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LA LEY HELMS-BURTON Y EL CASO DE MELIÁ HOTELS INTERNATIONAL S.A. / HELMS-BURTON ACT & MELIÁ HOTELS INTERNATIONAL S.A.

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ABSTRACT.

This paper aims to evaluate the regulatory changes experienced in the field of international sanctions. Specifically, it assesses the implications derived from the activation by former President Donald J. Trump of the Cuban Liberty and Democratic Solidarity Act, known as the Helms-Burton Act, approved by Clinton in 1996, but suspended until May 2019. This activation entails several challenges to International Law, including secondary sanctions, blocking mechanisms enacted by affected countries, extraterritoriality issues, as well as the potential application of immunity from jurisdiction and enforcement of sovereign states. From the standpoint of the operators of the sector, the case Meliá v. Central Santa Lucía as well as the role played by the preeminent European civil procedural rule in this procedure, Brussels I-Bis Regulation, shall be discussed.

KEY WORDS: Cuba, United States, Helms-Burton Act, Confiscated Property, International Law.

RESUMEN EJECUTIVO.

Este estudio tiene por objeto el análisis de la evolución normativa experimentada en el ámbito de las sanciones internacionales. En concreto, se evaluarán las implicaciones derivadas de la activación por el anterior presidente Donald J. Trump, de la Ley de Libertades Cubanas y de Solidaridad Democrática, conocida como la Ley Helms-Burton, aprobada por Clinton en el año 1996, que fue suspendida hasta mayo de 2019. Esta reactivación supone la existencia de diversos problemas de Derecho Internacional, que incluyen el régimen de las sanciones secundarias, los estatutos de bloqueo o leyes antídoto elaborados por los países afectados, posibles problemas de extraterritorialidad, así como la aplicación de la inmunidad de jurisdicción y ejecución. Desde el punto de vista de los operadores del sector, se estudiarán el caso Meliá vs. Central Santa Lucía y el papel que juega en este procedimiento la norma procesal civil europea por excelencia: el reglamento Bruselas I Bis.

PALABRAS CLAVE: Cuba, Estados Unidos, Ley Helms-Burton, Propiedades confiscadas, Derecho Internacional.

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ABREVIATURAS/ABBREVIATIONS.

BOE	Boletín Oficial del Estado / Federal Gazette.
Brussels I-Bis	Reglamento (UE) No 1215/2012 Del Parlamento Europeo y del Consejo de 12 de diciembre de 2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil. / Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
CC	Código Civil, 1889 / Spanish Civil Act.
CJEU	Tribunal de Justicia de la Unión Europea (TJUE) / Court of Justice of the European Union.
Congress	Congreso de los Estados Unidos / The United States Congress.
EC	La Comunidad Europea / The European Community.
EU	La Unión Europea / The European Union.
PIL	Derecho internacional privado / Private International Law.
Provincial Court	Audiencia Provincial.
REDI	Revista Española de Derecho Internacional. / Spanish Journal of International Law.
REEI	Revista Electrónica de Estudios Internacionales. / Electronic Journal of International Studies.
Rome I	Reglamento (CE) núm. 593/2008 del Parlamento Europeo y del Consejo, sobre la ley aplicable a las obligaciones contractuales. / Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
Rome II	Reglamento (CE) núm. 864/2007 del Parlamento Europeo y del Consejo, de 11 de julio de 2007, relativo a la ley aplicable a las obligaciones extracontractuales. / Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.
SAP	Sentencia de la Audiencia Provincial / Provincial Court ruling.

SCOTUS	Corte Suprema de los E.E.U.U. / Supreme Court of the United States.
STS	Sentencia del Tribunal Supremo Español / Spanish Supreme Court ruling.
TFUE / TFEU	Tratado de Funcionamiento de la Unión Europea / Treaty on the Functioning of the European Union.
TJUE / CJEU	Tribunal de Justicia de la Unión Europea / Court of Justice of the European Union.
TUE / TEU	Tratado de la Unión Europea de 7 de febrero de 1992 firmado en Maastricht UE Unión Europea / Treaty of the European Union.
U.S.S.R. / U.R.S.S.	Union of Soviet Socialist Republics / Unión Soviética
U.S.	Los Estados Unidos / The United States.
UN	United Nations / Organización de las Naciones Unidas.
OMC/WTO	Organización Mundial del Comercio / World Trade Organization.

I. PRELIMINARY CONSIDERATIONS.

Donald J. Trump's presidency was a turning point in U.S. relations with Cuba and had a major impact on the international community. On May 2, 2019, he activated Title III of the Cuban Liberty and Democratic Solidarity Act[1], (hereafter "Helms-Burton Act"), approved by Clinton in 1996, but which had been suspended until then. The Cuban government enacted the 890 Law[2] in October of 1960, aimed to seize private property, affecting both natural and legal persons.

This reactivation led to the registration of over six thousand claims filed in the United States, many of which affect Spanish interests. Nonetheless, only around fifty of these thousands of claims certified in the U.S. Government have prospered, due to the severe restrictions imposed by U.S. law. In fact, it is estimated that the claims filed so far only represent 0.15% of the initial certified claims. However, they represent four million hours of billable hours by law firms, reaching a value of 1.9 billion euros, which, added to the interest accrued over a period of 60 years, amounts to 8.5 billion euros.

The scope of this regulation is so far-reaching that its extraterritorial scope is questioned. In addition to achieving the economic blockade and discouraging investment in the Cuban country, it entails serious consequences for most companies with stakes in Cuba, opening legal proceedings against them in the United States. Not surprisingly, the European Union has taken a firm stand against this law and issued regulations that are the subject of study in this paper.

While the first company to be sued was Carnival Cruises, on the same May 2, 2019, this report will analyze in-depth the lawsuit filed against Meliá Hotels International, S.A. (hereinafter, "Meliá") and its international implications.

In short, there are several issues of Private International Law that this paper aims to address. An exhaustive analysis of the Helms-Burton Act, as well as the views

[1] THE UNITED STATES. CONGRESS. An Act to seek international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes, 1996 (Title 22 U.S.C. §§ 6021–6091, of March 12, 1996). Retrieved from: https://www.govinfo.gov/content/pkg/PLAW-104publ114/html/PLAW-104publ114.htm Last visit January 9, 2022.

[2] CUBA. GOBIERNO. Gaceta Oficial de la República de Cuba. Edición Extraordinaria. This law regulated in article 1: "Se dispone la nacionalización mediante expropiación forzosa de todas las empresas industriales y comerciales, así como las fábricas, almacenes, depósitos, y demás bienes y derechos integrantes de las mismas, propiedad de las siguientes personas naturales o jurídicas", listing 19 pages of companies that were confiscated by the Castro government, 1960. Retrieved from: https://s.libertaddigital.com/doc/decreto-expropiacion-cuba-1960-41912933.pdf Last visit January 9, 2022.

of various academics are evaluated to illustrate the potential scenarios and legal issues that may occur.

II. HISTORICAL CONTEXT.

1. United States.

1.1 Clinton era and the enactment of Helms-Burton Act.

The triangular relationship between the United States, Cuba and Spain is a key aspect of study under this report. Particularly, the notorious asymmetry found in Cuba-United States relations, generally regarded by the international community as abusive given the inequality of power and the traditional imperialist foreign policies enacted by the U.S.

The dissolution of the Soviet Union in 1991 had notorious importance since it accelerated the decline and the loss of significance of Cuba internationally, together with increasing pressures against communist regimes.

The United States took the lead to weaken Cuban regime by the introduction of the Cuban Democracy Act in 1992, commonly known as the Torricelli Act[3]. Apart from the pressure exercised by this law, it became the source of debate in U.S. electoral campaigns. In fact, it led to the enactment of the Cuban Liberty and Democratic Solidarity Act in 1996 or Helms-Burton Act, during the presidency of Bill Clinton in January 1993[4]. Clinton broke the tendency followed by his predecessor, George H. W. Bush, by starting a strategic and hostile policy toward Cuba. However, this new policy consisted in providing humanitarian assistance as well as maintaining embargo policies as pressure instruments to introduce a democracy in the island[5]. Nonetheless, these two opposing strategies had a clear goal: to initiate a smooth transition towards democratic values and avoid anti-United States movements.

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[3] The objective of this regulation was to isolate completely Cuba from the international economic environment and collapse its economy. Provisions contained in the regulation violated international norms regarding freedom of commerce and navigation and compromised national sovereignty. THE UNITED STATES. CONGRESS. An Act to authorize appropriations for fiscal year 1993 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for fiscal year for the Armed Forces, to provide for defense conversion, and for other purposes, 1992. (Title 22 U.S.C. §§ 6001 et seq, of October 23, 1992). Retrieved from: https://www.congress.gov/bill/102nd-congress/house-bill/5323/text Last visit January 9, 2022.

[4] William Jefferson Bill Clinton was in office from the 20th January 1993 to the 20th of January 2001.

[5] CASTRO, S.M. "U.S.-Cuban Relations during the Clinton Administration". *Latin American Perspectives*, vol. 29, n. 4, 2002, p. 47–76. http://www.jstor.org/stable/3185046 Last visit January 9, 2022.

Another key aspect of American-Cuban relations lies on immigration policies. In fact, Cuban immigration increased severely after the decision of U.S government of allowing the entrance of all Cuban immigrants and providing them with residential status in 1994[6], which was shortly reversed, given the massive migratory flow. In this scenario, both countries have signed several agreements to allow controlled migratory flows, but overall, American foreign policies have attempted to undermine Cuban authority and achieve political control of the island. In the end, the U.S. has historically passed laws that exceed their territorial boundaries, such as the Monroe Doctrine[7] or the act object under study, which unilaterally regulates political and economic aspects with severe implications beyond their frontiers.

Despite political interference, relations between the countries went smoothly during the 90s decade, until the Cuban air force decided to shoot down two unarmed civilian American planes, causing the death of four people on board, and one third plane that managed to escape. More specifically, these planes were operated by the civil group "Bothers to the Rescue", a Miami-based private organization devoted to exile Cubans into the U.S. In response to this situation, Clinton's message was stern: a petition to Congress to pass a law to prohibit direct air connections with Cuba. This fatality changed the political position of the Democratic Party, which no longer opposed to the application of the Helms-Burton Act[8]. In the end, both the Torricelli and the Helms-Burton Act were drafted in electoral periods, thus heavily influenced by political motivations, especially the fear of being accused of weakness towards Cuba. In fact, Title I Section 116 condemns this action. Particularly, the ninth paragraph states that the Cuban dictatorship "could have and should have pursued other peaceful options required by International Law" but Fidel Castro chose "the use of lethal force" which the U.S. considers "a blatant and barbaric violation of International Law and tantamount to cold-blooded murder"[9]. Title I ends by citing the names of the four civilian deceased, offering condolences to the families, and

[6] Cuban Rafter Crisis took place in 1994 given the policy of "wet feet, dry feet" that granted any Cuban immigrant residency after one year living in the U.S.
[7] It refers to an act passed in 1823 by James Monroe which positioned the U.S: as the political guardian against any European intervention in America. It was commonly coined as "America for the Americans".
[8] CASTRO, S.M. "U.S.-Cuban Relations during the…*op.cit.*, p. 59-61.
[9] FISLER DAMROSCH, L. "Sanctions Against Perpetrators of Terrorism". *Houston Journal of International Law*, *22*(1), p. 65, 1999. http://www.hjil.org/articles/hjil-22-1-damrosch.pdf Last visit January 9, 2022.

condemning this act of terrorism by the entire Congress, as well as requesting the president to accuse Fidel Castro before the International Court of Justice[10].

As for the Helms-Burton Act, the reality is that Title III, the one dealing with judicial procedures to claim seized property, although in suspension[11] during the entire term, it was actually used as a political weapon in the Clinton presidency. Not only did the Helms-Burton Act undermine trade and intensify the cold war between Cuba and the U.S., but also it globalized the conflict. More importantly, international allies, especially the European Union, were no longer supporting American movements. Particularly, the European Union initiated a dispute in 1997 by challenging the Helms-Burton Act before the World Trade Organization (WTO), claiming that U.S. restrictions were contrary to the obligations undertaken under the WTO Agreement. Specifically, the European Commission, in their initial submittal on May 1996[12], expressed the following concerns:

- The extra-territorial application of the U.S. ban on trade with Cuba insofar as it restricts trade between the EC and Cuba or between the EC and the United States.
- The requirement to submit certificates for trading with Cuban sugar, which prevents many European sugar-importing companies from trading with the U.S.
- The denial to EC[13] goods and vessels to transit through U.S. ports. Particularly, two prohibitions: firstly, the entry into any port of the United States or carrying merchandise by vessels transporting goods or passengers to or from Cuba; and, secondly, loading or unloading vessels in U.S. ports that have previously entered a Cuban port for trade with goods or services within the prior 180 days.
- The prohibition on the extension of any loan, credit or other financing by U.S. persons to any other person for the purpose of transactions involving any confiscated property to which a national of the United States is entitled.
- The right of U.S. citizens under Title III of the Libertad Act to bring actions against third persons and enterprises before U.S. courts to seek compensation for unlawfully seized property. The U.S. understands that those persons or companies have "trafficked" such property, which was initially confiscated by the Cuban Government from citizens who were or are now U.S nationals[14].

[10] Title I, Section 116, paragraphs a) 9 to 15 and b) 1 to 3.
[11] Section III was actually in force, although Clinton delayed its application and postponed it every six months.
[12] WORLD TRADE ORGANIZATION, Request for Consultations by the European Communities of 8 October 1996, Wto Doc. Wt/Ds38/2 (1996).
https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=5231,3572,34010,24298,38632,37935,870&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True Last visit January 9, 2022.
[13] Now known as the European Union.
[14] This is the main subject under study.

- Measures that may result in the denial of visas and refusal of entry into the territory of the United States to non-U.S. nationals.

It was no until 1997, when the United States ambassador to the European Union, Stuart E. Eizenstat, eased its stand and agreed to propose to Congress the recast of the act. However, the agreement lasted less than twenty-four hours because Senator Jesse Helms[15] claimed its full implementation, including controversial Titles III and IV[16], subjected to further analysis. As a response, the EU decided to suspend the dispute and try to reach a settlement. The EU and the U.S. finally reached an agreement on May 18 1998[17]. On the one hand, the U.S. agreed to maintain Title III in suspension and Title IV under congressional review. On the other hand, the EU compromised to stop bringing actions before the WTO[18]. With this action, Europe sought a resolution that would impose sanctions on Washington, and, although it was not entirely successful, it did achieve the suspension of judicial proceedings, the denial of visas to "trafficker" executives and the imposition of secondary sanctions. Thus, the conflict was postponed for 20 years, until May 2019. In the bilateral conflict between the U.S. and Cuba, Europe has a privileged position, the so-called "pivot in a romantic triangle"[19], since the U.S.A needs its cooperation in order to put pressure on Cuba and Cuba is interested in receiving financing and investing from the EU.

In 1998, after the Pope's visit to Cuba and the international support in favor of Cuban growth[20] U.S policies began to shift towards softer and less aggressive plans. This change of direction was primarily due to the disapproval of most American newspapers

[15] CASTRO, S.M. "U.S.-Cuban Relations…*op.cit.*, p. 63.
[16] Title III related to "trafficking" with seized U.S. properties and Title IV relative to sanctions against those trafficking.
[17] The agreement relative to the Helms-Burton Act was drafted as follows: "to step up their efforts to develop agreed disciplines and principles for the strengthening of investment protection, bilaterally and in the context of the multilateral Agreement on Investment (MAI) or other appropriate international fora", referring to Helms-Burton Act. SMIS, S., & VAN DER BORGHT, K. The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts. *The American Journal of International Law, 93*(1), 227-236, 1999. https://doi.org/10.2307/2997968 Last visit January 9, 2022.
[18] Ibim.
[19] LÓPEZ-LEVY, A. "Sanciones secundarias en el triángulo Estados Unidos-Unión Europea-Cuba". *Revista CIDOB d'Afers Internacionals*, n. 125, p. 96-97, 2020. Retrieved from: https://doi.org/10.24241/rcai.2020.125.2.87 Last visit January 9, 2022.
[20] John Paul II visited Cuba in January 1998 and criticized U.S. embargo policies. Other international allies, the EU, Canada and some countries in South America abandoned U.S. policies and reassigned their ambassadors in Cuba. CASTRO, S.M. "U.S.-Cuban Relations during..., *op.cit.*, p. 65.

and the lobbying efforts of many trade associations[21] that joined the *U.S.A. Engage*[22], to advocate against American economic sanctions imposed to Cuba and other countries. Even some U.S. political figures started to ask President Clinton for a bipartisan commission to review U.S. policies towards Cuba, although it was never implemented. This lack of action was unsurprising since Clinton had many open fronts. He was impeached on October 8, 1998 due to allegations of perjury and obstruction of justice, a total of eleven impeachable offenses. These allegations arose from the sexual harassment lawsuit brought against Clinton by Paula Jones and the Lewinsky scandal[23]. The Senate eventually acquitted Clinton of these charges on February 12, 1999.

In short, this period involved a set of imperialist policies designed to isolate Cuba, heavily influenced by major political interests, international conflicts, and the cold war continuation between the two countries.

1.2 Trump era and the reactivation of Helms-Burton Act.

After the scandalous end of Clinton presidency, and the subsequent presidency of Republican President George W. Bush, U.S.-Cuba relations seemed promising with the arrival of Democrat Barack Obama in 2009. Particularly, in 2014, with the release of Alan Gross, a spy for the U.S., who had been imprisoned in Cuba in 2009, positions between the two countries moved closer, thereby Obama declared his intentions to reopen an embassy in Cuba. Particularly, the one located in Havana closed in 1961, which finally opened on May 15, 2015. Moreover, in 2015, Obama removed Cuba from the Terrorism List[24] in 2015 in order to restore diplomatic relations. This way, Obama became the first American president not only to bring positions realistically closer, but also to visit Cuba in 2016[25], in order to establish commercial air routes between the countries. Following

[21] Newspapers such as the National Review, the Wall Street Journal or the Washington Times; trade associations, farm organizations and nearly 700 companies such as the U.S. Chamber of Commerce, the National Association of Manufacturers, Eastman Kodak, General Motors, among them. CASTRO, S.M. U.S.-Cuban Relations during…"., *op.cit.*, p. 66.

[22] A coalition of businesses, agriculture groups and trade associations working to promote the benefits of U.S. engagement abroad and educate the public about the ineffectiveness of unilateral economic foreign policy sanctions.

[23] The Lewinsky scandal was a political sex scandal that arose in 1998, over a sexual relationship between then 49-year-old U.S. President Bill Clinton and a 22-year-old White House intern, Monica Lewinsky.

[24] This rule amends the Export Administration Regulations (EAR) to implement the rescission of Cuba's designation as a State Sponsor of Terrorism. Specifically, this rule removes anti-terrorism (AT) license requirements from Cuba and eliminates references to Cuba as a State Sponsor of Terrorism but maintains preexisting license requirements for all items subject to the EAR unless authorized by a license exception. Bureau of Industry and Security. Federal Register. (2015).

[25] First U.S. President to visit Cuba since 1928.

the death of Fidel Castro in November 2016, Obama addressed the Cuban nation: "I'm also confident that Cuba can continue to play an important role in the hemisphere and around the globe, and my hope is, is that you can do so as a partner with the United States"[26]. However, the arrival of Donald J. Trump to the White House entailed a step backward.

Donald J. Trump won the presidency on January 20, 2017 and overturned major approach actions. More particularly, Trump expressed conformity towards opening relations with Cuba and announced the unexpected end of embargo policies. However, it did not take long until he reversed Obama's policies and introduced the following measures[27]:

- End of political talks with the Castro regime, the basis for the numerous agreements achieved between the countries.
- Suspension of all actions taken by Obama, announced in one of his speeches in Miami on June 16, 2017.
- Condemnation of any interaction with Cuba, except that aimed at ending the Cuban government. However, he also ceases involvement with human rights policies.
- Reduction of U.S. Embassy staff in Cuba and expulsion of Cuban diplomats in Washington, under the pretext of the September 2017 sonic attacks[28.]
- Appointment of political figures of his same political ideology, such as Mike Pompeo as Secretary of State and John Bolton as National Security Advisor. The former announced sanctions against Cuba and reaffirmed his motto: "make America great again".

Nonetheless, the removal of the periodic deferral of Title III of the Helms-Burton Act was one of Trump's most significant measures. He drastically changed twenty years of suspension and activated an act with severe international consequences. Every former president before Trump prioritized commercial and stable relations with Europe over hegemonic intentions towards the island.

This act allows any American to file a suit before an American court on the grounds of any "trafficked" seized property after January 1, 1959. Among the main immediate effects[29]:

- Impact on Cuban society given the threat of this act and potentially international interference, which does not help the progress of social and political movements.

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[26] THE WHITE HOUSE. Briefing Room. Remarks by President Obama to the People of Cuba. *Whitehouse*. 2016. Retrieved from: https://obamawhitehouse.archives.gov/the-press-office/2016/03/22/remarks-president-obama-people-cuba Last visit January 9, 2022.

[27] LÓPEZ-LEVY, A. "Cuba y el gobierno de Trump…*op. cit.*, p. 5-8.

[28] Cerebral damage and other secondary effects suffered by American diplomats in Cuba due to mysterious sonic attacks which have not been proved to be caused by the Cuban regime.

[29] LÓPEZ-LEVY, A. "Cuba y el gobierno de Trump…*op. cit.*, p. 9-11.

- Fear among American, Canadian, and European investors, which leads to Cuba seeking financing in Russia, China, or Iran.
- International conflict related to the unilateral and extraterritorial measures adopted by the United States, which violates the agreements of 199830 and several international rules.
- The literal interpretation of the act implies countless transactions considered illegal under this law and affects European interests in the island. More particularly, given the distinct relations between Cuba and Spain, Spanish hotels are severely affected by this policy, which has led to a public request to withdraw embargo measures immediately, by both the former Foreign Affair Secretary, Arancha González Laya, and the current Tourism Secretary, María Reyes Maroto.
- Given the separation of powers and the relation between Congress and the Judiciary, there are many suits already filed that cannot be ceased by the government.

Although Trump lost presidential elections in 2021, the current president, Joe Biden gives hope for smoother relations with the Cuban regime. However, Trump's political actions and on-going legal claims cannot be suspended by the new president, those effects already suffered are still in progress.

1.3 Biden era and future perspectives.

After the aggressive and questioned political campaign of 2021, Joe Biden was proclaimed as the next President of the United States, leaving aside Trump's agitated presidency. Undoubtedly, American social situation was not ideal given the coronavirus crisis[31], lockdown policies, global economic recession, *Black Lives Matter*[32] movements, as well as the events that took place at the State Capitol[33]. In fact, Biden promised he would revise the Helms-Burton Act at the end of January 2021, which was later postponed, meaning that Title III continues to be in force.

Despite being part of the Democratic Party, Biden surprisingly continued with the most restrictive Republican policies towards Cuba and openly criticized the regime. He defined Cuban government as a "failed state"[34] in July 2021. Some experts point this political stance to the electoral defeats suffered by the Democratic Party in Florida in

[30] See footnote 15.
[31] Being the United States a country very affected by the spread of contagions, with several social protests against social restrictions.
[32] Decentralized political and social movement protesting against incidents of police brutality and all racially motivated violence against black people.
[33] The United States Capitol assault was an event that took place on January 6, 2021 when supporters of then outgoing U.S. President Donald J. Trump crashed into Congress by breaching security and occupying parts of the building for several hours, resulting in a total of five deaths.
[34] SCOTT, M., & FRANK, M. "El desabastecimiento, el origen de las protestas en Cuba". *Expansión*, 22–23, 2021.

2020 and the fear of new massive migratory flows, a weapon of the Cuban regime. Miami is home to a large Cuban American community, which explains the great importance of foreign policies towards Cuba in the electoral results.

For now, Biden's inaction has dimmed the prospects of smooth relations between the countries[35]. In fact, some believe he has enforced tougher measures than his predecessor has. Biden claimed that Cuban policy was not among his top priorities, but such inaction was not expected. Furthermore, the Cuban protests of July and the support acts that have spread globally in the following months have been a wake-up call to the international community about the repression perpetrated by the Cuban government. One would expect the U.S. government to become actively involved in these events, following its usual policy of interventionism.

2. Cuba.

Historically, Cuba and Spain have maintained a close commercial relationship for centuries, specifically since the Spanish conquest by Christopher Columbus in the 15th century, the subsequent Spanish-American War in the 19th century in which the United States obtained Cuba as a possession and, decades later, in 1902, Cuba seceded from the U.S. government and became an independent nation.

Spain established a commercial monopoly in the 16th century, allowing only licensed Castilians[36] to trade. At the onset of the decolonization process, Spain lost its entire American mainland. By 1840, Cuba became one of the main sugar producers, accelerating growth and advances in infrastructure, such as the railroad. Nevertheless, the boom in this sector resulted in Cuba's economy becoming overly dependent on changes in trade. Besides, its economy was sustained by slave labor, which led to colonial problems that would result in the war of independence between 1868 and 1878, where the Cuban elite remained loyal to Spain. The war led to absolute devastation that ended with the intervention of the United States, which had the right to supervise finances and investments in Cuba[37] by 1902.

[35] U.S.-Cuba Relations. *Council on Foreign Relations*, 2021. Retrieved from: https://www.cfr.org/backgrounder/us-cuba-relations Last visit January 9, 2022.

[36] People who lived in certain former areas of the historical Kingdom of Castile in Spain.

[37] LILLO GONZÁLEZ, M., & SANTAMARÍA GARCÍA, A. "Historia de Cuba". *Proyecto ConnectCaribbean*, p. 5–10, 2020. Retrieved from: https://digital.csic.es/bitstream/10261/61936/8/Historia%20de%20Cuba.pdf Last visit January 9, 2022.

This political and economic instability, coupled with high levels of corruption, depressing living conditions and external interference, triggered a coup d'état in 1952, led by Fidel Castro. They seized power in 1959 and initiated a program of economic and social regeneration, with a marxist-leninist ideology, which led to sanctions from the United States, at the same time it received the support of the U.S.S.R and socialist Europe. Cuba's new communist partners began to acquire Cuban sugar and thereby, support the new regime, severely worsening relations with the neighboring United States.

Despite its small size, Cuba had notorious world influence and was a territory of conflict between the U.S.S.R and the United States, which in 1962 nearly started World War III with the secret installation of nuclear weapons in Cuba. This event triggered a period of tension between the American and Soviet regimes that concluded with the withdrawal of the missiles by the Soviet Union. The missile crisis unfolded in October 1962, a period in which American President J. F. Kennedy and Soviet Premier Nikita Khrushchev were in power. Years earlier, the U.S. had deployed nuclear ballistic missiles in Italy and Turkey, both NATO member countries seeking to protect their territory from Soviet expansion during the Eisenhower presidency. Likewise, Khrushchev and Castro reached an agreement to dissuade the U.S. from invading Cuba. Kennedy did not follow his military advisors' plan to launch an attack to destroy the missiles and invade Cuba. Instead, he announced a naval quarantine of Cuba on television and called on the Soviet Union to remove the missiles[38]. Nowadays, Cuba and North Korea are the only communist regime[39].

