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American Investment in Cuban Real Estate: Close But No Cigar

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COMMENT

AMERICAN INVESTMENT IN CUBAN REAL ESTATE: CLOSE BUT NO CIGAR

I. Introduction	369
II. U.S. Law	370
A. U.S. Legal History and Development	370
B. Obstacles under U.S. Law	371
1. U.S. Economic Embargo Under Helms-Burton.....	371
2. U.S. Expropriation Claims Under the International Claims Settlement Act and Helms-Burton.....	372
C. Elimination of Obstacles under U.S. Law	374
1. By the President.....	374
2. By U.S. Supreme Court.....	375
3. By U.S. Congress	377
III. Cuban Law	379
A. Cuban Legal History and Development	379
B. Obstacles Under Cuban Law	381
1. Current Obstacles	381
2. Future Obstacles	385
IV. Conclusion.....	388

I. INTRODUCTION

It is easy to understand why Americans, especially Floridians, are interested in investing in Cuban real estate. The beautiful island is the largest in the Caribbean and is located just ninety miles off the coast of Key West, waiting to be exploited by savvy real estate investors and developers who foresee substantial gains based on proximity and underdevelopment. At one time, these Cuban real estate opportunities were completely available to American investment.¹ However, in 1959, Fidel Castro and his revolutionaries defeated the Batista government and secured control over Cuba.² Thereafter, the communist expropriation of land,

1. Antonio R. Zamora, *Foreign Investment in Cuba: A U.S. Perspective*, PROB. & PROP., Dec. 2000, at 57-58.

2. John J. Coughlin, *Cuban Foreign Investment Act: Opportunities for United*

the Cold War, and the restrictions under U.S. and Cuban law all precluded Americans from conducting any commercial transactions with Cuba,³ including investment in real estate.

In recent years, however, the provisions of U.S. law restricting American investment in Cuba have been harshly criticized. Further, the end of the Cold War and the fall of the Soviet Union eliminated most of Cuba's financial support, causing the Cuban government to make significant legal changes in order to attract foreign investment.⁴ Unfortunately, despite the widespread international criticism of American law and the encouraging Cuban legal development, considerable obstacles in both U.S. and Cuban law have persevered and will continue to effectively prevent American investment in Cuban real estate.

This comment examines the various legal obstacles to American investment in Cuban real estate. Part II, focusing on U.S. law, briefly reviews the legal history and analyzes the legal restrictions on American investment in Cuba, as well as the possible methods of eliminating such obstacles. Part III, concentrating on Cuban law, gives a short summary of the development of Cuban law and examines both current and future legal barriers to foreign investment in Cuban land. Finally, Part IV offers conclusions regarding the elimination of both nations' legal obstacles and when Americans will be allowed and inclined to invest in Cuban real estate.

II. U.S. LAW

A. U.S. Legal History and Development

After Castro assumed power, the Cuban government expropriated all property owned by United States citizens and corporations without any compensation.⁵ In response to the confiscations, the U.S. Congress passed the 1961 Foreign Assistance Act, which authorized the President "to establish and maintain a total embargo upon all trade between the United States and Cuba."⁶

States Corporations in a Post-Embargo Era, 23 SUFFOLK TRANSNAT'L L. REV. 299, 301 (1999).

3. Anthony M. Solis, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L. REV. 709, 712-13 (1997).

4. FOREIGN INVESTMENT ACT OF 1995 (Cuba), translated in 35 I.L.M. 331, 343 (1996) [hereinafter CFIA] (English translation with Introductory Note by Jorge A. Vargas).

5. Coughlin, *supra* note 2, at 301.

6. Foreign Assistance Act, 22 U.S.C. § 2370(a)(1) (1996).

Doubts soon arose, however, as to whether there was solid legal foundation behind the Foreign Assistance Act to apply the embargo to Americans acting outside the U.S.⁷ Accordingly, the authorization for the embargo was amended to give it additional legal support under the Trading with the Enemy Act.⁸ After the 1963 Cuban Missile Crisis, a new comprehensive set of economic regulations and prohibitions entitled "Cuban Assets Control Regulations" (CACR)⁹ was enacted by Executive Order, but was never formally passed by Congress. Therefore, the provisions of the embargo under the CACR were open to revision or termination at the discretion of the President of the United States, and thus as international politics dictated.¹⁰

In 1996, however, after two small American airplanes were shot down by Cuban fighter jets, President Clinton signed into law the Cuban Liberty and Democratic Solidarity Act, also known as the Helms-Burton Act (Helms-Burton; the Act).¹¹ Today, the provisions of Helms-Burton operate as the principal U.S. legal obstacle to American investment in Cuban real estate.

B. *Obstacles Under U.S. Law*

1. U.S. Economic Embargo Under Helms-Burton

One of the express purposes of Helms-Burton is "to strengthen international sanctions against the Castro government."¹² The Act primarily accomplishes this by codifying all Executive Orders and Regulations concerning the economic embargo of Cuba, including the prohibitions of the CACR.¹³

Therefore, under both Helms-Burton and the CACR, American law expressly bars "any person subject to the jurisdiction of the United States" from conducting most business transactions with Cuba or Cuban nationals, including all investment in Cuban real estate.¹⁴ Prohibited real estate transactions include those which are "by, or on behalf of, or pursuant to the direction of . . . [Cuba], or any national thereof," as well as transactions that

7. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 420 (1996).

8. *Id.* at 420.

9. Cuban Assets Control Regulations, 31 C.F.R. § 515 (1963).

10. James M. Cooper, *Creative Problem Solving and the Castro Conundrum*, 28 CAL. W. INT'L L.J. 391, 400 (1998).

11. Helms-Burton Act, 22 U.S.C. §§ 6021-6091(1996).

12. 22 U.S.C. § 6022(2).

