Entre La Espada y La Pared: Obstacles to U.S. Investment in Cuba

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I. INTRODUCTION

Commercial relations between Cuba and U.S. investors have a complex history, fraught with interventions, expropriations, and the economic proxy war for the ideological competition that consumed U.S. politics for the second half of the twentieth century. Cuba has demonstrated a gradual shift toward a mixed economy, culminating with its new Law of Foreign Investment, and its recognition of private property as a form of property under the country’s New Constitution. Despite the significant tax incentives in the new Law of Foreign Investment, investing in Cuba is still a highly risky endeavor where the government can seize assets without compensation and jail investors without charge. The New Constitution,
celebrated for its recognition of private property, is ambiguous as to the legal remedies available to foreign investors in claims against the state and as to their rights for fair compensation under a taking of their private property. Although foreign investors from countries with bilateral trade agreements and arbitration treaties with Cuba can benefit from the country’s relatively promising arbitration tribunal, U.S. investors do not enjoy this benefit.

In addition to the risks posed by the Cuban government, U.S. investors also face the unpredictability of U.S. policy toward Cuba, which changes with each administration. Florida’s special status in U.S. politics and elections, and Cuba’s lack of threat or international influence, translate to a foreign policy toward Cuba that shifts dramatically based on the sitting President’s political affiliations and need to win the Florida vote. In particular, Title III of the Helms-Burton Act represents a great risk to U.S. investors, as they have become the most likely defendants due to the procedural and legal obstacles in suing third-country nationals.

II. RISKS AND OBSTACLES POSED BY CUBA

Although Cuba’s human rights violations have been the focus of the U.S. government’s rhetoric on Cuba, Cuba’s guarantees to foreign investors about the protection of their assets and operations are the driving force of foreign investment into—or away from—the island. In 2014, Cuba passed the Law of Foreign Investment, a new law that created significant tax benefits for foreign investors. In 2019, the country also adopted its New Constitution, which lists private property as one of the seven constitutionally recognized forms of property in the country. Despite these significant advancements, the benefits these laws have created do not outweigh the risks for foreign investors. Cuba must implement policies and demonstrate through practice that foreign investors’ assets and operations in Cuba are protected from government taking. Cuba should assent to arbitration with foreign investors regardless of their nationality to provide them with more meaningful protections, given that its Court of International Commercial Arbitration has been the only tribunal on the island to enter and enforce judgments against the Cuban government in disputes brought by foreign investors.
Law 118: The Law of Foreign Investment

In 2014, Cuba adopted the Law of Foreign Investment (“LFI”), also known as Law 118. Incentivized by its need to reach its target of seven percent growth a year, Cuba passed Law 118 to obtain between $2 billion to $2.5 billion a year in foreign investment. This law sought to diversify and broaden export markets; increase access to advanced technology; increase the import of goods—prioritizing food products; grow foreign investment flowing into the country; create new employment opportunities; update the management methods in the country; and maximize the use of renewable sources of energy throughout the country. Like earlier Cuban investment laws, Law 118 allows investment into all industries except in healthcare, education, and military ventures.

Under the law, foreign investment must be in one of three forms: (1) joint venture, a “Cuban commercial company that adopts the form of a corporation with registered shares in which one or more national investors and one or more foreign investors participate as shareholders;” international economic association contract, an “agreement between one or more national investors and one or more foreign investors to carry out corporation-like actions without the incorporation of a separate legal entity;” and (3) full-foreign capital company, a “commercial entity with foreign capital with no national investor or citizen investing foreign capital.” Law 118 introduced the new *Cartera de Oportunidades de Inversión Extranjera* (“Portfolio of Opportunities for Foreign Investment”), published by the Cuban government, which lists investment opportunities in Cuba.

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4. Id. art. 11.1. Although the law does not allow for foreign investment into the armed forces, corporations owned by the armed forces are an exception. Id.; see also Marcia Narine Weldon, *You Say Embargo, I Say Bloqueo—A Policy Recommendation for Promoting Foreign Direct Investment and Safeguarding Human Rights in Cuba*, 32 EMORY INT’L L. REV. 1, 30 (2017).
5. Law of Foreign Investment, art. 2(h) (Cuba); id. art. 14.
6. Id. art. 2(f); id. art. 15.
7. Id. art. 2(g); id. art. 16; see also Adir Paner, *Note, Why Cuba’s Global Tourism Allure Has Failed to Attract American Property Speculators*, 25 CARDOZO J. INT’L & COMP. L. 529, 538–39 (2017).
8. Law of Foreign Investment, art. 11.2 (Cuba).
1. Tax Incentives

Law 118 drastically changed the Cuban taxation structure to provide strong financial incentives to foreign investors participating in joint ventures and to those participating in international economic association contracts, but not to those in fully foreign capital companies.\(^9\) The new law exempted foreign investors from personal income tax over dividends or earnings issued by their corresponding joint ventures or international economic association contracts.\(^10\) It also reduced the profits tax to fifteen percent of the net taxable profit\(^11\) (a fifty percent decrease from the law’s predecessor\(^12\)), and exempted investors in joint ventures and international economic association contracts from paying the profits tax for the first eight years of the creation of the joint venture, or of the signing of the contract, respectively.\(^13\)

Further, the law also created a fifty percent discount on the tax rate applicable to the tax on wholesale goods and services, and exempted the payment of these taxes during the first year of investment.\(^14\) The law also exempted these investors from paying taxes on the use of labor force,\(^15\) and on customs duties for the import of equipment, machinery, and other means during the investment process.\(^16\) The law allowed foreigners to invest in real estate developments for tourism and offices, and to acquire up to a ninety-nine year lease or perpetual rights over the land and constructions.\(^17\) Additionally, it provided mixed companies, foreign-owned companies, and contractual international economic associations with preferential treatment on pricing, quality, and terms as found in the international market when purchasing goods and services domestically.\(^18\)

\(^{9}\) Id. art. 44.

\(^{10}\) Id. art. 35.

