US courts open to lawsuits for “trafficking” in confiscated Cuba property

April 25, 2019

As of May 2, 2019, US nationals will be able to file lawsuits in federal court against any individual or entity that “traffics” in property confiscated by the Cuban government on or after January 1, 1959—a time span of more than 60 years.

While this right of action (i.e., right to bring a lawsuit) was included as part of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, known as the Helms-Burton Act,[1] it has never gone live. Rather, the US has continuously suspended its implementation for more than 20 years. On April 17, 2019, however, US Secretary of State Michael Pompeo announced that he would not extend the suspension any further. Accordingly, effective May 2, US nationals will be permitted to file lawsuits in US courts seeking compensation from any person (Cuban or non-Cuban) that “traffics” in confiscated property.

The statute’s broad definition of what it means to “traffic” in confiscated property potentially encompasses a wide range of conduct for which a plaintiff could be entitled to substantial damages. This presents a novel—and potentially significant—US legal risk to many foreign companies, even if they do not directly do business in or with Cuba.

Separately, Title IV of Helms-Burton - which has been in force since 1996 - allows the US to deny a visa to, and exclude from the US, non-US persons who “traffic” in confiscated property, their officers, principals, and controlling shareholders, and their immediate family members. While this authority has reportedly been applied to only one company, it may increasingly be a legal risk in its own right and in the context of potential lawsuits under Title III.

Background

The Helms-Burton Act was enacted in 1996 to strengthen and increase sanctions against the Cuban government after Cuba shot down two planes operated by Brothers to the Rescue, an American nonprofit. Title III of the law created a federal cause of action for US nationals, and certain non-US nationals who later became US citizens, to sue any person who “traffics” in property that was seized from that individual by the Cuban government. [2]

This cause of action, however, has never been available for potential plaintiffs. Since the enactment of the Helms-Burton Act, successive US administrations—under both Democrats and Republicans—have suspended the implementation of Title III, prior to Secretary Pompeo’s announcement. [3] The law contains a two-year limitations period—meaning potential defendants face liability for actions in which they have participated over the last two years.[4]

Trafficking

As the private right of action under the Helms-Burton Act has never been active and thus is yet to be litigated, there is

no precedent applying or interpreting its elements, including the limits of what it means to "traffic" in confiscated property. As a result, liability under the Title III private right of action would likely extend to a wide range of actions and actors under the current broad statutory definition.

Under the statute, the term "traffic" applies to individuals or entities who "knowingly and intentionally" sell, transfer, dispose of or engage "in a commercial activity using or otherwise benefiting from confiscated property," as well as those who participate in or profit from others engaged in such activity, without the authorization of the US national with a claim to the property.[5] Further, "knowingly" is broadly defined to include those who either act with actual knowledge that particular property was confiscated or have a reason to know that it was confiscated.[6] The only specified exceptions to the definition of "traffic" relate to providing certain telecommunication services to Cuba, transactions involving publicly traded securities, transactions incident to lawful travel to Cuba, or actions taken by private Cuban-resident citizens.[7]

Given the statutory definition of trafficking and the absence of any precedent at this point, it should be expected that plaintiffs will seek out a wide variety of potential defendants, including defendants with only an indirect or tangential relationship to the confiscated properties. For example, a company that leases or uses a parking lot on land formerly owned by US nationals, or purchases sugar produced on that land, may be alleged to "traffic" in confiscated property under the law.

Plaintiffs will also likely seek to hold liable companies that indirectly participate in or profit from "trafficking," such as companies that ship the sugar produced on the confiscated lands, or—even more attenuated—companies of the defendant that are paid with profits made from selling such sugar. Until the courts begin to adjudicate claims, however, the precise extent of the definition of "traffic" is unknown.

