The Helms-Burton Act Backfires: Surprising Litigation Trends Following Title III’s Long-Feared Activation

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On May 2, 2019, the Trump Administration made the historic decision to lift the suspension of Title III of the Helms-Burton Act for the first time since its enactment in 1996. Title III allows US nationals whose property was confiscated by the Cuban government to sue entities and individuals who now “traffic” in that property. Legal scholars believed this activation would trigger an avalanche of lawsuits; however, after two years of the law’s operation, only forty-some suits were filed, many by the same plaintiffs. Even more surprising is that instead of exposing foreign corporations that derive substantial benefits from the expropriated properties to liability, Title III is largely being used to target American businesses that have attenuated connections to the properties, at best. This Article explores the surprising trends born from the parties’ filings and the opinions issued by federal courts in leading Title III cases, and argues that the statute’s violation of international legal norms, failure to secure compensation for US claimants, and unforeseen targeting of domestic companies is ample rationale for the newly elected Biden Administration to urge Congress to repeal the Helms-Burton Act, which has gained the reputation of being one of the most ill-advised foreign policies of the US for a quarter century.

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I. INTRODUCTION

Nearly four decades after the Cuban Revolution, the United States’ strained relationship with its communist neighbor situated a mere ninety miles from the State of Florida culminated in the passage of the Helms-Burton Act, formally known as the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996.\(^1\) The purpose of the Act was to reinforce and strengthen the US economic embargo against Cuba established in the early 1960s in order to weaken and eventually uproot the Castro regime in favor of democracy. The international community has vigorously criticized the Helms-Burton Act, as Title III of the Act seeks to punish individuals and entities who engage with property once owned by US nationals and later expropriated by the Cuban government.\(^2\) The uncompensated taking of property remains a major point of contention between the United States and Cuba, even now as relations have begun to thaw; however, Title III, which violates international law, has done little to secure compensation for victims and has merely angered the United States’ closest allies and trading partners.

Due to a special “suspension authority” written into the law, Title III had lain dormant since its passage;\(^3\) however, in May 2019, the Trump Administration made the historic decision to activate the civil remedy provision and give claimants the right to sue “traffickers” in US district courts.\(^4\) Given the United States’ inability to negotiate a formal settlement with Cuba over the last six decades, it is no surprise that US firms and citizens seeking redress for the uncompensated expropriation of their property are taking advantage of this statutory cause of action. The preliminary findings from these lawsuits, however, are surprising. As a number of key lawsuits develop, one thing has become clear: The Helms-Burton Act is backfiring. Instead of exposing foreign-owned businesses that derive large benefits from the expropriated properties to liability, Title III is being used to target American companies that have attenuated connections to the properties, at best. This unforeseen effect has revealed that Title III is not grounded in sound legal doctrine or judicious foreign policy. The statute’s violation of

\(^1\) 22 U.S.C. §§ 6021-6091 (1996). Throughout this Article, I interchangeably use the terms “the Helms-Burton Act,” “the Act,” and “the Libertad Act” to refer to the same statute. The Act codifies the Cuban embargo, and it cannot be lifted until Cuba has a democratically elected government, among other things. \textit{Id.}

\(^2\) \textit{Id.} § 6082. The Act labels a host of activities involving these properties as “trafficking.” \textit{Id.} § 6023(13)(A).

\(^3\) 22 U.S.C. § 6085(b).

\(^4\) \textit{See infra} Section II.B.
international legal norms along with its clear ineffectiveness is ample rationale for the newly elected Biden Administration to urge Congress to repeal the Act, which has gained the reputation of being one of the most ill-advised policies of the United States for a quarter century.\(^5\)

I begin Section II of this Article with a summary of the relations between the United States and Cuba since 1959, with an emphasis on the expropriations following Fidel Castro’s rise and the subsequent foreign investments in the Cuban economy. I then provide a description of the Helms-Burton Act. In Section III, I address the legality of the Act and of Cuba’s expropriations—two distinct issues. I propose that the Helms-Burton Act is inconsistent with international law for reasons relating to the effective conveyance of title, national sovereignty, and extraterritorial jurisdiction. Finally, in Section IV, I review fourteen of the approximately twenty-five Title III lawsuits filed from May 2019 to May 2020—the first year of Title III’s activation.\(^6\) I follow the developments of these key cases through January 7, 2022, and I conclude with an analysis of the trends born from the parties’ pleadings and the court rulings issued in these lawsuits.

II. THE ROAD TO THE HELMS-BURTON ACT

A. US RELATIONS WITH CUBA

Cuba, not unlike the rest of Latin America, has experienced several rounds of regime change over the past few centuries. From the 1820s until the 1870s, individual power-holders, or caudillos, dominated the political landscape.\(^7\) This regime was gradually substituted by oligarchies—small groups at the top of society that ruled from the 1870s to the 1940s.\(^8\) The 1940s to the early 1960s exhibited a more “proto-democratic” character with the institution of populist governments.\(^9\) The populists, however, were soon unable to contain popular unrest, and armed forces began to remove

\(^5\) US Senators have already proposed a bill titled the “United States-Cuba Trade Act of 2021” to repeal the Helms-Burton Act and the Cuban embargo more broadly. Jennifer Doherty, Senators Relaunch Bid to End the Cuba Trade Embargo, L. 360 (Feb. 5, 2021, 10:47 PM), https://www.crowell.com/files/20210205-Senators-Relaunch-Bid-To-End-The-Cuba-Trade-Emargo.pdf [https://perma.cc/VCB7-RT38]. As of this writing, the bill remains in the Senate Finance Committee and has not been recommended to the floor.

\(^6\) See infra Appendix for a list of Title III lawsuits filed during the first two years of Title III’s activation—May 2019 to May 2021. Updates to the outcomes are current through January 7, 2022.

\(^7\) Robert H. Holden & Rina Villars, Contemporary Latin America 44 (2013).

\(^8\) Id. at 45.

\(^9\) Id.
them from office. The armed forces were then challenged by guerrilla armies like that of Fidel Castro. Guerrilla leaders were guided by Marxist ideology and aimed to undermine the legitimacy of the state and inspire popular insurrections, which propelled them into power. Remarkably, Cuba has remained the only Latin American nation to maintain its Communist Party–led state socialism following the collapse of the Soviet Union.

The 1959 revolt against US-backed authoritarian ruler Fulgencio Batista ended with Fidel Castro’s capture of power, which he successfully maintained until 2006 when he resigned from the presidency. During that time, Castro’s success emboldened and inspired other Latin American nations to rid themselves of capitalism, dictatorship, and imperialism—a dangerous precedent in the eyes of the United States. Castro’s incredible influence along with his social programs and reforms turned Cuba into one of the United States’ fiercest enemies with marked hostilities between the two nations.

Once Castro took power, his government seized, without providing compensation, privately owned sugar plantations and other agricultural estates, converting them into state-owned farms. Castro also ordered the expropriation of private residences, commercial enterprises, and other lands, including property owned by foreign citizens and entities.

In response to the confiscations, the United States broke off diplomatic relations with Cuba and passed the Foreign Assistance Act of 1961, which permitted President John F. Kennedy to impose an economic embargo against Cuba. The United States implemented subsequent measures to attack all possible transactions and activities that benefited the Cuban econ-

10. Id. at 46.
11. Id.
12. HOLDEN & VILLARS, supra note 7, at 46.
13. Id. at 56.
14. Id. at 50.
15. Holden and Villars describe Castro as “without a doubt the single most influential Latin American of the twentieth century” and “the region’s chief spokesman for radical social change and violent revolution.” Id. at 50.
16. Id. at 56.
18. HOLDEN & VILLARS, supra note 7, at 54.
omy. Despite the US embargo, Cuba’s close ties with the Soviet Union guaranteed the island economic, military, and political support. However, the loss of Soviet trade and subsidies after the Soviet Union’s collapse devastated the Cuban economy. Almost immediately, Cuba lost roughly 85 percent of its foreign trade, and its gross domestic product fell by a third between 1989 and 1993.

Castro then instituted some “minor, and carefully regulated, market-oriented reforms—including the expansion of opportunities for much needed foreign investment.” Castro eased the restrictions that forbid foreign ownership of Cuban land and enacted legislation allowing foreign investments in the form of joint ventures. His economic liberalization reforms also allowed for some forms of self-employment, private farming, and the legalized use of US currency by Cuban citizens. Foreign firms from Canada, Mexico, and the European Union (major US trading partners) began investing in Cuba, and by 1994, the Cuban government had signed deals for 185 joint ventures in petroleum, mining, agriculture, biotechnology, and tourism.

In many ways, the Helms-Burton Act was a direct response to Cuba’s foreign investment programs, as “the Act specifically intends to chill foreign investors from providing . . . the cash that [Cuba] desperately needs.” Initially, Representative Dan Burton (R-IN) introduced the bill on February 14, 1995. It passed both houses of Congress and moved through a conference committee by December 14, 1995, with overwhelming Republican

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20. Id. In 1962, “Congress broadened the embargo through the Cuban Assets Control Regulations, which restricted Cuba’s assets in the United States and prohibited U.S. citizens or corporations from conducting any commercial transactions with Cuba.” Id. A subsequent measure was the passage of the Cuban Democracy Act in 1992, or the “Torricelli Law,” which prohibited (1) foreign-based subsidiaries of US companies from trading with Cuba, (2) travel to Cuba by US citizens, and (3) family remittances to Cuba. Helms-Burton Act: Resurrecting the Iron Curtain, COUNCIL ON HEMISPHERIC AFFS. (June 10, 2011), http://www.coha.org/helms-burton-act-resurrecting-the-iron-curtain/ [https://perma.cc/23EQ-UNWM]. The Trading with the Enemy Act, which currently applies only to Cuba, also makes up the framework of embargo regulations. See Dianne E. Rennack & Mark P. Sullivan, Cuba Sanctions: Legislative Restrictions Limiting the Normalization of Relations, CONG. R SCH. SERV. (May 4, 2018), https://fas.org/sgp/crs/row/R43888.pdf [https://perma.cc/P8T7-JWFV].

21. COUNCIL ON HEMISPHERIC AFFS., supra note 20.

22. HOLDEN & VILLARS, supra note 7, at 57.


24. Id.


26. Solis, supra note 19, at 716.

27. Dunning, supra note 23, at 222.
support.\textsuperscript{28} President Bill Clinton, however, was hesitant to sign the bill.\textsuperscript{29} Then, in 1996, the Cuban air force shot down two American planes operated by a Miami-based Cuban exile group, killing the four activists in the incident.\textsuperscript{30} Public outrage and the upcoming presidential election strongly influenced President Clinton’s decision to sign the Helms-Burton Act on March 12, 1996.\textsuperscript{31}

The US sanctions regime against Cuba is meant to coerce the last communist nation in the Western Hemisphere into democracy; however, neither the embargo nor the Helms-Burton Act has been effective in bringing political change to Cuba. Rather, these policies have merely aggravated tensions between the two neighbors, damaged the United States’ reputation in the international community, and caused substantial economic harm to Cuba and even the United States. The United Nations has estimated that the trade restrictions have cost Cuba more than $130 billion in economic damages since the embargo’s inception.\textsuperscript{32} Further, it is estimated that each year, the United States loses between $126 million and $252 million in agricultural sales.\textsuperscript{33} The embargo also increases worldwide trade costs, as nations exporting goods to the United States must certify that their products do not contain any raw materials originating from Cuba.\textsuperscript{34}

The United States has made some adjustments to its strict policies with respect to Cuba since the passage of the Libertad Act. In 1999, some restrictions were eased, allowing the US to export certain medical supplies

\textsuperscript{28} Id. at 222-23.
\textsuperscript{29} COUNCIL ON HEMISPHERIC AFFS., supra note 20.
\textsuperscript{30} Rene Sanchez & Catharine Skipp, Two Exile Planes Shot Down Near Cuba, WASH. POST (Feb. 25, 1996), https://www.washingtonpost.com/archive/politics/1996/02/25/two-exile-planes-shot-down-near-cuba/f5c76c05-677b-4f55-9a62-6787366d892/?noredirect=on&utm_term=.5148982440ca [https://perma.cc/KVX2-9AU7]. The activist group, known as “Brothers to the Rescue,” regularly flew in or around Cuban airspace spotting refugees and dropping leaflets that called for the overthrow of Fidel Castro. Despite warnings from the Clinton Administration to stay away from Cuban waters, the group continued its efforts, which Cuba viewed as a direct threat to the stability of its government. Reports suggest that the group’s flight plan did not list Cuba as their destination, and likely detoured. Id.
\textsuperscript{32} U.S.-Cuba Relations, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/us-cuba-relations [https://perma.cc/LKW8-XAEA] (Last updated Nov. 17, 2021); FEINBERG, supra note 17, at 13 (providing a detailed breakdown of economic damages claimed by Cuba).
\textsuperscript{33} COUNCIL ON HEMISPHERIC AFFS., supra note 20.
\textsuperscript{34} Id.
and food products to Cuba.\footnote{35} Relations began to thaw once President Barack Obama entered the White House in 2008. President Obama fulfilled his campaign promise to pursue direct diplomacy with Cuba, and his administration loosened restrictions on trade, remittances, and travel.\footnote{36} In late 2014, the two governments announced that they would restore full diplomatic ties.\footnote{37} Embassies were reopened, the United States removed Cuba from its official list of terrorism sponsors, President Obama repealed the “wet foot, dry foot” policy,\footnote{38} and he became the first sitting US President to visit Cuba since Calvin Coolidge toured the island in 1928.\footnote{39} The election of President Donald Trump in 2016 largely reversed these efforts. President Trump reinstated some of the travel and trade restrictions that had been eased and maintained that “U.S. sanctions will not be lifted until Cuba frees all . . . political prisoners, respects freedoms of assembly and expression, legalizes opposition parties, and schedules free and fair elections.”\footnote{40}

B. OVERVIEW OF THE ACT AND TITLE III’S ACTIVATION

The Helms-Burton Act is composed of four titles. Title I of the Act, labeled “Strengthening International Sanctions Against the Castro Government,” sets out multiple guidelines related to the economic embargo against Cuba. More specifically, it prohibits the indirect financing of Cuba, opposes Cuba’s membership in international financial institutions, withholds foreign assistance from any state found to be aiding Cuba’s military and intelligence facilities, and conditions reinstitution of family remittances and travel to Cuba on fundamental economic and political changes.\footnote{41}

Title II is labeled “Assistance to a Free and Independent Cuba,” and is meant to assist the Cuban people in a variety of ways after a transition of government and a democratically elected government is established.\footnote{42}

Title III, the most controversial provision, is labeled “Protection of Property Rights of United States Nationals.”\footnote{43} Title III creates a private right of action, allowing US nationals and companies to recover monetary damages in US district courts for claims stemming from the uncompensated

\footnote{35}{\textit{COUNCIL ON FOREIGN RELS.}, supra note 32.}
\footnote{36}{\textit{Id.}}
\footnote{37}{\textit{Id.}}
\footnote{38}{\textit{Id.} Passed in 1995, this policy allowed Cubans who reached the US without authorization to maintain permanent US residence. The repeal brought the treatment of Cuban immigrants in accordance with the US’s policies of other undocumented immigrants. \textit{Id.}}
\footnote{39}{\textit{COUNCIL ON FOREIGN RELS.}, supra note 32.}
\footnote{41}{22 U.S.C. §§ 6032-6034, 6036, 6042 (1996).}
\footnote{42}{\textit{Id.} § 6061.}
\footnote{43}{\textit{Id.} §§ 6081-6085.}
expropriation of their property by the Cuban government. These claims may be brought against any person who “traffics” in such expropriated property. The Act states that

a person traffics in confiscated property if that person knowingly and intentionally—

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,

(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

Notably, the Act applies to (1) any US citizen, including Cubans who were not US nationals at the time of the expropriation, but who subsequently became naturalized American citizens, and (2) any legal entity organized under US laws with a principal place of business in the United States, including Cuban legal entities that were not organized in the US at the time of the expropriation but that currently are.

Finally, Title IV, “Exclusion of Certain Aliens,” gives the US government the power to deny entry to aliens who either “traffic” in confiscated property once belonging to US nationals or who are corporate officers or majority shareholders of corporations that “traffic” in such property. Further

44. Id. § 6082.
45. Id. § 6023(13)(A). The term “knowingly” is further defined in the Act as “with knowledge or having reason to know.” 22 U.S.C. § 6023(9) (1996).
46. Id. § 6023(15).
47. Id. § 6091. Most recently, Spanish CEO Gabriel Escarrer of Meliá Hotels International, S.A. was banned from entering the United States due to the company’s operations in Cuba. See Spain’s Melia says CEO banned from U.S. over hotels in Cuba, REUTERS (Feb. 5, 2020, 12:05 PM), https://www.reuters.com/article/us-melia-cuba-usa/spains-melia-says-ceo-banned-from-u-s-over-hotels-in-cuba-idUSKBN1ZZ2G0 [https://perma.cc/9JFT-HU5C].
ther, these individuals’ spouses, children, and agents are also excludable from entry under this Title.48

The passage of the Helms-Burton Act was met with intense criticism from the international community, particularly with respect to Titles III and IV, due to their extraterritorial nature and violation of international trade treaties. Mexico and Canada condemned Title IV of the Helms-Burton Act as a violation of Chapter 16 of the North American Free Trade Agreement (NAFTA), which allows businessmen to travel freely throughout the NAFTA countries.49 The two nations also passed retaliatory legislation.50 The European Union (EU) responded forcefully, stating, “We do not believe it is justifiable or effective for one country to impose its tactics on others.”51 EU ministers expressed their displeasure not only with the extraterritorial provisions of the Act, but also with the effects that it would have on the World Trade Organization (WTO) and the international trade system, in general.52 The EU’s message was clear—it in no way intended to comply with the Act, and on November 22, 1996, it unanimously passed a “blocking statute,” which allows Europeans to bring their own suits to recover any damages assessed in US courts pursuant to Title III of the Act.53

Importantly, the Helms-Burton Act allows the sitting US President to suspend the right to sue under Title III for a period of six months if the President determines “that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.”54 Since the Act was passed, a US President or Secretary of State has regularly suspended Title III.55 Even the Trump Administration, which was perceived as more uncompromising toward Cuba, continued to suspend the provision in the first two years of its term.56

49. Dunning, supra note 23, at 228-29; PBS, supra note 31.
50. Solis, supra note 19, at 729-32.
51. Id. at 727.
52. Id. The EU brought a challenge to the Act in the WTO because it punishes foreign companies for conducting business outside US borders, but dropped the case in 1998. PBS, supra note 31.
56. July 2018 was the last time the Trump Administration suspended Title III. Id.
The Administration, however, began to review this policy following mounting protests and political tensions in Venezuela and Nicaragua.\(^{57}\) Accordingly, on January 16, 2019, Secretary of State Michael Pompeo announced that the Trump Administration would be suspending Title III for only forty-five days, instead of the typical six-month period permitted under the Act. The goal was to permit the Administration to conduct a careful review of the right to bring action under Title III in light of the national interests of the United States and efforts to expedite a transition to democracy in Cuba and include factors such as the Cuban regime’s brutal oppression of human rights and fundamental freedoms and its indefensible support for increasingly authoritarian and corrupt regimes in Venezuela and Nicaragua.\(^{58}\)

In March 2019, Secretary of State Pompeo reported his determination to suspend Title III for an additional thirty days through April 17, 2019, while continuing “to study the impact of [the] suspension on the human rights situation in Cuba.”\(^{59}\) This suspension was limited, and starting March 19, 2019, American citizens and companies could bring suits in US federal courts against entities and sub-entities identified on the “Cuba Restricted List”—a Department of State compilation of Cuban entities that the US government considers to be “under the control of, or acting for or on behalf of, the Cuban military, intelligence, or security services personnel.”\(^{60}\) On April 2, 2019, Secretary Pompeo announced that this partial lifting would be extended for another two weeks through May 1, 2019.\(^{61}\) Then, on April 17, 2019, President Trump fully lifted the long-standing limitation on

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60. The State Department’s List of Entities and Subentities Associated with Cuba, 82 Fed. Reg 52090 (Nov. 9, 2017).

American citizens seeking to file lawsuits against persons and entities that “traffic” in property confiscated by the Cuban regime. Consequently, Title III became effective on May 2, 2019, for the first time since the Act’s passage in 1996, and Secretary Pompeo warned: “Those doing business in Cuba should fully investigate whether they are connected to property stolen in service of a failed communist experiment.”

Even with the historically consistent suspension of Title III, the Libertad Act negatively impacted the Cuban economy. Foreign investors were always cognizant of the risks involved with pursuing business in Cuba, especially those that have property or subsidiaries in the United States. The activation of Title III has cast further doubt upon the validity of property titles, capable of causing discouragement of foreign investment, privatization, as well as economic recovery and diversification in Cuba. Section III of this Article explores the issue of effective transfer of property titles under international law and US real property law along with the Act’s various violations of international legal norms.