The economy in Cuba was severely affected by the collapse of the U.S.S.R. in 1991 and the massive migratory flows to the United States in search of better living conditions. Likewise, relations with the United States have had a significant impact on Cuba, with strong pressures and embargo policies implemented through the Torricelli[40] and Helms-Burton Acts in 1992 and 1996, the latter being the object of study.

[38] LÓPEZ, J.C. "Choque de superpotencias, misiles en Cuba y 13 días de extrema tensión: la Crisis de octubre que casi lleva al mundo al invierno nuclear". *CNN Español*, 2021. Retrieved from: https://cnnespanol.cnn.com/2021/10/26/crisis-misiles-cuba-guerra-dusa-documentales-orix/ Last visit January 9, 2022.

[39] Note that other communist regimes such as the U.S.R.R, China or Vietnam adopted somehow capitalist economic systems.

[40]Rober Torricelli, a U.S Congressman, passed a bill in 1992 aimed to forbid travel with Cuba, as well as foreign-based subsidiaries of U.S. companies from trading with Cuba.

In 2017, Donald J. Trump abruptly reversed Barack Obama's 2014[41] approach policies and reactivated embargo policies. Particularly, Title III of Helms-Burton Act, which allows Americans, including naturalized Cubans, to sue before U.S. courts companies that allegedly benefit from properties in Cuba that were theirs or their families before the Revolution led by Fidel Castro in 1959. The new presidency of Democrat Joe Biden is still an unknown factor in the future of U.S.-Cuban relations.

Due to the events of July 2021, Cuban political and economic situation may experience a great turnaround, becoming a country in growth. In fact, Cuban people's attempts to end the communist system and their impoverished situation received the support of most western governments and, naturally, the government of President Biden, who stated at the onset of the crisis:

> […] the U.S. stands firmly with the people of Cuba as they assert their universal rights. And we call on the government of Cuba to refrain from violence in their attempt to silence the voices of the people of Cuba […][42]

The major difference between Castro's government and the current president's is that Fidel Castro had a revolutionary spirit that was idealized by the citizens. As a result, this dearth of charisma, together with the shortages, the coronavirus crisis, famine, the devaluation of the currency, inflation, and international pressure, have endangered the current Cuban government.

The current president, Miguel Diaz Canel, called for violence and combat, but it is becoming increasingly difficult to repress a hungry nation, despite dominating the media. As a result, there were incidents, disappearances, mysterious murders, and beatings that alerted the international community. As for the international response, the U.S., the European Union, and the United Nations requested the Cuban regime to listen to its protesters[43].

Regarding Spain, the situation is a challenge given that Spain is the country with the highest number of subsidiaries and joint ventures, as well as the third largest trading partner after China and Venezuela. Specifically, it has more than 1.000 million euros

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[41] LEOGRANDE, W.M. "Reversing the Irreversible: President Donald J. Trump's Cuba Policy". *Ideés d' Amériques* n.10, 2018. Retrieved from: https://doi.org/10.4000/ideas.2258, Last visit January 9, 2022.
[42] QUINN, M. "Biden says U.S. «stands firmly» with Cuban people amid protests against regime". *CBS News*, 2020. Retrieved from: https://www.cbsnews.com/news/cuba-protests-biden-us-statement/ Last visit January 9, 2022.
[43] BENEDITO, I. "El gobierno evita responder si considera a Cuba una dictadura". *Expansión*, 2021, p. 31.

invested in commercial exchange, almost 300 companies[44] on the island. Although it is true that the coronavirus crisis in 2020 sank exports by 35% and increased defaults, already warned by ICEX[45]. Specifically, of the 285 Spanish companies currently established in Cuba, Meliá has over forty hotels and resorts, followed by Iberostar and NH. However, as it could not be otherwise, all of them are controlled and property of the Cuban government[46]. Added to this crisis, Meliá and other companies in the hospitality sector face judicial charges for trafficking with seized property, under the Helms-Burton Act.

In this respect, Cuba's economic model gradually evolved since 1959. At first, the Castro government nationalized all enterprises and grouped them into sectors of activity. Thus, the government granted a small amount of money for them to operate and then appropriated all their profits, which were transferred to the general budget. In fact, in 1966, the industrial sector was grouped into 56 consolidated companies that included 1051 factories. The situation changed in 1975 after the celebration of the First Congress of the Cuban Communist Party in which it was decided to implement a purely Soviet system, the *Sistema de Dirección y Planificación de la Economía (SDPE)*, based on centralized planning with exclusion of the market and the leadership of a single party, the communist party[47]. The inefficiency of this system led to the rethinking of changes in 1986, with the implementation of joint ventures with foreign capital or even 100% Cuban public limited companies. Despite its lack of competition and economic attractiveness, the number of companies is growing, especially those related to the tourism sector. In most cases, the companies pay 30% of their income in taxes and 50% in state investment[48], obtaining in return autonomy to manage but not to run the company, because the state plays the role of owner.

[44] 285 firms, according to Oficina Económica y Comercial de España en Cuba. Departamento de Información de Inversiones y Coordinación (ICEX), 2020.
[45] BENEDITO, I. "El gobierno evita responder si considera..., *op.cit.*
[46] MOLINA, C. "Los hoteles españoles en vilo ante la escalada del conflicto social en Cuba". *Expansión*, 2021, p. 3.
[47] DÍAZ VÁZQUEZ, J. "Cuba: gestión y dirección de la economía (1959-2008)". *Economía y Desarrollo*, 143, n. 1, 2008, p. 165-189. Retrieved from: https://www.redalyc.org/pdf/4255/425541312007.pdf Last visit January 9, 2022.
[48] DÍAZ FERNÁNDEZ, I. "Los cambios en la empresa estatal cubana en el contexto de la actualización del modelo". *Cuban Studies*, n. 44, 2016, p.112-132. Retrieved from: https://www.jstor.org/stable/44111913?read-now=1&refreqid=excelsior%3A47fdfd5b6cfa514fefd4f83f55ee2783&seq=19#page_scan_tab_contents Last visit January 9, 2022.

In Cuba, there are three main company models[49]: the mixed company understood as a public limited company participated by national and foreign investors and authorized by the Ministry of Foreign Trade and Foreign Investment of Cuba; the international economic association consisting of national and foreign investors that do not incorporate as a legal entity; and the company fully owned by foreign capital. In any case, the country is increasingly becoming more open to private investment. In fact, Cuba authorized last September 2021 the first thirty-two private companies[50] classified as micro, small and medium-sized enterprises, non-agricultural cooperatives, and self-employment. Nevertheless, in order to retain control, this liberalization does not apply to strategic sectors such as health, telecommunications, energy, defense, press, among others. Yet, many remain suspicious of this liberalization, since after all, many companies will still remain in state hands and Cubans will still have no ownership of their companies abroad.

Despite these recent moves, Cuba's seizure policy and the Helms-Burton Act continue to affect many other companies. In addition to Melia, other Spanish companies affected are *Amadeus Viajes El Corte Inglés*, *Viajes Poseidón, Iberia*, and the banks *BBVA* and *Sabadell.* Apart from Spanish companies, the act affected other famous firms, such as *Amazon, Visa, Mastercard, Expedia, Royal Caribbean, Trivago*, among others. This paper focuses on the case of Meliá, the company with the largest presence in Cuba.

III. LEGAL FRAMEWORK.

1. Analysis of Helms-Burton Act.

1.1 Introduction.

The so-called Helms-Burton Act is a 40-pages act, divided into 401 Sections and four titles, with the purpose of "seeking international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes"[51].

The first of the headings, entitled "strengthening international sanctions against the Castro government", regulates the main lines of action of the U.S.

[49] LANDEIRA, R. & VIÑALS, J.M. "Crear una empresa en Cuba". *Cinco Días*, 2016. Retrieved from: https://cincodias.elpais.com/cincodias/2016/04/20/economia/1461183574_740033.html Last visit January 9, 2022.
[50] VICENT, M. "El Gobierno de Cuba autoriza las primeras 32 empresas privadas". *El País*, 2021. Retrieved from:https://elpais.com/economia/2021-09-30/el-gobierno-de-cuba-autoriza-las-primeras-32-empresas-privadas.html Last visit January 9, 2022.
[51] First paragraph of Helms-Burton Act.

government with respect to Cuba. The second title, "assistance to a free and independent Cuba" attempts to regulate humanitarian policies toward Cubans and establishes criteria for considering the Cuban government as democratic and, if necessary, terminating the economic embargo. More importantly, the third title, which is the main target of this paper, entitled "protection of property rights of United States nationals" regulates the possibility of initiating private civil actions before federal district courts to claim property confiscated by the Cuban regime since 1959. Finally, Title IV: "exclusion of certain aliens" denies entry to those involved in the unlawful expropriation.

This paper aims to review thoroughly titles III and IV, their historical evolution and the numerous international, legal, and social challenges involved. The U.S. considers confiscated property the one subjected to nationalization, expropriation, or other seizure by the Cuban Government, as long as it has not been either returned, adequately compensated or undergone a settlement procedure[52].

In this regard, it is necessary to differentiate the notions of confiscation, expropriation and nationalization. Confiscation refers to a more general concept that encompasses any seizure of property without adequate compensation. Expropriation follows this concept but applies when the act is conducted by a public authority. Under American law, the government must prove *eminent domain*, referring to the duty of the public authority to use the seized property for a public purpose. This is how it is established in the Fifth Amendment, which only makes it legitimate when a fair compensation is given in return and it is conducted "prompt, adequate, and effective". Finally, nationalization usually refers to the same concept but applied to industrial undertakings[53]. This measure is often used in order to control key sectors of the country, such as telecommunications.

The Helms-Burton Act refers to the concept of confiscation, which defines in page 110 of Statute 823 as either:

a) "The nationalization, expropriation, or other seizure by the Cuban government of ownership or control of property in the following cases:
    1. Without the property having been returned or adequate and effective compensation provided; or

[52] Title IV, Section 401, b), 2) definitions.
[53] VAN HECKE, G. "Confiscation, Expropriation and the Conflict of Laws". *The International Law Quarterly*, n.4(3), 1951. Retrieved from:https://www.jstor.org/stable/762944?read-now=1&refreqid=excelsior%3Aefd67f5c2019048760808936de9f8aa6&seq=13#page_scan_tab_contents Last visit January 9, 2022.

2. Without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and

b) The repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government.
    1. a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or
    2. a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim".

As noted, the U.S. government is quite meticulous in setting the scope of confiscation, so as not to overlook any action taken by the Cuban government.

1.2 Title I: strengthening international sanctions against the Castro government.

The first title of the law begins by defining the abuses of power by the Castro regime as threats to international peace and citing chapter seven of the Charter of the United Nations, concerning action with respect to threats to the peace, breaches of the peace, and acts of aggression[54]. The language employed in the first paragraph where the statement of policy is introduced[55] has political and threatening connotations since terms such as threat, blackmail, political manipulation, violations, or totalitarian are used to justify the existence of the act.

Title I is structured in sixteen sections, each of one representing one line of action. First and foremost, Section 102 introduces the enforcement of the economic embargo of Cuba, consisting in different measures:

- To encourage third countries to restrict relationships with Cuba. Otherwise, the next section allows the president to impose sanctions to those countries that allegedly collaborate with the Cuban regime. Diplomatic efforts are contemplated to persuade third countries to cooperate with the economic embargo.
- To enforce the 1917 Trading with the Enemy Act (TWEA), a regulation that allows the president to control and restrict trade with certain countries in times of war. Trump was the last president to maintain Cuba in the list, which was the only country to suffer from the prohibition until September 14, 2020[56]. The act is still in force, but Biden has not declared anything on the matter.
- To deny visas to certain Cuban nationals, particularly those working for the government or for the communist political party.

[54] United Nations Charter of 1945.
[55] Section 101 Statement of Policy.
[56] 50 U.S. Code § 4305.

- To prohibit investment in domestic telecommunication services and to submit a semiannual report detailing payments made to Cuba by any American, regarding telecommunication services.

This section has been the subject of discussion within the U.S. as well, for allegedly violating the Constitution. Many U.S. academics believe it deprives U.S. citizens of their freedom of travel, although supporters of the law consider it justified by the right of a country to ensure control of its borders[57].

Section 103 prohibits indirect financing of Cuba by any national, foreign with permanent residency in the country or government agency, whereas Section 104 denies Cuban participation in international financial institutions[58] until a transitional government is established in Cuba. To this end, the Secretary of the Treasury will give direct instructions to international executive directors in America to permit certain loans as long as they contribute to the establishment of a democracy in Cuba. Otherwise, if loans or other financial instruments are given to Cuba, except in the aforementioned scenario, the United States will reduce its payments to the international institution in question. In addition, sections 104 and 105 are devoted to the withdrawal of support and reduction of economic assistance to those countries collaborating with Cuba, except for matters listed in Section 106 3), such as humanitarian needs, democratic reforms, non-governmental organizations, promotion of the free market and other liberal activities unconnected to communist values. This is the most relevant legal section of the title, since the rest of the title is characterized by its eminent political content.

Following the line of interventionist policies, Section 107 deals briefly with television communications through periodic reports, whereas Section 108 covers the imposition of an exhaustive control through annual reports on the bilateral trade of third countries with Cuba. This control includes not only bilateral aid provided to Cuba by third countries, but also the identification of all commercial partners, joint venture and businesses, debt contracted by Cuba with any country and the purchase of arms or military supplies, among others. In contrast, Section 109 offers support to democratic and human rights groups as well as international observers. This section

[57] ROY, J. "La ley Helms-Burton: desarrollo y… *op.cit.*, p.494.
[58] Understood as the International Monetary Fund (IMF), the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guaranty Agency, and the Inter-American Development Bank.

allows the president to offer assistance and support to any type of nongovernmental organization, including educational and training material, humanitarian aid for those suffering from political repression, support to democratic group, emergency funds and economic contribution. However, the section ends by stating the Cuban government will receive no funds.

Following a more economic and pragmatic approach, Section 110 imposes an importation safeguard against specific Cuban products. In particular, those that meet three conditions: those that are Cuban origin, those transported from or through Cuba and those products made, wholly or partially, of Cuban materials. As it can be easily extracted, it includes any product related to Cuba, regardless of the degree of intensity in the relationship. Moreover, the next paragraph mentions the TLC or CAFTA-DR[59] agreement. The act emphasizes that the aforementioned prohibitions do not interfere with the terms agreed on the latter condition and extracts part of the agreement relative to the prohibition of both importations and exportations from the United States to Cuba through its neighboring countries, Canada, or Mexico. Given the importance of the sugar industry, the act limits importations from any country, unless it is verified that it does not come from Cuba. As a result, it undermines Cuban economy since sugar is one of its main raw materials, imposing an absolute economic isolation. Given the economic superiority and hegemony of the United States, these measures result in many countries opting to avoid Cuba as a commercial ally.

Section 111 addresses a particular issue: the construction of a nuclear power plant in Juragua, near the province of Cienfuegos, in Cuba. The U.S.S.R signed an agreement with Cuba in 1976 for the construction of this plant, which would mean the end of Cuba's dependence on fuel oil. The U.S, as reflected in Section IV, has great concern on this matter, since it considers that Cuba lacks adequate infrastructure, has dangerous seismic environmental features, and an undemocratic president who threatens the country. Specifically, there is the precedent of the 1962 nuclear crisis already addressed, as well as Cuba's repeated attempts to send mass emigration flows to the U.S. For this reason, the U.S. not only refuse any assistance to Cuba in this regard but warns any country that cooperates with Cuba to withhold U.S. aid, unless the aid to Cuba is for one of the listed humanitarian issues and development of

[59] The Dominican Republic-Central America FTA (CAFTA-DR) approved in June 30, 2005 and in force since March 1, 2006. A free trade agreement between the United States, Central America and the Dominican Republic which aims to create a free trade zone.

democratic institutions. As evidence throughout the development of this law, the U.S. uses its predominant position to dissuade other countries from cooperating with the Cuban regime.

Finally, the last sections address a variety of issues: Section 112 covers family remittances and travel to Cuba and subjects the reinstatement of general licenses to the Cuban government's adoption of measures such as freedom of association, release of political prisoners and other democratic policies. Section 113 deals with the extradition and rendition of Cubans who have committed crimes in the U.S. Moreover, Section 114 addresses again the issue of press offices in Cuba and the risk of espionage, whereas Section 115 excludes from the prohibition contained in this act all U.S. authorized investigative and intelligence activities. Finally, Section 116 closes Title I by raising the issue of the attack on the two civilian aircrafts, discussed in the previous Section.

1.3 Title II: assistance to a free and independent Cuba.

This title, as the chosen name indicates, focuses on supporting the achievement of a free and independent Cuba. It consists of seven sections, four of which detail the American policy towards Cuba, whereas the rest list the needed requisites to be considered a democratic country by the U.S.

Firstly, Section 201 describes all the policies the U.S. follows to encourage developing a transitional and democratic government. There are sixteen measures that may be grouped in the following categories:

- To encourage the right of self-determination of the Cuban people[60].
- To provide assistance to establish a democratically elected government in Cuba by a peaceful transition. In particular, facilitate a representative democracy and a market economy[61].
- To cooperate with other countries and international agencies to assist a democratic transition in Cuba and coordinate assistance, as well as reestablish diplomatic and commercial relations[62].
- To stay neutral towards the election of a future government by the Cuban people and help the new democratic government to strengthen the national currency[63].
- To help train the Cuban armed forces and negotiate on the reinstallation of the U.S. Naval Base at Guantanamo Bay[64].

[60] Title II, Section 201, policies 1 to 4.
[61] Ibid., policies 5, 6, 7, 9.
[62] Title II, Section 201, policies 8, 13, 16.
[63] Title II, Section 201, policies 10 & 15.
[64] Title II, Section 201, policies 11 & 12.

- To adopt measures to relieve the economic embargo provided that the president considers that the transition to a democracy started[65].

All these political measures are based on a future democratic transition of Cuba and reveal the refusal of the American government to establish relations with the government of Fidel Castro[66] at that time. However, since the enactment of this legislation in 1996 and the end of Fidel's government in 2008, not even with the subsequent presidents, Raul Castro[67] and the current Miguel Diaz Canel[68], members of the Communist Party, that transitional government that the U.S. hoped for has not, occurred. In fact, Sections 202 and 203 deal with a potential assistance plan to help the inexistent transitional government, consisting of economic aid, training of the army and international efforts. This assistance plan is well developed and detailed, since it includes a coordinating official to implement the assistance strategy, a U.S.-Cuba council, and annual reports to Congress.

The underlying question raised by analyzing this section is the concept of by "transitional government" and "democratically elected government". Sections 205 and 206 list the requisites to be considered democratic to American eyes. On the one hand, Section 205 focuses on the transitional government and requires:

- Legalization of all political activities, release of political prisoners and review of Cuban prisons by international organizations[69].
- End of the Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades, as well as stopping interferences with Radio Marti or Television Marti broadcasts.[70].
- Free political elections, at the established date, where a variety of political parties participate freely and with equal access to the press, supervised by international observers[71].
- Establishment of a free judicial branch, devoted to the protection of human rights and fundamental liberties, as well as the creation of workers unions that do not include the presence of either Fidel or Raul Castro[72].
- Adoption of public compromises and plausible progress towards a representative democracy[73].

[65] Title II, Section 201, policy 14.
[66] From 1976 to 2008.
[67] From February 2008 to April 2018.
[68] The current President since October 2019.
[69] Title II, Section 205, a) 1 & 2.
[70] Title II, Section 205, a) 3 & 5.
[71] Title II, Section 205, a) 4.
[72] Title II, Section 205, a) 6 & 7.
[73] Title II, Section 205, b) 1 & 2 A).

- Restitution of the Cuban citizenship to all Cubans returning the country[74] and extradition of the persons sought by the United States Department of Justice for crimes committed in the United States [75].
- Guarantee the right to private property[76].
- Adoption of the necessary steps to either reinstitute or indemnify seized property by the Cuban government to American citizens as well as to those entities owning at least 50% of the seized property in question since January 1 of 1959[77].

Moreover, as for the requisites needed to constitute a democratically elected government listed in Section 206. There are three main requirements: free and democratic elections, independent judicial branch, and steps towards the reinstitution of seized property.

Finally, sections 204 and 207 address the potential lift of the economic embargo, provided that Cuba constitutes a transitional government. However, it is not automatic, but it is up to the U.S. President of to suspend the embargo as long as Congress is notified of the specific measures Cuba is adopting towards a democratic government every six months[78]. Moreover, Section 207 deals with the settlement of claims of seized property and orders the Secretary of State to submit a report to Congress within the first 180 days after the enactment of this law to evaluate the issue of the seized properties, including the number and quantity of the claims, its importance, technical and legal assistance as well as other support measures.

Title II ends by expressing the "sense of Congress" and subordinating the validity of any policy as well as the fully economic and diplomatic relations to the establishment of a new government recognized by the U.S. In sum, the U.S. refuses to cooperate with the communist government and elaborates an act hoping an unlikely change of government in Cuba.

In the end, America appoints itself as governor of a potential transition in Cuba. Not only does it aim to supervise every decision taken by the country, but conditions the suspension of the embargo to the proclamation of a transitional government. Moreover, this title mentions thirty-four times[79] the name of Castro and prohibits their[80] participation in this transitional era. This title follows the traditional

[74] Title II, Section 205, b) 2 B).
[75] Title II, Section 205, b) 3.
[76] Title II, Section 205, b), 2), C).
[77] Title II, Section 205, b), 2), D).
[78] Title II, Section 204, 4), e).
[79] ROY, J. "Las dos leyes Helms-Burton: contraste de la actitud…", *op.cit.*, p. 732.
[80] Not only Fidel Castro but also Raúl.

behavior of the U.S. towards Cuba, which seems at best demeaning for any sovereign country.

1.4 Title III: Protection of property rights of United States nationals.

After twenty-three years of periodic suspensions, the Secretary of State Mike Pompeo announced the reactivation of Title III in April 2019, which is still active despite the change in presidency. The main objective of the act, and more particularly of Title III, is to "protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime"[81] without fair compensation. Although concise, this statement needs comprehensive analysis. Firstly, by "U.S. nationals" is meant not only U.S. citizens, but also U.S. businesses, agencies and all Cubans naturalized in the country. The question, however, is not clear. Could anyone who obtain the American nationality sue before the American courts? Both the international doctrine and case law seem to agree that the individual must possess the nationality before the harmful event occurs[82]. However, this act provides a retroactive privilege granted only to Cubans, and not to other naturalized nationals. This opens the door to lawsuits by approximately 400,000 Cubans[83], while, for example, those Spanish nationals who may have acquired the nationality are not allowed to sue.

Section 301 lists the findings behind the enactment of this act, which main objective is to protect the fundamental right of private property consigned in the Fifth Amendment of the U.S. Constitution[84]. Following the same writing style, this section thoroughly explains the conflict and holds Castro's government accountable for the despotism and "trampling"[85] of fundamental rights. The Cuban government is also blamed for offering seized properties to third countries and obtaining economic benefits, which ultimately undermine American interest to debilitate the Cuban

[81] BERGER, J., SUN, C., & SPULAK, T. "Claims for expropriated property in Cuba under the Helms-Burton Act*"*, 2021. *Vlex*. https://app.vlex.com Last visit January 9, 2022.
[82] DÁVALOS LEÓN, L. "El Título III de la ley Helms-Burton desde el Derecho internacional. Un nuevo elemento de tensión jurídica entre Estados Unidos y Cuba". *Actualidad Jurídica Uría Menéndez*, n. *51*(1), 2021, p. 161–169.
[83] ROY, J. "La ley Helms-Burton: desarrollo y…", *op.cit.*, p. 495.
[84] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
[85] Title III, Section 301, 3).

government. Therefore, subsections 7 to 10 justify this option given to Americans and naturalized Cubans to sue owners of seized property. On the one hand, the inability of the international judicial system. On the other hand, the enactment of effective measures to combat unjust enrichment and unlawful seizure, as well as the obligation of the U.S. government to protect its citizens against foreign threats.

The most controversial aspect of the act is that it does not directly target the Cuban regime but imposes civil liability on any person or company that "traffics" in property confiscated by the Cuban regime after January 1, 1959. This is typical of the way international sanctions work. The most powerful sanctions are always aimed at targeting the individual or legal subject. In addition to the *Countering America's Adversaries Act*[86] which imposes sanctions on individuals implicated in certain human rights abuses or violations in Iran, Russia and North Korea, as well as certain acts of corruption in Russia, the *Global Magnitsky Human Rights Accountability Act*[87] (hereinafter "Magnitsky Act") is universal and was created after the death of a Russian financial advisor with the same surname, who denounced the corruption of Russian officials for stealing $230 million in 2012. It was him and not the alleged corrupt ones who died in prison, deprived of all basic rights, and tortured. This law was modified four years later by the American Congress to make it universal, that is, to allow it to go beyond the territorial scope of a country. Given the concern of the international community, most European and allied countries have passed similar laws[88]. In fact, the EU adopted Regulation 2020/1998, although without mentioning the term Magnitsky. Unlike the European regulation, the US regulation includes corruption and specifies three types of sanctions: the prohibition of entry and movement through the country, the seizure of economic funds and the impossibility to extend credit to them. Particularly, this law enables the President to impose those sanctions whenever it is:

a) "Any individual or entity is considered to be “responsible for extrajudicial killings, torture, or other gross violations of internationally recognized

[86] THE UNITED STATES. CONGRESS. An Act to provide congressional review and to counter aggression by the Governments of Iran, the Russian Federation, and North Korea, and for other purposes, 2017. (P.L.115–44, 131 U.S.C. § 886). Retrieved from: https://congress.gov/115/plaws/publ44/PLAW-115publ44.pdf Last visit January 9, 2022.

[87] THE UNITED STATES. CONGRESS. Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012. (Title XII, Subtitle F of P.L. 114-328; 22 U.S.C. §2656). Retrieved from: https://crsreports.congress.gov/product/pdf/IF/IF10576 Last visit January 9, 2022.

[88] SANTAOLALLA, C. “La Ley Magnistky europea: ¿y la corrupción?”. *Bitácora Millennium DIPr*, n.14. Retrieved from: http://www.millenniumdipr.com/ba-96-la-ley-magnistky-europea-y-la-corrupcion Last visit January 9, 2022.

human rights…against those working (1) to expose illegal activities of government officials or (2) to obtain, exercise, defend, or promote human rights and freedoms, including rights to a fair trial and democratic elections; or

b) It is a foreign government official responsible for acts of significant corruption, a senior associate of such an official, or a facilitator of such acts, which include the expropriation of private or public assets for personal gain, corruption in government contracts or natural resource extraction, bribery, or the offshore sheltering of ill-gotten gains".

The act also regulates the scenario in which the U.S. president may cease to apply secondary sanctions, including be found not guilty, have served the sentence, have changed behavior, there are public interests or even if the president considers that the person has already "paid an appropriate consequence", without specifying what is meant by an adequate consequence. Following the example of the Helms-Burton Act, the U.S. executive bases its intervention on "the stability of international political and economic systems". Finally, as an annex, the law includes a table specifying the persons or entities sanctioned for corruption, human rights abuses, or both. For example, First Vice President of South Sudan Taban Deng Gai, six current or former Chinese government, officials, two Ugandan judges, a Chinese state-owned entity, and many others.