Potential for significant damage awards

A broad application of the Helms-Burton Act poses especially significant risks because of the potentially onerous damages provided for in the statute. Damages are measured by the value of the confiscated property, rather than a claimant's damages or the profits derived from a party's "trafficking." [8] Furthermore, the law authorizes a range of different valuation methods, including valuation based on the current market value instead of historic value.[9] It also allows for the recovery of court costs and attorneys' fees. [10] Where a plaintiff provides advance notice in a prescribed format to a prospective defendant of an intent to initiate a claim under Title III, the plaintiff can recover triple the amount of damages to which they are entitled.[11]

Ability to leverage certified claims

If a claim regarding confiscated property has been certified by the US Foreign Claims Settlement Commission ("FCSC"), courts hearing lawsuits under Title III must accept that FCSC-certified claim as conclusive proof of the plaintiff's ownership of an interest in the subject property. [12] There are hundreds of such certified claims that are eligible for potential recovery under Title III, with estimated current valuations ranging, in the aggregate, from $2 billion to $8 billion. Additionally, there is a presumption that the value of a certified claim is the amount for which a defendant under a Title III action is liable[13] - although, as noted above, the damages may also be based on current market value. These provisions mean that for many potential Title III claims, the work required to prove ownership of a confiscated property and establish a damages amount is already done.

Connection with Title IV

As noted above, there is a second provision of Helms-Burton - Title IV - which also addresses “trafficking” in confiscated property. Under Title IV, the Secretary of State has authority to exclude from the US and deny visas to any “alien” (i.e., a person who is not a citizen or national of the US) who the Secretary of State determines to traffic in confiscated property to which a US national has a claim. This authority also extends to officers, principals, and controlling shareholders in such persons, and to their spouses, minor children, or agents.[14] The Secretary of State must provide a notification to persons targeted for action under Title IV 45 days prior to implementation of such action; a person receiving such a notification has an opportunity to respond.[15]

According to public reports, this authority has been used only once to date: in 1996, the United States banned executives of Sherritt International from entering the United States. However, enforcement under Title IV has reportedly been dormant since then. That appears likely to change in parallel with the full implementation of Title III.

Potential hurdles for plaintiffs

While the Helms-Burton Act contains several elements that appear favorable for plaintiffs, prevailing on a claim is not automatic. The plaintiff carries the burden to navigate procedural and substantive challenges, including the following:

Personal jurisdiction and service of process

US law requires a plaintiff bringing a lawsuit in the US to prove that courts have “personal jurisdiction” over the defendant. A plaintiff can establish personal jurisdiction based on a finding that (i) the foreign defendant’s general business contacts with the state in which the court sits show that the company is “at home” in that state, or (ii) that the defendant’s contacts with the state in which the court sits arise out of or relate to the defendant’s “trafficking” of the confiscated property. Companies that have little or no connection to the US may be able to avoid liability for lawsuits under the Helms-Burton Act by properly rebutting grounds for jurisdiction.

Service of process may also be challenging. US law requires international service of process through international agreements, like the Hague Service Convention. However, service under the Hague Convention can be time-consuming, and state authorities have been known to reject service for highly technical reasons.

Establishing “intent”

The law requires that a plaintiff prove that a defendant acted with the requisite intent. Specifically, plaintiffs will have to prove both “knowing” and “intentional” conduct by defendants. Although “knowing” can simply be demonstrated by showing a defendant had reason to know that the property at issue was confiscated, proving intent can be challenging for plaintiffs and is likely to be a contested issue. Potential defendants could rebut allegations of intentional and knowing “trafficking” by collecting and presenting already-conducted due diligence on Cuban business partners or business opportunities.

Statute of limitations

The two-year statute of limitations is also likely to pose challenges to plaintiffs, as this is a relatively short look-back period—especially for a law that purports to provide a remedy for property confiscated approximately 60 years ago. The statute of limitations begins to run “after the trafficking giving rise to the act has ceased to occur.” [16] Defendants who can thus establish that they ceased business dealings related to any confiscated property more than two years ago may therefore be able to avoid liability.

Enforcement of a judgment

Once a plaintiff has obtained a judgment from a US court, they must enforce the judgment to obtain any financial

award. If a defendant does not have assets in the US that can be seized to satisfy a judgment, plaintiffs will need to try to enforce the judgment abroad where such assets may be found. The US is not a party to any treaties or conventions concerning the enforcement of judgments; therefore, enforcement of US judgments abroad is governed by the local law of the place where the judgment is sought to be enforced (i.e., where the defendant has assets).

