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Cuban Immunity Crisis: How Sovereign Immunity Impacts Enforcing the Helms-Burton Act Against Business Ventures in Cuba

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CUBAN IMMUNITY CRISIS: HOW SOVEREIGN IMMUNITY IMPACTS ENFORCING THE HELMS-BURTON ACT AGAINST BUSINESS VENTURES IN CUBA

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I. INTRODUCTION

The Foreign Sovereign Immunities Act ("FSIA") created a presumption of immunity for foreign sovereign nations against litigation or injury through private actions by stripping jurisdiction from U.S. courts.[1] However, there are exceptions to the immunity laid out in the Act.[2] Specifically, Sections 1605(a)(2) and (3) lay out exceptions to property takings and commercial activity conducted by the foreign sovereign.[3]

In 1996 Congress passed the Cuban Liberty and Democratic Solidarity Act of 1996 ("Helms-Burton Act") in response to the totalitarian regime of the Cuban Government, which posed an ongoing national security threat to the United States.[4] Title III of the Act aimed to deter investors from conducting business in Cuba and with Cuban businesses by creating a private right of action against persons or entities who "traffic" in property confiscated by the Cuban government.[5] The legislation defines "traffic" relatively clearly and expansively and makes Title III fairly evident regarding how to apply it.[6] Similarly defined is "confiscated" in subsection (4) of the same section as "the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property" so long as there has not been some type of recourse for the confiscation.[7]

In *Exxon Mobil Corp. v. Corporación CIMEX S.A.*,[8] the United States

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1. *See* 28 U.S.C. §§ 1602–1607 (finding that immunity for foreign states from U.S. courts would serve interests of justice and protect rights of both parties).

2. *See id.* § 1605 (providing general exceptions to jurisdictional immunity for a foreign state).

3. *See id.* § 1605(a)(2)–(3).

4. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021–6091 (justifying action against the Cuban government by highlighting economic and political concerns against the Castro regime).

5. John B. Bellinger III et al., *Two Years of Title III: Helms-Burton Lawsuits Continue to Face Legal Obstacles*, ARNOLD & PORTER, https://www.arnoldporter.com/en/perspectives/publications/2021/05/two-years-of-title-iii-helmsburton-lawsuits?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

6. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 4(13) ("[A] person 'traffics' in confiscated property if that person knowingly and intentionally [directly or indirectly engages with confiscated property] . . . " and explicitly excluding certain activities from this definition).

7. *Id.* § 4(4) (providing additional restrictions on the definition of "confiscated").

8. 534 F. Supp. 3d 1 (D.D.C. 2021).

District Court for the District of Columbia evaluated the question of sovereign immunity for three related Cuban corporations under Title III of the Helms-Burton and the FSIA.[9] The Court evaluated exceptions for waiving immunity under both Title III and the FSIA, comparing vague Title III language and the established exceptions under the FSIA.[10] The Court held there was jurisdiction of the primary CIMEX corporation but stayed the motion to dismiss to provide the opportunity for discovery to establish jurisdiction for the remaining two.[11] The Court assigned the temporary stay because Title III did not waive the plaintiff's sovereign immunity contention but instead relied on the commercial activity exception for the FSIA.[12]

This Comment will address how Title III of the Helms-Burton Act waives sovereign immunity for establishing jurisdiction without requiring evaluation of FSIA exceptions. Provided Exxon can successfully establish injury in fact, as required in Title III, the Court should deny the defendant's two additional motions to dismiss the claims on grounds of sovereign immunity.[13]

Furthermore, the Court oddly addressed the question of standing for the claim of action based on redressability and injury in fact.[14] There is ongoing confusion for Title III cases based on the injury of the confiscation of property itself or the "trafficking" of such property.[15] For Cuban defendants, this question would only apply to sovereign related actions, as there would be no claim to injury from non-government entities simply for the expropriation of the land.[16]

Part II of this Comment discusses the historical relationship between the United States and Cuba leading up to the Helms-Burton legislation, the rationale behind the Helms-Burton Act, and the history and application of the FSIA. Part III analyzes the Helms-Burton legislation to evaluate whether Title III of the Act implicitly waives sovereign immunity for actions against foreign sovereign nations. Additionally, Part III applies this analysis to show how the court should decide *Exxon Mobil Corp.* Part IV recommends steps to take to clarify the restrictions around litigation under Title III moving forward, as well as how to clarify the use of the Title as cases continue to file

9. *See id.* at 10–11

10. *See id.* (walking through the discussion between Title III and the FSIA to compare appropriate methods for waiving immunity).

11. *See id.* at 29–30.

12. *See id.*

13. *See id.*

14. *Id.* at 30–31.

15. *See id.*

16. *See id.*

into the courts. Finally, Part V concludes by recapping the major rationale for the presence of the sovereign immunity waiver within Title III, as well as drawing attention to the uncertainty around Helms-Burton legislation under the changing political climate.

II. A CONSISTENT CONCERN WITH CUBA LEADS TO A HISTORY OF STEPS FOR PROTECTING THE WESTERN WORLD

In 1959, Fidel Castro took control of the Cuban government following the Cuban revolution overthrowing President Fulgencio Batista and establishing a socialist state.[17] Following Castro's rise to power, he visited the United States to meet with then-President Richard Nixon on relatively welcome terms.[18] But over the next half-century and now twelve presidents later, the relationship between the two nations has experienced a failed invasion, a nuclear crisis, and an ongoing asylum situation.[19] Throughout the years, the U.S. has handled the political relationship inconsistently through changing embargoes and legislation, including the Helms-Burton Act in 1996.[20]

A. The Historical Impact Leading to the Rise of the Helms-Burton Act

In the late 1950s, Fidel Castro took control of the Cuban government and implemented significant changes to political practices in Cuba, creating tension between the United States and Cuba.[21] As part of the Castro regime, the Cuban government nationalized all foreign assets in Cuba and significantly raised taxes on imports from the U.S.[22] Similarly, the nationalization of industries in Cuba led to the exiting of many businesses and set the initial cause of action for the expropriation of lands in Cuba.[23]

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17. *See* Adam Epstein, *A Timeline of US-Cuba Relations Since the Cuban Revolution*, QUARTZ (Nov. 26, 2016), https://qz.com/314271/a-timeline-of-us-cuban-relations-since-the-cuban-revolution/.

18. *See* Greg Myre, *The U.S. And Cuba: A Brief History Of A Complicated Relationship*, NPR (Dec. 17, 2014, 2:09 PM), https://www.npr.org/sections/parallels/2014/12/17/371405620/the-u-s-and-cuba-a-brief-history-of-a-tortured-relationship.

19. *See id.*

20. *See* Epstein, *supra* note 19 (highlighting the complicated relationship between the U.S. and Cuba throughout the years).

21. *See U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/timeline/us-cuba-relations (Jun. 13, 2021) [hereinafter *U.S.-Cuba Relations*]; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021–6091 (highlighting economic and political concerns against the Castro regime); Cuban Democracy Act of 1992 § 7, 22 U.S.C. 6001 (citing the similar policy goals for a transition of Cuban government).

22. *See U.S.-Cuba Relations*, *supra* note 21.

23. *See id.*

Tensions generally worsened over the next few decades enduring the Cold War and further embargoes until 1992, under President George H.W. Bush, the U.S. tightened sanctions against Cuba after the fall of the Soviet empire.[24] In 1996, the Clinton Administration signed the Helms-Burton Act, further tightening and codifying the sanctions on Cuba instituted under President H.W. Bush.[25] The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, also known as the Helms-Burton Act, named after former Senator Jesse Helms and Representative Dan Burton, aimed to enforce the embargo between the U.S. and Cuba during the Clinton Administration.[26] The intent for passing the Act was to bring about a peaceful transition to a representative democracy and economic market in Cuba.[27] The Act stipulated that the restrictions implemented may only be lifted once the Castro regime is no longer in control and Cuba began a political transition.[28] The Act included numerous provisions that impacted the relationship between the U.S. and Cuba, from television broadcasting to extradition.[29]

Initially, the Act received much criticism from U.S. ally organizations and governments, as potential litigation and embargo enforcement against Cuba went against the goal of independent sovereignty and international law.[30]

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24. *See id.*

25. *See id.*

26. *See id.*; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302(d).

27. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 3 (stating the purposes of the Act "(1) to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere; (2) to strengthen international sanctions against the Castro government; (3) to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States; (4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers; (5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and (6) to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.").

28. *See id.* § 205 (requiring that the political transition must include Cuba allowing free elections, free press, and releasing political prisoners); *see also* John B. Bellinger et al., *supra,* note 5.

29. *See, e.g.*, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 107, 113 (promoting free and democratic television broadcasting and establishing extradition requirements).

30. *See* Press Release, General Assembly, Assembly Again Seeks Repeal of Extraterritorial Measures Like United States Helms-Burton Act Against Cuba, U.N. Press Release GA/9349 (Nov. 5, 1997) (identifying examples of global reactions to the Helms-Burton Act) [hereinafter U.N. Press Release Against Extraterritorial Measures].

The EU introduced a council regulation protecting against extra-territorial impacts of legislation, and a United Kingdom extension to their statute protecting trading interests.[31] The EU Council, UK, Mexico, and Canada all expressed hesitancy regarding the Helms-Burton Act and sought to limit its enforceability in foreign jurisdictions.[32] The criticism focused on the Act's potential to contradict international law and the sovereignty of the nations.[33] Mexico and Canada condemned Title IV of the Act, saying it violated the North American Free Trade Agreement (NAFTA)[34]

The Bush Administration contemplated enforcing the suspended Title but ultimately believed that the resulting litigation would cause more difficulties than benefits.[35] The Obama Administration eased many of the restrictions between the U.S. and Cuba to improve the situation between the two nations.[36]

The Trump Administration was much harsher when it came to relations with Cuba as part of the somewhat protectionist economic policy, which aimed to support U.S. producers rather than relying on foreign trade.[37] Over two years after taking office, President Trump let the Title III suspension lapse in May of 2019 as a deviation from precedent administrations which

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31. Council Regulation 2271/96 of Nov. 22, 1996, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1 (EC); The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, SI 1996/3171 (Eng.).

32. *See* U.N. Press Release Against Extraterritorial Measures, *supra* note 30; *see also* Pawel K. Chudzicki, *The European Union's Response to the Libertad Act and the Iran-Libya Act: Extraterritoriality Without Boundaries*, 28 LOY. U. CHI. L.J. 505, 505–06 (1997).

33. *See* Jeffrey Dunning, *The Helms-Burton Act: A Step in the Wrong Direction for United States Policy Toward Cuba,* 54 WASH. U. J. URB. & CONT. L. 213, 213 n.3 (1998) (noting the initial backlash that the Helms-Burton Act received from neighboring countries and trade partners).

34. *Id.* at 229.

35. Bellinger, III et al., *supra* note 5.

36. *See* Mimi Whitfield, *One of Obama's Parting Acts: Suspending Lawsuit Provision of Helms-Burton*, MIAMI HERALD (Feb. 6, 2017, 5:24 PM), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article131092324.html#storylink=cpy (providing, for example, that the U.S. reopened its Cuban embassy, entered into twenty-two agreements with Cuba "on topics of mutual interest" and resumed commercial airline and cruise services to Cuba under the Obama Administration).

37. *See* Matthew Lee & Joshua Goodman, *Trump Hits Cuba with New Sanctions in Waning Days*, PBS (Jan. 11, 2021, 6:48 PM), https://www.pbs.org/newshour/politics/trump-hits-cuba-with-new-terrorism-sanctions-in-waning-days (highlighting the Trump Administration's issuance of new sanctions on Cuba and other relation-straining moves such as restricting "flights, trade, and financial transactions between the U.S. and [Cuba]").

maintained the suspension to avoid the risk of diplomatic friction.[38] It is unclear how the Biden Administration will address the Helms-Burton Act, but it has been reported that it is a low priority for Biden's cabinet and agenda.[39] Conversely, President Biden has recently received additional pressure to engage with Cuba and lift restrictions to better serve human rights in the country and ease the unilateral restriction.[40] While the Biden Administration does not appear to intend to normalize relations with Cuba anytime soon, the recent protests for economic and governmental reform in Cuba may impact the Helms-Burton legislation and force a reaction sooner than anticipated.[41]

B. Breakdown of the Helms-Burton Legislation

There are four main Titles within the Act covering a wide variety of topics.[42] Title I focuses on the existing embargo and sanctions between the U.S. and Cuba, including trade and financial transaction restrictions.[43] Title II focuses on the U.S. policy to help transition the Cuban government to a democratic one.[44] Title IV deals with the denial of visas to the U.S. and also

38. *See* Judith Alison Lee et al., *President Trump Ramps up Cuba Sanctions Changes – Allows Litigation Against Non-U.S. Companies Conducting Business in Cuba*, GIBSON DUNN (May 1, 2019), https://www.gibsondunn.com/president-trump-ramps-up-cuba-sanctions-allows-litigation-against-non-us-companies-conducting-business-in-cuba/.

39. *See* Karen DeYoung, *New Cuba Policy on hold while Biden Deals with Bigger Problems*, WASH. POST (June 27, 2021, 11:53 AM), https://www.washingtonpost.com/national-security/biden-cuba-policy/2021/06/27/dde275f6-d0f6-11eb-8014-2f3926ca24d9_story.html (reporting various perspectives as to what issues take priority over addressing the Helms-Burton Act).

40. *See* Carmen Sesin, *Over 100 Democrats Urge Biden to Engage with Cuba, Lift Restrictions*, NBC NEWS, https://www.nbcnews.com/news/latino/100-democrats-urge-biden-engage-cuba-lift-restrictions-rcna9072 (Dec. 16, 2021, 7:54 PM) (detailing how over 100 House members urged the Biden administration to lift trade restrictions amid economic and humanitarian crises).

41. *See* Dan Roe, *Helms-Burton Lawsuits Remain in Gridlock as Window to Litigate Closes for Some*, LAW.COM, (Aug. 27, 2021, 4:08 PM), https://www.law.com/dailybusinessreview/2021/08/27/helms-burton-lawsuits-remain-in-gridlock-as-window-to-litigate-closes-for-some/; *see also* Samantha Schmidt, *Cuba's President Confronts a Nation in Crisis. Among His Challenges: 'He's No Fidel.'*, WASH. POST (July 17, 2021, 7:00 AM), https://www.washingtonpost.com/world/2021/07/17/cuba-protests-president-crisis/ (identifying the recent protests in the Summer of 2021 in Cuba for the progressive changes to make the economy and government more democratic).

42. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 § 1, Pub. L. No. 104–114, 110 Stat. 785–86 (codified at 22 U.S.C. 6021–6091) (detailing the table of contents for the Helms-Burton Act).

43. *See id.* §§ 101–116.

44. *See id*. §§ 201–206.

addresses confiscated or taken property in Cuba claimed by U.S. nationals, further enforcing the restriction on travel between the two nations.[45]

Title III of the Helms-Burton Act provides a manner for U.S. nationals with a claim to property confiscated by the Cuban government to sue parties that may be "trafficking" that property to which they claim.[46] Title III includes a provision that grants the President of the United States the ability to suspend the right to private action as necessary to support a national interest.[47] This suspension only lasts for six months and must be renewed to stay suspended at the end of each period.[48] Sitting presidents have consistently suspended the use of Title III since its enactment, including Clinton, Bush, and Obama.[49] President Trump, however, was the first president to let the suspension lapse and enforced Title III in 2019 for the first time, allowing private citizens to sue businesses that had previously profited from utilizing the confiscated land in Cuba.[50]

C. Lasting Impact and Existing Legal Consequences Since the Enforcement of Title III

Though it was anticipated that the lapse in suspension would allow for a flood of lawsuits, there was an underwhelming number that flowed into the courts, considering experts estimated thousands of potential plaintiffs.[51] The few Title III lawsuits filed after the suspension lapsed, focusing on the "trafficking" aspect of the Act.[52] These lawsuits largely included businesses dealing with U.S. ports of exit or entry, as well as the international airport near Havana.[53] The suits therefore involved multiple cruise lines, American

45. *See id*. § 401.

46. *See id.* §§ 301–306.

47. *Id.* § 306(b).

