LA CONSISTANCE JURIDIQUE DE L'EMBARGO ECONOMIQUE ET FINANCIER AMERICAIN CONTRE CUBA

Par une décision ***Odebrecht Construction*** rendue le 6 mai 2013, la cour fédérale d'appel pour le 11ème circuit confirme une injonction préliminaire rendue en première instance en juin 2012 et qui empêche temporairement, le temps d'un examen au fond, l'application d'une loi de l'Etat de Floride interdisant l'accès aux contrats publics de sociétés faisant des affaires avec Cuba ou la Lybie. Cette demande de suspension de l'application de la loi avait été demandée aux juges par une entreprise brésilienne de construction et l'Etat de Floride s'était pourvu en appel contre la décision rendue par la première juridiction fédérale saisie. Si l'affaire a été portée devant une juridiction fédérale, c'est précisément parce que l'entreprise plaignante, *Odebrecht Construction*, contestait la conformité de la loi de Floride à la législation fédérale relative aux relations entre les Etats-Unis et Cuba, qu'ainsi la loi de Floride violait la *Supremacy Clause* de la Constitution fédérale. C'est donc considération faite du caractère sérieux de la contestation au fond portée par l'entreprise plaignante que la suspension de l'application de la loi a été prononcée.

Dans son examen de la condition d'admission de l'injonction préliminaire demandée par l'entreprise brésilienne tenant au sérieux de sa contestation de la loi sur le fond, la cour fédérale ne s'appuie pas seulement sur les différences « radicales » entre la loi de Floride et la loi fédérale s'agissant de leur champ d'application matériel (les actions prohibées) et sur l'ignorance par la loi de Floride des « nuances » de la législation fédérale. La loi de Floride, ajoute-t-elle, *« affaiblit la capacité du président des Etats-Unis à parler seul pour le compte de la Nation en matière de relations avec Cuba »*.

On a cru devoir extraire de la décision de la cour fédérale d'appel pour le 11ème Circuit les développements exposant clairement et précisément la législation fédérale relative à l'embargo américain sur Cuba. Mais l'on voudra garder à l'esprit que ce cadre législatif fédéral peut être décliné sur certains points dans des *executive order(s)* (décrets) du président des Etats-Unis. Ce fut le cas, par exemple, lorsqu'en 2011, le président des Etats-Unis décida d'assouplir les restrictions pesant sur les voyages ou les transferts de fonds vers Cuba. Cette décision, qui voulait encourager les voyages d'acteurs éducatifs ou d'organisations religieuses, limitait par ailleurs à 2000 dollars par an le montant maximal de transferts de fonds susceptibles d'être faits en faveur de personnes autres que des membres de famille mais à l'exclusion des dirigeants politiques et des membres du parti communiste. Et c'est dans le même contexte que les aéroports internationaux américains furent autorisés à accueillir des liaisons en charter avec Cuba. La décision de 2011 s'ajoutait à une précédente décision de 2009 sur les restrictions de voyage et de transferts d'argent, la faculté pour les entreprises de télécommunications américaines de desservir l'Île.

United States Court of Appeals for the Eleventh Circuit, *Odebrecht Construction, Inc., v. Secretary, Florida Department of Transportation*, 6 mai 2013 - No. 12-13958 (D.C. Docket No. 1:12-cv-22072-KMM)

"*Since the early 1960s, U.S. policy toward Cuba has consisted largely of isolating the island nation through comprehensive economic sanctions, including an embargo on trade and financial transactions.*" M.P. Sullivan, Cong. Research Serv. R41617, Cuba: Issues for the 112th Congress 30 (July 20, 2012) ("Cuba Issues"). The authority for, and contours of this federal policy come from a complex and interlocking network of statutes, regulations, and executive orders. Because our focus for present purposes is on the conflicts between the federal regime and the *Cuba Amendment [appellation de la loi de Floride contestée en l'espèce]*, which targets private companies, we highlight the provisions of the federal law that also affect private companies.

The authority for the federal Cuba embargo dates back to 1917, when Congress empowered the President to regulate and embargo trade with foreign nations. See ***Trading with the Enemy Act***, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-6, 7-39, 41-44). The statute affords the President broad powers to regulate, license, and prohibit trade with foreign nations:

[T]he President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise --
(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving,

any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States. 50 U.S.C. app. § 5(b)(1).

With respect to Cuba, the President has repeatedly exercised this power through the comprehensive ***Cuban Assets Control Regulations*** ("CACR"). The CACR were first promulgated by the Treasury Department in July 1963, almost fifty years ago[1]. The CACR are currently administered and enforced by the Treasury Department's Office of Foreign Assets Control. See 31 C.F.R. pt. 515.

