Under Helms-Burton Act, Entities With Business Ties to Cuba Now at Risk of Lawsuits

Skadden

05 / 09 / 19

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

Four Times Square
New York, NY 10036
212.735.3000

In April 2019, Secretary of State Mike Pompeo announced that the U.S. government would allow a private right of action, created by Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (also known as the Helms-Burton Act), 22 U.S.C. §§ 6021-6091, to become available to plaintiffs. Enacted in 1996 but continuously suspended for the last 23 years, Title III of the Helms-Burton Act provides a private cause of action allowing U.S. nationals to sue a range of persons and entities that "traffic" (see definition below) in property expropriated by the Cuban government.

Liability for "trafficking" is potentially severe, as the statutory damages for such activity are deemed to be the value of the property itself. Those damages are also subject to trebling in some cases. Liability for "trafficking" can potentially attach to any dealings in property confiscated since 1959.

The creation of this private civil claim, which claimants may argue has extraterritorial effect, drew criticism from some quarters when it was enacted in 1996 particularly among countries that do not subject Cuba to economic sanctions and saw the statute as an attempt to create a "secondary boycott" of Cuba. This diplomatic pushback was likely among the factors prompting successive U.S. administrations to suspend Title III's private right of action until this year. Now that the suspension has expired, all companies, individuals and governments with business ties to Cuba are potentially at risk of Helms-Burton lawsuits.

Private Right of Action Against Persons 'Trafficking' in Confiscated Property

President Bill Clinton signed the Helms-Burton Act on March 1, 1996, by which point Cuba's then-president, Fidel Castro, had been in power for over three decades. Much of the law addressed or codified sanctions and other matters directed against Cuba, including setting certain requirements for a termination of the U.S. embargo of Cuba.

The Helms-Burton Act is accompanied by congressional findings that reference the Castro government's past history of confiscating private property without compensation. It finds that allowing this previously confiscated property to be used in business transactions would "undermine[]" U.S. efforts to create a "general economic embargo."[1] Against that background, Title III seeks to create a private right of action for U.S. nationals against persons who have "trafficked" in property confiscated by the Cuban government.

Specifically, the Helms-Burton Act states that, with certain exceptions, "***any person*** that, ***after the end of the 3-month period beginning on the effective date of [Title III], traffics in property*** which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to ***any United States national who owns the claim to such property*** for money damages ..."[2] The cause of action runs for a period of two years after the alleged trafficking ceases.[3] The definition of "person" is broad and includes " any person or entity, including any agency or instrumentality of a foreign state."[4] Claims may be brought in a U.S. district court.[5]

[1] 22 U.S.C. § 6081(6)(A).

[2] 22 U.S.C. § 6082(a)(1)(A) (emphasis added). Despite the long dormancy of the private right of action, plaintiffs are likely to argue that the "effective date" of Title III was August 1, 1996.

[3] 22 U.S.C. § 6084.

[4] 22 U.S.C. § 6023(11). An action against a foreign government (or government-owned entity) would, of course, have to come within an existing jurisdictional exception to sovereign immunity, as set forth in a separate statute, 28 U.S.C. § 1602-1611.

[5] 22 U.S.C. § 6082(c)(1).

Under Helms-Burton Act, Entities With Business Ties to Cuba Now at Risk of Lawsuits

Damages in a private Helms-Burton Act lawsuit will be the greater of (i) fair market value at the time of taking plus interest; (ii) current market value; or (iii) the amount certified by the U.S. Foreign Claims Settlement Commission (FCSC) (on those cases where that body has adjudicated).[6] Damages may be trebled, however, in cases where a defendant has been on specific notice that it is trafficking in property and fails to cease doing so within 30 days.[7] Damages are also trebled in any case where the FCSC has already ascertained (in the course of one of its prior statutory reviews of Cuban expropriations) that the property was confiscated.[8]

The "act of state" doctrine (which might otherwise have barred consideration of these claims) is abrogated,[9] and the congressional findings include a statement that "a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory."[10]