13. 22 U.S.C. § 6032(h).

14. 31 C.F.R. § 515.201.

“involve property in which [Cuba], or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect.”¹⁵ The embargo applies to any U.S. citizen or permanent resident, wherever they may be located, any person actually within the U.S., any corporation organized under U.S. law, or any organization that is owned or controlled by such persons or organizations.¹⁶ The flat prohibition on virtually all business transactions under the embargo provision of Helms-Burton is the primary legal barrier to American investment in Cuban real estate.

2. U.S. Expropriation Claims Under the International Claims Settlement Act and Helms-Burton

Expropriation claims of U.S. nationals present another considerable obstacle to American investment in Cuban real estate. Since 1949, the Foreign Claims Settlement Commission, created under the International Claims Settlement Act (ICSA), has received and determined the validity and amount of claims by U.S. nationals against the government of Cuba for losses resulting from the nationalization or expropriation of property owned by such nationals.¹⁷ ICSA claims require that the party bringing the claim be a U.S. national at the time the property was confiscated.¹⁸ For some time, this requirement effectively eliminated the claims of Cuban-Americans who became U.S. nationals after their property was expropriated.¹⁹

In an effort to correct this ICSA shortcoming²⁰ and “to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime,”²¹ Helms-Burton established a private right of action in U.S. courts on behalf of any U.S. national who has a claim for property expropriated by Cuba since January 1, 1959, against any person who traffics in such property.²² While claims that have been certified under the ICSA are given a presumption of validity

15. 31 C.F.R. §515.201(a). The “effective date of this section” is July 8, 1963. 31 C.F.R. § 515.201(d).

16. 31 C.F.R. § 515.329; Matias F. Travieso-Diaz, *So, Your Client Wants To Go To Havana*. . . , 6 NAFTA: L. & BUS. REV. AM. 277, 281 (2000).

17. International Claims Settlement Act, 22 U.S.C. § 1643b(a) (1950).

18. 22 U.S.C. § 1643c(a).

19. Antonio R. Zamora, *Real Estate Investments in Cuba: Back to the Future*, 11 FLA. J. INT'L L. 539, 553 (1998).

20. Travieso-Diaz, *supra* note 16, at 287.

21. 22 U.S.C. § 6022(6).

22. 22 U.S.C. § 6082(a); Lowenfeld, *supra* note 7, at 425.

in private Helms-Burton actions for the amount certified,²³ Helms-Burton does not limit the category of prospective claimants to parties who were U.S. nationals at the time of expropriation.²⁴ Though they may not bring an action against the Cuban government under the ICSA, Cuban Americans and other parties who were not U.S. nationals at the time their property was confiscated may bring a Helms-Burton action against anyone who traffics in their expropriated property.²⁵

Further, the prospective liability under Helms-Burton is not limited to foreign persons and organizations, "but also applies to corporate officers of, principals of and shareholders with a controlling interest in an entity that has been involved in the trafficking of confiscated property that is the subject of a claim by a U.S. national."²⁶ Though most successful expropriation claims are settled in monetary damages and not by a return of the confiscated property, under Helms-Burton, any party dealing in such property is susceptible to monetary damages three times the value of the property in question.²⁷ In addition, aliens dealing in such property may be denied admission to the United States.²⁸

Therefore, the existence of such expropriation claims will significantly affect the decisions of cautious American real estate investors, most of whom want assurances of clear title.²⁹ "Clear title basically means that there are no impediments to the intended use of the property acquired, and that no one is going to challenge the ownership interest created by the acquisition."³⁰ Thus, to avoid the risk of considerable monetary damages, prospective American investors will have to ensure that any real property in which they are interested is not the subject of an existing, pending, or threatened expropriation claim by a U.S. national under the ICSA or Helms-Burton. "Some of the best real estate in Cuba, approximately 1.5 to 2.0 million acres, is included

23. 22 U.S.C. § 6082(a)(2).

24. 22 U.S.C. § 6082(a)(5)(C). Still, parties that are eligible to file a claim under the ICSA must do so as a prerequisite to filing a claim under Helms-Burton. 22 U.S.C. § 6082(a)(5)(A).

25. 22 U.S.C. § 6082(a)(5)(C); Zamora, *supra* note 19, at 552-53.

26. Harry L. Clark, *Dealing With U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 75 (1999).

27. 22 U.S.C. § 6082(a)(3)(c).

28. 22 U.S.C. § 6091(a).

29. Zamora, *supra* note 19, at 551.

30. *Id.*

in the U.S. certified claims category,"³¹ and "[a]s long as property titles remain unsettled, foreigners are going to perceive investing in Cuba as a rather risky proposition and may be discouraged from stepping into the country."³² Thus, these expropriation claims will continue to effectively inhibit American investment in Cuban real estate by subjecting traffickers to substantial monetary damages and hindering the acquisition of clear title.

C. *Elimination of Obstacles Under U.S. Law*

1. By the President

The codification of the embargo by Congress under Helms-Burton gives it unquestionable legislative support, and therefore removes the possibility that the President may unilaterally tighten or loosen its prohibitions.³³ Until the President suspends the embargo upon a determination that a transition government is in place,³⁴ or terminates the embargo upon a determination that a democratically elected government is in control,³⁵ it will be illegal under Helms-Burton and the CACR for Americans to invest in Cuban real estate. The primary qualifications for a transition government as defined under Helms-Burton is a Cuban government that has legalized all political activity, has released all political prisoners, is committed to organizing free and fair elections for a new government, and does not include Fidel Castro.³⁶ The more stringent conditions for a democratically elected government require a government that results from free and fair elections supervised by international observers, shows respect for human rights, is moving towards a market-oriented economy, and has made progress in returning expropriated property.³⁷

Like the embargo provisions, the President may suspend the Helms-Burton private rights of action upon a determination that a transition government is in place,³⁸ or may terminate such causes of action upon a determination that a democratically elected government is in control.³⁹ In fact, the President has repeatedly exer-

31. *Id.* at 552. Claims certified under the ICSA are given a presumption of validity for the amount certified. 22 U.S.C. § 6082(a)(2).