The provisions of the CACR that most directly affect private companies relate to imports, exports, and other transactions involving Cuba or Cuban nationals. Broadly speaking, the regulations prohibit, unless specifically authorized, any dealing in any property in which Cuba or a Cuban national has an interest of any nature. See 31 C.F.R. § 515.201(a), (b). "Property" is expansively defined to include not only tangible property, but also contracts, securities, and services as well. 31 C.F.R. § 515.311(a). These provisions also apply to exports to Cuba, whether from the U.S. or even through offshore dealing by a person or entity subject to the CACR, because by definition a product exported to Cuba is one in which Cuba or a Cuban national has an interest. In keeping with the

[1] Since the enactment of the *International Emergency Economic Powers Act* of 1977, the President is only authorized to exercise the embargo powers conferred by Congress in that statute if the President first declares a national emergency, and may only exercise the powers conferred by the *Trading with the Enemy Act* during times of war. See 50 U.S.C. § 1701; id. app. § 5(b)(1) (empowering the President "[d]uring the time of war"). However, existing embargoes, such as the one against Cuba, were grandfathered in by Congress. As the Supreme Court has explained, "*rather than requiring the President to declare a new national emergency in order to continue existing economic embargoes, such as that against Cuba, Congress decided to grandfather existing exercises of the President's 'national emergency' authorities.*" Regan v. Wald, 468 U.S. 222, 228 (1984). "*This grandfather provision also provided that '[t]he President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.'*" Id. at 229 (quoting 50 U.S.C. app. § 5 note). The CACR promulgated in the 1960's are still valid by virtue of these extensions as well as by Congress' subsequent codification in 1996 of the economic embargo against Cuba, see 22 U.S.C. § 6032(h), though the regulations have been "*alternately loosened and tightened in response to specific circumstances,*" Wald, 468 U.S. at 243.

regulations' expansive definition of property, the ban on exports covers not only tangible goods, but also "the exportation of securities, currency, checks, drafts and promissory notes." 31 C.F.R. § 515.405.

The CACR also specifically prohibit importation or other dealings in merchandise that is of Cuban origin or is made from products of Cuban origin or has been located in or transported from or through Cuba. 31 C.F.R. §§ 515.204, 515.410; see also 22 U.S.C. § 6040(a) ("*The Congress notes that section 515.204 of title 31, Code of Federal Regulations, prohibits the entry of, and dealings outside the United States in, merchandise that . . . is of Cuban origin; . . . is or has been located in or transported from or through Cuba; or . . . is made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba.*"). Related to the ban on imports are restrictions placed on vessels that have engaged in trade with Cuba. Subject to waiver for certain vessels engaging in licensed or exempt trade, "[n]o vessel carrying goods or passengers to or from Cuba or carrying goods in which Cuba or a Cuban national has an interest may enter a U.S. port with such goods or passengers on board." 31 C.F.R. § 515.207(b). Moreover, no vessel that enters Cuba for trade may enter a U.S. port for a period of 180 days from the date the vessel departed from Cuba. 31 C.F.R. § 515.207(a).

Notably, the CACR only place restrictions on any "*[p]erson . . . subject to the jurisdiction of the United States,*" 50 U.S.C. app. § 5(b)(1), which is defined by regulation to include U.S. corporations, their domestic and foreign subsidiaries, and any foreign company owned or controlled by a U.S. citizen. 31 C.F.R. § 515.329. There is nothing in this record to suggest that Odebrecht has run afoul of the CACR, because neither it nor any of its subsidiaries does any business with Cuba. Significantly, the CACR do not sanction a U.S. company like Odebrecht for the business activities of its foreign parent company

or of a distant foreign affiliate that shares a common parent company.

Congress has remained active in legislating with respect to Cuba, and the current CACR reflect the additional sanctions and exceptions Congress has crafted over many years. Thus, the ***Cuban Democracy Act*** of **1992**, codified at 22 U.S.C. §§ 6001-6010, ramped up economic sanctions against the Cuban government while simultaneously permitting humanitarian relief to the Cuban people. See generally 22 U.S.C. §§ 6001-6002 (congressional findings and statements of policy).

