

Trump Administration Allows Lawsuits Against Persons Who Have Used Assets Confiscated by the Cuban Government, Imposes More Sanctions on Venezuela and Nicaragua

by Lawrence Ward, Dave Townsend, and T. Augustine Lo

On April 17, 2019, the Trump Administration announced that it would now allow plaintiffs to file U.S. federal court cases against individuals and companies that use private property expropriated by the Cuban government after Fidel Castro first rose to power in 1959. The potential defendants in such suits could include foreign firms, such as those located in Canada, Mexico, the European Union (“EU”) or other countries, that have continued to do business with the Cuban regime and have invested in confiscated properties in Cuba such as factories, mines, hotels or other similar business ventures. Secretary of State Mike Pompeo unveiled this major policy shift in a speech in Washington DC on April 17.

Such litigation has long been authorized since 1996 under Title III of the Cuban Liberty and Democratic Solidarity Act (also known as the “Helms-Burton Act” or the “Libertad Act”), but, beginning in 1996, all Presidents until now had routinely used a special waiver power in the law to prevent such litigation in deference to the concerns of friendly governments in Canada, Mexico and the EU. President Trump has now decided to break with that uniform precedent in spite of continued strong opposition from these other governments.

A U.S. person will be able to file suits under Title III of the Helms-Burton Act to recover damages equal to the fair market value of property seized by the Cuban government, plus interest, court costs and attorney’s fees. Seized property can include any property confiscated by the Cuban government on or after January 1, 1959, and up to the present day. If the plaintiffs prevail in a suit, the defendants would be treated as “traffickers” of seized property, which broadly include persons or companies that knowingly sell, possess, manage, hold, profit or benefit from or cause another person to traffic in such seized property. However, the statutory term “trafficking” would exclude certain specific activities, such as trading or holding securities of non-sanctioned entities, transactions incident to lawful travel to Cuba or property of Cubans that are not associated with the Government of Cuba or its parastatal entities.

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The scope of properties subject to such suits under Title III of the Helms-Burton Act is potentially vast. The U.S. Department of Justice has already certified roughly 6,000 claims as having merit that, in the aggregate, are worth an estimated US\$8 billion for assets allegedly expropriated by the Cuban government since 1959. These claims include those from Cuban Americans whose families fled Cuba to the United States after 1959 and thus left behind considerable personal and business property and multi-million dollar commercial claims from well-known U.S. companies that had had operations in Cuba before the revolution. Moreover, because the properties that would be the subject of such lawsuits are generally either located outside the United States or involve non-U.S. business interests, that factor will only add to U.S. diplomatic tensions with other countries as their nationals are likely to become entangled in such Helms-Burton Act suits filed in American courts.

Moreover, foreign companies may wish to consider that the U.S. Secretary of State also has separate authority granted under the less-known Title IV of the Helms-Burton Act to deny entry to the United States to named senior officials or major shareholders of such “traffickers” in seized Cuban property and potentially even to their immediate family members. The U.S. Government has only invoked the Title IV exclusion authority in a handful of cases previously, but it is foreseeable that the Administration could now seek to apply this power more widely to highlight its opposition to the current Cuban government and to deter other potential foreign investment in Cuba that has been widely sought by Cuban officials in recent years.

U.S. multinational companies should now also be aware that other jurisdictions such as Canada, Mexico and the EU may elect to impose retaliatory measures against U.S. firms subject to their domestic laws as their own companies become subject to Title III litigation in U.S. courts. For example, Canada, Mexico and the EU all have so-called “blocking laws” that make it illegal for entities doing business locally to comply with sanctions laws not recognized by those governments. The U.S. sanctions against Cuba (and Iran) have been applied on an extra-territorial basis for many years, but there has been a long period of relative détente when those blocking laws have not been much enforced against the local subsidiaries of U.S. parent companies. This new Administration shift under Title III of the Helms-Burton Act might now trigger renewed calls to enforce those blocking laws against the foreign subsidiaries of American-owned multinationals, placing both the U.S. parent and foreign subsidiary companies in a classic legal “Hobson’s choice.”

On the same day as Secretary Pompeo’s speech, National Security Advisor John Bolton also announced in a separate speech in Florida that the Trump Administration intends to re-impose limits on personal remittances to Cuba, which the Obama Administration had lifted a few years ago, and to impose restrictions on non-family-related travel to Cuba. These multiple Administration policy shifts should be viewed in the context of its overt hostility toward the Cuban regime even after the death of Fidel Castro and the retirement of his brother Raul Castro from the Cuban government and of the Administration’s equally strong opposition to the Maduro regime in Venezuela and the Ortega regime in Nicaragua, both of which are considered by the Administration as illegitimate and

undemocratic governments supported by Cuba. These moves are thus intended both to further isolate Cuba for its repressive domestic policies toward the Cuban people and to punish Cuba for its continued ties to and support of the current governments in Venezuela and Nicaragua.

In addition, also on April 17, the Administration further tightened the Venezuelan sanctions administered by the Office of Foreign Assets Control (“OFAC”) by designating the Central Bank of Venezuela as an OFAC-sanctioned entity, along with its director Iliana Josefa Ruzza-Teran, which could impact international banking. This new designation will generally prevent any U.S. citizen, permanent resident, and any other person or company located in the United States from dealing in the property of that central bank or processing payments in Venezuela (which involve clearing transactions through that central bank). In addition, the designation could prevent U.S. persons and companies from dealing in bonds and notes issued by that central bank (e.g., Venezuelan currency and sovereign bonds that were not already covered by previous sanctions), and engaging in foreign exchange transactions involving Venezuelan currency. The Administration has allowed a 30-day wind-down period for affected banking transactions, and a wind-down period for certain credit card payments and personal remittances to be processed through the central bank until March 21, 2020. The Administration also issued several general licenses that allow specified international organizations to continue dealing with the Central Bank of Venezuela.

On the same day, the Administration also designated Nicaraguan vice president Laureano Ortega-Murillo, the son of the Nicaraguan president Daniel Ortega, as a sanctioned person, for his alleged role in public corruption. This latest designation follows the inclusion of Albanisa, a Nicaraguan petroleum firm, and Banco Corporativo, a Nicaraguan bank, under the Venezuela sanctions because of these companies’ ties to the already-sanctioned Venezuelan oil giant, Petroleos de Venezuela (“PDVSA”).

Collectively, these latest executive actions, all announced on the same day, have again confirmed the Trump Administration’s general hostility towards the current governments of Cuba, Venezuela, and Nicaragua and its willingness to consider the use of all available sanctions powers granted by Congress to the President. Moreover, the Administration seems inclined to apply such powers even at the risk of substantial friction with (and potential retaliation from) other nations such as Canada, Mexico and the EU.