32. Travieso-Diaz, *supra* note 16, at 288.

33. Cooper, *supra* note 10, at 400.

34. 22 U.S.C. § 6064(a). Suspension requires consultation with Congress. *Id.*

35. 22 U.S.C. § 6064(c).

36. 22 U.S.C. § 6065(a).

37. 22 U.S.C. § 6066.

38. 22 U.S.C. § 6082(h)(1)(A).

39. 22 U.S.C. § 6082(h)(1)(B).

cised his authority to suspend the ability of U.S. nationals to initiate suits against traffickers based on a determination that the international community as a whole has taken "a series of steps to promote democracy in Cuba."⁴⁰ However, even if the President were to suspend private rights of action under Helms-Burton, such a suspension does not eliminate existing claims under the ICOSA or pending claims under Helms-Burton initiated prior to the suspension.⁴¹ Further, the suspension of such lawsuits is only temporary, and, when these lawsuits are suspended, there is always a strong possibility that the suspension will later be lifted, thereby exposing parties who invested in expropriated property in the interim to significant liability. This threat of action, even during a time of suspension, was strong enough to cause an Italian telephone company, STET, to pay a U.S. corporate Helms-Burton claimant, ITT, a rumored \$25 million for a waiver of all claims by ITT against STET for use of ITT's expropriated property.⁴²

Thus, before the President can terminate the embargo and private right of action provisions under Helms-Burton, an extraordinary governmental transformation must occur in Cuba. Because changes of such magnitude take considerable time to implement, the President will continue to be prevented from permanently eliminating obstacles to American investment in Cuban real estate.

2. By U.S. Supreme Court

Many opponents of Helms-Burton claim that the private right of action provision violates international law because it is an unjustified extraterritorial application of U.S. law to foreign nationals.⁴³ If the U.S. Supreme Court has the opportunity to review the validity of the Act, it could potentially invalidate provisions of Helms-Burton, thereby removing certain obstacles to American investment in Cuban real estate. However, in drafting the Act, Congress anticipated this type of legal criticism and referred to international law norms for justification.⁴⁴

40. Jorge F. Pérez-López & Matias F. Travieso-Díaz, *The Helms-Burton Law and Its Antidotes: A Classic Standoff?*, 7 SW. J. L. & TRADE AM. 95, 137-38 (2000).

41. 22 U.S.C. § 6082(h)(2).

42. Edwin D. Williamson, *U.S. – EU Understanding on Helms-Burton: A Missed Opportunity to Fix International Law On Property Rights*, 48 CATH. U. L. REV. 293, 303 (1999).

43. Franchesco Soto, *The Helms-Burton Act: The Final Piece to Bring Down the Tyrant's Regime*, 8 ILSA J. INT'L & COMP. L. 237, 248-49 (2001).

44. Solis, *supra* note 3, at 721.

The authors of Helms-Burton expected complaints that the Act engaged in extraterritorial prescriptive jurisdiction.⁴⁵ Thus, Congress included a provision stating, "International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory."⁴⁶ Thus, Congress effectively employs the "effects doctrine" as a legal justification for Helms-Burton's private rights of action.⁴⁷

Further, the act of state doctrine generally precludes U.S. courts from inquiring into the validity of public acts that a recognized sovereign power has committed within its own territory.⁴⁸ However, the drafters of Helms-Burton anticipated the act of state doctrine as another potential legal obstacle,⁴⁹ and thus expressly stated that the act of state doctrine shall not preclude U.S. courts from hearing Helms-Burton cases.⁵⁰

More important than these defenses to the Act's legal validity is the fact that the U.S. Supreme Court has not had the opportunity to make such a determination because of the President's repeated exercise of his power to suspend the private rights of action provision.⁵¹ President George W. Bush has followed this trend, recently announcing his decision to continue the suspension of these Helms-Burton actions.⁵² Because of the drastic negative international reaction expected if such private rights of action are reinstated,⁵³ it is likely that the President will continue the suspension, thereby removing the power of the U.S. Supreme Court to review the legal validity of the Act. However, as is evidenced by the ITT-STET case,⁵⁴ the President's suspension, by itself, does not remove the threat of a Helms-Burton suit, thereby maintaining this chilling effect on American investment in Cuban real estate.

45. Lowenfeld, *supra* note 7, at 430.

46. 22 U.S.C. § 6081(9).

47. *See Soto, supra* note 43, at 248-253.

48. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1986).

49. Solis, *supra* note 3, at 722-723.

50. 22 U.S.C. § 6082(a)(6).

51. Travieso-Diaz, *supra* note 16, at 289.

52. U.S. DEP'T OF STATE, International Information Programs, *Bush Informs Congress of Need to Renew Helms-Burton Title III Suspension*, available at <http://usinfo.state.gov/regional/ar/us-cuba/burton17.htm> (Jan. 17, 2002).

53. *See generally* Pérez-Lopez & Travieso-Diaz, *supra* note 40; *see generally* Clark, *supra* note 26.

