

Investment risks in Cuba: property confiscated from U.S. nationals

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The new measures of the United States towards Cuba have materialised. On Thursday 2 May, Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (better known as the Helms-Burton Act) was activated for the first time, opening the door to claims in U.S. courts in connection with properties that were nationalised in Cuba at the time of the Revolution and that are currently being used by third parties. The international reaction to this development has been important, especially in the European Union.

On Wednesday 17 April, U.S. Secretary of State Mike Pompeo officially announced that the decision had been taken to lift, as of 2 May 2019 and for the first time in history, the suspension of Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (better known as the *Helms-Burton Act*), pursuant to which U.S. nationals have the right to bring legal actions before U.S. courts for property seized during the Cuban revolution.

This decision is the latest of a series of actions initiated at the beginning of this year, to which we already referred in our paper of January 2019, aimed at gradually lifting the suspension of the aforementioned Title III, a suspension that, as part of an understanding reached between the European Union and the United States in 1998, had theretofore been successively renewed each time for the maximum period (six months) since the Helms-Burton Act came into force.

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Background information

U.S. legislation includes a number of rules and regulations that limit the ability to trade, invest and transact financially with Cuba. The main one at present is the Helms-Burton Act. Most of this Act applies exclusively to natural and legal persons under U.S. jurisdiction. However, its articles contain two titles (III and IV) which may apply to natural and legal persons from third countries.

Title III grants U.S. nationals (including those of Cuban origin) a right to sue, in U.S. federal courts, those foreign individuals and companies that do business involving property in which, at the time of the Cuban revolution, U.S. nationals (or those who after the revolution became U.S. nationals) had rights ("*Confiscated Property*").

Title IV provides for the possibility of denying visas or expelling from the United States persons who carry on business or are engaged with companies that traffic in Confiscated Property.

Title III had never been triggered, its application having been successively suspended for the maximum time allowed by the Helms-Burton Act, i.e. six months. Breaking with that tradition, last 16 January, its application was suspended for only forty-five days and at the end of the same, last 4 March, the suspension was renewed for an additional month only. However, at that time, for the first time, Title III was implemented in part, as Cuban companies included in the list of restricted entities, updated on 12 March 2019, could then be sued. Many of these entities are already subject to a series of sanctions in the United States for their connection with the Cuban military, intelligence and security services and Title III's partial implementation, in practice, has not had much impact, due to, among other things, the difficulties of establishing the personal jurisdiction of these entities in U.S. courts, since many of them do not carry out any type of business activity there.

Finally, on 17 April, it was announced that the suspension would be extended for another two weeks, that is from 18 April to 1 May, at which time Title III would be implemented in full.

For its part, Title IV does not provide in its articles for the possibility of a temporary suspension of its application, so it has been in effect all this time, although in practice not much use has been made of it. Nonetheless, the same announcement of 17 April also warned of the hardening of its application.

The implementation of Title III implies an extraterritorial application of U.S. law, because as drafted, it would apply to acts performed inside and outside the United States, even if they involve individuals or companies not subject to its jurisdiction.

This rule is criticized because of said extraterritorial application and because of the doubts about the causal nexus of the harm, since it transfers the liability for the confiscation carried out by the Cuban government to nationals of third States that did not take part in said confiscation, on account of the mere use of that Confiscated Property.

Since the enactment of Title III, several countries have had to adopt their own protection measures. Thus, countries such as Canada and Mexico have amended their laws to protect their nationals, not recognizing court decisions that contravene international law.

The strongest and most active reaction, however, came from the European Union ("EU"), which denounced the United States to the World Trade Organisation ("WTO") for violating international law and impeding free trade, as its interests were directly affected. The procedure did not reach its conclusion due to the fact that both blocks reached a "Compromise" whereby the complaint lodged by the EU was withdrawn on the basis of compliance by the United States with the commitments assumed. One of these commitments was the uninterrupted suspension of Title III, provided that the EU continued its efforts to promote democracy in Cuba.

By lifting the suspension of this Title III, the United States would be in direct breach of this Compromise and the European Union could use this breach as one of its defence mechanisms to restart the procedure within the WTO and thereby oblige the United States to comply with the suspension thereof.

At the same time, within the EU and outside the WTO process, the Council materialised its position through two legal instruments:

- I. On the one hand, "Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom" was adopted, which advocates at all times the liberalization of world trade and the progressive elimination of trade restrictions. Further arguing that the extraterritorial application of laws violates international law by seeking to regulate the actions of third parties under the jurisdiction of the EU.

Finally, due to the exceptional nature of the case, it specifically states that judgments handed down by US courts in relation to the Helms-Burton Act will not be recognised and that defendant European companies will be allowed to counterclaim to recover any losses caused in this context, as they are not subject to obligations established by a third jurisdiction.

- II. On the other hand, a "Joint Action of 22 November 1996 adopted by the Council on the basis of Articles J.3 and K.3 of the Treaty on European Union concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom" was adopted, which allows Member States to establish the measures they deem appropriate to protect the interests of national natural or legal persons who might be affected.