48. *Id.*; *see also* John H. Jackson, *Helms-Burton, the U.S., and the WTO*, AM. SOC'Y INT'L L. (Mar. 03, 1997), https://www.asil.org/insights/volume/2/issue/1/helms-burton-us-and-wto (describing the use of the Title III suspension under the context of World Trade Organization treaties).

49. *See* Bellinger, III et al., *supra,* note 5; Jackson, *supra* note 48.

50. *See* Bellinger, III et al., *supra,* note 5; *see also* COUNCIL ON FOREIGN RELS., *supra*, note 24.

51. *See* John B. Bellinger, III, et al., *The Helms-Burton Act's Unexpected Boomerang Effect: Most Lawsuits Have Targeted U.S. Companies*, ARNOLD & PORTER, https://www.arnoldporter.com/en/perspectives/publications/2020/03/the-helms-burton-acts (Mar. 3, 2020) (identifying only ten suits in the first three months after the suspension lapsed in May 2019 and only fifteen in the following seven months).

52. *See* Bellinger, III et al., *supra,* note 5 (describing how defenses against Title III lawsuits focused on the scope of the broad definition of "trafficking" under the Helms-Burton Act).

53. *See id.*

and South American airlines, hotel groups, booking sites, and nationalized businesses.[54]

Cases against TripAdvisor in 2021 and American Airlines in late 2020 are ongoing under Title III for profiting off booking travelers to confiscated beachfront resorts in Varadero, Cuba, satisfying the commercial activity exception from the FSIA.[55] More suits have entered the courts but have been slow to move forward, and it is unclear how they will fare due to inconsistency in the rationale for dismissal and defenses.[56]

Title III cases are officially certified under the U.S. Foreign Claims Settlement Commission to validate any true claim to recovery under the Helms-Burton Act.[57] Many of these lawsuits naturally deal with transportation to and from Cuba as they are cases revolving around rightful claims to ports, airports, and other tourism-related locations, such as hotel properties.[58] Most of the lawsuits focus on the interpretation of certain phrases in the provision, including "trafficking" and "lawful travel."[59] Additionally, the court in *Exxon* is now grappling with how to interpret the application of sovereign immunity under Title III for sovereign defendants.[60]

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54. *See, e.g.*, Glen v. Am. Airlines, Inc., 2020 U.S. Dist. LEXIS 138148 (N.D. Tex. Aug. 3, 2020), *rev'd*, 7 F.4th 331 (5th Cir. 2021) (regarding land confiscated by the Cuban government and developed into hotels advertised by an airline); Glen v. Tripadvisor LLC, 529 F. Supp. 3d 316 (D. Del. 2021) (regarding the same land at issue in *Glen v. Am. Airlines, Inc.*, but against travel agencies advertising those hotels); Complaint ¶ 26–39, Marti v. Iberostar Hoteles Y Apartamentos S.L., 2020 U.S. Dist. LEXIS 170005 (S.D. Fla. Sept. 17, 2020) (regarding a similar claim against a hotel development managed by the defendant); Havana Docks Corp. v. Carnival Corp., 2019 U.S. Dist. LEXIS 231289 (S.D. Fla. Oct. 7, 2019) (regarding the operation of cruise lines at a port confiscated by the Cuban government).

55. *See Am. Airlines, Inc.,* 2020 U.S. Dist. LEXIS 138148, at *1–2; *Tripadvisor LLC*, 529 F. Supp. 3d at 321.

56. *See* Bellinger, III et al., *supra,* note 5 ("[F]ewer than [ten] cases total have entered the discovery phase of litigation, suggesting that plaintiffs are finding it tough to get past even the motion to dismiss stage.").

57. *See* Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 7 (D.D.C. 2021).

58. *See Am. Airlines, Inc.*, 2020 U.S. Dist. LEXIS 138148, at *2; *Tripadvisor LLC*, 529 F. Supp. 3d at 321; *Havana Docks Corp*., 2019 U.S. Dist. LEXIS 231289, at *2; Garcia-Bengochea v. Carnival Corp., 407 F. Supp. 3d 1281, 1284 (S.D. Fla. 2019).

59. *See id.*; *see also* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 §§ 301–306, 22 U.S.C. 6081–6085 (explaining how "[t]he wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development").

60. *See* Bellinger, III et al., *supra,* note 5 (referring mainly to the findings in Exxon Mobil v. Corporación CIMEX S.A., 534 F. Supp. 3d 1 (D.D.C. 2021)).

D. Sovereign Immunity and Title III: Breakdown of Exxon Mobil v. Corporación CIMEX S.A. and Subsidiaries

The primary sovereign immunity case under Title III in the courts right now involves the American corporation, Exxon Mobil, seeking compensation from three Cuban petroleum companies: Corporación CIMEX, CIMEX (Panama Subsidiary), and Cuba Petroleum ("CUPET").[61] In 1960, the Cuban government, under Castro, expropriated the oil and gas assets held by then Exxon Mobil subsidiary, Standard Oil.[62] The Castro government issued a series of resolutions that expropriated the companies' rights to the Cuban property by prohibiting them from operating and abandoning the property, including the oil refinery, multiple product terminals, and over a hundred service stations.[63]

In this case, the basis for recovery comes under the Foreign Claims Settlement Commission ("FCSC").[64] Congress established the FCSC in 1964, in coordination with the International Claim Settlements Act of 1949.[65] The FCSC establishes the claim's validity and the appropriateness of the amount of recovery sought from U.S. nationals, and certified Exxon's claim in 1969 of roughly 71 million dollars as a result of the expropriation.[66]

Under Helms-Burton Title III, the Court must address the "trafficking" activities of the CIMEX Cuban Corporations split into three separate defendants, of which the first defendant corporation is CIMEX Corporation ("CIMEX").[67] CIMEX operates hundreds of "7-Eleven" equivalent stations across Cuba, including confiscated land of the Exxon subsidiaries.[68] These stations operate as service stations for petroleum as well as a style of marketplace and the opportunity to process money transfers often received as "remittances" from the United States to Cuba.[69]

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61. Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d at 6–7 (D.D.C. 2021) (following the origin of the case under Title III based on Exxon Mobil's oil and gas assets in Cuba that the company owned and operated through subsidiaries).

62. *Id.* (providing background for the basis of the lawsuit that prior to the expropriation in 1960, Exxon (then known as Standard Oil) owned multiple subsidiaries operating out of Cuba, which included Esso Standard Oil out of Panama and two additional Esso companies out of Cuba).

63. *Id.* at 7.

64. *Id.*

65. International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621–1645o; *see also Exxon Mobil Corp.*, 534 F. Supp. 3d at 7.

66. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 7–8.

67. *Id.* at 8–9.

68. *Id.* at 8.

69. *Id.* at 8–9, 18 ("A remittance is initiated when a U.S. resident designates a recipient in Cuba for a transfer of money . . . .).

This "remittance business" is a major source of both currency and income for the Cuban economy and operates through a license to manage wire transfers from the U.S.[70] Exxon alleges the defendants processed roughly 3.6 billion dollars' worth of remittances in 2018 alone, of which 90% came from the U.S.[71]

The second defendant is CIMEX Panama ("CIMEX Panama"), a Panamanian subsidiary of the first defendant.[72] There is no alleged "trafficking" of lands in Cuba of CIMEX Panama, but the plaintiff argues the corporation should be liable through CIMEX Cuba.[73]

The third named defendant is Cuban Petroleum ("CUPET"), Cuba's state-owned oil company, which currently operates ESSOSA's confiscated oil refinery and other aspects of the confiscated property, including the terminals and infrastructure in place during their operation in the 1960s.[74] CUPET consistently operates with foreign partners as business ventures, otherwise known as commercial activities.[75] The main claim to damage, alongside its commercial activities with CUPET in the U.S. is pollution through negligent operation breaking into the United States maritime boundary between the U.S. and Cuba.[76]

Both parties agree that Cuba owns all three defendant corporations, and therefore, would presumptively be immune from litigation as a foreign state under the Foreign Sovereign Immunities Act.[77] However, Exxon argues that the following statutory provisions waive sovereign immunity.[78] Exxon asserts that Title III of Helms-Burton, the FSIA commercial activity exception, and the FSIA Expropriation exception should all provide a waiver of immunity against the Cuban defendants.[79]

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70. *Id.* at 9.