Notably, a plaintiff's ability to bring a claim is restricted in the case of property confiscated after March 1, 1996. If a claim for confiscation was acquired through an "assignment for value," the statutory cause of action is not available.[11] There are also certain exclusions for plaintiffs that had the opportunity to lodge their claim before the FCSC during its past statutory inquiries into Cuban expropriation but failed to do so.[12]

Also notable are the statute's sunset provisions, which provide that "[a]ll rights created under this section to bring an action for money damages with respect to property confiscated by the Cuban Government" can be terminated upon a congressional determination that Cuba has been restored to democracy (or suspended by presidential order, during a transition to democracy).[13]

Assuming a plaintiff can show it is a U.S. national that owns the compensation claim in question, the critical element of the statutory cause of action is that the defendant "trafficked" in confiscated property. The scope of this phrase was extremely controversial at the time of enactment and may well have been among the factors that contributed to its effective date being postponed.[14] Trafficking is defined in the statute as follows:

> 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.[15]

Excluded from this definition are a number of activities such as telecommunications with Cuba, lawful travel to Cuba or transactions between private Cuban citizens (*i.e.*, persons who are not part of the government).[16]

The definition of "traffic" has a "knowledge" element.[17] The statute might not, however, require a causal nexus between the act of "trafficking" and the value of the property being "trafficked." This was among the aspects of the legislation that was strongly criticized at the time of enactment.[18]

[6] 22 U.S.C. § 6082(a)(1). The FCSC is a "quasi-judicial, independent agency within the Department of Justice which adjudicates claims of U.S. nationals against foreign governments" as prescribed by statute. *See* U.S. Dep't of Justice, "About the Commission." In the case of Cuba, the FCSC previously administered past programs designed to ascertain the extent of claims against Cuba and the identity of the claimants. *See* 22 U.S.C. § 1643f(a).

[7] 22 U.S.C. § 6082(a)(3)(B)-(C).

[8] 22 U.S.C. § 6082(a)(3).

[9] 22 U.S.C. § 6082(a)(6). The "act of state" doctrine ordinarily "precludes" a U.S. court from "inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). Aside from the Helms-Burton Act, some statutory exceptions to this doctrine exist, including the "Second Hickenlooper Amendment," 22 U.S.C. § 2370(e)(2), curtailing the doctrine's operation in certain expropriation cases.

[10] 22 U.S.C. § 6081(9).

[11] 22 U.S.C. § 6082(a)(4)(C).

[12] 22 U.S.C. § 6082(a)(4).

[13] 22 U.S.C. § 6082(h)(1); *see also* 22 U.S.C. § 6064(a). The statute purports to preserve "suits commenced before the date of such suspension or termination." 22 U.S.C. § 6082(h)(2).

[14] *See* Andreas F. Lowenfeld, "Congress and Cuba: The Helms-Burton Act," 90 Am. J. Int'l L. 419, 425 (1996) (contending that the term "trafficking" had "heretofore [been] applied in legislation almost exclusively to dealing in narcotics").

[15] 22 U.S.C. § 6023(13)(A).

[16] 22 U.S.C. § 6012(9)(B).

[17] 22 U.S.C. § 6023(8). ("The term 'knowingly' means with knowledge or having reason to know.")

[18] *See* Lowenfeld, *supra* note 13 at 426 (writing that, on that author's interpretation of the legislative text, "[t]here is no necessary connection between the value of the property on which the claim is based and the value of the transaction on which the assertion of 'trafficking' rests").

Under Helms-Burton Act, Entities With Business Ties to Cuba Now at Risk of Lawsuits

Private Right of Action Becomes Generally Available on May 2, 2019

Although the Helms-Burton Act originally provided that its private cause of action would become available on November 1, 1996,[19] the statute also gave the executive branch the power to suspend the private right of action. In respect of certain actions against the Cuban government, the suspension expired on March 19, 2019.[20] In respect of all other actions, the suspension expired on May 2, 2019.

Except for the narrow list of activities excluded from the definition of "trafficking," the range of activities covered by the Helms-Burton Act is potentially broad, conceivably touching a variety of industries and financial services. In practical terms, the statute has been described as a "secondary boycott" of Cuba, designed to force other countries to join in the U.S. embargo.[21]

Given the potentially high damages levels (coupled with the risk of treble damages for companies after they are put on specific notice of a "trafficking" activity), companies with links to Cuba may now wish to review their Cuba-related activities.

