

## Helms-Burton Act Enters Into Effect

Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the “Helms-Burton Act” or the “Act”),<sup>1</sup> creates a private right of action that allows U.S. nationals to file suit in U.S. courts against persons and entities “trafficking” in property confiscated by the Cuban government on or after January 1, 1959.

Since its enactment in 1996, each U.S. administration has suspended this right of action. This long-standing practice changed in January 2019, when the U.S. Department of State made a determination to suspend the Act for only 45 days beyond February 1.<sup>2</sup> After this, two short-term extensions of 30 days and 15 days followed.<sup>3</sup> On April 17, U.S. Secretary of State Michael R. Pompeo confirmed that the Trump administration will no longer suspend the Act, which became effective on May 2, 2019.<sup>4</sup>

### The Broad Scope of the Helms-Burton Act.

The Helms-Burton Act provides U.S. nationals with a cause of action for damages if their property was confiscated by the Cuban government.<sup>5</sup> Under the Act, someone who “knowingly and intentionally” traffics in such property is subject to liability. The Act defines “trafficking” broadly, to include anyone who:

- (i) Sells, transfers, distributes, dispenses, brokers, manages or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property;

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<sup>1</sup> Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785, (codified as 22 U.S.C. Chapter 69A).

<sup>2</sup> U.S. Department of State, Secretary’s Determination of 45-Day Suspension under Title III of Libertad Act, January 16, 2019, available at <https://www.state.gov/r/pa/prs/ps/2019/01/288482.htm>.

<sup>3</sup> See U.S. Department of State, Secretary enacts 30-day suspension of Title III (LIBERTAD Act) with an exception, March 4, 2019 available at <https://www.state.gov/r/pa/prs/ps/2019/03/289864.htm>; U.S. Department of State, Secretary Pompeo Extends for two weeks Title III suspension with an Exception (LIBERTAD Act). April 3, 2019, available at <https://www.state.gov/r/pa/prs/ps/2019/04/290882.htm>.

<sup>4</sup> U.S. Department of State, Michael R. Pompeo Remarks to the Press. April 17, 2019, available at <https://www.state.gov/secretary/remarks/2019/04/291174.htm>.

<sup>5</sup> See, e.g., Section 301, paragraphs 8-11.

- (ii) Engages in a commercial activity using or otherwise benefiting from confiscated property; or
- (iii) Causes, directs, participates in, or profits from trafficking by another person, or otherwise engages in trafficking through another person;

without the authorization of any United States national who holds a claim to the property.<sup>6</sup>

As a result, “trafficking” covers not only companies that directly manage, use or exploit Cuban properties that had previously been confiscated, but also persons and entities (which can include foreign persons and entities) that “cause,” “participate in,” or “profit from” trafficking “by another person,” or that engage in trafficking “through another person.”

### Remedy under the Helms-Burton Act

Anyone found to have violated the Act is liable for money damages. Under Section 302 of the Act, damages will be the greater of (i) the amount certified to the claimant by the Foreign Claims Settlement Commission (“FCSC”) under the International Claims Settlement Act of 1949;<sup>7</sup> (ii) if the claim was not certified, the amount determined by an expert appointed by the court regarding the amount and ownership of the claim, plus interest from the date of confiscation to the date the lawsuit was filed;<sup>8</sup> or (iii) the fair market value of the property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest

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<sup>6</sup> Helms-Burton Act, Section 4(13)(A).

<sup>7</sup> Title V of the International Claims Settlement Act of 1949 (as amended) authorizes the FCSC to consider claims of nationals of the United States against the Government of Cuba based upon (i) losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against property by that government; and (ii) the disability or death of nationals of the United States resulting from actions taken by or under the authority of that government. *See* <https://www.justice.gov/fcsc/claims-against-cuba>. There have been two programs for Cuba: a first which was completed on July 6, 1972 and a second which ended on August 11, 2006. The programs foresee no fund payments on the claims but simply provide a determination on the validity, amount of the claim and a certification of the Commission’s findings to the Secretary of State for use in future negotiation of claims settlement agreement with the Government of Cuba. Of the 8,821 claims filed in the two program, the government certified 5,913 awards (with an estimated principal of \$1,902,202,284.95).