71. *Id.*

72. *Id.* at 7.

73. *See id.* at 9 ("Exxon . . . claims that CIMEX and CIMEX (Panama) 'are alter egos of one another' . . . [sharing] 'the ultimate same ownership, with the same officers and directors . . . out of the same office at the same address without any regard for corporate formalities or respecting the separateness of either entity.' ").

74. *Id.*

75. *Id.* ("CUPET engages in business with foreign companies, . . . provides 'offshore exploration opportunities for . . . international companies,' and 'host[s] conferences seeking foreign partners for oil and gas exploration and production.' ").

76. *Id.*

77. *Id.* at 10; *see* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1607 (establishing the exceptions which provide waiver to sovereign immunity jurisdiction).

78. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 11–29 (discussing Title III of the Helms-Burton Act and the two FSIA exceptions to waive sovereign immunity for the defendants).

79. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 §§ 301–

The court addresses the previous Supreme Court precedent and the clear congressional silence on the question of immunity in the Helms-Burton legislation overpowering the Title III waiver argument by citing *Argentina Republic v. Amerada Hess Corp.*,[80] which held that the sole manner for waiving immunity for sovereign defendants is through the FSIA exceptions.[81] The court dismissed Exxon's argument that Title III inherently waives sovereign immunity based on the "except as provided in this subchapter" clause.[82] Because the court denied the assertion based on Title III alone, the court then evaluates whether immunity should be waived based on the two FSIA exceptions.[83]

The FSIA Commercial Activity exception requires "direct effects" from the defendants' actions on the commercial activity of the plaintiff to show the sovereign nation is operating as a commercial actor rather than a government.[84] The Court looked several factors, including remittances, sale of imported U.S. goods, continued use of confiscated property, competition in the global oil market, and the pollution of U.S. waters to decide on the commercial activity exception.[85] The expropriation exception solely bases the claim on the injury caused by the illegal land expropriation not conducted through valid means such as eminent domain.[86]

Further, once the Court establishes jurisdiction over the defendants through an immunity exception, there still must be injury-in-fact to warrant standing.[87] This standing question poses a precedential decision on what injury must specifically be the injury as a result of Title III protection.[88]

306, 22 U.S.C. §§ 6081–85; 28 U.S.C. § 1605(a)(2)–(3).

80. 488 U.S. 428 (1989).

81. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 11 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989)) ("It has been a common refrain since the Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.* that 'the FSIA [is] *the sole basis* for obtaining jurisdiction over a foreign state in our courts.' ").

82. *See id.*

83. *See id.* at 14.

84. *See id.* at 17; 28 U.S.C. § 1605(a)(2).

85. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 17–25.

86. *See id.* at 26 ("[F]or the exception to apply . . . the court must find that: (1) rights in property are at issues; (2) those rights were taken in violation of international law; and (3) a jurisdictional nexus exists between the expropriation and the United States.").

87. *See id.* at 30–31.

88. *See id.* (quoting Spokeo v. Robbins, 578 U.S. 330, 339 (2016)) ("To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." (internal quotations omitted)).

Unfortunately, the Court here does not address this question in depth.[89]

E. Sovereign Immunity Precedent Cases Dictating the Boundaries of the Court's Evaluation for Exxon Mobil Corp. v. Corporación CIMEX

The first and most restrictive case that the *Exxon Mobil* court addresses is *Argentine Republic v. Amerada Hess Shipping Corp*.[90] *Amerada Hess* included a monumental decision from the Supreme Court that held the FSIA was the only method that could properly waive sovereign immunity and gain jurisdiction over sovereign defendants.[91] Further, when the defendant is a sovereign nation, the U.S. courts must apply the FSIA to form jurisdiction over the defendant per one of the enumerated exceptions as sovereign nations are traditionally immune from jurisdiction in U.S. courts.[92] Because Argentina's actions did not fall under any of the FSIA exceptions to sovereign immunity, and a respondent must adhere to the FSIA in order to bring a case in U.S. Courts, Argentina was subject to regulations by the United States.[93] *Republic of Argentina v. Weltover, Inc.*[94] evaluated whether the Argentina's default on certain bonds issued as part of a plan to stabilize its currency was an act taken "in connection with a commercial activity" that had a "direct effect in the United States" so as to subject Argentina to suit in an American court under the Foreign Sovereign Immunities Act of 1976."[95] *Saudi Arabia v. Nelson*[96] similarly evaluated whether the sovereign was subject to an FSIA exception when defendant nation committed various intentional torts and affirmed the holding exclusively requiring the FSIA as the sole method of waiving sovereign immunity through the enumerated exceptions.[97] The courts established the precedent adhering to the FSIA twice in the five years preceding the passage of the Helms-Burton

89. *See id.* at 30–31; *see also* Bellinger et al., *supra* note 5.

90. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

91. *See id.* at 433, 441–43 (considering sovereign immunity after Argentina bombed a tanker in international waters under the Alien Tort Statute); *see also* 28 U.S.C. § 1330.

92. *See Amerada Hess*, 488 U.S. at 433–35 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983)) ("[T]he FSIA 'must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.' ").

93. *See id.* at 443 ("The FSIA is clearly one of the 'local laws' to which respondents must 'conform' before bringing suit in United States courts.").

94. 504 U.S. 607 (1992).

95. *Id.* at 611 (identifying the Court's identification of the issue presented).

96. 507 U.S. 349 (1993).

97. *Id.* at 354–55 (considering sovereign immunity where the plantiff alleged battery, false imprisonment, and other sources of personal injury against a foreign state")

Act through these two cases.[98]

Similar to *Exxon Mobil*, *Cicippio-Puleo v. Islamic Republic of Iran*[99] addressed the sovereign immunity right of action.[100] A family brought action against the Republic of Iran for damages as a result of being held hostage in the country.[101] The family argued for waiving sovereign immunity for the nation under the terrorism exception of the FSIA.[102] While the Court agreed that the terrorism exception should waive immunity under FSIA, simply waiving immunity does not provide a private right of action against the nation as a whole.[103]

The Court in *Banco Nacional de Cuba v. Sabbatino*,[104] in 1964, made clear that exceptions to the presumption of foreign immunity must be clearly delineated.[105] In *Sabbatino*, the petitioner brought action against the sovereign nation to recover the value of similarly expropriated land under the Act of State Doctrine.[106] The Act of State Doctrine specifically precluded the courts of the United States from inquiring into the validity of public acts of a sovereign nation.[107] The Court concluded that if the scope of the Act of State Doctrine must be determined based on the validity of the expropriation in the foreign nation's jurisdiction, it must fail.[108] The Court in *Exxon* walks through the holding in *Sabbatino* to contrast the lack of explicit instructions on dealing with the FSIA in the Helms-Burton Act, but specifically addressing how to treat the contradiction with the Act of State Doctrine.[109]

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98. *See Amerada Hess*, 488 U.S. at 443 ("We hold that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country, and that none of the enumerated exceptions to the Act apply to the facts of this case.").

99. 353 F.3d 1024 (D.C. Cir. 2004).

100. *See id.* at 1026–27 (acknowledging the waiver to sovereign immunity under the terrorism exception to the FSIA).

101. *Id.* at 1026.

102. *Id.* at 1028.

103. *See id.* at 1032 (explaining that the relevant statutory provision "is merely a jurisdiction-conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents").

104. 376 U.S. 398 (1964).

105. *Id.* at 401; *see also* Exxon Mobil Corp. v. Corporación CIMEX S.A. 534 F. Supp. 3d 1, 13–14 (pointing out the Congressional intent for creating specific limits on Title III enforcement and adding additional exceptions to sovereign immunity over time).

106. *See* 376 U.S. at 406.

107. *See id.* at 438.

108. *See id.* at 439 (discussing that "since the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case, any counterclaim based on asserted invalidity must fail").

109. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 13–14.