III. INTERNATIONAL LEGAL CONSIDERATIONS WITH RESPECT TO TITLE III

The legality of Cuba’s expropriation of land is a distinct analysis from the legality of the Helms-Burton Act, which focuses on the extent of national jurisdiction over an extraterritorial act. While certain expropriations by the Cuban government may be considered to be illegal under international law, that does not mean that it is lawful for the United States to extend its jurisdiction to adjudicate acts that wholly take place within Cuba. The Act is inconsistent with international law for several reasons. First, Title III attacks the rights of third parties, who arguably have valid title to the property, as supported by real property law principles and the principle of permanent sovereignty over natural resources. Second, Title III exercises extraterritorial jurisdiction beyond any internationally recognized basis for

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jurisdiction, as it concerns transactions between foreign nationals and the Cuban State involving Cuban territory. Third, Title III’s conferral of retroactive rights upon naturalized Cuban-Americans is an unlawful interference in Cuba’s domestic affairs and a violation of the nationality of claims principle. Fourth, by declaring the act of state doctrine inapplicable, Title III forces the judicial branch to exercise the core functions of the legislative and executive branches. And fifth, Title III essentially acts as a secondary boycott, which is a violation of both US and international legal principles.

A. WERE THE CUBAN EXPROPRIATIONS A VIOLATION OF INTERNATIONAL LAW?

Cuba’s 1940 Constitution recognized “the existence and legitimacy of private property in its broadest concept as a social function.” Further, Article 24 of the Constitution prohibited confiscation except by a competent judicial authority, made with prior payment and justified by public utility. After the 1959 revolution, Castro amended Article 24 to allow for discriminatory takings of property from Batista’s supporters. The new Cuban government then repealed the Constitution of 1940 and drafted a new constitution in line with its communist goals. The Cuban nationalization process largely occurred between 1959 and 1968, targeting different categories of landowners and property during each step.

Castro’s government first seized the property of Batista government officials and alleged counterrevolutionaries. These seizures can be labeled as “confiscations” and diverge from Cuba’s later “expropriations” of property.

[A] confiscation is [a] seizure of private property by the state without compensation, usually to punish the person whose property is seized for who he is or for what he has done. Confiscations are ordered for political, religious, legal, or other reasons.

65. Ortiz, supra note 17, at 326 (citing Article 87 of the 1940 Cuba Constitution).
66. Id.
67. Id. at 328.
68. Id. at 329.
70. Id.
relating to a person subjected to the taking, and not the property itself. 71

In contrast, an expropriation “is the taking by the state, subject to compensation, of a specified property for some public purpose, with the taking being independent of the acts or identity of the owner.” 72

Following these initial confiscations, the Cuban government passed a series of laws targeting Cuban-owned property more generally as well as foreign-owned property. The Agrarian Reforms of 1959 and 1963 allowed the takeover of agricultural estates and cattle ranches. 73 The Urban Reform Law of October 1960 transferred all rental residential properties to the Cuban State, giving the government the exclusive right to lease residential properties. 74 In July 1960, the Cuban government passed Law No. 851, which authorized the expropriation of property and businesses in Cuba belonging to US citizens and stipulated that compensation would be resolved at a later date. 75 With Law No. 890 of 1960, the Cuban government expropriated and nationalized nearly all remaining foreign-owned and Cuban-owned businesses and industries. 76 Then, the “Revolutionary Offensive” of 1968 sought to end all private business, with the exception of a few small-scale agricultural businesses. 77 The last category of takings centered on abandoned property. Cuba’s passage of Law No. 989 of 1961 essentially deprived Cubans who had moved abroad of their inheritance and property rights. 78 As a result,

Cubans leaving the country for the United States [were given] twenty-nine days to return to Cuba; those traveling elsewhere in the Western hemisphere had sixty days, and those traveling to Europe had ninety days. Failure to return to Cuba within those time periods was deemed a permanent

71. Id. at 83 (citing BLACK’S LAW DICTIONARY (4th ed. 1968)). Throughout this Article, I often use the term “confiscated property” because that is the term utilized in the statute and by plaintiffs and defendants in their pleadings—this word choice is not meant to suggest that a particular seizure of property by the Cuban Government was ordered to punish the former property owner.
72. Id. (citing BLACK’S LAW DICTIONARY (4th ed. 1968)).
73. Id. at 83, 85.
74. Anillo-Badia, supra note 69, at 85.
75. Ortiz, supra note 17, at 332.
76. Id.
77. Anillo-Badia, supra note 69, at 86.
78. Id.
departure from the country, rendering the person’s property subject to confiscation.  

The uncompensated expropriation of US-owned property is the root of much of the antagonism between Cuba and the United States. It is widely recognized that a state has the right to take possession of private property belonging to both its own citizens and foreign nationals, provided that the taking is for a legitimate public purpose and that compensation is paid to the owner. Further, if the taking involves foreign-owned capital, it must be non-discriminatory toward the foreign owners. While the Cuban expropriations arguably served a legitimate state interest since they advanced Castro’s socialist state, Cuba has not satisfied compensation and must still resolve these outstanding property claims. 

There is a divergence of views in the international legal field regarding the issue of compensation for expropriated property. That being said, the Cuban government does not dispute the principle of compensation for the taking of foreign properties. In fact, Law No. 851 included a compensation mechanism that would provide such compensation “by means of 30-year bonds yielding two percent (2%) interest, to be financed from the profits Cuba realized from sales of sugar in the US market in excess of 3 million tons per annum at not less than 5.75 cents per pound.” This indicates that Cuba acknowledges its legal duty to indemnify American property owners for the takings. Cuba also “formally reaffirmed its willingness to discuss claims with the U.S. government” after President Obama initiated diplomatic relations. In 2015, a bilateral commission was charged with addressing a number of issues, including the nearly six thousand certified US property claims.

79. Id.  
82. Id. at 357.  
83. See infra Section III.C.  
84. FEINBERG, supra note 17, at 10. Cuba has already negotiated bilateral settlements of outstanding property claims with other governments, including Canada (1980), Great Britain (1978), France (1967), Spain (1967), and Switzerland (1967). These payments have not been large and typically resemble a “lump sum settlement,” which the receiving nation then distributes to claimants. Id. at 11-12.  
85. ANILLO-BADIA, supra note 69, at 83 n.1.  
86. Id.  
87. FEINBERG, supra note 17, at 7.  
88. Id. at 3. In 1964, the US Congress directed the Foreign Claims Settlement Commission (FCSC) to determine the amounts of valid US claims against Cuba based on
Scholars recognize that “the expropriation claims by U.S. nationals and Cuban citizens have separate legal and political bases and may have to be addressed differently by the Cuban government.” A state’s treatment of foreign nationals within its territory falls within the scope of international law, and Cuba will have to grapple with how to properly compensate US nationals whose property was expropriated. By contrast, the standard by which a state treats its own citizens is a domestic matter and “international law principles do not provide a remedy to domestic claimants for the expropriation of their assets by their government. The resolution of the Cuban nationals’ expropriation claims, therefore, [should] be handled in accordance with Cuban laws.”

Through the Helms-Burton Act, the United States seeks to blur the line between these two distinct groups of claimants. The number of US property claims was not large enough to threaten the Cuban economy, but by allowing Cuban-Americans to avail themselves of the remedies provided by Title III, the United States sought to ensure the deterrence of foreign economic activity in Cuba by threat of litigation in US courts—a threat that has now become reality. Yet, international law suggests that expropriation, whether followed by immediate compensation or not, effectively transfers title of the property to the Cuban government and then on to third parties, if any, indicating that Title III’s legal foundation is fragile.

B. EFFECTIVE TRANSFER OF TITLE

While some consider Cuba’s expropriation of US-owned land to be a breach of international legal obligations, because compensation was never satisfied and evidence suggests that some of the initial takings were discriminatory, the issue in this case boils down to this:

losses resulting from expropriation. Id. at 16-20. See infra Section IV.A., for a detailed discussion on the FCSC’s Cuban Program.


90. FEINBERG, supra note 17, at 16-20. For possible compensation solutions see id. at 27-34.

91. Travieso-Diaz, supra note 89, at 223; see also Muse, supra note 89, at 243.

92. Muse, supra note 89, at 223-25.

93. Travieso-Diaz, supra note 80, at 10 n.34.

It has been the conclusion of U.S. courts and legal scholars that at least some of the expropriations of the assets of U.S. nationals, such as those arising from Law 851 of July 6, 1960, were contrary to international law on the additional grounds that they were ordered in retaliation against actions taken by
When title to the property has been transferred by the State to a third party, whose title is challenged by the expropriated owner, the foreign court will have to pass judgment upon the validity of this transfer. Will public policy prevent the recognition of the transfer? There is no unity of opinion on this matter.94

In 1947, several law professors confronted this question at an international law conference, each taking a different stance. Professor B.A. Wortley, from the University of Manchester, read his paper on “Expropriation in International Law,” and others commented on it. Wortley stated:

To nationalize without compensation is confiscation; it is not in accordance with international law, and it is effective only so long as the sovereign continues in effective possession of the thing taken. A confiscating sovereign cannot expect his title, acquired solely by his own law and in contradiction to international law, to be universally guaranteed, and indeed it is not. Once the question of sovereign immunity goes, then a mere declaration by a sovereign will not confer a title.95

Professor Wortley added that while it is accurate to say that the validity of a sovereign’s acts in relation to property within its jurisdiction cannot be questioned in that nation’s courts, “it is quite another thing to say that the act of a sovereign in his own country necessarily gives an internationally valid title capable of transfer to third parties, in respect of all property seized by that State.”96

the United States to eliminate Cuba’s sugar quota, and because they discriminated against U.S. nationals.

Id. 94. George A. van Hecke, Confiscation, Expropriation and the Conflict of Laws, 4 Int’l L.Q. 345, 356 (1951) (“[T]he effect of confiscatory measures is strictly limited to the territory of the confiscating State. But once they have been carried into effect within the jurisdiction, the unconditional recognition of the third party’s title, as applied by the English and American courts, and the doctrine of jurisdictional immunity both combine to reduce to a bare minimum the protection which foreign courts can give to dispossessed owners.”). Id. at 357.


96. Id.
While some agreed with Wortley’s synopsis of the law, others found issue with his treatment of transfer of title to third parties. Professor G.C. Cheshire stated:

To deny the validity of a title acquired by a purchaser from the confiscating Sovereign would be a dangerous precedent and would be inconsistent with the general principles that govern the assignment of choses in possession in Private International Law. Moreover, would it not be regarded as an affront to the foreign Sovereign? Personally, I would hesitate to agree with the suggestion that if the expropriation by a State of property within its jurisdiction is contrary to natural justice, then no internationally valid title is acquired either by the State or its successors.97

This notion has been further developed and supported since 1947. Thus, even if some of the Cuban expropriations were “contrary to international law for one or more reasons, they were legally effective in transferring title to the assets to the Cuban state.”98

Indeed, United Nations researchers affirm that “[i]n cases of direct expropriation, there is an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure.”99 As discussed, the Cuban government passed a series of laws reflecting its intent to nationalize privately owned land, businesses, and industries in Cuba. With this newly acquired authority, Cuba engaged in direct expropriation resulting in the transfer of title of the properties benefiting the Cuban State or state-mandated third parties. Even assuming that Cuba’s 1940 Constitution was still in effect, its language “strongly suggests that the Cuban government’s failure to pay compensation in accordance with the constitutional provision

97. Id. at 37. See also van Hecke, supra note 94, at 356 (“In England it has been held, with regard to Soviet measures of nationalisation, that title to property situated within the jurisdiction of the confiscating State has validity and conclusively passed to the State and that hence the claim brought in England against the third party must fail, even though the previous owner is a British subject.”) (citing Luther v. Sagor, [1921] 3 K.B. 532 (U.K.)). Germany, Belgium, and Austria have held similarly. Id.

98. Travieso-Diaz, supra note 80, at 10 n.34.

99. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, at 7, U.N. Sales No. E.12.II.D.7 (2011) (emphasis added). In contrast to direct expropriation, “indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure.” Id. This well recognized category of expropriation is not at issue here.
did not render the takings legally ineffective, but instead transferred title of
the properties to the government and gave rise to an obligation to compen-
sate former owners.”

Article 24 of the Cuban Constitution required com-
pensation of expropriated property, but also made clear that “[f]ailure to
comply with [its] requirements shall give rise to the right by the person
whose property has been expropriated to the protection of the courts and, if
appropriate, to have the property returned to him.” This suggests that
title was meant to remain with the state unless and until a court ruled that
the expropriated property should be returned. A ruling by a Cuban court
that the government’s takings were legally invalid is highly unlikely; how-
ever, even if a court were to hold that particular takings were invalid and
require some form of relief, “it is likely that the court would find that the
takings were nonetheless effective in transferring title of the properties to
the state.” Of course, this does not signify that the Cuban government is
free of its duty to compensate the injured for the takings; however, that duty
has no bearing on the effective passing of title.

This conclusion is arguably supported by US real property jurispru-
dence as well. While the Fifth Amendment of the United States Constitu-
tion provides, in relevant part, that “private property [shall not] be taken for
public use, without just compensation,” the United States Supreme Court
has held that the “Fifth Amendment does not require that just compensation
be paid in advance of or even contemporaneously with the taking.” All
that is required is the existence of a “reasonable, certain and adequate pro-
vision for obtaining compensation.” Thus, Supreme Court precedent
stands for the proposition that property can indeed transfer without the im-
mediate payment of owed compensation.
Furthermore, the doctrine of equitable conversion recognizes that the interest in owning property and the interest in being compensated for property owned are distinct and severable.\textsuperscript{108} For example, when a property owner enters a contract to sell land, the buyer acquires the seller’s property interest, but the seller retains a pecuniary interest in the property—that is, “[t]he seller’s interest is treated as one in personal property because the seller’s true interest is in the proceeds.”\textsuperscript{109}

The rationale underlying equitable conversion can be extended to the exercise of eminent domain—a property owner whose land is the object of a state condemnation action has separate and distinct fungible and nonfungible interests in his property. More specifically, “[o]nce the right to take an individual’s property is established, the owner’s interest becomes an interest in fungible property (money) and the exact amount the government must pay can be determined after possession transfers.”\textsuperscript{110} The taking of private property can be further analyzed by the property rule and liability rule. The notion that one is protected from being deprived of his private property implicates the\textit{ property rule}; however, where circumstances demand the abrogation of this right, the\textit{ liability rule} comes into play, and just compensation must be provided in exchange for property taken for some legitimate public use.\textsuperscript{111} Thus, “[i]f an eminent domain action is executed by a lawfully authorized agent for a public use without paying just compensation initially, the property owner can later be made whole by awarding interest on the ultimate amount paid by the taking authority.”\textsuperscript{112}

Given these domestic and international legal principles, Congress’s finding that parties can legally be held liable for their dealings in what are now Cuban State–owned assets and lands is unsound. Pursuant to its constitution and national laws, Cuba engaged in direct expropriation of land for a public purpose. These expropriations necessitate compensation but were nevertheless effective in passing title from the original owners to the Cuban State. Subsequently, Cuba had the full right to transfer its interest to third parties. Therefore, any possession, use, or transfer of the property by either Cuba or a third-party purchaser should not be deemed “trafficking.” Certainly, the passage of time between the expropriations and the compensation poses many issues in determining recompense; however, those issues can be addressed by granting interest on the ultimate amount awarded when the final determination of just compensation is made.

\textsuperscript{108} Id. at 1314.
\textsuperscript{109} Equitable Conversion, BLACK’S LAW DICTIONARY (11th ed. 2019).
\textsuperscript{110} Hudson, supra note 107, at 1314.
\textsuperscript{111} Id. (citing Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1092 (1972)).
\textsuperscript{112} Id. at 1315 (emphasis added).
C. PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

The argument that title to the Cuban lands was effectively transferred following the expropriations is further supported by the principle of permanent sovereignty over natural resources. This principle was formally adopted by the United Nations General Assembly in 1962 by resolution 1803 (XVII), which provides that member states and international organizations will respect the sovereignty of nations over their natural wealth and resources.\textsuperscript{113} The resolution sets out eight articles concerning the exploration, development and disposition of natural resources, nationalization and expropriation, economic development, foreign investment, and other related issues.\textsuperscript{114} Paragraph 4 of the resolution states:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.\textsuperscript{115}

The resolution makes clear that a state has the right to nationalize property belonging to both its own citizens and foreign nationals, subject to the requirements stipulated by international law. Those requirements are: (1) the taking must be for a public purpose; (2) it must be non-discriminatory; and (3) compensation must be paid promptly, adequately, and effectively.\textsuperscript{116} This triple standard has changed over time, and "State
practice no longer provides support for the traditional claim that both the amount of compensation should be assessed and payment be made at the time of, or even prior to, the act of dispossession." 117 A number of circumstances are now taken into account when adequacy of compensation is discussed, including: (1) the state’s financial capacity to pay, (2) the length of exploitation, (3) the contribution the nationalized property made to the economic and social development of the state, and (4) the state’s reinvestment policies. 118 Accordingly, “if a large-scale nationalization program is implemented as a measure of social reform, less stringent compensation requirements should be imposed.” 119

The principle of permanent sovereignty over natural resources was subsequently incorporated in Article 2 of the Charter of Economic Rights and Duties of States (CERDS), which “reflected the growing Third World dissent from the international principle embodied in resolution 1803 (XVII).” 120 CERDS also acknowledges appropriate compensation, but it proceeds with a “precatory should,” suggesting that “CERDS has repudiated the principle of compensation as an international regulatory norm.” 121 These developments support the argument that Cuba had the prerogative to expropriate land after the Cuban Revolution, and that Cuba, not the United States, has the last word on the disposition of property, even if it owes a remedy to the original owner. 122

D. ADDITIONAL CONSIDERATIONS UNDER INTERNATIONAL LAW

Setting aside the inference that third parties who deal in expropriated property are wrongfully targeted by Title III because either they or the Cuban government holds valid title to the properties, the Helms-Burton Act poses other concerns, as it violates certain well-established principles of customary international law.

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117. Visser, supra note 116, at 82.
118. Id.; see also O’Connor, supra note 81.
119. Kradagich, supra note 116, at 34. Some have even argued that these states have no duty to compensate for expropriations unless they have been unjustly enriched. Id.
120. Visser, supra note 116, at 83.
121. Id. at 83-84. Article 2 of CERDS states, “Each state has the right: To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent.”
122. Of course, some disagree with this position and believe that “[a]bsent compensation, an expropriating country cannot transfer legally valid title to third-party purchasers. There can never be a secure right to private property if a thief can pass good title.” Ortiz, supra note 17, at 340.
1. Extraterritorial Jurisdiction

The Act’s greatest encroachment on international law may be its endeavor to control conduct abroad through the exercise of jurisdiction. Jurisdiction is an aspect of a state’s sovereignty, so it is generally restricted to the things and persons over which a state has sovereign authority.123 Territoriality and nationality are the primary bases of such authority.124 Thus, as a general rule, a state cannot exercise its powers in the territory of another state. Given this presumption, the question presented by the Act’s passage is whether “the United States [is] legally competent to legislate with respect to properties and activities beyond its territorial boundaries” and within the sovereign state of Cuba.125 The answer is no, with some exceptions.

a. The Effects Doctrine

The Restatement (Third) of Foreign Relations Law of the United States indicates that some extraterritorial jurisdiction may be recognized under international law. Section 402 of the Restatement asserts that “a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory.”126 This is known as the “effects doctrine,” and it permits a state to address offenses or acts commenced outside its territory causing serious and harmful consequences to the social and economic order within the state’s territory. Section 403 of the Restatement, however, adds an important limitation: “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”127 Section 403 provides several factors to help determine whether such jurisdiction is reasonable.128

First, it is doubtful that any substantial effects indeed resulted within US territory from the expropriations.129 The “certified claims of U.S. citizens only constitute 5% of the industrial and commercial properties in Cu-

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123. Muse, supra note 89, at 238.
124. Id.; AM. SOC’Y INT’L L., BENCHBOOK ON INTERNATIONAL LAW § IIA (Diane Marie Amann ed., 2014), https://www.asil.org/sites/default/files/benchbook/jurisdiction.pdf [https://perma.cc/KR5C-7YNZ]. Territoriality refers to “conduct taking place within the country’s territory, or designed to have effects within the country’s territory,” and nationality refers to “conduct performed by the country’s nationals.” Id.
125. Muse, supra note 89, at 239.
126. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (AM. L. INST. 1986) (emphasis added). See also Solis, supra note 19, at 721.
128. Id. § 403(2).
129. See Muse, supra note 89, at 261-65.
While the claims of Cuban-Americans add significantly to that percentage, they contribute nothing to the effects within US territory because the taking of Cuban citizens’ property did not violate international law and preceded the Cubans’ arrival to the United States, as well as their attainment of US citizenship. Even if effects can be found, they are far too indirect. Further, it was the Cuban government to cause any such effects, not the third-party purchasers, developers, or investors who are largely targeted by Title III. Thus, “the exercise of jurisdiction over persons found to be ‘trafficking’ in [what was once property belonging to Americans] punishes foreign corporations investing in Cuba while legally not touching the Cuban government.”

