# INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE IN CUBAN PRODUCTS

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The U. S. Department of State asserts that "the protection of intellectual property rights is an essential element of U. S. economic foreign policy. The United States government is fundamentally committed to protecting intellectual property rights on U. S. goods and services in domestic and international markets" (USDOS, 2000, June 12). The exercise of that policy has recently drawn the United States into serious confrontations with some of its major trading partners. Both Federal courts in the United States and international organizations such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) have become involved. This paper investigates these recent controversies over the use of Cuban brand names and trade marks. It focuses specifically on issues regarding Cuban cigars and Cuban rum in foreign markets.

## INTRODUCTION TO THE PROBLEM

When the Castro administration nationalized Cuban industry in the early 1960s, the owners of many business firms and agricultural enterprises fled the island, finding asylum in the United States and other friendly countries. They left behind the physical assets of their firms and farms. Presumably, however, they took with them the ownership of intellectual property, such as trademarks and brand names.

In time, the Castro government used the expropriated plant and equipment to produce a variety of goods and services, including cigars and rum. Many of the cigars were put on the market under brand names that were the original property of expatriate Cubans (Fruin, 1998). Havana Club rum was also marketed, although the Arechabala family originally owned that brand name. The Cuban government argued that the trademarks had also been expropriated when nationalization took place.

Expatriate Cuban businesspersons set up their own tobacco and cigar concerns in other countries, and began to use the brand names that they considered their own. In some cases, they later sold the rights to their cigar brand names to large cigar firms. These firms then produced free market cigars under the old names.

Because of the United States embargo of Cuban trade, non-Cuban cigar producers could market their wares in U. S. markets without competition from Cuba. Trademark controversies arose when Cuban and non-Cuban interests both tried to register the same brand name.

The controversies spread to rum when Bacardí purchased the rights to the Havana Club rum name from its original owners, and began to export it to the United States, where Cuba had already registered the brand name. Litigation and legislation followed.

Clearly, the existence of two sets of overlapping brand names creates problems internationally, and raises serious questions concerning the ownership of

1. The authors gratefully acknowledge the comments of Matías Travieso-Díaz.

such intellectual property. The extent of the problem regarding cigars is shown in Table 1, which lists the Cuban cigar brands that were being produced in other countries in 1998. Note that 17 of those brands were also being produced in Cuba.

### Table 1. Cuban Cigar Brands Produced in Other Countries, as of 1998

| Cuban Cigar Brand | U. S. Rights Owned By | Where Made |
|---|---|---|
| Belinda* | General Cigar | Honduras |
| Bolivar | General Cigar | Dominican Rep. |
| Cabanas* | Consolidated Cigar | United States |
| Cifuentes | General Cigar | Jamaica |
| Cohiba | General Cigar | Dominican Rep. |
| El Rey del Mundo | General Cigar | Honduras |
| Fonseca | MATASA | Dominican Rep. |
| Gispert | Tabacalera SA | Honduras |
| H. Upmann | Consolidated Cigar | Dominican Rep. |
| Henry Clay | Consolidated Cigar | Dominican Rep. |
| Hoyo de Monterrey | General Cigar | Honduras |
| La Gloria | El Credito | Dominican Rep. |
| Montecristo | Consolidated Cigar | Dominican Rep. |
| Partagas | General Cigar | Dominican Rep. |
| Por Larrañaga | Consolidated Cigar | Dominican Rep. |
| Punch | General Cigar | Honduras |
| Ramon | General Cigar | Dominican Rep. |
| Romeo y Julieta | Tabacalera SA | Dominican Rep. |
| Saint Luis Rey | Tabacalera SA | Honduras |
| Santa Damiana* | Consolidated Cigar | Dominican Rep. |

**Source:** *Cigar Aficionado*, July 20, 1998.

**Note:** Cigar brands with an asterisk are not produced in Cuba at this time.

Fewer problems existed in other countries. The Cuban tobacco marketing organization, Habanos S. A., made an agreement with Tabacalera S. A., the Spanish tobacco firm, to distribute its cigar brands around the world. The initial years of the partnership were filled with problems and litigation, focusing on Tabacalera's purchase of some cigar brand names from large American firms. An effective working arrangement was finally reached, however. As will be noted later, Tabacalera's successor company, Altadis, ultimately bought a half interest in Habanos.

