United States Department of State

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LEGAL CONSIDERATIONS REGARDING
TITLE III OF THE LIBERTAD BILL

The U.S. Government has long condemned as a violation of international law the confiscation by the Cuban Government of properties taken from U.S. nationals without compensation, and has taken steps to ensure future satisfaction of those claims consistent with international law. Congress recognized the key role of international law in this respect. Title V of the International Claims Settlement Act of 1949, as amended, pursuant to which the Foreign Claims Settlement Commission (FCSC) certified the claims against Cuba of 5,911 U.S. nationals, accordingly applies to claims "arising out of violations of international law."

The State Department, however, opposes the creation of a civil remedy of the type included in Title III of the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995" (the "LIBERTAD bill") currently under consideration by the Congress. The LIBERTAD bill would be very difficult to defend under international law, harm U.S. businesses exposed to copy-cat legislation in other countries, create friction with our allies, fail to provide an effective remedy for U.S. claimants and seriously damage the interests of FCSC certified claimants. It would do so by making U.S. law applicable to, and U.S. courts forums in which to adjudicate claims for, properties located in Cuba as to which there is no United States connection other than the current nationality of the owner of a claim to the property. Specifically, the LIBERTAD bill would create a civil damages remedy against those who, in the language of the bill, "traffic" in property of a U.S. national. The bill defines so-called "trafficking" as including, among other things, the sale, purchase, possession, use, or ownership of property the claim to which is owned by a person who is now a U.S. national.

The civil remedy created by the LIBERTAD bill would represent an unprecedented extra-territorial application of U.S. law that flies in the face of important U.S. interests. Under international law and established state practice, there are widely-accepted limits on the jurisdictional authority of a state to "prescribe," i.e., to make its law applicable to the conduct of persons, as well as to the interests of persons in things. In certain circumstances a state may apply its law to extra-territorial conduct and property interests. For example, a state may do so in limited circumstances when the conduct has or is intended to have a "substantial effect" within its territory. The Senate version of the bill appears to imply that so-called

"trafficking" in confiscated property has a "substantial effect" within the United States. Some have explicitly defended the LIBERTAD bill on this ground.

Asserting jurisdiction over property located in a foreign country and expropriated in violation of international law would not readily meet the international law requirement of prescription because it is difficult to imagine how subsequent "trafficking" in such property has a "substantial effect" within the territory of the United States. It is well established that under international law "trafficking" in these confiscated properties cannot affect Cuba's legal obligation to compensate U.S. claimants for their losses. The actual effects of an illegal expropriation of property are experienced at the time of the taking itself, not at any subsequent point. An argument that subsequent use or transfer of expropriated property may interfere with the prospects for the return of the property would be hard to characterize as a "substantial effect" under international law. Under international law, the obligation with respect to the property is owed by the expropriating state, which may satisfy that obligation through the payment of appropriate compensation in lieu of restitution.

As a general rule, even when conduct has a "substantial effect" in the territory of a state, international law also requires a state to apply its laws to extra-territorial conduct only when doing so would be reasonable in view of certain customary factors. Very serious questions would arise in defending the reasonableness under international law of many lawsuits permitted by Title III of the LIBERTAD bill. The customary factors for judging the reasonableness of extra-territorial assertions of jurisdiction measure primarily connections between the regulating state, on one hand, and the person and conduct being regulated, on the other. Title III would cover acts of foreign entities and non-U.S. nationals abroad involving real or immovable property located in another country with no direct connection to the United States other than the current nationality of the person who holds an expropriation claim to that property. Moreover, the actual conduct for which liability is created -- private transactions involving the property -- violates no established principle of international law. Another customary measure of reasonableness is the extent to which the exercise of jurisdiction fits with international practice. The principles behind Title III are not consistent with the traditions of the international system and other states have not adopted similar laws

International law also requires a state assessing the reasonableness of an exercise of prescriptive jurisdiction to balance its interest against those of other states, and refrain from asserting jurisdiction when the interests of other states are greater. It would be very problematic to argue that U.S.

interests in discouraging "trafficking" outweigh those of the state in which the property is located, be it Cuba or elsewhere, International law recognizes as compelling a state's interests in regulating property present within its own borders. The United States guards jealously this right as an essential attribute of sovereignty. In contrast, discouraging transactions relating to formerly expropriated property has little basis in state practice.

That international law limits the United States' exercise of extra-territorial prescriptive jurisdiction does not imply that U.S. courts must condone property expropriations in cases validly within the jurisdiction of the United States. Our courts may refuse to give affect to an expropriation where either (i) the expropriation violated international law and the property is present in the United States or (ii) in certain cases, the property has a legal nexus to a cause of action created by a permissible exercise of prescriptive jurisdiction. In fact, generally speaking, our laws prohibit our courts from applying the "Act of State" doctrine with respect to disputes about properties expropriated in violation of international law. If applied the doctrine might otherwise shield the conduct of the foreign state from scrutiny. Indeed, in a number of important cases the Department of State has actively and affirmatively supported these propositions in cases before U.S. courts to the benefit of U.S. claimants, including with respect to claims against Cuba. The difficulty with Title III of the LIBERTAD bill stems not from its willingness to disaffirm expropriations that violate international law, but from its potentially indefensible exercise of extra-territorial prescriptive jurisdiction.