Next, the factors provided under Section 403 indicate that extraterritorial jurisdiction in this case is unreasonable for a number of reasons, including (1) the “trafficking” takes place in Cuba, not the United States; (2) the “traffickers” are typically not US citizens; (3) the Act ignores Cuba’s interests in implementing its own legal rules regarding real property; and (4) the international community has not accepted the notion that US citizens should be allowed to sue for the “trafficking” referred to in the Act. In short, “[i]t does not appear reasonable for the U.S. government to dictate the investment policies of foreign companies deciding whether to invest in a separate foreign country.”

Lastly, the exercise of extraterritorial jurisdiction could also be permitted by the passive personality principle, which allows states to claim jurisdiction to try foreign nationals for offenses committed abroad that affect its own citizens. While US nationals could be considered victims of the Cuban government’s conduct, those US nationals are victims of the uncompensated expropriation, but not plausibly of the “trafficking,” at which Title III is directed. Thus, once again, the application of US law to conduct linked to the third-party investors or purchasers should be precluded because it is unreasonable under Section 403.

131. Muse, supra note 89, at 263-64.
132. Solis, supra note 19, at 722.
135. AM. SOC’Y INT’L L., supra note 124. In addition to territoriality, nationality, and passive personality, the other two recognized bases for asserting extraterritorial jurisdiction are universality and the protective principle. The former refers to “conduct recognized by the community of nations as of universal concern,” while the latter refers to “conduct directed against a country’s vital interests.” Id. at II.A-1.
b. Claims of Cuban-Americans

As explained, Title III provides standing to Cuban-Americans who were not US citizens when the expropriations took place. Retroactively extending jurisdiction to this class of claimants is plainly unsupported by international law. In 1995, before the Helms-Burton Act was passed, David Wallace, the chairman of the Joint Corporate Committee on Cuban Claims, urged the Senate to oppose Title III, stating:

[Title III] poses the most serious threat to the property rights of the certified claimants since the Castro regime’s confiscations more than thirty years ago. . . . In effect, this provision creates within the federal court system a separate Cuban claims program available to Cuban-Americans who were not U.S. nationals as of the date of their injury. This unprecedented conferral of retroactive rights upon naturalized citizens is not only contrary to international law but raises serious implications with respect to the Cuban Government’s ability to satisfy the certified claims. Allowing Cuban-Americans to make potentially tens if not hundreds of thousands of claims against Cuba in our federal courts may prevent the U.S. certified claimants from ever receiving the compensation due [to] them under international legal standards.136

As Wallace pointed out, Title III’s extension to Cuban-Americans is a clear violation of international law because it (1) intervenes with Cuba’s domestic affairs, and (2) violates the nationality of claims principle. It is well recognized that “[t]he obligation of states to respect the sovereignty of other states constitutes the fundamental principle underpinning the structure of public international law.”137 It is also undisputed that Cuba had the right to expropriate land of its own nationals under both its own laws and under international law. In doing so, Cuba did not breach any international legal obligations owed to the United States. In fact, “confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of

137. Id. at 245.
Accordingly, Title III is not a “legitimate exercise of state protection by the United States on behalf of Cuban Americans.”

Title III also violates the “nationality of claims” principle, which establishes that eligibility for compensation requires US nationality at the time of the loss. Thus, the Cuban government’s expropriation of property owned by Cuban nationals should not be actionable in US courts. Yet, Title III allows just that, thereby exponentially increasing the number of potential suits and distorting an established international legal principle.

2. The Act of State Doctrine

Next, by unreasonably exercising its jurisdiction over extraterritorial activities, the Helms-Burton Act also violates the act of state doctrine. This judicially developed doctrine limits the circumstances under which US courts will examine the validity of foreign government acts. The doctrine is premised partly on the concept of sovereignty and partly on the basic relationships between the branches of government.

In 1964, the Supreme Court upheld the act of state doctrine in Banco Nacional de Cuba v. Sabbatino with respect to Cuba’s power to expropriate property of foreigners. The Court explained that the doctrine “expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.” Clearly uneasy about the prospect of ruling on the legality of Cuba’s expropriations, the Court made it clear that “the act of state doctrine required sovereign acts to be treated as legally operative, and be given effect in the courts of other sovereigns, whether or not the act in question violated duties imposed by international law.”

138. Id. at 248 (emphasis omitted) (citing F. Palicio y Cia. v. Brush, 256 F. Supp. 481 (S.D.N.Y. 1966)).
139. Id. (emphasis omitted).
140. Solis, supra note 19, at 724.
141. Id.
142. Alexander, supra note 134, at 555.
143. See Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (“Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.”).
145. Id. at 439.
146. Id. at 423.
Congress tried to limit the effect of the act of state doctrine by declaring it *inapplicable* to actions brought pursuant to Title III.\(^ {148}\) This insistence that federal courts circumvent the act of state doctrine ignores two facts: (1) the realm of international relations belongs not to the judicial branch, but to the legislative and executive branches of government; and (2) the judiciary possesses “limited competence to pass judgement on a foreign sovereign’s laws.”\(^ {149}\) Thus, Title III misappropriates legislative and executive functions.

3. *Secondary Boycotts*

Finally, the Helms-Burton Act operates as a secondary boycott, which is a violation of both US and international law.\(^ {150}\) The United States has outwardly opposed such boycotts since 1977, making it a principle of domestic law.\(^ {151}\) It is unlawful for a US individual or entity “to comply with or further, in the interstate or foreign commerce of the United States, ‘any boycott fostered or imposed by a foreign country against a country which is friendly to the United States.’”\(^ {152}\) In essence, this is exactly what the Act does, as it imposes sanctions against foreign parties who do business with or derive economic benefit from Cuban expropriated property. While the Act may not punish a person for simply trading with Cuba, virtually all industries and commercial enterprises were expropriated after the Cuban Revolution, exposing nearly all foreign investors to liability.\(^ {153}\)

Title III also violates the rights of third-party states to be free of extreme economic coercion under international trade law. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States mentions such coercion twice, once in the preamble and once under the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State.\(^ {154}\) Under this principle, “[n]o State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”\(^ {155}\)

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149. Solis, supra note 19, at 724.
150. E.g., Alexander, supra note 134, at 556.
151. Id.
152. Id. In a secondary boycott, state A (the US) mandates that if X, a national of state B (Canada), trades with state C (Cuba), then X cannot trade with state A (the US). Id.
153. Id. at 557-58.
154. G.A. Res. 2625 (XXV) (Oct. 24, 1970). The Preamble recalls “the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State.” Id.
155. Id.
Secondary boycotts function as non-forcible countermeasures, which may be employed in order to procure cessation of an internationally wrongful act and achieve reparation for the injury. Chapter II of the Articles on State Responsibility details the purpose, conditions, and limits for countermeasures. Notably, countermeasures are strictly limited to protect against disproportionality, the violation of third-party rights or peremptory norms, tendencies toward the escalation of disputes, and bad-faith invocations employed for ulterior motives. Countermeasures are also to be directed against a state, not individuals or companies, and may not be directed against states other than the responsible state. Here, the secondary boycott imposed by Title III violates the rights of third-party states and their nationals to freely invest in Cuba and is disproportionate to the injury suffered. In addition, the liability under Title III is not based on a breach of any international obligation or duty to the United States, which the Articles on State Responsibility call for, but only on the act of “trafficking” in expropriated property.

Finally, the commentary to Article 50 states that the Committee on Economic, Social and Cultural Rights stressed that “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights,” and that “it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.”

It is no secret that Title I’s codification of the Cuban embargo and Title III’s attack on investors is an attempt to force Cuba to capitulate to US demands. In fact, Congressman Dan Burton described Title III’s objective in the following terms:

The real purpose of the bill is to send a very strong signal to a number of foreign entities that it is in their best interest not to do business with Fidel Castro. . . . By getting this message out, we contin-

157. Id. Article 51 references proportionality; peremptory norms are protected under Article 50; Article 52 lists the conditions an injured state must meet before taking countermeasures; and Article 44 governs the admissibility of claims, while Article 49 governs the objects and limits of countermeasures. Id.
158. Id. at 130.
159. Alexander, supra note 134, at 557.
160. Draft Articles on State Responsibility, supra note 156, at 103.
ue to keep Fidel Castro from getting the hard currency he needs to survive.\textsuperscript{161}

Since “there is considerable evidence that the achievement of a world economy based on human dignity requires at least some form of direct foreign investment,”\textsuperscript{162} the Helms-Burton Act can be viewed as a form of extreme economic coercion aimed at undermining Cuba’s independence, a clear prohibition under the Articles on State Responsibility.

IV. LITIGATION UNDER TITLE III OF THE HELMS-BURTON ACT

Section IV of this Article shifts focus to how Title III is being applied in the first rounds of litigation following the activation of the civil remedy provision. I first detail the two Cuban Claims Programs administered by the Foreign Claims Settlement Commission (FCSC) and the types of US property claims certified by the FCSC. In the next subsection, I take a closer look at key definitions in the Act, which extend the reach of Title III to virtually every commercial enterprise in Cuba and relatively remote defendants. This background information is key to understanding the breadth of US property claims in Cuba and the basis for the widespread concern over Title III’s activation. Finally, in the last set of subsections, I analyze a number of leading Title III lawsuits. These cases exemplify the surprising trends born from the parties’ filings and the opinions issued by federal courts, and support my argument for the need to repeal the Helms-Burton Act.

A. CERTIFIED CLAIMS BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION

Long before the Helms-Burton Act became law, on October 16, 1964, the US government amended the International Claims Settlement Act (ICSA) of 1949 to facilitate the future settlement of US property claims against the Cuban government.\textsuperscript{163} To this end, Title V was added to the ICSA authorizing the FCSC, to

\begin{quote}
receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba . . . arising since January 1, 1959 . . . from the national-
\end{quote}

\textsuperscript{161} Muse, supra note 89, at 221.

\textsuperscript{162} Visser, supra note 116, at 88.

ization, expropriation, intervention, or other taking of, or special measures directed against, property . . . of nationals of the United States.\textsuperscript{164}

The FCSC is an independent, quasi-judicial entity within the US Department of Justice that adjudicates the claims of US nationals against foreign governments pursuant to (1) international claims settlement agreements, (2) specific jurisdiction conferred by Congress, or (3) the request of the Secretary of State.\textsuperscript{165} The FCSC has conducted two Cuban Claims Programs.\textsuperscript{166} The first program, authorized by Title V of the ICSA, lasted from 1964 to 1972 and covered claims for losses which occurred on or after January 1, 1959.\textsuperscript{167} The FCSC adjudicated a total of 8,816 claims and found 5,911 of those claims to be compensable.\textsuperscript{168} The total principal value of those claims was $1,851,057,358.00.\textsuperscript{169} Then, in 2005, Secretary of State

\begin{itemize}
\item \textsuperscript{164} Id. Title V also provided for the determination of claims for “disability or death of nationals of the United States out of violations of international law by the Government of Cuba.” Importantly, Title V does not provide for the payment of these losses, but merely certifies the validity and the amount of the losses to provide the Secretary of State with appropriate information for future negotiation. See id.
\item \textsuperscript{165} About the Commission, U.S. DEP’T OF JUST. (July 10, 2015), https://www.justice.gov/fcsc/about-commission [https://perma.cc/6CYY-VMBR].
\item The FCSC was established in 1954 when it assumed the functions of two predecessor agencies: the War Claims Commission and the International Claims Commission. The FCSC and its predecessor agencies have successfully completed 43 claims programs to resolve claims against numerous countries including Germany, Iran . . ., Bulgaria . . ., the Soviet Union, Cuba, China . . ., and Vietnam. More than 660,000 claims have been adjudicated, with awards totaling in the billions of dollars.
\item Id. Funds for payment of the awards are derived from congressional appropriations, international claims settlements, or liquidation of foreign assets in the U.S by the Departments of Justice and the Treasury. Id.
\item \textsuperscript{166} Completed Programs-Cuba, U.S. DEP’T OF JUST. (June 18, 2019), https://www.justice.gov/fcsc/claims-against-cuba [https://perma.cc/A27U-3H7P].
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id. The below statistics are from FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, SECTION II COMPLETION OF THE CUBAN CLAIMS PROGRAM UNDER TITLE V OF THE INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949, https://www.justice.gov/sites/default/files/fcsc/docs/final-report-cuba-1972.pdf [https://perma.cc/R2J2-MCV3].
\end{itemize}
Condoleezza Rice requested a second program to adjudicate claims for uncompensated expropriation of property that arose after May 1, 1967, and that had not been adjudicated during the first Cuban Claims Program. The FCSC received only five claims this time; two of those claims were certified as valid in the principal amounts of $51,128,926.95 and $16,000.

170 Id.

171 Id. For the Secretary of State request, see Letter from Secretary of State, Condoleezza Rice, U.S. Dep’t of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission of the U.S., Dep’t of Justice (July 5, 2005) (on file with https://www.justice.gov/sites/default/files/pages/attachments/2014/06/23/cuba_ii_a.pdf [https://perma.cc/7C9U-2KF6].

In 2015, The Brookings Institution published a report detailing the position of the United States and Cuba with respect to compensation of property claims, and closely reexamining the types of certified claims along with the amount of loss certified. The results are a reminder of the United States’ broad corporate reach in Cuba in the 1950s. The largest fifty claims, which account for $1.5 billion, belong to companies like United Fruit Sugar Company, Exxon, Starwood Hotels and Resorts (Sheraton and Westin Chains), Texaco, Coca-Cola, Colgate-Palmolive, American Brands (formerly American Tobacco), Chase Manhattan Bank (now JPMorgan Chase), IBM World Trade Corporation, General Electric, and General Motors. The largest claim, valued at $267,568,413.62, is owned by Cuban Electric Company, which has a majority of its shares held by Office Depot, Inc. Corporate claims total 899 and account for the “lion’s share” of the total value of certified claims. Conversely, claims of individual US citizens account for the large number of total claims but typically carry much lower loss values. Of the total 5,014 individual claims, only thirty-nine are larger than $1 million and only four claims exceed $5 million in value. While the nearly 6,000 claims—worth close to $2 billion—are not insignificant, experts predicted that lifting Title III’s decades-long suspension would open the door to hundreds of thousands of lawsuits. This is

172. Feinberg, supra note 17.
173. Id. at 18.
175. Feinberg, supra note 17, at 18-19.
176. Id.
177. Id.
178. Id. at 2, 29. This figure does not include the 6 percent per annum interest set by the Commission. Id. Title III also provides for interest on the monetary damages awarded. § 6082 (a)(1)(B) of the Libertad Act states that interest is to be based on the standard civil judgments statute, which calculates interest “from the date of the entry of the judgment at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding.” 28 U.S.C. § 1961(a) (2000).
179. E.g., Francesca Paris, Trump Administration Announces Measures Against Cuba, Venezuela and Nicaragua, WBUR NEWS (Apr. 18, 2019), https://www.wbur.org/npr/714552854/trump-administration-announces-measures-against-
because there are potentially hundreds of thousands of Cuban-Americans who were not US citizens when their properties were expropriated and who, therefore, did not have their claims certified, since Title V of the ICSA only allowed the FCSC to consider claims for property “owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss.”

However, as discussed, the Helms-Burton Act was drafted with the intention of granting standing to these newly naturalized Cuban-Americans. Accordingly, claimants with uncertified claims can still bring an action under Title III if they were ineligible to file a claim with the FCSC during the filing period.

B. A CLOSER LOOK AT THE ACT: KEY TERMS AND PRELIMINARY LITIGATION PATTERNS

The large pool of potential plaintiffs, the Act’s broad definition of “traffics” and “property,” and the monetary damages at stake are all unique factors that were expected to trigger a flood of lawsuits against parties benefiting from expropriated properties. After all, Title III is not only targeted at the Cuban government—the successor-in-interest to former property owners—but it is also directed at individuals, entities, agencies, and other instrumentalities of foreign states that (1) have purchased or otherwise transferred expropriated property, (2) use or benefit from expropriated property while engaging in a commercial activity, and (3) participate in or benefit from a third party’s trafficking in expropriated property, among other prohibited acts.

The Act defines “property” to mean “any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.” However, property does not include real property used for residential purposes unless, as of March 12, 1996—

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180. 22 U.S.C. § 1643c(a) (emphasis added). It is estimated that more than 200,000 Cubans fled the island by 1962 and approximately 1.4 million Cubans have left since then. HODEN & VILLARS, supra note 7, at 54.
181. 22 U.S.C. § 6082(a)(5)(A) (1996). US nationals who were eligible to file a claim with the FCSC under Title V of the ICSA but did not do so may not bring an action on that claim under Title III. Id.
182. Id. § 6023(13)(A).
183. Id. § 6023(12)(A).
(i) the claim to the property is held by a United States national and the claim has been certified under title V of the International Claims Settlement Act of 1949; or

(ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba. 184

Ultimately, nearly every commercial enterprise on the island is at risk of being the subject of a Title III action.

Notably, the Helms-Burton Act specifies that the term “traffics” does not include the following:

(i) the delivery of international telecommunication signals to Cuba;

(ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;

(iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or

(iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba. 185

These definitions and exceptions are being litigated and likely will continue to be until their role and reach become settled.

As for the damages a defendant could be liable for—they are significant. Defendants could be on the hook for much more than the economic benefit they receive from the property. According to Section 6082, damages in a successful lawsuit would be awarded in an amount equal to the greatest of three alternatives: (1) the fair market value of the property, calculated as

184. Id. (quotation marks and citations omitted).
being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; (2) if certified by the FCSC, the amount of the certified claim, plus interest;\textsuperscript{186} or (3) if not certified by the FCSC, the value of the ownership claim as determined by a court-appointed “special master.”\textsuperscript{187} Defendants also risk facing court costs and reasonable attorneys’ fees.\textsuperscript{188} The advantage to bringing an action for a certified claim under Title III is that a certification by the FCSC is conclusive proof of ownership of an interest in property.\textsuperscript{189} Certified claims also benefit from a presumption that the FCSC’s valuation is correct and are eligible for treble damages under Title III.\textsuperscript{190}

With so much money at stake, legal, commercial, and political sectors all around the world were on edge after the activation of the previously dormant civil-remedy provision on May 2, 2019. The Canadian Minister of Foreign Affairs stated in an official press release:

Canada is deeply disappointed with today’s announcement. . . . Since the U.S. announced in January it would review Title III, the Government of Canada has been regularly engaged with the U.S. government to raise our concerns about the possible negative consequences for Canadians—concerns that are long-standing and well known to our U.S. partners. . . . I have also discussed this issue with the EU. I have been in contact with Canadian businesses to reaffirm we will fully defend the

\textsuperscript{186} Id. § 6082(a)(1)(A)(i).
\textsuperscript{187} Id. § 6083(a)(2).
\textsuperscript{188} Id. § 6082(a)(1)(A)(ii).
\textsuperscript{189} Id. § 6083(a)(1). The Cuban Claims Programs are largely considered to be credible. The FCSC was transparent, as it published an extensive report on the completion of the First Program along with a collection of select lead cases and an online index of all of its decisions. The FCSC took seven years to vet the claims, rejected a great number of cases (2,908 in total), reduced the proposed value of some, and even employed external experts to assist when needed. See Feinberg, supra note 17, at 20. However, the FCSC’s methodology has also been criticized by some because it had no access to Cuban property registries and did not conduct on-site inspections. Further, because FCSC adjudications are ex parte and non-adversarial, the Cuban Government could not examine or challenge the evidence presented by the claimants or present its own contradictory evidence. There is also no appeals process and parties disagree on the proper method for calculating fair market value. Id. at 21-22.
interests of Canadians conducting legitimate trade and investment with Cuba.\footnote{191}

Similarly, the High Representative on behalf of the EU made the following declaration:

The European Union deeply regrets the full activation of the 1996 Helms-Burton (LIBERTAD) Act by the United States. The decision to activate Title III, and opening the way for action under Title IV, is a breach of the commitments undertaken in the EU-US agreements of 1997 and 1998, which had been respected by both sides without interruption since then. This will cause unnecessary friction and undermines trust and predictability in the transatlantic partnership.

The EU considers the extra-territorial application of unilateral restrictive measures to be contrary to international law and will draw on all appropriate measures to address the effects of the Helms-Burton Act, including in relation to its WTO rights and through the use of the EU Blocking Statute.\footnote{192}

In an unexpected turn of events, however, the flood of lawsuits that international communities were anticipating turned out to be little more than a trickle. In the first three months of Title III’s activation, only nine cases were filed. After an entire year, twenty-five were filed, and as of May 2021—two years after President Trump officially lifted Title III’s suspension—only forty-some lawsuits were filed.\footnote{193} Even more surprising is the

193. See infra Appendix for a list of the Title III lawsuits filed during this time. Cases transferred to a different venue (Glen v. American Airlines, Inc., for example) or refiled with a different set of defendants (Echevarria v. Trivago GmbH, for example) were counted only once despite showing up on more than one court docket.}
unintended impact Title III has had on American businesses. The Trump Administration may have thought that permitting Title III lawsuits would scare foreign investors out of Cuba; however, due to difficulties with suing foreign corporations, many of the early defendants have been US companies. If the violations of the various principles of customary international law discussed in Section III were not enough to reverse the controversial Libertad Act, the unforeseen targeting of domestic companies that has now come to light is further proof that Title III’s activation has been unsuccessful and that the US legislature should consider the statute’s repeal.

