

**JANUARY 17, 2019**

For more information,
contact:

James E. Berger
+1 212 556 2202
jberger@kslaw.com

Thomas J. Spulak
+1 202 661 7948
tspulak@kslaw.com

Charlene C. Sun
+1 212 556 2107
csun@kslaw.com

King & Spalding

New York
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500

Claims for Expropriated Property in Cuba Under the Helms-Burton Act

INTRODUCTION¹

In 1996, the U.S. Congress enacted, and President Clinton signed, the Cuban Liberty and Democratic Solidarity Act (Libertad) Act (the Helms-Burton Act or the Act).²

The Helms-Burton Act was enacted, in part, to “protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.”³ To that end, Title III of the Act provides U.S. nationals with a private cause of action in U.S. federal courts against any person that knowingly “traffics” property confiscated by the Cuban government.

The Act empowers the President to suspend Title III – and thus, the right of U.S. nationals to sue – for six-month increments, provided the President provides Congress with at least 15 days’ notice.⁴ For over two decades since the enactment of the Helms-Burton Act, every U.S. President has suspended Title III out of concerns over offending U.S. allies whose nationals (including companies incorporated in those jurisdictions) could be subject to suit in U.S. courts. In January 2013, President Barack Obama delegated the suspension authority to the U.S. Secretary of State.

In exercise of that authority, U.S. Secretary of State Mike Pompeo suspended Title III for another six months beginning on August 1, 2018. It has been reported however, that the Trump administration is considering allowing Title III to take effect after the expiration of the current suspension period.⁵ Should the Trump administration decline to further suspend Title III, that could enable thousands of claims over confiscated Cuban property to finally be brought and heard in U.S. courts. We address below three questions that potential claimants in Title III cases must consider in the event that suits under the Act are permitted to be filed. First, who can sue? Second, who can be sued? And finally, what other factors should claimants consider?



WHO CAN SUE?

Any U.S. national “who owns the claim to ... property” confiscated by the Cuban government on or after January 1, 1959 may sue in federal courts for the expropriation of that property by the Cuban government.⁶ Those who may sue include U.S. businesses and citizens, as well as those who were Cuban nationals at the time their property was taken by the Cuban government but have since then become naturalized U.S. citizens.

WHO CAN BE SUED?

Title III of the Act imposes civil liability on “any person” that “traffics in property which was confiscated by the Cuban government on or after January 1, 1959. A “person” under the Act can include both corporations and individuals, and not just those from Cuba.⁷ Indeed, corporations, regardless of nationality, could be subject to suit, including persons from the European Union, Canada, and Mexico.

Section 4(13) of the Act defines “trafficking” broadly and would apply to a person or company that knowingly and intentionally sells, transfers, distributes, conducts financial operations or disposes in any other manner confiscated property or purchases, receives, holds, controls, manages or holds an interest in confiscated property or engages in a commercial activity using, or otherwise benefits from, confiscated property.⁸ This expansive definition encompasses not just those who are directly involved in trafficking, but also those who profit from the use of confiscated property.

A broad array of companies from a cross-section of industries could also be exposed to civil liability and could include, for example, mining companies that extract minerals from mines on expropriated property, and even cruise ships calling at expropriated ports or using expropriated port facilities. Moreover, even subsidiaries of those companies with operations in Cuba and potentially other entities in the ownership chain of those companies could be exposed to possible suit in the U.S.

Knowing who can be sued and which of their acts fall under the expansive definition of “trafficking” is crucial for potential claimants because the Helms-Burton Act imposes a two-year statute of limitations on claims. Section 305 of the Act provides that claims “may not be brought more than two years after the trafficking giving rise to the act has ceased to occur.”⁹ Determining when an act of trafficking has ceased is therefore critical, but in any event, potential claimants must act decisively in bringing potential claims, to obviate running against the statute of limitations.

WHAT OTHER FACTORS SHOULD CLAIMANTS CONSIDER?

Enforcement

Even after prevailing in a claim under the Helms-Burton Act, claimants must consider how and where to enforce judgments in Title III cases especially when the respondent does not have assets in the U.S. To begin, the U.S. is not a signatory to any international agreement on the reciprocal recognition and enforcement of court judgments. That the U.S. has not signed such an international instrument could make enforcement of such U.S. judgments difficult on the basis of comity, particularly in countries with friendly relations with Cuba.

Moreover, the laws of certain jurisdictions specifically render judgments arising from the Helms-Burton Act unenforceable. For example, in response to the Act and because of concerns about its extra-territorial reach, U.S. allies such as Canada and the European Union enacted or fortified measures to counteract the possible effects of the Act.¹⁰ Such types of retaliatory measures typically include so-called “blocking” features. Council Regulation (EC) No. 2271/96 (“EC Regulation 2271/96”) provides that any “judgment of a court or tribunal ... [or] of an administrative authority ... giving effect, directly or indirectly, to the [Helms-Burton Act] or to actions based thereon or resulting therefrom, shall [not] be recognized or be enforceable in any manner.”¹¹ Claimants therefore must assess whether the respondent in any Title III case only has or has most of its assets in jurisdictions with these types of blocking statutes. Where the assets are



located, and whether most or if all of them are located in jurisdictions with blocking statutes, will be relevant in determining where to focus enforcement efforts, or even whether to commence an action at all.

