

Trump Administration Authorizes Lawsuits Against Companies that Deal in Property Confiscated by the Cuban Government and Tightens Other Sanctions Against Cuba

International Trade Alert
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Key Points

- On, May 2, 2019, the United States government allowed implementation of Title III of the Helms-Burton Act, for the first time since the law was enacted in 1996, to permit U.S. nationals to sue persons that “traffic” in private property “confiscated” from them by the Cuban government since 1959¹. This action opens the door to a potential avalanche of lawsuits against companies with active interests in Cuba. The Trump administration has also stated that it will impose restrictions on entry into the U.S. of executives of companies and non-U.S. nationals determined to be trafficking in such confiscated property, pursuant to Title IV of the Helms-Burton Act.
- The Trump administration has also announced that, in the coming weeks, it will implement sanctions measures that further restrict “nonfamily travel” to Cuba, U-turn transactions involving U.S. financial institutions, and personal remittances to Cuban nationals, among other measures.
- Companies with business interests in Cuba, particularly interests that may intersect with expropriated property, should carefully consider the risks posed by these changes in U.S. law and, among other precautions, carefully engage in due diligence necessary to evaluate their potential risk and develop an effective mitigation strategy.

On April 17, 2019, the Trump administration announced that it would significantly tighten sanctions against Cuba, including implementing a never-before-used provision of U.S. law on May 2 that allows U.S. nationals to sue persons that “traffic” in private property “confiscated” from them by the Cuban government. The Trump administration also announced that it would deny visas to foreign nationals that “traffic” in such property and will implement additional sanctions measures that restrict “nonfamily travel” to Cuba, U-turn transactions involving U.S. financial institutions, and personal remittances to Cuban nationals, among other measures. More recently, President Trump and other senior administration officials have suggested the possibility of

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imposing even more severe sanctions on Cuba in connection with developments in Venezuela and assertions of Cuban involvement in the country.

These actions constitute the most substantial escalation of U.S. sanctions against Cuba by the Trump administration. Most significantly, companies with business interests in Cuba that intersect with expropriated property now face the risk that they may be sued in U.S. federal courts. However, it remains to be seen how many such lawsuits will be initiated, what type of proof plaintiffs will need to satisfy U.S. federal courts, the general approach that U.S. federal courts will take toward these cases, or how many cases may actually result in judgments against named defendants.

In combination with the other sanctions measures announced on April 17, this move to allow lawsuits in U.S. federal courts will increase the perceived risk of doing business in Cuba and present practical challenges for companies with active commercial interests in Cuba. Furthermore, the move will complicate U.S.-Cuba relations and generate foreseeable conflicts between the U.S. and some of its most important trading partners, including the European Union (EU), the United Kingdom, Mexico, and Canada, which maintain blocking statutes prohibiting actions to comply with U.S. sanctions against Cuba.

Title III of the Helms-Burton Act

Effective May 2, 2019, the U.S. government will no longer waive and will allow implementation of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, popularly known as the Helms-Burton Act. Title III of the Helms-Burton Act authorizes U.S. nationals, including businesses and individuals, a private right of action in U.S. federal courts to sue persons that “traffic” in property “confiscated” (e.g., expropriated without compensation) from them by the Cuban government on or after January 1, 1959.¹ The term “traffic” is defined very broadly and could potentially provide a basis for U.S. nationals to sue any company that “knowingly and intentionally” engages in transactions, commercial activities, or dealings related to expropriated property (e.g., leasing expropriated real estate, using expropriated trademarks, operating expropriated hotels, mining in expropriated mines, or calling at expropriated ports).²

Since enactment of the Helms-Burton Act in 1996 until now, every administration, including the Trump administration, has issued waivers to suspend the implementation of Title III, citing concerns that it could invite retaliation by U.S. allies. Those concerns reflect the reality that, when the law was enacted, the EU initiated World Trade Organization (WTO) dispute proceedings against the U.S. challenging Title III, with similar actions threatened by other countries. The EU subsequently suspended its case in the WTO in 1998 based on assurances from the Clinton administration that the U.S. would waive implementation of Title III.³