Some supporters of the LIBERTAD bill have advanced seriously flawed arguments in defending the extra-territorial exercise of jurisdiction contemplated by Title III. Some have defended Title III on the deeply mistaken assumption that international law recognizes the wrongful nature of so-called "trafficking" in confiscated property. No support in state practice exists for this proposition, particularly with regard to property either held by a party other than the confiscator or not confiscated in violation of international claims law (if, for example, the original owners were nationals of Cuba at the time of loss.) Many of the suits allowed by Title III would involve "trafficking" in properties of this type, where an internationally wrongful act would seem extremely difficult to establish.

Regrettably, the support in international state practice offered by some for viewing so-called "trafficking" as wrongful has generally confused a state's power to assert jurisdiction over conduct with the "Act of State" doctrine, discussed previously. The unwillingness of our courts to give effect to foreign state expropriations violative of international law in

matters over which they have valid jurisdiction under international law, however, does not imply that international law recognizes as wrongful any subsequent entanglement with the property. Others have suggested that general acceptance of domestic laws relating to conversion of ill-gotten property makes "trafficking" wrongful under international law. This argument is extremely unpersuasive as many universally accepted domestic laws, including for example most criminal laws, have no international law status. So-called "trafficking" has no readily identifiable international law status. International law does condemn a state's confiscation of property belonging to a foreign national without the payment of prompt, adequate and effective compensation. In such circumstances the U.S. Government has been largely successful in assuring that U.S. claimants obtain appropriate compensation, precisely because of the protection afforded by international law.

Some supporters have maintained incorrectly, in addition, that Title III is similar to prior extra-territorial exercises of jurisdiction by the United States over torts committed outside the United States. The Alien Tort Statute (ATS) and the Torture Victim Protection Act of 1991 (TVPA) have been cited as examples in this context. The assertion is plainly false and the LIBERTAD bill differs significantly from the examples cited. While the ATS and TVPA do empower U.S. courts to adjudicate certain tortious acts committed outside the United States, they do so only with respect to acts that violate international law. The ATS covers only torts "committed in violation of the law of nations or a treaty of the United States." Similarly, the TVPA creates liability for certain conduct violating fundamental international norms of human rights (i.e. torture and extra-judicial killing). In contrast, as explained previously, supporters of the LIBERTAD bill have failed to identify any basis in international law permitting the use of U.S. courts for the adjudication of suits regarding extra-territorial "trafficking."

Title III of the LIBERTAD bill also deviates substantially from accepted principles of law related to the immunity of foreign sovereign states, as well as their agencies and instrumentalities. Although much of the discussion of the bill has focussed on suits against certain foreign corporations and individuals, in its current form the Senate version of the bill would allow a suit to be brought against "any person or entity, including any agency or instrumentality of a foreign state in the conduct of commercial activity" that "traffics" in confiscated property. Since "trafficking" is defined to include such things as possessing, managing, obtaining control of, or using property, it would appear at a minimum that Title III authorizes suits against many Cuban or other foreign governmental agencies or instrumentalities. To the extent Title III provides for such suits, they would be highly problematic and difficult to defend.

The Foreign Sovereign Immunities Act (FSIA), enacted in 1976 after careful deliberation, is consistent with international law principles of foreign sovereign immunity. To the extent the LIBERTAD bill would permit suits against agencies and instrumentalities of foreign governments it would go far beyond current exemptions in the FSIA. The LIBERTAD bill, unlike the FSIA, would not require the agency or instrumentality to be "engaged in commercial activity in the United States." Moreover, the LIBERTAD bill contemplates suits against agencies or instrumentalities of foreign states for any conduct that constitutes so-called "trafficking"; as defined in the LIBERTAD bill this notion is broader than owning or operating property, the FSIA standard.

Similarly, to the extent the provisions of the LIBERTAD bill permitting suits against "entities" is construed to authorize suits against foreign governments as well, it would go well beyond current exemptions in the FSIA and under international law for claims involving rights in property. Under the FSIA, a foreign state (as distinguished from its agencies and instrumentalities) is not immune only when the "property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." The LIBERTAD bill would appear not to impose those requirements. In addition, suits against "entities" would in these circumstances include those brought against foreign governments other than Cuba that may have acquired confiscated property in violation of no principle of international claims law. These potential expansions of the exceptions from the immunity of foreign states, as well as their agencies and instrumentalities, from the jurisdiction of U.S. courts and their implications for U.S. liability in other countries represent matters of great concern.