\(^{11}\) Id. art. 36.1. The LFI also provides that the Council of Ministers, the country’s highest executive and administrative organ, may extend (but not shorten) the period of exemption. Id. art. 36.2. However, this tax rate may be increased up to 50% in case of investments in renewable and non-renewable natural resources, bringing the maximum tax rate to 22.5%. EY CARIBBEAN PRO. SERVS. LTD., THE LEGAL, REGULATORY & FISCAL FRAMEWORK FOR FOREIGN INVESTMENT IN CUBA 6 (2015), http://www.iberglobal.com/files/2017/cuba_ey_investment.pdf.


\(^{13}\) Law of Foreign Investment, art. 36.2 (Cuba); see also Ortiz, supra note 12, at 175.

\(^{14}\) Law of Foreign Investment, art. 37.1–2 (Cuba); id. art. 38.1–2.

\(^{15}\) Id. art. 39.

\(^{16}\) Id. art. 41.

\(^{17}\) EY CARIBBEAN PRO. SERVS., supra note 11, at 5.

Although these incentives indicate an intention by the Cuban government to decrease its control over foreign investment in the country, Law 118 reveals that Cuba’s intention is quite the opposite. For example, foreign investors must continue to hire Cuban workers through a Cuban employment agency and the workers’ salaries must be negotiated between the agency and the investors,19 thus eliminating the possibility of private citizens entering into employment contracts with foreign investors. The Cuban government’s intention to maintain this separation is particularly evident in the LFI provision that, in international economic association contracts, the Cuban employees must be contracted by the Cuban side of the economic association contract,20 thus eliminating all contact between the foreign investors and Cuban employees. The imposition of these intermediary employment agencies further harms both investors and workers by charging foreign investors in dollars while only paying workers the equivalent in Cuban pesos to eight cents per investor-paid dollar.21

Further evidence of the Cuban government’s intention is found in Law 118’s limitations to the free sale and purchase of interest in an investment venue. While foreign investors may sell or transfer their interest in the investment to a third party, another investor, or to the Cuban government, they may do so only after obtaining an Authorization.22 An “Authorization” is an “enabling resolution issued by the Council of Ministers or by the head of the entity of the Central Administration of the State entrusted with this task, to implement any of the modalities of foreign investments authorized by [the] Act.”23 Because the value of interests on liquidation, sales, or transfers are to be determined as agreed upon by the parties,24 foreign investors should negotiate liberal sale, assignment, and transfer rights at the start of any investment process to avoid issues or restrictions later on imposed by Law 118.25 Absent an agreement by the parties, an internationally recognized valuation expert authorized by the Ministry of Finance will be selected to determine the value.26 These limitations to the free flow of enterprise betray the purpose of the Law’s generous tax incentives, as foreign investors will be rightfully wary of committing their

19 Law of Foreign Investment, ch. XI (Cuba).
20 Id. art. 31.1.
22 Law of Foreign Investment, art. 7.1 (Cuba).
23 Id. art. 2(b).
24 Id. art. 8.
25 Alcalde, supra note 18.
26 Law of Foreign Investment, art. 8 (Cuba).
funds in ventures that bring with them obstacles to the transfer of interest and invite the most imposing of guests—the State.

2. Legal Protections for Investors

Of great concern to foreign investors is Law 118’s guarantee that investments enjoy full legal protection. The Law states that foreign investments in the country “enjoy all-out protection and legal security and could not be expropriated, unless such action is executed for reasons of public or social interest as previously stated by the Council of Ministers... with appropriate compensation for their commercial value established by mutual agreement...”27 On paper, this provision should provide peace of mind to investors, as it guarantees that their investment will be safe, except in the rare situations where the government must exercise its eminent domain powers, in which case the investor will receive fair compensation for the commercial value of their property. However, this guarantee is not among Law 118’s improvements to its predecessor—it is a verbatim copy of the guarantees under the previous law.28

Thus, foreign investors should be suspicious that Law 118’s unchanged provisions protecting foreign investors from expropriation are merely symbolic. Law 118’s predecessor, Law 77, was enacted in 199529 and did not provide the protections against expropriation that it so optimistically listed. Under Law 77, the state would welcome foreign investment, but once the project became operational and demonstrated great success, the state would attempt to take charge.30 In 2011, British investor Amado Fakhre, head of the investment fund Coral Capital, which owned one of the most exclusive hotel chains in partnership with the state, was detained without charge.31 Eventually, the investor and other of the fund’s British executives were found guilty of minor charges, and released after serving more than a year in prison.32 Coral Capital’s property and bank

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27 Id. art. 4.1.
29 Ley núm. 77, sobre inversiones extranjeras, [Law No. 77, About Foreign Investments], INT’L. LAB. OIT., https://natlex.ilo.org/dyn/natlex2/r/natlex/fc/details?p3_isn=44108&cs=1hjDNcT7rLemF5qyKL5VdIK4L7TWMhZz6EZiBYT7pOfn6p9wTWbrcJA1Qg8xobilX515doNQsKEA-cap1w (last visited Mar. 21, 2024).
30 Trotta, supra note 2.
32 Trotta, supra note 2.
accounts, reportedly worth $17.3 million dollars, were turned over to the state. Likewise, Canadian businessman Sarkis Yacoubian, owner of a trading company that imported emergency vehicles, mining equipment, and auto parts for Cuba’s state-run industries, was also arrested, and eventually sentenced to a nine-year sentence, fined $7.5 million, and had $19 million in assets seized by the government. He was accused of being a spy, spent two years in jail before facing any formal charge, and eventually was convicted by a Cuban court on corruption charges.

Of course, the Cuban government has a justification for these occurrences. It maintains that it is committed to eliminating the corruption that runs rampant in the country. The state has consistently imprisoned and exiled investors by using its anti-corruption sweep as an excuse. But much of the corruption that the state sought to combat was created by its own doing: Law 77’s requirement that foreign investors use a state agency to employ Cubans, and to negotiate and set their salaries. This requirement kept employee salaries low in a country with a constant increase in living expenses. Similarly, it also impeded the flow of benefits to other employees in the industries that receive large sums of foreign investment. As a result, foreign investors engaged in common business practices, such as handing over 1 or 2% on transactions for “protection money” to Cuban officials for routine matters, such as permission to operate a mechanic’s shop or to obtain payment for goods sold.