Finally, the *Exxon* court utilized *Owens v. Republic of Sudan*[110] and *Opati v. Republic of Sudan*[111] to support the requirement for FSIA amendments when intending to adjust sovereign immunity exceptions.[112] *Owens* and *Opati* are a part of the same procedural history and brought action based on the same cause of action, implementing the "terrorism exception" to the FSIA waiving sovereign immunity for the Republic, which abrogates sovereign immunity for state sponsors of terrorism that resulted in severe personal injury or death.[113] Following various terrorist attacks in the Republic of Sudan and Iran, the petitioners in *Owens* brought action against both nations as terrorism sponsors.[114] Prior to 1996 there was no remedy for actions of terrorism against U.S. citizens until the "terrorism exception" went into effect as an amendment to the FSIA.[115] The court concluded that the amended terrorism exception provided an opportunity for action just as the preexisting FSIA exceptions.[116]

III. ANALYZING EXXON MOBIL TITLE III ARGUMENTS AND FSIA EXCEPTIONS WITH SOVEREIGN IMMUNITY PRECEDENT

The primary case offered by *Exxon* presents numerous relevant questions that would set significant precedent by discussing and holding in-depth.[117] Foremost present is the question of Title III's implied waiver of immunity.[118] Because the provision itself is silent on how sovereign immunity specifically should be handled in Title III cases, the court can look at the legislative goals, plain language, and legislative history of the Act.[119]

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110. 864 F.3d 751 (D.C. Cir. 2017).

111. 140 S. Ct. 1601 (2020).

112. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 14; 864 F.3d at 764–65; 140 S. Ct. at 1606 (providing an example for FSIA amendment requirement with the Antiterrorism and Effective Death Penalty Act).

113. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 21–22 ("The 'terrorism exception' explicitly abrogates foreign sovereign immunity.").

114. 864 F.3d at 762.

115. *Id.* at 763–64.

116. *Id.* at 764 ("[A] plaintiff proceeding under the terrorism exception would follow the same pass-through process that governed an action under the original FSIA exceptions.").

117. *See* 534 F. Supp. 3d 10–29; *see also* Bellinger et al., *supra* note 5 (identifying the significant issues the Court can address based on Exxon Mobil's arguments and the sovereign immunity questions within the FSIA and Title III of the Helms-Burton Act to establish future precedent).

118. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 11 (noting that the plaintiff's opening argument is unusual in that it does not immediately jump to the FSIA to establish exceptions but aims to establish jurisdiction through Title III first).

119. *See generally* Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State*

Based on the rationale, legislative intent, language used, and definitions provided in Helms-Burton Title III, the Act likely provides an implied exception to sovereign immunity. This is despite the D.C. District Court's initial holding, utilizing the FSIA exceptions to formulate the requirements for Title III cases to establish implied jurisdiction without going beyond FSIA and court requirements.[120] The court continued on to hold sovereign immunity should be waived for the primary named defendant (CIMEX) based on enumerated exceptions to sovereign immunity as established in the FSIA.[121] Based on the lawmakers' goals when passing the Act, there are many potential legislative intentions to help interpret the ambiguity; these range from tightening the embargo and sanctions, to disincentivizing businesses from operating in Cuba and with the Cuban government, and pushing efforts to convert Cuba to a more democratic society.[122]

A. Using the Historical Relationship to Evaluate the Legislative Intent

The historical relationship between the U.S. and Cuba helps establish the mindset of the legislators to determine the intent behind the legislation.[123] As expressed in Congressional debates discussing the Act on the Senate floor, Senators addressed the benefits of the Act while debating the issues of the potential downfalls of particular language.[124] Since Title III specifically

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Courts, 80 MARQ. L. REV. 161 (1996) (following use of legislative history and intent to interpret a statute when the language is ambiguous); *A Guide to Reading, Interpreting, and Applying Statutes*, Georgetown University Law Center (2017), https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf (highlighting the four tools of statutory interpretation: plain text, legal interpretations, context and structure, and purpose).

120. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 §§ 301–306, 22 U.S.C. §§ 6081–6085; *see also Exxon Mobil Corp.*, 534 F. Supp. 3d at 14 (holding that an implicit waiver to sovereign immunity under Title III of the Helms-Burton Act is insufficient to deny a motion for dismissal); *Interpretation*, *Statutory Interpretation (Construction of a Statute or Statutory Construction)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012) ("The first priority is to consider the plain language of the statute.")

121. *Exxon Mobil Corp.*, 534 F. Supp. 3d at 29.

122. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306; Dortzbach, *supra* note 119, at 170–71 (establishing the significance of legislative history in statutory interpretation); Bellinger, *supra* note 5 (outlining background on the Title III suits).

123. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 2; Ivie v. Smith, 439 S.W.3d 189, 203 (Mo. 2014) ("[T]he canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended. Statutory interpretation should not be hyper-technical, but reasonable and logical and should give meaning to the statute.").

124. *See, e.g.*, 141 CONG. REC. S15077-02 (daily ed. Oct. 12, 1995); 141 CONG. REC. S15106-01 (daily ed. Oct. 12, 1995); 141 CONG. REC. S15055-01 (daily ed. Oct. 11,

had Cuba confiscation in mind, there are likely two sides for evaluating the intended consequences of the Title.[125] The first is that the legislators anticipated litigation with Cuban companies, therefore they involved the Cuban government.[126] The alternative is that they intended to avoid Cuba altogether and prevent businesses from partnering there, and disincentivize any desire to partner with Cuba for U.S. and foreign businesses alike.[127]

It likely was not anticipated that Cuban defendants would be willing to litigate in U.S. Courts.[128] Therefore, it is unlikely the legislators intended for Title III to lead to cases against Cuban residents, businesses, or governments.[129] The alternative would be more reasonable to anticipate as the rationale due to historical sanctions and protectionism against the island nation.[130] Based on the historical relationship, the legislation would likely lean away from implied sovereign immunity due to the seeming low expectation of lawsuits against Cuban defendants.[131]

B. Intended Goals of Passing Title III

The rationale and intent for passing Title III specifically provide an

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1995).

125. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 2 (identifying the significance of confiscation around the act, as it was specifically written to protect the rights of U.S. nationals to "own and enjoy property" which has been wrongfully confiscated or taken by the Cuban government and exploited for profit at the expense of the rightful owner).

126. *See id.* § 3 (intending "to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime"); *see also* Bellinger et al., *supra* note 51 (discussing the Act's intent to put pressure on Cuban companies).

127. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 3 (intending "to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States").

128. *See* Bellinger, et al., *supra* note 51 ("Perhaps the most surprising development is that the Cuban companies have shown up to defend their case at all, as the Cuban government has historically rarely litigated in U.S. courts.").

129. *See id.*

130. *See id.* (providing historical background information as it relates to the Helms-Burton legislation and the relationship between the U.S. and Cuba, including the full embargo on Cuba in 1962, labeling Cuba a terrorism sponsor in 1982, and tightening sanctions in 1992).

131. Bellinger et al., *supra* note 51 (noting the legal issue of whether Title III waive sovereign immunity and summarizing arguments from both sides regarding Congress's intent).

important interpretation of Helms-Burton and its application.[132] Under the Clinton administration, the intent for Helms-Burton was to strengthen the embargo and restrictions between the U.S. and Cuba.[133] For Title III specifically, the intent was to provide U.S. nationals a way of recovering from the confiscated land they claimed in Cuba.[134] As the Cuban government confiscated the land, it seems a logical progression to anticipate Cuban businesses would "traffic" such land.[135] As the legislators did not intend for U.S. companies to be victims of lawsuits for "trafficking" the confiscated Cuban land, the intent focused on recovering from foreign-owned businesses — likely including Cuban businesses.[136] Since the legislation was only in effect under the Castro and totalitarian regime, Cuban businesses, by default, would be sovereign-owned companies.[137] When examining Title III specifically, it leans toward an implied waiver of immunity.[138]

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132. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 3, 301.

133. *See id.* ("This trafficking in confiscated property provides badly needed financial benefit . . . to bring democratic institutions to Cuba through the pressure of a general economic embargo at a time when the Castro regime has proven to be vulnerable to international economic pressure."); *see also* Bellinger et al., *supra* note 5 ("Congress passed Title III of the Helms-Burton Act in 1996 to scare investors away from Cuba by allowing U.S. nationals to sue any persons or entities who "traffic" in property confiscated by the Castro regime.").

134. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 3; S. Res. 158, 104th Cong., 141 CONG. REC. 15078 (1995) (statement of Sen. Jesse Helms) (stating the intent of the Act as to "protect the interest of U.S. nationals whose property was wrongfully confiscated by Fidel Castro and his henchmen").

135. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 2; *see, e.g.*, Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 743 F. App'x 442, 443–47 (D.C. Cir. 2018) (exemplifying how prior instance of governmental taking for government use of that property).

136. *See* Bellinger et al., *supra* note 51 (identifying the unintended consequences that the legislation has led to more lawsuits against American persons and entities rather than foreign owned or Cuban businesses as initially expected); *see also* S. Res. 158, 104th Cong., 141 CONG. REC. 15077 (1995) (statement of Sen. Jesse Helms) ("What [the Act] does not do . . . is . . . adversely affect, in any way, the rights of any certified American claimants. Not one.").

137. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 205 (identifying specifically how the transition government must not include either "Fidel Castro or Raul Castro"); *see also* Exxon Mobil Corp v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 10 (D.D.C. 2021) (stipulating that the "parties wholly agree that Cuba wholly owns defendants . . . as agencies or instrumentalities of a foreign state").

138. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302 ("In an action brought under this section, any judgment against an agency or instrumentality of the Cuban Government shall not be enforceable against an agency or instrumentality of either a transition government in Cuba or a democratically elected government in Cuba.")

C. What the Specific Language and Structure of the Act Indicates

The language used in Title III and the rest of the Helms-Burton Act is perhaps the most persuasive argument to help provide further indications toward sovereign immunity intent.[139] Section 301 of Helms-Burton provides "protection against wrongful confiscations by foreign nations," and "den[ies] traffickers any profits from economically exploiting Castro's wrongful seizures."[140] It explicitly refers to protection and recovery from "foreign nations" and "economic exploitation" from confiscations specifically under the Castro government, appearing to include protection against foreign nations.[141]

Section 302 provides "any judgment against an agency or instrumentality of the Cuban Government shall not be enforceable against an agency or instrumentality of either a transition government in Cuba or a democratically elected government in Cuba."[142] The provision explicitly prevents recovery against the Cuban government only if it is either a "transition government" or "democratically elected in Cuba."[143] This language implies that if Cuba is still under a Castro-style totalitarian regime, a U.S. national should be entitled to recovery against the Cuban government.[144] Similarly, the earlier version of the bill introduced to the Senate in October 1995 included a provision that specifically addressed that no judgment shall be entered against the Cuban government.[145] This language was removed for the final draft of the bill the Senate passed in 1996 to specifically address that the only scenario that prevented enforcement against the Cuban government was in the instance of a transition or democratically elected Cuban government.[146]

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139. *See id.* §§ 301–306; Jimenez v. Quarterman, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute.").

140. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 301(10)–(11) (citing the findings section of Title III to specifically show what Title III aims to address and provide for U.S. nationals).

141. *Id.*

142. *See id.* § 302(d) (showing the intent of the legislation that there was initial expectation to recover directly from the Cuban government as a defendant).

143. *See id.* (following the language of the legislation to show that recovery from the Cuban government was intended and expected until the Cuban regime began transitioning toward a democratic economy and government).

144. *See id.* (showing that purpose of the Title was to provide opportunity for recovery for U.S. nationals for those trafficking their claimed land while additionally providing provisions for recovery from the Cuban government and tintended for U.S. nationals to bring action against the Cuban government within the Title).

145. The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 141 CONG. REC. S15055 (detailing an early version of the Helms-Burton Act, including section 302(c)(3), which was removed from the final version of the bill).

146. *Compare id.*, *with* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act

Additionally, Section 302(g) states "deposit of excess payments by Cuba**"** — not by Cuban persons — but addressing Cuba specifically, so it was conceivable that there would be recovery from the Cuban government.[147] The choice language and sections used seem to lean toward an implied waiver of immunity, as it seems intended that actions against the Cuban government would be commonplace.[148]

Furthermore, the Exxon Mobil argument that the "except as provided in this subchapter" language and intent similarly requires an implied waiver of sovereign immunity when in contradiction with the FSIA, though appropriately denied in court, brings up valuable discussions to be used instead.[149] Exxon argues that the language of "except as provided in this subchapter" shows congressional intent to take Title III cases outside of the restrictions of the FSIA when in direct contradiction with the FSIA.[150] Additionally, based on this language, Title III must apply provided there is a conflict between the FSIA and Title III.[151] The potential conflict exists as long as it prevents the opportunity for a private right of action; however, according to *Ciccipio-Puleo*, simply providing a right to action does not by default provide immunity.[152] The contradiction does not exist nor was it intended to exist within the legislation. Rather, the legislation was intended to be in line with the FSIA requirements, not go beyond it.[153] After properly denying the position that a contradiction between the two pieces of legislation requires Title III to govern, the court implies that the case must be in line with the FSIA requirements to succeed, further implying accordance with FSIA exceptions.[154]

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§ 302, 22 U.S.C. § 6082(d).

147. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302(g).

148. *See id.*; Jimenez v. Quarterman, 555 U.S. 113, 118 (2009).

149. Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 14–15 (D.D.C. 2021) (rejecting Exxon's argument concerning implied waiver of immunity).

150. *See id.* (citing 22 U.S.C. § 6082(c)(1)) (arguing that, because Title III specifically refers to Title 28, which includes the FSIA, it is intended to be read as a diversion from the requirements in Title 28 rather than in coordination with them).

151. See *id.* at 15 (arguing that Title III trumps FSIA).

152. *See id.* (stating as long as the FSIA requires further jurisdiction establishment outside of Title III, as it was intended to do, Title III's purpose of providing a right to action to U.S. nationals is frustrated under the FSIA and therefore creates a conflict that the "except as provided in this subchapter" language is meant to overcome).

153. *See* The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 141 CONG. REC. S15055 (statement of Sen. Jesse Helms) ("It requires . . . that any actions brought against a State entity must be in accordance with the Foreign Sovereign Immunities Act.").

154. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 22 ("The clause is most naturally understood to mean that where an *express* provision of Title III directly contradicts an *express* provision of Title 28, including the FSIA, the text of Title III governs.").

It is also important to note that while the court heavily takes into account the discreet absence of directly addressing sovereign immunity in the legislation, conversely arguing the specific intent for what is included is valuable as well.[155] While brief, the legislation provides a statutory limitation of two years for private action against "traffickers."[156] If it were intended to include further limitations to actions under Title III, it likely would have been included in this section as well.[157]

D. Legislative Definitions Provided

The legislation provides straightforward definitions of "trafficking" and "persons."[158] Section 302(a) identifies a civil remedy in liability for trafficking confiscated land by "any person."[159] A "person" is defined in the legislation broadly and expansively.[160] "Traffics" is also defined in section 401(b)(2) to expansively include a broad range of possible conduct to be subject to liability.[161] The definitions provided in the legislation should favor waiving sovereign immunity as it was originally written to included sovereigns as potential traffickers and persons meaning any person or entity, including any agency or instrumentality of a foreign state.[162]

E. Relevant Sovereign Immunity Decisions

Courts have dealt with waiving sovereign immunity almost exclusively based on the FSIA.[163] The Supreme Court precedent is the most challenging

155. *See id.* at 18 (holding that the "settled distinction" from *Ciccippio-Puleo* defeats Exxon's argument as it provides a right to private action for the plaintiff's the legislation as a whole is "silent as to sovereign immunity"); *Ivie v. Smith*, 439 S.W.3d 189, 203 (2014) (quoting the defendant's argument "in favor of invoking the canon of construction that the expression of one thing implies the exclusion of another," which in turn focuses on what is specifically included in the language itself)

156. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 § 605, 22 U.S.C. § 6084 (creating a statutory limitation on the right to private action but not addressing any additional restriction).

157. *See id.* (neglecting to create a statute of limitation for anything but private actions).

158. *See id.* 302(a).

159. *See id.*

160. *See id.* § 4(11) (including "any person or entity, including any agency or instrumentality of a foreign state").

161. *See id.* § 401 (b)(2).

162. *See id.* § 302(a), 401(b).