In the remainder of Section IV, I explore the developments in fourteen of the twenty-five cases filed during the first year of Title III’s operation. I divided these cases into three waves—based roughly on the date the complaints were filed and the types of defendants targeted. The cases in the first two waves were filed within the first six months of Title III’s activation and are against a variety of travel and hotel related entities. The cases in the third wave steer away from this pattern and are against producers and sellers of goods. I analyze the complaints, motions to dismiss, responses, and other filings, along with any applicable court orders. Thirteen of the fourteen cases have produced substantive court rulings on reoccurring legal issues centered on: (1) personal and subject matter jurisdiction; (2) Article III standing; (3) the element of scienter; (4) the application of Section 6082(a)(4)(B) of the Act to the inheritance of claims; (5) the “lawful travel” exception under the Act; and (6) constitutional issues such as violations of the Due Process and Ex Post Facto Clauses, excessive and punitive damages, and impossibly vague definitions under the Act. Four of the fourteen cases managed to proceed to the discovery stage. Eight cases were dismissed, and those decisions have been appealed by the plaintiffs in the Third, Fifth, and Eleventh Circuit Courts. One case has been stayed pending an appellate decision in its respective circuit, and another case was administratively closed. Two appellate decisions have been entered by the Fifth and Eleventh Circuit as of January 7, 2022.

C. FIRST WAVE OF LAWSUITS


Following the activation of Title III in May 2019, the first wave of lawsuits targeted a mix of US, Cuban, and other foreign defendants. On the first day possible, Havana Docks Corporation (“Havana Docks”), a Delaware corporation, sued Carnival Corporation (“Carnival”), a foreign corpo-
ration headquartered in Florida and a well-known cruise line, for allegedly “trafficking” in its confiscated property. Havana Docks and its predecessor owned commercial waterfront real property in the Port of Havana known as the Havana Cruise Port Terminal from 1917 to 1960. After the property was confiscated by the Cuban government on October 24, 1960, Havana Docks had its claim certified by the FCSC for a total loss value of $9,179,700.88, a claim that has not expired or been abandoned by the plaintiff. Pursuant to a land concession, Havana Docks had the right to use, improve, construct upon, operate, and manage the property for a term of ninety-nine years—a term that was cut short. Because the property was confiscated before the term ended, Havana Docks argued that it retains “a reversionary interest of 44 years remaining in the Subject Property (i.e., a future or contingent possessory right).”

In its complaint, Havana Docks alleged that from May 1, 2016, Carnival “knowingly and intentionally commenced, conducted, and promoted its commercial cruise line business to Cuba using the Subject Property by regularly embarking and disembarking its passengers . . . without the authorization of Plaintiff or any U.S. national who holds a claim to the Subject Property.” Havana Docks further alleged that Carnival “knowingly and intentionally participated in and profited from the communist Cuban Government’s possession of the Subject Property without the authorization of Plaintiff.” In response, Carnival moved to dismiss the complaint for failure to state a claim upon which relief can be granted because Havana Docks (1) failed to allege that Carnival’s use of the confiscated property was not “incident to lawful travel” and (2) did not have an ownership interest in the confiscated property at the time Carnival began utilizing it.

On August 27, 2019, the US District Court for the Southern District of Florida denied Carnival’s motion. In regard to the statutory exception of “lawful travel,” the court acknowledged that Carnival’s use of the confiscated property may not be “trafficking” because it may be subject to the

195. Amended Complaint, supra note 194, ¶ 6-7.
196. Id. ¶ 13.
197. Id. ¶ 15.
198. Id.
199. Complaint, supra note 194, ¶ 12.
200. Id. ¶ 13.
201. Carnival Corp.’s Motion to Dismiss the Complaint and Incorporated Memorandum of Law, Havana Docks Corp. v. Carnival Corp., No. 1:19-cv-21724 (S.D. Fla. May 30, 2019).
carve-out provision outlined in the Act’s definitions; however, the court also explained that “such argument is not appropriate at this stage of litigation.” Agreeing with the arguments made by Havana Docks, the court held that “the lawful travel statutory exception is not an element of the offense, but rather an affirmative defense on which the Defendant bears the burden of proof.” In short, the court concluded that Havana Docks had sufficiently pled all material elements under the Helms-Burton Act and was not required “to go a step further’ beyond the elements articulated in the statute and state that the alleged trafficking was not ‘incident to’ or ‘necessary for’ lawful travel.”

In regard to Havana Docks’ claim to the confiscated property, Carnival argued that the claim was a time-limited concession that expired in 2004, meaning that Carnival could not be found liable because the alleged trafficking commenced in 2016. Once again agreeing with Havana Docks’ position, the court held that Carnival “incorrectly conflates a claim to a property and a property interest.” The plain language of the Act provides that “any person . . . that traffics in property which was confiscated by the Cuban Government . . . shall be liable to any United States national who owns the claim to such property,” meaning that the Act does not expressly state that such trafficking needs to take place while a party holds a property interest in the property at issue.

Likely encouraged by this favorable holding, Havana Docks proceeded to file three additional actions against other well-known cruise lines: MSC Cruises (“MSC”), Royal Caribbean Cruises (“Royal Caribbean”), and Norwegian Cruise Line Holdings (“NCL”). MSC and NCL both moved to dismiss the complaints and argued, among other things, that Havana Docks’ claim fails as a matter of law because its interest in the confiscated property was a leasehold interest that expired in 2004, so it could only assert a claim

204. Id. at *2.
205. Id. at *4.
206. Id.
207. Id.
for trafficking under Title III for conduct that occurred prior to the expiration of that interest.210 Surprisingly, Judge Beth Bloom (the same judge presiding over the Carnival case) changed her mind and decided to reconsider her initial ruling. On January 7, 2020, following a closer look at the statute, the court granted both the MSC and NCL motions to dismiss.211

The court held that “the property interest in this case is time-limited by its terms, and the claim that Plaintiff owns is a claim covering the time-limited interest, which expired in 2004.”212 Citing the plain language of the statute, the court explained that the certification by the FCSC relates only to the specific interest held by a party. Here, Havana Docks held a leasehold interest, meaning that one would have to traffic in the leasehold to be liable to the owner of the claim.213 Following the end of the concession in 2004, the property (had it not been confiscated) would have reverted to the Cuban government. Because the defendants’ activities occurred after 2004, the court held that Havana Docks does not have the right “to sue for activities that took place years after it no longer has an interest in the property.”214 This interpretation, the court explained, is also consistent with the fundamental principles of US property law, which consider property to be a “bundle of rights.”215 This well-established principle suggests that a person’s interest in property extends only as far as the rights he has acquired from the bundle, meaning that because Havana Docks possessed a leasehold interest, it would be entitled to the value of the lease during its applicable term, not beyond.216 Ultimately, the court ruled that Havana Docks

210. Defendants’ Motion to Dismiss the Complaint and Incorporated Memorandum of Law, Havana Docks Corp. v. MSC Cruises SA Co., No. 1:19-cv-23588 (S.D. Fla. Oct. 11, 2019); Norwegian’s Motion to Dismiss, Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd., No. 1:19-cv-23591 (S.D. Fla. Oct. 11, 2019). Because the court’s opinion is virtually identical in these cases, I am citing to arguments and holdings made only in MSC to avoid redundancy. Royal Caribbean did not move to dismiss but instead filed an answer and affirmative defenses on October 4, 2019.


212. MSC Cruises SA Co., 431 F. Supp. 3d at 1372.

213. Id. The court cites 22 U.S.C. § 6083(a)(1): “the court shall accept as conclusive proof of ownership of an interest in property a certification of a claim to ownership of that interest that has been made by the . . . Commission,” and explained that “[a]ny other interpretation of the Act would require the Court to ignore the definition of ‘property,’ and the qualifying words ‘such’ and ‘that’ out of the liability of imposing language and conclusiveness of certified claims language, respectively—which would run afoul of basic canons of statutory interpretation.” MSC Cruises SA Co., 431 F. Supp. 3d at 1372.

214. Id. at 1373.

215. Id. at 1372.

216. Id.
failed to state a claim for trafficking under Title III of the Act because the defendants’ activities did not take place between 1960 and 2004.\textsuperscript{217}

Making this string of cases even messier, Havana Docks moved for reconsideration of the court’s MSC Order and requested leave to file an amended complaint, contending that the court made errors of fact and law and, if permitted, it could allege other facts to cure any deficiencies noted by the court.\textsuperscript{218} MSC argued that reconsideration was unwarranted because Havana Docks was trying to relitigate its previous arguments, but the court disagreed and granted the motion.\textsuperscript{219}

To come to this new decision, the court recognized that it had made impermissible findings of fact—namely that Havana Docks’ concession expired in 2004.\textsuperscript{220} A closer look at Havana Docks’ certified claim revealed that there is no temporal limitation on the claim. Rather, the FCSC had noted that the terms of the concession were to expire in the year 2004, had the leasehold interest run its course without interruption. Accordingly, the court had made an incorrect factual finding that the concession actually expired in 2004.\textsuperscript{221} Additionally, the court had overlooked other certified property interests in fixtures and equipment that were not time-limited like Havana Docks’ interest in the real property.\textsuperscript{222}

Based on these factual errors, the court also made a number of errors of law that were in conflict with the district court’s holding in a 2005 unlawful trespass and unjust enrichment case, \textit{Glen v. Club Méditerranée S.A.}\textsuperscript{223} and the Eleventh Circuit’s affirmation of that holding.\textsuperscript{224} In \textit{Club Méditerranée S.A.}, the court relied on \textit{Sabbatino}, where the US Supreme Court acknowledged the authority of the Cuban government to expropriate property within its borders and to vest the property right in the state.\textsuperscript{225} Thus, Havana Docks’ former ownership interest now manifests itself into a \textit{claim} for compensation under both US and international legal principles,

\begin{itemize}
\item \textsuperscript{217} Id. at 1374.
\item \textsuperscript{218} Plaintiff’s Motion for Reconsideration and Leave to Amend, and Request for Hearing, Havana Docks Corp. v. MSC Cruises SA Co., No. 19-cv-23588 (S.D. Fla. Jan. 31, 2020).
\item \textsuperscript{219} Havana Docks Corp. v. MSC Cruises SA Co., 455 F. Supp. 3d 1355 (S.D. Fla. 2020).
\item \textsuperscript{220} Id. at 1366.
\item \textsuperscript{221} Id. at 1367.
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id. at 1368; 365 F. Supp. 2d 1263 (S.D. Fla. 2005). Based on \textit{Sabbatino}, the district court held that the act of state doctrine mandates dismissal of the plaintiffs’ unjust enrichment and trespass claim. Id. at 1267. The decision in \textit{Club Méditerranée S.A.} is also raised in Glen’s case against Visa. \textit{See infra} Section IV.D.2.
\item \textsuperscript{224} Glen v. Club Méditerranée, S.A., 450 F.3d 1251 (11th Cir. 2006). The Eleventh Circuit affirmed the District Court’s holding. Id. at 1252.
\item \textsuperscript{225} MSC Cruises SA Co., 455 F. Supp. 3d at 1368.
\end{itemize}
but Havana Docks does not own the expropriated property. The court stated that it had “construed the liability provision of § 6082(a)(1)(A) too narrowly,” reasoning that “notably absent from the definition of ‘traffics’ is any limitation on the scope of ‘trafficking’ to only a specific ‘interest in property.’” The court also conceded that it mistakenly held that Havana Docks would possibly recover additional compensation beyond what it was entitled, in contradiction of the “bundle of sticks” principle. Upon reconsideration of the facts and law, the court explained that “[t]he amount of monetary damages memorialized in the Certified Claim . . . is the dollar value of the remainder of the leasehold term that Plaintiff was deprived of, coupled with the value of the other itemized property interests delineated in the Certified Claim, and this discrete amount would not change depending on the time of the trafficking.”

Havana Docks proceeded to file amended complaints against the cruise lines, which led to another round of briefings and discovery disputes. NCL filed a motion to dismiss, which the court denied on September 1, 2020. This time, NCL asserted three chief bases for dismissal of the suit:

(1) Havana Docks lacks Article III standing to sue because it cannot allege injury in fact that is traceable to NCL’s conduct; (2) Applying Title III to NCL’s pre-May 2019 operations in Cuba violates the Ex Post Facto Clause because such application would be both retroactive and punitive; and (3) Applying Title III to NCL’s operations in Cuba violates the Due Process Clause because NCL was not given fair notice of its potential liability through the Act’s retroactive application.

The law of standing under Article III of the US Constitution ensures that a plaintiff is actually entitled to have the judiciary decide the merits of its case. Plaintiffs must demonstrate three elements to meet Article III’s standing requirement: (1) an injury-in-fact (2) that is fairly traceable to the actions of the defendant and (3) that can be redressed by a favorable judg-
The court first found that Havana Docks properly alleged facts to support the elements of injury-in-fact because it showed an invasion of a legally protected property interest that is concrete, particularized, and imminent.\textsuperscript{234} NCL “contend[ed] that the only injury Havana Docks has asserted is the confiscation, which is only traceable to the Cuban Government, not to NCL.”\textsuperscript{235} In rejecting this argument, the court relied on a number of US Supreme Court and Eleventh Circuit cases, which provide that “[p]roximate causation is \textit{not} a requirement of Article III standing”\textsuperscript{236} and “[e]ven harms that flow indirectly from the action in question can be said to be ‘fairly traceable’ to that action for standing purposes.”\textsuperscript{237} The court reasoned that “[i]n enacting Title III, Congress recognized that there exists a causal link between a claimant’s injury from the Cuban Government’s expropriation of their property and a subsequent trafficker’s unjust enrichment from its use of that confiscated property.”\textsuperscript{238} Because the Supreme Court has previously found that Congress has the power to “articulate chains of causation,” when it comes to standing, the court here held that “any argument that the causal chain ceases with the Cuban Government falls short.”\textsuperscript{239}

The court also rejected NCL’s two constitutional grounds for dismissal of the case. NCL argued that the suit is a violation of the Ex Post Facto Clause because Title III laid dormant since the statute’s passage in 1996, thereby having no real legal effect and consequence until the suspension was lifted in May 2019.\textsuperscript{240} The court disagreed, holding that “liability for trafficking under Title III attached beginning on November 1, 1996, and the consistent suspension of the right to bring an action under Title III did not affect this liability.”\textsuperscript{241}

\textsuperscript{233} Id.; see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).
\textsuperscript{234} Norwegian Cruise Line Holdings, Ltd., 484 F. Supp. 3d at 1227-28.
\textsuperscript{235} Id. at 1226.
\textsuperscript{236} Id. at 1229 (citing Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 n.6 (2014)).
\textsuperscript{237} Id. at 1230 (citing Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1273 (11th Cir. 2003)).
\textsuperscript{238} Id.
\textsuperscript{239} Norwegian Cruise Line Holdings, Ltd., 484 F. Supp. 3d at 1230 (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)). The court goes on to state that NCL’s reliance on Trichell v. Midland Credit Management, Inc., 964 F.3d 990 (11th Cir. 2020), a recent case on Article III standing, “misses the mark because \textit{Trichell} does not stand for the notion that such causal links are insufficient to establish Article III standing, where a concrete and particularized injury otherwise exists.” Id.
\textsuperscript{240} Norwegian Cruise Line Holdings, Ltd., 484 F. Supp. 3d at 1231. The Ex Post Facto Clause prohibits retroactive application of a law, among other things. Id.
\textsuperscript{241} Id. at 1236. While the Act became effective on March 12, 1996, Title III became effective on August 1, 1996 and provides for a three-month grace period after the effective
in effect at the time of NCL’s alleged conduct in Cuba, the court relied on explicit language from the Act as well as President Clinton’s statements:

I will allow Title III to come into force. As a result, all companies doing business in Cuba are hereby on notice that by trafficking in expropriated American property, they face the prospect of lawsuits and significant liability in the United States. . . .

[W]ith Title III in effect, liability will be established irreversibly during the suspension period and suits could be brought immediately when the suspension is lifted. And for that very same reason, foreign companies will have a strong incentive to immediately cease trafficking in expropriated property, the only sure way to avoid future lawsuits.242

Finally, the court held “[n]either the government’s encouragement and licensure nor the history of suspending Title III is sufficient to establish the lack of fair notice under the Due Process Clause.”243 Having already rejected NCL’s retroactive application argument, the court augmented its reasoning by reminding NCL that it “had an obligation to familiarize itself with the mandates of Title III, especially once it began operating in Cuba.”244 Following the court’s denial of NCL’s motion to dismiss plaintiff’s amended complaint, it proceeded to also deny MSC and Carnival’s motions to dismiss in September 2020.245 Royal Caribbean, on the other hand, filed a
motion for judgment on the pleadings, which was dismissed in April 2020.246

Thereafter, all four cases proceeded with discovery, and on September 20, 2021, Carnival, MSC, Royal Caribbean, and NCL filed an omnibus motion for summary judgment arguing that they are entitled to judgment as a matter of law based on four key points.247 First, the defendants never “trafficked” in plaintiff’s property because Havana Docks never owned the waterfront property in question; rather, the piers and terminal were always owned by the Cuban government, and Havana Docks had been granted a non-exclusive right to operate a cargo business on that property. 248 Second, defendants’ use of the property was “incident to lawful travel to Cuba” and “necessary to the conduct of such travel,” which is an exception to the definition of “trafficking” under the Act.249 Third, Havana Docks is not a US national as required under Section 6082(a)(1)(A) of the Act because its place of business is in the United Kingdom.250 And fourth, Havana Docks’ interpretation of the Act raises significant constitutional concerns, since (1) the requested damages violate the proportionality principle of the Due Process Clause and the Excessive Fines Clause of the Eight Amendment; (2) plaintiff’s interpretation of the Act renders it an impermissible Ex Post Facto Law; and (3) defendants cannot be held liable for conduct that the US government permits.251 As of January 7, 2022, the court has not ruled on defendants’ motion.


Carnival has been simultaneously defending a second lawsuit filed by Javier Garcia-Bengochea, a US citizen and resident of Jacksonville, Flori-

246. Havana Docks Corp. v. Royal Caribbean Cruises, Ltd., No. 1:19-cv-23590, 2020 WL 1905219 (S.D. Fla. Apr.17, 2020). Royal Caribbean also argued that plaintiff’s claim had expired at the same time as the expiration of its leasehold interest; however, the court had already dismissed this argument in its April 2020 Orders on MSC’s and NCL’s motions for reconsideration described above. Id. at *6.


248. Id. at 3-4.

249. Id. at 12. Defendants make clear that their travel to Cuba was “licensed, authorized, and encouraged by the United States government.” Id. at 13. In fact, “OFAC [had] promulgated a general license authorizing cruise lines to transport passengers to Cuba.” Id. Notably, defendants state that they also stopped sailing to Cuba once the regulations were amended and licenses were revoked. Id. at 15.

250. Defendants’ Omnibus Motion, supra note 247, at 24-25.

251. Id. at 27-30. Plaintiff is seeking a collective $2.8 billion in damages from defendants. Id. at 30.
da. Garcia-Bengochea claims an 82.5 percent interest in commercial waterfront real property in the Port of Santiago de Cuba—only 32.5 percent of his interest was certified by the FCSC, while the remaining portion of the interest is based upon a non-certified claim. The total loss value of the claim is $547,365.24 together with interest of 5 percent per annum from the date of the loss. In his complaint, Garcia-Bengochea alleged that Carnival “knowingly and intentionally commenced, conducted, and promoted its commercial cruise line business to Cuba using the Subject Property by regularly embarking and disembarking its passengers on the Subject Property without the authorization of Plaintiff.”

On August 26, 2019, following an initial round of briefings, the US District Court for the Southern District of Florida denied Carnival’s motion to dismiss and delivered three main holdings in response to Carnival’s arguments. First, as in the Havana Docks cases, the court held that a plaintiff does not have to go a step further and plead facts stating that a defendant’s use of the property was not incident to lawful travel. The “lawful travel” exception is an affirmative defense that Carnival, not Garcia-Bengochea, must prove. Second, the court disagreed that Garcia-Bengochea’s complaint was flawed because the certified claim is not in his name, but in the name of Albert J. Parreno—there was plenty of time for Garcia-Bengochea to acquire ownership from 1970, when the claim was certified, to present day when Garcia-Bengochea filed the suit. According to the court, such an inquiry involves factual determinations that are inappropriate at the motion to dismiss stage. Third, the court was not persuaded by Carnival’s assertion that Garcia-Bengochea does not own a direct interest in the confiscated property since he only had stock ownership in a company that in turn owned the docks at issue. After examining the text and purpose of the Libertad Act and the ICSA, and after applying the basic

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253. Id. ¶¶ 6-11.
254. Id. at Exhibit A, p. 11.
255. Id. ¶ 12.
258. Id. at 1286.
259. Id. at 1288.
260. Id. The court also addressed the fact that plaintiff alleged that a portion of his interest is based on an un-certified claim, which is not contradicted by the FCSC certification. Id. at 1289.
canons of statutory interpretation, the court concluded that “a claim to confiscated property is substantially broader than a direct interest in such property” and Garcia-Bengochea had plausibly alleged a claim to the confiscated property based on his stock ownership.