3. Conflict Resolution

Law 118 provides the form of resolving economic disputes related to contractual relationships, and also provides the possibility of selecting the manner and place in which conflicts will be resolved in the constituent documents. Conflicts related to the inactivity of the key governing bodies; the winding-up, dissolution, and termination of joint ventures; and

34 Id.
36 Ortiz, supra note 12, at 180.
37 Foreign Investments Law, ch. XI.
38 Gray, supra note 35.
39 Law of Foreign Investment, art. 60.1–2 (Cuba); Marta Moreno Cruz, Safeguards in the Cuban Legal System for the Promotion and Protection of Foreign Investment, 29 FL A. J. INT’L L. 91, 103 (2017).
the execution of the contracts between the various modalities of foreign investments, must only be resolved by the Economic Division of People’s Provincial Courts (Sala de lo Económico del Tribunal Popular).  

The parties to conflicts arising from execution of contracts between the partners and a Cuban national can choose to go before the Economic Division of People’s Provincial Courts in Cuba or submit the conflict to arbitration as per Cuban law.  

Lastly, conflicts arising between partners in investments related to natural resources, public services, and public works must go to the People’s Provincial Courts.  

However, Cuban courts are an extension of the executive branch, and therefore a political arm of the state. The Cuban government is structured under the “unity of power” principle, where all legislative and executive powers of a state are assigned or delegated to one representative democratic body. In keeping with this concept, judges in Cuba do not have the power of judicial review; instead, the National Assembly has the right to determine the constitutionality of all laws. Although the Cuban Constitution states that the judiciary is an independent branch of government, it is under the jurisdiction and subordinated to the National Assembly and the Council of State. The National Assembly appoints and removes judges and magistrates from office, and the judges must report to the National Assembly as to the execution of their duties. Further, the Council of Ministers stripped the judiciary of its independence early in the revolution, when judges were removed and new judges were required to be integrated to the revolution. This poses great risks to foreign investors, especially those in joint ventures, as the Cuban courts would likely prove partial to the Cuban parties.  

Those investors in a conflict arising from execution of contracts with a Cuban national can choose to submit the conflict to arbitration instead of having the Cuban courts decide the case. The Cuban Court of International Commercial Arbitration (CCICA) was formed in Havana in  

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40 Law of Foreign Investment, art. 60.3 (Cuba).  
41 Id. art. 61.  
42 Id. art. 60.4.  
43 Paner, supra note 7, at 542.  
45 Id.  
47 Id. art. 149.  
48 Id. art. 154; SÁNCHEZ, supra note 44, at 6.  
49 SÁNCHEZ, supra note 44, at 6.  
50 Law of Foreign Investment, art. 61 (Cuba).
2007 after Cuba entered into over sixty bilateral investment treaties which provided for arbitration of investor disputes.\textsuperscript{51} Cuba has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the European Convention on International Commercial Arbitration; therefore, foreign arbitral awards are enforceable in the country.\textsuperscript{52}

The CCICA is an independent arbitral body that supports Cuban foreign trade and investment, and is not reliant on the Cuban state for administration.\textsuperscript{53} It is composed of twenty-one arbitrators, who are appointed by the President of the Chamber of Commerce for a term of two years, and preside over arbitrations at the headquarters of the Chamber of Commerce of the Republic of Cuba.\textsuperscript{54} The Cuban Arbitration law attempts to further isolate the CCICA from political influence or the appearance of political influence by calling upon the arbitrators to act with complete independence of judgment and impartiality.\textsuperscript{55} Although the CCICA honors choice of law contract provisions for local disputes, disputes arising between the parties to foreign investment contracts are subject to Cuban law.\textsuperscript{56}

Arbitration may provide foreign investors with a better option to solve their disputes, even against the Cuban government, as the tribunals have applied Cuban law and the international treaties that Cuba has ratified when deciding the disputes. In \textit{Empresa Italiana X v. Empresa Mixta Y}, an Italian entity alleged nonpayment by a Cuban joint venture of 242,953.84 EUR under an agreement for the sale of materials for the production of concrete.\textsuperscript{57} The tribunal noted that Cuba is a signatory to the United Nations Convention on the International Sale of Goods (CISG), and that, therefore, the CISG was part of the Cuban legal system and applicable to the dispute.\textsuperscript{58} The tribunal awarded the full principal amount to the Italian entity.\textsuperscript{59} Similarly, in \textit{C.I. Dental X Ray S.A.S. v. Medicuba}, a Colombian entity initiated arbitration against a Cuban entity, alleging nonpayment of over $200,000.\textsuperscript{60} There, the tribunal applied Cuban commercial law and

\begin{thebibliography}{9}
\item Id.
\item Id.
\item Cruz, \textit{supra} note 39, at 107–08.
\item Membali & Ortega-Cowan, \textit{supra} note 51.
\item Cruz, \textit{supra} note 39, at 108.
\item Membali & Ortega-Cowan, \textit{supra} note 51.
\item Id.
\item Id.
\item Id.
\end{thebibliography}
looked at the CISG, the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts, and the Vienna Convention for guidance where the Cuban law was not clear or instructive.\textsuperscript{61}

Although this is certainly a step in the right direction, U.S. investors likely will not benefit from the arbitration provision. In investment treaty arbitration, a sovereign must consent to appear before an arbitral tribunal.\textsuperscript{62}

Typically, sovereigns offer their consent to arbitration by: (1) domestic legislation, (2) specific contractual arrangements with foreign investors, or (3) through bilateral or multilateral investment treaties with the foreign investors’ country of origin.\textsuperscript{63}

While Law 118 provides for arbitration for dispute resolution, the Law does not on its own grant foreign investors the right to bring a dispute against Cuba before an arbitration tribunal. Cuba has, however, consented to investment treaty arbitration through the sixty bilateral investment treaties it has entered, but none of these bilateral investment treaties have been with the United States.\textsuperscript{64}

Therefore, unless the United States and Cuba enter into a bilateral investment treaty, Cuba consents through other means to appear before an arbitral tribunal, or the U.S. investor is a national of one of the sixty states that currently have a bilateral investment treaty with Cuba, U.S. investors cannot benefit from this promising provision in Law 118.