Section 302(a)(2) of the Act establishes a presumption in favour of the certified claims in the amount determined by the FCSC. This presumption can only be rebutted through “clear and convincing evidence”.

<sup>8</sup> Section 302(a)(i)(B).

from the date of confiscation to the date the lawsuit was filed, whichever is greater. Court costs and reasonable attorney fees will also be awarded.<sup>9</sup>

The Act allows the court to award treble damages if either (i) the claim has been certified by the FCSC, or (ii) the claimant has provided written notice to the prospective defendant, at least thirty days before starting the action, of the claimant's intention to sue, and demanding cessation of trafficking in the confiscated property and, after thirty days the defendant traffics in the confiscated property.<sup>10</sup>

### Jurisdictional Defenses

Foreign persons being sued under the Helms-Burton Act will likely have strong jurisdictional defenses. The Act contains Congressional findings that “foreign investors” have been “trafficking” in confiscated assets, and that “United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits” from the confiscated assets.<sup>11</sup> Nothing in the Act, however, expressly bestows jurisdiction on foreign persons or entities. Accordingly, it appears that the jurisdictional principles that are applicable in all cases are also applicable in cases brought under the Act.

A U.S. court only has general jurisdiction over a corporation if its headquarters or its principal place of business is in the United States.<sup>12</sup> Persons and entities subject to U.S. jurisdiction have long been prohibited from engaging in commercial activity with Cuba, as part of the U.S. embargo on Cuba.<sup>13</sup> Certain narrow exceptions were introduced during the Obama administration,<sup>14</sup> and it may be that a U.S. corporation

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<sup>9</sup> Section 302 (a)(ii).

<sup>10</sup> Section 302(a)(3)(C) & (D).

<sup>11</sup> Section 301.

<sup>12</sup> See *Daimler AG v. Bauman*, 571 U.S. 20 (2014).

<sup>13</sup> See 31 C.F.R. Part 515.

<sup>14</sup> See, e.g., U.S. Treasury Department Office of Public Affairs, Treasury and Commerce Announce Further Amendments to Cuba Sanctions Regulations, Oct. 14, 2016, available at [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba\\_fact\\_sheet\\_10142016.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_fact_sheet_10142016.pdf); U.S. Treasury Department Office of Public Affairs, Treasury and Commerce Announce Significant Amendments to the Cuba Sanctions Regulations Ahead of President Obama's Historic Trip to Cuba, March 15, 2016, available at [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba\\_fact\\_sheet\\_03152016.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_fact_sheet_03152016.pdf).

has engaged in conduct that is permissible under the embargo, but actionable under the Act.<sup>15</sup> Nevertheless, the existence of the embargo renders it unlikely that more than a limited number of U.S. corporations engaged in actionable conduct.

Foreign entities, however, have not been bound by the embargo, and may have engaged in actionable conduct. Because they are not subject to general jurisdiction, they would have to be sued in a U.S. court under a theory of specific jurisdiction. This would require a plaintiff to show that the claim arose out of the defendant's contacts with a specific state or with the United States as a whole.<sup>16</sup> In many (or most) cases, it might not be possible to make such a showing. Presumably, in most instances, a foreign entity's business activity with Cuba would not arise out of that entity's contacts with the United States.

U.S. courts will soon be grappling with these jurisdictional issues, and the decisions will be watched very closely. Given the jurisdictional challenges in suing foreign defendants, and the paucity of domestic defendants, it remains to be seen, as a practical matter, how effective the Act will be in providing a remedy to victims of confiscation.

### Statute of limitations

Section 305 of the Act provides that an action may not be brought more than 2 years after the trafficking giving rise to the action has ceased to occur.

### Blocking Regulations

Numerous countries, including Mexico, Canada, and Argentina, as well as the European Union, have adopted regulations that counter the effects of the Helms-Burton

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<sup>15</sup> See *Javier Garcia-Bengochea v. Carnival Corporation, d/b/a Carnival Cruise Lines*, Case No. 1:19-cv-21725 (S.D. Fla.) (alleging that Carnival Cruise Lines trafficked in property by embarking and disembarking cruise ships in a port that was confiscated by the Cuban government in 1960).