Generally, foreign courts rely on the principles of reciprocity and comity in enforcing judgments—that is, whether the US reciprocally recognizes judgments of the country where the judgment is to be enforced and whether enforcement would violate the laws of the respective foreign county. Depending on where the judgment is sought to be enforced, plaintiffs may have difficulty enforcing a judgment if reciprocity or comity issues are present. As discussed below, several jurisdictions have enacted "blocking statutes" to prevent and deter compliance with US sanctions on Cuba.

Blocking statutes

In addition to some of the challenges noted above, certain countries, like Canada and Mexico, as well as the European Union, have enacted so-called blocking statutes barring compliance with US sanctions on Cuba.

Canada

In Canada, the Foreign Extra Territorial Measures Act (FEMA), adopted in 1985, contains four principal countermeasures to protect Canadians against the extraterritorial application of the Helms-Burton Act. Specifically, the FEMA provides the following protections for Canadians that are named as defendants in US actions under Title III of the Helms-Burton Act:[17]

- Before a Title III judgment has been rendered, with the consent of the Attorney General of Canada, Canadians may commence actions in Canada to recover their costs associated with defending Title III actions from US plaintiffs, in Canadian courts.
- If US courts have exercised jurisdiction or powers under Title III, or are likely to do so, Canadians may petition the Attorney General of Canada to order the prohibition or restriction of the identification, disclosure and production of records in Canada or controlled by Canadian citizens and residents, and the giving of evidence, for purposes of Title III actions in the US.
- After a judgement is made under Title III in the US, or if such an award is satisfied outside Canada, Canadians may petition the Attorney General of Canada for an order to commence an action in Canada for the full recovery of any and all amounts awarded against them in the Title III proceedings (i.e., a "clawback").
- Judgments made pursuant to Title III of the Helms-Burton Act will not be recognized or enforced in Canadian courts.

Further, the Foreign Extraterritorial Measures (United States) Order, 1992 relating to Cuba requires notification to the Attorney General of Canada of directives, instructions, intimations of policy or communications relating to US extraterritorial measures with respect to trade and commerce between Canada and Cuba, and prohibits compliance with those directives, instructions, intimations of policy or communications.[18]

Notably, if US plaintiffs do not have assets in Canada, such decisions may be enforced through the normal course of recognition and enforcement proceedings in other jurisdictions (though enforcement in the US is unlikely).

Mexico

In 1996, Mexico enacted the Law to Protect Trade and Investment from Foreign Laws that Contravene International Law. (*Ley de Protección al Comercio y la Inversion de Normas Extranjeras que Contravienen el Derecho Internacional*). This law was intended to block or prevent the extraterritorial application of the Helms-Burton Act and

other sanctions imposed by the US against Cuba.

This blocking statute prohibits any person within Mexico, or persons whose acts have total or partial effects in Mexico, or who have expressly submitted to Mexican laws, to pursue acts that would affect trade and investment when such acts are the consequence of the extraterritorial application of foreign laws (such as the Helms-Burton Act). Among other important provisions, the law contains (i) the right to resort to Mexican federal courts in order to recover damages imposed under foreign extraterritorial laws, (ii) the non-recognition and non-enforcement of foreign judgments or awards issued under foreign extraterritorial laws requiring the payment of damages and (iii) the right to seek and obtain diplomatic protection from the Mexican government.

European Union

The EU first adopted the EU Blocking Statute[19] in 1996 as a countermeasure to what it considered to be the unlawful effects on "EU operators" of the Helms-Burton Act imposing US extraterritorial sanctions against Cuba, Libya and Iran. From the EU perspective, the Helms-Burton Act infringed on the EU's sovereignty because it interfered with the EU's legitimate trade with another country. The EU further recognized that the unlawful effect and burden of such laws was directly felt by and applied to "EU operators," defined as: (i) EU member state nationals, wherever located, (ii) EU residents, (iii) entities incorporated in the EU, (iv) shipping entities controlled by nationals of a member state if their vessels are registered in that EU member state and (v) any individual within the EU.[20]