\textbf{B. Cuba’s New Constitution}

On February 24, 2019, the new Cuban constitution (the “New Constitution”) passed via a national referendum, approved by nearly eighty-seven percent of the island\textsuperscript{65}. The New Constitution overhauled the 1976 constitution, which had been the law of the land for over forty years.\textsuperscript{66}

Like its predecessor, the New Constitution proclaims the Communist Party’s guiding role in Cuban society, that Cuba will never return to capitalism, “a system based on the exploitation of man by man,” and that only in socialism and communism can a human being achieve full dignity.\textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{61} Id.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} See \textit{International Investment Agreements Navigator, Cuba}, UNITED NATIONS CONF. ON TRADE & DEV., https://investmentpolicy.unctad.org/international-investment-agreements/countries/52/cuba (last visited Jan. 27, 2024).
  \item \textsuperscript{65} MARK P. SULLIVAN, CONG. RSCH. SERV., R45657, \textit{CUBA: U.S. POLICY IN THE 116TH CONGRESS} 6 (2020).
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION] Apr. 10, 2019, pmbl.
\end{itemize}
New Constitution includes major changes to Cuba’s traditional economic and political model, and represented a gradual step to Cuba’s long-coming shift to a mixed economy.\(^6^8\) Even the process that led to its adoption and approval represented a newer, more open Cuba: the drafting process included a relatively inclusive citizen consultation process that resulted in changes to the final document.\(^6^9\) A commission headed by Raul Castro wrote the initial draft, which was approved by the National Assembly in July 2018, and then was subject to public debate in thousands of workplaces and community meetings until November 2018.\(^7^0\) Among the major changes in the New Constitution are its recognition of private property\(^7^1\) and the acknowledgment of foreign investment as fundamental to the development of the economy.\(^7^2\)

Article 22 of the New Constitution recognizes seven forms of property in the country: (1) socialist, belonging to the people, with the State acting as representative and beneficiary as property owner on behalf of the people; (2) cooperative, sustained through the collective labor of partner-owners and through the effective exercise of the principles of cooperativism; (3) property of political, social, and mass organizations, in which ownership is exercised over goods necessary to fulfill their missions; (4) personal property, in which ownership is exercised over goods that, without being means of production, contribute to the fulfillment of the owner’s material and spiritual needs; (5) mixed, which combines two or more forms of property; (6) property of institutions and forms of associations, in which ownership is exercised over goods to fulfill non-profit goals; and (7) private, in which ownership is exercised over specific means of production by natural or legal persons, whether Cuban or foreign.\(^7^3\)

\(^{68}\) Reform guidelines announced in 2011, the LFI of 2014, and a Communist Party document approved in 2016 show that Cuba was moving toward a mixed economy that includes both a private sector and state-run sector, a greater focus in attracting foreign direct investment, and a diminished central planning role. Geoff Thale & Teresa García Castro, *Cuba’s New Constitution, Explained*, WASH. OFF. ON LATIN AM. (Apr. 10, 2019), https://www.wola.org/analysis/cubas-new-constitution-explained/.

\(^{69}\) Id.


\(^{71}\) CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION] Apr. 10, 2019, art. 22.

\(^{72}\) Id. art. 28.

\(^{73}\) Id. art. 22(a)–(g); see also Pedro Freyre, *Constitutional Constraints and Considerations for Cuba in Attracting Foreign Direct Investment*, COLUM. L. SCH.: CUBA CAPACITY BLDG. PROJECT (Feb. 28, 2022), https://horizontecubano.law.columbia.edu/news/constitutional-constraints-and-considerations.
Additionally, consistent with previous regulations such as Law 118, the New Constitution acknowledges the importance of foreign investment in the island. Article 28 provides that the State “promotes and offers guarantees to foreign investment, as an important element in the economic development of the country, grounded in the protection and rational use of human and natural resources, and the respect for national sovereignty and independence.”

Although the recognition of private property is certainly an improvement from the previous constitution, this recognition is severely limited by other provisions in the New Constitution. After listing the forms of property in the country, the New Constitution emphasizes that private property serves only a complementary role in the socialist economy and provides that the State regulates and controls all modes that contribute to the economic and social development of the country. This reveals the State’s intention to maintain its control over all aspects of economic development, seeing it primarily as a tool for the growth of the greater Communist system. These provisions also do not alleviate concerns that Cuba will continue to intervene in the operations of foreign investment enterprises under the guise of furthering the economic and social development of the country. They establish state and communally-owned property as the favored forms of ownership, while private property plays a secondary role in the economy subject to unpredictable policy changes meant to complement the preferred forms of ownership.

To further add to this concern, the New Constitution explicitly provides for the State’s preferential right to the acquisition of property. Article 29 states that private property over land is regulated under a special system. It allows for the sale and purchase (or other transfer for valuable consideration) of land, but provides the State preferential right over the acquisition by payment of a “fair price,” which it has yet to define. It prohibits leasing, sharecropping, and mortgage loans to individuals, and the transfer of title without prior authorization by the corresponding government agency. The New Constitution is silent as to what constitutes a “fair price” and who or what agency will be responsible for the determination.

Thus, Article 29 represents a great risk for foreign investors, especially in light of the LFI’s unchanged provisions on expropriation. Though the LFI purports to protect against expropriation, it made no changes to its

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74 CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION] Apr. 10, 2019, art. 28.
75 Id. art. 22.
76 Id. art. 29.
77 Id.
predecessor’s expropriation provision, instead adopting it verbatim. Given the multiple expropriations that the State conducted under the old foreign investment law, it is highly likely that these old practices will be as unchanged under the LFI as the text of the law itself. The New Constitution’s express grant of preferential treatment to the State substantiates this suspicion by granting the courts and other branches of the State a constitutional right to acquire land owned by private actors. Though the State may contend that State acquisitions pursuant to this quasi-eminent domain provision are unlike the asset seizures pursuant to arrests, this small legal difference cannot alleviate the State’s concerning track record of imprisoning investors without formal charges, charging investors with unsubstantiated corruption charges, and not attempting to return seized assets after investors are released.