The following sections provide more detail about cigar brand name controversies and the so-called "rum wars" in the United States.

## INSTITUTIONAL AND LEGAL BACKGROUND

When the United States Constitution was ratified in 1788, it gave Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries" (U. S. Constitution, Article II, Section 8). This provision permitted the establishment of patent and copyright laws. By extension, trade marks and service marks were later included.

A trademark is a name or a symbol that is used to distinguish one good from another. Using a popular soft drink as an example, the names, "Coca-Cola" and "Coke"; the hourglass shape of the bottle in which some Coca-Cola is sold; the special script used to write the name "Coca-Cola" on bottles; and the slogan, "Things go better with Coke," are all trademarks. They are registered with the United States Patent and Trademark Office, and are jealously guarded against use by others. Clearly, the brand name of a cigar, such as Cohiba, Punch, or Hoyo de Monterrey, is also a trade mark. Names or symbols used to identify services are called service marks (USDOC, PTO, 1999).

Trademarks such as brand names are clearly a type of intellectual property that can have substantial commercial value. Controversies over the ownership of a brand name often involve product sales that generate large flows of revenue.

It is important to understand that intellectual property, such as a trademark, is the most legalkind of property. It was created by lawyers and the legal system, who can also change it or abolish it. Disputes regarding trademarks can be complex and lengthy. Real property, in contrast, is much easier to identify and to analyze. As a result, disputes over real property can be more quickly resolved.

Varying attitudes toward intellectual property in different countries constitute a major complicating factor. The pirating of computer software, and controversies over the ownership of Internet domain names, have given new impetus to trademark protection activities in recent years (Jussawalla, 1992).

Under U. S. common law, the sale of a product having a brand name establishes that name as a trademark. "Common law rights arise from actual use of a mark. Generally, the first to either use a mark in commerce or file an intent to use application with the Patent and Trademark Office has the ultimate right to use and registration" (USDOC, PTO, 2000).

The trademark laws of the United States are currently enforced by the U. S. Patent and Trademark Office (USPTO), which is housed in the U. S. Department of Commerce. Registration of a brand name with the USPTO gives it official government recognition, and makes it easier to defend and protect in any legal proceeding. Registration occurs only after a thorough review process, including a determination that the trademark under review does not infringe upon other trademarks already registered. In the words of the USPTO, registration gives "notice to the public of the registrant's claim of ownership of the mark, a legal presumption of ownership nationwide, and the exclusive right to use the mark on or in connection with the goods or services set forth in the registration" (USDOC, PTO, 2000).

Before 1989, a good had to be actually sold in the marketplace before its brand name could be registered as a trademark. Since that year, however, a trademark can be registered with the USPTO if the registrant has a clear intention of marketing the good. Renewal of a trademark on a good that is not on the market at that time requires the filing of a Declaration of Excusable Non-Use, explaining the reasons for no current sales.

Interestingly, the U. S. trade embargo of Cuba permits Cuban firms or the Cuban government to register trade marks and logos with the USPTO. Any citizen or organization of a foreign country may register a trademark in the United States if the trademark is already being used in interstate commerce or trade between the U. S. and other countries; if the registrant intends to place the good in interstate commerce or trade between the U. S. and foreign countries; or if the registration of the trademark is either under way or granted in a foreign country (USDOC, PTO, 2000). Cuba has exercised this right, and has registered trademarks for a number of goods in the United States, including some cigars and rum.

The trademark situation in the United States is not unique. A foreign manufacturer who wishes to sell his or her branded good in 50 other countries must normally obtain a separate registration of the good's trademarks in all 50 countries.

Because trademark laws differ, sometimes significantly, from one country to another, questions have understandably been raised about the protection of valuable property rights. A number of international agreements now address the problem. Agreements concerning intellectual property rights were first negotiated over a century ago. The Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886 were the first such agreements, followed in 1891 by the Madrid Agreement Concerning the International Registration of Marks.

