On April 17, 2019, the United States made the historic decision to cease suspension of Title III of the Cuba Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (commonly called the "Helms-Burton Act").

Title III is the portion of the Helms-Burton Act which allows parties whose property was confiscated by the Cuban Government in 1959 to sue in U.S. courts companies and individuals who "traffic" in the property in question. The Act contains a broad definition of "traffic" and encompasses anyone who derives an economic benefit from confiscated property. Since 1996, each successive U.S. President has suspended this section of the Helms-Burton Act, making the decision to "cease suspension" particularly significant.

This note provides a brief review of the Helms-Burton Act itself and outlines the potential impacts of Title III on Canadian and other foreign companies currently operating in Cuba.

**About the Helms-Burton Act**

The Helms-Burton Act is the legal foundation of The United States' embargo on Cuba. The stated purpose of the Helms-Burton Act is "to seek international sanctions against the Castro government leading to a democratically elected government in Cuba, and for other purposes". The Helms-Burton Act is extra-territorial in nature. It aims to prevent individuals and companies from engaging in international trade with Cuba by subjecting foreign nationals to travel restrictions and financial liabilities in the United States.

Title III of Helms-Burton Act creates a private cause of action that allows Americans to sue anyone who, as of November 1, 1996, "traffics" or has "trafficked" in property confiscated from U.S. nationals by the Cuban State. The Act categorizes potential
plaintiffs into two groups of property claimants: (i) "certified" claimants, or persons who were U.S. nationals at the time of expropriation; and (ii) "non-certified" claimants, or persons who were Cuban nationals at the time of expropriation but later became U.S. nationals.

The definition of "traffic" under the Helms-Burton Act is broad. A person "traffics" confiscated property if, among other things, that person knowingly and intentionally sells, transfers, distributes, conducts financial operations, or disposes in any manner of confiscated property or purchases, receives, holds, controls, manages or holds an interest in confiscated property and engages in a commercial activity using or otherwise benefiting from confiscated property. Notably, this definition could theoretically encompass virtually any business conduct done in relation to Cuban property, including business done through subsidiaries and affiliates, with the present owner of formerly confiscated property.

Pursuant to section 306 of the Helms-Burton Act, the U.S. President may suspend Title III for any six-month period.[3] Since its enactment in 1996, Title III had been suspended by every presidential administration for successive consecutive six-month periods. The latest suspension will end without renewal on May 2, 2019, affecting a major departure in longstanding U.S. foreign policy.[4]

**Adding in Title IV**

It is worth noting that the U.S. Secretary of State's announcement regarding the cessation of suspension on April 17, 2019 also indicated the administration's intention to enact Title IV of the Helms-Burton Act. Title IV provides for exclusion of entry into the U.S. by any foreign national (as well as their spouses and minor children) who has converted confiscated property for personal gain, or who traffics or has trafficked in confiscated property in Cuba. (The definition of trafficking found Title IV differs from the Title III definition, but remains quite broad.)

**Potential Lawsuit Targets**

The activation of Title III creates significant legal exposure for international companies now operating in Cuba. When the suspension of Title III ends on May 2, 2019, companies that are currently "trafficking" or who have "trafficked" in the past two years could face immediate claims under the Helms-Burton Act –claims coming from private individuals and companies.

According to data collected by the U.S.-Cuba Trade and Economic Council Inc., there are
8,821 claims existent, of which 5,913 awards valued at U.S. $1,902,202,284.95 were certified by the U.S. Justice Department's Foreign Claims Settlement Commission (USFCSC) and not yet resolved. The USFCSC permitted interest to be accrued in the amount of 6% per annum, making the current value of the 5,913 certified claims approximately U.S. $8,521,866,156.95.[5]

The U.S.-Cuba Trade and Economic Council Inc. has released a list of companies mentioned by claimants as potential lawsuit targets under the provisions of Title III. The combined revenues of the companies in 2018 were approximately U.S. $678 billion and the combined market capitalization of the companies in 2018 was approximately U.S. $860 billion. The full list of companies can be accessed here.