However, even if investors believe that the legal difference between asset seizures pursuant to arrests and Article 29 provide enough guarantee that their private property will not be seized without recompense, the New Constitution still does not grant foreign investors sufficient protections to private property. Article 30 provides that property held by natural and non-State legal persons alike (personal property as defined in Article 22) is regulated by the State, who guarantees the redistribution of wealth with the goal of maintaining the socialist principles of equity and social justice.\textsuperscript{78} Under this Article, if the State deems that a foreign investor’s return from a joint venture investment with a State enterprise is necessary and must be retained by the State to satisfy an emergency need, it can do so without any limitations imposed by the New Constitution.\textsuperscript{79} Even if the retained property is land, the New Constitution only requires that the State pay the investor a “fair price,” a concept that has yet to be defined. And though the New Constitution provides a private right of action against the State in cases where the State has violated their rights (as defined in the New Constitution), it is not clear whether the State’s exercise of its powers over the investors’ private property constitutes a violation of their rights.\textsuperscript{80} Cuba must address these uncertainties and provide further guidance as to the meaning of a “fair price” under Article 29, the legal rights that owners of private property—including foreign investors—enjoy, how these rights stand vis-à-vis the State, and what the “complementary” role of private property is under the New Constitution.

\textsuperscript{78} \textit{Id.} art. 30.  
\textsuperscript{79} Freyre, \textit{supra} note 73.  
\textsuperscript{80} \textit{Id.; see also CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION] Apr. 10, 2019, art. 99.
III. RISKS AND OBSTACLESPOSED BY THE UNITED STATES

In addition to the obstacles that Cuba’s laws impose, U.S. investors must also account for the unpredictability of U.S. policy toward Cuba, which oscillates between limiting and easing trade and economic relations with Cuba with each administration. Most concerning to U.S. investors is Title III of the Helms-Burton Act, which creates a right of action against anyone who traffics in confiscated property. Although it targets actors worldwide, Title III’s procedural and legal challenges for suing third-country nationals have caused plaintiffs to disproportionately target U.S. companies. This undermines the Helms-Burton Act’s very purpose of protecting and compensating American interests.

A. Background

After the Cuban Revolution of 1959, relations between the United States and Cuba “fluctuated between open hostility and quiet estrangement,”81 illustrated with hostile events such as multiple U.S. efforts to overthrow the Castro government, culminating in the Bay of Pigs invasion; the Cuban missile crisis in 1962; the Mariel boatlift, where around 125,000 Cubans left Cuba for the United States in a mass exodus; and the 1996 shootdown by Cuban fighter jets of two U.S. civilian planes operated by the Cuban-American group Brothers to the Rescue.82 Most of U.S. policy toward Cuba has sought to isolate the country through economic sanctions, most notably with the U.S. Embargo, or Blockade.

Another component of U.S. policy toward Cuba has consisted of support measures for the Cuban people, including private humanitarian donations, medical exports, U.S. Government support for democracy-building efforts, authorization for purposeful travel and remittances to Cuba, and the enactment of legislation that has led to the United States becoming one of Cuba’s largest commercial suppliers of agricultural products.83 U.S. policy toward Cuba has ebbed and flowed with each administration, while trending toward more open relations—a reflection of an overwhelming American sentiment that favors better U.S.-Cuba relations.84

81 Ryan Forrest et al., Cuba: Déjà Vu or New Beginnings, 26 U. MIA. BUS. L. REV. 1, 13 (2017).
83 SULLIVAN, supra note 65, at 6.
84 According to a 2016 poll by the Pew Research Center, seventy-five percent of Americans approved of the decision to reestablish relations with Cuba, and seventy-three percent favored ending the Embargo. Even in Miami’s Cuban American community, under four-in-ten people support the
Although U.S. policies toward Cuba affect foreign investors at large, they pose a larger concern to American investors. Because Florida politics are important to national policies and presidential elections, and Cuba itself is not a priority due to its lack of threat or international influence,\(^{85}\) foreign policy toward the island shifts dramatically based on the sitting President’s political affiliations and their need to win the Florida vote. Of the six pieces of legislation that govern the Embargo,\(^{86}\) the Helms-Burton Act is the most pertinent to American investors. Title III of the Act is the biggest source of uncertainty for U.S. investors, as it allows the sitting President to suspend the Title’s right of action, or allow Americans to file their claims against anyone who has trafficked in property confiscated since the Cuban Revolution.\(^{87}\)

Although the right of action had been suspended since 1996, the provision took effect in 2019 under the Trump administration.\(^{88}\) Many American companies found themselves haled into court for their commercial activities in Cuba, despite having obtained express permission from the Executive Branch.\(^{89}\) Title III’s broad definitions of what constitutes trafficking in confiscated property, and the fact that confiscated property in Cuba is a significant part of the country’s commercial infrastructure, make it virtually impossible for investors to escape liability. American investors have become easy targets under Title III liability due to the procedural and legal hurdles of suing third-country nationals under the Title.

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\(^{86}\) The Trading with the Enemy Act of 1917, the Foreign Assistance Act of 1961, the Cuban Assets Control Regulations of 1963, the Cuba Democracy Act of 1992, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act), and the Trade Sanctions Reform and Export Enhancement Act of 2000. *Id.*

\(^{87}\) 22 U.S.C. § 6085(b).


B. The Helms-Burton Act

We are here today around a common commitment to bring democracy to Cuba. . . . Today I sign [this bill] with a certainty that it will send a powerful, unified message from the United States to Havana, that the yearning of the Cuban people for freedom must not be denied. . . . It sends a strong message to the Cuban Government: We will not tolerate attacks on United States citizens and we will stand with those both inside and outside Cuba who are working for a peaceful transition to freedom and democracy. . . . The Cuban people must receive the blessings of freedom they have been so long denied. And I hope and believe that this day is another important step toward that ultimate goal. . . .

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, or Helms-Burton Act—the legislative crown jewel of the Embargo—was the product of a series of unfortunate events. Representative Dan Burton introduced the bill in February of 1995, but after passing the House, the bill remained in the Senate due to concerns that it improperly restricted the executive branch’s freedom to conduct foreign policy. However, on February 24, 1996, the Cuban Air Force shot down two unarmed civilian planes operated by the Miami-based Cuban exile group “Brothers to the Rescue,” killing four activists. President Clinton, faced with the resulting public outrage and eager to win Florida in the upcoming presidential election, supported the bill. Congress passed the bill on March 6, 1996, and President Clinton signed it into law on March 12, 1996.

