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Might United States cruise lines and United States airlines agree to out-of-court settlements with plaintiffs as a means to avoid having a United States District Court Judge rule on the definition of “tourism.”

With a court ruling that travel-related activities authorized by the Obama Administration and the Trump Administration constitute “*tourism*” which is specifically prohibited, thus illegal, by the Trade Sanctions Reform and Export Enhancement Act (TSREEA) of 2000, a substantial revenue stream would evaporate for United States-based cruise lines, airlines, travel agents, tour operators, one hotel management company and for the government of the Republic of Cuba and Republic of Cuba government-operated companies.

According to a Washington DC-based analyst, if the “*educational travel*” sub-category of “*people-to-people*” is eliminated, the result could be a 66% decrease in the number of non-family visitors from the United States to the Republic of Cuba.

If a judge determines the Obama Administration and Trump Administration violated the TSREEA, then there will be the question of whether the activities of United States companies (and non-United States companies) engaging in the provision of travel-related services (airlines, cruise lines, hotel management companies) incident to what is now deemed to be unlawful have not been engaging in lawful activities despite licenses (general and specific) issued by the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury.

If the travel-related services companies are found to not be operating lawfully, they could be deemed to be subject to a determination of whether they are “*trafficking*” using the definition of the term in Title III of the Cuban Liberty and Democratic Solidarity Act of 1996 (Libertad Act).

On 16 March 2016, the United States Department of Transportation (USDOT) in Washington DC signed a Bilateral Arrangement, not an agreement or treaty, to re-establish scheduled air services between the United States and the Republic of Cuba. According to the USDOT: “*The signing brings into effect the arrangement that was reached December 16, 2015. This arrangement will continue to allow charter flight operations. While U.S. law prohibits travel to Cuba for tourist activities, this arrangement will facilitate authorized travel, enhance traveler choices, and strengthen people-to-people links between the two countries. Scheduled services are expected to commence sometime later this year. Expanding authorized travel is a critical focus of President Obama’s approach to Cuba policy, which emphasizes engagement with the Cuban people.*”

The Bureau of Transportation Statistics (BTS) of the USDOT has reported data for regularly-scheduled commercial flights from the United States to the Republic of Cuba.

The first regularly-scheduled commercial flight occurred on 31 August 2016. Since the first flight, more than 2,203,490 passengers have traveled to the Republic of Cuba aboard more than 13,479 flights.

2016: 2,036 flights carrying 177,365 passengers.

2017: 1,422 flights carrying 989,280 passengers.

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2018: 8,505 flights carrying 893,011 passengers.

2019: (January and February) 1,516 flights carrying 143,834 passengers.

United States airlines currently operating regularly-scheduled services are: Atlanta, Georgia-based **Delta Air Lines** (2018 revenues approximately US\$41 billion); Fort Worth, Texas-based **American Airlines** (2018 revenues approximately US\$42 billion); Chicago, Illinois-based **United Airlines** (2018 revenues approximately US\$38 billion); Long Island City, New York-based **JetBlue Airways** (2018 revenues approximately US\$7 billion) and Dallas, Texas-based **Southwest Airlines** (2018 revenues approximately US\$22 billion). United States airlines with ticket offices in the city of Havana, Republic of Cuba: Delta Air Lines, American Airlines, United Airlines and JetBlue Airways.

Travel Data

The Ministry of Tourism of the Republic of Cuba (MINTUR) reported total international visitor arrivals of 4.75 million [also reported as 4,732,280] in 2018 compared to 4.5 million in 2017.

For the period January 2019 through April 2019, MINTUR reported approximately 257,500 visitors (not including individuals of Cuban descent) from the United States representing an increase of approximately 93% compared to the same period in 2018. MINTUR reported 638,365 visitors in 2018 from the United States who were not of Cuban-descent, representing an increase of approximately 3% compared to 2017.

MINTUR reported 142,721 of the 257,500, approximately 55%, arrived by cruise ship during the period January 2019 through April 2019. The 142,721 represented an increase of approximately 300% compared to the same period in 2018.

Prior to the 4 June 2019 announcement by the Trump Administration, MINTUR expected visitor arrivals in 2019 to increase by approximately 7% to 5.1 million compared to 2018. MINTUR reported that gross tourism-related revenues were approximately US\$2.5 billion in 2018 and were expected to be approximately US\$3.1 billion in 2019, representing an increase of approximately 17% compared to 2018.

MINTUR reported that in 2018 seventeen (17) cruise lines delivered approximately 800,000 [also reported as 851,810] passengers to the Republic of Cuba compared to 619,000 in 2017 and 541,000 in 2016. Media reporting has 6,770 passengers in 2012, 37,513(9) passengers in 2015, 397,520 passengers in 2017 and 500,000 passengers in 2018. MINTUR reported that the seventeen cruise lines operate twenty-five (25) cruise ships that visit the Republic of Cuba.