As the key international agreement relating specifically to trademarks and other marks, the Madrid Convention has been revised several times. In 1989, a Protocol Relating to the Madrid Agreement was adopted by many of the Madrid Union countries. The Madrid system of international registration is currently administered by the International Bureau of the World International Property Organization (WIPO), which was created in 1967 by the United Nations. Member countries may register their trademarks with WIPO, requesting that the mark be accorded protection in other member countries. At the present time, Cuba has 2,159 trademarks registered with WIPO (UN, WIPO, 1999).

The United States is one of the signatories to the Madrid Agreement. It is also one of the founding partners of the World Trade Organization, which now involves itself in trade disputes, including those that focus on the legitimate use of trademarks.

The World Trade Organization (WTO) was set up on January 1, 1995, as a result of the Uruguay Round of multilateral trade negotiations (1986-1994). The WTO is the successor to the General Agreement on Tariffs and Trade (GATT). One of the major functions of the WTO is to mediate and, where possible, resolve trade disputes among member countries (WTO, 1999).

In 1994, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was concluded under the auspices of the Uruguay Round. This agreement encouraged the development of standards for the protection of intellectual property rights. It also helped to establish the means to enforce those standards, both domestically and "at the border" (USDOS, 2000). TRIPS is administered by the World Trade Organization. Developed countries were expected to implement the agreement by July 1, 1995. Developing nations were given more time.

Both WIPO and WTO facilities have been widely used by member countries to resolve intellectual property disputes. At the domestic level, trademark disputes are usually handled by a country's registering agency (such as USPTO) or by the country's courts.

## THE CONTROVERSY OVER CUBAN CIGARS

While many Cuban cigar brands are produced in both Cuba and elsewhere, the brand name controversy in the United States has so far centered on only two major brands: Cohiba and Trinidad.

Culbro Corporation, which owns General Cigar Company, began to register its Cohiba cigars with the U. S. Patent and Trademark Office in 1978. It received registration in 1981, and assigned the registration to General Cigar in 1987. At that time, and for some time afterward, General Cigar produced and sold only limited quantities of Cohibas (Falk, 1998).

On January 15, 1997, the Cuban government petitioned the USPTO to cancel Culbro's Cohiba trademark. Its position was that Cuban factories had begun making Cohiba cigars in 1960, and that they were available in diplomatic stores in Havana as early as 1967. And since Cohiba is a "well-known or famous name" like Xerox, Coca-Cola or Nike, under international law it should not be appropriated by a producer in another country. At the present time, Cuba has registered the Cohiba name in at least 115 countries, other than the United States (Falk, 1998).

The facts of the matter are apparently somewhat different from the Cuban version. Cigar industry officials indicate that Cuban Cohibas did not become available on the open market until about 1981. Some Cuban advertisements refer to 1982 as the year when the island's "best kept secret" became public. Before that time, Cohibas were produced for the use of Fidel Castro and as gifts to foreign dignitaries (Tamayo, 1997).

Given the accuracy of these observations, Culbro and General Cigar had a legal right to the trademark in the United States by about the same time that Cohibas reached the commercial market in Cuba. Note that this argument is exclusive of, and in addition to, the argument that General Cigar purchased the brand name from its original, rightful owner, and that the Cuban government had expropriated the brand name.

A complicating factor is that U. S. trademark law requires actual market use of a brand name, or the submission of an affidavit justifying the absence of sales. General Cigar did not produce Cohibas in significant quantities until 1997. Early in that year, it introduced Cohibas to the national market, promoting them heavily through advertisements. The U. S. version of the Cohiba has a logo that is very similar to the Cuban Cohiba logo. It is also advertised as being made from tobacco that is grown from Cuban seed. From the point of view of Cuban producers, the effect of such similarity is to confuse consumers. Trademark registration is intended to eliminate such confusion.

Since the issue could not be resolved by the USPTO, on November 12, 1997, Cubatabaco sued General Cigar Holdings, Culbro, and their distributor for "trademark infringement, trade dress infringement, false designation of source or origin, unfair competition, misappropriation and trademark dilution" (Falk, 1998). The suit appealed to the aforementioned international treaties for relief.