Under the Helms-Burton Act, the concept of trafficking does not really refer to the usual word, but includes a vague and broad definition that fundamentally encompasses any person who, according to Section 4.13, knowingly and intentionally:

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

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

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

The concept of *scienter*[89] has a significant role, which refers to the mental state of someone before they can be held legally responsible. This is where the American courts

[89] Intent or knowledge of the misconduct. This means that an offending party has knowledge of the "wrongfulness" of an act or event before committing it.

disagree, in establishing what is to be understood by "knowingly and intentionally". According to the most stringent approach, in *Glen v. American Airlines*[90], the person must know that the property in question has been seized and still trade with it. In fact, Glen asserted that the company had knowledge of the confiscation, but the courts did not admit this claim. As millions of Cubans have been expropriated, the court considered that public knowledge of this fact does not imply that the company acted knowingly and intentionally, but specific facts showing the mentioned state of mind should have been alleged.

As may be inferred, trafficking is considered to be any type of action performed directly or indirectly with confiscated property, which significantly broadens the scope of potential defendants, even those who have lawfully acquired property in Cuba that was originally owned by Americans or naturalized Cubans. However, one of the few limitations imposed by the law is a two-year statute of limitation on claims, which allows suing within the time frame of two years after the so-called “traffic" ceased. This term is rather unusual, because while the statute of limitations varies in each country, depending on whether it is criminal or civil and the type of crime, and in the case of the USA, depending also on the state, the general period in both USA and Spain, after the amendment of 2015, is five years[91].Therefore, this is the reason why this limitation period may be considered arbitrary or, at least, not very foreseeable.

Nonetheless, Section 4.13 also specifies which actions cannot be regarded as trafficking, which include telecommunications with Cuba, authorized trips to Cuba and private transactions[92] between Cuban citizens, not including the government.

In addition, Section 306 determines the entry into force of the act: the first of August of 1996. However, this title, contrary to the first two titles, has a presidential waiver. This prerogative allows the president to suspend the application of this title for periods of six months, as long as Congress is notified fifteen days in advance to the entry in force. This suspension must help to expedite a democratic government and help American interests; otherwise, the President is also entitled to terminate the suspension

[90] THE U.S. THE JUDICIARY. United States District Courtfor the Northern District of Texas. Fifth Circuit. (02/08/2021). USDC No. 4:20-CV-482. Retrieved from: https://law.justia.com/cases/federal/appellate-courts/ca5/20-10903/20-10903-2021-08-02.html Last visit January 9, 2022.
[91] 18 U.S.C. § 3282 & Article 1964.2 Código Civil Español.
[92] Such as the trading or holding of securities publicly traded or held or transactions and uses of property incident to lawful travel to Cuba, necessary to conduct that travel; or transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba. Section 4 (13) B) of Helms-Burton Act.

anytime. It is important to stress that the suspension will not affect on-going claims. Therefore, the longer Biden waits to take a stand[93], the more complicated the judicial situation will become. All former presidents, with the exception of Donald J. Trump, suspended Title III. In fact, Clinton Administration declared its intention to "put foreign companies in Cuba on notice that they face prospects of future lawsuits and significant liability in the U.S"[94]. However, Clinton also suspended this title and declared he would continue as long as America and its allies promote a transition to democracy in Cuba.

Given the extensive scope of the act, a significant number of associated international challenges have emerged, such as the potential extraterritorial nature of these private civil claims. The U.S. justifies extraterritoriality in the "act of state" doctrine, a common law principle that rules that national courts must abstain from pursuing the validity of official acts performed by a foreign state within its own territory, unless it commits violations of international norms with a general acceptance by the international community. Nevertheless, the enforcement of U.S. judgments was not well received internationally. It lacks mechanisms to make it succeed, given that the U.S. is not a party to any treaty on the recognition and enforcement of judgments. As for the response of its European and Canadian partners, they implemented blocking statutes, such as the Council Regulation (EC) No. 2271/96, to be discussed subsequently. Furthermore, this European regulation allows retaliatory suits to claim damages and legal costs, among others.

Regarding Cuban response, the government enacted the Cuban Reaffirmation of the Dignity and Sovereignty Act in December of 1996[95]. This law declares the Helms-Burton unlawful and inapplicable act given that an American internal act should not have effect on foreign countries[96].

It is particularly important to note that the U.S. Supreme Court has the power to construe international treaties unilaterally. This is regulated by their Constitution in article 3, section 2:

> "The judicial power shall extend to *all cases*, in law and equity, arising under this Constitution, the laws of the United States, and *treaties made*, or which shall be made, under their authority; to all cases affecting

[93] Remember that Donald J. Trump reactivated Title III in April 2019 and Biden has not suspended it yet.
[94] SULLIVAN & TAFT-MORALES. "Cuba: Issues for the 107th Congress*". The Library of Congres*s, p. 14-20, 2002. Retrieved from: https://www.everycrsreport.com/files/20020722_RL30806_5f085d420af76dce3b04fc9bab4cc089b75dc2e3.pdf Last visit January 9, 2022.
[95] CUBA. PARLAMENTO. Ley De Reafirmación de la Dignidad y Soberanía Cubanas. Ley 80, Gaceta Oficial No. 2 Extraordinaria, 1996. Retrieved from: http://juriscuba.com/wp-content/uploads/2015/10/Ley-No.-080-De-la-reafirmacion-de-la-dignidad-y-la-soberania.pdf Last visit January 9, 2022.
[96] DÁVALOS LEÓN, L. "El Título III de la ley Helms-Burton...", *op.cit.*, p. 161–169.

> ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects".

This power reduces the effectiveness of International Law and explains the traditional position of the United States with respect to International Law of ignorance or even contempt[97].

Section 302 regulates the procedural and details of the civil remedy. The first subsection considers any person who traffics with seized property legally liable after March 1, 1959, three months after the entry into force of the Helms-Burton Act. Concretely, money damages may be equal to the highest of the following amounts: the quantity certified by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949; the amount determined by an expert in those cases there is not a certified amount; or the fair market value of that property. The latter must be calculated as the highest amount between the current value of the property, and the value of the property when it was confiscated. These methods should also include interests, litigation costs and reasonable attorneys' fees[98].

Moreover, if the sued person is notified and he continues to traffic with seized property within the following thirty days after the notification, not only will he face those costs, but also the highest of the three quantities previously described multiplied by a factor of three[99]. Nevertheless, there is a quantitative limit to file a claim: it should be equal or exceed $50.000, without considering interest, attorney's fees, and other expenses[100].

The notification will be delivered in writing, either by certified mail or in person and it will include a declaration of intent to initiate a suit, accompanied by the legal grounds, as well as a request to cease immediately the unlawful trafficking[101]. Nonetheless, subsection 4) excludes its applicability to those cases taken place before the entry into force of the law, those accepting a fair value in exchange, those who did not

[97] CERDA, C. "Algunas hostilidades de Estados Unidos hacia el Derecho Internacional". *Revista Anuales de la Facultad de Ciencias Jurídicas y Sociales*, 14, n.47, 2017. Retrieved from: https://revistas.unlp.edu.ar/RevistaAnalesJursoc/article/download/4225/3994/ Last visit January 9, 2022.
[98] Title III, Section 302, A) to C).
[99] Title III, Section 302, B) 3) and C) i) and ii).
[100] Title III, Section 302, 8) b).
[101] Title III, Section 302, D).

submit a claim before the Foreign Claims Settlement Commission or fail to submit it on time[102]. Moreover, subsection 6) denies the potential application of the act of state doctrine. This important case law entails that courts are not competent to review foreign official acts enacted by legitimate authorities in the exercise of their duties, given that every country is sovereign[103]. The remaining sections describe procedural and general requirements of the American judicial system that are not relevant to the object of this study.

In sum, there are five requisites that must be met before filing a claim[104]:

1. Hold U.S. citizenship, including those Cubans who were naturalized in the country.
2. The claimant may sue anyone who trades in property confiscated on or after January 1, 1959 and provided that Title III be in effect.
3. The plaintiff must be able to prove his right to the confiscated property, a certification from the Foreign Claim Settlement Commission shall be adequate.
4. The amount of the claim must exceed $50.000.
5. The claim must have been filed prior to March 12, 1996, the effective date of the law.

If these requirements are met, the individual or legal entity, as well as its successors, may be sued before the federal courts.

1.5 Title IV: exclusion of certain aliens.

Despite its conciseness, this title entails significant repercussion. It is composed of a unique section, Section 401, but it is of great relevance. It regulates the denial of entrance to the U.S. to any person who either seized or traffic with American property. This section has been in force since its approval but has hardly been enforced. Particularly, subsection a) authorizes the Secretary of State to deny the visa and the Attorney General to ban entrance to the country.

Not only does it affect the person who actually commits the allegedly unlawful action, but also it includes:

- The one who seized property to an American citizen.
- The one who participated or benefit from the seizure.

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[102] Regarding the two-year statute of limitation.

[103] CAÑARDO, H. V. "Analysis of the Act of State Doctrine through the United States' Case Law: Evolution and Exceptions", n. 10. *Forum*, 2020, p. 23-88. Retrieved from: https://repositorio.uca.edu.ar/bitstream/123456789/11118/1/analisis-doctrina-acto-estado.pdf Last visit January 9, 2022.

[104] TRIGUERO, B. "Qué es la Helms-Burton, la ley que mantiene en jaque a las empresas españolas en Cuba". *Vozpópuli*, 2019. https://www.vozpopuli.com/economia_y_finanzas/que-es-ley-helms-burton-empresas-cuba_0_1298571250.html Last visit January 9, 2022.

- The one who actually traffics with the seized property.
- The corporate officer, principal, or shareholder with a controlling interest of an entity, which has been involved in the confiscation of property or trafficking.
- The spouse, children, or agent of the latter.

Undoubtedly, the prohibition broadly extends to a variety of persons. However, the most concerning case is the last one, since it opposes to one of the governing principles of Criminal Law, the principle of the individual nature of penalties, by which only the offender must be punished. Therefore, under this principle, it cannot be understood that this prohibition of entrance may extend to the relatives of the offender. This prohibition can only be waived for humanitarian or medical reasons as well as for those individuals entering the U.S. to show up in court in legal actions regarding seized property[105].

In fact, this regulation has already been enforced against some of the most relevant executives and their families. Particularly, the U.S. has denied entrance to the executives of the Mexican telecommunication company Domos, the Italian automotive supplier BM group, and the Spanish hotel industry Sol Meliá[106], among others.

Overall, the purpose of this law is both to undermine and pressure the Cuban government towards a democratically elected government. Undoubtedly, the U.S. takes advantage of its hegemony to impose some conditions that are arguable from a legal perspective. Nonetheless, some academics[107] highlight the contrast between the wording of titles I and II compared to the one of titles III and IV. Moreover, some consider them two different legal documents. In fact, Title II was an independent document, and it is obvious since it presents a clearer language and style. As opposed to the rest of the title that enumerate a list of requisites and conditions, Title II suggests an inspiring project of a new Cuba. However, those humanitarian and social principles sought by Title II were sent to a secondary position.

The purpose and style of the act as a whole reminds to other controlling legal documents enacted previously by the U.S. such as the Monroe Doctrine[108] or the Platt

[105] SULLIVAN & TAFT-MORALES. "Cuba: Issues for the 107th Congress". *The Library of Congress*, 2002, p. 18-22. Retrieved from: https://www.everycrsreport.com/files/20020722_RL30806_5f085d420af76dce3b04fc9bab4cc089b75dc2e3.pdf Last visit January 9, 2022.
[106] Meliá case will be fully developed in the following sections.
[107] ROY, J. "Las dos leyes Helms-Burton: contraste… *op.cit.*, p. 731.
[108] See footnote 5.

Amendment[109]. In this sense, a leading academic[110], identifies the aforementioned laws with the ideology of the current Helms-Burton. Particularly, he stated:

> […] Even if one were to agree that TV Martí[111] should be seen and heard in Cuba, that those who lost their citizenship should regain it, that market economies work best, that Fidel and Raul Castro's services are not needed in a future Cuban government, and that property should be returned or compensated, all of these aspiration go well beyond any internationally recognized criteria for the determination of democratic or transitional democratizing governments under the charters of the United Nations Charter or the Organization of American States. Ordering them in U.S. legislation as defining characteristics of a democratic or transitional Cuban government makes a mockery of the pledge to respect Cuban sovereignty[112] […]

As a result, the U.S. believes itself entitled to set the framework for the economic and political system they would accept in Cuba. These measures served a threefold purpose: to retaliate for the Cuban nationalizations, to destabilize the Cuban government and to prevent the revolution from spreading to other territories[113]. Yet, even if the intention is legitimate, the means employed to achieve their ends are at best questionable.

Not only does this act present challenges to the international community, but also within U.S. institutions. On the one hand, this law concerns the Judiciary, since Section 302 prohibits them from abstaining, although it is known that laws in the U.S. really have a meaning when they are enforced by a court. On the other hand, it grants excessive powers to the executive branch, which apparently contravenes the guarantees foreseen in the *War Powers Act*[114]. An example of this is that the unilateral activation of Donald J. Trump led to legal and economic problems globally.

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[109] U.S. CONGRESS. An act making appropriation for the support of the Army for the fiscal year ending June 30th, 190". (Chapter 803, 31, Stat. 895, 897). The Platt Amendment outlined the role of the United States in Cuba and the Caribbean, limiting Cuba's right to make treaties with other nations and restricting Cuba in the conduct of foreign policy and commercial relations. It imposed seven conditions to withdraw the U.S. troops from Cuba in the Spanish-American War.

[110] Such as the political scientist Jorge Domínguez, one of the most influential experts in the relationship between the U.S. and Cuba.

[111] An international radio and television service funded by the United States government. It broadcasts in Spanish from Miami to Cuba.

[112] DOMINGUEZ, J. I. "U.S.-Cuban Relations: From the Cold War to the Colder War". *Journal of Interamerican Studies and World Affairs*, n.*39*(3), 1997, p. 58. Retrieved from: http://www.jstor.org/stable/3185046 Last visit January 9, 2022.

[113] IRIARTE, J. L. "La ley Helms-Burton y la respuesta europea a sus efectos extraterritoriales". *Cuadernos Europeos de Deusto*, n. 63, 2020, p. 81-82. Retrieved from: https://ced.revistas.deusto.es/article/view/1879 Last visit January 9, 2022.

[114] UNITED STATES. CONGRESS. Joint resolution concerning the War powers of Congress and the President. (50 U.S.C & 87, Stat. 555, Pub.L 93-148). The War Powers Resolution or the War Powers Resolution of 1973 is a federal law intended to check the U.S. president's power to commit the United States to an armed conflict without the consent of the U.S. Congress. The War Powers Resolution requires the president to notify Congress within 48 hours of committing armed forces to military action and forbids armed forces from remaining for more than 60 days, with a further 30-day withdrawal period, without

Nevertheless, the United States considers this law to be justified on the grounds that it protects the victims, who are American citizens. Moreover, they base their intervention on their geographic proximity to Cuba and the weakness of international instruments, which grants them legitimate interests[115]. Therefore, they deem legitimate the violation of International Law since there was a prior violation of it when the Cuban government seized unlawfully the properties of millions of Cubans.

This study will focus on titles III and IV since they are the most problematic and entail complex legal reasoning. Particularly, aspects such as the immunity of jurisdiction, the extraterritoriality effects. The contrast between a potential unjust enrichment or an extra contractual action will be developed in this report, with the aim of studying different plausible scenarios under Private International Law, illustrated by the Central Santa Lucía v. Meliá ongoing dispute. There is little doubt that all the titles of this law contain great political content, especially the third one, which is the only title that has been suspended during most of its validity period.

2. Legal issues under Private International Law

From its enactment, the Helms-Burton Act led to waves of criticism due to the violations of International Law contained therein. The verdict[116] of the Inter-American Juridical Committee, one of the principal organs of the Organization of American States, should be highlighted. This non-binding opinion does not address bilateral policies between Cuba and the U.S., but it does evaluate the Helms-Burton Act from a legal perspective. Thus, this committee ruled as early as 1996 that "it is not in accordance with International Law", focusing on two aspects: the protection of the property rights of nationals and the extraterritorial effects.

Particularly, the committee points out the following legal problems[117]:

1. Helms-Burton Act grants a right to citizens who were not U.S. nationals at the time of the alleged injury.
2. It makes private persons liable for the acts committed by a foreign state, Cuba, which expropriated the property in question in the first place.

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congressional authorization for use of military force (AUMF) or a declaration of war by the United States. Retrieved from: https://www.govinfo.gov/content/pkg/PLAW-104publ114/html/PLAW-104publ114.htm Last visit January 9, 2022.

[115] ROY, J. "La ley Helms-Burton: desarrollo y… ", *op.cit.*, p. 495-498.

[116] Opinion of the Inter-American Juridical Committee in fulfilment of resolution AG/doc.3375/96 of the General Assembly of the Organization of American States, entitled "Freedom of trade and investment in the hemisphere". Issued in September 23rd, 1996. Retrieved from: http://www.oas.org/en/sla/iajc/docs/infoanual.cji.1996.ing.pdf Last visit January 9, 2022.

[117] Ibim, page 4, A) 4.

3. In addition to transferring the international problem to a problem of an internal and private nature, it does not provide effective means and gives irrefutable evidentiary value to claims issued by the claimants' country of origin.
4. It elevates a state-to-state diplomatic problem to a private lawsuit before the domestic jurisdiction of a country.
5. It holds the defendants liable for the full value of an expropriated property, independently of the profit obtained or expenses.
6. It allows to claim three times the value for the damages committed.
7. It combines three types of actions: a claim for damages or restitution arising from a wrongful expropriation; a personal action for unjust enrichment by the use thereof; and, finally, a real action allowing a direct claim for confiscated property.
8. The act entails liability to third-party acquirers for the use, direct or indirect, of a confiscated property.

However, the legal committee outlines the basic principles of any expropriation, and it is clear that the expropriations conducted by the Cuban regime did not meet those minimum requirements. Specifically, these conditions are as follows: the expropriation must be justified by reasons of public interest, in a non-discriminatory manner, through the payment of immediate and fair compensation. In case of non-compliance with these minimum principles, the expropriating state would incur liability. However, it is within the competence of the state of which the expropriated is a national to claim from the expropriating state, and not a matter between private parties. Furthermore, it is required that the national of the state filing the claim must not have had the nationality of the expropriating state.

The committee adds that the use of unduly expropriated property by third parties does not infringe International Law, since they use the property in accordance with the legal requirements of the expropriating state. In other words, Meliá's allegedly illegal exploitation of the Cuban properties would not be its responsibility, but rather that of the Cuban government, which expropriated them in the first place. This reasoning makes sense, since it does not seem logical to blame private entities for acts performed by a public authority.

Clearly, Title III of the Helms-Burton Act does not meet any of these conditions. It is certainly true that the Cuban regime illegally expropriated thousands of citizens, who did not obtain any compensation, and now benefits from having transferred those properties to third parties. The government acquired those properties free of charge, through coercion and state force. However, U.S. law facilitates the problem by allowing third parties to sue, even prohibiting them from entering the country, in a way that violates International Law. Naturally, it is simpler to claim responsibility from executives who do

business legally than to address the real source of the problem: confront the Cuban government. However, the American government prefers a pragmatic approach since it is aware that the Cuban government cannot and would not pay the compensation for the confiscated properties.

More precisely, paragraph 6 of the tribunal's ruling highlights the following problems of International Law[118]:

1. The domestic courts of the U.S. are not the competent forum for resolving disputes between two sovereign states.
2. The U.S. cannot administer the claims of persons, Cubans, who were not its nationals at the time the injury occurred.
3. The U.S. cannot attribute liability to private persons but should claim against Cuba.
4. The U.S. cannot hold liable third parties who had no involvement in the nationalization of the goods.
5. The U.S. is not entitled to impose arbitrary compensation, which exceeds the value of actual damages and interest.
6. The U.S. cannot deprive a foreign national of the right to an effective defense, without due process of law and the right to effective judicial protection.
7. The U.S., in its attempts to obtain just compensation, is acting against the interests of third country nationals, constituting an expropriation of third parties who have lawfully acquired their property, which implies that the U.S. could be likewise accountable.

Despite a non-binding opinion, the committee displays its strong opposition to this act, which contravenes a multitude of aspects of International Law. However, the opinion continues. It then addresses the principle of territoriality and its boundaries. In particular, the following insights are worth noting:

1. All states are subject to International Law and no state shall adopt measures that violate International Law unilaterally.
2. Although any state may exercise jurisdiction, it must respect international limitations. Otherwise, it will incur responsibility.
3. As a general rule and with few exceptions, a state may not exercise its power over the territory of another state, especially with regard to legislative and jurisdictional co-responsibilities.
4. Exceptionally, the principle of extraterritoriality is allowed in cases where the acts have partially occurred in the territory of that state, either because they have started in the state in question (objective territoriality) or because they have been consummated in that state (subjective territoriality). In this case, it may justify the application of the law beyond its territory if it has a direct, substantial and foreseeable effect, and provided that the exercise of this power is reasonable.

[118] Ibim, p.7 A) 6

In other words, the application of power of one state in the territory of another violates International Law categorically, unless there is a substantial connection or protection purposes of the nationals of a state. In this particular case, it is clear that U.S. law is not justified in any of these categories. Nevertheless, in case there was any doubt, the report ends by adding, in paragraph 9, that these conditions are not met and that "there is no apparent connection between such acts and the protection of essential sovereign interests". It is therefore not in conformity with International Law.

Following the same approach that this 1996 report, many countries rejected this U.S. interference and adopted "antidote laws"[119] in the 1990s, such as the Mexican law of 1996[120], the Canadian law of 1996[121], the European regulation 2271/96[122], or the Spanish law of 1998[123]. As for the European case, Europe filed an appeal before the WTO. A compromise was reached between the countries due to continuous suspensions of titles III and IV. In short, the international community has firmly opposed to this intrusive law, as reflected in the diminishing support to the U.S. in the UN votes. The following table shows the UN General Assembly votes until 2019 and how the U.S. loses support annually. In fact, since 1996, and specifically in the last session, 192 votes were cast in favor of removing sanctions and the blockade of Cuba, with the only votes against of the U.S. and Israel.

[119] DÁVALOS LEÓN, L. "El Título III de la ley Helms-Burton… *op.cit.*, p.168.
[120] MÉXICO. PARLAMENTO. Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional, 1996. Retrieved from: http://www.diputados.gob.mx/LeyesBiblio/pdf/63.pdf Last visit January 9, 2022.
[121] CANADÁ. CONGRESS. American Liberty and Democratic Solidarity (Loyalty) Act. Bill C-339, 1996. Retrieved from: https://web.archive.org/web/20130618072721/http://web.textfiles.com/politics/NWO/nwo_0012.txt Last visit January 9, 2022.
[122] EUROPEAN UNION. COUNCIL. Council Regulation No 2271/96, *OJ L 309, 29.11.1996, p. 1–6*, of 22 November 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. Retrieved from: https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32018R1101&from=EN Last visit January 9, 2022.
[123] ESPAÑA. CONGRESO. Ley sobre sanciones aplicables a las infracciones de las normas establecidas en el Reglamento (CE) número 2271/96, del Consejo, de 22 de noviembre, relativo a la protección frente a la aplicación extraterritorial de la legislación de un país tercero (Ley 27/1998, de 13 de julio), 1998. BOE-A-1998-16716. Retrieved from: https://www.boe.es/buscar/pdf/1998/BOE-A-1998-16716-consolidado.pdf Last visit January 9, 2022.

Año	A favor	En contra	Abstenciones	Países en contra
1992	59	3	71	Estados Unidos/Israel/Rumanía
1993	88	4	57	Estados Unidos/Israel/ Paraguay
1994	101	2	48	Estados Unidos/Israel
1995	117	3	38	Estados Unidos/Israel/Uzbekistán
1996	137	3	25	Estados Unidos/Israel/Uzbekistán
1997	143	3	17	Estados Unidos/Israel/Uzbekistán
1998	157	2	12	Estados Unidos/Israel
1999	155	2	8	Estados Unidos/Israel
2000	167	3	4	Estados Unidos/Israel/Islas Marshall
2001	167	3	3	Estados Unidos/Israel/Islas Marshall
2002	173	3	4	Estados Unidos/Israel/Islas Marshall
2003	179	3	2	Estados Unidos/Israel/Islas Marshall
2004	179	4	7	Estados Unidos/Israel/Palau/Islas Marshall
2005	182	4	1	Estados Unidos/Israel/Palau/Islas Marshall
2006	186	4	1	Estados Unidos/Israel/Palau/Islas Marshall
2007	184	4	1	Estados Unidos/Israel/Palau/Islas Marshall
2008	185	3	2	Estados Unidos/Israel/Palau
2009	187	3	2	Estados Unidos/Israel/Palau
2010	187	2	3	Estados Unidos/Israel
2011	186	2	3	Estados Unidos/Israel
2012	188	3	2	Estados Unidos/Israel/Palau
2013	188	2	3	Estados Unidos/Israel
2014	188	2	3	Estados Unidos/Israel
2015	191	2	0	Estados Unidos/Israel
2016	191	0	2	-
2017	191	2	0	Estados Unidos/Israel
2018	189	2	0	Estados Unidos/Israel
2019	187	3	2	Estados Unidos/Israel/Brasil

Table 1. Voting at the UN General Assembly requesting an end to the U.S. economic, commercial, and financial blockade of Cuba. Retrieved from López-Levy, A. (2020, September).

3. European and Spanish Legal Framework.

3.1 European blocking statutes.

3.1.1 Council Regulation 2271/96[124].

In response to the controversial Helms-Burton Act, the European Commission passed the Regulation 2271/96 (hereinafter, "blocking statute") in 1996 to prevent European citizens from complying with the obligations imposed by the American government. However, this blocking statute deters not only the Helms-Burton Act, but also all those listed in the annex, including the Iran and Libya Sanctions Act of 1996. This annex includes also a list of potential damages to EU interests, such as initiating legal proceedings in the U.S., upon liability already accruing, monetary compensation or refusal to entry into the U.S. In fact, it was amended in 2018 with the reintroduction of secondary sanctions against Iran, prior to the reactivation of Title III.

[124] EUROPEAN UNION. COUNCIL Regulation No 2271/96, *op.cit.*,, p. 1–6.

In fact, this blocking statute nullifies the effects of third state courts, such as American courts, thus preventing the enforcement of foreign judgments in Europe. Particularly, this blocking statute has two additional acts that update and develop it, explained in the following section. They are the European response to American interference. In fact, the explanatory memorandum of the blocking statute criticizes a "third country", referring to the U.S., which has approved extraterritorial rules that contravene International Law and the objectives of "free movement of capital and removal of any restrictions on direct investment".

