

It's Alive – Trump Administration Resurrects Helms-Burton Title III

On April 17, 2019, Secretary of State Mike Pompeo announced that the United States will permit Title III of the Helms-Burton Act, also known as the Libertad Act, to go into effect for the first time since the Act's passage in 1996. In particular, Title III of the Act permits U.S. citizens to file lawsuits in U.S. federal court against individuals and entities that "traffic[] in property which was confiscated by the Cuban Government on or after January 1, 1959."¹ In practical terms, Title III creates a regime of extraterritoriality and permits U.S. nationals to file lawsuits against foreign companies despite no adverse action occurring within the jurisdiction of the United States.

This decision to fully implement Title III was made in conjunction with National Security Adviser John Bolton's announcement of additional sanctions against Cuba, Nicaragua, and Venezuela to further efforts to remove Nicolas Maduro from power. These actions include further restricting travel to Cuba by U.S. nationals as well as implementing new sanctions against the Central Bank of Venezuela and the Nicaraguan Banco Corporativo SA. Overall, the foreign policy objective of these new policies is to force Maduro out of power in Venezuela while simultaneously punishing those governments that are currently providing assistance to the Venezuelan regime.

For a foreign entity to be liable under Title III, the entity must "traffic" in property that was confiscated by the Cuban government following the 1959 Cuban Revolution. Under the Act, the term traffic requires a person to knowingly and intentionally do any of the following:

1. Sell, transfer, distribute, dispense, broker, manage, or otherwise dispose of confiscated property, or purchase, lease, receive, possess, obtain control of, manage, use, or otherwise acquire or hold an interest in confiscated property;
2. Engage in a commercial activity using or otherwise benefiting from confiscated property, or;
3. Cause, direct, participate in, or profit from trafficking by another person.²

Thus, the statute creates a multistep process for determining liability. First, the person or entity must know or have reason to know that the property at issue is "confiscated" for purposes of the Act. Essentially, the property must have been nationalized or seized by the Cuban government after January 1, 1959 without adequate compensation being provided, and the property must have been valued at greater than \$50,000 when it was confiscated. Second, the person or entity must have knowingly and intentionally engaged in one of the actions that fit under the term traffic.

The statute does provide exceptions for certain activities that fit under the definition of traffic. In particular, the term traffic 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."³ Accordingly, this exception may provide a safe harbor for entities such as airlines or ocean carriers that use property and facilities in Cuba as a means of executing transactions that include lawful travel to Cuba.

The overall impact of this policy is difficult to gauge. Numerous sources have reported that claims under Title III could number in the tens of billions of dollars. Nearly 6,000 claims by plaintiffs have already been certified by the Foreign Claims Settlement Commission, with a combined value of more than \$8.5 billion. This commission only certified claims by those who were U.S. citizens at the time of the confiscation of property. However, Title III permits Cubans who later were nationalized in the United States to file lawsuits, meaning that the number of claims could be significantly higher.



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It is possible that lawsuits will start to be filed as soon as May 2, 2019 and that potential plaintiffs will seek to attach third party entities under Title III as a means of seeking compensation that the Cuban government would never provide. However, because claims under Helms-Burton have never been litigated, significant legal questions exist with regard to jurisdiction, scope of liability, and the interpretation of the Act's various provisions.

It also remains to be seen what actions other nations will take in response to the announcement and what effect these might have on U.S. policy. Shortly after the Helms-Burton Act was enacted in 1996, many U.S. allies and trading partners expressed outrage over the perceived U.S. extraterritorial overreach and sought relief at the World Trade Organization and through passage of blocking statutes that forbade their citizens from complying with the U.S. law. These actions will likely serve as a blueprint for the present reaction.

Several U.S. allies have already voiced strong opposition to any implementation of Title III of the Act. European Union trade and foreign affairs officials have again threatened to file a complaint with the WTO and Canadian officials have voiced similar opposition to the implementation of Title III due to the large investments that Canadians have made in Cuba in recent years. That said, unlike 1996, the U.S. State Department has vowed that there will be no turning back this time.

All entities that presently trade with Cuba should carefully review their transactions to determine whether they or their trading partners could be considered to be trafficking in confiscated properties. Not only will this help to determine the potential exposure to Act III claims, but it could also help to determine whether any possible trafficking was conducted knowingly or intentionally.

¹ 22 U.S.C. § 6082(a)(1)(A).

² 22 U.S.C. § 6023(13).

³ 22 U.S.C. § 6023 13(B)(3).