amount equal to the amount of any assistance and credits provided by the third nation to Cuba "in support of the completion of the Cuban nuclear facility at Jaragua."<sup>66</sup> Section 111(b)(2) provides a number of examples of permitted assistance which will not cause the U.S. to withhold foreign assistance.

Under Section 106 of the Cuban Liberty Act, the President is required to monitor any assistance that countries of the former Soviet Union provide to the Cuban government.<sup>67</sup> Any favorable trade arrangements (i.e., trade which is considered "non-market-based trade") and other types of assistance to Cuba would make these countries ineligible for assistance from the United States.<sup>68</sup>

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64. A person who violates these rules is subject to a civil penalty of \$50,000. *Id.* § 102(d). The normal procedures for notice, hearing and judicial review apply in this case.

65. *Id.* § 103(c).

66. *Id.* § 111(b)(1).

67. No specific mention is made of the former Eastern Bloc countries such as Poland and Romania.

68. Cuban Liberty Act § 106.



Further, if any international financial institution approves a loan or other assistance to Cuba over the opposition of the United States, the Secretary of the Treasury must withhold from any payments due to such institution an amount equal to the amount of the loan or other assistance given to Cuba.<sup>69</sup> The President is required to present a report to Congress on or within ninety (90) days from the date of the enactment of the Cuban Liberty Act in which he details the assistance which Cuba is receiving from other nations and also describes the current business activities being conducted by foreigners in Cuba.<sup>70</sup>

## VII. MISCELLANEOUS

The many other provisions of the Cuban Liberty Act (e.g., opposing the lifting of the suspension of Cuba as a member of the Organization of American States),<sup>71</sup> are beyond the scope of this Article.

The Cuban Liberty Act does contain a savings clause which provides that if any portion thereof is held invalid, the remainder of the Cuban Liberty Act shall continue to apply.<sup>72</sup> In view of the various constitutional and other challenges that may be made by opponents of the Cuban Liberty Act, this savings clause is designed to keep as much of the Cuban Liberty Act in place while certain of its provisions are tested in court.

## VIII. SUMMARY

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

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69. *Id.* § 104(b).

70. *Id.* § 108.

71. *Id.* § 105.

72. *Id.* § 5.

to the use of his or its property.<sup>73</sup> 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.

It will be much harder to determine the validity and extent of claims of persons who were not previously U.S. nationals and hence could not file their claims with the FCSC. While there has been some publicity regarding certain major properties (such as sugar mills) confiscated by the Cuban government, the number and value of possible claims is unclear. Such claims, however, must wait at least two (2) years before they can be asserted in U.S. federal court.

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 by 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 U.S. constitutional principles or treaty obligations previously undertaken by the United States.<sup>74</sup> What may come from this jurisprudence cannot be

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73. The Cuban Liberty Act provides that "trafficking" is a problem with regard to property confiscated by the Cuban government which was formerly owned by a U.S. national only if the U.S. national does not consent to the use of his or its property. *Id.* § 4(13).

74. Regarding the North American Free Trade Agreement (NAFTA), the Cuban Liberty Act states that NAFTA does not purport to modify or alter U.S. sanctions against Cuba. Cuban Liberty Act § 110(b). The issue, of course, is whether the Cuban Liberty Act itself modifies or alters sanctions against Cuba. In recent press re-

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 with Cuba.

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 persons will prefer to maintain their ties to the United States and consequently foreign investment in Cuba will cease or substantially decline. 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.

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ports, both Canada and Mexico have claimed that the Cuban Liberty Act violates NAFTA. *Cuba Trade Sanctions Anger Some U.S. Allies: Canada, Mexico May Strike Back*, SEATTLE TIMES, March 7, 1996, at A1.