Specifically, this blocking statute protects the parties regulated in article 11:

> **"**Any natural person being a resident in the Community and a national of a member state. It refers to those established in the Community for a period of at least six months within the 12-month period immediately prior to the date on which under this blocking statute, an obligation arises, or a right is exercised:
>
> i. Any legal person incorporated within the Community.
> ii. Any natural or legal person referred to in article 1.2 of Regulation No 4055/86, referring to nationals and shipping companies of member states based outside the community and controlled by nationals of a member state, provided that their vessels are registered in that member state in accordance with its legislation.
> iii. Any other natural person being a resident in the Community unless that person is in the country of which he is a national.
> iv. Any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity".

Notwithstanding the fact that it includes so many entities, only those companies incorporated in the EU contemplated in Section 2) is of interest to the report. This implicates that European companies that are suffering the effects of Helms-Burton are protected by this regulation. It is noteworthy that the purpose of this law is not to protect European citizens, but to provide protection to European Union operators, which may also be entities outside the European Union. Thus, it must be understood that the subjects mentioned in article 11 are EU operators.

Articles 2 to 5 regulate the duties of the affected individuals, regardless of whether they are directly or indirectly involved. Specifically, they must inform the Commission and provide any relevant information within a time lapse of 30 days. In fact, it is not only

a mere formal obligation, but the failure to inform the Commission carries penalties, which in the case of Spain, are developed in Law 27/1998[125].

In addition, these parties are prevented from collaborating or complying with the obligations established by a country outside the Union, for instance by being unable to testify, act as experts or provide evidence. This cooperation prohibition also extends to the states, which are strictly prohibited from recognizing or enforcing any judicial or administrative decision from outside the EU. However, article 5.2 allows for cooperation in exceptional cases, subject to authorization by the community and provided that there is damage to the interests of the community. Regarding the denegation of the *exequatur*[126], although it must be generally subject to strict interpretation, this cause is justified and allows lenient interpretation, since it clearly violates international rules[127].

Importantly, article 6 recognizes a right to compensation for damages suffered under the Helms-Burton Act. Specifically, it allows the initiation of legal proceedings in the courts where the person or entity causing the damage holds assets. Moreover, such compensation may involve the seizure and sale of assets. This article is of great importance because it opens the door to lawsuits in the European territory. It enables the application of Brussels I-Bis and expands its application by allowing suing in any state where the company causing the damage has assets, thereby facilitating the action. Consequently, the plaintiff must be careful when suing a European subject if he owns assets in member states, as he could receive a counterclaim and risk his assets.

Unlike Brussels I-Bis, the blocking statute applies regardless of the defendant's domicile[128], since it is not required to have the headquarters or domicile in Europe. This feature makes the law a powerful instrument for the affected entities. In sum, this regulation affects those subjects contained in article 11 in two ways: it provides them protection towards potential lawsuits and prevents them from cooperating with the U.S.

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[125] ESPAÑA. PARLAMENTO. Ley sobre sanciones aplicables a las infracciones de las normas establecidas en el Reglamento (CE) número 2271/96, *op.cit.*

[126] Set of rules by which a country verifies whether it allows the recognition and enforcement of definitive foreign judgments, of definitive foreign judgments adopted in a voluntary jurisdiction proceeding or of interim and provisional measures. WOLTERS KLUWER. Exequátur. *Guías Jurídicas Wolters Kluwer*. Retrieved from: https://guiasjuridicas.wolterskluwer.es/Content/Documento.aspx?params=H4sIAAAAAAAEAMtMSbF1jTAAAUMjMzNLtbLUouLM_DxbIwMDCwNzAwuQQGZapUt-ckhlQaptWmJOcSoAms4nGDUAAAA=WKE Last visit January 9, 2022.

[127] IRIARTE, J. L. "The Helms-Burton Act casts its shadow over the Spanish case-law and the European Union legislation". *Bitácora Millenium DIPr*, n.*11*, 2020, p.20. Retrieved from: http://www.millenniumdipr.com/archivos/1601637419.pdf Last visit January 9, 2022.

[128] HEREDIA, I. "La puerta trasera de la Ley Helms-Burton...*op.cit.*, p.190-194.

Consequently, it reinforces the EU position and projects a powerful image towards the international community.

Briefly, there would be three scenarios[129]:

1. European subsidiaries incorporated under the law of a member state with a registered office in an EU state. These clearly fall within the blocking regime.
2. U.S. subsidiaries in the EU fall outside the statute, as they are wholly dependent on the parent company.
3. European subsidiaries in the U.S. subject to US law. This situation has the greatest complexity, as they are subject to the Helms-Burton Act as US persons. Moreover, although they are not subject to the blocking statute, it does apply to their parent companies.

3.1.2 Implementing[130] & Delegated[131] Regulation 2018/1101.

These two regulations develop and update the previous regulation. On the one hand, the Commission Delegated Regulation 2018/1100 (hereinafter, "Delegated Regulation") essentially updates the annex of the previous blocking statute. In May 2018, the U.S. activated restrictions against Iran, but the regulation does not really address the Helms-Burton issue, which was still suspended at that time. On the other hand, the Implementing Regulation 2018/1101 (hereinafter, "Implementing Regulation") protects extraterritorial effects, but specifically develops article 5 of blocking statute. This article allows the concerned parties to seek authorization to comply, in whole or in part, with U.S. requirements or prohibitions. The blocking statute does not protect from every proceeding, but only from those based on the laws contained in the aforementioned annex. That is to say, in this case, it only prevents procedures based on the Helms-Burton Act.

Article 4 is the most important provision, which establishes the criteria for assessing whether the interests are seriously affected, which may be grouped in the following categories, affecting[132]:

1. Natural persons, the existence of:
   a. Ongoing administrative or judicial investigations.

[129] IRIARTE, J. L. "The Helms-Burton Act casts its shadow…*op.cit.*, p. 14-15.
[130] EUROPEAN UNION. COMMISSION. Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom. Retrieved from: https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32018R1101&from=EN Last visit January 9, 2022.
[131] EUROPEAN UNION. COMMISSION. Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom", . Retrieved from: https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32018R1100&from=EN Last visit January 9, 2022.
[132] Commission Implementing Regulation…*op.cit.*, article 4, p. 9.

b. A substantial connecting link with the third country, which is at the origin of the listed extraterritorial legislation or the subsequent actions (e.g., parent companies or subsidiaries, participation of natural or legal persons subject to the primary jurisdiction of the third country).
c. Whether measures could be reasonably taken by the applicant to avoid or mitigate the damage.

2. Legal entities:
   a. Potential adverse effect on the conduct of economic activity, such as significant economic losses (e.g., threaten viability or pose a serious risk of bankruptcy),
   b. Potential effect on the applicant's activity (e.g., loss of essential inputs or resources, which cannot be reasonably replaced).
   c. Human rights:
   d. Threat to the applicant’s individual rights
   e. Threat to safety, security, the protection of human life and health and the protection of the environment.
   f. Threat to the Union's ability to carry out its humanitarian, development and trade policies or the external aspects of its internal policies.
3. EU interests:
   a. Threat to the security of supply of strategic goods or services within or to the Union or a Member State and the impact of any shortage or disruption.
   b. Threat to the internal market in terms of free movement of goods, persons, services, and capital, as well as financial and economic stability or key Union infrastructures.
   c. Potential systemic implications of the damage (e.g., spillover effects into other sectors).
   d. Potential impact on the employment market and cross-border consequences within the Union.

Once the Commission analyzes the aforementioned circumstances, a decision proposal will be delivered.

In essence, these normative instruments represent an effective mechanism to defend the interests of the Union and constitute strong opposition to U.S. policies. In fact, with the reactivation of Title III of the Helms-Burton Act, the EU high authorities warned the U.S. that the EU might reopen its complaint before the WTO, and thereby implement all available mechanisms to mitigate this threat. Nonetheless, the reality is that these strong EU provisions do not affect those assets or properties located in the U.S., which prevents it from achieving full effectiveness and the intimidating effect on American companies. As it does not offer protection for assets located outside the EU, it falls short of safeguarding European interests.

3.2 Spanish law 27/1998[133].

This regulation adopts the blocking statute and establishes the sanctioning regime in Spain. Thus, articles 2 and 3 transfer the prohibitions to cooperate and the duty to notify the Commission considering non-compliance as a serious infringement.

The penalties established depend on the degree of intentionality, recurrence and the extent of the financial and economic interests affected. Given that this law dates from 1998, prior to the introduction of the Euro in Spain, sanctions are calculated in *pesetas*, the Spanish currency at the time the law was drafted. There are two ranges of penalties, minor penalties ranging from 250.000 to 1.000.000.000 pesetas (1.500 to 6.000 euros) and serious penalties ranging from 1.000.001 to 10.000.000 pesetas (6.000.000 to 60.000 euros).

The outdated nature of this regulation has been criticized[134] since it imposes very limited penalties due to the devaluation of the currency. In fact, some companies may find it more beneficial to violate the blocking statute in order to avoid serious consequences imposed by the U.S. authorities. For example,[135] an Iranian may face the dilemma of either refusing to report this situation to the Spanish authorities and face a penalty up to 60.000 euros or reporting it and face possible sanctions such as being banned from operating using US dollars or from operating in the U.S. In this situation, the blocking statute does not impose a real blockade since the American measures are far more severe.

Furthermore, several public authorities are competent to conduct the sanctioning procedure, depending on the amount of the sanction: Council of Ministers, Minister of Economy and Finance or Secretary of State for Trade, Tourism and SMEs. Apart from that, this Spanish law does not introduce any new provision with respect to the blocking statute.

Ultimately, these regulations succeeded to a certain extent because it achieved its goal of suspending the application of the most severe sanctions contained in titles III and IV of the Helms-Burton Act, achieving cooperation between the U.S. and the EU.

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[133] ESPAÑA. PARLAMENTO. Ley Orgánica sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España (Ley 16/2015, de 27 de octubre), 2015. BOE-A-2015-11545. Retrieved from: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-11545 Last visit January 9, 2022.
[134] IRIARTE, J. L. "La ley Helms-Burton y la respuesta… *op.cit.*, p. 98-99.
[135] IRIARTE, J. L. "The Helms-Burton Act casts its shadow over…*op.cit.*, p.11.

4. Application of Regulation Brussels I-Bis 1215/2012 (Brussels I-Bis)[136].

The Helms-Burton act introduces a legal dispute under International Law that continues to be the topic of discussion among leading academics. On the basis of Brussels I-Bis, three scenarios are considered: the defendant's domicile, the place where the harmful event occurs and the place where the immovable property is located. Subsequently, applicable law and conflicts of recognition and enforcement will be presented.

Note that Brussels I-Bis applies, given that there are no international or bilateral treaties that regulate this issue and would have preference of application. Therefore, it is necessary to indicate the requirements for the application of this European regulation:

a. *Substantive requirement*:

> "This regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (act iure imperii)"[137].

Indeed, if the Helms-Burton Act had not overreached its powers and the U.S. had chosen to resolve this issue bilaterally with Cuba, it would have been an act iure imperii, and thereby Brussels I-Bis would not apply. However, by addressing the matter as a private civil matter, it would fall within its scope. As for the other exceptions, they are not worth explaining.

b. *Temporal requirement:* The regulation is in force since January 10, 2015, prior to the entry into force of Title III.

c. *Territorial requirement*: It includes all EU member states and Denmark. As it involves defendant companies based in Europe, it is applicable. In cases involving Canadian or Mexican companies, other regulations would apply since they fall outside the European scope, albeit they are not the focus of this analysis.

d. *Personal requirement:* The regulation establishes a hierarchy of competent forums, which is as follows:

i. Exclusive competences of article 24[138], of which immovable property must be pointed out.

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[136] EUROPEAN UNION. COUNCIL. Regulation No 1215/2012 of the European Parliament and of the Council, *OJ L 351, 20.12.2012, p. 1–32,* of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN Last visit January 9, 2022.

[137] Ibim. Article 1. p. 6.

[138] The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: (1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

ii. Express and implied submission of articles 25[139] and 26[140], with the latter prevailing.
iii. Special forums of articles 10 to 23, which include workers, insured and consumers, not applicable in this case.
iv. Alternatively, special forums of article 7 and domicile of the defendant of article 4[141]. Particularly, article 7.2[142] is the one to mention since it addresses extra contractual liability.

Once jurisdiction is established, the applicable law will be examined. European applicable law is only be applied in the event that a judge of the European Union has jurisdiction, in the absence of international or bilateral treaties regulating this issue[143]. One may think that the Regulation No. 864/2007 on the law applicable to non-contractual obligations (hereinafter, "Rome II")[144] would apply. However, the events giving rise to the damage occurred in the 60s, prior to the entry into force of this regulation, as contemplated in articles 31 and 32:

> "Article 31 Application in time. This regulation shall apply to events giving rise to damage which occur *after its entry into force*.
> Article 32. Date of application. This Regulation shall apply from 11 January 2009, except for article 29, which shall apply from 11 July 2008."

Nevertheless, it is not so clear that European courts will enjoy jurisdiction over this matter. It should be noted that forums, particularly the exclusive immovable property forum, limit their effectiveness to the property being located in a member state of the EU or party to the Lugano Convention. In other cases, the courts must abstain *ex officio*. For the case at hand, dealing with properties located in third states such as Cuba, there is no direct answer.

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[139] If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

[140] Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

[141] Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

[142] A person domiciled in a Member State may be sued in another Member State: (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

[143] Rome II. Article 27: Relationship with other provisions of Community law. This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

[144] EUROPEAN UNION. PARLIAMENT & COUNCIL. Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007. Retrieved from: https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32007R0864&from=en Last visit January 9, 2022.

However, the majority doctrine understands that the *mirror effect o efecto reflejo*[145] of the exclusive forums should be applied. This effect presents two rationales: on the one hand, *cooperative reciprocity*, by which Spanish courts should recognize exclusive jurisdiction in the same cases that it considers itself exclusively competent. In other words, if the Spanish courts would attribute jurisdiction to Spain in the case a property was located in Spain, they should follow the same rationale and grant jurisdiction to the Cuban courts for the same reason. Or, in the opposite case, if they would consider in all cases the action to be a personal one and derive the controversy to another country different from the one where the property is located, they should do it this way. On the other hand, the second rationale is the sake of *procedural economy*, a principle by which it would only be convenient to assume jurisdiction if it has a likelihood of success. This may be a useful thesis for those holding the view that jurisdiction should be Spanish, as it is highly unlikely that the Cuban courts would try the case in the first place, and even more unlikely that they would judge the Cuban act of confiscation and uphold the claims, since national interests are at stake. Thus, in order to avoid denial of justice, Spanish jurisdiction could be considered.

The mirror effect thesis was used by Meliá to support the competence of the Cuban courts. As a consequence, Santa Lucía modified its main claim by clarifying that they referred to unjust enrichment rather than to the recognition of its condition of owner. This thesis is widely accepted by the doctrine, provided that the property is located within the EU, that is, within the scope of Brussels I Bis[146]. When the property is located in a non-EU country, as is the case at hand, it is generally understood that the jurisdiction control should not be performed ex officio, but upon request[147]. In other words, in the Meliá case, Spanish courts would only have jurisdiction if the mirror effect of the exclusive forums is denied. Otherwise, Spanish courts will not enjoy jurisdiction.

4.1 Jurisdiction & applicable law.

4.1.1 Immovable property rights: application of article 24 of Brussels I-Bis.

Brussels I-Bis contains multiple rules to regulate an international conflict. As already mentioned, article 24 is at the top of the pyramid, enjoying absolute primacy,

[145] HEREDIA, I. "La puerta trasera de la Ley Helms-Burton…*op.cit.*, p.212-214.
[146] HEREDIA, I. "La puerta trasera de la Ley Helms-Burton...*op.cit*.,p.210-215.
[147] GARCIMARTÍN, F. J. "¿Por qué una Ley de Inmunidades? Primeras reflexiones a propósito de la pertinencia y el contenido de la Ley Orgánica 16/2015, de privilegios e inmunidades". *Cuadernos de la Escuela Diplomática*, n.55(5), 2019, p. 163.

since it regulates aspects of national sovereignty. The reasoning underlying the primacy of this forum lies on the intense connection between the courts and the location of the property. Specifically, article 24 grants jurisdiction to the forum where the property in question is located, with one exception.

> "Article 24. Exclusive jurisdiction[148]:The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: (1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, *the courts of the Member State in which the property is situated*. However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord, and the tenant are domiciled in the same Member State".

The exception contained in this article does not apply to the present case because it focuses on private dwellings with specific conditions, not on business activities. Nonetheless, it is certain that the properties confiscated by the Cuban government are immovable properties located in Cuba, which would grant jurisdiction to Cuban courts. Moreover, this forum prevails over the general rule of the domicile of the defendant, due to its proximity with the dispute.

Meliá case is a great example of this legal argument. On the one hand, the plaintiff, Santa Lucía, based its claim on the grounds of an unjust enrichment, thus, an extra contractual liability. This action would allow the plaintiff to choose between suing in Cuba based on article 7.2, where undoubtedly the unlawful event occurred, or in Spain, based on article 4, where the defendant has its domicile. In fact, Santa Lucía chose the latter and filed the claim before the courts placed in Palma de Majorca, the headquarters of the defendant.

Nonetheless, the Spanish legal system does not regulate a legal action such the one claimed. article 455 of the Spanish Civil Code is the most similar option, which regulates the following:

> "El poseedor de mala fe abonará los frutos percibidos y los que el poseedor legítimo hubiera podido percibir, y sólo tendrá derecho a ser reintegrado de los gastos necesarios hechos para la conservación de la cosa. Los gastos hechos en mejoras de lujo y recreo no se abonarán al poseedor de mala fe; pero podrá éste llevarse los objetos en que esos gastos se hayan invertido, siempre que la cosa no sufra deterioro y el poseedor legítimo no prefiera

[148] Brussels I Bis, p.10.

> quedarse con ellos abonando el valor que tengan en el momento de entrar en la posesión[149].

This article stipulates that the possessor in bad faith must be compensated for all benefits obtained. However, it also provides that this possessor shall only be compensated for the maintenance expenses, but in no case for unnecessary expenses, which he may keep as long as they do not entail deterioration and if the good faith possessor does not wish to keep them, upon prior payment of a compensation.

The CJEU has issued many decisions analyzing the Brussels I Bis regulation, in order to prevent states from resorting to national law for the interpretation of international law. Regarding the interpretation of article 24.1, the *Ellmes Property Services v. SP* case[150] is a great example. The entity was the owner of a property located in Austria and rented it out for tourist use. Another entity sued it for that reason since the tourist use had not been declared and approved by the other neighbors. The lawsuit was filed in Austria on the grounds of exclusive jurisdiction. The Austrian Court declined to hear the case, claiming that they did not have exclusive jurisdiction under article 24.1 of Brussels I-bis, since it was a case involving a private law agreement relating to the use of a property, without affecting the property rights of the owners. As in the Meliá case, three forums apply: the exclusive forum of article 24, the alternative forums of the contractual regime of article 7 (in the case of Meliá, extracontractual) and the forum of the defendant's domicile of article 4.

The CJEU sets out the following considerations[151]. First, the concept of private property must be an autonomous and independent concept, which cannot be sought in the domestic legal systems of the Member States. Second, the concept of right in rem includes within the concept:

> […] it does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of

[149] Unofficial translation: "the possessor in bad faith shall pay any fruits received and those which the legitimate possessor could have received and shall only be entitled to be repaid any necessary expenses made for the preservation of the object. Expenses made for luxurious and recreational improvements shall not be paid to the possessor in bad faith; but he may take the objects in which such expenses have been invested, provided that the object suffers no impairment, and that the legitimate possessor does not prefer to keep them by paying their value at the time of becoming the possessor thereof".

[150] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-433/19. (11/11/2020). Ellmes Property Services Limited v SP, C-433/19. *Curia*. Retrieved from: https://curia.europa.eu/juris/liste.jsf?language=en&num=c-433/19&td=ALL Last visit January 9, 2022.

[151] ALOMAR, C. "Nota acerca de la sentencia del TJUE, de 11 de noviembre de 2020, asunto C433/19, Ellmes Property Services Limited y SP". *Bitácora Millennium DIPr*, n.13, 2020. Retrieved from: http://www.millenniumdipr.com/ba-94-nota-acerca-de-la-sentencia-del-tjue-de-11-de-noviembre-de-2020-asunto-c-433-19-ellmes-property-services-limited-y-sp Last visit January 9, 2022.

> that regulation and are actions which seek, first, to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and, secondly, to provide the holders of those rights with protection for the powers which attach to their interest […]

With respect to mixed actions, such as those based on a real right and a personal right, the issue is not clear. This same reasoning was followed in several rulings such as *Norbert Reitbauer and Others v. Enrico Casamassima*[152]*; Irmengard Weber v Mechthilde Weber*[153]*. Virpi Komu and Others v Pekka Komu and Jelena Komu*[154]*. Wolfgang Schmidt v Christiane Schmidt*[155], among others.

However, one must consider that the CJEU applies a restrictive interpretation and tends to leave out of the exclusive forum everything that is not clearly a purely real right element. Therefore, in the case of Melia, it would not be so clear whether the CJEU would consider it a purely inclusive element in the exclusive forum, or otherwise, if having claimed through a personal action, it would be excluded from it.

In the case study, the plaintiff argues that they are not seeking the liquidation of the possessory state, but rather claiming monetary compensation from the person who illegally conduct business with a property that belongs to the claimant. They refer to the figure of unlawful enrichment, although they do not seek all the fruits received and those that may be received in the future, but only the ones obtained in the last five years. Therefore, the plaintiff bases its claim entirely on Spanish law.

In the appeal of the plea of lack of jurisdiction, the plaintiff argues that the alleged proximity or *vis attractive* is not always justified and refers to several CJEU court rulings[156]. Consequently, they consider that the case does not intent to determine whether

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[152] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-722/17. (10/07/2019). Norbert Reitbauer and Others v. Enrico Casamassima. *Eurlex.* Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2019%3A577 Last visit January 9, 2022.

[153] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-438/12. (03/04/2014) Irmengard Weber v Mechthilde Weber. *Eurlex.* Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2014%3A212 Last visit January 9, 2022.

[154] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-605/14. (17/12/2015). Virpi Komu and Others v Pekka Komu and Jelena Komu. *Eurlex.* Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2015%3A833 Last visit January 9, 2022.

[155] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-417/15. (16/11/2016). Wolfgang Schmidt v Christiane Schmidt. *Eurlex.* Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2016%3A881 Last visit January 9, 2022.

[156] In particular, COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-341/16. (05/10/2017). Hanssen Beleggingen BV v Tanja Prast-Knipping., *Curia.* p. 17-19. Retrieved from: https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-341/16&td=ALL Last visit January 9, 2022.

or not the confiscation was legitimate, but to identify the legitimate owner. Thus, following CJEU previous interpretations, a preliminary ruling is not required.

The plaintiff also highlights the differences between the concepts of confiscation, nationalization, and expropriation and argues that the act that gave rise to the loss of its land had a confiscatory nature, given its interest to make Meliá liable, rather than a public authority. The action performed by the Cuban state in 1960 was an expropriation in which the properties of all citizens were taken. The government later set a compensation[157] that was never granted. In any case, there is no doubt that a sovereign state may nationalize the assets of its citizens. However, it is also true that this action must be limited to the assets of its territory the act may not be recognized in the international community.

By virtue of the territoriality principle and given that the Cuban state limited its action to the assets located within its borders; it seems that Cuba was competent to execute this act. However, in order for this act to be recognized, it must respect the international public order. Moreover, it must be justified in the general interest, guarantee the rights of defense to the expropriated, and there must be fair compensation free of discrimination or reprisal to have extraterritorial effects, In this sense, it is undeniable that none of the requirements were met, thus that it cannot be effectively recognized internationally.

In the Spanish context, the Spanish higher court, *Tribunal Supremo*, has judged Cuban nationalizations on two occasions[158] deeming both of them contrary to public order. The court focused on the lack of compensation, which is considered the defining requirement. Some consider that non-compensation falls within the sovereignty of each state, but the Spanish Supreme Court considers it a fundamental requirement. Although it is not a fundamental right, it is a basic right linked to private property pursuant to article

[157] Established in Law 956 of August 24, 1961, subsequent to the confiscation act, contemplated in the Law 890 of October 13, 1960.

[158].It is related to the sale of trademark rights by the participants of the company owning the trademark and their separation from the company by the Government of Cuba after the change of political regime in 1960. The case was dismissed on the grounds that the state auditor did not have a legitimate interest worthy of protection under Spanish law. (España. Tribunal Supremo Sala de lo Civil. (25/09/1992). Sentencia 812/1992. ECLI:ES:TS:1992:7198. *Cendoj*. Retrieved from: https://www.poderjudicial.es/search/AN/openDocument/9bea3357d2383bb2/20040424). In addition, Havana Club judgment relative to the request for the nullity of the trademark of the registers subsequent to the appropriation by the Cuban State and by the successive owners to whom it was transferred by the latter. It was dismissed due to 15 years of inactivity of the plaintiff, granting the ownership of the trademark in favor of the State of Cuba. (ESPAÑA. TRIBUNAL SUPREMO SALA DE LO CIVIL. (30/12/2010). Sentencia 747/2010. ECLI:ES:TS:2010:7666. *Aranzadi*. Retrieved from: https://insignis.aranzadidigital.es/maf/app/document?srguid=i0ad6adc60000017d76da9e5599efa7eb&marginal=RJ\2011\1791&docguid=Ib45c9b20408911e0a0fa010000000000&ds=ARZ_LEGIS_CS&infotype=arz_juris;&spos=2&epos=2&td=7&predefinedRelationshipsType=documentRetrieval&fromTemplate=&suggestScreen=&&selectedNodeName=&selec_mod=false&displayName=). Last visit January 9, 2022.

33 of the Constitution[159]. In any case, if the matter reaches the Spanish Supreme Court, they will presumably find that the expropriation violates Spanish international public order.

However, the nature of this action is a focus of debate between academics. On the one hand, one of the lawyers of the law firm defending Meliá[160] does not agree with the counterparty. He considers that a significant distinction must be made between the denomination given by the plaintiff and the real nature of the action. Indeed, he considers the dispute to be related to a right of immovable property, thus considering Spanish courts incompetent.

Not only is it enough to be related to an immovable property, but the action must not be a personal one, in order for a court to declare itself exclusively competent. This reasoning is the one followed in the CJEU case law of November 11, 2020[161]. The case deals with a claim of a homeowner in horizontal regime because the tourist use of the property had not been declared, and that the defendant did not have the approval of the other owners to perform this change of use. It involved the dilemma between choosing either rights in rem or contractual rights. The lawsuit was filed in Austria as the plaintiff considered that it was a matter of exclusive jurisdiction in rem. Thus, for the purposes of the exclusive jurisdiction, the court ruled that it included:

> […] actions brought to determine the existence, extent, consistency, ownership, or possession of immovable property, as well as actions aimed at securing the holders of such rights […]

As a result, the court deemed it was an immovable property dispute linked to the title to the property[162].

This *right in rem* differs from a personal one since it levies a tangible asset and has effects towards everyone. In this case, although the property is not located in Spain, it is being operated by a Spanish company, which could establish the legal connection.

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[159] HERNÁNDEZ, A. "Tribunales españoles y Derecho Internacional Privado el asunto central Santa Lucía contra Meliá Hoteles. Historia de un desencuentro palmario". *Cuadernos de Derecho Transnacional*, n. *13*(1), 2021, p.360-361. Retrieved from: https://dialnet.unirioja.es/servlet/articulo?codigo=7803611 Last visit January 9, 2022

[160] J&A Garrigues, S.L.P.