Additional comprehensive legislation came four years later, when Cuban MiG's shot down two U.S. civilian private planes in February 1996. See 22 U.S.C. § 6046 (Congressional findings condemning attack). Shortly thereafter, Congress enacted the ***Cuban Liberty and Democratic Solidarity Act*** of **1996** (*"Libertad Act"* or *"Helms-Burton Act"*), 22 U.S.C. §§ 6021-6091. One of the provisions of the Act codifies the regulatory sanctions that were in place on March 1, 1996. See 22 U.S.C. § 6032(h) (*"The economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under part 515 of title 31, Code of Federal Regulations, shall be in effect on March 12, 1996, and shall remain in effect, subject to section 6064 of this title."*). As a panel of this Court has previously explained, this provision of the *Helms-Burton Act "continues the embargo indefinitely and effectively suspends the . . . requirement that the President revisit the embargo each year."* See United States v. Plummer, 221 F.3d 1298, 1308 n.6 (11th Cir. 2000). Congress subsequently relaxed some of the Helms-Burton Act's sanctions in the ***Trade Sanctions Reform and Export Enhancement Act*** of **2000**, codified at 22 U.S.C. §§ 7201-7209, which loosened the restrictions on exporting agricultural and medical products to Cuba.

In short, the economic embargo against Cuba is pervasive. But the federal regime also contains numerous exceptions, permitting certain kinds of transactions with Cuba through licensing as well as through complete exemptions. One of the major exemptions is for published and informational materials, whether commercial or otherwise, 31 C.F.R. § 515.206(a), which includes *"[p]ublications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, news wire feeds, and other information and informational articles,"* 31 C.F.R. § 515.332. In addition, the Helms-Burton Act authorizes the President to establish and implement an exchange of news bureaus between the U.S. and Cuba if certain conditions are met. 22 U.S.C. § 6044.

Another substantial category of exceptions is for agricultural and medical products. The *Cuban Democracy Act* provides that *"[e]xports of medicines or medical supplies, instruments, or equipment to Cuba shall not be restricted"* except under certain circumstances, such as where there is a reasonable probability that the product will be used in human rights abuses, will be reexported, or could be used in the production *"of any biotechnological product."* 22 U.S.C. § 6004(c). In addition, the ***Trade Sanctions Reform and Export Enhancement Act*** of **2000** prevents the President from imposing any unilateral agricultural sanction or medical sanction against a foreign country or foreign entity unless Congress approves it, again subject to certain exceptions. 22 U.S.C. §§ 7202, 7203. The statute also terminated any existing unilateral agricultural or medical sanction in effect as of October 28, 2000. Id. The statute does provide, however, that any export of agricultural commodities, medicine or medical devices to Cuba must be done pursuant to 1-year licenses issued by the United States Government. Id. § 7205(a). Moreover, the exemption applies only to exports to Cuba, and does not affect the ban on importation of goods from Cuba. Id. § 7208. The statute also directs the Secretary of the Treasury to promulgate regulations

providing for general licenses to travel to, from, or within Cuba for the marketing and sale of agricultural and medical goods. Id. § 7209(a); accord 31 C.F.R. §§ 515.533(e), 515.560 (provisions of CACR authorizing travel and travel-related transactions incident to sales of agricultural commodities, medicine, or medical devices).

A final and important exception from the Cuba sanctions is for telecommunications services. The ***Cuban Democracy Act*** permits telecommunications services between the United States and Cuba, and authorizes telecommunications facilities as may be necessary "*to provide efficient and adequate telecommunications services between the United States and Cuba.*" 22 U.S.C. § 6004(e)(1), (2). It does not authorize, however, any investment by a United States person in a domestic telecommunications network within Cuba. Id. § 6004(e)(5). The CACR further authorize U.S. telecommunications providers to engage in all transactions incident to the provision of telecommunications services or satellite radio or television services between the United States and Cuba. 31 C.F.R. § 515.542. The regulations also authorize persons or entities covered by the regulations to enter into and pay for contracts with non-Cuban telecommunications providers to provide telecommunications services to individuals within Cuba, so long as the Cuban individuals receiving the services are not members of the Cuban government. 31 C.F.R. § 515.542(c). As with the agricultural and medical exceptions, the CACR also authorize travel and travel-related expenses in connection with the marketing, sale, and provision of telecommunications services. 31 C.F.R. § 515.533(f).

We do not labor on these points to comment on the wisdom or efficacy of the federal Cuban sanctions regime or its exceptions, but rather simply to show that the executive branch has considerable authority and discretion in the field of Cuban sanctions, and has actively exercised that authority, just as Congress has actively

legislated. Federal policy towards Cuba is long-standing, it is nuanced, it is highly calibrated, and it is constantly being fine-tuned. It is designed to sanction strongly the Castro regime while simultaneously permitting humanitarian relief and economic transactions that will benefit the Cuban people. When the State of Florida promulgated the Cuba Amendment, it plainly was not operating in an area where the federal government has been asleep at the switch.

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8 mai 2013

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