This means, in practice, that judgments given in the context of court proceedings initiated after 2 May 2019 would have no legal validity for members under EU jurisdiction and that, in addition, defendants could sue their claimants for damages.

Who is affected by Title III of the Helms-Burton Act

Title III of the Helms-Burton Act affects those who "traffic" in Confiscated Property. The Act uses the specific term "trafficking" to refer to a foreign company that: (a) 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; (b) engages in a commercial activity using or otherwise benefiting from Confiscated Property; or (c) causes, directs, participates in, or profits from, trafficking by or through another person.

One of the difficulties at the time of implementing this title will be that the very concept of "trafficking" is defined in an extremely broad way, wanting to address direct and indirect transactions on such Confiscated Property. Its definition reaches companies that directly exploit properties and businesses in Cuba, such as operators that exploit tourist properties on land previously owned by Americans, as well as those companies that "benefit" from these properties or have some "profit" from the "traffic" of third parties.

An extensive interpretation of the concept of "traffic" could have consequences even for U.S. companies, given that, for example, U.S. airlines and cruise lines use airports and ports on nationalized properties.

International consequences and reactions

To this day, no U.S. national has exercised his or her right to sue foreign companies that "traffic" in Confiscated Property, given that successive presidents who were in office after the beginning of the EU-U.S. Compromise have systematically extended, for the maximum period, the suspension of Title III in compliance with what was agreed at the WTO.

However, as of 2 May, for the first time this title will be applied. Apart from the fact that this decision has serious consequences for the development of foreign investment in Cuba, in practice, this means that the activation of this body of articles will bring with it the resumption and/or filing of a multitude of claims by U.S. nationals in respect of this Confiscated Property, and with it, a number of multinational companies from various sectors that have carried out transactions in Cuba are now facing potential exposure to litigation in the United States. Several of these companies are headquartered in Europe, Canada, China, Singapore, and other countries outside the United States.

In addition, it will trigger the initiation of legal battles of third countries and international actors, which, like the EU, have approved national legislation blocking and protecting against the Helms-Burton Act. In response to such lawsuits, as stated above, those affected may counter-claim for damages.

The international reactions have not been few. Countries like Canada, China, Mexico, Portugal, Russia, have publicly lamented the taking of this decision by the government of the United States. For her part, within the EU, the High Representative for Foreign Policy, Federica Mogherini, and the European Commissioner for Trade, Cecilia Malmström, sent a letter on 10 April 2019 to the US Secretary of State, Mike Pompeo, to warn him that they could reactivate the WTO complaint and to warn him that "the EU will be obliged to use all means at its disposal, including in cooperation with other international partners, to protect its interests".

It should be noted that the letter mentions that the majority of the top 50 claimants, who make up 70% of the total value of claims certified under the Helms-Burton Act, have assets in the EU. This would mean that, in the context of a counter-claim against US companies, such assets could be disposed of in the EU in order to repair any losses caused.

Finally, and following the communication of the lifting of the suspension, in a joint communiqué, the EU reiterates that it ratifies its opposition to the extraterritorial application of the Helms-Burton Act and that it profoundly condemns the decision taken by the US government.

RECOMMENDATIONS

Companies that currently carry out or have carried out in the last two years business activities in Cuba, or that have or have had in the last two years business relations with third parties that carry out business activities in Cuba, should consider assessing their potential exposure to these lawsuits and the possible options to mitigate their risks. Taking into account the current situation, our recommendations are different according to the stage in which the investor is to be found.

Before the investment

- Those individuals or companies interested in investing in Cuba or who have already begun planning projects related to foreign investment in the island, should be previously advised on U.S. law in order to know the possible implications that their investment could represent in relation to this country.
- Specifically, it would be necessary to know if the assets affected by the possible future investment are within those claims recognized and accepted by the Foreign Claims Settlement Commission or if they were Confiscated Property ("FCSC"). By way of example, it would be necessary to have the answer to questions such as who holds the claim, when it was acquired, whether it is certified by the FCSC or whether it was filed but not certified.
- There are several sources of information available, in Cuba and the United States, that although they do not absolutely rule out the risk of a claim, they do limit it.

- In the event that third parties related to the company carry out business activities in Cuba, it would be important to seek information and know whether their activities could fall within the definition of "trafficking" under the Helms-Burton Act, and to classify the risks associated with continuance of those direct relationships.

After the investment

- For those individuals or companies that have already established themselves in Cuba through any type of investment and legal form, it is decisive to know if they are in any way carrying out business activities that qualify as "trafficking".
- If the business activities can be deemed to fall within the term trafficking, then, given the imminent implementation of Title III, it would be advisable to seek advice on whether a U.S. court has personal jurisdiction over the company and on possible defences in the event of the eventual arrival of a Title III claim, including the possibility of filing a counterclaim based on the above-mentioned European law.
- Finally, and closely connected with the previous point, advice should be sought regarding the possible enforcement of a court decision in the United States by application of Title III and the obstacles it would encounter for its enforcement outside that country. At European level, the above-mentioned Regulation 2271/96 would be applicable and would seriously hamper the enforcement of these decisions within the EU. However, it would be prudent to know what other grounds of objection regulated at national level could apply to the case.