The EU Blocking Statute prohibits EU operators from complying with a set of specific extraterritorial laws or any decisions, rulings or awards based on those laws. The laws at issue, listed in an Annex to the EU Blocking Statute, include six different US sanctions laws and one set of US regulations (the Office of Foreign Assets Control's Iranian Transactions and Sanctions Regulations).[21]

In addition to prohibiting compliance with the listed US laws and regulations, the EU Blocking Statute requires EU operators to report to the European Commission, within 30 days, any circumstances arising from the extraterritorial laws that affect their economic or financial interests.[22] Moreover, no decision rendered in the United States or made elsewhere can be implemented in the EU.[23] This means that any court decision made in light of the Helms-Burton Act cannot be executed in the EU.

The operation of the EU Blocking Statute, however, is not without challenges. This is because the competent authorities of EU member states are responsible for implementing the statute at the national level. This includes the adoption and implementation in national penalties for possible breaches. Such penalties vary among member states, as they are laid down in national legislation. In some member states, for example, EU operators may face administrative penalties for breaching the EU Blocking Statute. In others, they can be held criminally liable for the same conduct. And in still others, the statute has not even been implemented.

In addition to lack of universal implementation of the EU Blocking Statute, enforcement actions under the statute in the EU have rarely been pursued. One of the few known examples of enforcement dates back to 2007, when Austria brought charges against BAWAG Bank, which had closed the accounts of 100 Cuban nationals in the context of its pending acquisition by a US private equity investor. In the end, BAWAG Bank's US counterpart was granted an exemption by US authorities and the acquisition went ahead as planned, with the Cuban accounts being reinstated.

Furthermore, the statute provides for flexible implementation in that EU operators are allowed to request authorization to comply with US sanctions if not doing so would cause "serious harm to their interests or the interests of the European Union."[24]

The EU Blocking Statute, similar to its Mexican and Canadian counterparts, allows EU operators to recover damages arising from the application of extraterritorial measures. In theory, this means that an EU operator would be allowed to exercise a private right of action and to be indemnified by companies that comply with the US laws if in doing so those

companies injure the EU operator. However, it remains unclear how this specific provision would work in practice, and whether and how the EU Blocking Statute would apply in practice to protect EU operators from actions brought against them under the Helms-Burton Act.[25]

Looking ahead

The activation of the private right of action for "trafficking" under the Helms-Burton Act will require potential defendants worldwide to confront a series of novel legal risks. The law's expansive definition of what it means to "traffic" in confiscated property, and the potential for triple damages, invite potential plaintiffs to pursue a broad range of claims against a broad range of defendants, even if the defendants do not directly do business in or with Cuba. In addition, the visa denial and exclusion provisions of Title IV present new risk to principals of companies with potential exposure under Helms-Burton, and may serve as leverage in Title III claims.

Accordingly, any individual or entity that does business in Cuba or with Cuban counterparties, directly or indirectly, should be on the lookout for communications from plaintiff's counsel or the Department of State regarding potential actions under Titles III and IV. Even absent such communications, they should consider evaluating their potential exposure to a lawsuit under the Helms-Burton Act. This could include reviewing whether any business dealings involve confiscated property and, if so, whether the dealings involve activities within the scope of "trafficking." It may also be prudent to consider developing potential factual and legal defenses, including those related to a lack of requisite knowledge or intent.

Individuals and entities with potential exposure to a lawsuit under the Helms-Burton Act should also consider reviewing whether they have assets that are within the US and therefore could be more easily attached to satisfy any judgment. Similarly, if an individual or entity with exposure to a lawsuit under the Helms-Burton Act has assets in another jurisdiction, they should consider whether a blocking statute might provide some degree of protection from having those assets attached—or a potential "clawback" to recover any assets that are attached elsewhere.

Additionally, especially because this right of action is newly available and there is no precedent as yet, it may be prudent to actively monitor the US civil litigation docket starting on May 2, 2019, to evaluate how any early Helms-Burton Act lawsuits are structured and styled.

The authors thank Matthew A. Lafferman, Nimrah Najeeb and Sean Stephenson for their assistance.

