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I. Introduction

Thank you and good morning, Mr. Chairman, members of the Committee. My name is Mark Orr. I am Vice President for North American Affairs, with Pernod Ricard.

Pernod Ricard is the world's co-leader in wines and spirits, with global sales in 2008/9 of approximately $10 billion. Headquartered in Paris, France, Pernod Ricard has 70 distribution companies around the world and employs nearly 19,000 people.

Pernod Ricard has been invested in the United States for more than 30 years. Our U.S. subsidiary has headquarters in New York, production facilities in Arkansas and California, and we employ approximately 1000 people across the country.

II. Pernod Ricard's Interest

Pernod Ricard's joint venture, Havana Club Holding, through its subsidiary Havana Club International, sells Havana Club rum in more than 120 countries around the world. Havana Club rum is authentic Cuban rum made in Cuba from Cuban sugar cane. Because it can be made only in Cuba, genuine Havana Club rum is not available in the United States at the present time due to the U.S. embargo imposed on imports of Cuban products in 1962.

Pernod Ricard is not seeking the early elimination of U.S. sanctions on Cuba. That is a policy matter properly reserved for the U.S. Government to decide. However, once the U.S. embargo on Cuban products eventually is lifted, Pernod Ricard is most interested in having the opportunity to sell, through its joint venture, genuine Havana Club Cuban rum in the U.S. market.

One of our principal competitors – Bacardi, the world's leading rum company and the largest supplier of rum to the U.S. market – is most interested in preventing us from having this opportunity. For the past fifteen years, they have pursued a concerted strategy designed to eliminate the prospect of having to compete against genuine Havana Club Cuban rum after the embargo is lifted.

III. Section 211's Origin

Mr. Chairman, I wish to commend you and the Committee for holding this hearing this morning. It is the first time that this Committee – or any other Committee of the House of Representatives -- has had the opportunity to consider Section 211 on its merits.

Prior to enactment, Section 211 never had such an open and transparent consideration. In October 1998, Section 211 was slipped into the conference report on the 1999 Omnibus Appropriations Act at the behest of a single company, Bacardi, just before the final vote was taken. The committees of jurisdiction were bypassed; no hearings were held in either house; and the provision was never marked up or voted upon. It was weeks before the provision was discovered in the 4,000 page Omnibus Appropriations Act, and then only after President Clinton already had signed it into law.

IV. Section 211's Purpose

With Section 211, Bacardi sought to achieve through legislative action what it had been unable to achieve on the merits in court. Bacardi designed Section 211 with the specific purpose of interfering in a pending trademark infringement case brought by Pernod Ricard's joint venture, Havana Club Holding, against Bacardi. In that case, Havana Club Holding had objected to Bacardi's sale in the United States of a product produced in the Bahamas, which Bacardi called "Havana Club." Because Havana Club Holding, at that time, owned the U.S. trademark rights to the HAVANA CLUB name, Bacardi's sale of its own imitation Havana Club rum constituted trademark infringement.

Bacardi also persuaded the Treasury Department to retroactively revoke permission for the transfer of the U.S. registration of the HAVANA CLUB trademark to Havana Club Holding, with the result that a different entity, Cubaexport, now owns the registration in the United States, while Havana Club Holding owns it everywhere else in the world.

These two actions stripped the federal judge hearing Havana Club Holding's case against Bacardi of all authority to decide the case under longstanding rules of trademark law. In May 1999, the judge, barred by Section 211 from ruling on the merits of the case, dismissed Havana Club Holding's claims of infringement. The practical effect was to leave Havana Club Holding and Cubaexport powerless to prevent the infringing activities of suppliers of imitation "Havana Club" products.

Years later, in 2006, the Bush Administration invoked Section 211 in an effort to prevent Cubaexport from renewing its registration for an additional ten year term. Section 211(a)(1) bars payment of the fee required by the U.S. Patent and Trademark Office to process a renewal application, unless specifically authorized by the Treasury Department. Cubaexport sought and was denied authorization to make the payment and its renewal application was rejected by the U.S Patent and Trademark Office.

Immediately thereafter, Bacardi again began selling in the U.S. market a product called "Havana Club" rum, this time made in Puerto Rico, knowing that Section 211 rendered Havana Club Holding and Cubaexport powerless to rely on their trademark registration to stop this latest infringement.

Cubaexport is in the process of appealing the Bush Administration's decision not to allow Cubaexport to renew its registration with the U.S. Patent and Trademark Office. Should that appeal be unsuccessful, Section 211 will have forced the cancellation of Cubaexport's ownership rights in the United States, clearing the way for Bacardi to claim ownership. No federal judge, anywhere or at anytime, will have ruled on the merits of the competing claims to ownership of the Havana Club trademark in the United States.

V. The Purported Rationale for Section 211

So what was the rationale for enacting Section 211? After the fact, some supporters have asserted that enacting section 211 was necessary to give full effect to longstanding U.S. policy not to recognize and legitimize the confiscation of property by foreign governments. Yet the property in dispute – the U.S. registration for the Havana Club trademark – never was confiscated by the Castro government. It is U.S. property, created here in the United States, and cannot be confiscated by a foreign government.