Carnival proceeded to file a motion for certification for interlocutory appeal, which was denied on September 26, 2019. Less than two months later, Carnival filed a second amended answer, followed by a motion for judgment on the pleadings. This time, Carnival not only argued that Garcia-Bengochea does not own the claim at issue, but also that, even if he did validly inherit the claim, the action is barred under Section 6082(a)(4)(B) of the Act because Garcia-Bengochea acquired the claim after the cutoff date of March 12, 1996. Section 6082(a)(4)(B) states: “In the case of property confiscated before March 12, 1996, a United States national may not bring a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996.”

On July 9, 2020, the court denied Carnival’s motion on the question of valid inheritance, but granted it on the question of whether Section 6082(a)(4)(B) bars the action. With respect to the inheritance argument, each side submitted competing evidence and affidavits relating to Garcia-Bengochea’s inheritance of the claim. The court found that the issues involved could not be appropriately resolved on a motion for judgment on
The court, however, agreed with Carnival’s second argument, reasoning that the term “acquire” in Section 6082(a)(4)(B) is broad enough to cover an inheritance, contrary to Garcia-Bengochea’s assertion that the term necessitates an affirmative action to obtain the property and that an inheritance is a “passive concept.” The court referenced the legislative history of the Act in coming to its decision, which “clearly explains that Congress wanted ‘to eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section.’”

On August 6, 2020, Garcia-Bengochea appealed the court’s decision to the US Court of Appeals for the Eleventh Circuit—making this one of the first Helms-Burton Act cases to move on to the appellate level. As of January 7, 2022, the court has heard oral arguments, but has not issued a decision.

Garcia-Bengochea brought nearly identical lawsuits against NCL and Royal Caribbean on August 27, 2019. Defendant NCL filed a motion to dismiss for plaintiff’s failure to adequately allege ownership of the property and to adequately plead unlawful intent, as well as the Act’s violation of the Ex Post Facto and Due Process Clauses. On August 25, 2020, the court denied the motion, holding: (1) NCL’s constitutional arguments were premature; (2) for reasons explained in the court’s August 26, 2019 Order in Carnival, plaintiff adequately alleged an ownership claim; and (3) plain-

270. Id. at *3. More specifically, the court found that “the competing affidavits create a conflict regarding reliability of experts and the issues of Costa Rican law raised by Carnival.” Id.

271. Id. at *4.


tiff need not allege specific facts showing NCL’s state of mind during its alleged “trafficking” in the confiscated property. Given that the court’s order in Garcia-Bengochea v. Carnival Corp. is on appeal, NCL and Garcia-Bengochea filed a joint motion to stay and administratively close the case, since “[t]he Eleventh Circuit’s decision in the Carnival appeal will significantly impact, if not outright determine, whether Plaintiff may pursue this case against [NCL].” The court granted the joint motion, and the case remains closed as of January 7, 2022.


Shortly after the suspension of Title III was lifted, a group of heirs to various hotel properties in Cuba brought a number of class action lawsuits against a variety of foreign defendants including Cuban companies, European hotel chains, and European travel companies. The plaintiffs in these class actions were still facing complications related to serving the foreign defendants six months after filing their complaints. Accordingly, one of the six cases, Mata v. Grupo Hotelero Gran Caribe, against a number of agencies and instrumentalities of the Cuban government was voluntarily dismissed.

In Mata v. Trivago GmbH, the plaintiffs’ difficulty in accomplishing service of process led to an administrative order that stayed the case “pend-
ing perfection of service on foreign Defendants.” A month and a half later, plaintiffs filed a status report regarding service on foreign defendants to advise the Court that despite making diligent efforts to do so, they have not yet successfully served Defendants Meliá Hotels International, S.A. (“Meliá”), and Trivago GmbH (“Trivago”). Both Spain (where Meliá is located) and Germany (where Trivago is located) have refused to execute requests for service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the “Hague Convention”). Meliá also refused to accept service by postal channels under Article 10 of the Hague Convention. Given the delay that Spain and Germany’s refusal to execute the Hague service requests has caused, and in an effort to streamline and simplify this action, the Putative Class Representatives filed on December 6, 2019, contemporaneously with this report, an Unopposed Motion for Leave to Amend in which they request leave to file the Second Amended Class-Action Complaint which removes 36 of the 39 named plaintiffs and 8 of the 15 defendants, including both Meliá and Trivago.

Subsequently, the group of heirs filed a second amended complaint, suing seven new defendants—six of which were US companies. In this renamed lawsuit of Mata v. Expedia, Inc., the plaintiffs, none of whom have certified claims, alleged that the Expedia Entities and the Booking.com Entities have knowingly and intentionally benefited from their confiscated hotel properties by providing online booking services for the

284. Second Amended Class Action Complaint for Damages at ¶¶ 4-10, Mata v. Expedia, Inc., No. 1:19-cv-22529 (S.D. Fla. Dec. 9, 2019). The defendants are now Expedia, Inc., a Delaware corporation, Hotels.com L.P., a Texas limited partnership, Hotels.com GP, LLC, a Texas limited liability company, Orbitz, LLC, a Delaware limited liability company, and Travelocity.com LP, a Delaware limited partnership (collectively, the “Expedia Entities”); and Booking Holdings Inc., a Delaware corporation along with Booking.com B.V., a Dutch limited liability company (collectively, the “Booking.com Entities”). Note that plaintiffs filed a notice of voluntary dismissal of defendant Travelocity.com, LP on Dec. 23, 2019.
hotels, in violation of Title III.285 The defendants filed a joint motion to dismiss, bringing what have become reoccurring arguments in Title III litigation to the court’s attention—namely, that the court lacks jurisdiction to hear the case and that plaintiffs failed to state a claim for relief.286

More specifically, defendants argued that plaintiffs failed to allege a prima facie case of specific jurisdiction (one of the two types of personal jurisdiction recognized by the Supreme Court),287 because their alleged conduct does not comport with Florida’s long-arm statute, which allows Florida courts to obtain personal jurisdiction over a non-resident corporation.288 To support their assertion, defendants referenced case law that holds that maintaining a website accessible in Florida (the only fact alleged to show that defendants are engaging in business in Florida) is insufficient to satisfy Section 48.193(1)(a)(1) of the long-arm statute.289 Next, defendants argued that plaintiffs alleged only economic injuries, while Section 48.193(1)(a)(6) of the statute necessitates personal injury or property damage in the State of Florida resulting from a defendant’s out-of-state actions.290 Defendants also argued that there is no nexus between the cause of

285. Id. ¶¶ 34, 40, 63-70.
287. Id. at 7; For the Supreme Court’s latest analysis on personal jurisdiction, see generally, Anthony R. McClure, There’s No Place Like Home—To Establish Personal Jurisdiction, ABA (Sept. 1, 2018), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2018/theres-no-place-home-establish-personal-jurisdiction/ [https://perma.cc/K3XU-SYKA]. A court has general personal jurisdiction over a defendant corporation if the corporation is “at home” in the forum state, meaning that the forum state is the corporation’s state of incorporation and where it maintains its principal place of business. Specific personal jurisdiction, on the other hand, arises out of the link between the underlying controversy and the forum state.
288. Defendants’ Joint Motion to Dismiss, supra note 286, at 7. The sections of the Florida long arm statute at issue in Helms-Burton Act suits in this forum are: FL ST §§ 48.193(1)(a)(1), 48.193(1)(a)(2), 48.193(1)(a)(6), 48.193(2) (2016). A defendant is subject to specific personal jurisdiction under § 48.193(1)(a)(1) if it is “[o]perating, conducting, engaging in, or carrying on a business venture in [Florida] or having an office or agency in [Florida].” A defendant is subject to specific personal jurisdiction under § 48.193(1)(a)(2) if it is “[c]ommitting a tortious act within [Florida].” A defendant is subject to specific personal jurisdiction under § 48.193(1)(a)(6) if it is “[c]ausing injury to persons or property within [Florida] arising out of an act or omission by the defendant outside of [Florida], if, at or about the time of the injury . . . [t]he defendant was engaged in solicitation or service activities within [Florida].” Finally, a defendant is subject to general personal jurisdiction under § 48.193(2) if it is “engaged in substantial and not isolated activity within [Florida], whether such activity is wholly interstate, intrastate, or otherwise . . . whether or not the claim arises from that activity.”
289. Defendant’s Joint Motion to Dismiss, supra note 286, at 7-8.
290. Id. at 7.
action at issue and defendants’ alleged conduct, stating “[a]ssuming arguendo that merely offering reservations at the Subject Hotels constitutes trafficking under Title III, the fact that residents in Florida (like those in every other state) could make such reservations is hardly essential to plaintiffs’ cause of action.” Finally, defendants argued that the court’s exercise of personal jurisdiction would not comport with the Due Process Clause, which requires a showing that defendants’ contacts with Florida relate to or give rise to plaintiffs’ cause of action. Maintaining that no such showing was made, defendants stated: “That Florida residents were among those that could book reservations on defendants’ web-based platforms is not a but-for cause of plaintiffs’ cause of action.”

Defendants also asserted that plaintiffs do not have constitutional standing to maintain their suit. Citing the fairly recent Supreme Court decision in *Spokeo Inc. v. Robins*, defendants maintained that plaintiffs lack standing under Article III of the US Constitution because “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” Here, defendants asserted that plaintiffs do not meet the first two elements of standing (a concrete injury fairly traceable to the actions of the defendant) because “Plaintiffs fail to plead any facts demonstrating that they own any right to the Subject Hotels” and that “Defendants ‘played no role’ in bringing about plaintiff’s alleged injury” because “that alleged injury occurred at least fifty years before defendants’ alleged conduct (decades before defendants even came into existence), and was caused by the Cuban government.”

Lastly, defendants argued that (1) “beyond conclusory allegations in footnotes describing the plaintiffs as ‘heirs’ to the hotels, the complaint contains no allegations that the named plaintiffs owned property interests in the Subject Hotels whatsoever;” and (2) plaintiffs “fail to allege that they acquired ownership of their claims before the Act’s enactment date . . . and, therefore, ‘may not bring an action’ under Title III.” In addition, defendants contended that plaintiffs failed to adequately plead the element of “trafficking,” presenting a two-fold argument: (1) plaintiffs did not allege any facts that could support a reasonable inference that that defendants acted knowingly and intentionally, as required by the Act; and (2) the Act clearly states that conduct incident to lawful travel does not constitute traf-

291. *Id.* at 8.
292. *Id.*
293. *Id.* at 9.
295. *Id.* at 11.
296. *Id.* at 12.
297. *Id.* at 13.
ficking, thereby requiring plaintiffs to allege conduct that falls outside of the lawful travel exception.298

On December 26, 2019, the court denied defendants’ joint motion to dismiss without prejudice and granted in part their joint motion to stay discovery, stating: “While the Court understands Defendants are challenging the Second Amended Complaint’s jurisdictional allegations, jurisdictional discovery will be permitted. Merits discovery is stayed.”299 Jurisdictional discovery proceeded in early 2020; however, on March 13, 2020, the court entered an administrative order closing the case after all parties filed a joint motion seeking a continuance of discovery deadlines “because of Coronavirus-related travel restrictions, closure of the Booking Defendants’ offices, the Booking Defendants’ inability to meet with and prepare their designated Rule 30(b)(6) representatives for their depositions, and Plaintiffs’ inability to take those depositions.”300 As of January 7, 2022, the case has not proceeded further.

4. Del Valle v. Trivago GmbH

Another set of heirs to Cuban beachfront property filed a class action in June 2019,301 yet, they too ran into what are becoming familiar roadblocks to surviving the motion to dismiss stage. In Del Valle v. Trivago GmbH, the Del Valle family and the Falla family each allege that they owned several parcels of land in the province of Matanza, Cuba, while the Angulo Cuevas family allegedly owned the entirety of the island Cayo Coco.302 By plaintiffs’ filing of the second amended complaint, plaintiff Cuevas was replaced with Angelo Pou, whose family allegedly owned two thousand acres of beachfront land, also in the province of Matanza.303 The plaintiff heirs were not US citizens at the time of the confiscations and were, therefore, not eligible to certify their claims with the FCSC.304

298. Id. at 13-15. Defendants recognized that two other judges in the same court declined to dismiss plaintiffs’ lawsuits based on their failure to allege conduct outside of the law travel exception but reminded the court that it is not bound by those rulings. Defendant’s Joint Motion to Dismiss, supra note 286, at 15.


300. Administrative Order Closing Case at 1, Mata v. Expedia, Inc., No. 1:19-cv-22529 (S.D. Fla. Mar. 13, 2020). Note that this order closes the case for “statistical purposes only . . . . The Court nonetheless retains jurisdiction, and the case shall be restored to the active docket upon court order following motion of a party advising all parties are ready to proceed.” Id.


302. Id. ¶ 2-3.


304. Id. ¶ 46.
As in *Mata v. Expedia, Inc.*, and a number of other pending class actions, the plaintiffs filed their suit against a mix of Cuban agencies, members of the Cuban government, and foreign companies—they did not name a single US defendant. In clearly facing similar service of process issues as those detailed above in *Mata*, the representative plaintiffs in *Del Valle* filed an amended complaint naming a new set of defendants—all but one were US entities. In their second amended class action complaint, the plaintiffs detailed how their families’ properties were confiscated by the Cuban government and developed into hotel resorts. Plaintiffs alleged that the defendants, designated as the “Expedia Entities” and the “Booking.com Entities,” are “directly benefitting from the Trafficked Hotels by receiving commissions or other fees for the booking of the Trafficked Hotels” and “also derive an indirect benefit from the Trafficked Hotels by receiving advertising revenues driven by or related to their offering of the Trafficked Hotels.”

The Expedia Entities and the Booking.com Entities filed separate motions to dismiss on April 10, 2020, and unsurprisingly, attacked plaintiffs’ statement of the claim and the existence of personal and subject matter jurisdiction. Unlike in *Mata v. Expedia, Inc.*, however, the court did not permit plaintiffs to engage in jurisdictional discovery, and it granted defendants’ motions to dismiss. In its opinion, the court analyzed only the

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305. *Id.* ¶¶ 13-18. In addition to the Cuban parties, the plaintiffs named Trivago GmbH, a German limited liability company headquartered in Dusseldorf, Germany and Booking.com B.V., a Dutch limited liability company based in Amsterdam, the Netherlands, as defendants. *Id.*

306. *Amended Class Action Complaint for Damages, Del Valle v. Trivago GmbH, No. 1:19-cv-22619 (S.D. Fla. Jan. 24, 2019).* As in *Mata*, the defendants are now Expedia, Inc., a Delaware corporation; Hotels.com L.P., a Texas limited partnership; Hotels.com GP, LLC, a Texas limited liability company; Orbitz, LLC, a Delaware limited liability company (collectively, the “Expedia Entities”) and Booking Holdings Inc., a Delaware corporation along with Booking.com B.V., a Dutch limited liability company (collectively, the “Booking.com Entities”).


308. *Id.* ¶¶ 49-51, 57-59.

309. *Id.* ¶¶ 43-44.


personal jurisdiction arguments posed by each side, ultimately holding that plaintiffs failed to establish that the court has jurisdiction to hear the case.  

Relying on Florida’s long-arm statute, the plaintiffs argued that by soliciting and accepting reservations from Florida residents for resorts on the confiscated property, defendants subjected themselves to Florida’s jurisdiction under Section 48.193(1)(a)(1). The court held that this level of activity did not amount to “carrying on a business venture” in Florida as required by the statute. To this end, the court found plaintiffs’ complaint lacking in facts that could establish “a general course of business activity in the state for pecuniary benefit.” The law demands the presence and operation of a Florida office, the possession of a Florida business license, or facts relating to the number of Florida residents served and the percentage of revenue derived from Florida residents. The court also reiterated previous holdings, which establish that “merely having a website accessible in Florida is not sufficient” to support specific personal jurisdiction. Additionally, plaintiffs asserted presence of specific jurisdiction under Section 48.193(1)(a)(2) by arguing that a tort was committed in Florida because plaintiffs reside in Florida and because the defendants’ websites, through which they rented the hotel properties, are accessible in Florida. The court, however, declined to find that it has jurisdiction under this subsection of the long-arm statute because plaintiffs did not cite to any analogous case law to support their argument. Finally, plaintiffs argued the existence of general jurisdiction under Section 48.193(2), which the court also rejected because “Plaintiffs’ allegation that Defendants run a website that is accessible in Florida falls woefully short of the required allegations to establish ‘substantial and not isolated activity within this state.’”

While the court did not address this argument in its opinion, both sets of defendants also maintained that the action should be dismissed because plaintiffs failed to state a claim. First, defendants stated that plaintiffs Pou and Falla failed to plead ownership to an actionable claim under Title III because they inherited their interest in the property after March 12, 1996—

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312.  Id. at *1-4. Plaintiffs argued that the court has specific jurisdiction under FL ST § 48.193(1)(a)(1) and § 48.193(1)(a)(2), and general jurisdiction under § 48.193(1), Florida’s long arm statute.
313.  Id. at *2. See supra note 288 for details on Florida’s long arm statute.
314.  Id. (quoting § 48.193(1)(a)).
315.  Id.
317.  Id. at *3.
318.  Id.
319.  Id.
320.  Id. at *2-3.
the cutoff date established by Section 6082(a)(4)(B) of the Act. Del Valle alleged that the interest in the property was “distributed to” his father’s children, but defendants argued that he failed to “allege any facts from which one could conclude that he actually inherited anything at all.”

Second, defendants argued that plaintiffs offered only conclusory allegations, and no facts, when claiming that defendants knowingly and intentionally trafficked in confiscated property. In addition, defendants maintained that the “lawful travel” clause of Title III bars the plaintiffs’ claim, since offering hotel accommodations is incident to and necessary to the conduct of travel to Cuba. Both sets of defendants have licenses which authorize the entities to provide travel related services to US residents lawfully traveling to Cuba, and plaintiffs, according to defendants, did not provide facts to support the claim that defendants’ customers are traveling to the resorts for “tourism” or any other unlawful purpose. Finally, the Expedia Entities provided a third argument for plaintiffs’ failure to state a claim: The proper-

321. Booking.Com B.V.’s Motion to Dismiss, supra note 310, at 15; Expedia Group, Inc.’s Motion to Dismiss, supra note 310, at 13-14. In its opinion, the court states, in a footnote, that “it would be futile for Angelo Pou (and possibly for Enrique Falla) to amend their complaint because they do not appear to have actionable ownership interests.” Del Valle, 2020 WL 2733729 at *5 n.2.

322. Expedia Group, Inc.’s Motion to Dismiss, supra note 310, at 13.

323. Id. at 15. Plaintiffs argue in their complaint that defendants acted knowingly and intentionally because plaintiffs’ counsel sent them a letter indicating their intent to commence an action unless defendants ceased their trafficking. (2d Am. Compl. ¶ 44 & Ex. A.). The Expedia Entities responded to this stating:

As an initial matter, receiving a letter from a plaintiff’s attorney containing unsubstantiated allegations about a claim to a particular property in Cuba does not render any subsequent activity involving that property ‘knowing and intentional’ trafficking. But even assuming arguendo that such a letter could render any subsequent activity regarding the identified property ‘knowing and intentional,’ the letters that Plaintiffs’ counsel sent do not even identify the hotels that the Expedia Entities were allegedly trafficking in. Further, the letters do not mention Pou at all, much less the location of his property or the name of the hotel that allegedly sits on it. Thus, even under Plaintiffs’ own flawed construct, the letter[s] do not pass muster.

324. Id. at 17; Booking.Com B.V.’s Motion to Dismiss, supra note 310, at 20. 31 C.F.R. § 515.560(a) permits persons subject to US jurisdiction to travel to Cuba for a number of specifically enumerated activities, including family visits, official government business, professional research, religious activities, educational activities, public performances, and humanitarian projects.

325. Expedia Group, Inc.’s Motion to Dismiss, supra note 310, at 16; Booking.Com B.V.’s Motion to Dismiss, supra note 310, at 20. Both sets of defendants also make the argument that OFAC regulations merely require travel service companies to obtain from customers a certification that their travel to Cuba conforms to an authorized and lawful travel category. Id.
ties at issue do not comport with the definition of “property” under the Act. The definition expressly does not include properties used for residential purposes at the time they were confiscated, unless, as of March 12, 1996, they were the subject of a certified claim or were occupied by a Cuban official. According to defendants, (1) plaintiffs’ allegations allowed no inference other than that the properties were used for residential purposes; and (2) plaintiffs failed to plead either circumstance posed by the definition, which would allow residential property to qualify as “property” under the Act. On June 24, 2020, plaintiffs filed an appeal with the Eleventh Circuit. As of January 7, 2022, the court has heard oral arguments, but has not issued a decision.