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93 Id.

94 Id. at 217–18.

95 Id. at 218.
The Helms-Burton Act contains four titles. Title I employed the U.S.’s financial power to economically estrange Cuba from the rest of the world. It strengthened sanctions against Cuba, both domestically and internationally. Most importantly, Title I codified the Embargo. It called for the full enforcement of the Cuban Assets Control Regulations (CACR) and added to it a new prohibition against indirect financing.

Although Title I reserves for the President some slight discretion in modifying the CACR’s restrictions on travel and family remittances, it provides that the President cannot completely deregulate travel to Cuba until a “transition government” is in power on the island. Title I expands the Embargo’s extraterritorial effects as well. It withholds U.S. financial assistance and donations to: (1) international financial institutions like the IMF if they loan funds or give financial assistance to the Cuban government; (2) the independent states of the former Soviet Union until

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98 Id. § 6032(c).
99 Id. § 6033(a)–(b).
100 Id. § 6062(b)(2)(A)(iii) (“Only after a transition government in Cuba is in power, freedom of individuals to travel to visit their relatives without any restrictions shall be permitted.”).
101 Coll, supra note 92, at 219.
103 Id. § 6033(b).
they cease to provide military aid to Cuba, and (3) countries supporting the Jaragua nuclear power plant.

Title II expands on Helms-Burton’s goal of establishing a democratic government in Cuba and details the steps that the U.S. will take once this goal is accomplished. It details the U.S.’s policy toward a transition government and democratically elected government in Cuba, the assistance program once such government exists, and the procedures for termination of the Embargo. Title III creates a right of action for U.S. nationals whose property was confiscated by the Cuban government to sue entities and individuals who now “traffic” in that property. Title IV excludes from the United States any person who traffics in confiscated property by denying them U.S. visas. This serves as an immediate deterrent to foreign investment in Cuba.

1. A Closer Look at Title III: “Everything I Touch Turns to Gold.”

Title III is undoubtedly the most controversial section of the Act. It creates a right of action for U.S. nationals to sue in U.S. courts anyone who traffics property confiscated by the Cuban Government on or after January 1, 1959. It features a broad definition of “traffics” and of “property,” and allows for certain U.S. nationals to recover up to three times their actual damages. It makes liable not only those actors directly engaged in the confiscation of the American property—mainly the Cuban government—but also individuals, entities, agencies, and other instrumentalities of foreign states that have purchased or otherwise transferred expropriated property, used or benefited from expropriated property while engaging in commercial activity, and participated in or benefitted from a third party’s

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104 Id. § 6036.
105 Id. § 6041(b)(1).
106 Id. § 6061.
107 Id. § 6063.
108 Id. § 6064(a).
111 Id. § 6091(a)(1); see also Coll, supra note 92, at 222–23.
112 Coll, supra note 92, at 220–21.
114 Id. § 6023(12)(A), (13)(A).
115 Id. § 6082(a)(3)(C)(ii).
trafficking in expropriated property.\textsuperscript{116} It makes it effectively impossible for investors in Cuba to escape liability.

In adopting the bill, Congress stated that the Cuban government’s wrongful confiscation or taking, and subsequent exploitation of, property belonging to U.S. nationals undermines the comity of nations, the free flow of commerce, and economic development.\textsuperscript{117} According to Congress, to deter trafficking in such property, U.S. nationals who were victims of these confiscations should have a judicial remedy in the U.S. courts that denies traffickers from economically profiting from the seizures.\textsuperscript{118}

Title III defines a U.S. national as (1) a person who is a U.S. citizen, or (2) any other legal entity that is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has the principal place of business in the United States.\textsuperscript{119} However, though historically Title III’s text had been interpreted to extend to property that belonged to non-U.S. nationals who subsequently become U.S. citizens,\textsuperscript{120} at least one district court has held to the contrary since the Title came into effect in 2019.\textsuperscript{121}

Under Title III, “property” is “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.”\textsuperscript{122} Although it excludes real property used for residential purposes, a U.S. national can sue under Title III if, as of March 12, 1996: “(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.”\textsuperscript{123} Under Title III, a person traffics in confiscated property if that person:

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages,

\textsuperscript{116} \textit{Id.} § 6023(13); see also Sivrieva, \textit{supra} note 91, at 33.
\textsuperscript{117} 22 U.S.C. § 6081(2).
\textsuperscript{118} \textit{Id.} § 6081(11).
\textsuperscript{119} \textit{Id.} § 6023(15)(A)–(B).
\textsuperscript{120} Coll, \textit{supra} note 92, at 221.
\textsuperscript{122} 22 U.S.C. § 6023(12).
\textsuperscript{123} \textit{Id.} § 6023(12)(B).
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 . . . by another person, or otherwise engages in
trafficking . . . .

Thus, under Title III, engaging in virtually any business transaction
involving most commercial property in Cuba constitutes trafficking, and
subjects the investor to liability.

Title III allows plaintiffs to recover up to three times the amount of the
actual damages they suffered. Defendants are liable for three times the
amount of actual damages in two situations: (1) when the claim has been
certified by the Foreign Claims Settlement Commission specifically under
Title V of the International Claims Settlement Act of 1949; or (2) when
the U.S. national provides proper notice to the defendant that they are
trafficking in confiscated property, and the defendant does not cease all
trafficking activities. The U.S. national may sue any person for the
greater of (1) the value of their claim as certified by the Foreign Claims
Settlement Commission; (2) the value of the claim as determined by a
special master; or (3) the fair market value of the property. There is a
strong presumption in favor of claims certified by the Foreign Claims
Settlement Commission, rebuttable only by clear and convincing evidence
that the correct amount of damages is different.

Title III gives the U.S. President the power to suspend the right to sue
for a period of six months if the President determines that “a suspension is
necessary to the national interests of the United States and will expedite a
transition to democracy in Cuba.” Every U.S. President has exercised this
power, until President Trump announced on April 17, 2019, that it would no
longer suspend Title III. President Biden has not suspended Title III.