Certain jurisdictions, such as the European Union and Canada, have so-called blocking statutes in place that are intended to mitigate the impact of U.S. sanctions on their citizens or entities conducting (in their view) legitimate business in Cuba. They could potentially impose criminal and/or administrative penalties for complying with U.S. sanctions. The EU blocking statute, Council Regulation (EC) No 2271/96, as amended, was first adopted in November 1996 and prohibits EU persons from directly or indirectly complying with U.S. sanctions on Cuba unless the EU person can demonstrate that compliance with the statute would seriously damage their interests or those of the European Community. The EU blocking statute specifically identifies the Helms-Burton Act as one of the U.S. laws that triggers the blocking statute's provisions. It also nullifies the effect of any third country judgment or decision of a court, tribunal or administrative authority, such as a U.S. court, that gives effect to the laws covered by the blocking statute. Individual EU member states are responsible for the implementation of the blocking statute, including setting the applicable penalties for noncompliance and enforcement of the blocking statute.

Companies that face actual litigation under the Helms-Burton Act (as well as plaintiffs bringing such claims) will need to grapple with the special challenges and unresolved questions presented by the act, such as:

- the meaning and scope of the term "trafficking" (and the meaning of the various statutory exceptions);
- potential difficulties in proving title to the claim to the confiscated property;
- what degree of contact with "property" will rise to the level of "trafficking";
- the challenges in laying venue and establishing personal jurisdiction against foreign defendants (and, in the case of state entities, overcoming sovereign immunity);
- possible constitutional infirmities in, or challenges to, Title III (including regarding its extraterritorial effect, the definitions of trafficking, the purported attempt to create a private right of action based on past events, the automatic setting of damages for any "trafficking" activity at the "fair market value" of the subject property, and the effect, if any, of the 23-year suspension of the right of action on the ability to claim in respect of past conduct); and
- the effect of "blocking statutes" and other measures in foreign jurisdictions (*e.g.*, shielding foreign nationals against extraterritorial jurisdiction or U.S. treble damages awards).

Litigation under the act has already been filed in several instances (both against private companies and against Cuban government agencies), and more will likely follow in the ensuing months. Proceedings brought under the EU and other blocking statutes are also a possibility.

[19] 22 U.S.C. § 6085(a), (c)(2).

[20] *See* U.S. Dep't of State, Media Note, "Secretary Enacts 30-Day Suspension of Title III (LIBERTAD Act) With an Exception" (Mar. 4, 2019). A similar 30-day suspension was announced on April 3, 2019, creating an expiration date of May 1, 2019. *See* U.S. Dep't of State, Media Note, "Secretary Pompeo Extends for Two Weeks Title III Suspension With an Exception (LIBERTAD Act)" (Apr. 3, 2019); *see also id.* (stating that the suspension does not apply to "[t]he right to bring an action against a Cuban entity or sub-entity identified by name on the State Department's List of Restricted Entities and Sub-entities Associated with Cuba (known as the Cuba Restricted List), as may be updated from time to time").

[21] *See* Lowenfeld, *supra* n. 13, at 429-30.

Under Helms-Burton Act, Entities With Business Ties to Cuba Now at Risk of Lawsuits

Contacts

Boris Bershteyn
Partner / New York
212.735.3834
boris.bershteyn@skadden.com

Jamie L. Boucher
Partner / Washington, D.C.
202.371.7369
jamie.boucher@skadden.com

Eytan J. Fisch
Partner / Washington, D.C.
202.371.7314
eytan.fisch@skadden.com

Steve Kwok
Partner / Hong Kong
852.3740.4788
steve.kwok@skadden.com

Timothy G. Nelson
Partner / New York
212.735.2193
timothy.g.nelson@skadden.com

Elizabeth Robertson
Partner / London
44.20.7519.7115
elizabeth.robertson@skadden.com

Jennifer L. Spaziano
Partner / Washington, D.C.
202.371.7872
jen.spaziano@skadden.com