

US Lawsuits Commence against Non-US Persons for Confiscated Cuban Property, EU Raises Concerns

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On May 2, 2019, claimants began filing lawsuits for the first time under Title III of the Helms-Burton Act against third parties alleged to be “trafficking” in property of US nationals confiscated by the Cuban Government after the Cuban Revolution.¹ The US State Department has routinely suspended Title III of the Helms-Burton Act, which authorizes these suits, since the enactment of the law in 1996. The current Title III suspension ended on May 2, 2019.² The EU, the UK, and Canada have expressed opposition to what they consider to be the extraterritorial application by the United States of unilateral Cuba-related measures, contrary to international law, and warn of an “unnecessary spiral of legal actions” under their respective blocking statutes.

The US Secretary of State initially announced on January 16, 2019, that he was reviewing whether further suspensions of Title III of the Helms-Burton Act (or “the Act”) were justifiable or necessary. As part of this reconsideration, on March 4, the State Department partially lifted Title III’s suspension to allow a limited set of lawsuits against Cuban entities and subentities listed on the Department of State’s List of Restricted Entities and Subentities Associated with Cuba (Cuba Restricted List) starting March 19, 2019.³ The suspension remained in place through May 1, 2019, for suits against all other parties.

¹ Department of State, Remarks to the Press, [available here](#).

² Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6021 et seq., P.L. 104-114. The Helms-Burton Act is also known as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.

³ State Department, Press Release, Secretary Enacts 30-Day Suspension of Title III (LIBERTAD Act) With an Exception, [available here](#); State Department, Special Briefing, Senior State Department Official on Title III of the LIBERTAD Act, [available here](#).

With the expiration of the remaining partial suspension, as of May 2 claims may be brought under Title III against any person. The State Department announced that there are no exemptions to the May 2 implementation of Title III.⁴ Since May 2, multiple lawsuits have been filed in US federal courts under Title III of the Helms-Burton Act.⁵

A White House fact sheet separately references several additional intended Cuba-related actions of the Trump Administration: (1) new restrictions on nonfamily travel to Cuba, (2) a US\$1,000 per person per quarter cap on personal remittances to Cuba, (3) a prohibition on US dollar transactions with Cuba through third party financial institutions (“U-turn transactions”), and (4) implementation of trafficker travel bans under Title IV of the Helms-Burton Act.⁶ There have been no further official statements regarding these additional actions. As discussed below, Title IV has remained in effect since the passage of the Helms-Burton Act in 1996, but has not been actively implemented.

Title III of the Helms-Burton Act

Title III of the Helms-Burton Act creates a right of action for a “United States national”⁷ to bring civil suit in US federal court against any person—including a non-US person—who “traffics”⁸ in “property”⁹ that was “confiscated”¹⁰ by the Cuban Government after the Cuban Revolution. The Act defines trafficking broadly, but requires that trafficking be knowing and intentional. Current US nationals who own claims on confiscated property may bring suit, regardless of whether they were US nationals at the original time of confiscation.¹¹ Treble damages are available for claimants holding claims certified by the Foreign Claims Settlement Commission (the FCSC) and in certain cases when the claimant provides the defendant with notice of an intended suit.

There are limitations on Title III claims, such as a two-year statute of limitations after the relevant “trafficking” ceases to occur and a requirement that the amount in controversy (as defined in the statute) must exceed US\$50,000. Additionally, US nationals who bring Title III suits are barred from bringing other civil suits in the United States or any US jurisdiction for the same subject matter, and likewise cannot bring a Title III suit if they previously sued in US court for the same subject matter under other laws. No license is needed to bring actions

⁴ State Department, Briefing with Assistant Secretary for Western Hemisphere Affairs Kimberly Breier, *available here*.

⁵ See generally Complaint, *Exxon Mobil Corp. v. Corporacion Cimex S.A.*, No. 19-CV-1277 (D.D.C. May 2, 2019); Complaint, *Garcia-Bengochea v. Carnival Corporation*, No. 1:19-cv-21725 (S.D. Fla. May 2, 2019); Complaint, *Havana Docks Corporation v. Carnival Corporation*, Case No. 1:19-cv-21724 (S.D. Fla. May 1, 2019).

⁶ White House Fact Sheet, President Donald J. Trump is Taking a Stand for Democracy and Human Rights in the Western Hemisphere, *available here*.

⁷ “US national” is defined as any US citizen or other legal entity organized under the laws of the United States, and which has its principal place of business in the United States. See LIBERTAD Act § 4 (15).

⁸ Trafficking: With certain exceptions, knowingly and intentionally (i) selling, transferring, distributing, dispensing, brokering, managing or otherwise disposing of confiscated property, or purchasing, leasing, receiving, possessing, obtaining control of, managing, using, or otherwise acquiring or holding an interest in confiscated property; (ii) engaging in commercial activity using or otherwise benefiting from confiscated property; or (iii) causing, directing, participating in, or profiting from, trafficking as described above by another person, or otherwise engaging in trafficking through another person, without the authorization of any US national who holds a claim to the property. See LIBERTAD Act § 4 (13).