163. *See, e.g.*, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992) (holding that the FSIA is the sole method for establishing exceptions to sovereign immunity).

issue to overcome for the *Exxon* court and future courts dealing with Title III questions, as well as the Supremacy Clause.[164] The court's decision regarding the Supreme Court's precedent is likely valid because the lack of direct connection to FSIA from Title III does not establish a clear enough contradiction for Title III to be controlling here.[165]

Evaluating the remaining arguments, however, is less convincing.[166] The court's argument regarding the recovery from and transition government in Cuba is unconvincing as it is related to the Court's decision in *Sabbatino* requiring explicit legislation describing how to handle contradictory legislation.[167] The legislation excludes enforcement against a transition government in Cuba, but enforces recovery against a totalitarian Cuban government. This shift seemingly provides a clear intent to waive sovereign immunity for Cuba as a defendant.[168]

Additionally, the argument against an implied private right of action is based on the holding in *Cicippio-Puleo v. Republic of Iran.*[169] The court in *Exxon* utilizes *Cicippio-Puleo* to discuss on the converse that the existence of a waiver to sovereign immunity does not create a right to private action.[170] Therefore conversely, a private right of action does not implicitly create a waiver to sovereign immunity.[171]

Finally, as established in *Owens* and *Opati*, the precedent for amending the FSIA to abrogate sovereign immunity through an amendment in the text

164. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .").

165. *See* Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 19–21 (D.D.C. 2021) (holding that "[t]he vague phrase '[e]xcept as provided in this subchapter,' 22 U.S.C. § 6082(c)(1), cannot overcome Congress's silence in the face of clear Supreme Court precedent").

166. *See id.* at 14–23 (analyzing FISA jurisprudence to disestablish the plaintiff's argument regarding the "except as provided in this subchapter language").

167. *See id.* at 20–21 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); *see also* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302(d) ("[A]ny judgment against an agency or instrumentality of the Cuban government shall not be enforceable against an agency or instrumentality of either a transition government in Cuba or a democratically elected government in Cuba.").

168. *See id* § 302(d).

169. 353 F.3d 1024, 1027 (2004) (holding that simply waiving immunity for action against a sovereign entity does not in turn provide a private right to action).

170. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 12 (explaining that the court in *Cicippio-Pueolo* held that "the exitence of a waiver of sovereign immunity does not establish a private right of action").

171. *See id.*

is not an explicit requirement moving forward.[172] While the court in *Exxon* utilizes the "terrorism exception" precedent to require an explicit amendment to waive immunity, they find it "improbable" that the legislators would operate differently between providing the terrorism exception and the potential Title III exception.[173] Again, the *Exxon* Court's rationale that this legislation is simply subtly addressing the potential contradiction through the "subchapter" language is not extremely convincing, as the requirements for right of action under the Antiterrorism and Effective Death Penalty Act[174] do not remotely fall under the existing FSIA exceptions.[175] In contrast, the right of action under Title III must be based on "commercial activity" as established in the legislation.[176] Hence, a new exception is not necessary but is, by default, applicable and invocable.[177]

F. Implied FSIA Exceptions within Title III Requirements for Right of Action

Perhaps the strongest argument is in coordination with a clear connection between the FSIA exceptions and the Title III requirements.[178] As Title III clearly enumerates the requirements for certified right to action in the legislation, the language from the FSIA exceptions coincide quite nearly and were intended to do so.[179] As noted, the Court in *Exxon* specifically

172. *See id.* at 14 (quoting "Title III's silence on sovereign immunity stands in stark contrast to Congress's abrogation of sovereign immunity in the terrorism exception"); Owens v. Republic of Sudan, 864 F.3d 751, 765 (2017); Opati v. Republic of Sudan, 140 S. Ct. 1601, 1609 (2020) (utilizing the terrorism exception of the FSIA which explicitly abrogates sovereign immunity per an amended exception setting precedent that any new exceptions to waive immunity against the FSIA must come in the form of a clear delineated amendment to the FSIA).

173. *Exxon Mobil Corp.*, 534 F. Supp. 3d. at 14 ("The court again finds it quite improbable that Congress would delineate the terrorism exception to sovereign immunity in incontrovertible terms but subtly dispatch the FSIA in Title III.").

174. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C.) (identifying the explicit additional exception amending the FSIA for causes of action moving forward).

175. *See* 28 U.S.C. § 1605 (providing general exceptions to jurisdictional immunity for a foreign state); *Exxon Mobil Corp.*, 534 F. Supp. 3d at 14.

176. *See* 28 U.S.C. § 1605(a)(2) (stating a foreign state does not posess immunity from United States jurisdiction if an action is based on commercial activities); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306, 22 U.S.C. §§ 6081–6085.

177. *See* Exxon Mobil Corp. 534 F. Supp. 3d at 17; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306.

178. *See* 28 U.S.C. § 1605; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302.

179. *See* 28 U.S.C. § 1605; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306 (identifying the requirements of proof of rightful ownership and ongoing

addresses the Commercial activity and expropriation FSIA exceptions.[180] Based on the two exceptions, under the requirements in Title III, as long as the claim under Title III is FCSC certified, it should almost always fall under the same FSIA exceptions, further waiving immunity.[181]

Under Title III, there are specific requirements for the claim to be valid, including (and most importantly here) proof of rightful ownership of confiscated land and proof of ripe trafficking in the land.[182] Additionally, there are many conditions that claimants must meet before they can even get their claim into court, let alone have it adjudicated on its merits.[183] The FSIA expropriation exception is relevant for proof of property ownership, while the proof of trafficking coincides with the commercial activity FSIA exception.[184]

The FSIA expropriation exception requires three elements that the Court identifies: (1) property rights are at issue; (2) property rights were taken in violation of International Law; and (3) there is a nexus between the expropriation and the United States.[185] The third element works to establish standing in the courts based on a direct injury to Act as the nexus to certify the claim, which would be a case-by-case evaluation and must exist regardless of FSIA evaluation.[186] The first two elements, however, are addressed through intent or language provided in the legislation.[187] The first element of "rights of property are at issue" is the sole purpose for the Title.[188] As long as the claimant has a valid title to the confiscated property in Cuba,

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or ripe trafficking in confiscated land); 141 CONG. REC. 15,077–78 (1995) (statement of Sen. Jesse Helms) ("It requires . . . including that any actions brought against a State entity must be in accordance with the Foreign Sovereign Immunities Act.").

180. *See Exxon Mobil Corp.*, 534 F. Supp. 3d. at 14–17.

181. *See id.* at 30–31 (explaining that "Title III provides for Exxon to receive the amount, if any, certified to it by the Foreign Claims Settlement Comission under the International Claims Act of 1949, plus interest").

182. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 4, 301–306

183. *See* 141 CONG. REC. 15,078 (explaining how current standing requirements, including minimum amount in controversy to provide proper diversity jurisdiction and proper notice, would still apply under new law).

184. *See* 28 U.S.C. § 1605(a)(3); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 4.

185. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 26 (discussing the expropriation exception by breaking the analysis into three elements).

186. *See id.* at 26–27 (discussing why the expropriation exception would not apply to Exxon's claims under the three criteria the court previously established).

187. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 4, 302.

188. *See id.* § 301(2) (utilizing the purpose of the Title III legislation to assert property rights proving rightful ownership prior to unjust confiscation).

the Act provides a remedy for such action.[189] Similarly, the findings provide justification and purpose for enactment of Title III primarily to correspond with the rights of property element.[190] Finally, the term "confiscated" has been defined to include the nationalization, expropriation, or other seizure by the Cuban government of ownership or control of property.[191] Simply put, the elements of the FSIA expropriation exception are required and intended for a certified Title III claim and should similarly be considered as overlapping evaluations to either satisfy or fail to satisfy both pieces of legislation.[192]

For the commercial activity FSIA exception, the same rationale can reach the same conclusion as the expropriation exception since the court's analysis for subject matter jurisdiction sheds light on both pieces of legislation.[193] The Supreme Court and the FSIA provide insight into the requirements for the Commercial Activity FSIA exception saying that a "foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[194] The exception requires that the action be based on a commercial activity that directly affects the United States.[195] The legislation also directly addresses how as long as there is a valid Title III claim and therefore a wrongful confiscation, there is a direct impact on the rights and expense of the rightful owner, as the "subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development."[196] Both the FSIA and the Helms-Burton call on similar definitions of "commercial activity in the legislation specifically for "commercial activity by a foreign state."[197] Additionally, utilizing the

189. *See id.* § 302.

