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10 Things to Know: US Allows Lawsuits Relating to “Trafficking” in Confiscated Property in Cuba

Trump Administration breaks with precedent to allow US plaintiffs to bring “trafficking” suits under Title III of the Helms-Burton Act.

Title III of the [Helms-Burton Act](#) (the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996) (the Act) allows US citizens to sue persons who “traffic” in property expropriated by the Cuban government. Title III includes a waiver used by US Presidents since 1996 to suspend every six months this private right of action.

On April 17, 2019, the Trump Administration [announced](#) that it would allow US citizens to bring suit under Title III, effective May 2, 2019. This announcement followed a 45-day [partial suspension](#) of the right of action under Title III, which authorized suits against Cuban entities identified on the US Department of State’s List of Restricted Entities and Sub-Entities Associated with Cuba (known as the [Cuba Restricted List](#)). This policy shift impacts both US and non-US persons and companies that conduct business in or involving Cuba.

Below are answers to 10 key questions about Title III and the end of its private right of action suspension.

1. What is Title III of the Helms-Burton Act?

Title III provides US citizens with a private cause of action in federal court against any person that knowingly traffics in property confiscated by the Cuban government on or after January 1, 1959. Under the circumstances described below, plaintiffs may seek damages for the full value of their confiscated property (which can include debts, forms of intellectual property, and real and personal property) in addition to potential treble damages.

2. What stopped US citizens from previously suing under Title III?

Since the enactment of the Act, every US President has suspended the private right of action under Title III, generally due to concerns of provoking US allies whose nationals could be subject to suit in federal courts and fear of retaliatory trade-related legal claims against the United States.

Nonetheless, a number of US citizens secured “certified” claims relating to confiscated property. Title V of the International Claims Settlement Act authorizes the US Foreign Claims Settlement Commission (the FCSC or the Commission) to consider claims of US nationals arising from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, their property, by the

Cuban government and others. Between 1967 and 1972 (the first Cuban Claims Program), and again between 2005 and 2006 (the Second Cuban Claims Program), the FCSC evaluated claims of US nationals regarding property confiscated during the Cuban revolution. Under the first Cuban Claims Program, the Commission [certified](#) 5,911 claims as compensable with a total principal value of over US\$1.85 billion. The second Cuban Claims Program resulted in two certified claims with a total principal amount of approximately US\$51.14 million. Successful claimants have not been able to “enforce” their claims in US courts until now.

3. Can a US citizen sue under Title III without a certified claim from the FCSC?

The Act prohibits US nationals who were entitled to bring claims before the Commission, but did not, from commencing an action under Title III. Individuals who were not US nationals during the two Cuban Claims Programs (and therefore not eligible to file a claim before the Commission), but who have since become naturalized US citizens, can file suit under Title III.

The FCSC’s adjudications are relevant to Title III actions in other ways. The Act provides a presumption in favor of the valuation of an FCSC-certified claim, a presumption that is rebuttable by clear and convincing evidence. Courts must also accept as conclusive the proof of ownership in a certified claim. Finally, courts must accept as conclusive a decision by the FCSC to deny a claim brought before the Commission.

As of May 2, 2019, US citizens who have certified claims may file suit under Title III. Plaintiffs who are asserting expropriation claims not previously certified will need to provide 30 days’ notice of a suit to seek treble damages. Plaintiffs must demonstrate that the “amount in controversy” has a valuation of US\$50,000 or greater, exclusive of interest.

4. What does it mean to “traffic” in confiscated property?

Title III defines “trafficking” to apply to a party that knowingly and intentionally, without authorization of any US national who holds a claim to the property:

- (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 by another person, or otherwise engages in trafficking through another person.

Given that Title III has been suspended since 1996, how US courts will interpret this definition (and Title III generally) is uncertain.

5. Who can be sued in a Title III action?

US plaintiffs can sue corporations or individuals currently trafficking in confiscated property, or who have done so in the prior two years. As a practical matter, defendants with little or no US presence may be able to dismiss suits brought under Title III on the basis of lack of personal jurisdiction. Depending on economic and commercial relationships, the US subsidiaries of foreign parent companies that deal in confiscated property could qualify as profiting from the trafficking of their foreign affiliates, though these types of jurisdictional issues will surely be subject to litigation.

6. Are there exceptions for persons or companies from any specific countries?

No, but there are limitations in the statute that appear to exempt certain activities from suit. For instance, the Act provides that a person's involvement in the delivery of international telecommunications, trading of securities publicly held or traded, or use of property incident to and necessary to lawful travel to Cuba, does not constitute "trafficking" under the statute and so does not form the basis for a claim.

7. Who is most likely to be affected by the lifting of the suspension?

Companies involved in the travel, hospitality, transportation, telecom, mining, and industrial sectors in Cuba are likely to be most exposed to Title III suits. (While the United States has maintained an economic and trade embargo against Cuba for several decades, these measures would not reach non-US companies that are not owned or controlled by a US person.) Multinational companies with assets in or that conduct business activities within the US may be at greater risk of exposure to suit as a result of a US jurisdictional nexus.

8. Does a US person need a license from the US government to sue under Title III?

No. The Act provides that US citizens may bring suit under Title III against the Cuban government without licensing from the US government. It also provides that an action may be brought and settled, and a related judgment enforced, without US Government authorization.

9. Will other countries take action to protect their citizens from Title III lawsuits?

The [European Union](#) (EU), [Canada](#), and [Mexico](#) have stated that they will defend the interests of their companies and citizens conducting lawful trade and investment with Cuba. One or more of these countries could initiate a World Trade Organization (WTO) action to defend the interests of their citizens in Cuba. (The EU initiated [WTO proceedings](#) in 1996, which were later withdrawn.)

Several countries have laws that could render judgments arising from the Act unenforceable and inhibit discovery in connection with Title III actions. Non-US companies could use such laws to protect themselves against Title III litigation. For example, the [Council Regulation \(EC\) No. 2271/96 of the EU](#) (the Blocking Statute) provides that judgments giving effect to the Act shall not be recognized or enforced within the EU, and limits compliance requirements with discovery requests related to Title III suits.

In addition, Article 6 of the Blocking Statute entitles EU operators to bring legal proceedings in the courts of EU Member States to recover "damages, including legal costs, caused by the application of the laws specified in [the Blocking Statute] or by actions based thereon or resulting therefrom." The EU Guidance Note explains that the scope of damages that can be claimed is deliberately broad to provide EU operators with the greatest possible protection. Accordingly, EU operators that are sued in the US courts and forced to pay damages under Title III could rely on the Blocking Statute to recover those sums through separate court proceedings. Canada's [Foreign Extraterritorial Measures \(United States\) Order, 1992](#) (the Order), issued under the Foreign Extraterritorial Measures Act (FEMA), likewise makes it an offense for Canadian corporations to comply with the US laws against Cuba. The Attorney General of Canada can issue orders that mandate non-recognition of judgements under the Act and restrict discovery attempts in connection with Title III suits. Mexico also has a so-called [antidote law](#) that prohibits providing information to foreign authorities or courts prosecuting Title III suits, among other provisions.

10. How can a foreign company prepare for a potential lawsuit under Title III?

Companies that have been doing business directly or indirectly with or in Cuba during the last two years can take steps now to assess potential exposure under the Act and to consider the issues and defenses that may arise in litigation. For instance, parties should consider:

- Searching FCSC claims for points of exposure
- Conducting diligence on properties relevant to their Cuban dealings for other evidence of historical expropriation
- Reviewing commercial relationships for risks of “trafficking” claims and evaluating mitigation and termination options
- Reviewing and strengthening contractual clauses to address associated risks

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