⁹ Property: Any property (including IP), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest. Real property used for residential purposes is excluded unless, as of March 12, 1996, the property claim is held by a US national and certified by the Foreign Claims Settlement Commission, or if an official of the Cuban Government or the ruling Cuban political party occupies the property. See LIBERTAD Act § 4 (12).

¹⁰ Confiscation: (a) The nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property on or after January 1, 1959 without the return or compensation for the property, or without settlement of the claim to the property pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; or (b) The Cuban Government’s repudiation of, default on, or failure to pay on or after January 1, 1959 the following: (i) a debt of any enterprise nationalized, expropriated, or otherwise taken by the Cuban Government, (ii) a debt that is a charge on property nationalized, expropriated, or otherwise taken by the Cuban government, or (iii) a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim. See LIBERTAD Act § 4 (4).

¹¹ State Department, Special Briefing, Senior State Department Official on Title III of the LIBERTAD Act, *available here*.

under Title III, but a license would be needed to execute a judgment against or to enter into a settlement involving blocked property.

The reinstatement of Title III does not have a direct impact on Title IV of the Helms-Burton Act, which was never suspended and remains in effect. The US government continues to have broad discretion regarding the enforcement of this provision, which requires the Secretary of State to deny visas to, and the Attorney General to exclude from the United States, any alien¹² who the Secretary of State determines: (1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a US national, (2) traffics in such property, (3) is a corporate officer, principal, or shareholder with a controlling interest in an entity that has been involved in the confiscation or trafficking of such property, or (4) is a spouse, minor child, or agent of any of the aforementioned.¹³ The White House issued a statement on April 17, stating that the Administration would not issue a visa to anyone found to have trafficked in property confiscated by Cuba from an American.¹⁴

Title III's Treatment of "Certified" Claims

The FCSC previously considered US nationals' claims for property expropriated, nationalized, intervened in, or otherwise taken by the Cuban Government, determined which claims were valid, and assigned a value to such claims. These valid claims were then certified to the Secretary of State.¹⁵ Title III provides for specific, privileged treatment of these certified claims, including the right to treble damages. Additionally, the Act requires US courts hearing Title III actions to accept the FCSC's certification of a US national's claim as conclusive proof of that US national's ownership of property and creates a rebuttable presumption in favor of the FCSC's valuation of certified claims. The Act also requires US courts hearing Title III actions to accept the FCSC's findings on denied claims as conclusive. Further, US nationals who were eligible to but did not file a claim with the FCSC may not bring an action on that claim under Title III. The Act recognizes the right of certain claimants with uncertified claims to bring Title III actions, and the State Department has confirmed that Title III actions are not limited to certified claims.¹⁶

There are currently 5,913 certified claims for confiscated property with the FCSC pending settlement with Cuba, valued at over US\$1.9 billion. With interest, the value is estimated to be roughly US\$8 billion.¹⁷ The US government estimates that as of 1996, there may have been up to 200,000 claims not reviewed by the FCSC that could be pursued (subject to Title III's restrictions), valued in the tens of billions of dollars.¹⁸

Following the US lifting of the suspension of Title III on May 2, multiple suits have been filed in US courts by claimants seeking treble damages on multimillion-dollar FCSC-certified claims.¹⁹

International Reactions: risk of "unnecessary spiral of legal actions"

The implementation of Title III will face political and legal challenges from other countries. The EU and Canada issued a joint statement on April 17, stating that they consider the extraterritorial application of unilateral measures relating to Cuba to be contrary to international law.²⁰ Both the EU and Canada have in place "blocking

¹² Although the Act does not define "alien," it is generally defined as any person not a citizen or national of the United States. See, e.g. 8 U.S.C. 1101(a)(3), Immigration and Nationality definitions.

¹³ See LIBERTAD Act § 401

¹⁴ White House Fact Sheet: President Donald J. Trump is Taking a Stand For Democracy and Human Rights in the Western Hemisphere, *available here*.

¹⁵ Department of Justice, Foreign Claims Settlement Commission of the United States, Completed Programs – Cuba, *available here*; Department of Justice, Foreign Claims Settlement Commission: Adjudication of Claims of US Nationals Against the Government of Cuba, 70 Fed. Reg. 46890-46891 (Aug. 11, 2005), *available here*.

¹⁶ State Department, Special Briefing, Senior State Department Official on Title III of the LIBERTAD Act, *available here*.

¹⁷ Department of Justice, Foreign Claims Settlement Commission of the United States, Completed Programs – Cuba, *available here*.

¹⁸ State Department, Briefing with Assistant Secretary for Western Hemisphere Affairs Kimberly Breier, *available here*.

¹⁹ See note 5, *supra*.

²⁰ Joint Statement by Federica Mogherini, Chrystia Freeland and Cecilia Malmström on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act, *available here*.

regulations,” Canada’s Foreign Extraterritorial Measures Act (FEMA) and the EU’s Blocking Regulation,²¹ which could present significant obstacles to the pursuit of Title III claims against Canadian and EU persons, as well as the enforcement and recognition of Title III judgments in Canada and the EU. In addition, these blocking regulations allow for counterclaims against Title III claimants in European and Canadian courts.²² In light of this, the joint statement warns that “the US decision to allow suits against foreign companies can only lead to an unnecessary spiral of legal actions.”