54. Williamson, *supra* note 42, at 303.

3. By U.S. Congress

Both the embargo and private right of action provisions of Helms-Burton have received widespread domestic and international criticism,⁵⁵ and those who oppose these controversial Helms-Burton provisions insist that Congress repeal the Act.⁵⁶ Opponents of the embargo argue that it is ineffective in sparking governmental transition in Cuba, and has only crippled the Cuban economy, causing great suffering.⁵⁷ Critics also contend that the embargo “provides Castro with a scapegoat, allowing him to blame any economic hardships on the American blockade.”⁵⁸

International disapproval of the private right of action against traffickers of expropriated property has been even stronger. U.S. trading partners complain that this Helms-Burton provision violates their sovereignty by exposing their citizens and corporations to the extraterritorial application of American law.⁵⁹ By exposing foreigners to monetary damages and possible exclusion from U.S. territory, “[t]his legislation seeks to force foreign businesses to participate in the United States economic embargo of Cuba.”⁶⁰ In response to these provisions of Helms-Burton, the European Union, Canada, Mexico, and other trading partners of the U.S. have protested the Act.⁶¹

Though in recent years this political and legal criticism may have weakened pro-Helms-Burton forces,⁶² the Act continues to enjoy considerable Congressional support. From the time of its introduction, Helms-Burton received almost complete backing from Republicans and, after the two small American planes were shot down, it received widespread support from Democrats.⁶³ Also, a large Cuban-American population in Florida represents a

55. See generally Rolando J. Santiago, Y2K, *The Millennium For a Revised U.S.-Cuba Trade Policy: Grounds For Removing the Embargo*, 6 NAFTA: L. & BUS. REV. AM. 169 (2000); see also Jeffrey Dunning, *The Helms-Burton Act: A Step in the Wrong Direction for United States Policy Toward Cuba*, 54 WASH. U. J. URB. & CONTEMP. L. 213 (1998).

56. See, e.g., Lucien J. Dhooge, *Fiddling With Fidel: An Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996*, 14 ARIZ. J. INT'L & COMP. L. 575, 634 (1997).

57. Santiago, *supra* note 55, at 183.

58. *Id.* at 184.

59. *Id.* at 180.

60. Pérez-López & Travieso-Díaz, *supra* note 40, at 107.

61. Santiago, *supra* note 55, at 180.

62. Zamora, *supra* note 19, at 550.

63. Dunning, *supra* note 55, at 223.

powerful political lobbying force in defense of the Act.⁶⁴ "The Cuban lobby, known as the Cuban American National Foundation, is so powerful that when in full effect it can paralyze Congress and even influence national trade policies."⁶⁵ Thus, there are still many Americans and politicians who continue to support the Act because they believe that Helms-Burton is the best way to accomplish its goal of generating positive change in Cuba.⁶⁶

Whether or not the criticism of Helms-Burton is deserved, Congress will not repeal the Act until the Cuban government makes actual changes to its most fundamental political institutions and policies. Even critics of Helms-Burton acknowledge that "[i]t is critical to a post-embargo transition process that the Cuban government concedes on the issues of human rights and political freedom."⁶⁷ Unfortunately, though Castro is willing to entertain dialogue with the United States and discuss the various hot issues, he refuses to acquiesce or to entertain compromise.⁶⁸ In passing Helms-Burton, Congress found that "[t]he Castro regime has made it abundantly clear that it will not engage in any substantive political reforms that would lead to democracy, a market economy, or an economic recovery."⁶⁹ "The Castro government has time and again proven that tyranny and oppression shall be the standards by which [the Cuban government] shall be measured, and [has] defiantly dare[d] the United States government to act."⁷⁰ The U.S. has acted by enacting Helms-Burton. At the time of enactment, Congress was completely aware of Castro's horrid history, and yet it made firm commitments to both the American and Cuban people that it would not relent or abandon its position until the Cuban government is truly ready to change. After all, Congress enacted Helms-Burton in order to assist the Cuban people in regaining their freedom, to encourage free and fair democratic elections in Cuba, and to protect U.S. nationals against confiscatory takings and the wrongful trafficking in expropriated property.⁷¹ Because lifting the embargo would benefit Cuba much more than the U.S.,⁷² Congress has no reason to repeal Helms-

64. *Id.*

65. Santiago, *supra* note 55, at 176.

66. *See generally* Soto, *supra* note 43.

67. Santiago, *supra* note 55, at 170-171.

68. *Id.* at 171.

69. 22 U.S.C. § 6021(3).

70. Soto, *supra* note 43, at 254.

71. 22 U.S.C. § 6022.

72. Santiago, *supra* note 55, at 170.

Burton and abandon these commitments without a legitimate effort on the part of the Cuban government to accomplish these goals.

Thus, the President cannot terminate the embargo or private right of action provisions of Helms-Burton until a democratically elected government is in control in Cuba. Moreover, the U.S. Supreme Court is powerless to overturn the Act while the Presidential suspension continues. Finally, Congress is unwilling to abandon its commitment to instigating change in Cuba and is unwilling to repeal Helms-Burton until Cuba is in transition to a free-market democracy. Therefore, U.S. legal obstacles to American investment in Cuban real estate will persist until Cuba is in transition to a free-market democracy.

III. CUBAN LAW

Unfortunately, even if the U.S. legal obstacles under Helms-Burton are eliminated in the near future, serious deficiencies in current Cuban law will continue to prevent American investment in Cuban real estate for a significant amount of time.