<sup>16</sup> See Fed. R. Civ. P. 4(k)(2).

Act.<sup>17</sup> In the case of the European Union, the “antidote” took shape through Regulation (EC) No 2271/96 of 22 November 1996 (the “EU Blocking Regulation”).<sup>18</sup>

According to Article 4 of the EU Blocking Regulation, “[n]o judgment of a court or tribunal and no decision of an administrative authority located outside the Community” which directly or indirectly gives effect to the extraterritorial legislation listed in the Annex (including the Helms-Burton Act)<sup>19</sup> “shall be recognized or be enforceable in any manner.” Thus, the EU Blocking Regulation nullifies the effect in the EU of any U.S. decision, including court rulings and arbitration awards, while the reference to a “decision of an administrative authority” is likely to include any decision taken by the FCSC.

The other category of protection afforded by the EU Blocking Regulation provides protections to certain classes of natural and legal persons (“EU Persons”).<sup>20</sup> For such persons the EU Blocking Regulation includes a claw-back provision for the recovery of damages via court actions in the court of EU Member States. Under Article 6, EU Persons can recover “any damages, including legal costs caused to that person by the application” of the listed extraterritorial legislation including the Helms-Burton Act “or by actions based thereon or resulting therefrom.” Further, under Article 6 the recovery “may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary”.

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<sup>17</sup> Canada Foreign Extraterritorial Measures Act (R.S.C., 1985, c. F-29); Mexico Ley de Protección al comercio y a la Inversión de normas extranjeras que contravengan el derecho internacional, DOF 23-10-1996; Argentina, Ley . 24.871 por la que se establece el marco normativo referido a los alcances de las leyes extranjeras en el territorio nacional, BO 09.10.1997.

<sup>18</sup> Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting thereon. OJEU of 29.11.1996, L 309 p. 1.

<sup>19</sup> The Annex of the EU Blocking Regulation includes the National Defense Authorization Act for Fiscal Year 1993, Title XVII of the Cuban Democracy Act 1992 sections 1704 and 1706, Cuban Liberty and Democratic Solidarity Act of 1996, Iran and Libya sanctions of 1996 and 1 CFR C.V Part 515 on Cuban Assets Control regulations. On 7 August 2018, the Commission Delegated Regulation (EU) 2018/1100 amended the Annex to the EU Blocking Regulation adding to its scope U.S. primary sanctions under the Iranian Transactions and Sanctions Regulations.

<sup>20</sup> EU Blocking Regulation, Article 11. The categories are: i) a legal person incorporated in an EU Member State; ii) a natural person who is both resident in the EU and who is a national of an EU Member State; iii) a natural person who is resident in the EU; unless that person is in the country of which he is a national; iv) an EU national resident outside the EU; v) any other natural person acting in a professional capacity within the EU, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State; or vi) a non-EU incorporated shipping company if it is controlled by EU nationals, and its vessel are registered in that EU Member State.

The extent to which such claims are brought in the European Courts, and how broadly the courts construe the ability to recover “any damages ... caused” remains to be seen.

For other aspects of the EU Blocking Regulation see our client alert entitled “EU Response to revived U.S. Sanctions against Iran.”<sup>21</sup>

Finally, it is expected that the EU will adopt actions not only under the EU Blocking Regulation, but also under the WTO framework, as announced by the High Representative in its press release of May 2, 2019.<sup>22</sup>

## Conclusions

The entry into effect of the Helms-Burton Act as of May 2, 2019, represents a significant change in U.S. foreign policy. What remains to be seen, however, is how effective the Act will be in affording a remedy to victims of Cuban government confiscation. In addition, foreign companies must comply with any applicable blocking legislation, which could create compliance issues.

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<sup>21</sup><https://www.curtis.com/siteFiles/Publications/EU%20Response%20to%20Revived%20U.S.%20Sanctions%20Against%20Iran.pdf>.

<sup>22</sup> Declaration by the High Representative on behalf of the EU on the full activation of the Helms-Burton (LIBERTAD) Act by the United States, Press release 05/02/2019, available at <https://www.consilium.europa.eu/en/press/press-releases/2019/05/02/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-full-activation-of-the-helms-burton-libertad-act-by-the-united-states/>.



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