Discovery

In addition to rendering judgments arising from the Helms-Burton Act unenforceable, statutes such as EC Regulation 2271/96 may also hamper discovery efforts of claimants under Title III. While federal rules authorizing discovery would apply in Title III cases, retaliatory measures such as EC Regulation 2271/96 arguably prohibit compliance with any discovery obligations or orders in Title III cases. For instance, Article 5 of EC Regulation 2271/96 provides: “No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the [Helms-Burton Act] or from actions based thereon or resulting therefrom.”¹²

In bringing Title III cases, claimants should formulate discovery plans that take into account the difficulties in obtaining discovery from respondents or third parties possessing relevant (and discoverable) information that are subject to blocking statutes such as EC Regulation 2271/96.

Clawback

Beyond the difficulties in enforcing and obtaining discovery, claimants must also weigh the possibility that they themselves may be subject to retaliatory suits in jurisdictions that have enacted measures against the Helms-Burton Act.

For example, Article 6 of EC Regulation 2271/96 allows the recovery of “any damages, including legal costs, caused ... by the application of the [Helms-Burton Act] or by actions based thereon or resulting therefrom.” This provision essentially allows the “clawback” of any damages awarded in Title III cases, plus legal costs, and extends to any “natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary.” These clawback features may negate any potential recovery by a Title III claimant.

Claims under the International Claims Settlement Act of 1949

Title V of the International Claims Settlement Act authorized the Foreign Claims Settlement Commission (the “Commission”)¹³ to consider claims of U.S. nationals arising from, among others, nationalization, expropriation, intervention, or other taking of, or special measures directed against property by the Cuban government, and others. The Commission is tasked with evaluating, valuing, and then certifying claims of U.S. nationals over expropriated property such as those confiscated by the Cuban government. Under the first Cuban Claims Program, the Commission found close to 6,000 claims as compensable with a total principal value of over USD \$1.8 billion. The second Cuba Claims Program only resulted in two certified claims with a total principal amount of approximately USD \$51 million.

Certain of the provisions of the Helms-Burton Act address claims under the International Claims Settlement Act, and claimants must consider them when formulating their litigation strategy. First, there is a presumption in favor of the valuation of a certified claim, a presumption that is rebuttable by clear and convincing evidence.¹⁴ Second, courts must accept as conclusive the proof of ownership in a certified claim.¹⁵ Third, “traffickers” implicated in certified claims may be liable for up to three times the value of the expropriated property, plus attorneys’ fees and court costs.¹⁶ Fourth, U.S. nationals who were entitled to bring claims before the Commission but did not, may not commence an action under Title III.¹⁷ Fifth, for claims brought before but denied by the Commission, courts must accept the Commission’s findings as conclusive.¹⁸ Sixth, certified claims may not be the subject of a Title III action by any other person.¹⁹

Summary

The possibility that the Trump administration will decline to suspend Title III presents not just a departure from the practice of past U.S. presidents but also an opportunity for claimants with properties confiscated by the Cuban



government to recover damages arising from that confiscation. Potential claimants however must take into consideration, when formulating their litigation strategy, or deciding whether to commence suit at all, the requirements of the Helms-Burton Act, as well as other factors that may impact whether they prevail in the litigation and are successful in enforcing any potential judgment.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,000 lawyers in 20 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

ABU DHABI	CHICAGO	HOUSTON	NEW YORK	SILICON VALLEY
ATLANTA	DUBAI	LONDON	PARIS	SINGAPORE
AUSTIN	FRANKFURT	LOS ANGELES	RIYADH	TOKYO
CHARLOTTE	GENEVA	MOSCOW	SAN FRANCISCO	WASHINGTON, D.C.

¹ The authors would like to thank William Panlilio, an Associate in King & Spalding's Singapore office and a member of the firm's Trial & Global Disputes Practice. William's practice focuses on international arbitration and litigation, including cross-border litigation disputes on the enforcement of foreign arbitral awards, foreign sovereign immunities, and discovery in aid of foreign proceedings.

² Pub. L. No. 104-114, 110 Stat. 785 (1996); 22 U.S.C. §§ 6021-6091. All references to "Sections" in the footnotes are references to the Helms-Burton Act, unless otherwise indicated.

³ Section 3(6).

⁴ Section 306.

⁵ Marc Frank, "Cuba lashes out at Trump administration over new sanctions," Reuters, November 3, 2018 (<https://www.reuters.com/article/us-cuba-usa/cuba-lashes-out-at-trump-administration-over-new-sanctions-idUSKCN1N72LK>).

⁶ Section 302(a)(1).

⁷ Section 4(11) defines "person" in full as follows: "The term 'person' means any person or entity, including any agency or instrumentality of a foreign state."

⁸ Section 4(13) defines "trafficking" in full as follows: "As used in title III, and except as provided in subparagraph (B), a person 'traffics' in confiscated property if that person knowingly and intentionally (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, (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property."

⁹ Section 305.

¹⁰ See Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29 (as amended by S.A. 1996 c. 28 s. 7), Canada; Council Regulation (EC) No. 2271/96, 22 November 1996, European Union; "Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional," D.O., 22 October 1996, Mexico.

¹¹ Article 4, EC Regulation 2271/96.

¹² Article 11 makes EC Regulation 2271/96 applicable to the following: "1. any natural person being a resident in the Community and a national of a Member State, 2. any legal person incorporated within the Community, 3. any natural or legal person referred to in Article 1(2) of Regulation (EEC) No. 4055/86, 4. any other natural person being a resident in the Community, unless that person is in the country of which he is a national, 5. any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity."

¹³ The Commission is a quasi-judicial and independent agency within the U.S. Department of Justice.

¹⁴ Section 302(a)(2).



¹⁵ Section 303(a)(1).

¹⁶ Section 302(a)(1)(A)(ii) and (a)(3).

¹⁷ Section 302(a)(5)(A).

¹⁸ Section 302(a)(5)(B).

¹⁹ Section 302(a)(5)(C).