A. *Cuban Legal History & Development*

After Castro assumed power, Cuba was too busy integrating with the Soviet bloc and enjoying its annual Russian subsidy to consider further foreign investment.⁷³ However, when the economic failures of the Soviet Union became apparent in the 1980s, the Cuban government began to consider foreign investment from non-communist countries.⁷⁴ In 1982, Cuba enacted the first foreign investment law of its revolutionary period, entitled "Regarding Economic Associations Between Cuban and Foreign Entities" (Law 50).⁷⁵ Under Law 50, "foreign investors were allowed to own a maximum of 49% in any joint venture, although most of the major sectors of the Cuban economy were placed outside the reach of foreign investors."⁷⁶ Due to this limitation on ownership, as well as Cuba's continued ties with the Soviet Union, Law 50 was remarkably unsuccessful in promoting foreign investment.⁷⁷

In 1992, after the end of the Cold War, the Cuban government amended the Constitution of Cuba to recognize some forms of pri-

73. Zamora, *supra* note 1, at 58.

74. *Id.*

75. *Id.*

76. CFIA, *supra* note 4, Introductory Note, at 333.

77. Zamora, *supra* note 1, at 58.

vate property.⁷⁸ Pursuant to these amendments, the Cuban Foreign Investment Act (CFIA, the Act) was enacted in 1995 “[i]n order to broaden and facilitate foreign participation in [Cuba’s] economy . . . for the fundamental purpose of achieving sustainable development in the country and a recovery of the national economy.”⁷⁹

Under the CFIA, foreigners, including Americans, are now permitted to invest “in real estate and acquire ownership and other property rights over that real estate.”⁸⁰ The Act allows foreign investment in Cuban real estate to be made by a joint venture, an international economic association contract, or the all-new totally foreign capital company.⁸¹ Unlike prior Cuban law, there is now no limitation of foreign ownership in joint ventures between foreign investors and the Cuban government.⁸² Moreover, the totally foreign capital company, formed by creating a foreign subsidiary of a non-Cuban corporation or by creating a new Cuban corporation,⁸³ is completely new and may be created by foreign investors without any Cuban national ownership or contribution.⁸⁴ Further, the CFIA guarantees that foreign investors will be protected from the uncompensated expropriation of property.⁸⁵ Finally, the Act guarantees that foreign investors will be able to freely transfer profits⁸⁶ or their ownership interest in certain investment entities.⁸⁷

Thus, on the surface, it seems as though the Cuban government has made a significant step forward by eliminating previous restrictions and risks to American investment in Cuban real estate. This liberalization of Cuban foreign investment law has

78. CFIA, *supra* note 4, Introductory Note, at 332.

79. CFIA, *supra* note 4, Introductory Note, at 344.

80. CFIA, *supra* note 4, Ch. VI, art. 16.1, at 349.

81. CFIA, *supra* note 4, Ch. V, art. 12, at 347. The primary difference between the joint venture and the international economic association contract is that a joint venture results in the creation of a legal entity distinct from the original parties. The international economic association contract does not create a distinct legal entity. See CFIA, *supra* note 4, Ch. V, art. 13.1, at 347; see also CFIA, *supra* note 4, Ch. V, art. 14.1(a), at 348.

82. Zamora, *supra* note 1, at 59.

83. CFIA, *supra* note 4, Ch. V, art. 15.2, at 348.

84. Coughlin, *supra* note 2, at 311.

85. CFIA, *supra* note 4, Ch. III, art. 3, at 346.

86. CFIA, *supra* note 4, Ch. III, art. 8.1, at 346.

87. CFIA, *supra* note 4, Ch. III, arts. 6.1, 6.2, at 346. The Act guarantees the free transfer of ownership interest in international economic association contracts and totally foreign capital companies. It does not mention the free transfer of ownership interest in joint ventures. See generally CFIA, *supra* note 4, Ch. III, at 346-347.

spawned the construction of what appear to be free-market style condominium apartments in downtown Havana.⁸⁸ These real estate projects were implemented by joint ventures between the Cuban government and investors from Spain, Israel, and Monaco.⁸⁹

The changes under the CFIA give the impression that American investors, barred by U.S. law from making similar investments, are being left behind because they are unable to take advantage of such opportunities.⁹⁰ Unfortunately, underlying risks and obstacles in current Cuban law make foreign investment opportunities in Cuban real estate much less attractive to Americans.

B. Obstacles Under Cuban Law

1. Current Obstacles

Despite these encouraging developments, the CFIA is far from perfect and still imposes significant constraints on American investment in Cuban real estate. First, under the Act, foreign investment in real estate is limited to property to be developed for (i) housing or tourism for persons who are not permanent residents of Cuba, (ii) housing or offices for foreign companies, or (iii) general real estate development for tourism.⁹¹ The term tourism, though not expressly defined in the CFIA, falls under the definition of "tourist" used by the Cuban authorities: "[A] foreign person who visits Cuba for at least 24 hours and [who] returns to his/her place of residence after a visit for recreational purposes, to visit friends or relatives, to attend a seminar or a conference or some very limited business purposes."⁹² Therefore, with a few exceptions,⁹³ foreign investments in real estate for agriculture, industry, land banking, and permanent residence are completely prohibited by current Cuban law.⁹⁴

Next, Americans will be skeptical about investing in Cuban

88. Zamora, *supra* note 19, at 539.

89. *Id.* at 541.

90. Coughlin, *supra* note 2, at 299-300.

91. CFIA, *supra* note 4, Ch. VI, art. 16.2, at 349.

92. Zamora, *supra* note 19, at 543.

93. Prior to the enactment of the CFIA, the Cuban government authorized foreign investment in agriculture, telecommunications, mining, and petroleum on a very limited basis. Steven E. Hendrix, *Tensions in Cuban Property Law*, 20 HASTINGS INT'L & COMP. L. REV. 1, 4-5 (1996). Further, this foreign investment was actually channeled toward production rather than the true ownership of real estate assets. *Id.*

94. See generally CFIA, Ch. VI, Art. 16, *supra* note 4, at 349.

real estate because “[f]oreign investors are still not permitted to acquire title to the properties in which they invest.”⁹⁵ Though the CFIA authorizes foreign investors to “acquire ownership and other property rights” in Cuban real estate,⁹⁶ the Act neither defines the term “acquisition”⁹⁷ nor mentions any transfer of title. Further, while the CFIA guarantees the free transfer of profits and ownership interest in the investment entities,⁹⁸ it is silent regarding the free transfer of the actual land. Thus, despite the immediate impression that the Cuban government has authorized foreign fee simple ownership of land,⁹⁹ the real estate rights acquired by investors are just long or medium term leases of the improvements in which they invest.¹⁰⁰ Americans will not make large investments in Cuban real estate when they are precluded from acquiring certain title to such property.