D. SECOND WAVE OF LAWSUITS

1. Glen v. TripAdvisor LLC

Following the first wave of lawsuits, Robert M. Glen kicked off the second wave in early fall of 2019 by filing five cases against American Airlines, Visa, Mastercard, and a variety of travel companies. Glen alleged that he holds a claim to two beachfront properties (known as “Blancarena” and “Cotepen”) located in Varadero, Cuba, once belonging to his family who fled Cuba after the revolution. Since the Cuban government’s expropriation of the properties, they have become the site of four separate beachfront resorts—the Iberostar Tainos, the Meliá Las Antillas, the Blau Varadero, and the Starfish Varadero. Perhaps anticipating difficulties associated with suing foreign defendants, Glen has not sued any of these four resorts so far. Instead, he has focused his attention on American companies, as many other plaintiffs have. Glen alleged that each of the defendants has “trafficked” in his property by (1) facilitating bookings at these

326. Expedia Group, Inc.’s Motion to Dismiss, supra note 310, at 18-19.
328. Expedia Group, Inc.’s Motion to Dismiss, supra note 310, at 18-19.
332. Id. ¶¶ 5, 8.
hotels, (2) permitting the hotels to collect payment from their guests, and (3) profiting from the hotels’ own trafficking. 333

Glen consolidated three of his cases against various Expedia affiliates including but not limited to Expedia, Inc., TripAdvisor LLC, and Travelscape LLC (the “Expedia Defendants”), into one action in the US District Court for the District of Delaware in exchange for the Expedia Defendants agreeing to waive any jurisdictional defenses. 334 On December 7, 2020, the court heard oral arguments on all pending motions, including defendants’ motion to dismiss. 335 On March 30, 2021, Judge Leonard P. Stark issued one ruling with respect to both TripAdvisor LLC and Visa, Inc., granting defendants’ motions to dismiss. 336 The court’s opinion is discussed below following an analysis of Glen’s case against the Visa and Mastercard entities.

2. Glen v. Visa Inc.


Defendants offer their network services to merchants in Cuba, including the beachfront resorts on the properties confiscated from Glen’s family . . . .

333. Id. ¶¶ 6-10.
335. See Oral Order, Glen v. TripAdvisor LLC, No. 1:19-cv-1809 (D. Del. Oct. 28, 2020) (ordering that the court will hear all pending motions on December 7, 2020 for TripAdvisor LLC and for Visa). In large part, Expedia Defendants’ arguments in their motions to dismiss mirror those made in the cases already discussed above. Defendants argue that plaintiff (1) lacks Article III standing; (2) did not acquire the property claim before the statutory bar date; (3) fails to allege that defendants acted “knowingly” and “intentionally;” and that (5) defendants did not “traffic” in plaintiff’s property because their services are “incident and necessary to lawful travel.” See Opening Brief of Defendants Kayak Software Corp. and Booking Holdings Inc. in Support of their Motion to Dismiss the Second Amended Complaint, Glen v. TripAdvisor LLC, No. 1:19-cv-1809 (D. Del. May 11, 2020); and Defendants TripAdvisor LLC and TripAdvisor, Inc.’s Opening Brief in Support of their Motion to Dismiss the Second Amended Complaint, Glen v. TripAdvisor LLC, No. 1:19-cv-1809 (D. Del. May 11, 2020). One new argument is that Glen is barred from bringing the action by the “election of remedies” clause of the Helms-Burton Act, described in further detail in Subsection D.2. below. See Opening Brief of Defendants Kayak Software Corp. and Booking Holdings Inc. at 6, Glen v. TripAdvisor LLC, No. 1:19-cv-1809 (D. Del. May 11, 2020).
[and] bly affirmatively permitting these hotels to collect payment from their guests through a Visa- or Mastercard-branded credit card (and by earning revenue in connection with each such swipe), Defendants are engaging in commercial activity that uses or otherwise benefits from Glen’s confiscated property.\(^{337}\)

As required by the Act, Glen provided notice of his claims to the defendants. While Mastercard did not respond to the statutory notice, Visa did, stating that it “has instructed its licensees that all Visa-branded cards cannot be used at the [Subject Hotels] henceforth.”\(^{338}\) Despite Visa’s statement, Glen maintains that “Visa remains liable for its prior trafficking in the Glen Properties.”\(^{339}\)

Visa and Mastercard filed separate motions to dismiss, each presenting familiar arguments to the court. Defendants maintained that the action should be dismissed because (1) Glen did not acquire his claim before the statutory cutoff date of March 12, 1996; (2) the transactions defendants are involved in are “incident to lawful travel”—an exception to the Act’s definition of “trafficking;” and (3) Glen failed to plausibly allege that defendants acted “knowingly” and “intentionally.”\(^{340}\) However, some of the defendants’ arguments are peculiar to Glen’s case—namely that the action should be dismissed (1) due to the existence of a prior action for damages arising from the same claim,\(^{341}\) and (2) because a Title III lawsuit cannot be based on real property used for residential purposes (with some narrow exceptions).\(^{342}\)

In 2004, Glen and his mother sued Club Méditerranée S.A., a French travel and tourism operator that built a hotel on their former land, for trespass and unjust enrichment.\(^{343}\) Visa argued that this prior suit triggers dismissal of Glen’s current action under the “election of remedies” provision of the Helms-Burton Act,\(^{344}\) which states:

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337. Amended Complaint, supra note 331, \(\S\) 8-9.
338. Id. \(\S\) 71-73 (citing Visa’s response).
339. Id. \(\S\) 74.
341. Visa’s Brief in Support of their Motion to Dismiss, supra note 340, at 7-8.
344. Visa’s Brief in Support of their Motion to Dismiss, supra note 340, at 7-8.
(B) any person who brings, under the common law or any provision of law other than this section, a civil action or proceeding for monetary or non-monetary compensation arising out of a claim for which an action would otherwise be cognizable under this section may not bring an action under this section on that claim.345

Glen’s answer in opposition to this was that Club Méditerranée S.A. involved different property and different defendants—allegations that should meet his obligation “to allege that he is entitled to relief and to negate (to the extent it is even his burden) the election-of-remedies provision.”346

Next, in his amended complaint, Glen detailed the transfer of the property (which initially belonged to his great-grandfather) and referenced a “rustic, one-room limestone cottage” built by his family on one of the two tracts of land.347 Mastercard latched onto this fact and argued that “Glen’s suit cannot succeed, as the plain text of the Helms-Burton Act makes clear that a Title III claim may not rest on real property used in this way.”348 Glen, in turn, argued that Mastercard misread the Act, stating:

The residential purposes exception in the Act’s definition of “property” bars a plaintiff from alleging that a defendant is trafficking by using real property as a residence. That a portion of a property may have been historically used for residential purposes is irrelevant. . . . The exclusion is meant to prevent a flood of claims where the alleged trafficking is the modern-day, residential use of property by Cuban citizens, and not to bar Glen from asserting a claim for Defendants trafficking in properties that are the site of commercial hotel establishments.349

347. Amended Complaint, supra note 331, ¶¶ 30-42.
348. Mastercard’s Brief in Support of their Motion to Dismiss, supra note 340, at 16-17. Addressing the Act’s carveouts for eligible residential properties, Mastercard argued that Glen’s claim does not fall into those exceptions because (1) his claim was not certified by the FCSC, and (2) the property is not occupied by an official of the Cuban Government, as provided in the Act’s definition. Id.
349. Plaintiff’s Omnibus Answering Brief, supra note 346, at 18-19 (citations and emphasis omitted).
Alternatively, Glen argued that even if Mastercard’s interpretation is correct, its argument still fails because the cottage was only on a small portion of one of the two tracts of land, and Glen can still assert a claim for trafficking in connection with the remaining undeveloped portion of his family’s land.\footnote{350}

Finally, the defendants also made two relatively \textit{unfamiliar} arguments for this category of litigation. First, Mastercard argued that the action should be dismissed because Glen has not pleaded facts to show that the property at issue has not been the subject of a claim certified by the FCSC, as required by Section 6082(a)(5)(D) of the Act.\footnote{351} More specifically, Mastercard maintained that Glen’s allegation that he was not eligible to have his claim certified by the FCSC is insufficient and he must bear “the burden of establishing for the court that the interest in property that is the subject of the claim is not the subject of a claim so certified.”\footnote{352} In response, Glen stated:

\begin{quote}
Considering that the claim to the Glen Properties has been held by Glen or his family members since confiscation, it is reasonable to infer from this allegation that the Glen Properties are not the subject of a claim certified by the FCSC in the 1960s. In any event, all claims adjudicated by the FCSC are publicly available, and an index of such claims published by the commission reflects that there are no certified claims associated with . . . the Glen Properties.\footnote{353}
\end{quote}

Second, Visa argued that the Helms-Burton Act (or at least its civil remedy provision) violates Visa’s constitutional rights because (1) the Act’s definition of “traffics” is vague both facially and as Glen seeks to apply it to Visa; and (2) the Act’s damages provision would impose “impermissibly excessive, punitive and disproportionate remedies.”\footnote{354} Visa’s position was that the Act did not give it “fair notice” that it might be subject to liability for trafficking. This is because the definition of “traffics” states that transactions incident to “lawful travel” are not trafficking, thereby placing Visa’s services (facilitating bookings and permitting the hotels to collect payment from their guests) outside the realm of prohibited activity.\footnote{355} Visa also

\begin{footnotes}
350. \textit{Id.} at 19.
351. Mastercard’s Brief in Support of their Motion to Dismiss, \textit{supra} note 340, at 16.
354. Visa’s Brief in Support of their Motion to Dismiss, \textit{supra} note 340, at 15-18.
355. \textit{Id.} at 16.
\end{footnotes}
argued that the definition is impermissibly vague on its face because it prohibits engaging in “commercial activity using or otherwise benefiting from confiscated property . . . by another person, or . . . through another person.”\textsuperscript{356} Visa illustrated the predicament created by the definition:

If literally applied, this definition would encompass a virtually limitless number of actors. With respect to the hotels at issue in this case, it would encompass, not only the entities that own and operate the hotels, but also, for example: a Swedish furniture maker, an Irish linen producer, a Canadian farmer, or a U.S. paint manufacturer whose products, sold by international distributors rather than directly to Cuba, wind up in one of the hotels in question (or in any other hotels or commercial entities in Cuba located on confiscated property). Each would have profited “by” or “through” others (one or more independent distributors) from the sale of its products or services ultimately paid for and used by the hotels.\textsuperscript{357}

Visa lastly addressed the damages provision of the Helms-Burton Act, which it argued violates its constitutional due process rights for a few main reasons: (1) damages under the Act are not based on any profit Visa might have obtained, but on the entire value of Glen’s property at the time of confiscation plus 60 years of interest; (2) the Act does not require multiple traffickers to make a contribution toward an award of damages—a plaintiff could potentially recover the entire value of its property from a string of traffickers who each profit from the property in some way; and (3) the Act provides for treble damages along with attorneys’ fees and court costs.\textsuperscript{358}

The court dismissed both TripAdvisor LLC and Visa Inc.\textsuperscript{359} First, the court found that Glen was not precluded from relitigating the issues that had already been decided in \textit{American Airlines}.\textsuperscript{360} It further held that it would

\begin{itemize}
  \item \textsuperscript{356} \textit{Id.} at 17 (citing 22 U.S.C. § 6023(13)(A)(ii)-(iii)).
  \item \textsuperscript{357} \textit{Id.}
  \item \textsuperscript{360} Memorandum Op., supra note 359, at 7. The court requested that both sides file letter briefs addressing the impact, if any, of the US District Court for the Northern District of Texas’s decision in Glen v. American Airlines, Inc. to dismiss Glen’s claim. \textit{Id.} at 6. Glen’s case against American Airlines is discussed below in Subsection D.3.
\end{itemize}
not dismiss the action for lack of subject matter jurisdiction because Glen had met his burden of establishing Article III standing.\textsuperscript{361} The court reasoned that Glen’s harm satisfies standing requirements because, while it may be “intangible,” it is nevertheless “concrete,” since Congress expressed its intent to make the injury redressable by enacting the Helms-Burton Act.\textsuperscript{362} The court further found that (1) the particularity and actuality requirements are both satisfied; (2) the injury is fairly traceable to defendants’ conduct because Congress did not intend for the casual link to stop at the Cuban government’s confiscation; and (3) the injury can be redressed by a favorable judgment.\textsuperscript{363}

Despite these wins for the plaintiff, the court ultimately dismissed the suit for failure to state a claim because Glen failed to allege that (1) he acquired the claim prior to March 12, 1996, and (2) defendants knowingly and intentionally trafficked in the subject properties.\textsuperscript{364} Glen urged the court “to read the word ‘acquire’ as meaning ‘to get by one’s own efforts,’ which would result in the statutory term ‘acquire’ not including ‘passively inher-\textsuperscript{365}it\[ing\] the claim.’”\textsuperscript{365} The court did not adopt Glen’s proposed interpretation—first, it did not believe that the term is ambiguous, and second, it relied on a published notice by the US Department of Justice summarizing the provisions of Title III, which stated that “if the property was confiscated before March 12, 1996, the US national bringing the claim must have \textit{owned} the claim before March 12, 1996.”\textsuperscript{366} The court reasoned that “the word ‘own’ is not limited to ‘by one’s effort,’ as Glen suggested, but is, instead, sufficiently broad to cover ownership by inheritance.”\textsuperscript{367} To come to its decision, the court also delved into surrounding statutory language, legislative history, and conceivable justifications such as judicial economy for the date-of-acquisition requirement.\textsuperscript{368}

With respect to the element of scienter, the court came to three conclusions. First, it held that it is not enough for defendants to merely knowingly and intentionally engage in commercial activities—they must know that the properties at issue were confiscated.\textsuperscript{369} Second, having “reason to know” that the properties were confiscated because it is a well-known fact that the Castro Regime expropriated property following the Cuban Revolution does

\begin{itemize}
\item \textsuperscript{361} Memorandum Op., \textit{supra} note 359, at 14.
\item \textsuperscript{362} \textit{Id.} at 12.
\item \textsuperscript{363} \textit{Id.} at 13-14.
\item \textsuperscript{364} \textit{Id.} at 14.
\item \textsuperscript{365} \textit{Id.} at 15.
\item \textsuperscript{366} Memorandum Op., \textit{supra} note 359, at 15-16.
\item \textsuperscript{367} \textit{Id.} at 16.
\item \textsuperscript{368} \textit{Id.} at 16-18.
\item \textsuperscript{369} \textit{Id.} at 20.
\end{itemize}
not satisfy the requisite scienter under the Act.\textsuperscript{370} And third, with respect to the post-notice period only, Glen “plausibly alleged scienter against all Defendants other than Visa . . . because Visa Defendants promptly ceased their commercial activities in connection with the Subject Hotels upon receiving the notice.”\textsuperscript{371} Having concluded that Glen’s action is barred because he did not timely acquire his claim and because he failed to allege scienter (at least with respect to Visa), the court did not address any of the other arguments brought by the defendants and discussed in this Article.\textsuperscript{372} On April 27, 2021, Glen filed appeals for both TripAdvisor LLC, and Visa Inc. with the US Court of Appeals for the Third Circuit. As of January 7, 2022, the court has not issued a decision for either case.


Initially filed in the US District Court for the Southern District of Florida, Glen v. American Airlines, Inc. was transferred to the US District Court for the Northern District of Texas.\textsuperscript{373} In its complaint against American Airlines, Glen alleged that not only does the airline operate daily flights from Miami International Airport to Cuba, but it also facilitates hotel bookings for passengers’ stay in Cuba through its website—including bookings for the four beachfront resorts now on Glen’s confiscated property.\textsuperscript{374} Glen argued that by facilitating these bookings, American Airlines is itself engaging in a commercial activity that benefits from the confiscated property, and is participating and profiting from the resorts’ own trafficking.\textsuperscript{375} The parties proceeded to file a series of briefs culminating in the court’s dismissal of the action.\textsuperscript{376}

American Airlines argued that Glen’s complaint should be dismissed because Glen (1) lacks Article III standing, (2) did not acquire his claim before the statutory cutoff date, and (3) failed to adequately plead that defendant acted intentionally and knowingly.\textsuperscript{377} On August 3, 2020, the court

\textsuperscript{370}. Id. at 21.
\textsuperscript{371}. Memorandum Op., supra note 359, at 22.
\textsuperscript{372}. Id. at 23.
\textsuperscript{375}. Id. ¶¶ 9-12. Glen alleges in his complaint that between January 23, 2018, and July 19, 2019, visitors of American Airlines’ website made twenty-four reservations at the resorts, earning the airline commissions for each reservation made. Id. ¶¶ 145-148.
\textsuperscript{377}. Id.
agreed with American Airlines, holding that Glen indeed (1) lacks standing to sue, and (2) failed to state a claim upon which relief may be granted.\footnote{378 \textit{Id.} at *2.} 

Glen conceded that neither the Cuban government’s confiscation of the properties nor the hotels’ operations constituted injuries-in-fact; instead, he based his injury entirely on the airline’s alleged violation of the substantive right given to claimants by the Act.\footnote{379 \textit{Id.} at *1.} The court’s position on this argument is unequivocal:

Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. Plaintiff complains that defendant fails to compensate plaintiff when defendant earns commissions on reservations made at the Subject Hotels. It is unclear how plaintiff is injured by such an action. Defendant did not deprive plaintiff of the Properties or the profits he might make if he owned and operated hotels on the Properties. Instead, defendant merely does business with the Subject Hotels. . . . [P]laintiff would not be entitled to a portion of defendant’s commissions even if he owned the Properties and operated the Subject Hotels.\footnote{380 \textit{Id.} at *5.}

Standing aside, the court also based its holding on its finding that Glen failed to plead sufficient facts to prove the element of scienter required by Title III of the Act, which (according to the court) requires a showing that American Airlines knew that the resorts were constructed on confiscated property and intended to traffic in that confiscated property.\footnote{381 \textit{Id.} at *1.} Glen maintained that “a defendant need not have realized that property was confiscated in order for the listed activity involving such property to constitute ‘trafficking’ under the Act.”\footnote{382 \textit{Id.} at *5.} Glen’s position is that “knowingly and intentionally” modify only the verbs found in the definition of “traffics” (i.e. sells, transfers, purchases, possesses, acquires, engages, participates, profits, etc.), and not the language of “confiscated property.” The court disagrees with this interpretation, reasoning that:

\begin{itemize}
  \item \footnote{378 \textit{Id.} at *2.}
  \item \footnote{379 \textit{Id.} at *1.}
  \item \footnote{380 \textit{Id.} at *5.}
\end{itemize}
plaintiff does not explain how someone might sell, buy, or engage in some other commercial activity without knowing that he is doing so or intending to do so. It seems that to engage in any of the actions listed in § 6023(13)(A), the actor must at least be aware of his own actions.\textsuperscript{383}

According to the court, Glen’s interpretation of the provision would render the “knowingly and intentionally” language “superfluous.”\textsuperscript{384} Additionally, the court addressed Glen’s argument that American Airlines had (1) “reason to know” that real property belonging to US nationals was confiscated by the Cuban government due to Congress’s inclusion of this finding in the Act, and (2) gained actual knowledge of the confiscation after Glen sent a cease and desist notice prior to filing his action.\textsuperscript{385} The court, again, disagreed with this position, reasoning that if the Act was meant to place all potential defendants on notice, Congress would not have included the word “knowingly” in the definition of “traffics.”\textsuperscript{386} Additionally, the court found that Glen did not plead facts to show that American Airlines continued to facilitate bookings to the resorts after receiving the cease and desist notice.\textsuperscript{387}

Lastly, the court held that Glen is not eligible to bring a suit under the Helms-Burton Act because, according to his pleadings, he inherited his claim to the properties in 1999 and 2001.\textsuperscript{388} As discussed above in other case analyses, the Act provides that, for property confiscated before March 12, 1996, a US national may not bring a Title III unless such national acquires ownership to the claim before March 12, 1996.\textsuperscript{389} While Glen argued that the term “acquires” in the provision should not be read to include inheritance (meaning that the Act would not bar actions related to inherited claims after the cutoff date), the court disagreed, reasoning:

If the Act’s definition of ‘acquires’ does not include inheritance, plaintiff never ‘acquire[d] ownership of the claim’ and therefore ‘may not bring

\begin{itemize}
\item \textsuperscript{383} Am. Airlines, 2020 WL 4464665, at *6.
\item \textsuperscript{384} Id. The court also states that it “is not alone in its interpretation of the breadth of the scienter element,” referring to the decision in Gonzalez v. Amazon, Inc., No. 19-23988, 2020 WL 1169125, at *2 (S.D. Fla. Mar. 11, 2020). Gonzalez is discussed in Section IV.E.1.
\item \textsuperscript{385} Am. Airlines, 2020 WL 4464665, at *6.
\item \textsuperscript{386} Id.
\item \textsuperscript{387} Id.
\item \textsuperscript{388} Id. at *4.
\end{itemize}
an action’ under the Act. If the Act’s definition of ‘acquires’ does include inheritance, plaintiff did acquire his claim to the Properties, but not until after the March 12, 1996 deadline.390

Glen appealed the decision to the US Court of Appeals for the Fifth Circuit on August 28, 2020.391 On August 2, 2021, the Fifth Circuit vacated the district court’s dismissal for lack of standing, but ultimately rendered a decision for American Airlines.392 The court disagreed with Glen’s assertion that Section 6082(a)(4)(B) does not apply to inheritance. The Fifth Circuit explained that “[i]f Congress meant for ‘acquires’ to require some form of active conduct, like a purchase, it knew how to communicate that meaning.”393 It specifically pointed to Section 6082(a)(4)(C), which prohibits a Title III claim for property confiscated on or after March 12, 1996, if the US national “acquires ownership of a claim to the property by assignment for value,” after the confiscation, reasoning that “[t]here would have been no reason for Congress to add the words ‘by assignment for value’ if ‘acquires ownership’ was already limited to assignment for value.”394

The Fifth Circuit made no mention of the amicus curiae brief of former Congressmen Dan Burton and Robert Torricelli filed in support of Glen’s argument on this issue.395 In their brief, the Congressmen explain their stance:

Today, approximately 85% of all certified claims are owned by individuals who inherited their claims from relatives whose property was confiscated by the Castro government prior to March 12, 1996. To accept the proposition that claims inherited after March 12, 1996, are unenforceable would effectively render the law meaningless. It would have made no sense for Congress to establish in the Helms-Burton Act such a compensatory and deterrent remedy in 1996 for confiscations that arose two generations earlier, which law also included

393. Id. at 336 (emphasis omitted).
394. Id. (citing § 6082(a)(4)(C)) (internal citations omitted).
the ability of the President to suspend the right to bring a lawsuit, and then say that Congress did not intend the remedy to be available to the heirs who inherited the claim 40+ years after the confiscation. Such a result would be completely incompatible with Congress’s purpose and actions.\(^{396}\)

According to Congressmen Burton and Torricelli,

\begin{quote}
[the] provision was specifically enacted to disallow the acquisition of claims by purchase or trade in a secondary market for claims. This was made clear in the House Legislative Report, which confirms that both sections 6082(4)(B) and 6082(4)(C) were intended to eliminate any incentive that otherwise might exist to transfer claims to U.S. nationals to take advantage of the remedy created by this section . . . . Congress did not want to create a marketplace for the buying and selling of Title III claims. A claim inherited from a family member was never at issue.\(^ {397}\)
\end{quote}

Many Title III plaintiffs were undoubtedly eagerly anticipating the Fifth Circuit’s decision given this amicus curiae submission; however, it appears the court did not place much importance on the arguments made by the Congressmen. It remains unclear whether the Eleventh Circuit will be influenced by the Congressmen’s submission in the Garcia-Bengochea appeals.