Specifically, the EU Blocking Regulation prohibits certain EU-related persons from complying, whether directly or through a subsidiary or other intermediary person, with any requirement from a US court resulting from the Helms-Burton Act (potentially including interim orders concerning, for example, discovery). The EU Blocking Regulation also provides that any US judgment giving effect to the Helms-Burton Act shall not be recognized or enforced in the EU, making it difficult to enforce a Title III judgment against assets in the EU. Finally, if any EU-related person protected under the EU Blocking Regulation were to suffer detriment as a result of the application of the Helms-Burton Act, they would be entitled to recover compensation in the EU from any person or entity causing them damage, or from any person acting on their behalf or their intermediary.

There is sparse guidance and precedent on these provisions, so it remains to be seen how EU and US courts respond to them. It is clear, however, that for Title III claims that involve Canadian or European parties, plaintiffs and defendants alike should consider these complexities at the outset when defining their litigation strategies.

The UK Foreign & Commonwealth Office has also voiced its support for the EU position, in line with its stated policy that even after “Brexit” it would remain aligned with the EU on the issue of US sanctions that are deemed to apply extraterritorially and affect business interests of EU and UK companies.²³

Previously, challenges to the Helms-Burton Act were launched following its passage in 1996, including a Request for Consultations at the WTO.²⁴ The WTO action was suspended in light of understandings reached by the EU with the United States regarding the suspension of the Title III right of action. The EU asserts that the announced implementation of Title III breaches these EU-United States agreements, which could result in the reactivation of the case before the WTO.²⁵

US Trajectory on Cuba

The State Department stated that Title III’s implementation is part of a new US policy trajectory toward Cuba that emanates from the June 16, 2017 National Security Presidential Memorandum (NSPM-5) “Strengthening the Policy of the United States Toward Cuba.”²⁶ NSPM-5 directed increased sanctions on Cuba, such as limitations on “people to people” travel to Cuba.

Cuba Restricted List

The first major step in the “trajectory” under NSPM-5 was the issuance of the Cuba Restricted List on November 9, 2017.²⁷ The Cuba Restricted List includes entities and subsidiaries that are determined to be under the control of, or acting for or on behalf of, the Cuban military, intelligence, or security services or personnel. Entities or subsidiaries owned or controlled by an entity or subsidiary on the Cuba Restricted List are not treated as restricted

²¹ Canada, Foreign Extraterritorial Measures Act (FEMA) § 7.1, [available here](#); European Union, Council Regulation No. 2271/96 at Articles 4, 5, 11 and Annex, as amended, [available here](#).

²² See FEMA §§ 8.1, 9 [available here](#); Regulation No. 2271/96 at Articles 6 and 11, as amended, [available here](#).

²³ See our client alert on UK Sanctions after Brexit, [available here](#).

²⁴ DS38: United States – The Cuban Liberty and Democratic Solidarity Act, [available here](#).

²⁵ Joint Statement by Federica Mogherini and Cecilia Malmström on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act, [available here](#).

²⁶ State Department, NSPM, [available here](#); our previous client alert on the NSPM is [available here](#).

²⁷ The current Cuba Restricted List, last updated April 24, 2019, is [available here](#); State Department, Notice and Initial Publication of List of Entities and Subsidiaries Associated with Cuba, [available here](#).

unless they are also specified by name on the Cuba Restricted List. Persons subject to US jurisdiction²⁸ are prohibited from engaging in “direct financial transactions” with parties on the Cuba Restricted List.

The State Department most recently updated the Cuba Restricted List on April 24, 2019, adding five subentities.²⁹ As stated above, the initial implementation of Title III on March 19, 2019, allowed for limited lawsuits against only Cuban entities and subentities listed on the Cuba Restricted List.

Conclusion

The State Department encourages persons doing business in Cuba to consider whether they are trafficking in confiscated property, intentionally or unintentionally, as it could give rise to risk of suit under Title III.³⁰ The implementation of Title III reflects increasing US pressure on Cuba, in tandem with pressure on Venezuela and Nicaragua, which are viewed by the United States to be engaged in mutual support of repressive regimes. Notably, the activation of Title III was announced alongside the issuance of US sanctions against Nicaragua and against the Central Bank of Venezuela. The United States has progressively increased sanctions pressure against these three countries, including against Cuban entities in relation to their Venezuelan activities. The ongoing political developments in this region could therefore lead to changes and have widespread effects on US foreign policy, and in particular, US sanctions policy.

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²⁸ Persons subject to US jurisdiction include US citizens and residents, entities organized under US law, and entities owned or controlled by the foregoing.

²⁹ State Department, Cuba Restricted List, [available here](#).

³⁰ State Department, Special Briefing, Senior State Department Official on Title III of the LIBERTAD Act, [available here](#).