Further, despite the Act’s formal authorization of foreign investment through a joint venture, international economic association contract, or totally foreign capital company, the approval of the Cuban government, through the Executive Committee of the Council of Ministers, is required for the creation of all foreign investment entities.¹⁰¹ To utilize a totally foreign capital company as an entity for foreign investment, the prior written approval of the appropriate Cuban governmental body responsible for that economic sector is also required.¹⁰² In the past, the individual authorization of all foreign investment entities has always been a protracted process, involving successive reviews by several agencies, and with Fidel Castro as the ultimate decision-maker.¹⁰³ After passing the CFIA, Castro admitted that he envisioned Cuban state majority ownership as the rule and 100% foreign

95. Matias F. Travieso-Diaz & Alejandro Ferrate, *Recommended Features of a Foreign Investment Code for Cuba’s Free Market Transition*, 21 N.C. J. INT’L L. & COM. REG. 511, 528 (1996).

96. CFIA, *supra* note 4, Ch. VI, art. 16.1, at 349.

97. Travieso-Diaz & Ferrate, *supra* note 95, at 525.

98. *See* CFIA, *supra* note 4, Ch. III, arts. 6.1, 6.2, 8.1, at 346.

99. Some authors seem to believe that foreign investors may acquire title to Cuban real estate, though there is no evidence of this in the CFIA. *See* Zamora, *supra* note 19, at 546; *see also* Venera A. Gallousis, *Cuba’s Flirtatious Love Affair With Foreign Investment: The Evolution of Laws 50 and 77*, 5 TEX. HISP. J.L. & POL’Y 81, 96 (2001).

100. Travieso-Diaz & Ferrate, *supra* note 95, at 525.

101. Coughlin, *supra* note 2, at 306.

102. *Id.* at 311.

103. Travieso-Diaz & Ferrate, *supra* note 95, at 527.

ownership only in "exceptional cases."¹⁰⁴ In fact, only one wholly-owned foreign enterprise has been allowed since the Act was passed.¹⁰⁵ It therefore seems, as a general policy and practice, that foreign investors are only welcome if they assume minority roles in joint ventures with the Cuban government.¹⁰⁶ Thus, "[a] major flaw in the Act is its failure to establish objective criteria for approval of foreign investment entities, resulting in a bureaucratic and arbitrary approval process."¹⁰⁷

Besides prescribing the terms under which each investment is authorized, the Cuban government can randomly dictate when an investment is to come to an end.¹⁰⁸ Thus, the Castro regime can terminate foreign investment entities essentially at will, with all property in Cuba involved in the investment remaining in the hands of the government.¹⁰⁹

In addition, despite the CFIA's guarantee against the uncompensated expropriation of property, confiscation is still permitted "for reasons of the public good or in the interest of society, as declared by the Government."¹¹⁰ Though indemnification for expropriated property is assured in freely convertible currency equal to a mutually agreed upon commercial value,¹¹¹ such an assurance seems rather hollow in light of Cuba's communist history of uncompensated expropriation and Castro's reputation for breaking promises. Though the Act purportedly holds the Cuban government to its guarantee by providing for arbitration by an international organization in the event the parties disagree as to the value of the taken land,¹¹² such arbitration is an expensive and futile process when Cuba itself does not observe international law.¹¹³ Moreover, the CFIA does not address the situation where the parties are unable to agree on an arbitrator.¹¹⁴ Thus, despite the express guarantees in the CFIA, investors should remain

104. See Mireya Navarro, *Cuba Passes Law to Attract Greater Foreign Investment*, N.Y. TIMES, Sept. 7, 1995, at A12 (quoting Fidel Castro).

105. Travieso-Diaz, *supra* note 16, at 279.

106. Carlos Alberto Montaner, *Castro Seeks Capital. Hold On to Your Wallet*, WALL ST. J. (EUR.), July, 28, 1998, at 8.

107. Coughlin, *supra* note 2, at 323.

108. Travieso Diaz & Ferrate, *supra* note 95, at 528.

109. *Id.*

110. CFIA, *supra* note 4, Ch. III, art. 3, at 346.

111. *Id.*

112. *Id.*

113. Montaner, *supra* note 106.

114. Gallousis, *supra* note 99, at 97.

doubtful of Castro's promise to refrain from expropriating real estate without indemnification.

Similarly, though the Act guarantees that foreign investors will be able to freely transfer their interest in some investment entities,¹¹⁵ such a transfer is only permitted when authorized by the Cuban government.¹¹⁶ This requisite governmental authorization makes the dependability of any acquired ownership right seem doubtful because it essentially precludes an investor in real estate from selling his interest until the Castro regime approves. Since investors in Cuban real estate do not acquire title to the land in which they invest, ownership interests in investment entities can often be the most valuable marketable asset. Therefore, such a restriction on the alienability of ownership interests in real estate could effectively bar a foreign investor from ever realizing the true value of an investment by precluding him from openly marketing his interest.