Despite the Fifth Circuit’s ultimate judgment for American Airlines, it ruled in favor of Glen on the key legal issue of standing. American Airlines argued that (1) Glen does not have a legally protected interest in the properties because they were confiscated years earlier, meaning that Glen’s relatives had nothing to pass down to him upon their deaths; and (2) Glen’s injury is not traceable to American Airline’s actions, which resulted in a total of $503.18 in commissions.\(^ {398}\) With respect to the first point, the court explained that “American’s argument goes to the merits of Glen’s claim, not his standing.”\(^ {399}\) Glen had standing because his complaint alleged an interest in the properties, which is sufficient to meet the minimum Article

\begin{flushleft}
396. \textit{Id.} at 3.
397. \textit{Id.} at 9-10.
399. \textit{Id.} at 335.
\end{flushleft}
The Court also relied on the Act’s abrogation of the act of state doctrine, which specifically provides that no US court will decline to make a determination on the merits of a Title III action based on the doctrine. The Fifth Circuit ultimately refused to assume the validity of the Cuban expropriations—an assumption that would impact the existence of Glen’s interest in the properties. With respect to the second point, the Fifth Circuit reasoned that Glen “alleges an injury that is entirely separate from either the confiscation of the properties or the operation of hotels on those properties. Specifically, he alleges that American was unjustly enriched because it did business with the entities that now occupy the properties that were wrongly taken from him.”

On December 15, 2021, Glen filed a petition for a writ of certiorari, leaving the door open (as of this writing) for a potential Supreme Court hearing on “[w]hether the word ‘acquires’ within the context of the Act embraces a broad or narrow meaning.”

E. THIRD WAVE OF LAWSUITS

The preceding cases reveal one of many patterns—a large number of the defendants that are part of the novel Helms-Burton Act litigation are travel related entities that have little direct connection to the expropriated properties in question. Two lawsuits that steer away from this pattern are Gonzalez v. Amazon.com, Inc. and Cueto Iglesias v. Pernod Ricard.
I. Gonzalez v. Amazon.com, Inc.

Plaintiff Daniel A. Gonzalez’s grandfather purchased approximately 2,030 acres of agricultural land in Cuba in 1941 that was confiscated by the Cuban government in 1964. At that time, Gonzalez could not file a claim with the FCSC because he was not a US citizen. In his complaint, Gonzalez alleged that the interest in the land passed to him by operation of succession. He further alleged that starting January 5, 2017, Amazon.com, Inc. and Susshi International Inc. knowingly and intentionally trafficked in the property by marketing and selling marabu charcoal produced on the confiscated land without his authorization.

Both defendants filed motions to dismiss, and on March 11, 2020, the US District Court for the Southern District of Florida granted those motions, holding that Gonzalez did not sufficiently allege that (1) he has an actionable ownership interest in the property, and (2) the defendants knowingly and intentionally trafficked in the property. With respect to the element of scienter, the court held that plaintiff’s allegations are conclusory and that, “Gonzalez’s assertion that the charcoal advertisement on Amazon, which states that it is ‘Direct from Farmers in Cuba,’ demonstrates the Defendants’ knowledge, is mistaken. That the charcoal is produced by Cuban farmers does not demonstrate that the Defendants knew the property was confiscated by the Cuban government nor that it was owned by a United States citizen.”

The court allowed Gonzalez to file an amended complaint to correct the deficiencies indicated in its opinion; however, after another round of briefings, the court again granted defendants’ motions to dismiss with prejudice, holding that Gonzalez still had not alleged that he has an actionable ownership interest in the property—a dispositive issue. The amended complaint illuminates certain details about the succession of the property interest. Gonzalez’s grandfather passed away in 1988 and, upon his death,

406. Id. ¶¶ 16-17.
407. Id. ¶ 9.
408. Id. ¶¶ 18-19. Amazon.com, Inc. is a Delaware corporation and Susshi International, Inc., d/b/a Fogo Charcoal is a Florida corporation.
410. Id. at *2.
411. Id.
the subject property passed to Gonzalez’s father.\textsuperscript{413} After his father’s death in 2016, Gonzalez’s mother, Adis Gonzalez, inherited the property, but she chose to pass her ownership claim to her son.\textsuperscript{414} According to the court, these facts did not indicate that Gonzalez inherited the property before March 12, 1996, the claims acquisition deadline.\textsuperscript{415} Due to this missing critical element, the court held that Gonzalez failed to state a claim upon which relief can be granted, declaring that because he had two opportunities to state a claim and has failed to do so, any further amendment would be futile.\textsuperscript{416}

Gonzalez filed an appeal with the Eleventh Circuit, \textit{pro se}, on June 9, 2020. In his brief, Gonzalez argued that his “right of future ownership and interest” in the claim was established in 1988 when his grandfather passed away.\textsuperscript{417} He further argued that, had the Helms-Burton Act not been suspended for 23 years, his father would have had the opportunity to timely pursue his legal rights.\textsuperscript{418} Accordingly, Gonzalez’s position (and that of many other non-corporate Title III plaintiffs) is that heirs who inherited their claims after the acquisitions deadline should be permitted to bring an action under Title III.\textsuperscript{419} To support his position, Gonzalez referenced the amicus brief of former Congressmen Dan Burton and Robert Torricelli filed in \textit{Glen v. American Airlines, Inc.}\textsuperscript{420} In this brief, the amici state that “there is no question that Congress intended that heirs should enjoy the right to sue under Title III even if they inherited their claims after March 12, 1996. Any other interpretation would render the law meaningless . . . .”\textsuperscript{421} Despite these arguments, on February 11, 2021, the Eleventh Circuit affirmed the district court’s judgment stating, “[t]he language that Congress used in this provision is clear and unambiguous. . . . [a]nd because the statute’s text is plain, we have no power to waive or extend the deadline.”\textsuperscript{422}

\begin{verse}
\textsuperscript{414} Id. ¶ 16.
\textsuperscript{415} Gonzalez, 2020 WL 2323032, at *2.
\textsuperscript{416} Id.
\textsuperscript{417} Appellant Initial Brief at 13, Gonzalez v. Amazon.com, Inc., No. 20-12113 (11th Cir. July 16, 2020) (emphasis added).
\textsuperscript{418} Id. at 13, 16.
\textsuperscript{419} Id. at 16.
\textsuperscript{420} Id. Gonzalez stated the district court did not permit the filing of the Amicus Brief.
\textsuperscript{421} Brief of Former Congressmen Dan Burton and Robert Torricelli, \textit{supra} note 395, at 2.
\textsuperscript{422} Order at 3, Gonzalez v. Amazon.com, Inc., No. 20-12113 (11th Cir. Feb. 11, 2021).
\end{verse}
2. **Cueto Iglesias v. Pernod Ricard S.A.**

The District Court for the Southern District of Florida also dismissed the Title III case against Pernod Ricard S.A., a French producer of alcoholic beverages.\(^{423}\) Plaintiff Marlene Cueto Iglesias’s father was the owner of Conac Cueto, C.I.A., a Cuban-based cognac producer and seller.\(^{424}\) Plaintiffs alleged that the Cuban government confiscated “intellectual property, oak barrels, bottles, labels, corks, tasters, meters, and other assets the Company used in the production and sale of cognac.”\(^{425}\) Plaintiffs further alleged that these assets were then merged into the Cuban Government Rum Company, which later partnered with Defendant Pernod Ricard to sell the Cueto cognac under the brand name “Havana Club.”\(^{426}\) According to plaintiffs, Pernod Ricard has knowingly and intentionally distributed the Havana Club line of products worldwide since 1993.\(^{427}\) To do so, it has allegedly used the assets and intellectual property of the family company without authorization or compensation and has participated and profited from the Cuban government’s possession of those assets.\(^{428}\)

Defendant raised the issue of standing; however, the court found that plaintiffs do indeed have standing, reasoning that “[l]ike the plaintiff in Havana Docks, Plaintiffs’ standing here is predicated on their claim that they hold an interest in the confiscated property that was the subject of dealings between Defendant and the Cuban Government.”\(^{429}\) The court also found that plaintiffs sufficiently stated their claim and established the element of scienter.\(^{430}\) In addition to plainly alleging that Pernod Ricard knowingly and intentionally trafficked in the confiscated property at issue, plaintiffs referenced “Cuban newspapers that reported on the Cuban Government’s confiscation of various areas of private property, including rum and alcohol companies, and . . . contend[ed] that the markings on the seized property, including barrels and other materials, gave or should have given Defendant reason to know that the property was owned by Cuban citizens.”\(^{431}\) The court explained that these extra details distinguish plaintiffs’ case from others, where only conclusory allegations of scienter were made, without more.\(^{432}\)


\(^{424}\) Id. at 1. Miriam Iglesias Alvarez, a family member, was added to the amended complaint as another plaintiff.

\(^{425}\) Id. at 2.

\(^{426}\) Id.

\(^{427}\) Id.

\(^{428}\) Order, supra note 423, at 18.

\(^{429}\) Id. at 18.

\(^{430}\) Id. at 19.

\(^{431}\) Id.

\(^{432}\) Id. at 20.
Despite these wins, the court ultimately dismissed the case, finding that plaintiffs did not establish either general or specific personal jurisdiction.\footnote{Order, supra note 423, at 16.} Because Pernod Ricard is a French corporation organized under foreign law with a principal place of business in Paris, France, it would have to possess significant contacts with the State of Florida for the court to establish general jurisdiction.\footnote{Id. at 9.} Plaintiffs argued that the activities of defendant’s subsidiary, Pernod Ricard USA, LLC, a Delaware limited liability company, meet the “substantial and not isolated activity within this state requirement necessary to satisfy Florida’s long-arm general jurisdiction statute.”\footnote{Id.} According to plaintiffs, those activities are imputed to the defendant because the US subsidiary is an “alter-ego” of defendant.\footnote{Id. at 9-10.} To support their alter-ego claim, plaintiffs asserted, among other things, that the subsidiary is registered to do business in Florida and that 28 percent of Pernod Ricard’s overall sales take place in the United States.\footnote{Order, supra note 423, at 10 (citing WH Smith, PLC v. Benages & Assocs., Inc., 51 So. 3d 577, 581 (Fla. Dist. Ct. App. 2010)). While at the motion to dismiss stage, a plaintiff need only allege facts to support a plausible basis for its claim. Here, plaintiffs failed to allege that “the corporate form must have been used fraudulently or for an improper purpose; and . . . the fraudulent or improper use of the corporate form caused injury to the claimant.” Id. at 11.} The court found that these allegations were insufficient to support plaintiffs’ arguments and explained that under Florida law, “to pierce the corporate veil under an alter-ego theory, the plaintiff must establish ‘both that the corporation is a ‘mere instrumentality’ or alter ego of the defendant, and that the defendant engaged in ‘improper conduct’ in the formation or use of the corporation.’”\footnote{Id. at 13.} This aside, the court reiterated that the exercise of jurisdiction must also satisfy the Due Process Clause. Under the US Constitution and Supreme Court precedent, general personal jurisdiction over a corporation exists only “when [its] affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”\footnote{Id. at 14.} Here, the court found that Pernod Ricard’s connections with Florida do not meet the rigor of the test.

Finally, because plaintiffs failed to identify which sections of the Florida long-arm statute they were relying upon to establish specific personal jurisdiction, the court was unable to assess whether any of those sections were applicable to the case.\footnote{Id. at 10.} The court, nevertheless, addressed two sec-
tions of the long-arm statute that could establish jurisdiction. First, because plaintiffs contended that specific jurisdiction could be established through defendant’s US subsidiary, the court considered whether that subsidiary was “operating, conducting, engaging in, or carrying on a business venture in Florida” that “had a substantial connection to the cause of action in this case.” The court found that “Plaintiffs merely advance the conclusory assertion of alter ego, while giving only a general description of what business Pernod USA conducts.” Without allegations on defendant’s acts within Florida and more details on the relationship between Pernod Ricard and the US subsidiary, the court could not find that jurisdiction exists under this basis. Second, the court considered whether defendant committed a tortious act within the state, but once again found that plaintiffs did not establish jurisdiction under this scenario, because they “failed to allege that Defendant, or its agent, committed a tortious act in Florida by selling or distributing the Havana Club.” As with its analysis on general jurisdiction, the court made it clear that even if plaintiffs could allege the types of facts needed to satisfy the long-arm specific jurisdiction statute, any exercise of jurisdiction must comport with the Due Process Clause.

The court gave plaintiffs leave to file a motion for jurisdictional discovery and a second amended complaint but later denied all three of plaintiffs’ motions for jurisdictional discovery, finding that “Plaintiffs failed to inform the Court what discovery they sought or how it would establish personal jurisdiction.” In response to plaintiffs’ second amended complaint, defendant filed another motion to dismiss for lack of jurisdiction, which the court granted on June 17, 2021. In this second round, plaintiffs added the allegation that defendant’s US subsidiaries allow international travelers to purchase Havana Club Cognac duty free at the

443. Id. at 15.
444. Id.
445. Id.
446. Id. at 15-16. The court provides the three-part test employed by the Eleventh Circuit to determine whether Due Process is being respected: Consider whether (1) “plaintiffs have established that their claims ‘arise out of or relate to’ at least one of the defendant’s contacts with the forum;” (2) “plaintiffs have demonstrated that defendant ‘purposefully availed’ itself of the privilege of conducting activities within the forum state;” and (3) “the defendant has made a compelling case that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice.” Order, supra note 423, at 16.
447. Id.
Miami airport and (2) argued that defendant’s sale of rum to Florida residents through its website is sufficient to establish the minimum contacts necessary to trigger personal jurisdiction. The court disagreed, stating that these types of arguments would “render foreign corporations subject to personal jurisdiction in nearly every major city in the United States where a consumer has access to an airport and the internet.” Ultimately, the court found that “Plaintiffs did not add any meaningful substance to their jurisdictional allegations.” Plaintiffs appealed the district court’s decision to the Eleventh Circuit on July 21, 2021, and as of January 7, 2022, the court has not issued an opinion.

F. A SUMMARY OF LITIGATION TRENDS

The lawsuits brought over the past two years may not have overwhelmed the US judicial system as initially expected; however, they have been instrumental in revealing the shortcomings of the Helms-Burton Act and providing analysis to many pertinent provisions for the first time since it was passed. The sample of cases discussed in this Article have presented some patterns—both as to the type of defendant being targeted and the contested legal issues facing parties and judges alike.

1. A Slow Start to Litigation with Unexpected Defendants

In part, the Helms-Burton Act seeks to provide former property owners with a path to recovery, given the absence of formal compensation from the Cuban government. For this reason, Congress likely contemplated that the “model” Title III lawsuit would be against Cuban entities or foreign investors benefiting from expropriated properties once belonging to US citizens. In fact, in the conference report on the Helms-Burton Act, Representative Livingston, the Chairman of the House Appropriations Committee, stated:

The conference report permits American citizens to recover damages from foreign investors who are profiting from their stolen property in Cuba. This will block the foreign investment lifeline which keeps Castro’s regime alive.

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451. Id. at *2.
452. Id.
453. Id.
The conference report also creates a right for U.S. citizens to sue parties that knowingly and intentionally traffic in confiscated property of U.S. nationals. Moreover, it denies entry into the United States of any such individual. These are logical steps which will compel international companies to make a fundamental choice: ignore U.S. property rights and engage in business as usual with Castro or maintain access to the world’s largest market.455

However, the majority of defendants are turning out to be American companies. The trends born from the cases analyzed in this Article help answer why so few cases have been filed and why so many cases are targeting domestic defendants, who often have very little direct connection to plaintiffs’ expropriated property.

First, *Mata v. Expedia, Inc.* demonstrates that serving process against remote foreign entities is time consuming and challenging.456 This has led plaintiffs to abandon foreign defendants and pivot toward suing more reachable American companies, even if their claims of “trafficking” are not as robust as they could be with a more appropriate defendant. In other cases, plaintiffs are likely making the strategic decision to avoid naming foreign defendants from the start in order to dodge service of process, lack of jurisdiction, and other procedural hurdles. US courts are unlikely to have personal jurisdiction over most foreign corporations, which are by their very nature incorporated abroad. The mere fact that a company might be commercially active in the United States is likely not enough to bring it within the purview of US courts.

Next, the Act itself can help explain the low number of cases generated since Title III went into effect. While the pool of potential plaintiffs is very large, Section 6082(b) requires that the amount of controversy exceed $50,000, exclusive of interest and other costs, thereby excluding over 85


456. *See supra* Section IV.C.3. One notable exception is the case filed by the US energy conglomerate, Exxon Mobil, against three Cuban state-owned companies. In an unprecedented move, the Cuban government appeared in US court to defend the lawsuit, which has tackled the question of whether Title III waives the immunity afforded to sovereign defendants under the Foreign Sovereign Immunities Act (FSIA). The US District Court for the District of Columbia has held that the FSIA’s commercial activity exception abrogated the Cuban defendants’ sovereign immunity. The district court has certified this issue for interlocutory review by the D.C. Circuit. Memorandum Opinion and Order, Exxon Mobil Corp. v. Corporacion CIMEX S.A., No. 19-cv-1277 (D.D.C. Nov. 23, 2021).
percent of certified claims alone. Further, Section 6084 creates a two-year limitation period, meaning that a lawsuit for “trafficking” may not be brought more than two years after the trafficking activities have ceased to occur. Other statutory provisions that likely limit the amount of cases filed revolve around actions that are not considered to be “trafficking.” The “lawful travel” exception has been a hotly contested exception in multiple cases, and while Judge James Lawrence King in Garcia-Bengochea v. Carnival Corp., and Judge Bloom in the Havana Docks cases, both issued the significant procedural ruling that the lawful travel clause is an affirmative defense, plaintiffs may be hesitant to bring actions if their case might be dismissed in later stages of litigation due to this exception. The Act also provides that the delivery of international telecommunication signals to Cuba, the trading or holding of publicly traded or held securities, and any transaction or use of property by a person who is both a Cuban national and a resident of Cuba are activities that are not “trafficking.”