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124 Id. § 6023(13)(A).
125 Id. § 6082(a)(3)(A), (C); see also Cristina L. Lang, Libertad for All? Why the Helms-Burton Act Is an Empty Promise of "Freedom" for the Cuban People, 86 BROOK. L. REV. 231, 237 (2020).
127 Id. § 6082(a)(3)(B).
128 Id. § 6082(a)(1)(A).
129 Id. § 6082(a)(2).
131 Kim et al., supra note 88.
Title III casts a long shadow over investors worldwide. After the Cuban Revolution, the Cuban government passed land reforms that nationalized, without compensation, large swaths of lands owned by foreigners and Cubans alike.\textsuperscript{132} American investments in Cuba totaled approximately \$1.9 billion at the time,\textsuperscript{133} and Americans owned approximately forty percent of Cuba’s sugar plantations.\textsuperscript{134} The Department of Justice’s Foreign Claims Settlement Commission certified, under its First Cuban Claims Program, almost 6,000 confiscated property claims, with an estimated value of over \$8 billion at the time, with interest.\textsuperscript{135} In addition, the State Department estimated in 1996 that there were between 75,000 and 200,000 uncertified claims held by U.S. nationals that could be in the tens of billions of dollars.\textsuperscript{136} The ubiquity of the confiscated property in Cuban commercial operations, coupled with the Act’s broad definitions of “confiscated property” and “trafficking,” makes liability under Title III inescapable for foreign investors, especially those with property or subsidiaries in the United States.

Title III bifurcates claims certified by the Foreign Claims Settlement Commission into two categories: (1) those under Title V of the International Claims Settlement Act during the Commission’s First Cuban Claims program,\textsuperscript{137} and (2) those certified during the Commission’s Second Cuban Claims Program, which were not certified under Title V of the International Claims Settlement Act.\textsuperscript{138} The First Cuban Claims Program covered claims for losses which occurred on or after the Revolution and was completed on July 6, 1972.\textsuperscript{139} During this program, the Commission adjudicated a total of 8,816 claims, of which 5,911 were found compensable.\textsuperscript{140} The total principal value of those claims was \$1,851,057,358.00 in 1972.\textsuperscript{141}

Then, on July 15, 2005, Secretary of State Condolezza Rice requested a Second Cuban Claims Program from the Commission, with the goal of

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\item \textsuperscript{132} Lang, supra note 125, at 235.
\item \textsuperscript{134} Lang, supra note 125, at 236.
\item \textsuperscript{135} Kim et al., supra note 88.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Completed Programs - Cuba, U.S. DEP’T OF JUST., https://www.justice.gov/fcsc/claims-against-cuba (Apr. 21, 2022).
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.
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certifying claims for the Cuban government’s uncompensated taking of United States nationals’ property that arose after May 1, 1967, and which had not been adjudicated during the First Program. Only five claims were submitted under the Second Program, and three of those five were dismissed. The remaining two claims were certified for $51,128,926.95 and $16,000.00.

Title III’s treble damages provision and the strong presumption in favor of claims certified by the Foreign Claims Settlement Commission expose foreign investors to significant liability. The First Cuban Claim Program’s certified claims, amounting to over $8 billion, are favored by Title III in two ways. First, like all other claims certified by the Commission under the International Claims Settlement Act of 1949, they enjoy a strong presumption in the courts for the money damages on these claims as determined by the Commission. Second, if the U.S. national owns a claim certified under Title V of the International Claims Settlement Act of 1949—i.e., all claims certified on the First Cuban Claims Program—then the defendant is liable for three times the actual damages incurred. Provided that plaintiffs are otherwise successful in the litigation process, these two provisions together translate to a minimum of $24 billion in guaranteed damages against investors worldwide.

b. International Reaction

The international community condemned Helms-Burton and its extraterritorial reach. When the Act first passed in 1996, the European Union responded by stating, “We do not believe it is justifiable or effective for one country to impose its tactics on others.” Title III accomplished what had never been done at the time: all fifteen member states of the E.U. voted in favor of that year’s U.N. resolution denouncing the Embargo.

A number of Cuba’s largest trade partners and investors have enacted legislation to protect their citizens from liability under Title III. In 1996, the E.U. filed a complaint against the United States with the WTO, claiming that Helms-Burton’s trade restrictions, possible refusals of visas, and exclusions of non-U.S. nationals from U.S. territory were inconsistent with

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142 Id.
143 Id.
144 Id.
146 Id. § 6082(a)(3)(A), (C).
147 Sivrieva, supra note 91, at 10.
148 Coll, supra note 92, at 223.
the U.S.’s obligations under the WTO agreement. Then, on November 22, 1996, the E.U. passed its Blocking Statute. The Statute does not recognize the extraterritorial application of laws adopted by third countries, such as the United States Helms-Burton Act. It nullifies the effect in the E.U. of any foreign court ruling based on those foreign laws and allows E.U. defendants to bring their own suits to recover the court damages caused by the application of those laws. Similarly, the United Kingdom passed its Protection of Trading Interests legislation in January of 1997, which criminalizes compliance with Helms-Burton’s extraterritoriality provisions while the defendant is in the United Kingdom. The E.U. remains Cuba’s largest foreign investor and main export and trade partner. Its Blocking Statute has nullified Title III’s potential reach on E.U. investors by making litigation against the largest pool of possible Title III defendants a lengthy and expensive process that will also subject the U.S. claimant to the E.U. courts.

Likewise, Canada passed the Canadian Foreign Extraterritorial Measures Act (FEMA), which allows the Canadian Attorney General to order Canadian nationals to ignore lawsuits filed against them pursuant to Title III. Further, under FEMA, Canada will not recognize or enforce any Title III judgment in any manner in Canada, and Canadians can use Canadian courts to sue the person who instituted a Title III action against

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152 Id.