With Federal legal proceedings hanging over their heads, both sides agreed to suspend litigation and to begin negotiations that might lead to a settlement. Representatives of both parties met in Mexico City to explore this possibility. A financial settlement would clearly have damaged at least the spirit of the embargo against Cuba, and would have established a precedent for negotiations about other contested brand names.

Most of the legal maneuvering by both in the controversy was eliminated or postponed by a simple piece of legislation that was sponsored by the two Senators from the State of Florida. On October 21, 1998, the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, was signed into law. Section 211 of that law prohibited Cuban companies or persons from registering a confiscated trademark in the United States without the permission of the original owner. U. S. courts are also prohibited from recognizing any such trademark rights unless the original owner gives his consent. The prohibition is effective even when the original owner of the trademark abandoned or relinquished it in the United States.

This law provided the basis for a clear decision in the Cohiba case. The Federal judge who heard the case found in favor of Culbro and General Cigar. As will be noted below, Section 211 also affected decisions concerning Havana Club rum.

Section 211 was phrased very broadly, although aimed primarily at Cuba. From the point of view of other foreign countries, it may also limit their ability to register or maintain trademarks in the United States.

The position of the European Union is that Section 211 violates several portions or provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). For example, it may treat one right-holder differently from another right-holder. And, according to TRIPS, "a trademark registration cannot be made conditional on the consent of a trademark owner who has abandoned his rights" (EU, 1999, July 9). Representatives of the United States have adamantly rejected the position of the European Union, arguing that Section 211 is in accord with TRIPS.

On July 9, 1999, the European Union asked for formal consultations with the United States under the auspices of the World Trade Organization, arguing that Section 211 is in conflict with TRIPS (EU to back Pernod, 1999). Meetings were held on September 13 and December 13, 1999, with no resolution of the dispute. Accordingly, on June 30, 2000, the European Commission formally requested that the WTO place the matter before its Dispute Settlement Body at its next meeting. And there the matter currently stands (WTO, 2000).

If the dispute settlement process follows the timelines established by the WTO, a panel report from the Dispute Settlement Body should be available for U.S. review within a year or a year and a half.

A similar controversy has arisen concerning Trinidad cigars. The Trinidad family operated one of the largest cigarette and cigar firms in Cuba, until the Castro government took it over in 1960 and formally nationalized it in 1961. The family had registered the cigar brand name, TTT Trinidad, La Habana, Cuba, with the Cuban Office of Trademarks and Patents in 1958 (Trinidad, 1999).

The Trinidad family migrated to the United States, where they set up cigarette and cigar production facilities. The brand name Trinidad y Hermano was registered for the firm's cigars.

In 1994, the Cuban government filed a petition to register the brand name, TTT Trinidad, La Habana, Cuba, with the USPTO. Permanent registration was granted to Cuba in December, 1996. At about the same time, the Trinidad family made arrangements with the Fuente organization to manufacture cigars using that brand name.

After some initial political maneuvering, the Trinidad family entered a Petition for Cancellation with the USPTO in December, 1997, asking that the Cuban registration be cancelled. The results of that petition, given Section 211, are predictably positive, although the USPTO has not yet rendered a formal decision. In the meantime, the Trinidad family is selling both Trinidad y Hermano and TTT Trinidad premium cigars in the United States.

Since 17 cigar brands are produced concomitantly in Cuba and in other countries, the resolution of these two disputes has far-ranging implications for the international cigar industry.

## THE CONTROVERSY OVER CUBAN RUM

José Arechabala y Aldama migrated from Spain to Cuba in 1862, at the age of 15. In 1878, he established a small distillery in Cárdenas. The company grew over time, in spite of varying business conditions and the depredations of hurricanes. It was incorporated in 1921 as "José Arechabala, S. A." (Arechabala Industries, 1999).

Shortly before the time of the Cuban revolution, Arechabala Industries produced alcohol and fuels, refined sugar, candies, and a variety of liquors, including Havana Club rum. It also imported and distributed foreign liquors and wines.