Political realities surrounding the Act could also explain the low number of cases. Canada, Mexico, and the EU have responded to the passage of the Helms-Burton Act by enacting “blocking statutes,” which are meant to deter Title III lawsuits. These statutes nullify the effect of foreign court rulings. They also often provide a “claw-back” right of action, which allows affected entities to recover damages incurred as a result of one’s compliance with the foreign ruling. The EU specifically announced in its February 2019 declaration that it would rely on its blocking statute to counteract any effects on EU entities from the full activation of the Helms-Burton Act. The EU Blocking Statute—European Commission (EC) Regulation 2271/96—requires “EU operators” to notify the EC of any Title III claim asserted against them. In fact, named defendants cannot respond to a Title III complaint without express authorization from the EC. In

457. 22 U.S.C. § 6082(b) (1996). 5,095 of the 5,911 claims from the first Cuban Claims Program are valued at less than $50,000. See Final Report of the Commission’s First Cuba Claims Program, supra note 169.
459. See supra Section IV.C.1 and IV.C.2.
462. Id.
463. Id.
464. See supra Section IV.B.
466. Id.
Canto Marti v. Iberostar Hoteles y Apartamentos, S.L., for example, the defendant (a Spanish hotel and resort company) filed a motion to stay the proceeding while it seeks the EC’s authorization to defend the claim. Judge Robert N. Scola, Jr., from the Southern District of Florida, denied plaintiff’s motion to vacate the stay reasoning that: (1) Iberostar’s violation of the blocking statute could expose it to fines up to EUR 600,000.00, which are imposed by the Spanish government; (2) concerns of international comity weigh in favor of the court maintaining the stay; (3) a consideration of the fairness to the litigants warrants continuing the stay; (4) the stay does not inefficiently use judicial resources; and (5) the stay is not immoderate or indefinite, as there is evidence that the EC is actively considering Iberostar’s application for authorization. As of January 7, 2022, Iberostar is still waiting for a decision from the EC on its application for authorization to respond to the complaint. Pursuant to a court order, Iberostar continues to file a status report every month to keep the court updated of any developments associated with the authorization request. Given this hurdle, it is possible that some individuals and companies are thinking twice before filing a Title III lawsuit, which may be delayed by blocking statutes, and in which they ultimately may never recover damages even if they do prevail in US courts.

Practical limitations are also deterring potential plaintiffs from filing lawsuits. Title III actions are guaranteed to be expensive from the very start, as there is a special filing fee of $6,800, in addition to the typical $350 filing fee imposed for instituting any civil action in district court. Additionally, many claimants, particularly Cuban-Americans who were not US citizens at the time of the expropriations, could not get their claims certified by the FCSC. In the absence of a certification, plaintiffs need to prove that they have ownership of an actionable claim. Over half a century after the expropriations, obtaining paperwork that might have been destroyed or lost during the 1959 revolution to prove property ownership may be a considerable obstacle for some. Evidence of inheritance is not always easy to prove either, as is demonstrated by Garcia-Bengochea v. Carnival Corp., where the question of valid inheritance led to the submission of over five hundred

468. Id. at *2-3.
470. Id.
pages of evidence and required a study of Costa Rican law.\textsuperscript{472} Some potential plaintiffs may not even know who to sue, and years of travel restrictions to Cuba have not made ascertaining defendants easy. While Cuba has loosened its economic and political restrictions and now permits foreign investment, the Cuban State is still a socialist state that exclusively controls the majority of its economic sectors. Thus, the majority of claimants would likely have to go up against Cuban-state owned companies in a Helms-Burton Act suit and not an average corporate defendant. An American attorney attempting to represent a plaintiff seeking to sue the Cuban government would need to have a contact within Cuba for such an objective. The private practice of law is illegal in Cuba, and Cuban attorneys are state attorneys.\textsuperscript{473} Finding an investigator or other qualified individual in Cuba to assist with any number of discovery tasks is an additional burden to already complicated proceedings. Finally, another important consideration is that there are likely many potential plaintiffs and attorneys who are unwilling to file high-cost suits in the face of low-stake claims or to sue corporations with whom they do business or with whom they hope to do business one day.

2. \textit{Initial Judicial Interpretations of Contested Legal Issues}

From the fourteen cases that have been analyzed in this Article, thirteen have produced substantive court rulings on reoccurring legal issues, solely based on the pleadings.\textsuperscript{474} Six judges (Judges Beth Bloom, Robert N. Scola, Jr., Kathleen M. Williams, James Lawrence King, John McBryde, and Leonard P. Stark) from three federal districts (US District Courts for the Southern District of Florida, the Northern District of Texas, and the District of Delaware) have delivered opinions—some of which are conflicting—regarding key issues such as personal jurisdiction, Article III standing, scienter, and the application of Section 6082(a)(4)(B) to the inheritance of claims.\textsuperscript{475}

On February 11, 2021, the first appellate opinion for a Title III lawsuit was issued when the Eleventh Circuit affirmed the Southern District of

\begin{itemize}
\item \textsuperscript{472} See supra Section IV.C.2.
\item \textsuperscript{473} Victor Li, \textit{A New Dawn for Cuba as it Opens for Business}, ABA J. (June 1, 2016, 12:10 AM), https://www.abajournal.com/magazine/article/a new dawn for Cuba as it opens for business [https://perma.cc/762K-ZDQP].
\item \textsuperscript{474} These cases are the four \textit{Havana Docks} cases, the three \textit{Garcia-Bengochea} cases, \textit{Del Valle v. Trivago GmbH}, the three \textit{Glen} cases, \textit{Gonzalez v. Amazon.com Inc.}, and \textit{Cueto Iglesias v. Pernod Ricard}. \textit{Mata v. Expedia, Inc.} is the only case to have been closed administratively before producing an opinion on defendant’s arguments in their motion to dismiss.
\item \textsuperscript{475} Each individual holding is discussed in detail, supra Section IV. C., D., and E.
\end{itemize}
Florida’s decision to dismiss Gonzalez v. Amazon.com, Inc. 476 A few months later, the Fifth Circuit also issued a judgment for a Title III defendant in Glen v. American Airlines, Inc. Subsequently, Glen became the first person to petition the US Supreme Court to review the appellate decision, which would be a case of first impression for the Court. 477 Six additional opinions have been appealed in the Eleventh and Third Circuit Courts. 478 After facing the uncertainty of a law that has never been tested in US courts, parties are finally receiving some guidance on key issues that can make or break a Title III action.

Judge Scola in Del Valle v. Trivago GmbH and Judge Williams in Cueto Iglesias v. Pernod Ricard both found that, based on plaintiffs’ allegations, the court lacks personal jurisdiction over the defendants. 479 The key takeaway from the decisions is that to establish personal jurisdiction (the court’s power to rule over a specific defendant), plaintiffs must demonstrate a fairly significant connection between the defendant and the forum state or show that the suit arises from defendant’s specific activities in the forum state. To avoid dismissal on this ground, plaintiffs seeking to file Title III lawsuits should be cognizant of the minimum contacts a defendant must possess with the forum when drafting their complaints. The facts presented by the plaintiffs in Del Valle—such as defendant’s maintenance of a website accessible in Florida—fell “woefully short” of the allegations needed to establish “substantial and not isolated activity” in the forum. 480 In Cueto Iglesias, the issue was of a different sort—plaintiffs failed to allege sufficient facts to permit the judge to attribute Pernod USA’s activities to the parent company, which is a foreign corporation and the named defendant. 481

The judges in Glen v. American Airlines, Inc., Cueto Iglesias v. Pernod Ricard, the Havana Docks cases, and Glen v. TripAdvisor LLC along with Glen v. Visa Inc., each reached different conclusions on the issue of Article III standing. Judge McBryde from the Northern District of Texas held that Plaintiff Glen did not have standing to sue American Airlines, because he was not harmed by the airline merely engaging in business with the hotels now built upon what was once his family’s property. Glen’s attempt to argue that the Supreme Court has previously recognized that plain-

476. See supra Section IV.E.1.
477. See supra Section IV.D.3.
479. See supra Section IV.C.4. and IV.E.2.
481. See supra Section IV.E.2.; Order, supra note 423, at 10.
tiffs may sue to enforce a congressionally created substantive legal right without establishing additional harm was rejected by the court. The Fifth Circuit, however, reversed the district court’s decision on this point, holding that Glen had alleged an injury that was traceable to American Airlines—that they were trafficking in his properties without compensation or his authorization. In Cueto Iglesias, Judge Williams from the Southern District of Florida reached the opposite conclusion from Judge McBryde, holding that the allegations of profits obtained by defendant from its use of the expropriated property without providing compensation to the original owner does constitute sufficient concrete harm. Judge Bloom, also from the Southern District of Florida, similarly found that plaintiffs have standing to sue in Havana Docks, because “trafficking” in confiscated property is a violation of plaintiff’s property interest. Focusing on the causation element of standing, Judge Bloom reasoned that, according to Congress, there exists a chain of causation between plaintiff’s injury initially inflicted by the Cuban government and the subsequent unjust enrichment of the trafficker. Lastly, Judge Stark from the District of Delaware found that Glen met the standing requirements in both TripAdvisor LLC and Visa Inc. because the trafficking constituted a concrete harm, and because Congress did not intend for the causal link to stop at the Cuban government’s confiscation. While these holdings are useful, additional appellate court decisions are needed to provide a clear interpretation on when standing may or may not be present in Title III cases. For example, one straightforward question that still needs to be clearly answered is whether plaintiffs always have standing to sue if they have properly alleged “trafficking.”

Another important issue that has been subject to conflicting rulings is the element of scienter. Under Title III, for a defendant to be liable for “trafficking,” he must have knowingly and intentionally engaged in the conduct described in the Act. The term “knowingly” is further defined by the Act as “with knowledge or having reason to know.” Judge McBryde in Glen v. American Airlines, Inc. held that to commit trafficking under Title III, one must know that the property at issue was confiscated and intend that it be the “subject of their commercial behavior.” It is not enough for a defendant to only know and intend to engage in a commercial

482. See supra Section IV.D.3.; Am. Airlines, 2020 WL 4464665, at *3.
483. See supra Section IV.D.3.; Am. Airlines, 7 F.4th at 336.
484. See supra Section IV.E.2.; Order, supra note 423, at 18.
485. See supra Section IV.C.1.; Norwegian Cruise Line Holdings, Ltd., 484 F. Supp. 3d at 1227-28.
activity defined as “trafficking” under Title III. The court also rejected the argument that American Airlines must have known that the property at issue was confiscated, because the Act includes a finding that the Cuban government confiscated virtually all privately owned real property. The court reasoned that this position is flawed, since Congress clearly felt the need to add the word “knowingly” into the Act and to further define it despite this finding.

Knowledge aside, the court also pointed out that Glen failed to allege any facts to show American Airlines had acted intentionally. In Glen’s other two cases, Judge Stark similarly held that a defendant must know that the properties at issue were confiscated, and having reason to know, given the historical and political context, is insufficient. Judge Stark also discussed the status of scienter during the post-notice period—that is, after a plaintiff delivers the “cease and desist” notice to a defendant indicating its intent to initiate an action. The Visa entities were the only defendants to stop their commercial activities with the hotels following the notice; accordingly, Judge Stark found that Glen had “plausibly alleged scienter against all Defendants other than Visa, at least of the post-notice period.”

Judge Scola in Gonzalez v. Amazon.com, Inc. also held that plaintiff failed to allege scienter because it only offered conclusory allegations without presenting any additional facts that could demonstrate defendant’s knowledge of trafficking. Judge Williams in Cueto Iglesias issued the opposite holding, reasoning that the allegations presented by plaintiffs were distinguishable from those presented in Gonzalez. By adding a few factual allegations to the complaint, such as references to Cuban news articles detailing the government’s expropriation of alcohol companies, plaintiffs in Cueto Iglesias were able to establish scienter, at least at the pleading stage. Lastly, Judge King in Garcia-Bengochea v. Norwegian Cruise Line Holds Ltd., presents an entirely different holding on this issue—plaintiffs only need to allege scienter in general terms, and no specific facts showing defendant’s state of mind at the time of the “trafficking” need to be included in the pleadings.

Ultimately, the judges in these cases appear to agree that “trafficking” requires a defendant to knowingly and intentionally interact with the con-

491. Id. at *6.
492. Id.
493. Id.
496. See supra Section IV.E.1.; Gonzalez, 2020 WL 1169125, at *2.
497. See supra Section IV.E.2.; Order, supra note 423, at 20.
fiscated property in a manner provided for in the Act. Where the opinions diverge is, how specific a showing of scienter must be. Garcia-Bengochea held that a plaintiff does not need to allege specific facts to show a defendant’s state of mind—an allegation that defendant trafficked in confiscated property with the requisite state of mind is sufficient. Cueto Iglesias required greater specificity and held that a plaintiff must allege facts to show that a defendant knows or has reason to know that the property it is dealing with was confiscated. Gonzalez and American Airlines both held that plaintiff must allege facts to demonstrate defendant’s knowledge. American Airlines went a step further, holding that “[m]erely having reason to know is insufficient to satisfy § 6023(13)(A)’s scienter requirement,” and reminding plaintiffs that “Congress chose to include the intent requirement, and the court should not ignore it.” Thus, from all the opinions addressing the issue, American Airlines appears to have imposed the most rigorous standard for satisfying the Act’s scienter requirement.

The final major issue that courts have produced opinions on is what it means for a plaintiff to have “acquired” their claim before the statutory cut-off date of March 12, 1996. The plaintiffs in Garcia-Bengochea v. Carnival Corp., Gonzalez v. Amazon.com, Inc., and the three Glen cases each inherited their claim after March 12, 1996, so defendants argued that plaintiffs are barred from bringing an action. In response, plaintiffs assert that the term “acquire” does not pertain to scenarios of inheritance. The courts, however, have all disagreed, holding that the provision requiring a plaintiff to have acquired their claim before March 12, 1996 is broad enough to include acquisition by inheritance. The Fifth and Eleventh Circuits both upheld this interpretation in American Airlines and Gonzalez.

Besides this important holding, the district court opinions make clear that it is vital for plaintiffs to allege facts regarding the date of confiscation and the date of acquiring the property or claim so that the court can evaluate the positions properly. For example, the court in Gonzalez found in its March 2020 Order that Gonzalez’s complaint lacked allegations regarding critical facts surrounding the line of inheritance and the family’s citizenship status, leading to its conclusion that “[w]ithout these allegations, Gonzalez

500. In holding that the Act requires that “a person must know that the property was confiscated by the Cuban government and intend that such property be the subject of their commercial behavior,” the Glen court states that it is “not alone in its interpretation of the breadth of the scienter element,” referencing the decision in Gonzalez, 2020 WL 1169125.

501. Id. The court did not specify how a plaintiff can show a defendant’s intent.

502. See supra Section IV.C.2., IV.D., and IV.E.1.

503. Id.; Garcia-Bengochea, 2020 WL 4590825, at *4; Am. Airlines, 2020 WL 4464665, at *4; Am. Airlines, 7 F.4th at 336; Gonzalez, 2020 WL 2323032, at *2; Order, supra note 422. The defendants in Del Valle also made this argument, but it was not addressed by the district court’s opinion. See supra Section IV.C.4.
has not sufficiently alleged that he has an actionable ownership interest in
the confiscated property. 504

V. CONCLUSION

US policy toward Cuba has been defined for far too long by conflicts of
the past. Promoting democratic values and obtaining compensation for
US nationals whose property was expropriated by the Cuban government
are important national priorities; however, it is clear that the Helms-Burton
Act has not been effective in achieving either. Instead of advancing demo-
cratic change in Cuba, the Act has merely entrenched anti-US attitudes
among Cubans and angered our allies. In reality, most of the United States’
justifications for the statute’s promulgation are disingenuous. It was never
purely about protection of private property rights. For years, the United
States refused to initiate diplomatic relations with Cuba, preventing any
negotiation on claims settlements. Representing the Libertad Act as a reac-
tion to Cuba’s violation of political and human rights also holds minimal
weight, as the United States has maintained close trade (and at times diplo-
matic) ties with countries like China, Vietnam, Thailand, Saudi Arabia, and
India, which have been also widely criticized for human rights abuses. 505
This legislation is more accurately described as an attempt to exert econom-
ic pressure and drive foreign investment out of the communist island nation.
In its efforts to do so, the Act violates fundamental principles of interna-
tional law, casts great doubt on the effectiveness of US diplomacy, and has
most recently resulted in the unanticipated targeting of American compa-
nies in Title III litigation. For these reasons, the new Biden Administration
should consider restoring diplomatic relations with Cuba and implore Con-
gress to repeal the Helms-Burton Act. As the United States has done in the
past with the Soviet Union, China, Germany, and Vietnam (for example), it
should focus on negotiating a settlement agreement with the Cuban gov-
ernment. 506 Failure to restore these ties and ease deep-rooted bilateral ten-
sions will mean that Title III plaintiffs will continue to struggle with what
appear to be unsustainable lawsuits, domestic companies will be forced to
defend even more “trafficking” claims, and the United States will remain
tied to the diplomatic challenges it created for itself over half a century ago.

504.  Gonzales, 2020 WL 1169125 at *2 (citation omitted).
505.  For US trade statistics, see Countries & Regions, OFF. OF THE U.S. TRADE
REPRESENTATIVE, https://ustr.gov/countries-regions [https://perma.cc/TP73-FJEX]. China is
the United States’ 3rd largest goods trading partner, India is the 9th largest, Vietnam is the
13th largest, Thailand is the 20th largest, and Saudi Arabia is the 27th largest trading partner.
Id. All of these nations are known for their poor human rights records. See e.g., Countries,
506.  Feinberg, supra note 17, at 26-27.
## VI. APPENDIX

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<td>9/25/2019</td>
<td>1:19-cv-23965</td>
<td>S.D. Fla.</td>
<td>No</td>
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<td>Glen v. TripAdvisor LLC et al.</td>
<td>9/26/2019</td>
<td>1:19-cv-01809</td>
<td>D. Del.</td>
<td>No</td>
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<td>9/26/2019</td>
<td>1:19-cv-23994 4:20-cv-00482</td>
<td>S.D. Fla. N.D. Tex.</td>
<td>No</td>
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<td>S.D. Fla.</td>
<td>No</td>
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<td>Farm Land Producing Charcoal</td>
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<td>John S. Shepard Family Trust v. NH Hotels USA, Inc.</td>
<td>9/27/2019</td>
<td>1:19-cv-09026</td>
<td>S.D.N.Y.</td>
<td>Yes</td>
<td>Voluntarily Dismissed</td>
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<tr>
<td>Glen v. Visa Inc. et al.</td>
<td>10/4/2019</td>
<td>1:19-cv-01870</td>
<td>D. Del.</td>
<td>No</td>
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| CASE NAME | DATE FILED | DOCKET NUMBER | COURT | CERTIFIED CLAIM? | OUTCOME | TYPE OF PROPERTY "TRAFFICKED"
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<td>23 Cueto Iglesias et al. v. Pernod Ricard</td>
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<td>24 Sucesores de Don Carlos Nuñez y Doña Pura Galvez, Inc. v. Société Générale, S.A.</td>
<td>2/4/2020</td>
<td>1:20-cv-00851</td>
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<td>27 Rodriguez et al. v. Imperial Brands PLC, et al.</td>
<td>8/6/2020</td>
<td>1:20-cv-23287</td>
<td>S.D. Fla.</td>
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<td>28 Ciatlin et al. v. LafargeHolcim Ltd et al.</td>
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<td>Yes</td>
<td>Settled</td>
<td>Sugar Mill and Related Infrastructure Converted to a Cement Plant</td>
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<td>29 Soto v. Booking.com B.V. et al.</td>
<td>10/2/2020</td>
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<td>30 Pujol Moreira et al. v. Société Générale, S.A. et al.</td>
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<td>31 Blanco de Fernandez et al. v. Crowley Maritime Corp.</td>
<td>12/20/2020</td>
<td>3:20-cv-01426</td>
<td>M.D. Fla.</td>
<td>No</td>
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<td>Seaport, Warehouses, and Other Land</td>
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<td>32 Blanco de Fernandez et al. v. Seaboard Marine Ltd.</td>
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<td>34 North American Sugar Industries Inc. v. DSV Air &amp; Sea Inc.</td>
<td>1/4/2021</td>
<td>2:21-cv-00080</td>
<td>D.N.J.</td>
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<td>Stayed Pending Resolution of Motion to Dismiss in Plaintiff’s S.D. Fla. Action</td>
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<td>35 Blanco de Fernandez et al. v. Crowley Maritime Corp. et al.</td>
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<td>S.D. Fla.</td>
<td>No</td>
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<td>36 Blanco de Fernandez et al. v. A.P. Møller-Maersk A/S et al.</td>
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<td>No</td>
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<td>Seaport, Warehouses, and Other Land</td>
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<td>37 Castanedo Escalon v. Trafiguera Trading, LLC et al.</td>
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<td>S.D. Tex.</td>
<td>No</td>
<td>Motion to Dismiss Pending</td>
<td>Mines</td>
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