

U.S.-Cuba Trade and Economic Council, Inc.

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Has United States Department Of Justice “*Intervened*” On The Constitutionality Of A Libertad Act Title III Cuba Lawsuit On Behalf Of United Kingdom-Based Company?

A Good Day For Defendants.

Legally, What DOJ Did Might Not Be Defined As Intervening. From A Layperson Perspective Seems Just That.

DOJ Filed With Court Statement That May Not Have Been Required To Be Filed. Though Statement Is Not Binding, It Is Influential.

Thumb On The Scale? For Whose Interest? Impact Of Sixty-Day Clock? Poisoning Of The Well?

Could DOJ Could Have Filed Statement Without Referencing Three Other Lawsuits?

Is The Statement “Too Cute By Half”?

On 31 August 2021, the United States Department of Justice (DOJ) in Washington DC filed its first “*Statement of Interest of the United States*” (SOIOTUS) in a Libertad Act Title III lawsuit. The lawsuit was filed in the United States District Court for the Southern District of Florida.

The Trump Administration on 2 May 2019 made operational Title III of the Cuban Liberty and Democratic Solidarity Act of 1996 (known as “*Libertad Act*”). Title III authorizes lawsuits in United States District Courts against companies and individuals who are using a certified claim or non-certified claim where the owner of the certified claim or non-certified claim has not received compensation from the Republic of Cuba or from a third-party who is using (“trafficking”) the asset.

A defendant in the lawsuit is headquartered in the United Kingdom. Bristol, United Kingdom-based **Imperial Brands plc** (2020 revenues approximately US\$45 billion) is listed among the thirty-largest companies in the United Kingdom. Prior to the United Kingdom existing the EU on 31 January 2020, the defendant, Imperial Brands plc (formerly Imperial Tobacco plc) was subject to decisions of the Brussels, Belgium-based European Commission (EC), the governing entity for the now twenty-seven member Brussels, Belgium-based European Union (EU). From Imperial Brands: “*Our Imperial Tobacco subsidiaries manufacture and market a range of cigarettes, fine cut and smokeless tobacco products, mass market cigars, and tobacco accessories such as papers and tubes.... Key Imperial Tobacco subsidiaries include Reemtsma in Germany, Altadis in Spain and Seita in France as well as our Imperial Tobacco businesses in the UK, Australia, Poland, Russia and Ukraine.*”

Questions abound.

- Why did the DOJ select this lawsuit? No defendant in other Libertad Act Title III lawsuits served notice to the DOJ, but DOJ may weigh-in on any lawsuit.

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- Why did the DOJ respond? The statute (28 U.S.C. Section 517) does seem to require the DOJ to respond. The statute includes “*may*” not “*must*”
- Is the DOJ seeking to “*tip the scale*” in favor of the defendant(s) and telegraphing Biden-Harris Administration (2021-) thinking that Title III is unconstitutional or thinking about basis to suspend Title III? The Clinton-Gore Administration (1993-2001), Bush-Cheney Administration (2001-2009), Obama-Biden Administration (2009-2017), and until 2019 Trump-Pence Administration (2017-2021) did suspend Title III in six-month increments as permitted by the Libertad Act.
- Is there a political consideration directed to The Honorable Boris Johnson, Prime Minister of the United Kingdom (UK)?
- Why did not the DOJ file a SOFOTUS in any of the Libertad Act Title III lawsuits that include defendants with headquarters in the EU?

Since 2 May 2019, forty-one (41) Libertad Act Title III lawsuits have been filed in United States District Courts throughout the United States. One lawsuit is reported settled out-of-court. Some of the lawsuits have been dismissed, some have been consolidated, some have been appealed, and some have been withdrawn.

Since the first Libertad Act Title III lawsuit was filed, ten (10) defendants are headquartered within the twenty-seven member countries of the EU and twenty (20) defendants are headquartered in non-EU-member countries.

LUIS MANUEL RODRIGUEZ, MARIA TERESA RODRIGUEZ, a/k/a MARIA TERESA LANDA, ALFREDO RAMON FORNS, RAMON ALBERTO RODRIGUEZ, RAUL LORENZO RODRIGUEZ, CHRISTINA CONROY, and FRANCISCO RAMON RODRIGUEZ, Plaintiffs, v. IMPERIAL BRANDS PLC, CORPORACIÓN HABANOS, S.A., WPP PLC, YOUNG & RUBICAM LLC, and BCW LLC, a/k/a BURSON COHN & WOLFE LLC [1:20-cv-23287; Southern Florida District].