According to Cuban government information, Arechabala Industries was in very weak financial condition at the time of the Cuban revolution. In 1955, it had permitted the Havana Club trademark to fall into the public domain in Spain and the Dominican Republic. It still maintained its trademark registration in the United States, however (Campo-Flores, 2000).

After the nationalization of Arechabala Industries in 1960, the family members migrated to the United States and to Spain. They neglected to renew the Havana Club trademark registration in the United States, although they could have done so with a Certificate of Excusable Non-Use.

Cubaexport, a Cuban state enterprise, resumed production of rum under the Havana Club name. The rum was exported primarily to Communist Bloc countries. Cubaexport registered the Havana Club brand name in Spain in 1966, and with the USPTO in 1976 (Still, October, 1999).

With the breakup of the Soviet Union and the communist bloc countries, Cuban rum lost a significant market and suffered declining revenues.

In an attempt to bring in foreign capital and to expand its marketing abilities for Havana Club rum, the Cuban government approved a new joint venture with a foreign beverage firm in 1993. The agreement formed two companies. The first was Havana Club Holding, a holding company with equal shares of ownership going to a new Cuban company, Havana Rum & Liquor, S. A., and to the French beverage group, Pernod Ricard. The second company was Havana Club International, a distributing company which was also equally owned by Havana Rum & Liquor and Pernod Ricard.

In 1993, representatives of Pernod Ricard offered to compensate the Arechabala family, if they would give up all claims to the Havana Club name. This action by Pernod suggests that the firm may have recognized the family's right to the brand name. The family instead sold the rights to the trademark to Bacardi-Martini, in 1995, for a reported $1.25 million (Still, October, 1999).

In 1995, the U. S. Treasury Department granted a license to the Cuban government that permitted the transfer of the Havana Club trademark to Havana Club Holding. Havana Club Holding then gave Havana Club International an exclusive license to sell Havana Club Rum internationally, and to use the Havana Club trademark (Sánchez, 1998).

At this point, the Cuban government not only had tight control over the production of Havana Club Rum, but also enjoyed the use of the international distribution network provided by Pernod Ricard.

In July, 1995, Bacardi petitioned the USPTO to cancel Cuba's registration of the Havana Club trademark. At about the same time, it began to produce limited quantities of Havana Club Rum in the Bahamas, and marketed it in the United States. Production and sales continued for about a year, ending in 1996.

The arrangement was attacked by U. S. interests, but held up under initial legal review. In August, 1997, however, the Treasury Department withdrew the license it had issued to the Cuban government, placing the legality of the trademark transfer in doubt (Falk, 1998).

The New York District Court, which heard the Havana Club case, invoked Section 211 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, and ruled that the joint venture was not the owner of the trademark. Bacardi now has legal right to the brand name in the United States. Interestingly, the court's decision included no finding as to whether the Arechabala family was the rightful owner of the brand name when it was sold to Bacardi. That issue is still moot (Lopez, 1999b).

At the moment, Cuban-made Havana Club rum is being sold in 115 countries, other than the United States. The critical question of who really owns the brand name will be answered when the United States responds to the findings of the Dispute Resolution Body of the World Trade Organization in about a year. The question is the same for cigars and rum: Do the original owners of the brand names still own them?

Note that the controversy now extends only to cigars and rum. Should Cuba attempt to register other branded goods whose brand names belong to expatriates, the same question would be raised.

Although recent U. S. legislation has eased the embargo to permit the export of food and medical goods to Cuba, the major provisions of Helms-Burton and previous embargo acts still prevail. In the short run, Cuba therefore has limited options to solve the brand name problem.

Note, too, that the Clinton Administration has continued to suspend Title III of the Helms-burton Act, thus making it impossible for Cuban-Americans to sue foreign companies that traffic in properties that the Castro administration has confiscated. The latest extension of this suspension was signed by President Clinton on July 17, 2000 (Clinton suspende, 2000).

Once the transition occurs, and the island's economy is opened to U. S. trade and investment, the options open to Cuba become more numerous. At the same time, there is much uncertainty about brand name usage in international markets until some basic questions about the privatization of state-owned enterprises are resolved.