Indeed, the original Cuban owners – Jose Arechebala SA (JASA) -- maintained their ownership of the U.S. registration until 1973, long after their properties in Cuba had been nationalized by the Castro government in 1960. They could easily have perpetuated their ownership by filing an application for renewal of the registration for an additional 20 year term in 1973. For whatever reason, they did not do that.

In 2004, the U.S. Patent and Trademark Office found that JASA likely had abandoned their registration in the United States in 1973. In subsequent testimony before the Senate Judiciary Committee in July 2004, a representative of JASA admitted that the company could have renewed its trademark rights in the United States but failed to do so. It was only after JASA decided to abandon its U.S. trademark rights that Cubaexport submitted its application to register HAVANA CLUB in the United States. That registration, with an original design never used or registered by JASA, was granted by the U.S. Patent and Trademark Office in 1976.

Moreover, if section 211 was such a necessary addition to U.S. policy regarding confiscations, why was no effort made to enact such provisions when Cubaexport first applied to register the trademark in the U.S. in 1974? Instead, the USPTO granted the registration to Cubaexport, no objections were filed by the owners of the previous registration, Bacardi, or anyone else, and no effort was made in Congress to block Cubaexport's application.

In evaluating the "necessity" of Section 211, one might reasonably come to the exact opposite conclusion. U.S. policy with regard to confiscations is and has been quite clear and consistent for many, many years. The enactment of Section 211 in 1998 was a

superfluous addition to this policy and totally unnecessary to give the policy its full effect.

Supporters of Section 211 also have asserted that it is a necessary element of U.S. sanctions policy toward Cuba, which is intended, *inter alia,* to deny hard currency to the Castro government. But, the product itself – Havana Club – is genuine Cuban rum which can be produced only in Cuba. As such, it cannot be sold in the United States at the present time due to the U.S. embargo on imports of Cuban products.

Moreover, the sanctions imposed by the United States in 1962, and codified by the Congress in subsequent legislation, require*, inter alia*, a change in government in Cuba before the U.S. embargo can be lifted. Thus, the Castro regime derives no benefit at the present time from Cubaexport's ownership of the U.S. registration and will not benefit at any time in the future because, according to the terms of U.S. law, the regime must depart power before sales of Havana Club can take place in the U.S. market.

There also can be no plausible argument that Section 211 is needed to permit Jose Arechabala SA to recover its abandoned U.S registration and re-establish its rum business. JASA sold whatever rights it purported to still have in the Havana Club trademark to Bacardi in 1997, prior to the enactment of Section 211, and more than 30 years after exiting the rum business.

The real reason for Section 211 is clear. Section 211 applies only to the specific set of circumstances surrounding the Havana Club trademark. No other Cuban-origin trademark is affected and no other company besides Pernod Ricard and its joint venture partners has been disadvantaged. And only one company – Bacardi -- has benefited.

For the past fifteen years, Bacardi has sought through a series of legal and legislative maneuvers to gain control of the U.S. rights to the Havana Club trademark. Section 211 has been the linchpin of this effort. Its real purpose can only be to enable Bacardi to prevent Pernod Ricard from selling Havana Club rum in the United States, and thereby safeguard the dominant competitive position Bacardi enjoys in the world's largest rum market.

VI. The Impact of Section 211

More than a decade later, it is quite clear that section 211 has failed to meet whatever laudatory aims its supporters ascribe to it, with one exception: it has significantly weakened the ability of Pernod Ricard and its joint venture partners to battle Bacardi's efforts to gain control of the U.S. registration, so that it does not have to compete against Havana Club rum once the embargo on Cuban products is lifted.

But the negative repercussions for the United States have been considerable. In 2002, the World Trade Organization ruled that Section 211 was inconsistent with the fundamental WTO principles of non-discrimination and national treatment. The United States still has not complied with the ruling eight years later, despite mounting criticism from U.S. trading partners.

Section 211 also has placed the United States in breach of its obligations vis-à-vis Cuba under the Inter-American Convention on the Protection of Trademarks and Commercial Property, exposing U.S. trademark holders to possible loss of protection in Cuba. To date, Cuba has respected U.S. and other foreign intellectual property rights, in recognition of the importance of securing reciprocal protection for its own trademarks abroad. One can only imagine how U.S. trademark owners would have reacted, though, if Cuba had instead blocked ownership of such well-known U.S. trademarks as General Motors, Exxon, Hewlett-Packard, Federal Express, Pfizer, Brinks, Bank of America, Maytag, Goodyear, Sears and Kohl's, and allowed their foreign competitors to sell under those brands.

Section 211 also provides a pretext for other countries to create loopholes in the protection they afford intellectual property owners in order to suit their own narrow parochial interests. Left unaddressed by Congress, Section 211 will continue to undermine the ability of the United States to lead efforts internationally to secure stronger protection of intellectual property at a critical time for the U.S. economy.

VII. Conclusion

Congress should repeal Section 211 in its entirety as soon as possible and restore the full authority of the courts to resolve the competing claims to the ownership of the Havana Club trademark in the United States. Repeal will not unfairly benefit Pernod Ricard, Bacardi, or any other party – it would leave the courts free to determine fairly, on the merits, which party owns the HAVANA CLUB trademark, just as they could have done before Section 211 was enacted. The courts have compiled a long and admirable record of resolving complex disputes over trademark rights in accordance with longstanding rules of law and equity. We should not fear the result of such consideration in the present dispute.

Thank you very much.