

US GRANTS BRIEF, 30-DAY SUSPENSION OF HELMS-BURTON ACT LITIGATION CLAIMS, WITH EXCEPTIONS FOR LISTED CUBAN ENTITIES

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Legal Briefings - By

Scott Balber, Jonathan Cross, Geng Li, Susannah Cogman, Daniel Hudson and Andrew Cannon

On March 4, 2019, the US Department of State [announced](#) that the administration has decided to suspend Title III of the 1996 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (the "Helms-Burton Act") for another 30 days, following its earlier [announcement](#) in mid-January 2019 of a limited suspension of 45 days. Title III would allow US nationals having claims that their property was expropriated pursuant to the Cuban revolution of 1959 to bring damages actions against companies "trafficking" in such property.

The State Department's brief, 30-day suspension is noteworthy for several reasons: (i) it departs from the usual practice of successive sixmonth renewals of the suspension of Title III - in fact, the administration expressly stated that it is using the 30 days to study the impact of this suspension on the human rights situation in Cuba; and (ii) it makes an exception for claims against Cuban entities or subentities on the Cuban Restricted List.

Title III of the Helms-Burton Act provides that a US national who owns the claim to property that was confiscated by the Cuban government can sue any person who "traffics" in such property. The term "traffic" is defined broadly, and may include not only sales, transfer, distribution, or management of the property, but also using the property, engaging in a commercial activity or benefiting from the property, or profiting from a third party's "trafficking" of the property. If the provision is allowed to go into effect, claimants may claim up to three times the value of the property, plus interest, court costs and attorneys' fees. The statute, however, allows the Trump administration to suspend its application if deemed in the national interests of the US.

The broad extraterritorial reach of Title III has historically led to objections from many countries, especially EU countries. While the US has long maintained an embargo against Cuba, many EU countries have developed business ties with Cuba, meaning that many European businesses could face potential claims under Title III if it ultimately takes effect. In response, in 1996, the EU adopted "blocking statutes," which prohibit EU persons (as defined) from complying with certain US extraterritorial measures (including in Titles I, III and IV of the Helms-Burton Act); provide that no judgments or administrative decisions based on these measures (such as US court judgements) will be recognized or enforced in the EU; and allow EU persons to seek damages caused by the application of these measures including "clawback" (which might allow, for example, claims against claimants of Title III lawsuits - although the mechanism by which such claims would be made is unclear). Consequently, the Clinton administration immediately suspended the operation of Title III when the Helms-Burton Act was enacted, and every administration since has routinely suspended Title III every six months.

The Trump administration's recent decision to suspend Title III for only one month signals a potential change towards more aggressive restrictions against Cuba. Indeed, the Trump administration earlier made a policy decision to reinstate certain sanctions against Cuba, which the Obama administration had relaxed. One step it took in November 2017 was to release a "Cuba Restricted List" identifying Cuban military, intelligence, and security entities. US persons are prohibited from conducting "direct financial transactions" with these entities, meaning that an entity listed cannot be the originator or the ultimate beneficiary of a transfer of funds involving a US person. The Trump administration has now also introduced an exception to its Title III suspension, allowing lawsuits against entities on the Cuba Restricted List.

Title III claims can only be brought within two years of the "trafficking" conduct alleged. The continued suspension of Title III does not allow direct lawsuits against counterparties of entities on the Cuba Restricted List, so the exception currently has a limited direct impact, but there is no guarantee that the exception will not be further broadened, and in its current form it may lead to indirect commercial impacts for counterparties of the listed Cuban entities. The US Department of State, in its announcement of the 30day suspension, has "encouraged any person doing business with Cuba to reconsider whether they are trafficking in confiscated property and abetting the Cuban dictatorship."

Companies with Cuban business interests should closely monitor further developments in this area, and should consider the potential impact of any possible claims under Title III, if the suspension is allowed to expire on April 17, 2019, 30 days following the expiration of the current suspension period. Screening the property involved in current dealings in Cuba against [the current Foreign Claims Settlement Commission claim list](#) could be an initial step, and assessing potential contractual suspension or termination options may also be advisable. For European companies, any action should be taken with full consideration of compliance issues under the EU blocking regulation.

Herbert Smith Freehills' New York office continues to monitor developments in this area and will continue to release updates as warranted.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



SCOTT S. BALBER
MANAGING PARTNER,
NEW YORK

+1 917 542 7810
Scott.Balber@hsf.com



JONATHAN CROSS
PARTNER, NEW YORK

+1 917 542 7824
jonathan.cross@hsf.com



**SUSANNAH
COGMAN**
PARTNER, LONDON

+44 20 7466 2580
Susannah.Cogman@hsf.com



DANIEL HUDSON
PARTNER, LONDON

+44 20 7466 2470
Daniel.Hudson@hsf.com



ANDREW CANNON
PARTNER, CO-HEAD,
PUBLIC
INTERNATIONAL LAW
PRACTICE, DEPUTY
HEAD, GLOBAL
ARBITRATION
PRACTICE , LONDON

+44 20 7466 2852
Andrew.Cannon@hsf.com

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