Because this will be the first time that the U.S. has permitted these types of lawsuits to proceed, it remains to be seen how they will unfold in U.S. federal courts. However, given the broad language of the statute, many observers have suggested that this action could result in a flood of U.S. lawsuits against foreign companies with active interests in Cuba alleged to involve expropriated property. The U.S. government has previously certified and registered \$1.9 billion (\$8 billion, including interest) worth of private claims of U.S. nationals against the Cuban government for expropriation through two Foreign Claims Settlement Commission (FCSC) programs. In addition,

official U.S. government estimates suggest that there may be as many as 200,000 additional uncertified claims, valued in the tens of billions of U.S. dollars, that could be the subject of lawsuits made possible by implementation of Title III.³

Eligible Plaintiffs

Title III permits U.S. nationals, including persons who were Cuban nationals at the time of the expropriation but later became naturalized U.S. citizens, to sue persons who traffic in confiscated property.⁴ U.S. nationals who certified their claims to the FCSC when they had the opportunity to do so have the easiest path to proceed with lawsuits under Title III, as Title III directs courts to accept their FCSC-certified claims as conclusive.⁵ U.S. nationals who were not eligible to make claims at the time of the FCSC (e.g., Cuban nationals who became U.S. nationals after the FCSC programs for Cuba concluded) may also bring lawsuits under Title III, but must establish proof of ownership of their claims.⁶

In contrast, U.S. nationals who had the opportunity to bring claims before the FCSC and failed to do so are ineligible to pursue an action under Title III.⁷ Further, those who brought claims before the FCSC but had those claims denied are also ineligible to receive relief under Title III.

Damages

Notably, a defendant's potential liability under Title III does not depend on the actual amount of economic benefit derived from the confiscated property. Instead, the amount of damages provided for by this law is the greater of the following amounts: (i) the amount certified by the FCSC plus interest, which Title III directs the courts to treat as presumptively conclusive; (ii) if the claim has not been certified by the FCSC, the amount determined by the court, plus interest; or (iii) the fair market value of the property or the value of the property when confiscated plus interest, whichever is greater.⁸

Certain plaintiffs, including those suing persons that traffic in property that serve as the basis for a claim certified by the FCSC, are entitled to treble damages regardless of the method of valuation.⁹ The law further provides for the award of interest, costs, and attorneys' fees to plaintiffs where they succeed in winning such cases, although these amounts may not be tripled.¹⁰

Title III further requires that the amount in controversy must be worth more than \$50,000.¹¹ Plaintiffs are not permitted to include interest, costs, attorneys' fees, or the treble damages amount when calculating the total amount in controversy.¹²

Limitations

There are a number of practical and legal limitations for plaintiffs seeking to sue under Title III, some of which could, in some cases, make it impossible to pursue actions or to enforce judgments. These limitations include:

- **Actions Excluded from Suit.** The term "trafficking," while broadly defined, does not include "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel."¹³ Thus, U.S. persons traveling to Cuba pursuant to specific or general authorization by the Office of Foreign Control (OFAC) would not be a target

of a lawsuit for staying at a hotel that was previously expropriated by the Cuban government.

- Additionally, the term “trafficking” does not include (1) the delivery of international telecommunications signals to Cuba; (2) trading or holding securities publicly traded or held, unless done with a Specially Designated National (SDN); and (3) transactions and uses of property by a person who is both a citizen and resident of Cuba, provided that person is not an official of the Cuban government or Communist Party of Cuba.¹⁴
- **Personal Jurisdiction over Defendants:** The U.S. Constitution requires that, for a court to exercise power over a defendant, the defendant must have sufficient minimum contacts with the forum where it is being sued—a concept known as personal jurisdiction. It will likely be difficult for plaintiffs to establish personal jurisdiction over non-U.S. defendants that do not have business in the U.S., particularly when the defendants’ “trafficking” activities also occurred abroad.
- **Statute of Limitations:** There is a two-year statute of limitations that prohibits an action from being brought “more than two years after the trafficking giving rise to the action has ceased to occur.”¹⁵ Additionally, as explained above, plaintiffs who were entitled to bring claims before the FCSC during the two Cuba Claims Programs, but did not, are barred from bringing suit under Title III.
- **Evidentiary Challenges:** Plaintiffs may run into challenges proving that defendants “knowingly” and “intentionally” trafficked in their property, establishing ownership over a claim, or determining the value of a claim, particularly since many foreign governments and courts will object to discovery requests related to Title III suits. As mentioned below, certain foreign blocking statutes prohibit foreign persons and companies from complying with discovery obligations in Title III cases.
- **Challenges in Enforcing Judgments:** Plaintiffs who successfully obtain Title III judgments may encounter difficulties enforcing them. If a defendant does not have any assets in the U.S., a plaintiff will be unable to enforce a judgment in his or her favor domestically and would have to go through the complicated process of trying to enforce the judgment abroad. Moreover, as explained below, Canada and the EU have signaled that their courts will not enforce judgments obtained in the U.S. under Title III, and other foreign courts may similarly decline.