Berenthal & Associates (plaintiff)

Rodriguez Tramont & Nunez (plaintiff)

Nelson Mullins (defendant)

Allen & Overy (defendant)

Wilmer Cutler Pickering Hale and Dorr (defendant)

Broad & Cassel (defendant)

Akerman (defendant)

Trenam, Kemker, Scharf, Barkin, Frye, O’Neill & Mullis (defendant)

Rabinowitz, Boudin, Standard, Krinsky & Lieberman (defendant)

[Link To Statement Of Interest Of The United States \(8/31/21\)](#)

[Link To 28 U.S.C. Sec. 517](#)

[Link To 28 U.S.C. Rule 5.1](#)

[Link To Defendant Corporación Habanos, S.A.’S Notice Of Constitutional Question \(4/29/21\)](#)

[Link To Memorandum Of Law In Support Of Defendant Imperial Brands Plc’s Motion To Dismiss The Amended Complaint- Claim Of Unconstitutionality \(4/28/21\)](#)

[Link To Defendant Imperial Brands Plc’s Notice Of Constitutional Question \(4/28/21\)](#)

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[Link To Defendants' Supplemental Briefing In Further Support Of Their Motion To Dismiss The Amended Complaint \(8/18/21\)](#)

[Link To Libertad Act Title III Lawsuit Filing Statistics](#)

Statutes Referenced By United States Department of Justice In Its Statement Of Interest Of The United States (SOIOTUS)

28 U.S.C. United States Code, 2011 Edition

Title 28 - JUDICIARY AND JUDICIAL PROCEDURE

PART II - DEPARTMENT OF JUSTICE

CHAPTER 31 - THE ATTORNEY GENERAL

Sec. 517 - Interests of United States in pending suits

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States. (Added Pub. L. 89-554, §4(c), Sept. 6, 1966, 80 Stat. 613.)

28 U.S.C.

United States Code, 2011 Edition

Title 28 - JUDICIARY AND JUDICIAL PROCEDURE

TITLE 28 - APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 5.1 - Constitutional Challenge to a Statute-Notice, Certification, and Intervention

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly: (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if: (A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or (B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and (2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose. (b) Certification by the Court. The court must, under 28 U.S.C. §2403, certify to the appropriate attorney general that a statute has been questioned. (c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional. (d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted. (As added Apr. 12, 2006, eff. Dec. 1, 2006; amended Apr. 30, 2007, eff. Dec. 1, 2007.)

Excerpts From Statement Of Interest Of The United States

The United States of America, by and through undersigned counsel, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 5171 to set forth the interests of the United States

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(the “Government”) as they relate to the above-captioned lawsuit. The Government is not a party to this matter and takes no position on the merits of Plaintiffs’ claims. However, the Government received a notice, pursuant to Federal Rule of Civil Procedure 5.1,2 that Defendants Imperial Brands PLC (“Imperial”) and Corporación Habanos, S.A. (“Habanos”) have challenged the constitutionality of Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 U.S.C. §§ 6081–6085 (“Title III”) in their pending motions to dismiss.

The Government became aware of the constitutional challenge to Title III in April 2021 after Imperial and Habanos served notices of constitutional questions on the Attorney General of the United States pursuant to Rule 5.1. ECF Nos. 92, 94; see Fed. R. Civ. P. 5.1(a). As framed by Imperial, “[t]he constitutional question raised is: does the Due Process Clause of the Fifth Amendment to the United States Constitution prohibit the extraterritorial application of Title III to Imperial’s concededly ‘non-U.S.’ Cuban-cigar business under the circumstances alleged in the Complaint due to lack of legislative jurisdiction.”

The Court has not yet certified the constitutional challenge. See Fed. R. Civ. P. 5.1(b) (“The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.”). Nonetheless, the Government files this Statement of Interest upon the completion of the parties’ briefing on the Motions, including supplemental briefing filed on August 18, 2021, see ECF Nos. 123–24, to respectfully request that the Court decide the personal jurisdiction issues before reaching the constitutional question and, only if the Court finds it necessary to reach and certify the constitutional question, to respectfully request that the Court provide the Government an opportunity to participate at that stage.

The Government has reviewed the parties’ arguments on the Motions and notes that Imperial and Habanos raise several arguments in support of dismissal that do not depend on the constitutionality of Title III or other Title III issues. In particular, the Government believes that the defendants’ arguments concerning lack of personal jurisdiction raise substantial questions, similar to those that three courts in this district have already addressed.

