

General information on USA Embargo

It should be noted that US Regulations vis-à-vis Cuba (also known as "embargo" or "blockade") do not prohibit persons (including entities) not subject to US jurisdiction to carry out business, commercial activities or investment in Cuba. However, certain US regulations vis-à-vis Cuba have extraterritorial effects and have been contested by the European Union, Canada and Mexico. In particular the EU has enacted specific legislative measures to protect the interests of EU nationals from the extraterritorial effects of the US embargo vis-à-vis Cuba (the EU Regulation 2271/1996, protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom).

The US embargo vis-à-vis Cuba, which has been overwhelmingly condemned by the United Nations General Assembly since 1992, is compounded by three principal set of regulations:

- (a) The Cuban Assets Control Regulation which prohibit persons and entities subject to US jurisdiction to engage in commercial activities with Cuba or with Cuban national unless a license (general or specific) is granted by the Office of Foreign Assets Control of the US Department of Treasury. It should be noted that persons and entities not subject to US jurisdiction are not bound by these regulations.
- (b) The Export Administration Regulations (Export controls) administered by the US Department of Commerce which restrict any import into Cuba of US origin goods unless a US export license is granted.
- (c) The Helms Burton Act which is directed against foreign entities and individuals in Cuba that profit from (use, trade with, invest) properties that were nationalized by the Cuban government after 1959 and in relation to which a US national holds a claim.

The Helms-Burton Act has been contested by a number of countries (including EU member states) because it represents a serious breach of International Law given the US attempt to use economic coercion to achieve political goals. Title III of Helms-Burton Act has created a cause of action for US nationals before US federal courts against those who (in the terminology of Helms-Burton Act) "traffic in confiscated property" (i.e. invest, use or trade with a property that was nationalized by the Cuban Government after 1959 and the claim to which is held by a US national) in order to seek compensation for damages (the market value of the property that, in some circumstances, may be trebled). Title IV of helms-Burton Act authorizes the US Department of State to exclude from the United States (denial of visa) those who are considered "traffickers in confiscated property" or the principals and directors (and their spouses, minor children and agents) involved in "trafficking of confiscated property".

In particular the EU Regulation 2271/1996 contains the following protection measures vis-à-vis Helms-Burton Act for nationals of EU member states investing in or trading with Cuba:

- (a) Obligation to provide information: "Where the economic and/or financial interests of any person referred to in Article 11[1] are affected, directly or indirectly, by the laws specified in the Annex[2] or by actions based thereon or resulting therefrom, that person shall inform the Commission accordingly within 30 days from the date on which it obtained such information; insofar as the interests of a legal person are affected, this obligation applies to the directors, managers and other persons with management responsibilities" (art.2).
- (b) Non enforceability of judgement or decisions giving effect to Helms-Burton Act: "No judgment of a court or tribunal and no decision of an administrative authority located outside the EU giving effect, directly or indirectly, to the Helms-Burton Act or to actions based thereon or resulting there from, shall be recognized or be enforceable in any manner" (art.4).
- (c) Obligation by any person subject to EU jurisdiction not to comply with any requirement or prohibition, including requests of foreign courts, based on or resulting from the Helms-Burton Act: "No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom" (art.5).

(d) "Clawback": Pursuant to art.6 of Regulation 2271/1996:

1. any person subject to EU jurisdiction, who is engaging in a commercial activity in Cuba shall be entitled to recover any damages, including legal costs, caused to that person by the application of the Helms-Burton Act or by actions based thereon or resulting therefrom.
2. Such recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary.

^[1] Article 11 of the EU Regulation provides that:

"This Regulation shall apply to:

1. *any natural person being a resident in the Community (4) and a national of a Member State,*
2. *any legal person incorporated within the Community,*
3. *any natural or legal person referred to in Article 1 (2) of Regulation (EEC) No 4055/86 (5),*
4. *any other natural person being a resident in the Community, unless that person is in the country of which he is a national,*
5. *any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity."*

^[2] Annex of Regulation 2271/1996 expressly includes, *inter alia*, the CFR (Code of Federal Regulations) Ch. V (7-1-95 edition) Part 515 - Cuban Assets Control Regulations, subpart B (Prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties).

3. Without prejudice to other means available and in accordance with applicable law, the recovery could take the form of seizure and sale of assets held by those persons, entities, persons acting on their behalf or intermediaries within the EU, including shares held in a legal person incorporated within the EU.