[161] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-433/19. (11/11/2020). Ellmes Property Services Limited v SP, C-433/19. *Curia*. Retrieved from: https://curia.europa.eu/juris/liste.jsf?language=en&num=c-433/19&td=ALL Last visit January 9, 2022.

[162] DOLORES, C. "Nota acerca de la sentencia del TJUE, de 11 de noviembre de 2020, asunto C433/19, Ellmes Property Services Limited y SP". *Bitácora Millennium DIPr*, n.13, 2021. Retrieved from: http://www.millenniumdipr.com/ba-94-nota-acerca-de-la-sentencia-del-tjue-de-11-de-noviembre-de-2020-asunto-c-433-19-ellmes-property-services-limited-y-sp Last visit January 9, 2022.

Considering this exclusive jurisdiction, the competent courts would be the Cuban courts. Therefore, the applicable law would also be Cuban law, thereby falling outside European jurisdiction. Both the First Instance Court of Majorca number 24 (hereinafter, "First Instance Court") that judges the Meliá case, as well as the Public Prosecutor's Office share this view. The rationale behind is that in order for the plaintiff to receive the profits of the property, it needs to be first considered the owner and legitimate possessor of the expropriated property.

4.1.2 Unfair enrichment: application of articles 4 and 7.2 of Brussels I-Bis.

This second scenario opens the door to a range of possibilities. Assuming that there is no explicit or implicit submission in the case of non-contractual tort and excluding the scenario of real property, two alternative forums may be chosen: the defendant's domicile or the place where the harmful event occurred.

On the one hand, article 4.1 regulates the defendant's domicile, commonly known as a weak forum given its subordinate position. This article states the following[163]:

> "Article 4.1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

Following this article, the competent courts are those of the defendant's domicile, regardless the place of birth, which would lead to as many competent judges as the defendants' place of residence. This forum acts as a general rule, unless it is displaced by special, exclusive forums or submission clauses, as well as the *forum non conveniens*[164] exception. It acts independently of the judicial proceeding in question and has great relevance in Private International Law litigation, given its high predictability. This foreseeability acts in different ways: as a guarantee for the defendant, who may litigate at home; and for the plaintiff, who is facilitated the enforcement of a favorable judgment by the defendant's assets, which are likely to be located at his place of residence.

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[163] Brussels I-Bis, p.7.

[164] The theory of *forum non conveniens* first appeared in Scots law and has undergone a steady and significant development in English law. Currently, its application follows the requirements set out in 1986 by the House of Lords in Spiliada Maritime Corporation v. Cansulex Ltd. The House of Lords established the principle that "a stay of proceedings under the forum non conveniens test will only be granted if the court is satisfied that there is another court, equally competent, which is the proper forum for the dispute, i.e., before which the dispute can be properly tried having regard to the interests of all parties and the ends of justice". Thus, contrary to what might be implied by the expression forum non conveniens, it is not, as regards the judge before whom the action is brought, a question of mere practical or personal "convenience", linked in particular to the burden of the court, but a question relating to the objectively appropriate nature of the forum for the dispute in question. EUROPEAN COURT REPORTS, *Eurlex*. Retrieved from https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A62002CC0281. Last visit January 9, 2022.

Brussels I-Bis establishes three autonomous criteria to determine the domicile of a company. Specifically, article 63 states:

> "Article 63. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business."

It is hereby proven, as listed on the official website of Meliá, that the defendant is located at Gremio Toneleros Street 24, 07009 Palma de Majorca and registered in the Mercantile Registry of Palma de Majorca, Book: 112, Volume: 1335, Page: PM-22603[165]. Therefore, the competent courts would be the Spanish ones.

In this case, given that Europe, and specifically Spain, is one of the most affected countries by the claims, the European rules would be applied to settle this conflict. It would avoid large litigation and relocation costs. Moreover, it would bring the dispute closer to our jurisdiction, benefiting the defendants. Furthermore, this alternative is also attractive to plaintiffs as well since it is more likely to result in a successful seizure of the defendant's assets. In addition, due to the blocking statutes discussed above, initiating a European proceeding would allow its evidentiary material to be used in a U.S. lawsuit once the European proceeding is lost. In fact, Central Santa Lucía is accused of employing this strategic action, to be analyzed later.

On the other hand, article 7.2[166] grants jurisdiction to the courts of the place where the damage occurs. The question is a delicate one, since it entails a certain subjectivity. Moreover, in cases of such complexity as this, the damage is not always located in a single place, known as the *theory of mosaic* and *plurilocated damage*, to be discussed hereafter. Based on the interpretation of the previous Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, "Brussels I") and settled case law[167], two requirements must be met. Firstly, it shall not be a contractual matter; and, secondly, the action shall

[165] Retrieved from Meliá website: https://www.Meliáhotelsinternational.com/es/aviso-legal Last visit January 9, 2022.

[166] Article 7 regulates this special forum and states a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

[167] Among others: COURT OF JUSTICE OF THE EUROPEAN UNION. Case 189/87. (27/09/1988). Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others. *Eurlex*. Retrieved from: EUR-Lex - 61987CJ0189 - EN - EUR-Lex (europa.eu) Last visit January 9, 2022; COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-375/13. (28/01/2015). Harald Kolassa v Barclays Bank plc. *Eurlex*. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0375 Last visit January 9, 2022.

be aimed at seeking liability from the defendant. In any case, the court does not require that it be based on a tort or quasi tort, but only that it be of a non-contractual nature.

It is reasonable to consider the place of the damage to be European. Not only do these companies operate internationally, but also the global impact triggered by this dispute, affected their reputation severely. Nonetheless, in order to avoid such subjective considerations that widen the scope of the case, the CJEU in several court rulings[168] has held that the place of damage

> […] cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere […][169]

The court gives prevalence to the general rule of the defendant's domicile, so the appreciation of other forums must be based on reasons of proximity. Following this interpretation, it is evident that the place of the damage would be limited to the Cuban courts, where the damage originally occurs. Moreover, the court emphasizes the *ratione loci* indicating that the place where the harmful event occurs cannot be understood as the place in which the effects are projected. What is more, the court recalls the main objective of the European Regulation: provide for a clear and certain attribution of jurisdiction[170].

Another key court ruling of the CJEU, the one of June 10, 2004[171], that solves the question of *lex loci damni,* particularly in those cases of financial damage, traditionally interpreted extensively. Consequently, the court considered that special forums must be construed restrictively. As a result, the court sets a precedent and stipulates that 7.2 does not include the place of the claimant's domicile only on the grounds that the plaintiff suffered the economic loss in that place, for those cases where the harm occurred in another member state. In this way, it avoids multiple courts having jurisdiction, the

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[168] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-364/93. (10/06/2004). Antonio Marinari v Lloyds Bank Plc And Zubaidi Trading Company. *Eurlex.* Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0364. Last visit January 9, 2022.; COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-168/02. Rudolf Kronhofer v Marianne Maier and others. *Eurlex.* Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0168 Last visit January 9, 2022.; COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-12/15. (16/06/2016). Universal Music International Holding BV v Michael Tétreault Schilling and Others. *Curia.* Retrieved from: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-12/15 Last visit January 9, 2022.

[169] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-364/93. (10/06/2004). Antonio Marinari v Lloyds Bank Plc And Zubaidi Trading Company. *Curia.* Retrieved from: https://curia.europa.eu/common/recdoc/convention/gemdoc96/pdf/04-z-en-96.pdf Last visit January 9, 2022.

[170] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-364/93…,*op.cit.*, p. 2741.

[171] COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-168/02. (10/06/2004). *Eurlex.* Retrieved from: EUR-Lex - 52008XC0703(02) - EN - EUR-Lex (europa.eu) Last visit January 9, 2022.

ultimate aim of the regulation, and thereby avoid jurisdictional issues and unnecessary litigation costs.

The same rationale is portrayed in recital 15 of Brussels I-Bis:

> […] the rules of jurisdiction should be *highly predictable* and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in *a few well-defined situations* in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor […]

In the same line, recital 21 states:

> […] in the interests of the harmonious administration of justice it is necessary to m*inimize the possibility of* concurrent *proceedings* and to ensure that irreconcilable judgments will not be given in different Member States […]

The U.S. courts do not seem to agree either. The rule of *standing* must be met in order to attribute them jurisdiction. This common law principle entails that the plaintiff must prove an *injury in fact*[172]. Particularly, it refers to an attack to a concrete, current, imminent and particularized interest[173]. However, it is unlikely to meet this requisite when the claims are based on unjust enrichment of third parties.

Three recent cases in which the district courts delivered divergent solutions. First, in *Glen v. American Airlines*[174], the court dismissed the claim on the grounds that the company had merely done business with the property, rejecting the idea that mere violation of Helms-Burton was sufficient. However, in *Cueto v. Pernod Ricard*[175], the court held that *standing* simply existed because Pernod had "trafficked" with the seized property, without assessing the extent of the damage the company had caused. Third, in *García Bengochea v. Norwegian Cruise Line Holds Ltd*.[176], the court found that the

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[172] Article III of U.S. Constitution requires that the plaintiff must personally have: 1) suffered some actual or threatened injury; 2) that injury can fairly be traced to the challenged action of the defendant; and 3) that the injury is likely to be redressed by a favorable decision. *LawCornell.*

[173] HEREDIA, I. "La puerta trasera de la Ley Helms-Burton…*op.cit.*, p.190.

[174] THE U.S. THE JUDICIARY. FLORIDA SOUTHERN DISTRICT COURT. (13/05/2020). Case 1:19-cv-23994. Glen was the owner of two beachfront properties in Cuba that were confiscated after the Cuban revolution. However, instead of suing those resorts, he rather sued US companies that facilitated booking of rooms and other services. *Pacer monitor*. Retrieved from: https://www.pacermonitor.com/public/case/31789876/Cueto_v_PERNOD_RICARD Last visit January 9, 2022.

[175] THE U.S. THE JUDICIARY. FLORIDA SOUTHERN DISTRICT COURT. (14/01/2020). Case 1:20-cv-20157. Cueto, the owner of a cognac company, sued the French liquor Pernod Richard on the grounds of collaborating with the Cuban regime to distribute the Havana Club brand and using Conac Cueto's assets in its distribution network. *Unicourt*. Retrieved from: https://unicourt.com/case/pc-db5-glen-v-american-airlines-inc-484429 Last visit January 9, 2022.

[176] THE U.S. THE JUDICIARY. FLORIDA SOUTHERN DISTRICT COURT. (27/08/2019). Case 1:19-cv-23593. Havana Docks sued Norwegian Cruise Line on the grounds of allowing cruise ships to tie up in a confiscated dock. *Unicourt.* Retrieved from: https://unicourt.com/case/pc-db5-garcia-bengochea-v-norwegian-cruise-line-holdings-ltd-197227 Last visit January 9, 2022.

plaintiff had not sufficiently shown that Norwegian had acted "knowingly and intentionally"[177]. Thus, of the three cases, only the first imposes a high standard.

Accordingly, in the light of the above, it must be concluded that article 7.2 addresses only the Cuban courts. Thus, for the sake of procedural economy, the principles of the regulation and the CJEU's interpretation, an action based on article 7.2 cannot be founded on a broad notion of damage. Therefore, reputational or economic damage is not enough to grant jurisdiction to American or European courts. Nonetheless, given that this special forum is alternative to the domicile's forum, it will open the door to European courts.

This is the view shared by the Provincial Court in the Meliá case, which adopts the arguments raised by the plaintiff and classifies the action as non-contractual. Thus, it opens the door to the alternative application of articles 7.2 and 4, and therefore, allowing the Spanish courts to hear the case. This argumentation is criticized by the defendant, which considers that the court adheres to the plaintiff's classification, when it should examine the true nature of the case. As for the case of study, Central Santa Lucía emphasizes its opposition to the application of the alternative forum of article 7.2 in the challenge to the plea of lack of jurisdiction, since they opted exclusively for the general forum in their initial claim.

In the event that the Spanish courts had jurisdiction, Rome II could not be applicable, given the date on which the harmful event happened, well before the entry into force of the regulation. If the damaging event occurred more recently, article 4[178] would have regulated the general rule of the *lex loci damni* and article 10[179] would have regulated the specific case of unjust enrichment. In such a case, however, article 10.9 of the Civil Code shall apply alternatively: "non-contractual obligations shall be governed by the law of the place where the event from which they arise occurred", and continues: "in cases of unfair enrichment, the law by virtue of which the transfer of the patrimonial value in favor of the enriched party took place shall be applied". Therefore, following the

[177] BELLINGER, J., & MIRSKI, S. "*Conflicting Rulings in Cases Brought Under the Helms-Burton Act"*. Lawfare, 2020. *LawFare*. Retrieved from: https://www.lawfareblog.com/conflicting-rulings-cases-brought-under-helms-burton-act Last visit January 9, 2022.

[178] Article 4 of Rome II. General rule. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which *the damage occurs* irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

[179] Article 10 of Rome II.. Unjust enrichment. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a *relationship existing between the parties*, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

wording of this article, the law governing the transfer of patrimonial value is undoubtedly the Cuban law. That is to say, in the event the Spanish courts finally declare themselves competent, the law to be applied would be the Cuban law[180].

It is also worth noting the traditional *theory of the plurilocated damage* and the *mosaic theory*, especially relevant in cases where the damage has indirect and extensive effects. This theory implies that the plaintiff claims in every court where the damage has been suffered, until a "mosaic"[181] is formed. However, this is not only an advantage, but it also implies a jurisdictional journey that involves high costs.

Furthermore, plurilocalized or illicit damages at a distance may be considered, since the unlawful expropriation carried out in Cuba has detrimental effects in other states. In this regard, both the CJEU[182] and the Spanish Supreme Court[183] consider two alternative options: either to sue in the place of the causal event, Cuba, for all the damages; or to sue in every state where the damage has been materialized, but exclusively for the damage occurred in that state.

This theory entails certain complexity, which makes unlikely that a lawyer would decide to sue indiscriminately. One would expect the attorney to focus on those countries where he has suffered the greatest damage. In particular, it should be considered whether the damage could be understood as occurring not only in Cuba, but in all the places where the companies operate. Given the international nature of most of the affected companies, this consideration would complicate the case.

In the Meliá case, Spain may also be included because it is the place where the activities of the company are exercised, in addition to Cuba being the country where the damage originated. Nevertheless, pursuant to the court standard, not any damage can be considered to be within the scope of article 7.2. It would therefore depend on a judicial evaluation, although the plaintiff in this case opted to waive this alternative forum.

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[180] HERNÁNDEZ, A. "Tribunales españoles y Derecho Internacional Privado…*op.cit.*, p.354.

[181] CARRASCOSA. "La vista del mosaico: daños en múltiples países, Internet, competencia desleal y demandas inteligentes". *Accursio*, 2020. Retrieved from http://accursio.com/blog/?p=1015 Last visit January 9, 2022.

[182] In cases such as the Judgment of Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA. COURT OF JUSTICE OF THE EUROPEAN UNION. Case C-21/76. (30/11/1976). *Eurlex.* Retrieved from: https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A61976CJ0021 Last visit January 9, 2022.

[183] ESPAÑA. TRIBUNAL SUPREMO SALA DE LO CIVIL. (31/10/2007). Sentencia 1129/2007. ECLI:ES:TS:2007:6937. *Cendoj.* Retrieved from: https://www.poderjudicial.es/search/indexAN.jsp Last visit January 9, 2022.

Ultimately, regardless of whether the Spanish courts eventually find themselves competent or not, the Spanish conflict of laws rule undoubtedly directs the dispute to the application of Cuban law.

4.2 Doctrinal opinion.

In view of the legal complexity of the matter and the varying judicial interpretations, there is no single solution to this conflict, and not even major academics may reach an agreement.

On the one hand, following the position of the defendants, there is the thesis that understands that the exclusive forum of article 24 of Brussels I-Bis applies since the disputed property is located in Cuba. Thus, Spanish courts do not have jurisdiction to judge the matter. Moreover, as the defendant alleges, not only is the property not located in Spain, but the damage was also suffered in Cuba, not even being the plaintiff Spanish nor having any ties with Spain[184]. Thus, according to the defense, even if the alternative forum of the place of the damage was considered, it would still lead to Cuba.

On the other hand, the plaintiff and part of the doctrine believe this action to be extra contractual, allowing the application of article 7.2 alternatively to article 4, thus opening the jurisdiction to the Spanish courts. In order to avoid a possible transfer of jurisdiction to Cuba, the plaintiff avoids basing the claim on the alternative forum of the place of the damage, as Cuba is considered by some as such place. Therefore, the plaintiff restricts the claim to the general forum of the defendant's domicile, thus assuring the jurisdiction of the Spanish courts.

Some academics strongly oppose to grant jurisdiction to Cuban courts. Indeed, they understand that the reasoning of the First Instance Court is inaccurate. They consider the nature of the action to be a personal one:

> "The court incurs in a *serious error* in sustaining that the claims of the plaintiff are based on a real action referring to a real property located in Cuba. This assertion is *unsustainable;* since the reality is that we are not dealing with a real action but with an action of a personal nature".

These academics highlight two aspects: firstly, immunity from jurisdiction cannot be applied, since the claim is directed against a private company rather than against a sovereign state. Therefore, there is no room for *iure imperii* exceptions. Secondly, they deem the lawsuit to be of a personal nature, which precludes the appreciation of an

[184] HEREDIA, I. "La puerta trasera de la Ley Helms-Burton...*op.cit.*, p. 222.

exclusive forum[185]. This consideration is significant since the key to the problem is to treat the action as real or personal.

In fact, they go even further by rejecting the application of the mirror effect. According to them, the *anti-refusal of justice* theory should be applied, consisting in the idea that, if there is an exclusive jurisdiction of a third state but the courts of a member state may have jurisdiction by virtue of another forum (as in the Meliá case, the domicile of the defendant or special forums), they may and must hear the case. Consequently, not only do they consider that the Spanish courts have jurisdiction due to the personal nature of the action, but, even if it were a real action, applying the aforementioned theory, the Spanish courts would also have jurisdiction given that Meliá's domicile is in Spain. This argument protects the right of defense and avoids the so-called denial of justice.

Furthermore, those academics supporting the jurisdiction[186] of the Spanish courts fully agree with the interlocutory decision of the Provincial Court of Majorca in the case Central Santa Lucía v. Meliá. They distinguish between declining jurisdiction and declining international legal competence, supporting the court's conclusion that there is no immunity from jurisdiction since the Cuban state has not been sued. In this sense, they believe that articles 49 and 51 of the Spanish Immunity Act 16/2015 (hereinafter, "Spanish Immunity Law") require that it be expressly directed against Cuba[187]. Thus, since immunity from jurisdiction does not operate, it is not necessary to qualify the action of expropriation previously, as it is a claim for unjust enrichment.

It should be noted that although these academics firmly consider that the Spanish courts have jurisdiction, they do not necessarily believe that the claim should be successful. In any case, although both interpretations seem legitimate, the Spanish higher court must deliver a definitive ruling on the merits of the case.

4.3 Critical remarks.

The existence of opposing positions with an extensive underlying legal basis is well established by the leading academics of the sector. Following these positions,

[185] IRIARTE, J. L. "The Helms-Burton Act casts its shadow…*op.cit.*, p.6-7.
[186] Such as university professor José Luis Iriarte Ángel, lecturer at the Public University of Navarra.
[187] IRIARTE, J. L. "De nuevo sobre el problema de competencia judicial internacional de los tribunales españoles para resolver litigios derivados de las nacionalizaciones cubanas. Reflexiones sobre el auto de la Audiencia Provincial de Palma de Majorca (Sec. 3a) de 18 de marzo de 2020". *Bitácora Millennium DiPr*, n. *11*, 2020. p. 10. Retrieved from: http://www.millenniumdipr.com/ba-87-de-nuevo-sobre-el-problema-de-la-competencia-judicial-internacional-de-los-tribunales-espanoles-para-resolver-litigios-derivados-de-las-nacionalizaciones-cubanas Last visit January 9, 2022.

although they all provide reasoned arguments, it seems more equitable that the exclusive forum of article 24 be applicable. Although the defendant bases its claim on a personal action of unjust enrichment against a private entity, the basis of the action is the Cuban unlawful expropriation. The defendant companies have obtained the operating licenses complying with Cuban regulations and observing the law, which makes it extremely unfair to accuse them of cooperating in an unlawful action, when the real offender, the expropriating state, was not even summoned initially to appear in court.

The plaintiff's approach appears to be nothing more than a shortcut to obtain economic compensation that would otherwise be difficult to achieve. It is a clever and strategic action, somewhat contrived, which, in no way can it circumvent the application of an exclusive forum. Even if the personal nature of the action was admitted by the court, Meliá did definitely acted in good faith, therefore, the unfair enrichment action could not be considered. For this reason and following the decision of the First Instance Court in Majorca, the Spanish courts should declare themselves incompetent *ex officio,* at least to preliminarily examine the legality of the Cuban expropriation, which is the basis of the whole action.

The reason why the exclusive forum seems more reasonable lies also in subjective reasons. It would not be fair to hold private companies responsible for the action of a government, just as it would not be appropriate to justify the personal nature of an action by the claim in the lawsuit, but by the true nature of the claim, which is none other than real. At least, in a prejudicial approach. Once the Cuban exportation is resolved, it will be possible to judge the actions of private companies and the possible involvement of the parties. It is not reasonable to judge a company on the grounds that it knew about the illegality of an expropriation and unlawfully took advantage of it when the expropriation in question has not been considered to be illegal.

Some academics insist on considering that there is no need to evaluate the previous act of expropriation[188], thus, the exclusive forum is not applicable. According to the prevailing Spanish doctrine[189], the actions for enrichment act objectively, therefore it is not necessary the prior assessment of the unlawfulness of the confiscation. It is well

[188] The unjust enrichment is a legal construction that can be estimated regardless of the potential lawfulness or unlawfulness of the acts of the defendant, since proof of guilt is not required. IRIARTE, J. L. "The Helms-Burton Act casts its shadow…", *op.cit.*, p. 10.
[189] ESPAÑA. AUDIENCIA PROVINCIAL. (31/03/2008). Sentencia 222/2008 (RJ 1955/1126), cited by IRIARTE, J. L. "La ley Helms-Burton y la…", *op.cit.*, p.95.

known that the plaintiff did not receive compensation, but rather that the property was seized without compensation.

Nevertheless, even if this view was accepted, the plaintiff must prove that the defendant acted in bad faith. For instance, in order for Central Santa Lucía to claim economic benefits from Meliá, they need to prove that Meliá acted knowingly and intentionally, which means that the company conducted business while knowing that those properties belonged to third parties. Apparently, it would not be difficult to prove that Meliá was aware of the expropriations made by the Cuban government since millions of Cubans suffered them. However, it would definitely not be that simple to prove that the company had that knowledge about the properties it operates. On this aspect, there are more U.S. rulings, and likewise, each court holds a different interpretation.

On the other hand, Meliá may claim that they legally obtained a state authorization in compliance with the Cuban law. This reasoning may be enough to prove easily they acted in good faith. In fact, as unfair the expropriation was, the blame is not on Meliá for legally obtaining a license, but on the Cuban government for initiating the conflict. Private companies cannot bear the burden of poor governmental decisions. Cuba opted, under its state sovereignty, to expropriate thousands of Cubans, yet the international community did not exert enough pressure to prevent it. Other countries, such as the U.S., decided to adopt unilateral and legally questionable measures to restrain these actions.

Today, companies that continued or started to do business in Cuba are now accused of collaborating with the Castro regime for the sole reason of complying with the Cuban law in the exercise of their activities. It does not differ much from the actions of the international community, where most countries have not ceased their diplomatic and commercial relations with Cuba.

Not only that, but this case also illustrates how forums were expanded in order to judge the matter in a democratic country, Spain, rather than in the country where the dispute arose. International forums are designed to facilitate litigation and the enforcement of judgments, but in any case, could they be justified in obtaining an upholding judgment. This is not a trivial issue, as the companies affected face millionaire sanctions, and it also affects Spanish interests. Undoubtedly, Cuban courts may not consider the expropriation to be illegal, but perhaps the key to the problem is that this dispute should not be resolved in private litigation, but in a coordinated international response that both satisfies the interests of those who were unjustly expropriated and protects those companies doing business on the island in good faith at the same time. If

the case is tried in Spain or in another democratic country, it is more likely that a just and fair solution will be reached. However, it would be fairer to first judge the Cuban act and then seek responsibility for subsequent acts of third parties.

In any case, it seems reasonable to follow the jurisprudential solution of the CJEU, which indicates that if a litigation depends on an exclusive matter of another country, even if it is not a member state, the courts judging the matter should declare themselves incompetent *ex officio* and wait for a judgment to be delivered on that prior question. Thus, it does not mean that the Spanish courts will not be able to hear the dispute, but rather that a prior declaration of the lawfulness of the confiscation of the Cuban assets by the Cuban courts is required. Once this ruling is delivered, the Spanish courts may judge the question of unjust enrichment, but it does not seem appropriate to skip this previous step by referring to the doctrine of *anti-denial of justice,* for the simple reason that it undermines the competences of a sovereign state.

In short, it would be advisable to balance the situation by avoiding the denial of justice and obtaining a judgment based on the law, or alternatively, to adhere to the established rules and to at least, wait for the act giving rise to the dispute to be judged in the first place.

IV. OTHER RELATED ASPECTS

1. Immunity from Jurisdiction.

One of the most controversial elements of the law is that it facilitates lawsuits against individuals, rather than addressing the root of the problem by initiating bilateral negotiations between the U.S. and Cuba.

Under the traditional principle of *par in parem imperium non habet*, courts of one state cannot judge another state's actions. It encompasses both the right of the state not to be sued or put on trial before the jurisdictional organs of another state, known as immunity from jurisdiction; as well as the right not to be executed, known as immunity from execution[190]. Of particular interest is the immunity from jurisdiction, which would prevent Spanish courts from prosecuting the acts performed by the Cuban state.

However, it is true that the Spanish courts must determine whether the Cuban expropriations contemplated in Law 890 were in accordance with the law, and, if not, the

[190] Explanatory Memorandum to Organic Law 16/2015, of 27 October, on the privileges and immunities of foreign States, the International Organizations with headquarters or office in Spain and the in Spain and International Conferences and Meetings held in Spain.

claimants would have a right to compensation. Undoubtedly, this action entails prosecuting a sovereign act of another state. In this sense, the Spanish Supreme Court based on December 30, 2010[191] with respect to a trademark law case:

> […] no nos corresponde controlar la legitimidad de los actos ejecutados en Cuba como consecuencia de la aplicación de la Ley 890. Pero sí, dada la significación que en nuestro sistema de atribución patrimonial tienen la existencia y la licitud de la causa, valorarlas en la medida en que sea necesario para determinar la validez de la nueva titularidad causada por la expropiación de la marca número 99.789, y publicada por el registro de la propiedad industrial. A ese control indirecto tienen pleno derecho los demandantes, conforma a nuestro ordenamiento. […] [192]

Therefore, the question is whether the Spanish courts may enter to assess this question, when the claim imposed on Meliá does not even address this issue, but an extra contractual liability, although it is essential to the case. In this sense, the plaintiff addressed the issue as a private matter, thus avoiding the potential issue of immunity. However, article 6.2[193] of United Nations convention of 2004 on jurisdictional immunities of states and their property states[194]:

> […] A proceeding before a court of a State shall be considered to have been instituted against another State if that other State: (a) is named as a party to that proceeding; or (b*) is not named as a party to the proceeding but the proceeding in to affect the property, rights, interests, or activities of that other state* […]

Undoubtedly, even the Cuban state is not named in the claim because the plaintiff strategically avoids it. The present case does affect the property, rights, and interests of Cuba. Therefore, in eyes of this international convention, this case deals with state immunity. However, this convention is not in force in Spain, although it certainly helps the interpretation of the case.