155 See, e.g., Marti v. Iberostar Hoteles Y Apartamentos S.L., 54 F.4th 641, 643, 648, 651 (11th Cir. 2022). The trial court had stayed the claim pending a determination from the European Commission as required under the Blocking Statute. Id. Under the Statute, E.U. companies cannot participate in Helms-Burton suits without the European Commission’s express permission. Id. Almost three years had passed since the defendant, a Spanish hotel company, had requested permission, without receiving a response from the Commission. Id. The Eleventh Circuit Court of Appeals eventually lifted the stay. Id.

them, even while proceedings are ongoing in the U.S. courts.\textsuperscript{157} The Canadian national can recover any damages entered against them, as well as legal expenses.\textsuperscript{158} Canada is Cuba’s second-largest source of direct investment with significant Canadian investment in mining, power, oil and gas, and some investments in renewable energy, agriculture/heavy equipment, and tourism.\textsuperscript{159} Cuba is Canada’s top market in the Caribbean/Central American sub-region and is Canada’s largest merchandise export market in that region.\textsuperscript{160}

Similarly, Mexico has also passed legislation that deters Title III claims against its nationals. On October 23, 1996, it passed \textit{Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional} (Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law), which orders Mexican courts to not recognize any court or arbitration proceedings against Mexican nationals under any foreign law with extraterritorial effects on Mexican commerce and investment.\textsuperscript{161} Further, the law also allows Mexicans to use Mexican courts to sue the Title III plaintiff to recover the judgment amount and any other damages and expenses incurred as a result of the suit.\textsuperscript{162} Along with Spain, Canada, China, and Venezuela, Mexico is one of Cuba’s main trade partners,\textsuperscript{163} and Cuba is Mexico’s third largest trading partner in the Caribbean.\textsuperscript{164} These blocking statutes serve to disincentivize Title III litigation against nationals of these countries.

c. \textit{Big Pockets Within Reach: U.S. Investors as the Most Vulnerable Potential Title III Defendants}

As a result, these blocking statutes have made U.S. nationals the easiest and most realistic target under Title III, thereby undermining Helms-
Burton’s very purpose of protecting and compensating American nationals (individuals and companies alike). Within the first year after President Trump’s decision not to suspend Title III in April of 2019, most suits were directed at American defendants.\textsuperscript{165} Several of these American defendants had even obtained express permission from the U.S. Government, in the form of licenses issued by the Treasury Department’s Office of Foreign Assets Control, to facilitate trade and travel with Cuba.\textsuperscript{166} As U.S.-Cuba commercial relations strengthen, Title III muddies the water for U.S. investors who are eager to partake, yet cannot avoid liability under the Act, even when otherwise complying with U.S. laws.

Title III claimants must already overcome procedural obstacles to sue third-country investors that do not otherwise exist in suits against U.S. defendants. Personal jurisdiction is difficult to establish over most foreign defendants, even those corporations who have a presence in the United States. Foreign companies are incorporated abroad, and even if they engage in business in the United States, the plaintiffs’ claims are unlikely to arise out of the foreign companies’ contacts with the United States.\textsuperscript{167}

This became clear to American plaintiffs soon after the suspension of Title III was lifted. A group of plaintiffs, heirs to various hotel properties in Cuba, filed several class actions against foreign defendants, including Cuban companies, European hotel chains such as Meliá, and European travel companies.\textsuperscript{168} Six months after filing their complaints, the plaintiffs were still struggling with service of the foreign defendants. They voluntarily dismissed one of the cases, and swapped in new defendants: the U.S. company Expedia and some of its affiliates.\textsuperscript{169}

Blocking statutes add to these procedural hurdles. For example, the E.U.’s blocking statutes forbid their nationals from participating in litigation under Helms-Burton without the express authorization of the designated government body.\textsuperscript{170} In Marti v. Iberostar Hoteles Y Apartamentos S.L., the case was stayed for almost three years while the defendant waited for the European Commission’s authorization to participate in the suit. Faced with all these difficulties and almost guaranteed delays, Title III claimants turn to U.S. companies as possible defendants.

Since 2019, U.S. defendants have included: American Airlines for having “trafficked” by operating flights between Cuba and the United

\textsuperscript{165} Bellinger, III et al., supra note 89.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} See Marti v. Iberostar Hoteles Y Apartamentos S.L., 54 F.4th 641, 644 (11th Cir. 2022).
States, Carnival Cruise for “trafficking” in the Havana Cruise Port Terminal and in the Santiago port; MSC Cruises, Royal Caribbean Cruises, Norwegian Cruise Line; Trivago and Expedia, Trip Advisor, Visa and Mastercard, and Amazon. Although some cases have been dismissed based on the plaintiffs’ failure to establish their own eligibility as to nationality and title of property requirements, federal courts have found that plaintiffs have Article III standing, and have allowed many suits against U.S. companies to survive, with one case awarding a total of $440 million in damages to the plaintiff. Therefore, claims under Title III likely will continue to target U.S. companies. Among these claims are those certified by the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949, worth a minimum of $24 billion in damages.

IV. CONCLUSION

Although Cuba has demonstrated a gradual shift toward a mixed economy, culminating with its new law of foreign investment and its recognition of private property as a form of property under the country’s New Constitution, investing in Cuba is still a highly risky endeavor where the government can seize assets without compensation, and jail investors without charge. Cuba has not made clear what legal remedies are available to foreign investors in claims against the state, or what fair compensation for a taking of private property means. Although the country’s arbitration court has acted as an effective option for investors to seek claims even

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174 Sivrieva, supra note 91, at 58, 85–86.
177 See 22 U.S.C. § 6082(a)(2); Completed Programs – Cuba, supra note 137; see, e.g., Garcia-Bengochea, 57 F.4th at 922 (seeking treble damages for the portion of Plaintiff’s ownership interest certified by the Foreign Claims Settlement Commission); Havana Docks Corp., 2022 U.S. Dist. LEXIS 233783, at *5 (granting treble damages for certified claims).
against the Cuban government, this option is only available to investors from countries with bilateral trade agreements and arbitration treaties with Cuba. As a result, U.S. investors do not enjoy this benefit, and risk confiscation of their property—and even imprisonment—without trial.

In addition to the risks posed by the Cuban government, U.S. investors also face the unpredictability of U.S. policy toward Cuba, which changes with each administration. Florida’s special status in U.S. politics and elections, and Cuba’s lack of threat or international influence, translate to a foreign policy toward Cuba that shifts dramatically based on the sitting President’s political affiliations and need to win the Florida vote. In particular, Title III of the Helms-Burton Act represents a great risk to U.S. investors, as they have become the most likely defendants due to procedural and legal obstacles to suing third-country nationals.