**Jurisdictional Issues**

Notwithstanding the extra-territorial nature of the Helms-Burton Act, prospective plaintiffs asserting Title III claims against non-American companies may face several legal obstacles in pursuing desired remedies under the Helms-Burton Act.

First, establishing personal jurisdiction over non-U.S. defendants who do not themselves do business in the United States may prove difficult. Second, Title III claims may potentially be clawed-back as a result of the "blocking statutes" enacted by a number of countries in response to the Helms-Burton Act. Many of the U.S.'s major trading partners, including Canada[6], the United Kingdom, Mexico, the European Union and Argentina, have implemented "blocking legislation" to counter-act the extra-territorial effects of the Helms-Burton Act on their companies.[7] Countermeasures found in the Helms-Burton blocking statutes include:

- prohibiting compliance or restricting production of records for the purposes of the U.S. extraterritorial measures found in Title III;
- providing for non-recognition of judgments and administrative determinations pursuant to Title III;
- creating "clawback" mechanisms by providing a cause of action enabling recovery for damages suffered as a result of imposition of Title III decisions; and
- requiring reporting to relevant foreign legal authorities of actions related to the Title III measures.[8]

The blocking statutes remain in effect and will likely form the basis of the countries' future responses to Title III enactment.
Third, challenges to the Helms-Burton Act by member countries of the World Trade
Organization are likely imminent. The European Union ("EU") previously challenged key
elements of the U.S. trade embargo by requesting the establishment of a World Trade
Organization ("WTO") panel to consider the consistency of the U.S. measures with WTO
agreements, including the General Agreement on Tariffs and Trade 1994 and the General
Agreement on Trade in Services.

Six months after initiating the panel, the U.S. and the European Union signed a
Memorandum of Understanding in which the EU agreed to suspend its challenge on the
basis that the U.S.'s waiver of Title III remained in effect and no action would be taken
against EU companies. As the U.S. is now ending the suspension of Title III, the terms of
1997 U.S.-EU Memorandum of Understanding will need to be reviewed.

International Responses

Canada, the European Union, the United Kingdom and other significant U.S. trading
partners have issued statements of concern regarding the U.S. decision to implement Title
III of the Helms-Burton Act.

Canada's Minister of Foreign Affairs, the Honourable Chrystia Freeland, issued a
statement on April 17, 2019 indicating that Canada would be reviewing "all options" in
response to the U.S. decision. The statement reaffirmed the Minister's commitment to fully
defending the interests of Canadians conducting legitimate trade and investment with
Cuba.[9]

The European Union published a joint statement from the Press Officer for Foreign Affairs
and Security Policy and the Spokesperson for Foreign Affairs and Security
Policy/European Neighbourhood Policy and Enlargement Negotiations, which reiterated the
Union's strong opposition to the extraterritorial application of unilateral Cuba-related
measures. The statement indicated the Union would consider all options at its disposal to
protect its legitimate interests, including in relation to its WTO rights and through the use
of the EU Blocking Statute.[10]

The Foreign & Commonwealth Office of the United Kingdom also issued a statement
which echoed the concerns expressed by the European Union. The United Kingdom will
work alongside the EU to protect the interests of UK-based companies.[11]

More Information
For further information and resources regarding the importance and potential impact of the United States' historic suspension of Title III, please reach out to a member of Gowling WLG's Cuba country desk team.


[6] Canada enacted its Foreign Extraterritorial Measures Act (FEMA) in 1984 authorizing the Canadian Government to block foreign laws that apply extraterritorially to Canadian companies and nationals. FEMA is "blocking" legislation designed to prohibit Canadians and corporations from complying with extraterritorial measures. After the United States enacted the Helms-Burton Act in 1996, Canada amended the FEMA to strike back at Title III of the Helms Burton Act. Canada's Foreign Extraterritorial Measures (United States) Order of 1992 actually prohibits Canadian corporations, and there directors, officers, managers and employees, from complying with any U.S. legislation that seeks to prohibit, infringe on or otherwise influence trade between Canada and Cuba. This prohibition applies to any act or omission constituting compliance with U.S. extraterritorial laws regarding Cuba even if compliance with that measure or communication is not the only purpose of the act or omission.


[10] European External Action Press Service, "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" (17 April 2019).


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