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[191] Spanish Supreme Court, num. 747/2010 (10/12/2010). ECLI:ES:TS:2010:7666. *Aranzadi.* Retrieved from: https://insignis.aranzadidigital.es/maf/app/document?srguid=i0ad6adc60000017d76da9e5599efa7eb&marginal=RJ\2011\1791&docguid=Ib45c9b20408911e0a0fa010000000000&ds=ARZ_LEGIS_CS&infotype=arz_juris;&spos=2&epos=2&td=7&predefinedRelationshipsType=documentRetrieval&fromTemplate=&suggestScreen=&&selectedNodeName=&selec_mod=false&displayName= Last visit January 9, 2022.

[192] Unofficial translation: it is not up to us to control the legitimacy of the acts executed in Cuba as a consequence of the application of Law 890. However, given the significance that the existence and lawfulness of the cause have in our system of patrimonial attribution, we must evaluate them to the extent necessary to determine the validity of the new ownership caused by the expropriation of the trademark...the plaintiffs are fully entitled to this indirect control, according to the plaintiffs' right, in accordance with the law.

[193] GARCIMARTÍN, F. J. "¿Por qué una Ley de Inmunidades? Primeras reflexiones a propósito de la pertinencia y el contenido de la Ley Orgánica 16/2015, *op.cit*.

[194] THE UNITED NATIONS. United Nations Convention on jurisdictional immunities of states and their Property, 2004. *United Nations.* Retrieved from: https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf Last visit January 9, 2022.

Not any affection of the interests of the state can be considered covered by this article. In fact, economic or political effects are not sufficient, but they must be of a legal nature[195]. The case under consideration is a legitimate one, since it is necessary to deny the condition of owner to the state of Cuba in order to recognize it to the plaintiff, regardless of the whether Cuba is or is not included in the claim. Therefore, it is a legal action.

The Spanish law that regulates this matter is the aforementioned Spanish Immunity Law. Article 4 of this law is clear:

> "Artículo 4. Inmunidades del Estado extranjero. Todo Estado extranjero y sus bienes disfrutarán de inmunidad de jurisdicción y ejecución ante los órganos jurisdiccionales españoles, en los términos y condiciones previstos en la presente Ley Orgánica"[196].

This article grants immunity from both jurisdiction and execution generally, both to the foreign state and its property. Moreover, article 49 orders Spanish courts to appreciate *ex officio* the issues relating to immunity.

> "Artículo 49. Apreciación de oficio de la inmunidad por los órganos jurisdiccionales. Los órganos jurisdiccionales españoles apreciarán de oficio las cuestiones relativas a la inmunidad a las que se refiere la presente Ley Orgánica y se abstendrán de conocer de los asuntos que se les sometan cuando se haya formulado demanda, querella o se haya iniciado el proceso *de cualquier otra forma* o cuando se solicite una medida ejecutiva respecto de cualquiera de los entes, personas o bienes que gocen de inmunidad conforme a la presente Ley Orgánica[197].

Therefore, Spanish courts must refrain from hearing the matters submitted to them when either a lawsuit or complaint has been filed or proceedings have been initiated "in any other way". Furthermore, it also applies to those cases when an enforceable measure is requested with respect to any of the entities, persons or assets enjoying immunity. It is worth noting the remark "in any other way*"*, which would include the opening of the process by a lawsuit against a third party[198], as in the case of Santa Lucía v. Meliá.

As for confiscations, the doctrine establishes two requirements to recognize the effects of nationalizations in Spain: firstly, that they do not violate public order policies; and, secondly, that there is a reasonable connection between the expropriated parties and

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[195] HEREDIA, I. "La puerta trasera de la Ley Helms-Burton…*op.cit.*, p. 200-205.
[196] Unofficial translation: "Any foreign State and its property shall enjoy immunity from jurisdiction and enforcement before the Spanish courts, under the terms and conditions provided in this organic law".
[197] Unofficial translation: Article 49. Ex officio assessment of immunity by the courts. The Spanish courts shall assess ex officio the questions relating to immunity referred to in this Organic Law and shall refrain from hearing the cases submitted to them when a lawsuit or complaint has been filed or proceedings have been initiated in any other way or when an enforcement measure is requested with respect to any of the entities, persons or property enjoying immunity pursuant to this Organic Law.
[198] Ibid., p. 200.

the expropriating state. Regarding public order, any expropriation in Spain must comply with article 33.3 of the Spanish Constitution:

> "Artículo 33. 1. Se reconoce el derecho a la propiedad privada y a la herencia. 2. La función social de estos derechos delimitará su contenido, de acuerdo con las leyes. 3. Nadie podrá ser privado de sus bienes y derechos sino por *causa justificada de utilidad pública o interés social*, mediante la *correspondiente indemnización* y de conformidad con lo dispuesto por las leyes".[199]

The third provision is key to this matter: "no one may be deprived of his property and rights except for justified reasons of *public utility or social interest, by means of the corresponding compensation* and in accordance with the provisions of the laws". These features are the minimum requirements recognized in most legal systems since they are the basis for any confiscation. At the light of them, the confiscations performed by the Castro regime did not comply with these standards.

Furthermore, based on the *theory of attenuated application of international public order*, the case must be closely linked to Spain, something that has not been proven in the case of Meliá. Therefore, the courts should not enter into the assessment of the Cuban confiscation. This is how the Spanish Supreme Court understands it in the ruling of September 25, 1992[200], limiting the valuation of foreign state actions only to those affecting assets located in Spain. In the present case, since they are located in Cuba, the question is clear: Spanish courts should not judge the matter. Consequently, the position is as follows: the plaintiff is not claiming directly against Cuba, but rather she is claiming possessory rights that entitled her to sue against the possessor in bad faith for the economic benefits obtained. As a result, in order for the plaintiff to have the right to compensation, it is necessary that the Spanish courts deny effectiveness to the Cuban expropriation. In this situation, not even the courts that are judging the Meliá case seem to agree.

On the one hand, the First Instance Court understands that the evaluation of the acts of another state is not allowed under the principle of immunity from jurisdiction.

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[199] Unofficial translation: Article 33. 1. Private property rights and the right to inheritance are recognized. 2. The social function of these rights shall delimit their content, in accordance with the law. 3. No one may be deprived of his property and rights except for justified reasons of public utility or social interest, by means of the corresponding compensation and in accordance with the provisions of the laws.

[200] ESPAÑA. TRIBUNAL SUPREMO SALA DE LO CIVIL. (25/09/1992). Sentencia 812/1992. ECLI:ES:TS:1992:7198. *Cendoj*. Retrieved from: https://www.poderjudicial.es/search/AN/openDocument/9bea3357d2383bb2/20040424 Last visit January 9, 2022.

Therefore, the court considers that it is a case of *iure imperii* as it is a matter on which, although not directly, the immunity of jurisdiction is projected.

On the contrary, the Provincial Court assesses article 51 of the Spanish Immunity Act:

> "Artículo 51. Proceso *incoado* contra Estados u organizaciones internacionales o contra personas con inmunidad. A los efectos de la presente Ley Orgánica, se entenderá que se ha incoado un proceso ante los órganos jurisdiccionales españoles contra cualquiera de los entes o personas que, de conformidad con la presente Ley Orgánica, gozan de inmunidad, si alguno de ellos *es mencionado* como parte contra la que se dirige el mismo[201]".

This article only protects states that are just mentioned in a proceeding, even when the claim is not directed to them. Following this provision, the Provincial Court rules that it is not a case of immunity because it does not explicitly mention the foreign state, Cuba. In this sense, one of the defendant's attorneys considers this second approach mistaken, as the court interprets a single article without putting it into consideration with the purpose and content of the entire legal text. Moreover, he understands that if a systematic interpretation was conducted, the protections derived from this law would be understood to apply to all the subjects of article 2[202], that is to say, not only those sued, but also those being prosecuted[203].

Analyzing the law in its entirety, it becomes crystal clear that it cannot be understood that the immunity from jurisdiction is lost for not being an explicit party in a proceeding, especially when the proceeding clearly affects Cuban interests. Furthermore, the defendant's lawyer considers this approach contrived and strategic, since it raises a private lawsuit in order to obtain compensation quickly, although it is a case of great complexity. The implication is such that if the expropriation were to be considered illegal, or even if it were to be disregarded and the act were merely considered as unfair enrichment, it would trigger a call effect and jeopardize international interests, the status of numerous companies as well as the relations with the Cuban state.

Nonetheless, the plaintiff's arguments are reasonable as well. Thus, the plaintiff understands that there is no immunity from jurisdiction since they do not seek to prosecute foreign acts or to include the Cuban government in the process. They base their thesis on

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[201] Unofficial translation: For the purposes of this Organic Law, it shall be understood that proceedings have been brought before the Spanish courts against any of the entities or persons who, in accordance with this Organic Law, enjoy immunity, if any of them *is mentioned* as a party against whom the proceedings are directed.

[202] States, organizations or persons being *sued or prosecuted* by the courts of another State.

[203] HEREDIA, I. "La puerta trasera de la Ley Helms-Burton…*op.cit.*, p. 206-210.

the objective character of the action of unjust enrichment, which is based on objective factors, such as, fundamentally, the patrimonial advantage of one party with the corresponding impoverishment of the other. As long as this cause-consequence relationship is proven, a prior contract is not required.

In this sense, there are two theories about immunity, being a prerogative of each state to decide, in spite of the considerable international effort that was made in this regard. On the one hand, the *doctrine of absolute immunity* from jurisdiction, traditional in the 19th century, which prevents a state from having jurisdiction when the defendant is another state, regardless of the nature of the act. Therefore, the slightest link with a sovereign state was considered an act subject to immunity.

On the other hand, the *restricted thesis* only grants immunity to a foreign state in *iurii imperii* cases and not for *iure gestionis* cases. This second thesis does not prevent a state from being liable in all cases, especially in those situations where the state enters into commercial transactions as an equal party to its commercial partners. As such, both International Law[204] and Spanish courts[205] apply this second approach. Consequently, if Cuba acts privately though Gaviota to commercialize with Meliá, it will no longer be protected by the immunity of jurisdiction. This is the reasoning followed by Central Santa Lucía.

Nonetheless, the key question is whether the commercial acts between Gaviota and Meliá are being judged, or alternatively, the act of expropriation performed by the Cuban government. The difference is essential because immunity should be appreciated in the second case.

Moreover, the plaintiff also refutes those provisions of the Spanish Immunity Law and refers to others contained therein, such as article 9. This article also excludes immunity when operating as a private entity. Particularly, it indicates the following:

> "Artículo 9. Procesos relativos a transacciones mercantiles. 1. El Estado extranjero no podrá hacer valer la inmunidad ante los órganos

[204] Article 10. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of Private International Law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. UNITED NATIONS Convention on Jurisdictional Immunities of States and Their Property,*op.cit.*.

[205] Among others: STC 107/1992: The appellant for amparo understands that the privilege of State immunity in matters of employment contracts has been interpreted restrictively, as there is no legal basis for admitting immunity from execution of a judgment in matters of employment relations: violation of the fundamental right to obtain the effective protection of Judges and Courts. ESPAÑA. TRIBUNAL CONSTITUCIONAL. (01/07/1992). Sentencia 107/1992. ECLI:ES:TC:1992:107. *Tribunal Constitucional.* Retrieved from: https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/1994#complete_resolucion Last visit January 9, 2022.

> jurisdiccionales españoles en relación con procesos relativos a *transacciones mercantiles celebradas por dicho Estado con personas físicas o jurídicas que no tengan su nacionalidad*, salvo en los siguientes supuestos: a) Cuando se trate de una transacción mercantil entre Estados; o b) Cuando las partes hayan pactado expresamente otra cosa"[206].

This article denies invoking immunity before the Spanish courts relating to commercial transactions when they are between a protected state and a natural or legal persons who are not nationals of that state. However, immunity may be invoked whenever it is a commercial transaction between states, or if the parties have expressly agreed otherwise. Nevertheless, these exceptions do not apply to the Meliá case since it is a matter dealing with a commercial transaction between a sovereign state, Cuba, and a private entity national of another state, Spain. article 9 continues:

> […] *No se considerará que un Estado extranjero es parte en una transacción mercantil cuando* quien *realiza la transacción sea una empresa estatal o una entidad creada por dicho Estado*, siempre que dicha empresa o entidad esté dotada de personalidad jurídica propia y de capacidad para: a) Demandar o ser demandada; y b) Adquirir por cualquier título la propiedad o posesión de bienes, incluidos los que este Estado le haya autorizado a explotar o administrar y disponer de ellos"[207] […]

Particularly important is paragraph 2 of the article. In the case of Meliá, the Cuban government intervenes through a company, Gaviota, which would eliminate the immunity protection.

Accordingly, Cuba should not be considered party to the commercial transaction between Gaviota and Meliá, thus, immunity of jurisdiction cannot be invoked. The plaintiff considers it misleading to rely on the Spanish Immunity Act. Specifically, they opposed to the application of article 4 over article 9. The latter article relativizes immunity, but it has nothing to do with Meliá's alleged unjust enrichment, but rather appears to be a strategy to avoid the application of immunity. However, the underlying question of the valuation of the prior expropriation conducted by the Cuban government is protected by immunity, and the First Instance Court consider it key to clarify prior to judge the unfair enrichment.

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[206] Unofficial translation: "Article 9. Proceedings relating to commercial transactions. The foreign State may not assert immunity before Spanish courts in connection with proceedings relating to commercial transactions entered into by that State with natural or legal persons who are not nationals of that State, except in the following cases: a) When it is a commercial transaction between States; or b) When the parties have expressly agreed otherwise".

[207] Unofficial translation: "A foreign State shall not be considered a party to a commercial transaction when the party to the transaction is a State enterprise or an entity created by such State, provided that such enterprise or entity has its own legal personality and the capacity to: a) sue or be sued; and b) acquire by any title the ownership or possession of property, including that which such State has authorized it to exploit or administer and dispose of".

2. International Sanctions.

Secondary sanctions are those applied to non-U.S. persons[208], thus every person besides U.S. nationals, residents or those companies incorporated based on U.S. law. Precisely, secondary sanctions are those economic restrictions and legal penalties aimed at third countries in order to weaken their relations with the country targeted by the blockade. In this sense, they differ from primary sanctions since they are not directed at the target country, but at the rest of the countries that maintain relations with it. Naturally, such a regime cannot be imposed by any country, but only those of great international significance may act so dominantly towards others. It tends to be a subsidiary remedy, when the primary sanctions fail to work[209].

Undoubtedly, these sanctions illustrate the American frustration towards the Cuban regime. In fact, that is exactly what happened in this context, in which after many years of poor relations between the U.S. and Cuba, the Helms-Burton Act was the last resort to prevent democratic countries with relations with the U.S. from cooperating with Cuba. Ultimately, however, this regime puts pressure and force on allied countries, which is not viewed favorably by the international community.

Although the U.S. denies that this law constitutes an embargo since it does not have a military closure to trade, the UN General Assembly considers it to be so, since it entails multilateral effects. This blockade is an imperialist attempt that carries several negative effects for the U.S. It weakens the image and prestige of the U.S., which for many becomes a bully towards the international community. The U.S. prioritizes its hegemonic interests towards Cuba rather than maintaining solid relations with its European and international partners. Thus, these secondary sanctions are framed within a regime of triangular relations[210], those in which third parties are relevant to bilateral relations. Therefore, in addition to the tight U.S.-Cuba relations to achieve a regime change in Cuba, the Cuba-Europe and U.S.-EU relations are involved.

Not even the most radical anti-Castro positions, including that of former Spanish President Jose Maria Aznar[211] match American aspirations. In fact, it was signed the

[208] IRIARTE, J. L. "The Helms-Burton Act casts its shadow…*op.cit.*, p.2.
[209] LÓPEZ-LEVY, A. "Sanciones secundarias en el triángulo… *Op.cit.*, Estados Unidos-Unión Europea-Cuba. *Revista CIDOB d'Afers Internacionals*, n. 125, p.87-89.
[210] Ibid, p.88.
[211] President of the right-wing Popular Party, which was in office from 1996 to 2004 and advocated tougher policies against the Castro regime.

Political Dialogue and Cooperation Agreement in December 2016[212] between the European Union, its member States, and the Republic of Cuba. This agreement aims to cooperate against secondary sanctions. They have already held two conferences, in November 2018 and 2019[213]. At one of these meetings, Federica Mogherini[214], declared that Europe would not allow the U.S. to be the one to define its relations with Cuba. Europe is also considering reopening the case before the WTO, but the European position within this organization is no longer so significant, as the Trump administration has deliberately stopped appointing judges to this body to prevent it from functioning due to a lack of quorum[215].

As a result, the outcome of these policies was the contrary to what was expected: American motivations to stigmatize Cuba turned Cuba into a symbol of opposition to imperialist policies and led to counter-stigmatization of the United States.

Nevertheless, these pressures are not only directed from the U.S. towards Europe and other allies such as Canada or Mexico. As mentioned above, the American interest in the Cuban government is not accidental. Electoral interests exert heavy pressure on foreign policies, especially the lobbies of Florida, a state with great electoral weight[216]. In addition, Cuban migrations to the American country pose a problem of internal security, another instrument of pressure to the government decision-making.

Far from being a consensual and strategic decision, American policies towards Cuba are the result of decisions made under pressure. From the 128 American officials of the Office of Foreign Assets Control in 2002, after the attack on the twin towers[217], only

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[212] EUROPEAN UNION. COUNCIL. Council Decision (EU) 2016/2232 of 6 December 2016 on the signing, on behalf of the Union, and provisional application of the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, 2016. *Eurlex.*
Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D2232 Last visit January 9, 2022.

[213] LÓPEZ-LEVY, A. "Sanciones secundarias...", *op.cit,* p.101.

[214] Former High Representative of the Union for Foreign Affairs and Security Policy.

[215] The Appellate Body is a permanent body and is composed of seven members, who are responsible for reviewing the legal aspects of panel reports. In December 2019, the United States opposed the adoption of a draft decision by the WTO General Council aimed at preventing the imminent paralysis of the Appellate Body. Thus, the Appellate Body of the World Trade Organization (WTO) lacked the quorum necessary to function, with only one of the seven panelists remaining in office, due to the reluctance of the United States to renew the seats of the other six panelists as their terms expired.

[216] In fact, it is the most important state in presidential elections, given that it has the most electoral votes of any battleground state and the third most among all states. Moreover, it has supported the overall winner six campaigns in a row. JEWETT, A. "The Importance of Florida in Presidential Elections". *Florida and the 2016 Election of Donald J. Trump*, 2019, p.5-31.

[217] A series of four suicide terrorist attacks committed in the United States on the morning of Tuesday, September 11, 2001, by the militant Islamic terrorist group Al Qaeda, a group that has been active in the United States for more than a decade.

two were dedicated to control the major Islamist terrorists, while 21 coordinated activities with Cuba. This fact demonstrates the failure of a consensual policy. The Islamic threat was stronger than the Cuban challenge, but still, electoral expectations translated into increased spending to control the Cuban regime. In fact, in a desperate attempt to implement a change in the Cuban regime, the U.S. has infringed the main principles of International Law such as free trade, self-determination and multilateralism. Not only does this action erodes its trade relations with other partners, but also it also undermines America's image.

3. Evasion of the law in Private International Law.

Article 6.4 of the Spanish Civil Code states:

> "los actos realizados al amparo del texto de una norma que persigan un resultado prohibido por el ordenamiento jurídico, o contrario a él, se *considerarán ejecutados en fraude de ley y no impedirán la debida aplicación de la norma que se hubiere tratado de eludir"*[218].

This article refers to those acts that lead to a forbidden result by the application of legal text which infringes the legal system. They are deemed as fraud and disregarded, since the bypassed outcome shall be applied in any case.

Specifically, the civil code regulates the evasion of law in PIL in article 12.4:

> "Se considerará como fraude de ley la utilización de una norma de conflicto con el fin de eludir una ley imperativa española"[219].

This provision clarifies that any fraudulent application of a conflict rule will be deemed as evasion of law. In this sense, fraud would consist of illegally modifying the connection point in order to achieve the application of a more favorable forum than the one foreseen. However, the legislative technique is not very accurate, because it only alludes to the fraud of a Spanish law, when it should have referred to the fraud of any international regulation.

Meliá case study alleges that the plaintiff has committed fraud by attempting to apply the Helms-Burton Act, as well as by trying to grant jurisdiction to the Spanish courts, bypassing the exclusive forum of immovable property. More precisely, Meliá considers that the plaintiff is perfectly aware of the total lack of possibilities of success of its claim in Spain and intends to orchestrate the procedure initiated before this

[218] Unofficial translation: "acts performed under the cover of the text of a rule that pursue a result prohibited by or contrary to the legal system shall be deemed to have been performed in fraud of the law and shall not prevent the due application of the rule that had been sought to be evaded".
[219] Unofficial translation: "The use of a conflict rule for the purpose of circumventing a mandatory Spanish law shall be deemed to be fraud of law".

honorable Court to put it at the service of a future American procedure, in order to obtain "through the back door" that collaboration, to use it in a future trial in the U.S.

The plaintiff denies such strategy, since, as explained above; the blocking statute prevents the recognition of foreign judgments using this law. Therefore, if a subsequent favorable judgment were obtained in the U.S., it would not be recognized in Spain or in the EU. As mentioned earlier, the fraudulent application of exclusive forums constitutes fraud of law. Consequently, this concept fits with the defendant's allegations that the plaintiff is strategically modifying the points of connection and the nature of the action in order to grant the jurisdiction of the Spanish courts.

The Spanish courts have not yet addressed this question in their rulings, but it is undoubtedly worth noting the fine line between fraud and good faith that this case presents. In addition to the aforementioned strategy to avoid the blocking mechanisms and bring the dispute to the U.S., the mere fact of orchestrating a claim based on unjust enrichment or a real right is so complex that it may lead to fraud issues. In fact, both the defendant and the plaintiff in Central Santa Lucía v. Meliá in their pleadings accuse the opposing party of manipulating the situation in order to get their way. Nevertheless, as previously explained, the blockade regulation does not prevent any action based on Cuban confiscations, but only those based on the Helms-Burton Act. Therefore, the European courts may issue resolutions as long as they are based on any legal norm, except those contained in the annex to blocking statute. However, in line with the defendant's argument, actions indirectly based[220] of the acts in the annex would not be admissible either.

V. CASE LAW: MELIÁ INTERNATIONAL HOTELS S.A.

1. Facts of the Case & parties.

There are multiple parties involved in this case. On the one hand, the plaintiff, Central Santa Lucía, S.A. (hereinafter "Central Santa Lucía"), represented by counsel Rafael Gimeno-Bayón. The latter is a North American successor company of Santa Lucía Company, S.A. and of the civil society Sánchez Hermanos, owners of the land "Ingenio

[220] IRIARTE, J. L. "Continúan las decisiones sobre el Asunto Central Santa Lucía L.C. contra Meliá Hotels Internacional S.A., Notas al Auto del Juzgado de Primera Instancia Nº 24 de Palma de Mallorca de 6 de julio de 2020". *Bitácora Millennium DIPr*, n. 35–47, 2020, p. 41-42. Retrieved from http://www.millenniumdipr.com/ba-90-continuan-las-decisiones-sobre-el-asunto-central-santa-lucia-lc-contra-melia-hotels-internacional-sa-notas-al-auto-del-juzgado-de-primera-instancia-no-24-de-palma-de-mallorca-de-6-de-julio-de-2020 Last visit January 9, 2022.

Santa Lucía", in the area of Playa Esmeralda (Holguín, Cuba), dedicated to the cultivation of sugar cane.

On the other hand, the defendant is Meliá, a company domiciled in Palma de Majorca (Spain), represented by counsel David Vich Comas. Meliá manages and operates these lands, which were confiscated by the Cuban government in the 60s, on which the company built several hotels[221]. Meliá has a state license granted by the Cuban government, or more specifically, by Gaviota, S.A. (hereinafter "Gaviota"), a 100% state-owned company.

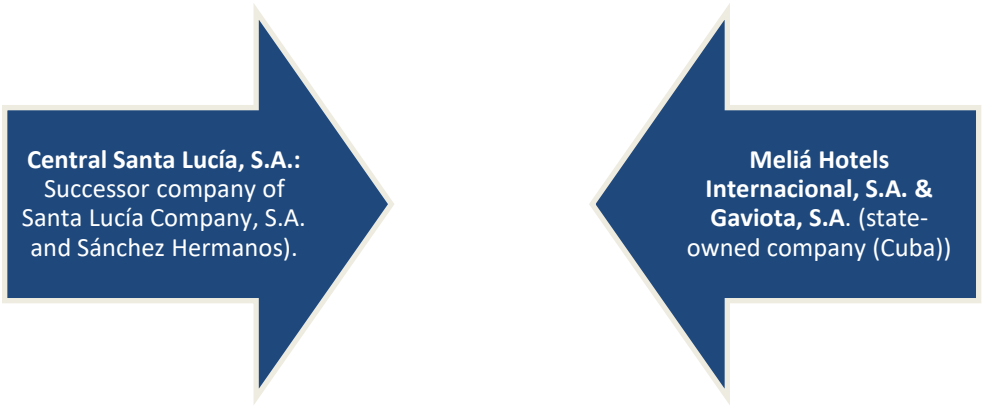

Figure 1. Parties of the case. Own creation.

Regarding the facts of the case, the Cuban revolutionary government enacted the 890 Law of October 15, 1960, with the purpose of abolishing private property. To this end, the government decided to nationalize all assets and enterprises belonging to private individuals or legal entities. Consequently, Central Santa Lucía was unlawfully expropriated from certain lands located in Holguín dedicated to sugar plantations, known as "Ingenio Santa Lucía", which became property of the Cuban government. In allegation number 16 of the claim, Central Santa Lucía claims that Meliá acted as a *perista*[222] or receiver to collaborate with the government of Cuba in the exploitation and use of confiscated lands, obtaining an enrichment with an illicit cause.