## SHORT-TERM CUBAN STRATEGIES

In the short run, while the effects of Helms-Burton, Section 211, and the embargo are still being felt, the options open to the Cuban government are primarily legal.

The first such strategy is the filing of additional lawsuits, similar to the recent suits regarding Cohiba and Havana Club, in an effort to displace competing brands already in the U. S. market. Such an action would accompany the attempt by Cuba to register other cigar brand names with the USPTO, for example.

This strategy is surrounded by uncertainty, since the expatriate owners of brand names will undoubtedly also be in the courts, attempting to recover the property that was expropriated from them. Up to this point in time, U. S. courts have been largely unreceptive to claims of the Castro government. It is difficult to imagine that their position would change significantly. And the blocking action of Section 211 looms large in this scenario, although it is under attack at the WTO. Cuba has lost in the U. S. courts, and probably will continue to do so in the near future.

As an international alternative, Cuba may seek further mediation from the World Trade Organization. As noted above, the European Union has already asked the WTO to consider the dispute between Cuba and the United States, since its own interests may be affected by Section 211. This approach places the brand name dispute in the international arena, at a higher level than the domestic courts. But the United States has a record of using the WTO as it uses the United Nations and other international organizations. When the outcome of a dispute is seen to be favorable to the U. S. position, it is accepted and supported. But when the outcome goes against U. S. interests, it is very often ignored.

Fidel Castro has threatened another short-term action. If the United States persists in enforcing Section 211, he says, the Cuban government may eliminate its support of U. S. trademarks on the island. State-owned firms could produce their own versions of Coca-Cola and MacDonald's hamburgers, for example (Tamayo, 1999).

Interestingly, the WTO dispute settlement process includes the possibility of "retaliation" against the losing country in the process, if that country does not implement the terms handed down in the panel report. What form that retaliation might take in the case of the United States is uncertain.

## AFTER THE TRANSITION

The short-term options open to Cuba are therefore the ones that the Castro administration is already using or is considering. As long as Helms-Burton and the embargo are in effect, wider options do not exist.

After the transition, the situation is far less predictable. The key institutional changes arethose that will take place when state-owned enterprises are privatized. What will happen to Cuban trademarks and brand names at that time? From the point of view of the Cuban expatriates who have lost their property, the ideal solution would be the return of that property to them, and the recognition that they are the rightful owners of the contested brand names. Production of Cohiba and Montecristo and H. Upmann could resume under their rightful owners, and the Cuban cigars would have free access to the U. S. market.

A possible casualty of this event would be the factories in the Dominican Republic, Honduras, and elsewhere, that now produce cigars under the old Cuban brand names. Presumably, they would phase out production of cigars such as Cohiba and Montecristo, and would shift to the production of non-competing brands. The introduction of new cigar brands would also make sense, if the market permitted. In the absence of market growth, such factories might well be shut down.

If privatization proceeds gradually, once trade with the U. S. resumes, the Cuban government may find it rational to retire some or all of the brands that are in controversy, and replace them with new brands that can be legally registered and sold in the United States.

That strategy is already being used. In recent years, Habanos has created and introduced a number of new cigar brands, probably in anticipation of a reopened U. S. market. These include Cuaba, Vegas Robaina, Trinidad, Vegueros, San Cristóbal de la Habana and La Vigía. The newest brand, San Cristóbal de la Habana, was placed on the market on November 20, 1999. None of these brands has a counterpart in the United States. But none of the older brands under controversy hasbeen retired from the market, primarily because they enjoy strong sales in other countries. It would not be rational for the Cuban government to attempt to retire and replace strongly-selling brands such as Montecristo and Cohiba.

While this new product strategy can be effective in achieving market entry, it has some disadvantages. If the Cuban government retired the Cohiba brand of cigars, and replaced it with another brand name that could be registered in the United States, it would lose all of the market advantage that accrues to a well-known, well-established cigar. Cohibas, like Montecristos, are known and prized all over the world. The new brand would be unfamiliar, untested, and, initially, perhaps unwanted by consumers. Some time would have to elapse before the new cigar could establish itself competitively. Note, too, that a stable or slowly-growing cigar market, such as exists today, presents a difficult environment for any new product. The booming cigar market of 1994-98 would have made it much easier to introduce a new cigar brand.