Finally, the most significant current obstacle to American investment in Cuban real estate is the incompatibility of foreign private ownership with a communist Cuban society and economy. For one, foreign investment entities pay for labor by first paying the Cuban government in American dollars, which in turn pays the actual employees in Cuban pesos.¹¹⁷ Under this lopsided arrangement, the Castro administration retains 95% of the wages.¹¹⁸ The governmental discrimination against Cuban citizens has generated a deep animosity towards foreign investors, causing riots and the vandalism of foreign investment projects.¹¹⁹

More importantly, as the construction of foreign real estate investment projects progressed, Cuban officials began to worry "that the trend toward private-property ownership represented a dangerous precedent in a country whose own citizens aren't allowed to buy or sell their homes."¹²⁰ Moreover, the Cuban government has stated that a Cuban capitalist class would generate inequalities, and thus prohibits foreign investors from creating

115. Though the CFIA guarantees the free transfer of ownership interest in international economic association contracts and totally foreign capital companies, it is silent as to a guarantee of the free transfer of ownership interest in joint ventures. This silence further reduces the reliability of other express guarantees. *See generally* CFIA, *supra* note 4, Ch. III, at 346.

116. CFIA, *supra* note 4, Ch. III, arts. 6.1, 6.2, at 346.

117. Montaner, *supra* note 106.

118. *Id.*

119. *Id.*

120. *Will Castro Respond to U.S. Softening, Cuba May Prefer to Keep the U.S. as a Boogeyman*, WALL ST. J., Jul. 18, 2000, at A14.

partnerships with Cuban citizens.¹²¹ This tension between communism and foreign private ownership caused the Cuban government to declare a “freeze” on all foreign investment in residential real estate, halting this type of investment in order to analyze the impact of private ownership on the country.¹²² Though the freeze on foreign investment activity only applies to new investments in residential real estate, unsold apartments and condominiums will be purchased by Cuba and subsequently leased.¹²³ Thus, the inherent conflict between the communist character of the Cuban economy and foreign private ownership of real property creates an uncertain and unstable setting that prevents Americans from confidently investing in Cuban real estate.

Consequently, despite the significant step the Cuban government took in passing the CFIA, neither the country nor its legal system is currently ready for foreign investment in real estate. Even non-American foreign investors, who are less inhibited by U.S. law, retreat from investing in Cuba “because of the legal uncertainty, the material obstacles, the stubbornness of the bureaucracy and the lack of any entrepreneurial culture.”¹²⁴ Thus, before Americans can invest in Cuban real estate with certainty, Cuba will need to undergo a “far greater liberalization to the country’s foreign investment regime” than the CFIA provides.¹²⁵

2. Future Obstacles

Without assistance from the Soviet Union or the United States, the communist Cuban economy continues to struggle,¹²⁶ creating constant international pressure for liberalization and transformation. Because Castro cannot live forever, someday Cuba will be free of his grasp and hopefully able to transform into a free-market democracy.¹²⁷ Unfortunately, “the laws in effect in

121. Montaner, *supra* note 106.

122. See Dalia Acosta, *Real Estate Freeze Renews Question of Property*, INTER PRESS SERV., Jun. 1, 2000, available at 2000 WL 4091459; Doreen Hemlock, *Cuban Officials Spell Out Terms for Foreign Trade, Investment*, KNIGHT-RIDDER TRIB. BUS. NEWS, Sep. 11, 1998, available at 1998 WL 16336709; *Freeze on Residential Property Investment*, CARIBBEAN UPDATE, Jun. 1, 2000, available at 2000 WL 2138068.

123. Acosta, *supra* note 122.

124. Montaner, *supra* note 106.

125. Travieso-Diaz & Ferrate, *supra* note 95, at 528.

126. See *Cuban Economy In Recession With Rising Oil Prices & Falling Export & Tourism Income*, NOTICEN: CENT. AM. & CARIBBEAN AFF., Jan. 23, 2003, available at 2003 WL 12454470; see also Lawrence Solomon, *Cuba’s Cruel Joke*, NAT’L POST, Jan. 11, 2003, available at 2003 WL 3273890.

127. See Rudi Dornbusch, *Getting Ready For Cuba After Castro*, BUS. WK., May 24, 1993, available at 1993 WL 2141956; see also Soto, *supra* note 43, at 253-254.

Cuba at this time are both obsolete (in that they do not represent currently accepted legal and business practices throughout the world) and so infused with socialist dogma that they would need to be replaced with suitable legislation at the earliest possible time.¹²⁸ Thus, Cuban law will need to undergo substantial change in order to form a legal infrastructure conducive to American investment in real estate.¹²⁹

The first and most important legal change required is the drafting of a new permanent constitution.¹³⁰ The last pre-Revolutionary Cuban constitution, enacted in 1940, was replaced by successive socialist constitutions that established a “centrally-planned, state-owned, and state-controlled economy.”¹³¹ Thus, to achieve a transition to a free-market economy, Cuba must enact a new constitution following a constitutional convention.¹³² A new Cuban constitution would “have to expressly declare the country’s commitment to freedom of economic activity and the protection of private property rights.”¹³³ Unfortunately, because the process of drafting a new constitution could take up to two to three years,¹³⁴ Americans will be further delayed from securely investing in Cuban real estate.

Next, the new Cuban government will have to negotiate a settlement with the international community regarding expropriation claims.¹³⁵ A system providing remedies for the property confiscations must provide predictable and fair treatment to all claimants, create an administration of secure and marketable rights to property, promote prompt privatization of state-held assets, and keep the total cost of the remedies within the financial means of the country.¹³⁶ Unfortunately, unless payment is delayed for a substantial period of time, Cuba’s economic condition

128. Matias Travieso-Diaz & Steven R. Escobar, *Cuba’s Transition to a Free-Market Democracy: A Survey of Required Changes to Laws and Legal Institutions*, 5 DUKE J. COMP. & INT’L L. 379, 384 (1995).

129. *Id.* at 379.

130. *Id.* at 382.

131. Matias Travieso-Diaz & Stephan M. Bleisteiner, *Some Lessons for Cuba from the Legal Changes in Eastern Europe*, 3 U. MIAMI Y.B. INT’L L. 173, 186 (1996).