EU and Canadian Response

The EU and Canada quickly condemned the Trump administration’s move to allow implementation of Title III and threatened to enforce their established blocking measures against U.S. sanctions on Cuba to protect EU and Canadian companies.¹⁶ These measures respectively prohibit EU and Canadian courts from enforcing judgments obtained under Title III and permit EU and Canadian persons to pursue counterclaims against Title III plaintiffs in European and Canadian courts.

Additionally, the EU has threatened to reinstate a case against the U.S. before the WTO, which was initiated following enactment of the Helms-Burton Act in 1996, but was subsequently suspended in 1998 based on assurances from the Clinton administration that the U.S. would waive implementation of Title III.¹⁷

In that context, it appears likely that implementation of Title III will create legal challenges and litigation in other countries and multilateral venues. Some of these

challenges may present defendants in Title III cases with certain protection from discovery obligations or judgment enforcement outside the United States.

Mitigating Risk

It remains to be seen how Title III lawsuits will proceed, as judicial proceedings for such claims are unprecedented. However, given the potential for substantial damages that U.S. courts could award under Title III, companies and investors with established or prospective trade or investment interests associated with Cuba should exercise care to perform due diligence to identify and help safeguard against litigation risk and other complications that could result from Title III lawsuits. This may include seeking disclosure of business and ownership records for property and property interests associated with Cuba, as well as including focused contractual clauses, representations, covenants, and indemnities in commercial agreements to establish assurances and protections against potential risks associated with Title III litigation. Among other measures, such steps may help mitigate the risk of being sued, establish a potential defense against allegations of knowing and intentional trafficking, and provide a basis for other structural business and legal protections. Additionally, for any company with active business in Cuba, performing diligence on property associated with activities in Cuba may be helpful to identify potential litigation risk and develop strategies and mechanisms to limit that risk and defend its commercial interests.

Plaintiffs that initiate lawsuits under Title III will also face related challenges and risks. As discussed above, Title III plaintiffs may face significant jurisdictional, procedural, and evidentiary hurdles that could effectively prevent them from enforcing a final judgment rendered by a U.S. court against a defendant. Plaintiffs with interests in Canada or the EU should also consider the possibility that they could face counterclaim litigation risks if they pursue Title III claims.

Title IV of the Helms-Burton Act: Visa Restrictions on Foreign Nationals Who Deal in Confiscated Property

On April 17, 2019, National Security Advisor John Bolton also announced that the Trump administration would actively enforce Title IV of the Helms-Burton Act, which restricts the issuance of U.S. visas for foreign nationals that “traffic” in property confiscated from U.S. nationals. The restriction covers any individual who, after March 12, 1996, (1) “has confiscated, or has directed or overseen the confiscation of” such property, or “has converted [it] for personal gain,” or (2) “traffics” in such property. Furthermore, the restriction applies to (3) “a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation” of such property, or is a “spouse, minor child, or agent” of a person described in (1), (2), or (3). Importantly, unlike Title III, the process for enforcing visa restrictions under Title IV falls within the purview of the U.S. Department of State, rather than U.S. courts.

Active enforcement of Title IV could cause a significant number of foreign nationals to be denied entry into the U.S. For example, certain foreign nationals who work at buildings that the Cuban government expropriated from U.S. nationals could potentially fall under this provision. Furthermore, a foreign national who has been an officer or controlling shareholder of an entity that “traffics” in property confiscated from U.S. nationals may be denied a U.S. visa, as well as his or her spouse or children. However, it remains to be seen how the Department of State will enforce Title IV.