190. *See id.* § 2, 301.

191. *See id.* § 4(4) (defining "confiscated").

192. *See* 28 U.S.C. § 1605(a)(3); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 4, 301–306; Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 26 (D.D.C. 2021).

193. *See* 28 U.S.C § 1605(a)(3); *Exxon Mobil Corp.*, 534 F. Supp. 3d at 25–26.

194. Exxon Mobil Corp v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 15 (D.D.C. 2021) (quoting OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 33 (2015)).

195. *See id.* (setting forth the applicable elements as "(1) whether Exxon's claim is "based upon" a "commercial activity" and (2) whether Defendants' alleged commercial activity "causes a direct effect in the United States").

196. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § § 301(2).

197. 28 U.S.C. § 1603(d)-(e) (defining "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act); *id.* § 4(3) (accepting the FISA definition of "commercial activity").

provided definition of "traffics" from the Helms-Burton Act further evidences the overlap between the legislative intent and the FSIA exception to again show they should be evaluated as satisfying or failing both regardless of the scenario.[198] "Traffics" specifically invokes the phrase to engage in "commercial activity" pointing to the specific intention of the legislators by identifying "a person "traffics" in confiscated property if that person knowingly and intentionally . . . engages in a commercial activity using or otherwise benefiting from confiscated property . . . ."[199] While the Helms-Burton Act may not directly address the concern of sovereign immunity, the legislation overwhelmingly points to show the implicit waiver of immunity through its accordance with the FSIA requirements.[200] The Act is not wavering from the FSIA exceptions nor creating new ones, but simply utilizing the exceptions to provide a private right of action under the existing requirements of the Title III claims to ensure the satisfaction of both.[201]

IV. TITLE III INTENT AND HANDLING SOVEREIGN DEFENDANTS

This Comment argues that Title III likely includes an implicit waiver of sovereign immunity and should not bar plaintiffs from bringing lawsuits against the Cuban government-controlled companies trafficking their claimed land in Cuba. Specifically looking at *Exxon-Mobil v. Corporacion CIMEX*, Exxon must still show injury-in-fact for all three defendants regardless of the court's sovereign immunity decision.[202] Sovereign immunity alone should not bar them from doing so and should establish precedent for bringing claims under Title III based on the initial purpose of the legislation.[203]

Much of the Court's discussion that forces it away from the implied waiver of immunity from Title III comes from the inconsistency of expressly addressing certain requirements.[204] Potentially clarifying the existing legislation to directly address the concept of sovereign immunity in contrast with the FSIA and how it is intended to apply as it conversely does with the

198. *See* 28 U.S.C. § 1605; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 4(13), 301–306 (adding depth to the definition of "traffics" with its Title III application).

199. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 4(13) (defining "traffics").

200. *See id.* § 4(11), 301–306 (imposing liability against "persons" construed broadly including "instrumentalities" of foreign states).

201. *See id.* §§ 301–306.

202. Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 30–31 (D.D.C. 2021).

203. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306.

204. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 12–13.

"terrorism" exception would fix this inconsistency.[205] Since the political attitude toward Cuba has changed significantly in recent years, the easiest solution would be to add in a provision on how the Title III right to action is meant to apply with the FSIA exceptions, as well as in coordination with the Supreme Court decisions that deal with FSIA sovereign immunity directly.[206]

The court struggles extensively with the lack of explicit instructions on how to handle the FSIA in contrast with how Congress had done so previously.[207] Explicit instructions from Congress stating the intentions for the courts on how to handle the cause of actions under Title III would similarly fix this lack of clarity.[208] Moreover, as the Court finds it difficult to apply Title III as a waiver of immunity due to the potential friction with international relations, a set of instructions based on various scenarios to avoid further conflict would help clarify the issue to the courts. The fact that Congress had previously referred directly to provisions in the FSIA led to an issue of how the "except as provided in this subchapter" language is meant to apply.[209] Further addressing the direct contradictions the "except" language is meant to avoid would create a more explicit application for the courts as well moving forward.[210] For example, the express contradiction regarding the amount in controversy requirement to earn jurisdiction provides a clear intention through Congressional legislation.[211]

Similarly, in the past, when Congress has decided to make additional exceptions to the FSIA, it amended FSIA to make the exceptions consistent.[212] Directly addressing how the Helms-Burton Act would impact the use of the FSIA by pointing toward establishing jurisdiction under Title

205. *See id.* at 14 (citing Owens v. Republic of Sudan, 864 F.3d 751, 763, (D.C. Cir. 2017); Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020).

206. *See id.* at 13 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434–45; Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993)).

207. *See id.* at 13 (quoting Fed. Republic of Germany v. Philipp, 141 S. Ct. 703 (2021)) ("Congress knew how to refer to a provision of the FSIA when it wanted to, the Court doubts that Congress would have cavalierly jettisoned for Title III actions . . . . [C]ourts generally presume that 'Congress . . . does not . . . hide elephants in mouseholes.' ").

208. *See id.*

209. *See id.* at 13–14 (providing examples of how to properly utilize the "except provided in this subchapter" provision).

210. *See id.*

211. *See id.*

212. *See id.* at 14 ("[W]hen Congress has devised new exceptions to the presumption of sovereign immunity in the past, it has amended the FSIA in plain and certain terms.").

III only would continue this consistency.[213]

Additionally, with the recent protests in Cuba pushing for economic and governmental reform in the nation, the provision in the Helms-Burton Act regarding enforcement against a transition government would be highly relevant.[214] If the protests make headway for a transition government, courts would likely have to address how to handle ongoing and pending cases.[215] It would be relatively unjust for companies to have simply outlasted litigation largely due to the ineffective Title for 25 years, and now the legislation would no longer be available for use.[216] The most reasonable way to handle this potential issue would be to allow a similar grace period as the statute of limitations in Title III.[217] Alternatively, providing the opportunity for existing legislation to come to a conclusion would both motivate potential plaintiffs to file their cases and force the courts in ongoing cases to make decisions.[218]

V. CONCLUSION

A significant issue that the District Court addresses in the opinion on April 20, 2021, involves the Supreme Court precedent in *Amerada Hess*.[219] Precedent establishes that FSIA exceptions are the only possible avenue for waiving sovereign immunity.[220] For a Court to decide that Title III waives immunity would cause issues for lower courts as it would be inconsistent with Supreme Court precedent, likely leading to another Supreme Court decision. Nevertheless, based on the Helms-Burton Act, waiving immunity

213. *See id.*

214. *See* Schmidt, *supra* note 41; Helen Yaffe, *If the US Really Cared About Freedom in Cuba, It Would End its Punishing Sanctions*, THE GUARDIAN, https://www.theguardian.com/commentisfree/2021/aug/04/us-freedom-cuba-punishing-sanctions-critics-blockade (Aug. 4 2021, 4:00 PM) (opining how the Helms-Burton sanctions do more harm than good in the push for Cuban democracy); *see also* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 201, 22 U.S.C. § 6061 (referring to the Policy toward a transition government or democratically elected government in Cuba and how such a case would impact the use of the Helms-Burton legislation).

215. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 201.

216. *See* Roe, *supra* note 41 (addressing what might happen with the usefulness of the legislation if the lawsuits take too long in the courts and the claims pass away with the original claim holders).

217. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 305 (identifying the existing statute of limitations for filing cases as two years post trafficking activity).

218. *See* Bellinger et. al, *supra* note 5 (supporting the notion that cases have been slow to move through the courts and even enter the courts compared to the number of lawsuits that were excepted to enter the courts when the suspension of Title III lapsed in 2019).

219. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

220. *See id.*

for sovereign nations for certified claims under Title III is a logical conclusion when considering the necessary language and FSIA exceptions in place. There will continue to be turmoil around the Helms-Burton Act as long as the Title III suspension remains open. Until the Biden administration or subsequent administrations decide to initiate the suspension again, the question of how courts should handle Title III cases will require increasing clarity, but holding that Title III provides a waiver to sovereign immunity would be a significant step to clarifying Title III questions.