---

1. Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021 *et seq.*).↩
2. 22 U.S.C. § 6082(a)(1)(A).↩
3. US Dep't of State, *Remarks to the Press by US Secretary of State Michael R. Pompeo* (Apr. 17, 2019), https://www.state.gov/secretary/remarks/2019/04/291174.htm.↩
4. 22 U.S.C. § 6084.↩
5. *Id.* § 6023(13)(A).↩
6. *Id.* § 6023(9).↩
7. *Id.* § 6023(13)(B).↩
8. *Id.*§ 6082(a)(1)(A)(i).↩
9. *Id.*§ 6082(a)(1)(A)(i)(III).↩
10. *Id.* § 6082(a)(1)(A)(ii).↩
11. *Id.* § 6082(a)(1)(C)(ii).↩
12. *Id.* § 6083(a)(1).↩
13. *Id.*§ 6082(a)(1)(A)(i)(I).↩
14. *Id.* § 6091.↩
15. 61 Fed. Reg. 30655 (June 17, 1996).↩

16. *Id.* § 6084.↩
17. *Foreign Extraterritorial Measures Act (FEMA)* R.S.C., 1985, c. F-29.↩
18. *Foreign Extraterritorial Measures (United States) Order, 1992*, SOR/92-584.↩
19. Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 309, 29.11.1996, p. 1), as amended.↩
20. It is noteworthy however that, when EU subsidiaries of US companies are formed in accordance with the law of an EU member state and have their registered office, central administration or principal place of business within the EU, they are subject to the statute. However, branches of US companies in the EU are not. The European Commission's *Guidance Note Questions and Answers: adoption of update of the Blocking Statute*, *OJ C 277I , 7.8.2018, p. 4–10,* available at https://eur-lex.europa.eu/legal-content/EN/TXT /?uri=uriserv:OJ.CI.2018.277.01.0004.01.ENG&toc=OJ:C:2018:277I:TOC.↩
21. The listed laws are the: National Defense Authorization Act for Fiscal Year 1993, Title XVII "Cuban Democracy Act 1992", sections 1704 and 1706; Cuban Liberty and Democratic Solidarity Act of 1996; Iran Sanctions Act of 1996; Iran Freedom and Counter-Proliferation Act of 2012; National Defense Authorization Act for Fiscal Year 2012; Iran Threat Reduction and Syria Human Rights Act of 2012; and the Iran Transactions and Sanctions Regulations (31 CFR Part 560).↩
22. Article 2, paragraph 1 of the EU Blocking Statute.↩
23. Article 4 of the EU Blocking Statute.↩
24. Article 5, paragraph 2 of the EU Blocking Statute. The European Commission designed a template for making the request, which includes 13 potential criteria that applicants can refer to in making their application. These include whether there exists "a substantial connecting link" between the EU operator and the United States, whether not complying with US measures could have an "adverse effect on the conduct of [a company's] economic activity" or whether the "applicant's activity would be rendered excessively difficult due to a loss of essential inputs or resources, which cannot be reasonably replaced." *See,* Template for Applications for Authorisations under Article 5 paragraph 2 of Council Regulation (EC) No 2271/96.↩
25. To recall, in 2018 the EU has updated the list of laws to which the Blocking Statute applies to cover the re-imposed US secondary sanctions targeting Iran. There remains little information about the practical effect of the updated Blocking Regulation and the extent to which the EU operators were successful in invoking its provisions.↩

Your Key Contacts

Joaquin Contreras
Partner, Mexico City
D +52 55 3685 3338
joaquin.contreras@dentons.com

Paul M. Lalonde
Partner, Toronto
D +1 416 361 2372
M +1 416 414 5833
paul.lalonde@dentons.com

Nadiya Nychay
Partner, Brussels
D +32 2 552 29 00
M +32 49 518 88 81
nadiya.nychay@dentons.com

Peter G. Feldman
Partner, Washington, DC
D +1 202 408 9226
peter.feldman@dentons.com

Drew W. Marrocco
Partner, Washington, DC
D +1 202 408 6387
drew.marrocco@dentons.com

Jason M. Silverman
Partner, Washington, DC
D +1 202 496 7423
jason.silverman@dentons.com