To date, this provision has only been used a handful of times in the past. Most notably, in 1996, the State Department used this provision to deny visas to the director of Canadian company Sherritt International Corporation, as well as other top officers of the company and their immediate families. As noted in the company's 2018 annual report, the action had the collateral effect of making recruitment of directors for the company more challenging, given the risk that directors, their spouses, and children could be prohibited entry into the U.S.¹⁸ The Trump administration's renewed focus on Title IV could generate similar concerns for officers and major shareholders of other non-U.S. companies that engage in business in Cuba involving property previously expropriated from U.S. nationals that could be subject to U.S. claims.

New Travel and Financial Services Sector Restrictions and Other Sanctions Measures

In addition to announcing that the administration would allow and actively pursue implementation of Titles III and IV of the Helms-Burton Act, on April 17, 2019, National Security Advisor John Bolton announced that the Department of the Treasury will implement other measures to roll back certain Cuba sanctions relief that occurred under the Obama administration. The measures announced include restrictions on "nonfamily travel" to Cuba by U.S. persons and rescinding a general license issued by OFAC that allowed U.S. banks to process certain "U-turn" transactions involving Cuba. Additionally, the administration announced a cap on personal family remittances to Cuba of \$1,000 per person per quarter. Finally, effective April 24, 2019, the administration added five entities owned by the Cuban military or intelligence services, including Cuban airline Aerogaviota, to the "Cuba Restricted List," prohibiting U.S. persons from engaging in direct financial transactions with such entities.

As of the date of this publication, only the additions to the Cuba Restricted List have been implemented. OFAC is expected to issue guidance and necessary amendments to the Cuban Assets Control Regulations in the coming weeks to implement these additional sanctions measures announced on April 17, 2019.

Conclusion

The measures announced by the Trump administration on April 17, 2019 mark a significant escalation of U.S. sanctions against Cuba. In the near term, implementation of Title III of the Helms-Burton Act, in combination with the other sanctions measures announced by the Administration, can be expected to further worsen U.S.-Cuba relations and bilateral relations between the U.S. and the EU and Canada, as well as elevate perceived risks of doing business in Cuba for both U.S. and non-U.S. companies.

1 See The Cuban Liberty and Democratic Solidary (LIBERTAD) Act of 1996 (Codified in Title 22, Sections 6021-6091 of the U.S. Code), § 302(a)(1)(A).

2 See *id.* at § 4(13).

3 Foreign Claims Settlement Comm'n of the U.S., Completed Programs – Cuba, U.S. Dep't of Justice, <https://www.justice.gov/fcsc/claims-against-cuba>; Cuba: U.S. Policy in the 116th Congress, Congressional Research Serv. (Mar. 29, 2019), 45.

4 LIBERTAD, § 303.

5 See *id.* at § 303(a)(1).

6 See *id.* at § 303(a)(2).

7 *Id.* at § 302(a)(5)(A).

8 Id. at § 302(a)(1)(A) .

9 Id. at § 302(a)(3)(C).

10 See id.

11 Id. at § 302(b).

12 Id.

13 Id. at § 4(13)(B)(iii).

14 Id. at § 4(13)(B)(i)-(iv).

15 Id. at § 302(a)(5)(C).

16 See 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 , European Union (Apr. 17, 2019), https://eeas.europa.eu/headquarters/headquarters-homepage/61181/joint-statement-federica-mogherini-chrystia-freeland-and-cecilia-malmstr%C3%B6m-decision-united_en.

17 See 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, European Union (Apr. 14, 2019), https://eeas.europa.eu/headquarters/headquarters-homepage/61183/joint-statement-federica-mogherini-and-cecilia-malmstr%C3%B6m-decision-united-states-further_en.

18 See Sherritt International Corporation, Notice of Annual Meeting of Shareholders and Management Information Circular, May 4, 2018, https://s2.q4cdn.com/343762060/files/doc_financials/2018/05/2018-05-07-MIC-Notice-of-AGM.pdf at 16.

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