The Washington, DC-based *Cruise Line Industry Association* reported that approximately 200,000 passengers visited the Republic of Cuba from January 2019 through May 2019.

For the period 2017 through 2020, the three-largest United States-based cruise lines expected to deliver more than 700,000 passengers (progressively increasing annually) on more than 400 sailings.

The gross revenues to the Republic of Cuba in 2018 from 500,000 cruise ship passengers would have been approximately US\$63 million and the gross revenues to the Republic of Cuba from 851,810 cruise ship passengers would have been approximately US\$107 million.

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The gross revenues to the Republic of Cuba from port charges in 2018 were approximately US\$20 million.

The gross revenues to the cruise ship companies in 2018 were approximately US\$400 million (500,000 passengers) to US\$700 million (851,810 passengers).

Sailings to the Republic of Cuba represented approximately 1% of global sailings for Carnival Corporation & plc; approximately 3% of global sailings for Royal Caribbean Cruise Lines; and approximately 4% of global sailings for Norwegian Cruise Line. Carnival Corporation & plc had a market share of approximately 15% of sailings to the Republic of Cuba amongst competitors.

MINTUR reported 585,600 individuals of Cuban descent visited in 2018, with most arriving from the United States. The majority of these visitors reside with relatives rather than occupying hotels.

Bethesda, Maryland-based **Marriott International, Inc.** (2018 revenues approximately US\$20 billion) and its subsidiary, Stamford, Connecticut-based *Starwood Hotels and Resorts Worldwide LLC*, have a series of two-year licenses from the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury in Washington DC to manage two (2) properties located in the Republic of Cuba. Both properties managed by Marriott International (through Starwood Hotels and Resorts Worldwide LLC) are in the city of Havana, *Four Points by Sheraton Havana* and *Hotel Inglaterra* (delayed opening without explanation from December 2016 to December 2017 to December 2019 to “sometime” in 2020) and owned by entities controlled by the Revolutionary Armed Forces of the Republic of Cuba (FAR). The OFAC licenses were first issued during the Obama Administration and were renewed during the Trump Administration, although there has been a reported delay by the OFAC in transferring the licenses from Starwood Hotels and Resorts Worldwide LLC to Marriott International.

The Obama Administration was not intent upon enforcing who could not travel to the Republic of Cuba because it did not support the statute which prohibited travel for the purpose of tourism. The Obama Administration permitted an elasticizing of the twelve (12) statutorily-authorized definitions as to who could visit the Republic of Cuba.

The Trump Administration is nearing the end of an internal analysis: If two 3,000-passenger cruise ships arrive to the Port of Havana, how do 6,000 passengers have, as regulations for the statute require, “*meaningful interaction between the traveler and individuals in Cuba*” during a several hour visit? What does a Republic of Cuba national gain from the brief encounter other than money? Isn’t a cruise ship, by definition, a vehicle to transport and service tourists? Isn’t a cruise ship passenger, by definition, a tourist- regardless of whether they believe it so? Can “*meaningful interaction*” be reasonably defined? Is the definition a function of the individual rather than the government?

On 2 May 2019, two lawsuits were filed in the Miami Division of the United States District Court against Miami, Florida-based **Carnival Corporation & plc** relating to its use of passenger terminals located in Havana and in the city of Santiago de Cuba by plaintiffs with certified claims against the Republic of Cuba. LINK: <https://www.cubatrade.org/blog/2019/5/2/libertad-title-iii-united-states-district-court-lawsuit-filing-texts-against-carnival-corporation>

When Carnival Corporation & plc commenced cruises on 1 May 2016 to the Republic of Cuba, it used the 704-passenger *Adonia* and the itineraries were licensed by the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury and managed through its *Fathom*

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subsidiary which specialized in travel with a social impact. Importantly, the cruise itinerary only included the Republic of Cuba- it was not a component of a multi-country cruise which are designed for tourism. Given a lack of marketplace interest, soon the *Fathom* cruises to the Republic of Cuba ceased and the Republic of Cuba was increasingly included on regularly-scheduled mainline cruise ship itineraries, but with on-shore excursions within the Republic of Cuba that were marketed to be in compliance with OFAC regulations.

Since that 1 May 2016 inaugural cruise by the *Adonia*, there are few cruises by any company, including Miami, Florida-based **Norwegian Cruise Line** and Miami, Florida-based **Royal Caribbean International**, that only have the Republic of Cuba as the multi-day cruise destination.

According to the Republic of Cuba, in 2018 the three-largest United States-based cruise lines and smaller cruise lines delivered more than 500,000 passengers to the Republic of Cuba. The majority of passengers traveled on cruise itineraries that included multiple countries.