132. *Id.*

133. *Id.*

134. Travieso-Diaz & Escobar, *supra* note 128, at 382.

135. Jose A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes For a Post-Socialist Cuba*, 22 LOY. L.A. INT’L & COMP. L. REV. 321, 322 (2000).

136. Matias Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims Against Cuba*, 16 U. PA. J. INT’L BUS. L. 217, 225.

will not allow more than token compensation to the former owners.¹³⁷ Hopefully, the resolution of claims of former land-owners will be through compensation instead of through the return of property so that the ownership rights of current and future owners do not remain in jeopardy.¹³⁸ Even if such claimants are willing to settle, resolution of these claims will be complicated by the passage of time and by the fact that most expropriated property has been destroyed, modified, or merged with other property.¹³⁹ Thus, these outstanding claims will not be resolved for a long time and will continue to operate as an obstacle by clouding title to Cuban real estate.¹⁴⁰

Additionally, before Americans can safely invest in Cuban real estate, the nation will have to enact a new foreign investment act.¹⁴¹ This act should learn from the CFIA's shortcomings by eliminating all prior-approval requirements for foreign investment.¹⁴² Also, the new act should outline exactly what types of business activities, including real estate transactions, foreign investors are allowed to carry out.¹⁴³ Lastly, a new foreign investment act should include guarantees similar to those in the CFIA. These guarantees, however, should be authored by a governmental source more reputable than Castro.¹⁴⁴

Unfortunately, many more legal developments must take place before Americans can easily and confidently invest in Cuban real estate. Fortunately, some of Cuba's pre-Revolutionary laws are still technically valid and provide a framework for future private Cuban real estate law.¹⁴⁵ For example, Cuba's 1952 Condominium Law contains provisions on the critical elements of modern condominium ownership such as co-ownership of common elements, horizontal division of property, easements, and owners' rights.¹⁴⁶ Other well-developed areas of pre-Castro Cuban law include a registry of property and real estate mortgage law.¹⁴⁷ While some legal foundations exist which can be built upon during Cuba's transition to a free-market democracy, there is a much

137. *Id.* at 29.

138. Zamora, *supra* note 19, at 556.

139. Travieso-Diaz & Escobar, *supra* note 128, at 411.

140. *Id.*

141. *Id.* at 413.

142. *Id.* at 414.

143. *Id.* at 415.

144. *Id.* at 416.

145. Zamora, *supra* note 19, at 544-545.

146. *Id.* at 545.

147. *Id.* at 545-546.

longer list of legal gaps with no precedent on which to rely. A partial enumeration of new laws that need to be enacted includes accounting, administrative, immigration, military, banking, civil, commercial, customs, education, election, environmental, judicial reform, insurance, land use, maritime, mining, penal, occupational health and safety, public contract, public labor, securities, social security, telecommunications, and transportation law.¹⁴⁸ Thus, Cuba will have to completely reconstruct its entire legal infrastructure, and until this immense project is completed Americans will be unable to invest in Cuban real estate with confidence and certainty.

IV. CONCLUSION

Significant obstacles in both U.S. and Cuban law currently prevent American investment in Cuban real estate. In the U.S., the economic embargo, codified under the Helms-Burton Act, completely bars all business transactions with Cuba. Were it not for the embargo, the Act's private right of action provisions impede foreign investment in real estate by exposing investors to considerable liability for trafficking in property that is the subject of expropriation claims. Neither the President, nor the Supreme Court, nor Congress will eliminate these obstacles under Helms-Burton until Cuba is in transition to free-market democracy.

In Cuba, despite the liberalization of the law under the CFIA, significant legal shortcomings persist and create further restrictions to American investment in Cuban real estate. Most types of real estate investments, including those for agriculture, industry, and land banking remain off limits for foreign investors. More importantly, foreigners are unable to acquire title to the property in which they invest. Also, prior governmental approval is required for all foreign investments. Further, despite formal guarantees, foreigners are skeptical of investing in an unstable and uncertain political setting. Castro's communist government and economy are incompatible with foreign private ownership, and Cuba will have to completely revise its legal infrastructure to remedy this inherent conflict. Americans will be unwilling to invest in Cuban real estate until a political and legal setting exists that is stable enough to convince foreigners that their investments are secure.

The bottom line is that the elimination of both nations' legal

148. Travieso-Diaz & Escobar, *supra* note 128, at 419-420.

obstacles cannot occur while Castro and communism still govern Cuba. Despite the CFIA's superficial liberalization of Cuban law, the Cuban economy struggles without Soviet support and the Act is likely no more than one of Castro's ploys to lure foreign funds by convincing the rest of the world that Cuba is a safe locale for foreign investment. Though one can see the construction of luxury condominium buildings in downtown Havana, the Cuban government has already put a freeze on all foreign investment in residential real estate, one of the few types of land in which foreigners may invest. This freeze is concrete evidence of the intrinsic conflict between communism and the private ownership of real estate. Other foreign real estate investors are not surpassing American investors because Cuba does not currently offer a setting conducive to sound and secure foreign investment in real property. "Cuba will be a place to make profit when Castro is gone, when power has been transferred in a peaceful and orderly fashion, and when the course of transition toward democracy and a market economy has been clearly defined – and only then."¹⁴⁹ Such progress is not impossible. After all, Castro is nearing the end of his life and everyday the need for foreign capital grows stronger. Still, Castro's rule continues, Helms-Burton remains good law, and the legal obstacles to American investment in Cuban real estate endure. Moreover, even when Cuba is finally ready to become a free-market democracy, it will be a complex and prolonged process requiring the reconstruction of virtually every field of Cuban law. Though attractive, profitable real estate investments will someday be available in Cuba, right now prospective American investors are left saying, "It's close, but no cigar."

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149. Montaner, *supra* note 106.

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