Years later, Cuba granted a state authorization to Meliá to exploit part of such land called "Playa Esmeralda", which currently belongs to the Cuban state-owned company "Gaviota". As part of this exploitation, several hotel resorts were built and operated by Meliá. They have reported great economic benefits. This is why Central Santa Lucía considers those revenues to be fruits derived from a possession exercised in bad faith[223]. These properties refer to *Sol Rio y Luna Mares* hotels as well as *Paradisus Río*

[221] *Sol Río*, *Luna Mares* and *Paradisus Río de Oro*.
[222] A person engaged in the purchase and sale of stolen goods.
[223] HEREDIA, I. "La puerta trasera de la Ley Helms-Burton…*op.cit.*, p. 186-200.

de Oro hotel. In this sense, Central Santa Lucía claimed to be the legal owner, since it is the successor of the alleged owners of the land, Santa Lucía Company, S.A., and Sánchez Hermanos.

Initially, Central Santa Lucía filed a settlement request before the First Instance Court. In such claim, they requested the liquidation of the possessory state of the land, pursuant to article 455 CC. They requested an amount equivalent to the economic benefits that the latter had obtained during the last five years from the operation of the hotels located in "Playa Esmeralda", quantified at ten million euros. Central Santa Lucía considered that the defendant knowingly and in bad faith was benefiting from an unlawful confiscation of assets, contrary to the rules of International Law. In any case, these amounts are often difficult to determine since Meliá has made substantial improvements and investments on these lands[224].

It is evident that the luxurious hotels that exist today in the sugar plantations have cost thousands of dollars. As the Spanish rule of unjust enrichment indicates, the possessor in bad faith will only be entitled to be reimbursed for the necessary expenses made for the conservation of the thing. However, the expenses made in luxury and recreational improvements will not be paid, but he will be able to take the objects in which these expenses have been invested, provided that the property does not suffer deterioration and the legitimate possessor does not prefer to keep them paying the value that they have at the moment of entering in the possession. Thus, if Central Santa Lucia's claim was upheld, the second and very weighty question would be to determine the nature of the investments made by Melia and the subsequent steps to be taken.

Nonetheless, Meliá considered this action to be a right *in rem* over real property, thus they failed a declinatory, understanding that the Cuban courts had exclusive jurisdiction. This reasoning was upheld by the First Instance Court through an order dated September 2, 2019. However, the plaintiff referred to “unjust enrichment”, thus being a non-contractual action. Consequently, the plaintiff appealed the dismissal of the plea of lack of jurisdiction to the Provincial Court of Palma de Majorca, which upheld the appeal by Order of March 18, 2020. Therefore, it was then again returned and dismissed by the Court of First Instance.

[224] IRIARTE, J. L. “La ley Helms-Burton y la respuesta europea…”, *op.cit.*, p.88.

It is worth noting that the claim is not based in the Helms-Burton Act, despite the defendant's accusations that this lawsuit is a cover to obtain evidence for a subsequent U.S. trial.[225]. As a result, the European blocking statute is not applicable to the case.

2. Procedural history.

The dispute arose on 3 June 2019, one month after the activation of the Helms-Burton Act, when Central Santa Lucía filed a lawsuit against Meliá before the courts of Palma de Majorca, where the defendant company is domiciled.

Based on the aforementioned arguments, Meliá filed a plea of lack of jurisdiction and Central Santa Lucía challenged such action. In September 2019, the First Instance Court issued an interlocutory decision dismissing the claim and confirming its lack of jurisdiction.

Central Santa Lucía appealed to the Provincial Court of Palma de Majorca, which overturned the lower instance court decision in March 2021. As a result, Meliá filed an incidental question and an exception before the Court of First Instance. One the one hand, regarding the incidental question filed on July 6, 2020, they argued that the plaintiff was orchestrating a claim based on U.S. law to circumvent the blocking statutes.

In addition to requesting that the court raise a preliminary question before the CJEU to resolve doubts of interpretation, it demanded the confidentiality of the proceedings. The defendant intended to maintain all the documents in private domain as well as obtaining from Central Santa Lucía a written injunction to prohibit it from using these records in a future lawsuit in the United States.

On the other hand, however, Meliá filed a plea of necessary joinder of defendants, known as *litisconsorcio pasivo necesario*, regulated in article 12 of the Spanish Procedural Law[226]:

> "Artículo 12. Litisconsorcio. 1. Podrán comparecer en juicio varias personas, como demandantes o como demandados, cuando las acciones que se ejerciten provengan de un mismo título o causa de pedir. 2. Cuando por razón de lo que sea objeto del juicio la tutela jurisdiccional solicitada *sólo pueda hacerse efectiva frente a varios sujetos conjuntamente*

[225] The defendant insists on considering that the plaintiff's strategy is to use the outcome of the Spanish judicial proceeding to open a new trail in the United States, where the plaintiff is domiciled, and avoid the application of the blocking statute.

[226] ESPAÑA. PARLAMENTO. Ley de Enjuiciamiento Civil. (Ley 1/2000, de 7 de enero). BOE-A-2000-323, 2020. Retrieved from: https://www.boe.es/buscar/doc.php?id=BOE-A-2000-323 Last visit January 9, 2022.

considerados, *todos ellos habrán de ser demandados*, como litisconsortes, salvo que la ley disponga expresamente otra cosa"[227].

The second provision is of great importance and constitutes the basis of the exception filed by Meliá. As the Cuban government is the one that performed the expropriation that led to the subsequent exploitation of the hotels in the first place, the defendant considers it necessary to call Cuba and Gaviota to court. Certainly, this is an intelligent movement, since requesting this participation, the case extremely difficult due to the immunity from jurisdiction that Cuba enjoys.

However, in an order dated July 6, 2020[228], the First Instance Magistrate dismissed everything but the extension of claim. Thus, in January 2021, Central Santa Lucía had to extend its claim to the Cuban state and its state-owned company. In May 2021, the First Instance Court upheld its decision and confirmed its lack of jurisdiction. As a result, the claim was dismissed.

Once again, Central Santa Lucía appealed to the Provincial Court. This ruling is expected to be heard. However, given that this court previously affirmed its jurisdiction and returned the dispute to the Court of First Instance, then it would not be unusual for them to overrule the previous ruling and issue a decision on the merits of the case.

Once the decision is delivered, the last resort to appeal would be to the Supreme Court, which cannot be reached in all cases, but must comply with the requirements of article 477 of the Spanish Civil Procedural Law.

In any case, the judgment of the Provincial Court is still pending, which may change the ruling of the lower court, just as it did when it ruled on the jurisdiction of the Spanish courts. The aforementioned procedural history may be represented in the following figure:

[227] Unofficial translation: "Article 12. Plea of necessary joinder of defendants. 1. Several persons may appear at trial, as plaintiffs or as defendants, when the actions to be brought arise from the same cause of action or cause of action. 2. When, by reason of the subject matter of the suit, the jurisdictional protection sought shall only be effective against several persons jointly considered, all of them shall be defendants, as litisconsortes, unless the law expressly provides otherwise".

[228] ESPAÑA. PALMA DE MALLORCA (BALEARES). JUZGADO DE PRIMERA INSTANCIA, NÚMERO 24. (06/07/2020). Auto en el procedimiento ordinario 542/2019. ECLI:ES:JPI:2020:17A. *Cendoj*. Retrieved from: https://www.poderjudicial.es/search/AN/openDocument/cb3ad9a7923463a8/20200723 Last visit January 9, 2022.

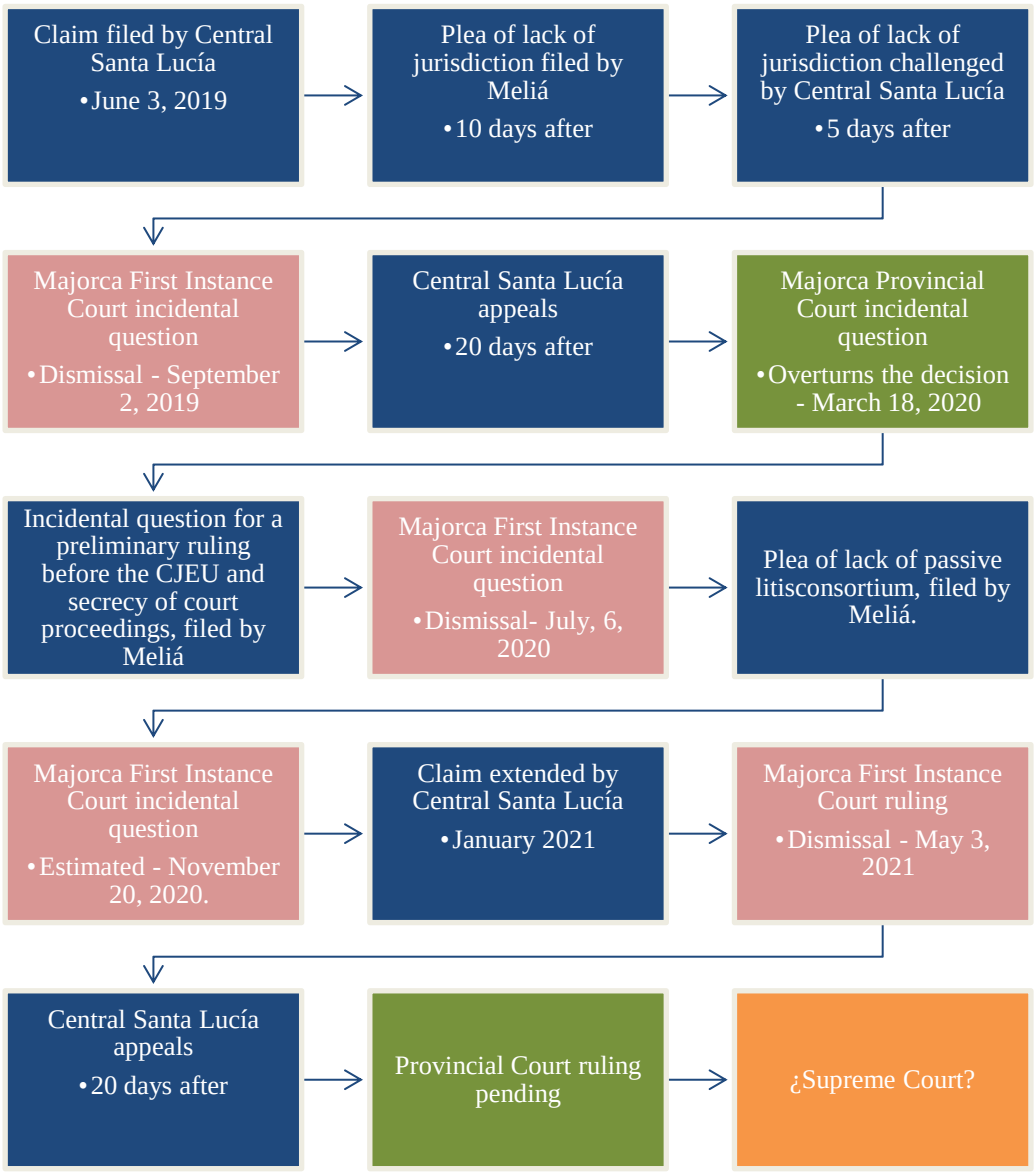

Figure 2. Procedural history of Central Santa Lucía v. Meliá. Own creation.

3. Legal issue.

Whether the action brought by Central Santa Lucía is a personal action or an action *in rem*. In the former case, jurisdiction could be granted to the Spanish courts, while in the latter case, an exclusive forum would apply that would grant jurisdiction only to the Cuban courts. Moreover, to decide whether it is necessary to wait for the Cuban courts to rule on the legality of the Cuban nationalization or if it is possible to judge the unjust enrichment without this preliminary ruling.

4. Holding & rationale.

Prior to the analysis of the court orders and judgments, it is worth mentioning the challenge to the by Central Santa Lucía against the plea of lack of jurisdiction filed by Meliá. In this sense, the appeal addresses every legal issue covered in this report.

First of all, they start by referring to the statement of claim, although rectifying that they do not describe an act of expropriation, but of confiscation. They mention articles 36.1[229] and 2 (1)[230] of the Spanish Procedural Law:

> "Artículo 36. Extensión y límites del orden jurisdiccional civil. Falta de competencia internacional. 1. La extensión y límites de la jurisdicción de los tribunales civiles españoles se determinará por lo dispuesto en la Ley Orgánica del Poder Judicial y en los tratados y convenios internacionales en los que España sea parte. 2. Los tribunales civiles españoles se *abstendrán de conocer* de los asuntos que se les sometan cuando concurra en ellos alguna de las circunstancias siguientes: 1.ª Cuando se haya formulado demanda o solicitada ejecución respecto de *sujetos o bienes que gocen de inmunidad de jurisdicción o de ejecución* de conformidad con la legislación española y las normas de Derecho Internacional Público".

This article orders Spanish courts to dismiss a claim when it is directed to those people or goods protected by immunity. Article 21[231] Organic Law of the Judiciary (hereinafter, Spanish Judicial Law)[232] is also named in the claim:

> "Artículo 21. 1. Los Tribunales civiles españoles conocerán de las pretensiones que se susciten en territorio español con arreglo a lo establecido en los tratados y convenios internacionales en los que España sea parte, en las normas de la Unión Europea y en las leyes españolas. 2. No obstante, no conocerán de las pretensiones formuladas respecto de sujetos o bienes que gocen de inmunidad de jurisdicción y de ejecución de conformidad con la legislación española y las normas de Derecho Internacional Público".

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[229] Unofficial translation: The extent and limits of the jurisdiction of the Spanish civil courts shall be determined by the provisions of the Organic Law of the Judiciary and the international treaties and conventions to which Spain is a party.

[230] Unofficial translation The Spanish civil courts will abstain from hearing the matters submitted to them when any of the following circumstances apply: 1.ª When a lawsuit has been filed or enforcement has been requested with respect to subjects or assets that enjoy immunity from jurisdiction or enforcement in accordance with Spanish law and the rules of Public International Law. 2.ª When, by virtue of an international treaty or convention to which Spain is a party, the matter is attributed exclusively to the jurisdiction of another State. 3.ª When the defendant summoned in due form does not appear, in cases in which the international jurisdiction of the Spanish courts could only be based on the tacit submission of the parties.

[231]Unofficial translation 1. The Spanish civil courts shall hear claims arising in Spanish territory in accordance with the provisions of international treaties and conventions to which Spain is a party, the rules of the European Union and Spanish law. 2. However, they shall not hear claims formulated with respect to subjects or assets that enjoy immunity from jurisdiction and execution in accordance with Spanish law and the rules of Public International Law.

[232] ESPAÑA. CONGRESO. Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. BOE-A-1985-12666, 1985. Retrieved from: https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666 Last visit January 9, 2022.

According to Central Santa Lucía, these articles do not apply because the claim does not involve the Cuban State, but only the payment of profits obtained by Meliá from conducting business using illegally confiscated territories belonging to them. Even if the lawsuit were directed against the apparent illegal possessor of the property, it still would not be a matter of *in rem* jurisdiction, since Meliá has a business relationship[233] with the company wholly owned by the Cuban government, Gaviota. Therefore, they consider that it would not be an act *iurii imperii* of a foreign government, but rather an act *iure gestionis*, not protected by immunity from jurisdiction.

Accordingly, in the second allegation the claimant justifies the jurisdiction of the Spanish courts based on the following arguments. Firstly, the violation of the territoriality principle is denied because the plaintiff does not include the Cuban state in its claim. Secondly, even if it was included, the Cuban government is acting as a private entity through Gaviota, excluding the application of public International Law. In this line, the plaintiff clarifies the concepts of acts *iurii imperii* and *iure gestionis,* including this case in the latter case, and therefore, deprived of immunity. Thus, not every state intervention can be protected, as states are increasingly involved in private activities. Therefore, it is clear that states may be sued on certain occasions. Consequently, there are two requisites to determine the private or public nature of a state act. Firstly, the purpose of the act, being *iurii imperii* if it has a public purpose. In this case, the business relationship between Meliá and Gaviota has not a public purpose, but the confiscation is supposed to have, since it was conducted for the benefit of the communist regime and the Cuban society. Furthermore, this second consideration involves an act executed by a sovereign state, therefore denying jurisdiction to Spanish courts. Secondly, the nature of the act, being *iurii imperii* if it can only be carried out by states. In the present case, the plaintiff considers it proven that it is an act *iurii imperii,* being key the participation of the Cuban state through a commercial company. However, the assessment of the prior confiscation is not mentioned in the claim since they consider it irrelevant, but it is certainly not insignificant.

As a result, the plaintiff refutes Meliá's allegations that the Spanish court should declare itself *ex officio* incompetent. This party emphasizes that they did not challenge the confiscation in their claim, but rather sought compensation for the consequences of

[233] ESPAÑA. PALMA DE MALLORCA (BALEARES). JUZGADO DE PRIMERA INSTANCIA, NÚMERO 24. (06/2019). Interposición de declinatoria por Meliá International, S.A. en el procedimiento número 542/2019, first allegation, paragraph 4, p. 1-3.

benefiting from it. Thus, they understand that the defendant "has imagined a claim different from the one actually filed" and "has distorted the claim"[234]. Nonetheless, the defendant's counterclaim is not imaginative, because Meliá considers itself innocent since they have followed the Cuban law when entering into a business relationship with Gaviota.

In this way, both parties offer sound reasoning, which generates discussion among leading scholars of International Law. Indeed, as discussed below, not even the courts seem to reach an agreement.

4.1 First Instance Court interlocutory decision.

The First Instance Court, and specifically, the magistrate Margalida Victoria Crespi Serra, begins her reasoning by assessing whether the Spanish courts have jurisdiction to resolve the controversy. Thus, the court cites article 36 of the LEC to emphasize the submission to domestic legislation of each state in order to set procedural standards.

The court then refers to articles 2 and 4 of the Spanish Judicial Law:

> "Artículo 2. 1. El ejercicio de la potestad jurisdiccional, juzgando y haciendo ejecutar lo juzgado, corresponde *exclusivamente* a los Juzgados y Tribunales determinados en las leyes y en los tratados internacionales. 2. Los Juzgados y Tribunales no ejercerán más funciones que las señaladas en el párrafo anterior, y las demás que expresamente les sean atribuidas por ley en garantía de cualquier derecho[235].
> Artículo 4. La jurisdicción se extiende a todas las personas, a todas las materias y a todo el territorio español, en la forma establecida en la Constitución y en las leyes"[236].

The court mentions those articles to limit their competence to the provisions contained in the law and treaties signed by Spain.

As for the immunity from jurisdiction, Spain follows the relative or restricted thesis. This thesis protects exclusively acts *iurii imperii* and not those deriving from private activities carried out by a state. It also rules out the application of exceptions contained in article 9 of the Spanish Immunity Law because the court deems that commercial transactions are not the object of the lawsuit.

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[234] Ibim, p. 6.
[235] Unofficial translation: "Article 2. 1. The exercise of jurisdiction, both delivering a ruling and executing it, belongs exclusively to the courts provided in the law and international treaties. 2. Those courts shall not exercise any other power other than the established in the laws and treaties".
[236] Unofficial translation: "Article 4. Jurisdiction extends to all people, matters and Spanish territory, according to the law".

The central point of the decision is to assess whether it is necessary to analyze the possible unlawfulness of the confiscation made by Cuba to the companies Santa Lucía Company and Sanchez Hermanos, predecessors of the current Central Santa Lucía. In this regard, the court understands that this evaluation is a prior and fundamental requirement, since the lawsuit does not assess the legal business currently being conducted on those lands, but the acquisition of the lands by Cuba itself. In other words, the current business between Meliá and Cuba is not questioned, but the property of the rented land.

The court understands that Meliá may only be considered to have obtained an unjust or bad faith enrichment if the confiscatory act was contrary to International Law. Particularly, the court rules:

> "Com que Melia ha estat autoritzada per l'Estat Cuba per explotar els citats terrenys perque és aquest Estat el propietari dels mateixos, l'acte a valorar en el cas concret haura de ser necessariament el que genera aquest dret de propietat, és a dir, la nacionalització, no els celebrats amb posterioritat"[237].

The claim of Central Santa Lucía has been directed against a private legal entity domiciled in Majorca that has previously obtained an authorization to exploit land owned by Gaviota S.A., a company owned by the State of Cuba. In this regard, the judge understands that the main basis of the claim is not the specific legal negotiations that Meliá and Gaviota may have entered into, nor their commercial relations. Thus, it dismisses the application of the article 9 exception and dismantles the plaintiff's allegations.

The actual basis of the claim that has given rise to the present pleading is the declaration of the illegality of the title of ownership that Cuba holds over the land at Playa Esmeralda. Meliá may incur in responsibility for profiting from such land only if they have knowledge of the manner in which it became the property of the state of Cuba. Even if the Cuban expropriation act were to be judged contrary to law, it would be necessary to prove that Meliá acted in bad faith in order for the claim for unjust enrichment to succeed.

Following these interpretations and by application of article 21 of the Organic Law of the Judiciary, both Cuba and the property owned by Cuba are protected by

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[237] Unofficial translation: "since Meliá has been authorized by the Cuban State to exploit the aforementioned land because it is the State that owns it, the act to be valued in the specific case must necessarily be the one that generates this right of ownership, that is to say, the nationalization, not those celebrated subsequently". ESPAÑA. PALMA DE MALLORCA (Baleares). JUZGADO DE PRIMERA INSTANCIA, NÚMERO 24. (06/07/2020). Auto en el procedimiento ordinario 542/2019. ECLI:ES:JPI:2020:17A, p. 4 . *Cendoj*.
Retrieved from: https://www.poderjudicial.es/search/AN/openDocument/cb3ad9a7923463a8/20200723. Last visit January 9, 2022.

immunity from jurisdiction. The viability of Central Santa Lucía's claims necessarily depends on granting it an ownership right over a real property owned by the state of Cuba. Consequently, the court merely holds that it is not necessary to enter into further legal considerations given the nature *iurii imperii* of the acts of nationalization of the land on which the claim is based. As a result, they dismissed the claim on the grounds that it is directed against assets owned by a State. Accordingly, the plea of lack of jurisdiction filed by Meliá was sustained.

Furthermore, the court addresses the nature of the action and concludes that the Spanish civil courts do not have international jurisdiction to resolve the claims of the plaintiff"[238], since it is based on an action *in rem* related to a real property located in Cuba. As a result, the Spanish courts do not have international jurisdiction for its resolution as referred in article 24 of Brussels I-Bis.

In the eyes of the court, the claim relies on two basic premises. Firstly, that Cuba obtained ownership of the land in the Playa Esmeralda area unlawfully through a confiscation process contrary to the rules of International Law. Secondly, that Meliá consciously took advantage of this situation to obtain Cuba's permission to operate two hotels located in *Playa Esperanza*, thereby unlawfully obtaining benefits in the form of economic gains. Nonetheless, the key aspect is that the plaintiff does not limit her lawsuit to judge this situation, but claims that Meliá, as the current owner of the land, returns the profits obtained during the last five years.

In order for the court to declare that the plaintiff is entitled to receive some payment from Meliá, it must be proved that Central Santa Lucía has some type of right or title that justifies this payment. In this regard, the simple fact that Meliá is allegedly exercising a possession in bad faith does not entitle any third party to claim compensation. The claimant must hold a lawful title to obtain a favorable judgement. The analysis of the confiscation is considered to have real nature and, therefore, beyond the court's international competence, since it concerns an exclusive forum of an immovable property located in Cuba.

The court considers that both doctrine and case law agree when deeming these types of actions as real actions. The judge cites case law of the Spanish Supreme Court, which set that the actions for unjust enrichment based on a bad faith possession must be

[238] Ibim, p. 5.

subsumed under article 455 CC. That is to say that their nature must be a liquidation of the state of possession.

In short, the court concludes with a decisive ruling:

1. The estimation of the claim entails the legal assessment of the acts executed by a subject protected by immunity from jurisdiction.
2. The lawsuit is not only exercising actions *in rem* of assets located in Cuba but also about a property owned by the State, which is also protected by from jurisdiction.

Therefore, by any of these assumptions, Spanish court cannot enjoy jurisdiction to hear the case since they entail evaluating an act performed by a sovereign state. As a result, the court understands that the Spanish courts do not hold international jurisdiction over it and condemns the latter to pay the costs of the proceedings.

Central Santa Lucía filed an appeal against this dismissal judgment within the following twenty days[239]. In its pleading, the plaintiff criticizes the application of article 21 of the Spanish Judicial Law and article 4 of the Spanish Immunity Law, since they consider that this interpretation grants a private legal entity, Meliá, immunity from jurisdiction. Not only that, but it also contemplates the application of the exclusive forums, whereas the plaintiff claims that they did not sue for property, but for unjust enrichment via the development of a commercial activity.

In fact, the appeal adds a fact that is not stated in the initial complaint:

> "Meliá incluso ofreció compensación, que, además de ser insultante por su escasa cuantía, supone una innegable aceptación de su ilícita explotación, y, el derecho de mi demandante a ser compensada"[240].

The plaintiff insists that Spanish courts may judge actions performed by a foreign state since the protection shall not be absolute. It quotes again article 2 of the Spanish Immunity Act to argue that the Cuban state is not being prosecuted or sued in this case, not even its state-owned company, Gaviota. The plaintiff only sues a Spanish company domiciled in Spain with respect to its relations with a company domiciled in the U.S, thus not including Cuba in the dispute. They consider that the judge is granting immunity from jurisdiction to a Spanish commercial company, thus confusing the exploitation of a

[239] Legal deadline provided for in Article 458 of the Spanish Civil Procedure Law.

[240] Unofficial translation: "Meliá even offered a compensation that, apart from its insulting amount, contains an undeniable act of acceptance of the unlawful exploitation and the right of my plaintiffs to be compensated". ESPAÑA. PALMA DE MALLORCA (BALEARES). AUDIENCIA PROVINCIAL. (18/03/2020). Recurso de apelación número 709/2019, de Central Santa Lucía S.A. en procedimiento ordinario 542/2019. ECLI:ES:APIB:2020:37A, p.4. *FernandezRozas.* Retrieved from: https://fernandezrozas.com/wp-content/uploads/2020/05/DIPr-CJI-AAP-Palma-de-Mallorca-3%C2%AA-18-marzo-2020.pdf Last visit January 9, 2022.

private individual with the valuation of reprehensible[241] acts performed by a state, which are not the object of the lawsuit.

Furthermore, the plaintiff adds that Spanish judges must hear the case in order to comply with article 24[242] of the Spanish Constitution on effective judicial protection. In this regard, the plaintiff mentions case law of the Spanish Constitutional Court[243]: that sets that privileges must always be given a restrictive interpretation. Moreover, they refer to the order of the Spanish Supreme Court of May 2019[244] that establishes that immunity is a privilege of undeniable and legitimate constitutionality, but a privilege. Therefore, it must be subject to restrictive interpretation. Following these two rulings, Central Santa Lucía alleges helplessness. The avoidance of the denial of justice may be the key aspect to bring the dispute to Spain.

Finally, the plaintiff understands that the defendant confuses immunity from jurisdiction with immunity from execution. They insist again that it is not their intention to sue or execute assets of the Cuban State but to sue a Spanish commercial company. Regarding the applicable forum, the plaintiff reiterates the possibility of applying the special alternative forum of article 7.2 of Brussels I-Bis, but their option to exclude its application. They chose uniquely the general forum of article 4 relative to the defendant's domicile, as set in the statement of claim. As a result, they appeal to the higher court, the Provincial Court for the dismissal of the plea of declinatory jurisdiction as well as the imposition of the litigation costs on the defendant, considering that Spanish courts do have jurisdiction.