If cruise lines could not be profitable with Republic of Cuba-only cruises, then is the message to the OFAC that the passengers are not focusing upon the Republic of Cuba? If the Republic of Cuba is one of two or three or four countries on a cruise itinerary, what percentage of passengers would not participate on the cruise if the Republic of Cuba was excluded? That data will likely be important for the cruise lines to compile.

The OFAC authorized (specific licenses and general licenses) the cruises under the “*educational travel*” provision within the Trade Sanctions Reform and Export Enhancement Act (**TSREEA**) of 2000. The licensee is the cruise line rather than the passenger; the cruise line has potential liability as the passenger is reasonably relying upon the licensee to operate within the confines of United States laws, regulations and policies. To mitigate liability, cruise lines have been requiring passengers to self-certify that they adhere to the statutory and regulatory requirements of the TSREEA.

United States airlines are not considered licensees and passengers traveling from the United States to the Republic of Cuba are self-certifying that they adhere to one of the twelve authorized categories of travel to the Republic of Cuba. The third-party companies that are processing the self-certifications are also not licensees. The passenger is wholly-responsible for compliance with the OFAC regulations.

The OFAC can reach back five years to seek documentary evidence of compliance. Because the OFAC has not yet sought action against United States-based companies engaged in providing travel-related services does not exempt compliance. Individuals remain liable for their actions.

All general and specific licenses issued by the OFAC are subject to change or revocation at any time should the terms of the license no longer be deemed as consistent with United States policy.

The Trump Administration may require the airlines, cruise lines and tour operators to provide the documentation since 1 May 2016 from each passenger who has traveled to the Republic of Cuba under their license. That’s potentially millions of pieces of paper subject to audit by the OFAC... and how long would that take to complete? And, would the cruises be permitted to operate during the audit process?

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TSREEA Permits 12 Categories Of Travel

There are twelve (12) categories of travel authorized by the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury; the categories were codified into law by the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSREEA).

The authorized categories are: 1) family visits 2) official business of the U.S. government, foreign governments, and certain intergovernmental organizations 3) journalistic activity 4) professional research and professional meetings 5) educational activities 6) religious activities 7) public performances, clinics, workshops, athletic and other competitions, and exhibitions 8) support for the Cuban people 9) humanitarian projects 10) activities of private foundations or research or educational institutes 11) exportation, importation, or transmission of information or information materials and 12) certain authorized export transactions.

Travel to the Republic of Cuba for the purpose of tourism by individuals subject to United States law is prohibited by United States law- not by regulation and not by policy.

The statute within the TSREEA: “(b) Prohibition on travel relating to tourist activities (1) In general Notwithstanding any other provision of law or regulation, the Secretary of the Treasury, or any other Federal official, may not authorize the travel-related transactions listed in subsection (c) of section 515.560 of title 31, Code of Federal Regulations, either by a general license or on a case-by-case basis by a specific license for travel to, from, or within Cuba for tourist activities. (2) Definition. In this subsection, the term “tourist activities” means any activity with respect to travel to, from, or within Cuba that is not expressly authorized in subsection (a) of this section, in any of paragraphs (1) through (12) of section 515.560 of title 31, Code of Federal Regulations, or in any section referred to in any of such paragraphs (1) through (12) (as such sections were in effect on June 1, 2000). (Pub. L. 106–387, § 1(a) [title IX, § 910], Oct. 28, 2000, 114 Stat. 1549, 1549A–71.)”

From The OFAC (2017):

“What is *individual* people-to-people travel, and how does the President’s announcement impact this travel authorization?

Individual people-to-people travel is educational travel that: (i) does not involve academic study pursuant to a degree program; and (ii) does not take place under the auspices of an organization that is subject to U.S. jurisdiction that sponsors such exchanges to promote people-to-people contact. The President instructed Treasury to issue regulations that will end individual people-to-people travel. The announced changes do not take effect until the new regulations are issued.

Will *group* people-to-people travel still be authorized?

Yes. Group people-to-people travel is educational travel not involving academic study pursuant to a degree program that takes place under the auspices of an organization that is subject to U.S. jurisdiction that sponsors such exchanges to promote people-to-people contact. Travelers utilizing this travel authorization **must**: (i) maintain a full-time schedule of educational exchange activities that are intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities, and that will result in meaningful interaction between the traveler and individuals in Cuba; and (ii) be accompanied by an employee, consultant, or agent of the sponsoring organization, who will ensure that each

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traveler maintains a full-time schedule of educational exchange activities. In addition, the predominant portion of the activities engaged in by individual travelers must not be with prohibited officials of the Government of Cuba or prohibited members of the Cuban Communist Party (as defined in the regulations). Once OFAC issues the new regulations, new *individual* people-to-people travel will not be authorized.

Will organizations subject to U.S. jurisdiction that sponsor exchanges to promote people-to-people contact be required to apply to OFAC for a specific license?

