Trump Administration Revises List of State Sponsors of Terrorism

by Lawrence Ward, Carlos E. Méndez-Peñate, Dave Townsend, and T. Augustine Lo

On January 11, Secretary of State Michael Pompeo announced[1] the Trump Administration in its final week in office is returning Cuba to the official State Department list of state sponsors of terrorism. Cuba will thus re-join Syria (listed since 1979), Iran (listed since 1984) and North Korea (listed since 2017). As part of the Obama Administration's efforts to thaw relations with Cuba, then-Secretary of State John Kerry had removed Cuba from that same list in May 2015. In addition, Secretary Pompeo said on January 10[2] that the State Department will now treat the entire Houthi rebel movement in Yemen, also known as Ansarallah, as a "foreign terrorist organization" and a "specially designated terrorist organization" under Executive Order 13224.

The Secretary of State can classify a country as a "state sponsor of terrorism" if it has repeatedly given aid and support for acts of international terrorism because of legal authority under three U.S. statutes. Those laws are Section 6(j) of the Export Administration Act; Section 40 of the Arms Export Control Act; and Section 620A of the Foreign Assistance Act. Collectively, these three statutes provide a list of U.S. economic sanctions that bar both U.S. foreign aid and the sale and export of "defense articles" or "defense services" under the International Traffic in Arms Regulations ("ITAR") to any listed country. The designation also limits the export of goods, technology or software that are subject to export licensing under the Export Administration Regulations ("EAR") and leads to a range of financial and other restrictions through the trade embargoes administered by the Office of Foreign Assets Control ("OFAC").

Secretary Pompeo's January 11 statement indicated Cuba was being put back on the state sponsors of terrorism list because it is sheltering, among others, American fugitive Joanne Chesimard, the convicted murderer of a New Jersey state trooper in 1973 who had escaped from prison in 1979, and a number of National Liberation Army members accused of a deadly 2019 bombing in Colombia whom the Colombian government has asked Cuba to extradite. Cuba had granted political asylum in 1984 to Chesimard, who has renamed herself Assata Shakur; the FBI had named her as the first woman added to its "most wanted terrorist" list. Cuba had also agreed to allow the Colombian rebels to

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enter and remain in Cuba during an unsuccessful set of negotiations between the rebels and a previous Colombian government to end their long-standing civil war.

However, this last-minute move against Cuba is probably largely symbolic. The United States has not in fact provided any foreign aid assistance or allowed the export or sale of defense-related items subject to ITAR controls to Cuba for several decades. In addition, the existing constraints on U.S.-Cuba trade are already stringent due to OFAC's Cuban Assets Control Regulations ("CACR"), 31 CFR Part 515, especially as the Trump Administration had already curtailed what modest trade was allowable under the CACR during the past four years.

In addition, Secretary Pompeo's Executive action cannot override the Trade Sanction Reform and Export Enhancement Act of 2000 ("TSRA"). Under Title IX of TSRA, Congress directed OFAC to allow U.S. persons to export and sell to Cuba a wide range of U.S. agricultural commodities (as defined by Section 102 of the Agricultural Trade Act of 1978) and U.S. medicines and medical devices (as defined by Section 201 of the Federal Food, Drug, and Cosmetic Act), subject to certain restrictions such as a prohibition on U.S. persons extending any credit terms to Cuban buyers, meaning such buyers can only make such purchases on a cash basis or can otherwise use financing from a non-U.S. bank in a third country without involving any U.S. persons in that credit facility. Moreover, there is also a statutory exemption under CACR Section 515.206(a) that excludes the export of "information and informational materials" to Cuba and the import of such materials from Cuba, and that exemption will remain in force in spite of this designation of Cuba to the State Department list.[3]

One fundamental change, however, resulting from Cuba's redesignation on the state sponsor of terrorism list is that it will now lose the shield of sovereign immunity that normally protects most foreign countries from litigation in U.S. courts under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 USC § 1602 *et seq*. Once that FSIA immunity is gone, then Cuba can be sued in U.S. courts under laws such as the Antiterrorism Act of 1990 ("ATA") that allow plaintiffs to lodge tort claims against any nation on the State Department list for injuries or losses due to the terrorist acts of a listed nation or the agents or instrumentalities of such a nation.[4]

Inasmuch as this is an Executive action that could be reversed by the incoming Biden Administration, it remains to be seen how long this designation of Cuba will remain in effect. However, if the Biden Administration were to seek to remove Cuba again, the next Secretary of State will need to give 45 days' prior notice to Congress, which would have an opportunity to oppose that removal. Inevitably, given the slender margin that the Democrats will hold in the House and the Senate in the 117th Congress whose term began on January 3, 2021, it can be assumed that any such move by the Biden Administration would meet some push-back from lawmakers, consuming a degree of scarce political capital. It is thus unclear what sort of priority would be given to reversing Secretary Pompeo's decision to return Cuba to the list of terrorist-sponsoring states, especially when the new Biden team may have so many other foreign policy issues to address.

As another example of the multiple diplomatic crises that the Biden Administration will need to confront immediately, on January 10, Secretary Pompeo had also announced that the State Department will immediately designate the entire Houthi or Ansarallah faction in the bitter civil war raging in Yemen as a "foreign terrorist organization" and "specially designated terrorist organization," going well beyond previous declarations against individual Houthi leaders. The Houthis have achieved effective control over about 80% of Yemen's population of 30 million people.

Both the United Nations and many aid groups in the Middle East now rate the civil war in Yemen as the single greatest humanitarian crisis in the world today, with many millions of innocent civilians on the verge of starvation and death. Their slender lifeline for the past several years has been the international aid community, including an array of non-governmental organizations ("NGOs") and their combined efforts to supply emergency food and medical aid. Although Secretary Pompeo's public statement indicates that OFAC will create a series of authorizations under the new U.S. sanctions regime against the Houthis to sustain the supply of such aid, requiring NGOs and their supporters to seek such prior OFAC approval before they can act will likely hamper and slow aid efforts and could have foreseeable life-or-death consequences for the millions in Yemen who are wholly dependent on such aid.

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[1] https://www.state.gov/u-s-announces-designation-of-cuba-as-a-state-sponsor-of-terrorism/.

[2] https://www.state.gov/terrorist-designation-of-ansarallah-in-yemen/.

[3] *See* 22 USC § 7207(b)(1); 31 CFR § 515.533(a)(4).

[4] *See* 18 USC § 2333; 28 USC §§ 1605A, 1606.