4.2 Provincial Court interlocutory decision.

On March 18, 2020, the speaker of Section 3 of the Provincial Court of Palma de Majorca, María Encarnación Gonzalez, evaluates the appeal number 709/2019[245].The

[241] Unofficial translation: "reprehensive". Ibim, p. 12.
[242] Unofficial translation: "all persons have the right to obtain the effective protection of the judges and courts in the exercise of their rights and legitimate interests, without, in any case, without any defenselessness".
[243] ESPAÑA. TRIBUNAL CONSTITUCIONAL. (11/06/1987). Sentencia 99/1987. ECLI:ES:TC:1987:99. *Tribunal Constitucional*. Retrieved from: https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/831 Last visit January 9, 2022.
[244] ESPAÑA. TRIBUNAL SUPREMO. (14/05/2019). Auto 20907/2017. ES:TS:2019:5051A. *Cendoj*. Retrieved from: https://www.poderjudicial.es/search/contenidos.action?action=accessToPDF&databasematch=AN&reference=6c69b0aa46a82d8e&publicinterface=true&optimize=20190520&encode=true Last visit January 9, 2022.
[245]ESPAÑA. PALMA DE MALLORCA. AUDIENCIA PROVINCIAL.(18/03/2020). Auto número 66/2020, *op.cit.*

court proceeds to determine the plaintiff's claim, based on the description contained in the appealed decision. It should be noted:

Regarding the infringement of article 24 of the Spanish Constitution, the court cites Constitutional Court Ruling 45/2002[246] to specify the extent of the constitutional right that the party considers infringed. This way, she clarifies the court's duties and grants the plaintiff its right to obtain from the judges a reasoned and well-founded decision in law on the merits of the claim. The courts are prevented from setting arbitrary obstacles that prevent access to the process, since this would imply the violation of the constitutional right of judicial protection.

The latter being set, the court analyzes article 21.2 of the Spanish Judicial Law, which excludes Spanish courts from hearing claims on subjects with immunity of jurisdiction. The ruling of the Court of First Instance appreciates immunity of jurisdiction with respect to the state of Cuba and its assets due to the need of assessing an action of a sovereign state. In the view of the higher court, the First Instance Court did not mix the two types[247] of immunity legally recognized in any case, as the plaintiff claimed. However, the court does disagree with the Court of First Instance; considering it possible for the Spanish courts to enjoy jurisdiction. They overturned the ruling since they do not consider it necessary to evaluate the previous act of expropriation that generated the claim. Since no lawsuit or claim was directed to a foreign state or its assets, Spanish courts must hear the case.

The court bases its claim on the judgment of the Spanish Supreme Court number 747/2010[248], which quotes:

> "No nos corresponde controlar la legitimidad de los actos ejecutados en Cuba como consecuencia de la aplicación de la Ley 890. Pero sí, dada la significación que en nuestro sistema de atribución patrimonial tienen la existencia y la licitud de la causa, valorarlas en la medida en que sea necesario para determinar la validez de la nueva titularidad causada por la expropiación de la marca número 99.789, y publicada por el registro de la propiedad industrial. A ese control indirecto tienen pleno derecho los demandantes, conforme a nuestro ordenamiento"[249].

[246] Ibim, p.2.
[247] Immunity of jurisdiction and execution.
[248] ESPAÑA. TRIBUNAL SUPREMO SALA DE LO CIVIL. (30/12/2010). Sentencia 747/2010. ECLI:ES:TS:2010:7666. *Aranzadi.* Retrieved from: https://insignis.aranzadidigital.es/maf/app/document?srguid=i0ad6adc60000017d76da9e5599efa7eb&marginal=RJ\2011\1791&docguid=Ib45c9b20408911e0a0fa010000000000&ds=ARZ_LEGIS_CS&infotype=arz_juris;&spos=2&epos=2&td=7&predefinedRelationshipsType=documentRetrieval&fromTemplate=&suggestScreen=&&selectedNodeName=&selec_mod=false&displayName= Last visit January 9, 2022.
[249] Unofficial translation: "It is not up to us to control the legitimacy of the acts executed in Cuba as a consequence of the application of Law 890. However, given the significance that the existence and

The reasoning of the court is somewhat contradictory. They assert their impossibility to judge the legitimacy of the acts performed by the Cuban state, but they deem appropriate to evaluate "to some extent" those acts given the magnitude of the patrimonial issue at the same time. Consequently, they understand that the Spanish courts may exercise an indirect control, since the plaintiff does not seek to be compensated by the Cuban State. But could immunity from jurisdiction be applied partially? How fair would it be to force Meliá to pay on the basis of a confiscation that cannot be prosecuted? One must not forget that defendants also enjoy the right of effective judicial protection, and that the innocent assumption must not be disregarded.

Secondly, the court addresses the potential application of article 24 of Brussels I-Bis by evaluating the qualification of the action filed. They understand that jurisdiction must always be governed by the principle of the defendant's domicile, except in certain specific cases in which the subject matter of the litigation or the autonomy of the parties justifies another connecting criterion. Thus, the European Court interprets restrictively those rules of jurisdiction or forums that deviate from the general jurisdiction.

More specifically, they agree with the CJEU interpretation of article 24.1 of Brussels I-Bis, which understands that this article does not encompass the totality of actions relating to real property rights. Therefore, it is not enough that the action affects a real property right, but it must be based on a real right rather than a personal right.

The First Instance Court understands that it is undoubtedly a real action, yet the Court of Appeals considers that the plaintiff's claim cannot be attributed a real character since it does not affect any of the rights that determine the application of the exclusive jurisdiction. Since it is based on a potential unjust enrichment, the nature of this action must be attributed to the Spanish bodies with jurisdiction to hear it. Consequently, the Spanish courts must have jurisdiction given that the plaintiff has opted for the jurisdiction corresponding to the defendant's domicile from among the possible jurisdictions. Thus, in just five pages of judgment, the Provincial Court overturns the decision of the lower court by reversing every consideration of the lower court and imposing costs on the defendant.

lawfulness of the cause have in our system of patrimonial attribution, it is up to us to evaluate them to the extent necessary to determine the validity of the new ownership caused by the expropriation of trademark number 99,789, and published by the industrial property registry. The plaintiffs are fully entitled to this indirect control, according to our legal system" ESPAÑA. PALMA DE MALLORCA. AUDIENCIA PROVINCIAL. (18/03/2020). Auto número 66/2020, procedimiento ordinario…*op.cit.*

After this favorable judgment, Meliá filed a plea of necessary joinder of defendants, which was admitted. Thus, the defendant claimed that the company Gaviota and the Cuban State should be called to the lawsuit, since they had interests at stake. Upon being admitted, Central Santa Lucía filed an extension of the claim on December 30, 2020, admitted on January 11, 2021. In this brief, the plaintiff emphasizes that they do not consider it necessary to sue the Cuban Republic, since Meliá is the only one interested in the unlawful enrichment. Neither Gaviota nor the Cuban State presented any brief within the legal 10-day period. However, the public prosecutor's office presented two briefs, in which they denied the jurisdiction and competence of the Spanish courts, thus contradicting the Provincial Court. At the same time, on April 9, 2021, the Ministry of Foreign Affairs issued a report in which it considered the nationalization to be an act *iurii imperii* that prevented the Spanish courts from hearing the case. All in all, most public authorities agreed with the First Instance Court, with the exception of the Provincial Court.

Academics supporting this view considered the court's arguments cumbersome and tortuous[250] since the court may have reached the same conclusions by simplified legal reasoning. Particularly, some consider that the *anti-denial of justice* theory would apply. This theory applies in cases dealing with third states, since it allows any EU member state to be competent if there is a forum contemplated in Brussels I-Bis, besides the one that attributes jurisdiction to that third state. Thus, although they agree with the court's reasoning based on the forum of the domicile of the defendant, the same legal solution may have been reached by alternative and simpler theories. Especially when, erroneously and unsolicited by the plaintiff, the court applies the alternative forum of 7.2[251]. This forum is intended to displace the defendant's forum, which is the one actually alleged by the plaintiff. However, the court seems to use this forum to emphasize its jurisdiction, because it considers Spain as the place of the harmful event. Thus, it unnecessarily presents this argument, which is at best questionable from a legal standpoint. In any case, academics share the same view about the general misunderstanding of national courts of the enforcement of International Law and the right relation between the forums which domestic courts tend to mix.

[250] IRIARTE, J. L. "De nuevo sobre el problema de competencia…*op.cit.*, p. 9.
[251] HERNÁNDEZ, A. "Tribunales españoles y Derecho Internacional…*op.cit.*, p. 350.

4.3 First Instance Court ruling.

After issuing an interlocutory decision in July 2020, denying both the preliminary ruling before the CJEU and the confidentiality of the judicial process, the First Instance Court evaluated this case again on May 3, 2021, but this time to deliver a ruling on the merits.

On the one hand, it should be noted that the request for a preliminary ruling before the CJEU was rejected because the plaintiff based its action on Spanish law, without including at any time, even indirectly, the Helms-Burton Act, consequently the blocking regulation was not applicable to the case[252]. Particularly, the court believes that the judgment to be rendered resolving the dispute between the parties will in no way apply or take into account any of the provisions of the Helms-Burton Act or any other law that is not Spanish or EU law.

This appreciation is extreme[253], since while it does not seem that American law is applicable, Cuban law may be applicable, especially at this procedural stage when decisions on the merits had not yet been issued. In any way, despite Meliá's attempts to report the hidden interests of the plaintiff to initiate a future lawsuit in the U.S., the case does not affect matters vetoed by the blocking statute.

On the other hand, the plea of necessary joinder of defendants serves two purposes: the avoidance of contradictory decisions as well as the prevention of prejudice to those who have not been heard and defeated at trial. The necessary joinder of defendants is not foreseen for cases in which the effects are indirect. However, it shall be considered in this case given the potential economic, diplomatic, and social implications of a favorable ruling. Therefore, it is surprising that any court appreciated it, especially the First Instance Court because it was the one that dismissed the case on the grounds of immunity of jurisdiction.

Although it seems necessary to assess the prior act of expropriation, it is questionable to assume that the Cuban state intervention is essential for the assessment of this prior act. This is why the appreciation of this second exception has been criticized by many academics, who do not understand how the First Instance Court requires that the

[252] In particular, the court states, although it is true that, according to the plaintiff, the parties in this case seem to have a current claim procedure based on the Helms-Burton Act in the United States, it is true that the present proceeding cannot be considered to be derived from this law or that it could have any kind of influence on it. Thus, this procedure will only and exclusively resolve a claim for unjust enrichment derived from a possessory status.

[253] IRIARTE, J. L. "Continúan las decisiones sobre el Asunto Central Santa Lucía…*op.cit.*, p. 47.

lawsuit be directed against subjects with immunity from jurisdiction when it was this court the one that specifically declined its jurisdiction for this particular reason. In other words, it does not make sense to call a protected state to trial when it was considered they could not be even tried.

This judgment summarizes the main events of the proceedings, as well as the major claims of the parties. Nevertheless, the court does not alter its initial assessment, and rules that the valuation as unlawful of the act of nationalization that caused the disputed lands to become the property of the Cuban State is a prior and essential requirement in the formulation of the claims of Central Santa Lucía. Consequently, Meliá may only be considered to have obtained an unlawful enrichment or to be conducting a possession in bad faith if the unlawfulness is legally assessed beforehand. Meliá has been authorized by the Cuban State to exploit the lands since it is the state who owns them. Therefore, the act to be assessed must necessarily be the one that generates this right of ownership, that is to say, the confiscation, not those celebrated subsequently. As a result, the court upholds its previous ruling and affirms the lack of jurisdiction of the Spanish civil courts.

In addition, the court explains the concept of unjust enrichment and its requirements: it must be based on an unjust gain associated with the existence of enrichment of one person and the correlative impoverishment of another. Moreover, it should be a lack of cause that justifies this patrimonial loss. According to this ruling, a basic condition for the action brought by Central Santa Lucía to be successful is the prior declaration of the illegality of the ownership title held by the Cuba over the land of Playa Esmeralda. Only the unlawfulness of this title could result in the consideration as unjust of the benefits that Meliá obtains from the exploitation of this land.

In addition, the tribunal declares Cuban interests directly affected. Although the Cuban state has not intervened when it was requested by the extension of claim, it has not waived[254] its immunity from jurisdiction either, and therefore cannot be ignored. Therefore, the court again holds that the Spanish courts may not hear the case and ordered the plaintiff to pay costs. Thus, the lower court overturned the higher court's ruling, granting the plaintiff twenty days to file an appeal before the Provincial Audience.

[254] Article 7 of the Spanish Immunity Act: "No se interpretará como consentimiento del Estado extranjero al ejercicio de la jurisdicción por órganos jurisdiccionales españoles respecto de un determinado proceso: c) La incomparecencia del Estado extranjero en el proceso". Unofficial translation: "The following shall not be construed as consent of the foreign State to the exercise of jurisdiction by Spanish courts with respect to a given proceeding: c) The failure of the foreign State to appear in the proceeding".

The plaintiff submitted the appeal, and it has been already admitted. The higher court may again overturn the previous decision and grant jurisdiction to the Spanish courts as it did before. However, given the enormous international pressure and the multiple governmental reports issued, the outcome will remain unknown.

In short, the procedural history can be summarized in the following points:

1. Both the First Instance Court and the Provincial Court consider it necessary to assess the unlawfulness of the Cuban confiscation. However, they provide divergent rulings since the latter rejects the existence of immunity from jurisdiction, since neither the Cuban State nor the Gaviota company were named in the initial claim. Therefore, in eyes of the Provincial Court, they are not parties to this case and the assessment may be performed indirectly.
2. Brussels I-Bis is the basis for this action, which is a real action in eyes of the First Instance Court and, therefore, competence of the Cuban courts by application of the exclusive forum of article 24.1; whereas it is considered an action of unjust enrichment of article 7.2 for the Provincial Court, and therefore, subject to the Spanish jurisdiction-.
3. Both courts offer puzzling arguments and confuse the rules of application of the European regulations, offering a *totum revolutum*[255] that shows the general lack of expertise in Private International Law among the majority of Spanish magistrates.

Undoubtedly, one of the most remarkable aspects is that the lower court has not changed its arguments, previously rejected by the appellate court. Not only has it not modified them, but the court also introduced third parties protected by immunity from jurisdiction into the process, which leads one to believe that the case will be dismissed by the court. Furthermore, it is not surprising that the plaintiff considers this action contrary to the right to effective judicial protection, as not only does it fail to reconsider international jurisdiction, but it also introduces new parties that make it highly unlikely that the Spanish courts will have jurisdiction.

5. Future scenarios.

Once the Provincial Court of Majorca rules on the Meliá case, the ruling may be appealed in cassation before the Spanish Supreme Court if it complies with the requirements of article 477.2 of the Civil Procedure Law (hereinafter, "LEC"):

> "Artículo 477. Motivo del recurso de casación y resoluciones recurribles en casación. 2. Serán recurribles en casación las sentencias dictadas en segunda instancia por las Audiencias Provinciales, en los siguientes casos: 1.º Cuando se dictaran para la tutela judicial civil de derechos fundamentales, excepto los que reconoce el artículo 24 de la Constitución;

[255] HERNÁNDEZ, A. "Tribunales españoles y Derecho Internacional Privado…*op.cit.*, p. 350.

> 2.º Siempre que la cuantía del proceso excediere de *600.000 euros*; 3.º Cuando la cuantía del proceso no excediere de 600.000 euros o este se haya tramitado por razón de la materia, siempre que, en ambos casos, la resolución del recurso presente *interés casacional*"[256]

Among these provisions, the monetary requirement is not a problem because Central Santa Lucía is suing for the economic benefits that Meliá had obtained during the last five years from the operation of the hotels located in "Playa Esmeralda", quantified at ten million euros. Nonetheless, the idea of the *interés casacional* arises when there is prior and reiterated conflict between judicial bodies, resulting in the existence of contradictory case law. It is worth noting. Article 477.3 of the LEC states:

> […] Se considerará que un recurso presenta interés casacional cuando la sentencia recurrida se oponga a doctrina jurisprudencial del Tribunal Supremo o resuelva puntos y cuestiones sobre los que exista jurisprudencia *contradictoria de las Audiencias Provinciales* o aplique normas que no lleven más de cinco años en vigor, siempre que, en este último caso, no existiese doctrina jurisprudencial del Tribunal Supremo relativa a normas anteriores de igual o similar contenido. Cuando se trate de recursos de casación de los que deba conocer un Tribunal Superior de Justicia, se entenderá que también existe interés casacional cuando la sentencia recurrida se oponga a doctrina jurisprudencial o no exista dicha *doctrina del Tribunal Superior* sobre normas de Derecho especial de la Comunidad Autónoma correspondiente […].[257]

As there has not been case law of the Spanish Supreme Court on this matter nor contradictory case law of the Provincial Courts yet, it is not so clear that this claim would be appealed before the higher court. There has only been opposing rulings between the First Instance Court and the Provincial Court of Majorca, being predominant the ruling of the latter. However, it may be additional claims filed before other provinces that may alter the ruling, allowing the second scenario to be applied.

As for the third scenario, the Meliá case is the only dispute judged in Spain. Therefore, the Spanish Supreme Court may find it interesting in terms of *casación*. The

[256] Unofficial translation: Art. 477.2 LEC: "the judgments issued in second instance by the Provincial Courts will be appealable in "cassation", in the following cases: 1.When they were issued for the civil judicial protection of fundamental rights, except those recognized by Article 24 of the Constitution. 2.Whenever the amount of the process exceeds 600,000 euros. 3.When the amount of the process does not exceed 600.000 euros or this has been processed by reason of the subject matter, provided that, in both cases, the resolution of the appeal presents a "interés casacional".

[257] Unofficial translation: "An appeal shall be considered to have a "interés casacional" when: The appealed judgment opposes the jurisprudential doctrine of the Supreme Court or, it resolves points and issues on which there is contradictory case law of the Provincial Courts or, it applies rules that have not been in force for more than five years, provided that, in the latter case, there is no jurisprudential doctrine of the Supreme Court relating to previous rules of the same or similar content. In the case of "cassation" appeals to be heard by a High Court of Justice, it will be understood that there is also a "interés casacional" when the appealed judgment is opposed to jurisprudential doctrine or when there is no such doctrine of the High Court on special rules of law of the corresponding Autonomous Community".

plaintiff did not refer to the Helms-Burton Act in its pleading, and even if they did so, the blocking statute would prevent Spanish courts or any European courts to hear the matter. As a result, although titles III and IV of the Helms-Burton have been in force for less than five years, it is likely that this option be feasible.

In order for the Supreme Court to hear the case, there must be additional claims filed in Spain, together with opposing ruling of other Provincial Courts, which given the complexity of the case, it is likely to happen. It would not be unexpected given the large number of Spanish companies operating in Cuba that could be affected by potential lawsuits. In addition, if the Provincial Court of Majorca rules favorably to the plaintiff again, it could trigger a call effect for new lawsuits. It would be in such a case, whenever there is more than one contradictory ruling, that the Supreme Court might hold that there is *interés casacional* in the case and solve this dispute. Until then, one can only wait for it.

Nonetheless, not all contradiction is subject to appeal, but what constitutes *interés casacional* is not:

> […] la mera diferencia entre la sentencia impugnada y otras resoluciones, sino la existencia de un previo y reiterado antagonismo entre órganos judiciales, que haya determinado la existencia de 'jurisprudencia contradictoria' que el legislador trata de evitar, permitiendo al Tribunal Supremo sentar una doctrina con finalidad unificadora […][258].

Furthermore, it could be the case that multiple cases arise in Europe requiring the CJEU to clarify this issue. The Supreme Court or the national courts have the obligation to raise a question of preliminary ruling before the CJEU when it comes to the interpretation, in compliance with national law, of the rules contained in the European treaties and other communitarian provisions. Perhaps a question could be posed to resolve the question of the applicable forum, to determine whether the European Courts have jurisdiction. The purpose is for the CJEU to be able to rule on whether EU law is being properly applied under the law of a country or whether EU law itself conflicts with a European rule, prior to a court decision.

However, the Court of Justice of the European Union is not a fourth or final instance in all situations, just as the Supreme Court is not a third instance, which would

[258]Unofficial translation: "not the mere difference between the challenged judgment and other rulings, but the existence of a previous and repeated antagonism between judicial bodies, which has determined the existence of contradictory case law that the legislator aims to avoid, allowing the Supreme Court to establish a doctrine with a unifying purpose". ESPAÑA. TRIBUNAL SUPREMO. (10/06/2014). Auto 2712/2013. ES:TS:2014:5090A. *Vlex*. Retrieved from: https://app.vlex.com/#WW/vid/517205274 Last visit January 9, 2022.

violate article 19.3 of the Treaty on European Union[259] since they will only rule on actions brought by a member state, an institution or a natural or legal person or give preliminary ruling European law or the validity of acts adopted by the institutions.

Regardless of the uncertain decision of the Provincial Court, the CEO of Meliá, Gabriel Escarrer Jaume, is not allowed to enter the U.S. since November 2019. There was a lawsuit filed before the courts against several companies in 2019, including Meliá. Luckily, the federal court decided to maintain only American companies in order to concentrate the claim and accelerate the procedure.

However, the order denying entrance to the United States directed to not only the CEO, but also to his family. In fact, Jaume was given forty-five days to either resign, sell his shares or compensate the plaintiff. Even though he was excluded from the lawsuit in January 2020, he continued to be included in that blacklist.

This measure attempts not only against any reasonable policy a democratic state may apply, but also against the basic principle that prohibits to extend liability to third persons other than the allegedly perpetrator. It is not conceivable that Jaume's family is denied entrance to the country, although the U.S. may enact any measure they deem appropriate, as any sovereign state should. However, it is an overreach of powers that undermine relations with one of American strongest allies, the European Union.

VI. FINAL REMARKS.

I. Global implications and future projections of the Helms-Burton Act.

The global significance of the activation of titles III and IV of the Helms-Burton Act has raised significant alarm among the international community. In addition to the political, economic and legal implications of this law, it presents a doctrinal debate on the nature of the actions filed so far. Undoubtedly, this American act is an abusive and desperate strategy to pursue a regime change in Cuba, and certainly an overreach of any country's prerogatives.

Apart from that, the nature of the lawsuits is yet unknown. The initial aspirations of this law are actually more limited than expected since plaintiffs are facing obstacles to file a claim, given the lack of international jurisdiction of the American courts, the

[259] EUROPEAN UNION. Treaty on European Union and the Treaty on the Functioning of the European Union, 2007. *Eurlex.*
Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT Last visit January 9, 2022.

difficulties to prove standing, as well as the blocking instruments enacted by the European Union and Canada, among others. Despite the number of potential claims that where initially registered in the U.S. and as the extensive scope of the law which contemplates as "trafficking" almost any action connected to Cuba, the success of this act has proved to be really limited.

It is surprising that there has not been a flood of claims, although it is yet too soon to draw conclusions. These cases are not simple, as they present problems of recognition and evidentiary hurdles, and tend to be lengthy and costly processes. This is why it scared many investors away, who opted for paying compensations secretly to the original owners of the properties in question in order to avoid future lawsuits with such a powerful adversary. However, the majority of the suits filed have been directed to U.S. companies, rather than to foreign entities, which was certainly not the purpose of the act.

The path followed by the U.S. is, at best, questionable. They forget humanitarian policies established in the first two chapters of the Act and reduce the issue to the payment of a monetary compensation. Therefore, the transition to democracy and those humanitarian policies remain secondary. In the end, every American president, with the exception of Donald J. Trump, placed commercial relations with Europe in the very first place, given that Cuba is not worth having a commercial war. Donald J. Trump broke this tendency, although this was to be expected considering his abrupt and scandalous presidency. Nonetheless, it was not expected that the current president of the left-wing ideology, Joe Biden, has not announced suspensions of titles III and IV yet.

II. Central Santa Lucía v. Meliá Case.

The case of Central Santa Lucía v. Meliá is a perfect illustration of this issue. On the one hand, the plaintiff is certain that the Spanish courts have jurisdiction to hear the dispute, given the personal nature of the claim, and providing that it was directed to a private entity. On the other hand, the defendant filed a plea of lack of jurisdiction considering that this is an issue dealing with an exclusive forum, which grants jurisdiction to the Cuban courts. Moreover, Meliá considers it to be an act of immunity from jurisdiction, since the previous assessment of the expropriation made by the Cuban government in the 60s plays a pivotal role in the lawsuit.

As a result, this case exemplifies many of the points raised in this report. On the one hand, it shows how potential beneficiaries of the Helms-Burton Act seek to escape the limitations imposed by the blocking statutes of the EU. On the other hand, it raises relevant legal questions regarding both the delimitation of the boundaries of immunity

from jurisdiction and, in particular, whether such immunity is applicable when the state is not formally a defendant in the proceedings, as well as the extraterritorial effectiveness of state nationalizations. In addition, this case is of special interest as it is not only about the interests of private individuals, but the ruling could jeopardize the future of the tourism industry in Spain, as it could lead to future lawsuits against Spanish hotel companies and other firms that do business with Cuba. Thus, it could affect a vital sector in Spain.

The specific solution to the case is yet to be determined, although it is clear that there is no unanimity, not even within the Spanish judicial system. The reasoning presented by both parties are plausible and entail international implications. Nonetheless, in light of the above reasons, it may seem more reasonable to think that the act of expropriation that caused the entire controversy, including the very existence of the Helms-Burton Act, should be first assessed. Once the confiscation is evaluated, the viability of the claim and the potential liability of Meliá and similar companies could be tried.

Otherwise, it simply does not seem appropriate to blame private companies for exploiting property without analyzing whether the act giving rise to such unjust enrichment escapes prosecution. It is clear that the Cuban government harmed the interests and caused serious damage to those entities or private persons whom it confiscated, but measuring the damage caused by the subsequent traffic with these properties is not so obvious. However, it certainly is easier than claiming compensation to the Castro government.

There is little doubt that the act of expropriation executed by the Cuban government is morally questionable, but it must not be used as a legal ground to claim compensation from those who rightfully obtained authorization to trade with those properties. Any expropriation without fair compensation is deemed unlawful, but it should not permit prosecuting those profiting from those confiscated properties, if the allegedly confiscator has not even been called to proceedings. Apart from American desperate attempts to pressure Cuba, other options such as elevating the issue to an international debate or suggesting cooperation among democratic states to clarify this matter would be more effective and consistent with international customary law.

Additional rulings are needed to clarify the legal dispute since the delivered rulings rose more questions than they answered. Supplementary legal questions and contrasting doctrine will continue to appear, because this case poses a series of legal

challenges. Even if President Biden shifts its political position, the unknowns arising from the lawsuits already filed will remain uncertain until the Spanish Supreme Court or even the European Court of Justice unify the doctrine presented in this report.

One thing is clear: the elaboration of unilateral legislative measures to solve foreign policy issues, far from strengthening international relations, weakens them and fails to solve the underlying problem: the nationalization performed by the Cuban state. Such conflict is an example of the poor management of an international problem, where imperialistic aspirations and desires for control are placed over the protection of both citizens and companies.

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