Some have suggested that even though the creation of a cause of action such as that contemplated in Title III of the LIBERTAD bill is not currently defensible under international law, the United States should enact these provisions of the bill to promote the development of new international law principles in this area. Suggestions of this sort in this context rest on a dubious premise of how state practice contributes to international law. While the practice of states represents a source of international law, state practice makes law only when it is widespread, consistent and followed out of a sense of legal obligation. The enactment of Title III in the face of serious questions about its consistency with international law, and without the support of the international community, would not contribute positively to international law relating to the expropriation of property.

In addition to being very difficult to defend under international law, enactment of Title III would also undermine a

number of important U.S. interests connected to these significant international law concerns. General acceptance of the principles reflected in Title III would harm U.S. business interests around the world. At present and in general, the laws of the country in which the property lies govern the rights to that property, particularly with respect to real property. United States businesses investing all over the world benefit from their ability to rely on local law concerning ownership and control of property. Under the precedent that would be set by Title III, a U.S. business investing in property abroad could find itself hailed into court in any other country whose nationals have an unresolved claim to that property. Such a precedent could increase uncertainties for U.S. companies throughout the world. Perversely, Title III would hurt U.S. businesses most directly in Cuba. U.S. businesses seeking to rebuild a free Cuba once a transition to democracy begins will find themselves easy targets of Title III suits, as U.S. corporations generally are subject to the jurisdiction of our courts.

Congress should expect that the enactment of Title III of the LIBERTAD bill, with its broad extra-territorial application of U.S. law, significant departures from established claims practice and possible contravention of international law, will create serious disputes with our closest allies, many of whom have already voiced their objections. The United States must expect the friction created by Title III to hurt efforts to obtain support in pressing for change in Cuba. Moreover, once the transition to democracy does begin, Title III will greatly hamper economic reforms and slow economic recovery as it will cloud further title to confiscated property.

Perhaps most importantly, Title III of the LIBERTAD bill would not benefit U.S. claimants. The private right of action created by Title III, furthermore, would likely prove ineffective to U.S. claimants. Past experience suggests that countries objecting to the extra-territorial application of U.S. law reflected in Title III, most likely some of our closest allies and trading partners, could be expected to take legal steps under their own laws to block adjudication or enforcement of civil suits instituted against their nationals. Moreover, many foreign entities subject to suit would deem U.S. jurisdiction illegitimate and fail to appear in our courts. Title III would in those circumstances merely produce unenforceable default judgements. In addition, some commentators have estimated potential law suits to number in the hundreds of thousands, so the LIBERTAD bill would also clog our courts and result in enormous administrative costs to the United States. As the lawsuits created under Title III might not result in any increase in or acceleration of compensation for U.S. claimants, these costs would be unjustifiable.

In so far as it departs from widely accepted international claims law, Title III of the LIBERTAD bill undermines widely-established principles vital to the United States' ability to assure that foreign governments fulfill their international obligations for economic injury to U.S. nationals. In doing so, Title III hurts all U.S. citizens with claims against another government. With respect to claims against Cuba specifically, the cause of action contemplated in Title III of the LIBERTAD bill will hamper the ability of the U.S. Government to obtain meaningful compensation for certified claimants. Consistent with our longstanding and successful claims practice, at an appropriate time when a transition to democracy begins in Cuba, the United States will seek to conclude a claims settlement agreement with the Cuban government covering certified claimants, or possibly create some other mechanism to assure satisfaction of their claims. If Title III is enacted into law and U.S. claimants have an opportunity, at least on paper, to receive compensation for claimed properties from third party "traffickers," the Cuban Government may simply refuse to address these claims on the grounds that the claimants must pursue alternative remedies in U.S. courts. Yet, as indicated previously the prospects for broad recoveries in this manner are very poor.

Even if Cuba accepts its international law responsibilities with respect to U.S. claims, the United States can expect that a large quantity of private suits would profoundly complicate claims-related negotiations, as well as subsequent claims payment procedures. Cuba might easily demand that the United States demonstrate that each person holding an interest in any of the nearly 6,000 certified claims, and possibly the tens of thousands of uncertified claims, has not already received compensation via a lawsuit or private settlement. As the United States will not have records of private suits, let alone non-public out of court settlements, doing so would be extremely difficult. In addition, dealing with unpaid judgments in this context would likely prove particularly difficult.

Finally, the Castro regime has already used, and if enacted into law would continue to use, the civil cause of action contemplated by Title III of the LIBERTAD bill to play on the fears of ordinary citizens that their homes or work places would be seized by Cuban-Americans if the regime falls. The United States must make it clear to the Cuban people that U.S. policy toward Cuban property claims reflects established international law and practice, and that the future transition and democratic governments of the Cuban people will decide how best to resolve outstanding property claims consistent with international law.