Gradual privatization of the Cuban manufacturing sector could also bring about the auctioning of key cigar brands to individuals in the private sector, individuals who are not necessarily the original owners of the brands. For Cohiba cigars, this policy might result in private-sector owners of the Cohiba brand name in both Cuba and the United States.

This alternative does not offer a solution, since it does not resolve the question of who legitimately owns the brand names. Litigation and petitions to international organizations could result, with a standoff that is similar to the one now in effect.

Alternatively, it has been suggested that Cuban producers might negotiate agreements with the holders of competing trademarks in the United States. Cuban producers of cigars could license the firms who hold the U. S. trademarks to sell the Cuban brands in U.S. markets.

How such agreements would work, and whether they could work at all, is uncertain. The position of General Cigar regarding its Cohiba trademark would probably be that the Cuban-made brand should be retired from the market. If both brands were to be marketed in the United States at the same time, with each identified as to country of origin, the profit levels of the producing firms could both be adversely affected. There would still be the problem of brand name confusion, especially if current cigar bands, logos, and other marks remained unchanged.

## SOME CONCLUSIONS AND ADDITIONAL PROBLEMS

Given the current status of the trade embargo against Cuba and official U. S. policy as stated in the Helms-Burton Act, the Cuban government is doing all that it rationally can do to protect its expropriated cigar and rum brand names. If the WTO Dispute Resolution Body declares Section 211 to be in violation of TRIPS, then the United States must develop a policy reaction that preserves U. S. registered trademarks. That reaction is unpredictable, but may be as simple as ignoring the WTO decision, or criticizing it as being unfair.

When the transition occurs, a key consideration will be whether expatriate brand name owners can quickly and freely reclaim both their expropriated physical assets and the Cuban registration of their brand names. If this happens, economic dislocations may be minimized.

If a post-transition privatization process places brand names on the auction block, for sale to the highest bidder, the results become less predictable. If the brand names are not acquired by their original owners, then all will face a situation similar to the one that exists today, with competing claims to the brand names. The major difference will be the existence of open trade between the U. S. and Cuba.

It is clear that the resolution of these problems depends upon the answers to some very crucial legal questions. All of them bear upon the nature of intellectual property, and how it is transferred.

- Cuba expropriated the physical facilities of producers in the 1960's. Did it also legally expropriate their brand names?
- If Cuba does not own the brand names, who does?
- What is the legal standing of expropriated marks in countries other than the United States?
- How long, and under what conditions, can a person or organization assert its right to a brand name?
- Will Section 211 of the Omnibus Appropriations Act be upheld on appeal in United States courts?
- Does Section 211 conform with TRIPS? If not, how will the United States respond?
- And, importantly, how will the post-transition Cuban government handle this problem?

In sum, the resolution of the controversy will come from the legal sector, since the key questions are legal in nature.

Recent structural changes in the internationalcigar market have introduced further uncertainty. The Spanish firm, Tabacalera S. A., and the French firm, Seita, have merged to form the world's fourth-largest tobacco company, called Altadis (short for "alliance tabac distribution"). Altadis controls 25 percent of the world's cigar market. It officially came into being in December, 1999. Tabacalera owns Consolidated Cigar. Seita now owns 50 percent of the Cuban distribution agency, Habanos, S. A., through a joint venture. Altadis therefore owns or has a major interest in both of the firms that are involved in the U. S. litigation concerning the Cohiba brand name. In fact, Altadis now controls a large percentage of the cigar brands worldwide that have Cuban origins. Will Altadis attempt to find an acceptable solution to the Cohiba brand name problem, since it now has some control over both producing firms? Only time will tell.

In the meantime, the deliberations of the Dispute Settlement Body of the WTO continue. Within the next eighteen months, the United States will be pressed for a reaction to the report of that body, which will, in all probability, declare Section 211 in violation of TRIPS.

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