No. To the extent that proposed travel falls within the scope of an existing general license, *including* group people-to-people educational travel, persons subject to U.S. jurisdiction may proceed with sponsoring such travel without applying to OFAC for a specific license. It is OFAC's policy not to grant applications for a specific license authorizing transactions where a general license is applicable."

20. What constitutes "support for the Cuban people" for generally authorized travel and other transactions? This general license authorizes, subject to conditions, travel-related transactions and other transactions that are intended to provide support for the Cuban people, which include activities of recognized human rights organizations; independent organizations designed to promote a rapid, peaceful transition to democracy; and individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba. In accordance with the NSPM, OFAC is amending this general license to require that each traveler utilizing this authorization engage in a full-time schedule of activities that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities and that result in meaningful interactions with individuals in Cuba. OFAC is also amending this general license to exclude from the authorization certain direct financial transactions with entities and subentities identified on the State Department's Cuba Restricted List. The traveler's schedule of activities must not include free time or recreation in excess of that consistent with a full-time schedule in Cuba. For a complete description of what this general license authorizes and the restrictions that apply, see 31 CFR §515.574

Certified Claims Background

There are 8,821 claims of which **5,913** awards valued at **US\$1,902,202,284.95** were certified by the USFCSC and have not been resolved for nearing sixty years (some assets were officially confiscated in the 1960's, some in the 1970's and some in the 1990's. The USFCSC permitted simple interest (not compound interest) of 6% per annum (approximately US\$114,132,137.10); with the approximate current value of the 5,913 certified claims **US\$8,521,866,236.75**.

The first asset to be expropriated by the Republic of Cuba was an oil refinery in 1960 owned by White Plains, New York-based **Texaco, Inc.**, now a subsidiary of San Ramon, California-based Chevron Corporation (USFCSC: CU-1331/CU-1332/CU-1333 valued at **US\$56,196,422.73**).

The largest certified claim (*Cuban Electric Company*) valued at US\$267,568,413.62 is controlled by Boca Raton, Florida-based **Office Depot, Inc.** The second-largest certified claim (*International Telephone and Telegraph Co, ITT as Trustee, Starwood Hotels & Resorts Worldwide, Inc.*) valued at US\$181,808,794.14 is controlled by Bethesda, Maryland-based **Marriott International**; the certified claim also includes land adjacent to the Jose Marti International Airport in Havana, Republic of Cuba. The smallest certified claim is by *Sara W. Fishman* in the amount of US\$1.00 with reference to the Cuban-Venezuelan Oil Voting Trust.

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The certified claim controlled by Marriott International also includes land adjacent to the Jose Marti International Airport (HAV) in Havana, formerly known as *Rancho-Boyeros Airport*, located in the town of Boyeros, approximately 9 miles from Havana. HAV handles approximately 25 international airlines and serves approximately 60 destinations in approximately 30 countries.

The two (2) largest certified claims total US\$449,377,207.76, representing **24%** of the total value of the certified claims. Thirty (30) certified claimants hold **56%** of the total value of the certified claims. This concentration of value creates an efficient pathway towards a settlement.

Title III of the Cuban Liberty and Democratic Solidarity (**Libertad**) Act of 1996 requires that an asset had a value of US\$50,000.00 when expropriated by the Republic of Cuba without compensation to the original owner. Of the 5,913 certified claims, 913, or **15%**, are valued at US\$50,000.00 or more. Adjusted for inflation, US\$50,000.00 (3.70% per annum) in 1960 has a 2019 value of approximately US\$427,267.01. The USFCSC authorized 6% per annum, meaning the 2019 value of US\$50,000.00 is approximately US\$1,649,384.54.

The ITT Corporation Agreement

In July 1997, then-New York City, New York-based **ITT Corporation** and then-Amsterdam, the Netherlands-based STET International Netherlands N.V. signed an agreement whereby STET International Netherlands N.V. would pay approximately US\$25 million to ITT Corporation for a ten-year right (after which the agreement could be renewed and was renewed) to use assets (telephone facilities and telephone equipment) within the Republic of Cuba upon which ITT Corporation has a certified claim valued at approximately US\$130.8 million. *ETECSA*, which is now wholly-owned by the government of the Republic of Cuba, was a joint venture controlled by the Ministry of Information and Communications of the Republic of Cuba within which Amsterdam, the Netherlands-based Telecom Italia International N.V. (formerly Stet International Netherlands N.V.), a subsidiary of Rome, Italy-based Telecom Italia S.p.A. was a shareholder. Telecom Italia S.p.A., was at one time a subsidiary of Ivrea, Italy-based Olivetti S.p.A. The second-largest certified claim (*International Telephone and Telegraph Co, ITT as Trustee, Starwood Hotels & Resorts Worldwide, Inc.*) valued at US\$181,808,794.14 is controlled by Bethesda, Maryland-based **Marriott International**.