See *Iglesias v. Pernod Ricard*, No. 20-20157-CIV, 2021 WL 3083063, at *3 (S.D. Fla. June 17, 2021) (no personal jurisdiction over French company with French principle place of business even where subsidiary did business in Florida); *Herederos de Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, No. 20-21630-CIV, 2021 WL 1648222, at *3–4 (S.D. Fla. Apr. 27, 2021) (no personal jurisdiction over foreign defendant with foreign principle place of business in Title III action where plaintiff “fail[ed] to explain how its claim for unlawful trafficking in Cuba is related to [the plaintiff’s] activities in Florida”), reconsideration denied, No. 20-21630-CIV, 2021 WL 3054908 (S.D. Fla. Jul. 20, 2021); *Del Valle v. Trivago GmbH*, No. 19-22619-CIV, 2020 WL 2733729, at *2–4 (S.D. Fla. May 26, 2020) (same), appeal filed, 20-12407 (11th Cir. Jun. 24, 2020).

The Government therefore declines to intervene at this stage of the litigation but will continue to actively follow developments in this case as it progresses, particularly regarding the constitutional question concerning Title III, should the Court decide not to dismiss this matter on other grounds. If the Court does find it necessary to address the constitutional question, the Government requests a further opportunity to consider whether to provide its views at that time. The Government thanks the Court for its consideration of the Government’s views at this stage.

From Imperial Brands

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27 Apr 2020- Imperial Brands PLC agrees sale of Worldwide Premium Cigar Business for €1,225 million with proceeds to be used to reduce debt

“The business comprises assets purchased as part of Imperial’s acquisition of Altadis in 2008, and the disposal consists of two transaction perimeters: *Premium Cigar US*- Tabacalera USA, which is responsible for the business’ premium cigar operations in the US, the world’s largest premium cigar market, including: The assets and other property of Altadis USA, which is responsible for the distribution of premium cigars in the US; Leading online retail platforms, including JR Cigar, cigar.com and Serious Cigars; A specialist brick-and-mortar retailer, Casa de Montecristo, with 28 stores across the USA. *Premium Cigar RoW*- Cuban premium cigar interests, including: A 50 per cent stake in Habanos S.A., which exports hand-made cigars from Cuba and is responsible for international marketing activities. Habanos products include world-renowned Cuban brands such as Cohiba, Montecristo and Romeo y Julieta. A 50 per cent stake in Altabana S.L., which is responsible for the distribution of Cuban cigars worldwide through its network of over 20 subsidiary distributors. A 50 per cent stake in Internacional Cubana de Tabaco, S.A., which is responsible for the manufacturing of Cuban premium machine-made cigars. A 50 per cent stake in Promotora de Cigarros, S.L., which manages the distribution of the Cuban premium machine-made cigar portfolio worldwide. Other sales of premium cigar products through Tabacalera SA including: Exclusive distribution of Cuban handmade cigars in Spain; Non-Cuban premium handmade cigar sales operations outside the US, including Vegafina, the bestselling non-Cuban brand outside the US.”

26 February 2013- Investor Day Presentation. “Firstly, I would like to put it in the context of the Total Cigar market. Premium cigars only account for around 3% of the units of the total traditional cigar market, but have a much more relevant participation in value and margin terms. It’s a niche but high value oriented business. USA is the largest Premium Cigar market with more than 60% of total sales. Adding Western Europe both represent around 85% of total consumption. In the rest of the world, mainly emerging markets, where 90% of the population lives, the knowledge of Premium cigar culture is very limited and sales per capita are still low. With the increasing purchasing power for many living in these countries and western lifestyle becoming more popular, there is significant growth potential for Premium cigars. Cuba, Dominican Republic, Nicaragua and Honduras are the main production origins. Cuban origin cigars have more than 70% of market share excluding the USA where these products are forbidden. In this category, Imperial enjoys a solid global leadership position with around 40% of market share in units thanks to: Our partnership with Cuba in Habanos, the global leader and marketer of the prestigious Cuban brands; Our strong presence in the USA; and The increasing international development of our brands, complementing the Cuban offer.

During last fiscal year we’ve achieved double digit growth in our main indicators, 11% in units and 10% in sales value, with sales going up across all our operations. Our Cuban business showed a very good dynamism in emerging markets where our sales increased by 17% in line with the increasing demand of luxury products in these territories. Countries like China (+13%), Russia (+38%), Brazil (+15%) and areas like Middle East (+19%) are becoming increasingly important for us. In the USA, we had a very positive performance, mainly driven by a stronger focus on our key strategic brands, underpinned by innovative product initiatives. We are covering all price segments with our core assets: our Cuban heritage brands Montecristo and Romeo y Julieta in the high end, VegaFina in the mid-price and Casa de Garcia in the low end, all made in our Dominican and Honduran factories. And finally, our international business, complementing our Cuban offer, grew significantly, driven by VegaFina expansion, in line with our commitment to develop this brand as our non-Cuban global Premium brand.”